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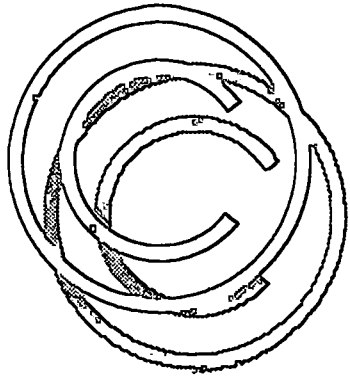

Published at

NEW YORK UNIVERSITY LAW CENTER

VOL. 28, No. 1 OCTOBER, 1980

Published at New York University Law Center, 40 Washington St. South, New York, N.Y. 10012. Printed and distributed by Fred B. Rothman & Co., 10368 West Centennial Road, Littleton, Colorado 80127.

ISSN 0010-8642

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THE BULLETIN of The Copyright Society of the U.S.A. is published 6 times a year by The Society at the Law Center of New York University, 40 Washington Square South, New York, New York 10012; David Goldberg, *President*; Richard Dannay and Alan J. Hartnick,, *Vice Presidents*; Edward M. Cramer, *Treasurer*; Eugene H. Winick, *Secretary*; Milton M. Rosenbloom, *Assistant Treasurer*; Jerold L. Couture, *Assistant Secretary*.

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CITE: 28 BULL. COPR. SOC'Y, page no., Item . . . (1980).

PART I

ARTICLES

1. DROIT MORAL AND THE AMORAL COPYRIGHT: *A Comparison of Artists' Rights in France and the United States*

By RUSSELL J. DASILVA*

In the 1940's, Twentieth Century Fox released a film entitled "The Iron Curtain." The movie depicted Soviet espionage in Canada, and for its background used selections from the uncopyrighted music of Dmitri Shostakovich and three other eminent Soviet composers. One might suppose that "The Iron Curtain" was not a highly favorable documentary of Soviet foreign policy, for in 1948, the four Russian composers brought suit in New York State against Twentieth Century Fox, seeking damages and a permanent injunction against the exhibition of the film.[1] They contended, *inter alia*, that the use of their music in a film which was so politically objectionable cast upon them "a false imputation of disloyalty to their country."[2] This, they claimed, constituted defamation, and violated something called their "moral right."

Moral right? The New York court paused to consider that issue, but was at a loss to find any standard by which to test such a claim.[3] In the end, the court dismissed the complaint, and as for moral right, stated: "In the present state of our law, the very existence of such a right is not clear."[4]

The four composers also brought the suit in a French court—and won.[5]

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[1] Shostakovich v. Twentieth Century-Fox Film Corp., 196 Misc. 67, 80 N.Y.S.2d 575 (Sup. Ct. 1948), *aff'd*, 275 App. Div. 695, 87 N.Y.S.2d 430 (1st Dept. 1949).

[2] 196 Misc. at 70.

[3] "Is the standard to be good taste, artistic worth, political beliefs, moral concepts, or what is it to be?" *Id.* at 71.

[4] *Id.*

[5] Soc. Le Chant de Monde v. Soc. Fox Europe et Soc. Fox Americaine Twentieth Century, Judgment of Jan. 13, 1953 [1953] 1 Gaz. Pal. 191 [1954] D.A.

0010-8642/80/05/001-56 $2.00/0

The *Shostakovich* case illustrates the common contention that American law has not evolved doctrines which adequately protect the artist's rights of personality in his or her own work.[6] For while France is considered to be in the vanguard of protection of the artist's rights of personality,[7] American law has only grudgingly begun to recognize the non-pecuniary interests of artists. Today, however, the attention of American lawmakers is being drawn to the long-neglected area of artists' rights. For example, the California Art Preservation Act[8] (the "Preservation Act"), while it does not speak of "moral rights", is the first significant state legislation to attempt to rectify the disparity between French and American law.

Enacted in 1979, the Preservation Act affords to the creator of a painting, sculpture or drawing[9] the right, with several limitations, to prevent the intentional "physical defacement, mutilation, alteration or destruction"[10] of his created work, and secures the right of the artist to claim or disclaim its authorship.[11] These rights subsist until fifty years after the author's death,[12] and may be waived only by the artist himself in a signed, written instrument. Thus, although Shostakovich could not have availed himself of the Preservation Act to protect against misuse of his music, still California has taken an important step in recognizing the author's rights of personality.

This article does not purport to examine the applicability or enforceability of the Preservation Act under California law. It does, however, seek to illustrate the significance of the Preservation Act in light of the development of artists' rights in the United States and in Civil Law countries, and further, to assess, on the basis of French law, which rights of authors deserve to be further developed in the United States.

16, 80 (Cour d'Appel Paris). For a discussion of moral rights protection in the Soviet Union, *see* S. STROMHOLM, 1 DROIT MORAL DE L'AUTEUR 423-24 (1966).

[6] Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 557 (1940); Strauss, *The Moral Right of the Author*, 4 AM. J. COMP. L. 506 (1955). *See generally* Comment, *Toward Artistic Integrity: Implementing Moral Right Through Extension of Existing American Legal Doctrines*, 60 GEO. L.J. 1539 (1972) [hereinafter cited as *Georgetown Comment*]; Comment, *Moral Rights for Artists Under the Lanham Act: Gilliam v. American Broadcasting Cos.*, 18 WM. & MARY L. REV. 595 (1977) [hereinafter cited as *William and Mary Comment*].

[7] Giocanti, *Moral Rights: Authors' Protection and Business Needs*, 10 J. INT'L L. & ECON. 627, 627 n.1 (1975).

[8] Cal. Civ. Code §987 (West) [hereinafter cited as Preservation Act].

[9] *Id.* §(b) (2)

[10] *Id.* § (c) (1)

[11] *Id.* §(d)

[12] *Id.* §(g) (1)

The French *droit d'auteur* is a concept far broader than American copyright, so broad, in fact that French scholars dispute whether it really can be called a property right at all.[13] While United States copyright seeks to protect primarily the author's pecuniary and exploitative interests,[14] French law purports to protect the author's intellectual and moral interests, as well.[15] The French law of *droit d'auteur*, therefore, protects not only the artist's pecuniary rights (*droits patrimoniaux*), but also his moral right (*droit moral*).[16]

The *droits patrimoniaux* are analogous to the American federal copyright.[17] They include a statutory monopoly over the exploitation of the work until fifty years after the author's death, including the right of reproduction, and in the case of dramatic works, the right of representation.[18] *Droit moral*, on the other hand, is by nature non-pecuniary. It is a "collection of prerogatives, all of which proceed from the necessity of preserving the integrity of intellectual works and the personality of the author."[19]

The unitary concept of moral right traditionally is divided into four overlapping categories: first, the *droit de divulgation*, the right of the author to determine the publication or non-publication of his work; second, the *droit de retrait ou de repentir*, the right of the author to withdraw or modify a work which already has been made public; third, the

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[13] *See, e.g.*, H. DESBOIS, COURS DE PROPRIETE LITTERAIRE, ARTISTIQUE ET INDUSTRIELLE 4 (1961); P. RECHT, LE DROIT D'AUTEUR, UNE NOUVELLE FORME DE PROPRIETE. For convenience, however, this paper will at times refer to the *droits patrimoniaux* in terms of "property" interests.

French law describes *droit d'auteur* as a right of "incorporeal property," the precise meaning of which still is disputed by French scholars. *See* G. GAVIN, LE DROIT MORAL DE L'AUTEUR DANS LA JURISPRUDENCE ET LA LEGISLATION FRANÇAISES 15 (1960); H. Desbois, *supra* note 13, at 4; P. Recht, *supra* note 13, at 11.

[14] *See, e.g.*, Comment, *An Artist's Personal Rights in his Creative Works: Beyond the Human Cannonball and the Flying Circus*, 9 PAC. L.J. 885 (1978) [hereinafter cited as *Pacific Comment*].

[15] Loi du 11 mars 1957 Sur La Propriété Littéraire Artistique, [1957] J.O., *translated in* UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1976) [hereinafter cited as 1957 Law]. Article 1, clause 2, provides:

> This right bears attributes of a moral and intellectual order, as well as attributes of a patrimonial order, which are determined by the present law.

[16] *Id.* Article 6 describes *droit d'auteur* as a "*droit de propriété incorporelle.*" *See* author's comment, note 13 *supra*.

[17] Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465 (1968).

[18] *Id. Also see* 1957 Law, *supra* note 15, art. 21, 26-42.

[19] A. LETARNEC, MANUEL DE LA PROPRIETE LITTERAIRE ET ARTISTIQUE 25 (1966).

droit à la paternité, the right of an author to be acknowledged as the creator of his work, and to disclaim authorship of works falsely attributed to him; and most important, the *droit au respect de l'oeuvre*, the right of the author to preserve his work from alteration, mutilation, or even from excessive criticism.[20]

There also exists under French law the *droit de suite*,[21] which is the right of an artist to receive a royalty on future resales of his work.[22] Since this right is pecuniary and lasts only until fifty years after the author's death, some French scholars consider *droit de suite* simply to be one of the *droits patrimoniaux*.[23] Other scholars, recognizing the essentially "moral" origin of this right, prefer to treat it as a third category of *droit d'auteur*.[24] In the United States, *droit de suite* is not recognized by federal copyright law, although at least one state, California, has established the right by statute.[25] It is no longer uncommon in this country, moreover, to find similar rights secured for artists by contract.[26]

In the view of French jurists, moral rights are not trifling interests which merely are appended to the law of copyright. On the contrary, they derive from the same natural law principles which established the *droits patrimoniaux*; indeed, moral rights are independent from and superior to any pecuniary interest in a work of art.[27] *Droits patrimoniaux*, after all, may be transferred, sold, or made the subject of contracts or commerce. *Droit moral*, on the other hand, is deemed by statute to be "personal, perpetual, inalienable, and unassignable,"[28] and at least in

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[20] *See* discussion in section II *infra*.

[21] 1957 Law, *supra* note 15, art. 42.

[22] The most comprehensive discussion of *droit de suite* is in M. NIMMER, LEGAL RIGHTS OF THE ARTIST (1971) (unpublished), which contains essays on *droit de suite* by legal scholars throughout the world. For a classic study of the subject, *see* J.-L. DUCHEMIN, LE DROIT DE SUITE DES ARTISTES (1948). For a discussion of *droit de suite* in relation to the United States, *see* 1 J. MERRYMAN *and* A. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 4-102-4-141 (1979).

[23] *See* H. DESBOIS, *supra* note 13, at 207; C. COLOMBET, PROPRIÉTÉ LITTERAIRE ET ARTISTIQUE 173 (1976).

[24] *See Pacific Comment*, *supra* note 14, at 857.

[25] CAL. CIV. CODE. § 986 ("Artist's Resale Royalty Act"). Morseburg v. Baylon, et al., No. 78-2129 (9th Cir. June 17, 1980) held that the Artist's Resale Royalty Act did not violate the pre-emption clause of the United States copyright statute, 17 U.S.C. § 301 (1976); *also see Pacific Comment*, *supra* note 14, at 858.

[26] 1 J. MERRYMAN *and* A. ELSEN, *supra* note 22, at 4-141-4-166.

[27] H. DESBOIS, *supra* note 13, at 23-26, 58. In West Germany, however, moral rights and patrimonial rights are not wholly separable.

[28] 1957 Law, *supra* note 15, art. 6. West German law also provides that moral rights are inalienable. Law of Sept. 9, 1965, [1965] Bundesgesetzblatt[BGBl] I 1924, § 29 [hereinafter cited as German Law].

theory, it cannot be abandoned by the author by contract or will.[29] Moreover, the moral right survives both the *droits patrimoniaux* and the author's own life; it may be asserted after the work has fallen into the public domain, and it may be enforced, with some limitations, by the author's heirs even after the author's death.[30] Violations of moral right may give rise to civil or penal sanctions.[31]

In short, *droit moral* is the very core of the French *droit d'auteur*, for it is by virtue of the moral right that an author may secure and assert his pecuniary interests.[32]

Although the concept of moral right may seem anomalous to the American lawyer, it has been incorporated into the copyright laws of at least sixty-three countries of the world.[33] The Berne Convention,[34] to which the United States does not subscribe, affords some international protection to moral rights, especially to *droit à la paternité* and *droit au respect*.[35]

The moral right doctrine originated in France, and as a child of the Civil Law, it is not recognized in the United Kingdom, although many of the rights included in *droit moral* do receive protection under British law.[36] United States copyright law[37] makes no mention of moral rights, and American courts, both state and federal, traditionally have

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[29] *See* W. GOLDBAUM, DERECHO DE AUTOR PANAMERICANO 42 (1943).

[30] *See, e.g.*, 1957 Law, *supra* note 15, art. 6.

[31] A discussion of penal and civil sanctions for violations of *droit moral* is beyond the scope of this paper. Sanctions and procedures are codified in articles 64-76 of the 1957 Law. For a discussion of sanctions and procedures, *see* G. GAVIN, *supra* note 13, 225-48.

[32] H. DESBOIS, *supra* note 13, at 299.

[33] *Pacific Comment, supra* note 14, at 859.

[34] The Berne Convention for the Protection of Literary and Artistic Works [hereinafter cited as Berne Convention] was first convened in 1886 to develop rules for multinational protection of authors' rights. The Convention has been revised in 1908, 1928, 1948, 1967 and in 1971. For a brief statement of the Berne Convention, *see* COPYRIGHT L. REP. (CCH) ¶ 6025 (1979).

[35] *See* Berne Convention, June 26, 1948 (Brussels) art. 6(2), *reprinted in* UNESCO, *supra* note 11 *and in Georgetown Comment, supra* note 7, at 1540 n.7. The Universal Copyright Convention, of which the United States is a member, contains only limited recognition of moral rights. For a discussion of moral rights under the Berne Convention and the Universal Copyright Convention, *see* Diamond, *Legal Protection for the "Moral Rights" of Authors and Other Creators*, 68 TRADEMARK REP. 244, 245-248 (1978).

[36] For a discussion of moral rights in the United Kingdom, *see* Marvin, *The Author's Status in the United Kingdom and France: Common Law and the Moral Right Doctrine*, 20 INT'L & COMP. L.Q. 675 (1971); *also see* Diamond, *supra* note 35, at 276-277.

[37] 17 U.S.C. § 101 (1976).

rejected the doctrine, at least in name, calling it "meta-legal" and "the law of least effort."[38]

At least one federal court, however, has shown itself a bit more receptive to the moral right doctrine.[39] Moreover, legal scholars have argued quite persuasively[40] that the major principles of moral right—especially *droit à la paternité* and *droit au respect*—have been protected by American law when claims have been brought under doctrines of breach of contract, defamation, invasion of privacy, unfair competition, right of publicity, and more recently, under section 43(a) of the Lanham Act on trademarks.[41] The California Preservation Act, although far more limited than *droit moral*, is the closest American equivalent to a "moral right," at least for paintings, sculptures and drawings of recognized quality.

Still, it cannot be maintained that artists' rights are protected as fully in the United States as they are in those countries which have adopted the unitary concept of moral right.[42] After all, even where state law does afford artists remedies for violations of their rights of personality, the law has "grown up in an unprincipled way,"[43] and has reached inconsistent results from state to state. Moreover, as illustrated in the *Shostakovich* case, there do exist some important aspects of *droit moral* which are not yet protected in any state, and which may indeed prove to be irreconciliable with American law. Above all, one may argue that no matter how diligently a state may try to protect moral rights, the failure of the federal copyright law even to address the issue creates a national standard of indifference toward artists' rights, and firmly establishes a legal notion of intellectual property which puts the rights of the copyright proprietor above the rights of the artistic creator. By ignoring moral rights, federal law creates a fundamentally "amoral" copyright.

Scholarly interest in *droit moral* has increased in recent years, and a few writers have advocated legislative, or at least judicial, recognition

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[38] Granz v. Harris, 198 F.2d 585, 590 (2d Cir. 1952) (Frank, J. concurring). *See* discussion in *Georgetown Comment, supra* note 6, at 1545; Streibich, *The Moral Right of Ownership to Intellectual Property: Part II—From the Age of Printing to the Future*, 7 MEM. ST. U. L. REV. 45, 78 (1976) [hereinafter cited as *Streibich Part II*].

[39] Gilliam v. American Broadcasting Cos., 538 F.2d 14 (2d Cir. 1976).

[40] *See generally* Roeder, *supra* note 6; Strauss, *supra* note 6; Treece, *American Law Analogues of the Authors' "Moral Right,"* 16 AM. J. COMP. L. 487 (1968).

[41] *See* discussion at text accompanying note 333, *infra*.

[42] Roeder, *supra* note 6, at 557; *William and Mary Comment, supra* note 6, at 595. *But see* Strauss, *supra* note 6, at 538.

[43] Treece, *supra* note 40, at 487.

of the moral right doctrine.[44] Legislators—even outside of California—have shown interest in the doctrine, and have gone so far as to propose an amendment to the federal Copyright Act, which would secure the moral rights of authors, artists, and musicians.[45] This scholarly and political attention has served to underscore the pressing need for American law to recognize artists' rights beyond the present notion of copyright, and to take note of developments in continental jurisprudence regarding intellectual property.

However, those who suggest that the unitary doctrine of moral right be adopted in this country may fail to observe the complexity of the doctrine in theory, the difficulty which Civil Law countries have faced in applying it, and the many limitations which courts in those countries have found it necessary to establish. American scholars also pay too little attention to the precise historical and cultural context in which *droit moral* arose, and to the significant differences which have emerged even among those countries which have adopted the doctrine. Finally, scholars too often fail to consider the practical and theoretical difficulties which would attend the wholesale introduction of the doctrine into the United States, and the undesirable consequences which it might have.

After an exploration of these issues, we may find that the goal of protecting the artist's rights of personality cannot be solved, as one scholar has suggested, simply by legislative or judicial recognition of the words "moral right."[46] Indeed, the challenge is far more enticing.

I. THE MORAL RIGHT DOCTRINE IN FRANCE

A. Origins

One can hardly begin a study of *droit moral* without pausing to observe the inexhaustible reverence with which French jurists approach the subject of authors' rights.[47] Pierre Recht accurately has observed, "When *droit moral* fanatics discuss moral rights, they take the attitude of a religious zealot talking of sacred things, or a Girondin reading the Declaration of the Rights of Man."[48]

Perhaps one reason for this sentiment is that French scholars regard the *droit d'auteur* as a natural right, deeply rooted in the principles of the French Revolution from which modern French jurisprudence

[44] *See, e.g., Streibich Part II, supra* note 38, at 76, 83-84.

[45] H.R. 8261, 95th Cong., 1st Sess. (1977); H.R. 288, 96th Cong., 1st Sess. (1979).

[46] *Streibich Part II, supra* note 38, at 84.

[47] *See, e.g.*, statements in F. WEY, LA PROPRIETE LITTERAIRE SOUS LE REGIME DU DOMAINE PUBLIC PAYANT 16 (1862); G. GAVIN, STRÖMHOLM, *supra* note 5, at 113.

[48] P. RECHT, *supra* note 13, at 281.

emerged. Indeed, scholars have sought the origins of *droit moral* in the earliest periods of recorded history.[49] Until the end of the Middle Ages, however, recognition of authors' rights generally was limited to a ban on plagiarism,[50] and it was not until the eighteenth century that the notion of *droit d'auteur*, as it is now known, came into being.[51]

During the *Ancien Régime*, virtually all rights in an intellectual work were conferred by the sovereign, and generally were bestowed upon printers.[52] Rights in books went scarcely beyond a monopoly on the reproduction of the work for a fixed term, and did not even include a right to sell the work.[53] Voltaire, in 1769, grumbled that druggists, by comparison, at least could sell their own concoctions freely.[54]

Yet, even before the French Revolution and its emergent "natural right" concept of *droit d'auteur*, important principles of modern civil law were debated in France. As early as 1725, it was argued that an author had a perpetual property interest in his unpublished manuscript.[55] Consequently, in the two decades preceding the French Revolution, various

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[49] *See, e.g.*, Streibich, *The Moral Right of Ownership to Intellectual Property: Part I—From the Beginning to the Age of Printing*, 6 MEM. ST. U. L. REV. 1 (1975) [hereinafter cited as *Streibich Part I*].

[50] F. WEY, *supra* note 47, at 46. For a discussion of antiplagiarism laws in ancient Rome and the Middle Ages, see *Streibich Part I*, *supra* note 49, at 407; V. SEGRELLES-CHILLIDA, LA NUEVA LEY FRANCESA SOBRE DERECHOS DE AUTOR 5 (1959) [hereinafter cited at CHILLIDA]. Interestingly, ancient China, unlike Europe, did not outlaw plagiarism. *Id.*

[51] The issue of authors' rights gained prominence in the age of printing. 1 S. STRÖMHOLM, *supra* note 5, at 67. CHILLIDA, *supra* note 50, at 5, speaks of "the transcendental apparition of printing." The earliest traces of a copyright system are said to be found in the Guild of Printers and Publishers of Venice, which was founded in 1548. *See Streibich Part II*, *supra* note 38, at 57; P. RECHT, *supra* note 13, at 44-45.

[52] Monta, *The Concept of "Copyright" Versus the Droit D'Auteur*, 32 S. CAL. L. REV. 177, 178 (1959); CHILLIDA, *supra* note 50, at 5; Pottinger, *Protection of Literary Property in France During the Ancien Régime*, 2 ROMANIC REV. 81-108 (1951). P. RECHT, *supra* note 13, at 43-44, points out that during the 17th and 18th centuries in Germany, protection of books was by local ordinance. Authors' rights appeared late in Spain—not until the law of Don Carlos de Bourbon in 1762. *Id.*

[53] P. RECHT, *supra* note 13, at 27.

[54] Letter of Oct. 21, 1769, to Luneau de Boisgermain, *quoted in* P. RECHT, *supra* note 13, at 27.

[55] In 1725, l'avocat d'Hericourt argued:

> A manuscript is the property of the author, and he cannot be deprived of it any more than he can be deprived of his money, his personal property or his land, for it is the fruit of his labor and is personal to him, and he should have the liberty to dispose of it at will. . . .

Quoted in 1 S. STRÖMHOLM, *supra* note 5, at 112, *quoted and discussed in* P. RECHT, *supra* note 13, at 29-30.

ordinances and decrees were published, which defined more explicitly the prerogatives of editors and publishers,[56] and affirmed the existence of perpetual interests of writers "emanating from the creative activity of the author."[57]

During the French Revolution, jurists sought to abolish any notion that *droit d'auteur* was a royal privilege.[58] Early legislation eased the freedom to perform plays in public, and confirmed the authors' exploitative rights, based on the notion that these rights were inherent in the artist.[59] The *droits patrimoniaux* at last were enunciated in the law of 19-24 juillet 1793.[60] Although they—like American copyright—were primarily pecuniary rights, they expressed the principle that *droit d'auteur* was not merely a privilege of the sovereign, as in the *Ancien Régime*, but it was, rather, a natural right, arising simply from the author's act of creation.[61]

Droit moral, on the other hand, emerged not from statute, but from judicially created doctrines, which developed slowly in the nineteenth century, and more rapidly in the twentieth. But *droit moral*, too, arose from the spirit of these laws, and from the philosophy of individualism which accompanied the French Revolution.[62]

Scholars divide the history of *droit moral* into three periods: the first from 1793 to 1878; the second from 1878 to 1902; and the third from 1902 to 1957.[63] During the first period, French scholars began to debate the "property" nature of an author's rights.[64] Gastambide and his followers in the 1830's held to the traditional notion that *droit d'auteur* was a property right, albeit a temporary one.[65] On the other hand, Renouard and his school, influenced by Kant,[66] preferred to dislodge authors'

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[56] *See* P. RECHT, *supra* note 13, at 46.

[57] The most notable were les arrêts de 1771 et de 1777. *See* discussion in *id.* at 33-38.

[58] Monta, *supra* note 52, at 178.

[59] Decrét de 13-19 janvier 1791, and decrét de 19-24 juillet 1793, *discussed in* Sarraute, *supra* note 17, at 465; Monta, *supra* note 52, at 178; P. RECHT, *supra* note 13, at 8, 38-40.

[60] J. LABAURIE, L'USURPATION EN MATIERE LITTERAIRE ET ARTISTIQUE 9 (1919); 1 S. STRÖMHOLM, *supra* note 5, at 113.

[61] *See* Monta, *supra* note 52, at 178.

[62] Sarraute, *supra* note 17, at 465; P. RECHT, *supra* note 13, at 48; 1 S. STRÖMHOLM, *supra* note 5, at 114.

[63] *See generally* P. RECHT, *supra* note 13, at 49-93. But Strömholm extends the second period to 1928.

[64] *See generally id.* 48-60.

[65] For a discussion of Gastambide and his followers, *see* 1 S. STRÖMHOLM, *supra* note 5, at 150-53.

[66] Kant's writings had an even stronger influence over the development of moral rights in Germany. For a discussion of Kant's influence, *see id.* at 182-95.

rights from the notion of property, and considered them instead to derive from a more abstract "right of personality."[67] Recht observes that opposition to the "property" characterization of *droit d'auteur* grew even stronger with the early influence of Marx in the 1840's and 1850's,[68] and by the 1860's, a generation of "personalist" writers emerged, who strongly discredited the idea that *droit d'auteur* was a form of property.[69]

It should come as no surprise, then, that during this first period, the notion that there may exist non-property "moral" rights could easily gain acceptance in French courts. By 1880, the foundations had been laid in French jurisprudence for *droit de divulgation, droit à la paternité,* and *droit au respect de l'oeuvre.*[70]

The doctrine of *droit moral* received even greater development in the second period, from 1878 to 1902. In this period, the application of traditional notions of property to *droit d'auteur* was virtually abandoned,[71] and scholars continued to search for a more precise characterization of *droit moral,* and of its place in the larger *droit d'auteur.* Some French scholars, led by Pouillet,[72] tended to hold onto fragments of the property notion of *droit d'auteur,* and developed a theory of "intellectual property," by which *droit d'auteur* combined certain elements of property with elements of purely personal or intellectual rights.

However, the central debate over the nature of authors' rights arose in Germany. Joseph Kohler[73] developed a theory of "*Doppelrecht,*" which considered an intellectual work to be a "*bien immatériel,*"[74] from which various rights of personality arose. These personal prerogatives could be separated into two distinct categories of either a patrimonial or a moral nature.[75] The other principal view, advocated by Alfred Gierke,[76]

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[67] *Id.* at 154-56. This view was even more popular in Germany. *Id.* at 237-52.

[68] P. RECHT, *supra* note 13, at 54.

[69] *Id.* at 58-60. For a discussion of the rise of the "personalists" in Germany, *see* 1 S. STRÖMHOLM, *supra* note 5, at 197-204.

[70] 1 S. STRÖMHOLM, *supra* note 5, at 150.

[71] P. RECHT, *supra* note 13, at 67-69. Recht discusses the significance of the first Berne Convention in 1886 with regard to the abandonment of the term "property" as applied to intellectual works.

[72] *See* discussion in *id.* at 62-64.

[73] For a discussion of Kohler's theory, *see* 1 S. STRÖMHOLM, *supra* note 5, at 327-29; P. RECHT, *supra* note 13, at 75-82.

[74] P. RECHT, *supra* note 13, at 78.

[75] 1 S. STRÖMHOLM, *supra* note 5, at 327. P. RECHT, *supra* note 13, at 80-81, comments that Kohler's theory created a right too analogous to the old idea of property.

[76] *See* discussion in 1 S. STRÖMHOLM, *supra* note 5, at 316-18, 329-30; P. RECHT, *supra* note 13, at 83-87.

considered both personal and patrimonial rights to be inseparable parts of a single "*Persönlichkeitsrecht.*"[77]

It was in the third period, from 1902 to 1957, that the debate over these two views became resolved.[78] Kohler's "dualist" view triumphed in France, where to this day, *droit d'auteur* is considered to be a right of "*proprieté incorporelle*" separable into moral and patrimonial rights.[79] In Germany, the monist school prevailed, and as a result, moral rights ("*Urheberpersönlichkeitsrecht*") and exploitative interests form a single right, which expires seventy years after the author's death.[80]

We see, then, that *droit d'auteur* is part of a larger debate over the meaning of "property" and "personality" rights in the Civil Law system. The debate, in fact, engendered two systems of authors' rights with different characterizations of *droit moral*—each purporting to be as vigilant of the authors' well-being as the other.[81]

B. Characteristics

In France today, both the *droits patrimoniaux* and *droit moral* are enshrined in a single statute, the law of 11 March 1957 ("1957 Law"), whose opening sentence reflects the "natural right" origins of *droit d'auteur*:

> The author of a work of the spirit enjoys in that work, by sole virtue of its creation, a right of incorporeal property, exclusive and opposable against all.[82]

This "natural right" character of author's rights is linked to a particular characterization of the artist and his work. *Droit d'auteur* arises from the assumption that an artist infuses into his work something of his own creative personality,[83] and further, that the interests of society fundamentally are opposed to that artistic presence.

> When an artist creates, he does more than bring into the world a unique object having only exploitive possibilities; he projects

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[77] P. RECHT, *supra* note 13, at 84.

[78] *Id.* at 90-93.

[79] H. DESBOIS, *supra* note 13, at 175. *But see* P. RECHT, *supra* note 13, at 274-75.

[80] German Law, *supra* note 28, art. 64(1).

[81] *See* Pakuscher, *Recent Trends in German Copyright Law*, 23 BULL. COPR. SOC'Y 65, 75 (1976).

[82] 1957 Law, *supra* note 15, art. 1,¶ 1 (emphasis added).

[83] *Pacific Comment, supra* note 14, at 860; Giocanti, *supra* note 7, at 628. *Also see* statement of Poinsard, *quoted in* CHILLIDA, *supra* note 50, at 12-13.

> into the world part of his personality and subjects it to the ravages of public use.[84]

This is a profoundly romantic characterization of the artist, perhaps conjuring up visions of poets in garrets, burning their lyric masterpieces for heat in the icy Parisian winter, or of Walt Whitman, crying out to the corporeal world, "I celebrate myself, and sing myself."[85] Yet, it is because of this characterization of the author and his art that French law feels a need to protect the honor of the author's personality and the integrity of his work. The author has, in a sense, made a gift of his creative genius to the world; in return, he has a right—a moral right—to expect that society respect his creative genius.

With this in mind, French law recognizes a personal, perpetual, inalienable and unassignable moral right in "works of the spirit". Yet as idealistic as the statute may seem, in practice these characteristics have proved to be far more limited.

1. *Personal*

Even before *droit moral* was codified, French jurists recognized that *droit moral* is attached not to the work, but to the person who created it, and thus, it remains vested in the artist even after the object itself has been transferred.[86] This principle has been codified in article 1 of the 1957 Law,[87] and it holds true even in the case of a work for hire.[88] French law, however, imposes two conditions in order for moral rights to attach: the person must be (1) a natural person (2) who is in fact the creator of the work.[89] These two conditions have posed practical difficulties, especially in cases of collective or collaborative works, and they have proved to be particularly cumbersome when applied to newer art forms, such as film and television.

The "natural person" requirement means that an organization, such as a private corporation, cannot claim moral rights. Thus, ironically, the requirement can end up restricting the ability of artists' guilds or societies to defend the rights of their members.[90] More important, the require-

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[84] Roeder, *supra* note 6, at 557.

[85] Whitman, *Song of Myself*, in LEAVES OF GRASS. It is interesting to observe that the emergence of *droit moral* in the early 19th century parallels the rise of romanticism in French literature.

[86] "The *droit moral* is inherent in the person, and, according to us, it cannot be conceded by the author to the editor." J. LABAURIE, *supra* note 60 at 14.

[87] 1957 Law, *supra* note 15, art. 1, ¶ 3: "The existence or the conclusion of a contract for licensing of an artist's work or services regarding a work of the spirit does not carry with it any derogation of his enjoyment [of his rights]."

[88] Giocanti, *supra* note 7, at 629.

[89] *Id.* at 628.

[90] *See* discussion in Sarraute, *supra* note 17, at 483.

ment seems uniquely inapplicable to collective works, such as newspapers and magazines, where no one natural person has complete responsibility for the work's creation. The 1957 Law, therefore, found it necessary to create a statutory exception for collective works,[91] so that the rights of authorship may vest in a legal entity.[92]

The "personal" character of *droit moral* is even more cumbersome in the case of collaborative works,[93] for each collaborator could assert his own moral right to the detriment of all the others—for example, by enjoining publication of the entire work. Article 10 of the 1957 Law attempted to solve this problem by providing that a collaborative work is the joint property of the co-authors, and that the co-authors may exercise their rights only in unanimity.[94] The unanimity rule itself, however, may have harsh results in the case of a serious disagreement among the authors. Thus, article 10 provides that in such cases, a court, at its own discretion, may choose to ignore the rule.[95]

Finally, the two requirements of being a natural person and having been the creator of the work are most troublesome in the case of cinematographic works,[96] where the contributors are so numerous; indeed, film seems to be the exception to almost everything under the 1957 Law. The statute says that in films, authorship is reserved to "the physical persons who realize the intellectual creation of the work," and creates five categories of persons who qualify as authors: the author of

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[91] 1957 Law, *supra* note 15, art. 9, ¶ 3, defines a "collective" work as

> a work created under the initiative of a natural or legal person, who edits, publishes, and discloses it under his direction and name, and in which the personal contribution of the various authors who participate in its creation blend into the whole, in view of which such contribution was created, to the extent that it is not possible to attribute to each of them a distinct right over the collectively realized work.

[92] *Id.* art. 13. Portuguese law contains an interesting provision, by which the *droit moral* of a work which falls into the public domain attaches to the state, which exercises it by means of "adequate cultural institutions." Kerever, *Le Droit d'Auteur en Europe Occidentale*, in HOMMAGE A HENRI DESBOIS: ETUDES DE PROPRIETE INTELLECTUELLE 35, 50 (1974).

[93] 1957 Law, *supra* note 15, art. 9, ¶ 1, defines a "collaborative" work as "a work in whose creation several physical persons have concurred." Unlike a collective work, the contribution of each collaborator is less readily separable from the whole.

[94] *Id.* art. 10, ¶ 2. Paragraph 4 adds, however, that each author may exploit his own contribution separately provided that such exploitation does not prejudice the exploitation of the larger collaborative work.

[95] *Id.* art. 10, ¶ 3. *Also see* Giocanti, *supra* note 7, at 629.

[96] The problems of cinematographic works are equally applicable to broadcasting and television. Article 18 of the 1957 Law resolves them in a similar fashion.

the script, the author of the adaptation, the author of the dialogue, the composer of the music, and the director.[97] Moreover, if the film is adapted from a pre-existing work which is still protected by copyright, the authors of the original work are "assimilated" into the authorship of the film.[98] Thus, actors, camera crew, lighting designers, and other "creators" are excluded from authorship, although their rights may be protected through other doctrines.[99]

2. *Perpetual*

Article 6 unequivocally deems *droit moral* to be perpetual, for it survives both the *droits patrimoniaux* and the author's life.[100] In order for this principle to be of any utility, there must be some way for future generations to assert the right. Thus, even before *droit moral* was codified, it was held that the moral right could be transmitted by will to the author's heirs "under the conditions of applicable law,"[101] and today, the inheritability of the right is set forth in article 6, paragraph 4.

At first glance, the inheritability of *droit moral* would seem to contradict, at least in theory, the principle that *droit moral* attaches only to the person of the creator of the work. French law may have resolved this issue, by distinguishing between the moral right itself and the right to exercise it.[102] Thus, if the *droit moral* is transferred by will, the artist's heirs get only the right to exercise the right, not the right itself. One may question the practical wisdom of this distinction, for the heir, while not possessing the moral right, still is entitled to damages for its violation.

We should observe, moreover, that certain moral rights in a work do indeed expire upon the author's death. It generally is held that *droit à la paternité* and *droit au respect* survive the author, once again with the limitation that the heirs inherit only the right to exercise the right, not the right itself.[103] On the other extreme, those aspects of *droit moral* which depend on the exercise of the author's volition are said to expire with the death of the author.[104] Accordingly, *droit de retrait* and *droit de repentir* may not be exercised by the author's successors.

A more difficult issue arises with the *post mortem* exercise of *droit de*

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[97] 1957 Law, *supra* note 15, art. 14.

[98] *Id.* art. 14.

[99] In many European countries, rights of performers and technical crews are protected under the doctrine of "*droit voisins*" or "neighboring rights." For a discussion of neighboring rights in West Germany, *see* Pakuscher, *supra* note 81, at 73-74.

[100] 1957 Law, *supra* note 15, art. 6, ¶ 3. See discussion in Sarraute, *supra* note 17, at 483; Giocanti, *supra* note 7, at 631.

[101] J. LABAURIE, *supra* note 60, at 14.

[102] CHILLIDA, *supra* note 50, at 17.

[103] LETARNEC, *supra* note 19, at 74.

[104] *Id.*, at 72-73.

divulgation. First, there is the problem of who may assert the right. Article 19 provides that the right of disclosure is to be exercised by the artist's executors during their lives, and afterwards by the author's descendants, spouse, heirs, or legatees, in that order.[105]

A second problem with the right of disclosure is the manifest possibility that the heirs will abuse the right. Article 20 provides that in a serious case of abuse, the courts have the power "to order any appropriate measures." The courts also may take charge of administering the right of disclosure in case of serious conflict among the artist's successors in interest, or in case there is no heir, or in case of disinheritance.[106]

It is not yet settled whether the power of the courts to administer the *droit de divulgation* under article 20 may be extended to include *droit à la paternité* and *droit au respect*, as well.[107] French courts have, however, recognized the possible abuses which may result from the exercise of these rights *post mortem*, and have held that "an heir must exercise the moral right, insofar as he is vested with it, for the sole purpose of effectuating the wishes of the deceased and not to serve his own interests."[108]

A final complication arises if the artist believes that his heirs will not adequately safeguard his moral interests. French law resolved this issue by allowing an artist to transfer his rights by will to a third party.[109]

Even with these limitations, the perpetual nature of *droit moral* has evoked criticism. Pierre Recht declares article 6 to be "juridical heresy,"[110] for nowhere else in French law does a personal right exist in perpetuity.

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[105] 1957 Law, *supra* note 15, art. 19.

[106] *Id.* art. 20, ¶ 1:

> In a case of manifest abuse of the right to exercise or not to exercise the droit de divulgation on the part of the deceased author's representatives, as provided for in the preceding article, the civil court may order any appropriate measure. The same shall apply if there is a conflict among said representatives, if they have no knowledge of the right, or in case of absence or disinheritance of said representatives.

[107] Giocanti, *supra* note 7, at 643, citing Françon, says that article 20 probably does include *droit à la paternité* and *droit au respect*. LETARNEC, *supra* note 19, at 72-73, is less certain.

[108] Sarraute, *supra* note 17, at 484. For a brief discussion of *abus de droit, see* CHILLIDA, *supra* note 50, at 17. It should be noted that in France, the National Literary Fund is entrusted with the task of securing respect for art works in the public domain. Sarraute, *supra* note 17, at 486.

[109] "The author can, if he judges his heirs to be unworthy, withhold from them the custody of his moral right, and vest it in a third party." J. LABAURIE, *supra* note 60, at 19. Article 6 of the 1957 Law codifies this principle.

[110] P. RECHT, *supra* note 13, at 292 (agreeing with Savatier).

3. Inalienable and Unassignable

Article 6 declares the moral right to be inalienable, and the strongest proponents of *droit d'auteur* have emphasized the transcendent importance of this principle. "Renouncing [one's] moral right," says Desbois, "would be equivalent to moral suicide."[111] And if an author may not renounce his *droit moral*, neither may he, during his life, contract it away to a third-party, even when the third-party has been assigned the material object and the exploitative rights in it.[112] Thus, if a contract contains a clause requiring transfer of the moral right as a condition of employment, some writers assert that the contract is unenforceable.[113]

As a matter of practice, however, such clauses often are found in contracts, and courts do enforce them in many situations.[114] Pierre Recht, the strongest critic of the inalienability principle, states that the courts are correct to do so, for any other decision would render meaningless the force of contracts.[115]

The statutory declaration of inalienability, moreover, is riddled with exceptions.[116] We already have seen that in a collaborative work, each co-author is deemed to have relinquished most of his own moral prerogatives, and to have accepted his position in a commonly held moral right. Articles 15 and 16 establish a comparable exception for films. As we shall see later, an assignment of the right to adapt a work to another medium necessarily requires the abandonment of at least part of the right of integrity.[117] Furthermore, the *droit de repentir* ordinarily may be exercised only over a work that is not yet made public; thus, publication of a book or performance of a play may constitute an implicit waiver of that right.[118]

Recht points out, finally, that the German Law of 1965 is more lenient on the issue of assignment of authors' rights, and the Berne Convention ignores the inalienability rule altogether. Thus, he concludes, "One will discover in its application the unreality of the formula; the imperatives of practicality must survive."[119]

We see from its application that the basic formulation of the characteristics of *droit moral* gives rise to practical difficulties, which French

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[111] Giocanti, *supra* note 7, at 630 (discussing Desbois).
[112] 1957 Law, *supra* note 15, art. 6, ¶ 3. *See* Giocanti, *supra* note 7, at 630.
[113] *See, e.g.*, statements of Françon, *cited in* Giocanti, *supra* note 7, at 630.
[114] *See, e.g.*, Bernstein v. Matador et Pathé Cinéma, [1933] D.H. 1933, 533, D.A. 1933, 104, *discussed in* Strauss, *supra* note 6, at 516 n.48.
[115] P. RECHT, *supra* note 13, at 281-86.
[116] Treece, *supra* note 40, at 505-06.
[117] P. RECHT, *supra* note 13, at 283, and discussion *infra*.
[118] P. RECHT, *supra* note 13, at 282, and discussion *infra*.
[119] P. RECHT, *supra* note 13, at 285.

law has only begun to resolve through statutory and judge-made exceptions. And yet, if United States legislators or judges decide to adopt the principle of moral right by name, these are but the first of the problems which ought to be addressed.

C. Categories

During the author's life, a work of art is protected both during the period of creation and after it has been disclosed to the public. "These are two distinct periods, separated by the artist's act of disengaging himself from his work and submitting it to the judgment of the public."[120]

The "pre-disengagement" period affords the artist absolute sovereignty over his work; even if the artist is under contract, he has a right to alter or destroy his work, and to decide whether and when to make it public. "No one [else] can claim any right to it whatsoever."[121] After disengagement, the work may become the subject of contracts or commercial transactions, and property or exploitative rights in it may be transferred.[122] The author, however, retains certain moral prerogatives.

1. *Droit de Divulgation*

The *droit de divulgation*, or "right of disclosure,"[123] involves the very moment of "disengagement." It is the right of the author to have complete authority over the decision to publish, sell, unveil, or by any other means make his work public. The right undoubtedly stems from a belief that only the artist himself can determine when a work is completed, and also from a recognition of the fact that public disclosure of a work has a direct impact on the artist's reputation.

Droit de divulgation was codified in Italy as early as 1941,[124] and is recognized in article 19 of the French law of 1957.

> The author alone has the right to disclose his work. . . . He determines the process of disclosure and fixes the conditions thereof.[125]

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[120] Sarraute, *supra* note 17, at 466.

[121] *Id.* at 466.

[122] *Id.* at 466.

[123] "*Droit de divulgation*" sometimes has been translated as "right of publication." That translation, however, may cause some confusion with the common law "publication" doctrine. Moreover, in the case of graphic arts, "publication" might become confused with the right of "reproduction," which is one of the *droits patrimoniaux*.

[124] Italian Law of April 22, 1941 (Law No. 633), UNESCO, *supra* note 15, art. 12 [hereinafter cited as Italian Law], *also cited in* Giocanti, *supra* note 7, at 631. *Also see* the Japanese Law of May 6, 1970 (Law No. 48 of 1970), art. 18, *translated in* UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD [hereinafter cited as Japanese Law].

[125] 1957 Law, *supra* note 11, art. 19, ¶ 1.

In order to appreciate the full significance of this provision, it is important to review briefly the judicial doctrine which engendered it.

Droit de divulgation received its most celebrated endorsement in the landmark case of *Whistler v. Eden*[126] in 1898. James McNeill Whistler had been commissioned to paint a portrait of the wife of Lord Eden. When the time came for delivery, a dispute arose as to payment. Whistler then claimed to be dissatisfied with the work, painted out the face of the subject, and refused to deliver the portrait. Lord Eden sued for breach of contract, and a trial court ordered that the portrait be delivered. The Paris Court of Appeals reversed, however, holding that so long as the artist was dissatisfied with his work, he could not be compelled to deliver it. The artist, while excused from specific performance, was required to pay damages to Lord Eden for his failure to perform under the contract.

The *Whistler* case reflects the French view that an artist is the absolute master of the decision to disclose his work, even when the right of disclosure would seem to impair contractual obligations. "Thus, the artist's lack of inspiration is not a breach of contract. . . . [I]t is a 'normal risk,' foreseeable by all parties."[127] The exercise of the *droit de divulgation*, however, requires good faith on the part of the artist; he could not, for example, claim to be dissatisfied with a work and then sell it unaltered to another buyer for a higher price.[128]

An American lawyer may find it anomalous that a contract which does not call for either party's satisfaction as a condition for delivery, could be held unenforceable simply because one contracting party is dissatisfied with his own performance. Yet, critics have observed that an American or English court of equity also would refuse to grant specific performance for a contract to create.[129]

The second leading case, *L'Affaire Camoin*,[130] upheld the artist's *droit de divulgation* not at the expense of another party's contractual right, but rather at the expense of another party's property right. An artist, dissatisfied with some of his paintings, slashed and discarded them. The defendant found the mutilated paintings, restored them, and put them

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[126] Judgment of Mar. 20, 1895, Trib. Civ. Seine, [1898] D.P.2. 465; Judgment of Dec. 2, 1897, Cour d'Appel Paris; Judgment of May 14, 1900, Cass. Civ., [1900] D.P.1. 5000, discussed in 1 S. STROMHOLM, *supra* note 5, at 282-83; Sarraute, *supra* note 17, at 467-68; Roeder, *supra* note 6, at 559.

[127] Sarraute, *supra* note 17, at 468.

[128] *Id.* at 468. The issue also is discussed in Roeder, *supra* note 6, at 5591.

[129] Roeder, *supra* note 6, at 558-59. It may even be argued that, in English and American Law, equity is a form of "moral right."

[130] Judgment of Mar. 6, 1931, Cour d'Appel Paris, [1931] D.P.2. 88, *discussed in* Sarraute, *supra* note 17, at 468-69.

up for auction. The Paris Court of Appeals, holding for the artist, ordered that the works be destroyed according to the artist's wishes, and said:

> "[A]lthough whoever gathers up the pieces becomes the indisputable owner of them through possession, the ownership is limited to the physical quality of the fragments, and does not deprive the painter of the moral right which he always retains over his work."[131]

Camoin illustrates dramatically the extent of an artist's *droit moral,* but it has not gone without criticism. Writers have asked what is the meaning of "ownership of a material object" if the artist's *droit de divulgation* can require the material object to be destroyed;[132] indeed, French law does not adequately resolve this paradox. One also might question whether courts ought to be in the business of fulfilling artists' wishes so literally. After all, if *droit moral* arises from a notion that art works somehow are more sacred than fungible property, it would be ironic for the doctrine to justify court-ordered art-burnings.

Droit de divulgation was again at issue in *L'Affaire Rouault.*[133] In that case, Vollard, an art dealer, kept locked in his room over 800 paintings, which the artist Rouault would visit from time to time, to apply finishing touches. Upon Vollard's death, the art dealer's heirs claimed ownership of the works, but Rouault claimed that since the works were unfinished, only he "could decide their final delivery."[134] The court held that ownership in the paintings had never passed to Vollard, and ordered the works returned to Rouault, upon repayment to the heirs of the advances which Vollard had paid Rouault on the paintings.

An artist retains absolute sovereignty over a work until he chooses to disclose it, but the *Rouault* case illustrates the great difficulty of determining what constitutes disclosure. After all, here the artist accepted advances and kept the virtually completed works in the custody of an art dealer; one might well ask how many more incidents of disclosure must be present before a work is deemed to have been "made public," and, therefore, to have become transferable. Moreover, the *Rouault* court decided the issue of disclosure on the basis of whether or not the work was finished, and we might question, once again, whether such

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[131] Sarraute, *supra* note 17, at 468.
[132] *Id.* at 469.
[133] Judgment of Mar. 19, 1947, Cour d'Appel Paris, [1949] D.P. 20, *discussed in* Sarraute, *supra* note 17, at 469-70.
[134] Sarraute, *supra* note 17, at 469.

issues are appropriate for judicial inquiry.[135] Indeed, the court's failure to separate the issue of "disclosure" from the issue of "completion" has been a source of criticism.[136]

Although one may well question the wisdom of these cases, it was these principles which shaped the development of *droit de divulgation*, and which the French legislature sought to enshrine in the 1957 Law. Today, the right has an even broader scope, which article 19 only begins to reflect.

Under the modern formulation, first, the *droit de divulgation* is considered a "personal" right, which means that the author alone can decide when and how the work will be publicly disclosed, even when the work and all pecuniary rights in it are owned by the transferee.[137] Thus, if an artist wants one of his paintings reproduced, the owner of the painting cannot, without compelling reasons, refuse to cooperate.[138] The right is not absolute, however, for the subject of a portrait may validly refuse to allow reproduction of the portrait if the reproduction would endanger the subject's privacy.[139]

Secondly, *droit de divulgation* is considered to be "discretionary," for the artist has sole discretion over the decision to disclose. An important application of this principle would be a case where a creditor seizes a manuscript against the author's wishes. Such seizure, while arguably legal in Great Britain or the United States,[140] could violate the artist's

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[135] "It is hardly necessary to point out that the court's assumption of power to decide on the completeness [of a work of art] is a negation of the most obvious aspect of the artist's moral right." *Id.* at 471 (discussing l'Affaire Bonnard, Judgment of Oct. 10, 1951, Trib. Civ. Seine, [1951] Gaz. Pal.2. 290; Judgment of Jan. 19, 1953, Cour d'Appel Paris, [1953] Gaz. Pal. 1.99; [1953] J.C.P. 7427).

[136] In *Bonnard*, *supra* note 135, the court insisted that the issue of *droit de divulgation* is not whether or not the work has been completed, but, rather, whether or not it has been made public. *See* Sarraute, *supra* note 17, at 470-71.

[137] 1957 Law, *supra* note 15, art. 19, ¶ 1, art. 29, ¶ 1. *Also see* discussion in Giocanti, *supra* note 7, at 632.
The scheme is somewhat different under the Japanese Law, *supra* note 124, art. 18, § 2 (Right to Make Public), which provides that if the copyright in an unpublished work is assigned, the author is deemed to have consented to having his work made public. *See* Iijima, *Musical Copyrights in Japan*, 23 BULL. COPR. SOC'Y 371, 395 (1976).

[138] 1957 Law, *supra* note 15, art. 29, ¶ 3; Giocanti, *supra* note 7, at 632.

[139] S. STRÖMHOLM, LA CONCURRENCE ENTRE L'AUTEUR D'UNE OEUVRE DE L'ESPRIT ET LE CESSIONNAIRE D'UN DROIT D'EXPLOITATION 17-18 (1969) [hereinafter cited as CONCURRENCE]; Giocanti, *supra* note 7, at 632 n. 37.

[140] The issue of whether or not a manuscript under common law copyright could be seized and published was unsettled. *See* Treece, *supra* note 40, at 490. Giocanti, *supra* note 7, at 632; Roeder, *supra* note 6, at 559.

droit de divulgation in France.

Another important application of the right's discretionary character is in cases where, as a result of the artist's marriage, an art work has become community property.[141] The extent of the spouse's rights, unsettled before 1957,[142] was resolved by article 25 of the 1957 Law, which declares that the author alone retains discretion over the decision to publish.[143]

Finally, the statutory scheme deems the *droit de divulgation* to be "exclusive."[144] This means that a work which is transferred may be exploited only within the limitations prescribed by the author.[145] The impact of this principle falls most heavily on the interpretation of contracts. An artist who contracts for a gallery to display his work cannot be held to have authorized its reproduction, as well, even if the language of the contract is ambiguous. Thus, "[a]ny method of disclosure that is not accepted unequivocally by the author shall be excluded from the exploitation."[146]

Armed with this personal, discretionary, and exclusive right, an artist who desires not to complete a work may refuse to create under contract, so long as he is willing to pay damages to the injured party.[147] Even if the artist has completed the work, he still may refuse to deliver it, again, if he is willing to pay damages.[148] Once the artist has paid damages as ordered by the court, the parties are free of all obligations to one another, and the author is free to exhibit, sell, or otherwise exploit the work,[149] subject to requirements of good faith.

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[141] A discussion of *droit moral* in relation to marital rights is beyond the scope of this paper. For a discussion, *see* G. GAVIN, *supra* note 13, at 185-223.

[142] *See, e.g., Bonnard, supra* note 135.

[143] "Article 25 provides, moreover, that in all matrimonial arrangements, and with the penalty of rendering void all contrary clauses in the marriage contract, the *droit de divulgation* remains vested solely in the author. This confirms the discretionary character of this right."
A. LETARNEC, *supra* note 19, at 28-29.

[144] 1957 Law, *supra* note 15, art. 30, ¶¶ 2-3.

[145] Giocanti, *supra* note 7, at 632 (citing Desbois).

[146] *Id.* at 632.

[147] A. LETARNEC, *supra* note 19, at 30; G. GAVIN, *supra* note 13, at 44. For a detailed discussion of the validity of contracts to create under French, German, and Scandinavian legal systems, *see* 2, 1 S. STRÖMHOLM, *supra* note 5, at 121-262.

[148] "The result of this principle is that the refusal of the author to deliver the work invokes the responsibility of the author, to the extent he is at fault, and that the sanction for such refusal may be translated into an assessment of damages to be paid to the creditor." A. LETARNEC, *supra* note 19, at 36. Also see G. GAVIN, *supra* note 13, at 47.

[149] A. LETARNEC, *supra* note 19, at 37.

Despite the apparent breadth of the right of disclosure, French law has found it necessary to limit its application in certain cases.[150] We already have seen the unanimity rule for the exercise of moral rights over collaborative works. This principle is especially important in the exercise of *droit de divulgation*, for it is here that the assertion of the right by one author—for example, in demanding the destruction of the work—could most readily prejudice the rights of the other co-authors. French law also has held that if one collaborator fails to complete his part of the work, "the author who is unable to complete his contribution shall not be entitled to oppose the use of the part of his contribution already in existence."[151]

Droit de divulgation is especially cumbersome when applied to cinematographic works, because the detailed process of film editing and distribution makes it difficult to determine when a film has been "made public." Thus, the French legislature found it necessary to create detailed provisions for films. First, article 16 states that co-authors of a film may exercise their rights only over the *completed work*, and it defines completion as the time when "the first master-print has been made by common consent of the co-authors and the producer."[152] Then, article 17 and 19 together allow the producer by himself to exercise the *droit de divulgation*.[153]

Droit de divulgation is a useful doctrine, but it functions best when the artist works alone. The exceptions for film and collaborative works demonstrate the impracticality of the right when it is applied to works with many creators. At present, we cannot even imagine the problems which will arise as new art forms—such as electronically realized music—emerge, requiring numerous "technical," as well as "artistic," authors for their creation.[154]

Furthermore, even in the case of a single artist, *droit de divulgation* seldom can be asserted without indemnifying another party's contract

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[150] Giocanti, *supra* note 7, at 633-36, suggests that limitations on *droit de divulgation* may be classified either as those which arise from the contract (*i.e.*, where the exercise of the right is limited by the author's duty to pay damages) or as those which arise from the nature of the work itself.

[151] *Id.* at 635. *But see* l'Affaire Léo Ferré, Judgment of Dec. 2, 1963, Cour d'Appel Paris, *cited in* Sarraute, *supra* note 17, at 474, in which the court refused to follow the unanimity rule.

[152] 1957 Law, *supra* note 15, art. 16. For an excellent discussion of this issue, see Giocanti, *supra* note 7, at 635.

[153] In the United States, ordinarily the producer of the film holds the copyright over the entire film, and exercises all rights of distribution.

[154] A related issue arises with regard to "random" music, for it is arguable that the work is different every time it is performed, and therefore is never really "disclosed" to the public.

or property rights, for even French law has recognized the inequities which the right of disclosure creates. This means that, ultimately, the right of disclosure depends on the artist's ability to purchase it.

2. *Droit de retrait ou de repentir*

As a corollary to *droit de divulgation*, there exists a second category of moral rights: even after the work has been disengaged and made public, the artist has a right to withdraw the work from publication (*droit de retrait*) or to make modifications in it (*droit de repentir*).

These two rights are recognized in Italian and German law.[155] In France, they are codified in article 32 of the 1957 Law, which states that even if the rights of exploitation in a work have been transferred, and even after the work has been published, the author enjoys the right to withdraw or modify the work, so long as the artist indemnifies the transferee in advance of the exercise of the right.[156] Scholars add that the withdrawal or modification requires no justification other than the author's "change of conviction,"[157] and that French courts will not pass judgment on the artist's motives for assertion of the right[158]—a kind of artistic "act of state" doctrine.

It is difficult to evaluate *droit de retrait* and *droit de repentir*, for both their existence and their application in the courts are disputable. Before 1957, the rights had been discussed by French jurists, but virtually never applied in the courts.[159] Since 1957, few French cases have even ad-

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[155] Giocanti, *supra* note 7, at 638. *See, e.g.*, Italian Law, *supra* note 124, arts. 142-143.

[156] 1957 Law, *supra* note 15, art. 32, ¶ 1:

> Notwithstanding the transfer of his right of exploitation, the author, even subsequent to the publication of his work, enjoys a right of modification or withdrawal vis-à-vis the transferee. Nonetheless, he may not exercise the right unless he agrees to indemnify the transferee in advance for any prejudice which such modification or withdrawal may cause him.

[157] In German law, *droit de repentir* actually is called "right of revocation for change of conviction." Kerever, *supra* note 92, at 49.

[158] The author's decision presents an absolute unilateral and discretionary right. The author does not need to justify himself before the court. French law does not submit the author's decision to judicial authority, because the court would be forced to take into consideration the motives of an intellectual and moral nature that prompted the retraction.
Giocanti, *supra* note 7, at 637. Note, however, that Italian courts will review the artist's motives for withdrawal. *Id.* at 638.

[159] In 1953, Tager wrote:

> This right often is spoken of, but it has not yet fully manifested itself in French law. Not one judicial decision has recognized it. Few authors have seriously maintained its existence, and yet it exists, even if only as a myth; an advantage—a bit fictitious and indeterminate—attached to his status as artist.

dressed the issue, and those scholars who do support *droit de retrait ou de repentir* still differ as to the nature of the right and the parameters of its application.[160]

The French statute on its face would seem to indicate that *droit de retrait* allows a writer to interrupt the publication of his book,[161] or even attempt to remove a published work from circulation; *droit de repentir* could even mean that an artist may make changes in a work already disseminated to the public. Both situations give rise to tremendous practical difficulties, and readily could place an unrealistic burden on publishers and distributors of literary and artistic works.

It is no wonder, then, that French law has seen fit to impose limitations on the right, even this early in the right's development. Article 32, for example, states that the artist must be prepared to indemnify the transferee in advance for any losses which the retraction or modification may cause.[162] While this provision does attempt to rectify the inequities which could result from an exercise of moral rights, it also renders it difficult for the artist to assert his right. As in *droit de divulgation*, the exercise of *droit de retrait ou de repentir* often depends simply on the artist's ability to pay for it.

As a second restriction on *droit de retrait*, article 32 adds that in the case of a withdrawal, "if the author does publish the retracted work, he must first offer it to the original transferee on the same terms as the original contract."[163] This provision attempts to protect publishers from bad faith exercise of moral rights, but one may question whether the publisher's interests are adequately protected. The statute, after all, does not specify whether an author who retracts a work and then makes

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Quoted in G. GAVIN, *supra* note 13, at 64. *Also see* Sarraute, *supra* note 17, at 476-77.

It is arguable, however, that the case of Anatole France v. Lemerre, Judgment of Dec. 4, 1911, Pataille 1912. 1. 98, represents an early recognition of *droit de retrait*. In 1882, Anatole France had sold a manuscript to a publisher for 3000 francs. The publisher delayed publication for 25 years, at which point the author, now a famous writer, claimed that the manuscript no longer represented his work, and sought to enjoin publication. The court upheld France's claim, but ordered him to return the 3000 francs. *See* Roeder, *supra* note 6, at 560.

[160] For a discussion of the positions of various French jurists on *droit de retrait ou de repentir*, *see* P. RECHT, *supra* note 13, at 304. *Also see* G. GAVIN, *supra* note 13, at 63-74.

[161] Indeed, LeTarnec refers to *droit de retrait* as the "right to interrupt publication." A. LETARNEC, *supra* note 19, at 43.

[162] 1957 Law, *supra* note 15, art. 32, ¶ 1. Note, also, that German law has created the same limitation. Kerever, *supra* note 92, at 49.

[163] 1957 Law, *supra* note 15, art. 32, ¶ 2. (Translation in Giocanti, *supra* note 7, at 638).

changes so significant as to constitute a new work still can be compelled to offer it to the original transferee for publication.

The *droit de repentir* also is limited. It is said, for example, that a writer may not make changes in a manuscript after the exploitative rights have been transferred, unless the changes are insignificant and do not substantially alter the work.[164] Moreover, the editor needs only accept those changes which were "normally foreseeable when the contract was signed."[165]

Most important, although article 32 applies even after a contract of exploitation has been signed, French courts eventually may hold that *droit de retrait* and *droit de repentir* exist only as long as the artist retains all property rights in the work, for leading scholars believe that as soon as the property rights are alienated, the *droit de retrait* and *droit de repentir* cease to exist.[166] This means that an artist who sells a painting or sculpture "cannot unilaterally cancel the contract of sale or donation."[167] It also means that the *droit de repentir* may not be exercised without the consent of the owner of the art work, for the artist has no right to repossess his creation in order to make the desired modifications.[168]

This limitation did receive some judicial recognition by the Paris Court of Appeals in 1961, when it assessed damages against the artist Vlaminck.[169] Vlaminck had erased his signature from a painting, claiming it to be a forgery. The court's reasoning was twofold:

> If the painter was correct in his estimate, he still had no right to alter another person's property. If, on the contrary, the painting was not a forgery, Vlaminck's moral right did not permit him to exercise a right of withdrawal after having sold the canvas.[170]

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[164] "The editor cannot be forced to accept changes of such nature as to alter the work in a substantial manner, for the object of the contract cannot be changed, even in part, without the agreement of both parties." *Id.* at 639.

G. GAVIN, *supra* note 13, at 72, also writes: "The modifications which the author may be required to accept can only be secondary modifications which tend to give to the work a more elevated degree of completion, in conformity with an already established literary or artistic reputation."

[165] Giocanti, *supra* note 7, at 639. *Also see* G. GAVIN, *supra* note 13 (citing Michaelidis-Nouaros).

[166] *See, e.g.*, statements of Savatier and Desbois, *cited in* G. GAVIN, *supra* note 13, at 70.

[167] Giocanti, *supra* note 7, at 638.

[168] Sarraute, *supra* note 17, at 477.

[169] Judgment of Apr. 19, 1961, Cour d'Appel Paris, [1961] Gaz. Pal. 2.218, *discussed in* Sarraute, *supra* note 17, at 477.

[170] Sarraute, *supra* note 17, at 477.

These limitations may constitute the only equitable way of administering such an unorthodox area of *droit moral*. Indeed, without them, *droit de retrait* and *droit de repentir* could prove to be an invitation for injustice and impracticality. Yet, the limitations also should serve to illustrate that the two rights not only are commercially impracticable, but also are fundamentally inapplicable to many art forms, most notably, the plastic arts. Moreover, when we observe the extensive limitations on the two rights, we can only wonder what is left of them at all.

3. *Droit à la paternité*

Since the artist injects his own creative personality into his work, French law vests him with the right to claim authorship of it. Thus, article 6 of the 1957 Law states: "The author enjoys the right to have his name, his status as author, and his work respected."[171] Although this clause also embodies the right of integrity, it is considered to be the statutory source of the *droit à la paternité*, the right of authorship.

The deceptively simple concept of *droit à la paternité* was first recognized in 1837, when the Paris Court of Appeals declared:

> The collaborator whose name has been omitted without his knowledge from the title of a work may obtain recognition of his authorship and his rights through the courts.[172]

Today, *droit à la paternité* has blossomed into three rights. First, an author has a right to be recognized by name as the author of his work,[173] and by the same reasoning, he has a right to publish anonymously or under a pseudonym.[174] Second, the author has a right to prevent his work from being attributed to someone else.[175] And, third, the artist has a right to prevent his name from being used on works which he did not in fact create.[176]

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[171] 1957 Law, *supra* note 15, art. 6, ¶ 1.

[172] Jurisprudence Général Dalloz, 1857, under the heading «Propriété littéraire et artistique», N° 194, cited in G. GAVIN, *supra* note 13, at 50-51. (Translation in Sarraute, *supra* note 17, at 478.)

[173] Strauss, *supra* note 6, at 508; *William and Mary Comment*, *supra* note 6, at 597; *Georgetown Comment*, *supra* note 6, at 1540; Comment, *The Monty Python Litigation—Of Moral Right and the Lanham Act*, 125 U. PA. L. REV. 611, 615 (1977) [hereinafter cited as *Pennsylvania Comment*].

[174] Judgment of Dec. 7, 1955, Trib. civ. Seine, 1re Ch., [1956] Gaz. Pal. I. 195, *cited in* A. LETARNEC, *supra* note 19, at 39. Anonymous or pseudonymous publication may give rise to practical difficulties, especially the problem of determining the duration of copyright. These matters are addressed in article 22 of the 1957 Law. For a discussion, *see* G. GAVIN, *supra* note 13, at 58-59.

[175] *See* sources cited in note 173 *supra*.

[176] *Id. Also see* Giocanti, *supra* note 7, at 637.

The first category of *droit à la paternité* has been applied broadly in a multitude of situations. First, it has been held to mean that the author's name must appear not only on his work but also on all copies of the work,[177] as well as on all publicity materials which precede or accompany its sale,[178] even if the author has contracted otherwise.[179] If an author is quoted or cited in another work, he has a right to have his name appear with the quote or citation.[180] A reproduction of a painting, sculpture, or architectural model must bear the name of the original artist.[181] All co-authors have a right to be identified as the creators of a collaborative work, as do authors of films.[182] Interestingly, a photographer has a right to be named the "author" of his photograph,[183] even though the film camera-man need not be included among the "authors" of a film.[184] And in a collective work, such as a newspaper or magazine, each contributor has a moral right to sign his own article.[185]

The artist's right to sign his own paintings was dramatically upheld in the 1966 case of *Guille c. Colmant.*[186] In that case, a contract between an artist and an art dealer required the artist to sign with a designated pseudonym all works commissioned by the dealer, and to leave all of his other works unsigned. The Paris Court of Appeals declared the contract void, as a violation of the artist's *droit à la paternité.*

Oddly enough, examples of the second category under *droit à la paternité* are difficult to find in French case law.[187] The third category,

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[177] G. GAVIN, *supra* note 13, at 53.

[178] Judgment of Feb. 20, 1922, Trib. civ. Seine, [1922] Gaz. Pal. 2.282, cited in A. LETARNEC, *supra* note 19, at 39. *Also see* Strauss, *supra* note 6, at 506.

[179] Sarraute, *supra* note 17, at 485.

[180] Judgment of July 24, 1924, Trib. civ. Seine, [1925] Gaz. Pal.II.463; Judgment of Mar. 19, 1926, Cass. crim. [1927] D.P.25, cited in A. LETARNEC, *supra* note 19, at 39.

[181] A. LETARNEC, *supra* note 19, at 39. In 1954, a lower French court held that an artist, whose signature on a war monument had been defaced, had a right to have the monument repaired and his signature restored. Judgment of July 8, 1954, Trib. civ. Confolens, discussed in G. GAVIN, *supra* note 13, at 51.

[182] Sarraute, *supra* note 17, at 478.

[183] *Id.*

[184] 1957 Law, *supra* note 15, art. 14.

[185] Giocanti, *supra* note 7, at 636.

[186] Cour d'Appel, Paris, [1967] Gaz. Pal.1.17, discussed in Sarraute, *supra* note 17, at 478-79.

[187] P. RECHT, *supra* note 13, at 288. An example of the second category, however, may be the Judgment of May 30, 1955, Trib. civ. Clermont, [1951] D. 780, discussed in G. GAVIN, *supra* note 13, at 51. In that case, a tombstone had been signed by the marble cutter and not by the artist. The artist was held to have a right to have his authorship take precedence over that of the marble-cutter.

however, has been applied in at least two kinds of cases. First, an author or his heir has the right to remove the author's name from distorted or mutilated editions of his work.[188] And, secondly, the right to prevent wrongful attribution of authorship allows the author to protest the use of his name without his permission in advertisements.[189] For example, *Pangrazi e Silvestri c. Comitato*,[190] an Italian case in 1974, held that an artist's *diritto alla paternità* was violated when his picture was used, without his permission, to advertise a political issue.

Droit à la paternité may well be the least controversial of all the moral rights. It suffers from few, if any, restrictions, and its exercise appears to have the least tendency to prejudice the contract or property rights of others. It comes as no surprise, then, that the right is recognized by the Berne Convention,[191] and it even receives some protection in the People's Republic of China.[192]

Yet, the *droit à la paternité* poses problems which too often are overlooked by American observers. First, there is the question of abandonment, waiver, or assignment of the right. Early in the development of *droit moral*, French jurists differed as to whether the author could by contract divest himself of his *droit à la paternité*,[193] to the extent that one observer, in 1940, declared the question to be "one of the most difficult in the entire realm of moral right."[194] The possibility that an artist could assign or waive the right gained further support from early court decisions holding that a work done at the command of an editor could be considered the unrestricted property of the editor.[195]

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[188] J. LABAURIE, *supra* note 60, at 15; *William and Mary Comment*, *supra* note 6, at 597. It is here that *droit à la paternité* and *droit au respect de l'oeuvre* overlap.

[189] *See, e.g.*, Bernard-Rousseau c. Société des Galéries Lafayette, Judgment of Mar. 13, 1973, Trib. gr. inst. Paris, 3e Ch. (unpublished), cited in 1 J. MERRYMAN *and* A. ELSEN, *supra* note 22, at 4-25, and discussion *infra*.

[190] Judgment of May 6, 1974, Pret. Roma, cited and discussed in 1975 IL DIRITTO DI AUTORE 119-22.

[191] 1971 Paris Revision to the Berne Convention, *supra* note 34, art. 6 bis, *reprinted in* UNESCO, *supra* note 15.

[192] For a discussion of authors' rights in China, *see* Loeber, *Copyright Law and Publishing in the People's Republic of China*, 24 U.C.L.A. L. REV. 907 (1977).

[193] *See* A. LETARNEC, *supra* note 19, at 40-41.

[194] Roeder, *supra* note 6, at 564. G. GAVIN, *supra* note 13, at note 28, at 59-62, discusses the traditional debate over the inalienability of *droit à la paternité*. Of particular interest is the attitude of Pouillet, *id.* at 60:

> There are today, and there always will be, obscure writers, working for a pittance, and valuing glory less than money. Such people license their industry away, and cannot reclaim a single property right over the work which they themselves conceived and wrote under the employ and for the account of a third party.

[195] *See, e.g.*, Judgment of Mar. 27, 1905, Trib. civ. Nantes, [1907] D.II.297, cited

The 1957 statute presumably answered the question by declaring the artist's rights to be personal, perpetual, inalienable, and unassignable,[196] but even today, French scholars continue to debate the wisdom of that rule and the scope of its applicability.[197] Desbois, at one extreme, writes that an author "can no more abandon his authorship than a father can abdicate his status as father."[198] Recht, on the other hand, asks why the law should forbid an author to promise—in return for compensation—that he will not announce himself to be the true author of his work:

> Must we always consider authors to be nursery school children? I ask, like Monsieur Lyon-Caen: "Why should we treat authors like minors, and defend them against acts permitted to every other person, regarding every other type of property and every other type of rights?"[199]

The result, as Giocanti observes, is that while artists in Great Britain and the United States may waive their right to authorship by contract, "in France, agreements for anonymity or concealed collaboration are 'legal but revocable *ad nutum*. The author may at any time disclose his authorship.' "[200]

French scholars have criticized the third category of *droit a la paternité* on the ground that the right would be better protected under other legal doctrines. Even Desbois, the most emphatic proponent of *droit moral*, believes that the right to prevent false attribution of authorship "is inherent in any person and has nothing to do with a copyright in [the work of art]."[201]

A still more serious point of scholarly disagreement has been the

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in G. GAVIN, *supra* note 13, at 60. This issue was settled by the 1957 Law, *supra* note 15, art. 1, ¶ 3. *See* note 87, *supra*. In the United States, copyright in works made for hire is presumed to be vested in the employer. 17 U.S.C. § 201(b) (1976).

[196] 1957 Law, *supra* note 15, art. 6.

[197] *But see* A. LETARNEC, *supra* note 19, at 40-41, who says that the 1957 Law definitively settled the issue.

[198] H. Desbois, cited in G. GAVIN, *supra* note 13, at 58.

[199] P. RECHT, *supra* note 13, at 291.

[200] Giocanti, *supra* note 7, at 636.

[201] Strauss, *supra* note 6, at 508 n.5. G. GAVIN, *supra* note 13, at 55, also admits that the right to prevent usurpation of one's name by another author does not proceed from the *droit à la paternité*, and quotes Michaelidis-Nouaros: "This protection derives more appropriately from the general right of each individual over his honor and his personality, and has nothing to do with *droit moral*."

extension of *droit à la paternité* to include protection of the author's reputation.[202] The source of this dilemma may be the 1957 Law itself, for article 6, instead of speaking specifically of *droit à la paternité*, joins the right of authorship with the right of integrity in one broadly worded clause which includes respect "for one's name."[203] Yet, under its most precise formulation, an author's right to be recognized as the creator of his work is not the same as his right to safeguard his reputation.

> In reality, the status which the law protects is the author's status under the law, not his reputation. Any other view is excluded by the principles which underlie the law of March 11, 1957, since legal protection is granted "solely for the performance of the creative act" (Article 1), regardless of the artistic merit of the work produced (Article 2).[204]

Sarraute points out the danger of extending *droit à la paternité* too far in this direction.[205] For example, if an artist's works were to be sold by a gallery at low prices for the purpose of raising money quickly, the artist could claim that the sale is an assault on his reputation as an artist. *Droit moral,* Sarraute warns, was never intended to be a doctrine by which artists can be guaranteed court-ordered inflation of market prices in works of art.

Thus, despite the utility of the doctrine, *droit à la paternité* at times may prove to be an unnecessary exercise of paternalism, which achieves no more for artists than could be secured by other, less restrictive legal principles.[206]

4. *Droit au respect de l'oeuvre*

Finally, we come to the *droit au respect de l'oeuvre*, the right of an author to demand respect for his work. We save it for last because it arises only after a work has been completed, published, performed, or transferred.[207] In France, *droit au respect* is codified in the same clause of article 6 which established the *droit à la paternité*, and it is considered

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[202] *See* cases discussed in Sarraute, *supra* note 17, at 478-80.

[203] *See* text accompanying note 171, *supra*.

[204] Sarraute, *supra* note 17, at 479.

[205] *Id.* at 479-80.

[206] P. RECHT, *supra* note 13, at 288, in fact, ridicules the second category of *droit à la paternité* for duplicating that which already is protected under plagiarism laws. "Why do jurists, who study *droit moral*, feel the need to waste their time inventing a 'moral' right of paternity, to designate that which simple common sense would call 'highway robbery'. . . ?"

[207] Sarraute, *supra* note 17, at 480.

by virtually all scholars to be the most essential part of *droit moral.*[208] Simply stated, *droit au respect* or "right of integrity" means that the artist has a right to preserve his work from any alteration or mutilation whatsoever.[209]

The right of integrity was recognized as early as 1874,[210] and has developed in the twentieth century at a startling pace. As early as 1919,[211] it had been recognized in France that if an editor made significant changes or omissions in a manuscript, the author or his heirs had a right to suppress the work.

The right of integrity was illustrated vividly in the now classic case of Bernard Buffet in 1965.[212] Buffet had painted designs on all sides of a refrigerator. The owner of the refrigerator proposed to dismantle it and sell its individual panels as separate art works. Buffet opposed the sale, claiming that the refrigerator was "an indivisible artistic unit."[213] The Paris Court of Appeals, affirmed by the Cour de Cassation, held that the sale constituted a violation of the artist's right of integrity.[214]

The same principle received even broader application in a German case in 1975.[215] An opera conductor ordered the alteration of certain stage directions in a production of Wagner's *Götterdämmerung*, claiming that the staging had created a scandal on opening night. Peter Mussbach,

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[208] P. RECHT, *supra* note 13, at 291: "The doctrine is considered to be the essential element of the so-called moral right." G. GAVIN, *supra* note 13, at 75; Roeder, *supra* note 6, at 565.

[209] P. RECHT, *supra* note 13, at 291: "The *droit au respect* is the right of the author to prohibit any modification whatsoever, made in his work, without his express consent. It guarantees the integrity of the work." *Also see Pacific Comment, supra* note 14, at 859; Sarraute, *supra* note 17, at 480.

[210] *See* discussion in G. GAVIN, *supra* note 13, at 75.

[211] In 1919, for example, Labaurie, observing the trend in court decisions, analyzed the following hypothetical situation:

> Let us imagine a literary work which has fallen into the public domain. A third party reproduces it, making additions or cuts to such an extent as to alter the meaning of the work. The deceased author has direct descendents who are living. They may bring suit on the basis of *droit moral* and obtain the suppression of the offending publication.

J. LABAURIE, *supra* note 60, at 13.

[212] Fersing v. Buffet, Judgment of May 30, 1962, Cour d'Appel Paris, [1962] D. 570; Judgment of July 6, 1965, Cour de Cassation, [1965] Gaz. Pal.2.126, cited in Sarraute, *supra* note 17, at 480, discussed in 1 J. MERRYMAN *and* A. ELSEN, *supra* note 22, at 4-2; P. RECHT, *supra* note 13, at 287-97. *Also see* Merryman, *The Refrigerator of Bernard Buffett*, 27 HASTINGS L.J. 2023 (1976).

[213] Sarraute, *supra* note 17, at 480.

[214] P. RECHT, *supra* note 13, at 296, writes that the same result might have been reached through the doctrine of *abus de droit.*

[215] Judgment of Aug. 14, 1975, LGE Frankfurt-on-Main, discussed in Pakuscher, *supra* note 81, at 68-69.

the director, argued that by modifying the stage directions, the conductor had offended the integrity of his work. The district court of Frankfurt-on-Main agreed with Mussbach, and issued an injunction against performance of the opera with the conductor's alterations.

In the *Buffet* case, the transferee's inability to sell the refrigerator in pieces seems to be a minor sacrifice in comparison to the artist's interest in preserving his art work. In the *Mussbach* case, however, the interests of the two parties appear more equal. The argument is inescapable that the public's response to the staging was a risk which the producer assumed when he hired Mussbach and allowed the production to open, and yet it also appears unjust to require a controversial production to complete its run, when it may jeopardize the reputation and financial status of the entire opera company and of the other artists involved.

The right of integrity, like *droit à la paternité*, has been asserted on the grounds of injury to the artist's reputation, as in the *Shostakovitch* case.[216] Another case arose in 1973, when the granddaughter of Henri Rousseau sued to enjoin a Paris department store from using reproductions of her grandfather's paintings as window displays.[217] The court agreed that the use of the paintings damaged the deceased artist's reputation and violated his moral right.[218]

It can hardly be disputed that in cases like *Shostakovitch*, an artist should have some means for vindication of his reputation. But in France the broad extension of *droit au respect* to achieve that purpose is of questionable legal basis, for as we have seen, scholars still question whether protection of the artist's reputation—as opposed to protection of the work itself—is an appropriate application of article 6.

The supposed right of an artist to defend his reputation in court has even allowed artists a right of action against excessive criticism. In France a successful claim of excessive criticism gives the artist at least a right to have his reply published.[219] In practice, however, the right against excessive criticism has seldom been successfully asserted, for the general rule is that only criticism of the work—not criticism of the artist—is actionable, and the criticism must be extreme.[220] Furthermore,

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[216] *See* discussion, *supra*, in text accompanying notes 1-5.

[217] Trib. gr. inst. Paris, 3e ch., note 189 *supra*.

[218] Italian courts, it should be noted, have been particularly generous in recognizing damage to reputation as a basis for finding violation of the right of integrity. *See, e.g.*, Ente autonomo "La Biennale di Venezia" c. De Chirico, Judgment of Mar. 25, 1955; Foro. it. 1955. I. 177, discussed in 1 J. MERRYMAN *and* A. ELSEN, *supra* note 22, at 4-26; *see* discussion *infra*.

[219] *See* discussion in Roeder, *supra* note 6, at 572.

[220] *Streibich Part II, supra* note 38, at 77.

we may well challenge the advisability of enforcing such a right, for its exercise could manifestly restrict the freedom of others to criticize, a right which arguably is just as valuable to the flourishing of the arts as is *droit moral.*

Even apart from such theoretical difficulties, French courts have found the need to impose restrictions on the exercise of the right in certain situations. First, the right of integrity is more limited in the case of collaborative works or film, where the artist's only remedy may be to remove his name from the work.[221] In some cases, courts have required the artist to indemnify a publisher for expenses incurred due to the author's exercise of his right.[222]

Interestingly, the right to prevent alteration or mutilation of a work has at times been held not to include a right to prevent complete demolition of it.[223] Roeder discusses the rationale for this distinction:

> The doctrine of moral right finds one social basis in the need of the creator for protection of his honor and reputation. To deform his work is to present him to the public as the creator of a work not his own, and thus make him subject to criticism for a work he has not done; the destruction of the work does not have this result.[224]

The law on this issue, however, does not appear to be settled, and some French courts do hold that a transferee of an art work has no right to destroy it.[225]

Giocanti points out that French courts give broadest protection to the right of integrity when the artist has transferred only the exploitative rights, and has retained his property interests in the work.[226] Such transfers only of rights of exploitation are quite common, for example, in contracts for presentation of a play.[227] Accordingly, in a Belgian case,

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[221] Giocanti, *supra* note 7, at 640.

[222] Roeder. *supra* note 6, at 565.

[223] *See, e.g.*, Judgment of June 23, 1922, Trib. civ. Versailles, [1932] D.H. 487, discussed in P. RECHT, *supra* note 13, at 297. *See also* Lacasse c. Abbé Quenard, Judgment of Apr. 27, 1934, Cour d'Appel Paris, [1934] D.H. 385, discussed in Roeder, *supra* note 6, at 569, and in 1 J. MERRYMAN *and* A. ELSEN, *supra* note 22, at 4-26, where the Paris Court of Appeals denied relief to an artist whose murals, owned by a church, were destroyed by the abbé.

[224] Roeder, *supra* note 6, at 569.

[225] *See, e.g.*, Judgment of Dec. 9, 1937, [1937] G.P. 347, discussed in P. RECHT, *supra* note 13, at 297.

[226] Giocanti, *supra* note 7, at 640. Giocanti suggests that the opposite may be true in the United States.

[227] A. LETARNEC, *supra* note 19, at 50, also points out that the impact of the

the author of *The Merry Widow* successfully enjoined a performance of his play, on the sole basis that the staging violated the "spirit" of the work.[228] It should be noted that in France, article 47 of the 1957 Law creates a special right of integrity with regard to dramatic works.[229]

Even when the property rights in an art work have been transferred, many courts limit the exercise of *droit au respect* to protection of "the material integrity of the work,"[230] as in the case of Buffet's refrigerator. By this principle, a court denied relief to Salvador Dali, who claimed that the addition of another artist's sets and costumes to those which Dali had designed for a ballet gave an "imprecise idea of his work."[231] The court said that since Dali's creations had not been physically mutilated, no moral right had been violated.[232] By similar reasoning, an Italian court of appeals denied relief to the artist De Chirico, who sued to prohibit an exhibition of his paintings on the ground that it disproportionately represented his early works and thereby damaged his reputation.[233] The "material integrity" limitation, although it provides no precise criteria for its application, is a fortunate one, not only because it helps avoid frivolous claims, but also because it may serve to spare courts the need to decide issues which do not lend themselves well to adjudication.

An artist's *droit au respect* has proved to be uniquely cumbersome in cases of adaptations or derivative works.[234] When a work is transferred to another medium—for example, when a novel is made into a film—certain organic changes are inevitable, and yet paradoxically, the original artist's right of integrity protects the original work from any alterations whatsoever. The question becomes, then, at what point does the adapter violate the original artist's moral right? This problem gains further complexity when we bear in mind that the adapter himself is

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right of integrity falls most heavily on the assignee of the right of reproduction of an art work, or of the right of presentation of a play.

[228] Judgment of Sept. 29, 1965, Cour d'Appel, 2e Chambre, Bruxelles, [1966] J.C.P.Ed. G. 14, 820, cited in Giocanti, *supra* note 7, at 641.

[229] 1957 Law, *supra* note 15, art. 47: "The producer of a play shall make sure that the staging and public performance shall be undertaken with the proper technical conditions necessary to guarantee observance of the intellectual and moral rights of the author."

[230] Giocanti, *supra* note 7, at 640. But it is not clear whether "material integrity" means physical integrity of the work, or "material" in the sense of avoiding significant or extreme alteration.

[231] *See* discussion in P. RECHT, *supra* note 13, at 297.

[232] Arguably, if Dali had wanted no costumes or sets other than his own to be used in the ballet, he should have secured that right by contract.

[233] [1955] Foro. it. I. 177, *supra* note 218.

[234] Sarraute, *supra* note 17, at 481.

an independent artist, who enjoys moral rights in his own work, and who, just like the original artist, must be guaranteed absolute sovereignty over the creative process by which his work comes into being.[235]

As a partial solution to this problem, French courts have adopted what we may term the "transfer of medium" rule. The author of the original must accept all changes which are necessitated by the transfer to another medium.[236] The adapter, on the other hand, is expected to "transpose, with honesty, the spirit, character and substance of the work."[237] As a matter of practice, the rights of the adapter are given greater weight in French courts.[238]

The discretion of an adapter to alter the original work commonly is defined by contract, and French courts have been called upon to determine the enforceability of various types of contract clauses. First, clauses which unconditionally authorize the adaptation of the work generally are held valid,[239] but the adapter is required to act in good faith and to refrain from distorting the spirit of the original work. In unconditional contracts, the standard for judging distortion of the spirit of the original was first pronounced in the landmark case of *l'Affaire Bernstein*:[240]

> Even though the characters may be the same, and they evolve in the same milieu and participate in a plot whose general theme remains basically intact, one does not find in the film that which constitutes the *genuine originality of the piece*, that which bears the mark of the author's own genius.[241]

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[235] 1957 Law, *supra* note 15, art. 4: "Authors of translations, adaptations, transformations or arrangements of works of the spirit enjoy the protection afforded by this law, without prejudice to the rights of the author of the original work."

[236] G. GAVIN, *supra* note 13, at 84:

> The *Tribunal de Bordeaux* . . . has affirmed [the principle] that, when transferring the right to adopt his work, the author implicitly consents to all modifications which are necessitated by the technical conditions and applicable rules of an art which is essentially different from that of the preexisting work.

[237] Giocanti, *supra* note 7, at 642, discussing Bernanos v. Bruckberger, Cour d'Appel Paris, [1964] Gaz. Pal.2.286, *aff'd*, Cass. civ. 1re, [1967] D.S.Jur.485, which involved the film adaptation of *Dialogues des Carmelites*. *Also see* discussion in G. GAVIN, *supra* note 13, at 82-83.

[238] *Pennsylvania Comment*, *supra* note 173, at 633.

[239] Giocanti, *supra* note 7, at 642.

[240] Judgment of July 23, 1933, Trib. civ. Seine, [1933] D.H. Jur. 5, 33, cited in Giocanti, *supra* note 7, at 642, discussed in G. GAVIN, *supra* note 13, at 87.

[241] G. GAVIN, *supra* note 13, at 87.

The standard, however, is vague, and Giocanti points out that as a matter of practice, lower courts in France "rarely decide that an adapter has modified the preexisting work."[242]

A second type of contract clause is one which simply "authorizes all changes which do not distort the spirit and character of the original."[243] Courts generally uphold these contracts, too, and many of the considerations which apply to unconditional authorizations apply here as well. In this context, a case arose in Italy in 1974, where an author, granting the film rights to his autobiography, gave the adapter and actors "liberal latitude" to interpret the original.[244] The film, however, distorted the author's personality to such an extent as to jeopardize his reputation. The court concluded that in the case of autobiographies, "modifications in the personality of the character require, as their only limitation, respect for the propriety and reputation of the author."[245]

Finally, the third type of contract clause is one where all modifications of the original require the approval of the original artist. These clauses have been held valid, but courts do require that the artist of the original may not unreasonably withhold his consent.[246]

These principles may for the time being solve the problem of applying *droit au respect* to adaptations, but they raise an important theoretical question. In virtually all cases of adaptations, courts are called upon to decide whether an adaptation had violated the spirit of the original work, and not a few French scholars have challenged the appropriateness of judicial inquiry into such matters. Sarraute, discussing the case of the film adaptation of *Dialogues des Carmélites*,[247] writes:

> The court found it necessary to determine whether the adaptation respected the spirit of the adapted work, and proceeded to analyze and compare the basic elements and the spirit of the original work with the film version. This dangerous undertaking is difficult to justify on theoretical grounds. In fact, it is disquieting to see the courts take on such powers.[248]

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[242] Giocanti, *supra* note 7, at 641-42. For example, in Judgment of Mar. 8, 1968, Trib. gr. inst. Paris, [1968] D.S. Jur. 742, discussed in *id.* at 642 n.117, a court held that changing the locale of a story did not violate the spirit of the original work.

[243] Sarraute, *supra* note 17, at 481-82.

[244] Anastasio c. Documento Film, Judgment of Jan. 7, 1974, Pret. Roma, discussed in 1974 IL DIRITTO DI AUTORE 459-61.

[245] *Id.* at 459.

[246] Giocanti, *supra* note 7, at 642; Sarraute, *supra* note 17, at 482.

[247] [1964] Gaz. Pal. 2.286, *supra* note 237.

[248] Sarraute, *supra* note 17, at 482.

Sarraute's objection, however, also serves to underscore more fundamental problems of *droit au respect*, indeed, of all of *droit moral*. The right of integrity is bold in its ideals, and plays an essential role in the defense of artists' rights. But like all other categories of *droit moral*, it is a self-serving right, which, formulated in the abstract, refuses to balance itself against the interests of contracting parties or even against the interests of other artists, unless the courts impose equitable limitations. Moreover, the right of integrity, in the end, is based on artistically subjective judgments which are inappropriate to judicial examination, for French courts, like American courts, are reluctant to pass judgment on literary or artistic merit.[249] These considerations force us to question whether vesting the artist with a "moral right of integrity" is necessarily the fairest and most effective way to ensure that artists' interests are protected.

II. PROTECTION OF MORAL RIGHTS IN THE UNITED STATES

A. Origins

The development of authors' rights in Britain and the United States bears little resemblance to the history of *droit d'auteur*. Prior to 1710, England, like France, afforded few rights to authors. The Stationers' Company of London, chartered in 1557,[250] had complete control over the publication of books, and held all rights in them. The Stationers' Company also had rules which frequently were enforced by acts of Parliament or by decrees of the Star Chamber, and it thereby served as an arm of censorship by the sovereign.[251]

England established the world's first modern copyright system with the Statute of Anne in 1710,[252] whose stated purpose was "the encouragement of learning" by vesting authors with the right of publication for a period to be limited by Parliament.[253] The Statute of Anne, however, did not derive from principles of natural law, as we have observed in early French legislation. The Statute was regarded as a three-way compromise between interests of publishers, interests of censorship, and

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[249] This reluctance derives in part from the 1957 Law, *supra* note 15, art. 2, which provides: "The dispositions of this law protect the rights of authors in all works of the spirit irrespective of the genre, the form of expression, the merit or the intended purpose of the work."

[250] For a brief history of the Stationers' Company, *see Streibich Part II*, *supra* note 38, at 57.

[251] *Id.*

[252] 8 Anne, ch. 19 (1710).

[253] *See* discussion of the Statute of Anne in Wheaton v. Peters, 33 U.S. (8 Peters) 590, 656 (1834).

the interests of authors.[254] The author had only those property rights which were conferred by statute, and the question of whether there existed any perpetual "common law" interests in an unpublished manuscript would only be determined many years later by the courts;[255] indeed, both in Britain and in the United States, the common law traditionally has been reluctant to recognize authors' rights outside of copyright.[256] As a result, the Statute of Anne has been called "an owner's statute, and not an author's statute."[257]

It was from these principles that the American law of authors' rights was born in 1790, when Congress passed the first American copyright act,[258] and much of that tradition has persisted, even as copyright protection has been expanded to include art forms other than writing.[259] As in Britain, the subject of statutory copyright protection in the United States has been limited to the property interests bestowed upon the copyright owner,[260] who may not necessarily be the author.[261] Unlike the French system, American law has required that formalities be met if the work becomes published;[262] even today, federal copyright accidentally may be lost for failure to comply with formalities.[263] Interests of the author beyond copyright, when they have existed at all, traditionally have been the concern only of the common law as recognized by the courts, and of the state legislatures.

Today, the 1976 copyright statute[264] secures an author's property interest in his work, and protects the work from unauthorized exploi-

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[254] *See* B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 6-12 (1967); *Georgetown Comment, supra* note 6, at 1542.

[255] *See* Millar v. Taylor, 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769); Donaldson v. Beckett, 4 Burr. 2408, 1 Eng. Rep. 837 (H.L. 1774); B. KAPLAN, *supra* note 254, at 12-17.

[256] *Pennsylvania Comment, supra* note 173, at 616-17 & n.27.

[257] *Georgetown Comment, supra* note 6, at 1542.

[258] 1 Stat. 124; 1st Cong., 2d Sess., c. 15, *reprinted* in B. KAPLAN & R. BROWN, CASES ON COPYRIGHT, UNFAIR COMPETITION, AND OTHER TOPICS BEARING ON THE PROTECTION OF LITERARY, MUSICAL, AND ARTISTIC WORKS 981-983 (1974).

[259] *See* discussion in 1 M. NIMMER ON COPYRIGHT § 1.08 (1978).

[260] 17 U.S.C. § 106 (1976) grants copyright protection to "the owner of copyright under this title."

[261] For example, copyright in works made for hire vests initially in the employer unless the parties provide otherwise. *Id.* § 201(b).

[262] *Id.* §§ 401-404.

[263] The 1976 statute, however, makes it difficult to lose copyright protection by failure to comply with formalities. *See id.* §§ 405-406.
See, e.g., California's *droit de suite* statute, CAL. CIV. CODE § 986, and Preservation Act, *supra* note 8.

[264] 17 U.S.C. § 101 *et seq.* (1976).

tation.[265] The statute does not purport to protect the author's rights of personality; a code of moral rights, in fact, has been introduced in Congress at least twice, and both times was ignored.[266] Most American courts, too, have rejected the moral right doctrine in name.[267]

This does not mean that American law ignores completely the issue of artists' rights, for American courts have upheld rights analogous to at least some of the prerogatives of *droit moral.* It does mean, however, that those rights which have been recognized in this country have been vindicated not through copyright law, but through familiar doctrines of tort, contract or trademark law.[268] Moreover, the American judiciary has not felt the need to unify the different judge-made principles of artists' rights into a unitary doctrine, as have continental jurists.

Recently, United States analogues for *droit moral* have been the subject of exhaustive scholarly attention,[269] and so a restatement of that research here would be unnecessary. It is useful, however, to observe the framework of moral right protection in the United States, the gaps in that framework, and the overall posture with which American law approaches the subject of authors' rights.

B. Categories

1. *Droit de divulgation*

Before the 1976 copyright statute went into effect, American law offered both "common law" and "statutory" copyright protection.[270] First, as long as an art work was unpublished,[271] it generally was pro-

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[265] *William and Mary Comment, supra* note 6, at 578; *Georgetown Comment, supra* note 6, at 1542; *Pacific Comment, supra* note 14, at 858.

[266] *See* note 45 *supra.*

[267] *See, e.g.*, Granz v. Harris, *supra* note 38, at 590 (Frank, J. concurring); Vargas v. Esquire Inc., 164 F.2d 522, 526 (7th Cir. 1947), *cert. denied*, 335 U.S. 813 (1948); Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 575, 89 N.Y.S.2d 813, 818 (Sup. Ct. 1949), *cited in* Giocanti, *supra* note 7, at 627. *But see* Gilliam v. American Broadcastings Cos., *supra* note 39, at 24.

[268] *William and Mary Comment, supra* note 6, at 599; Giocanti, *supra* note 7, at 625; *Pacific Comment, supra* note 14, at 879.

[269] Generally, *see* sources cited notes 6-7, 38 & 40; Katz, *The Doctrine of Moral Right and American Copyright Law—A Proposal*, 24 S. CAL. L. REV. 375 (1951); Stevenson, *Moral Right and the Common Law: A Proposal*, 6 ASCAP COPYRIGHT L. SYMP. 89 (1953); Comment, *The Moral Rights of the Author: A Comparative Study*, 71 DICKINSON L. REV. 93 (1966); Diamond, *supra* note 35; Comment, *Copyright: Moral Right—A Proposal*, 43 FORDHAM L. REV. 793 (1975); Note, *Monty Python and the Lanham Act: In Search of the Moral Right*, 30 RUTGERS L. REV. 452 (1977); Comment, *An Author's Artistic Reputation Under the Copyright Act of 1976*, 92 HARV. L. REV. 1490 (1979).

[270] *See* 1 NIMMER, *supra* note 259, § 2.02.

[271] Standards for determining whether or not "publication" of an art work had

tected by each state's "common law" copyright.[272] Under "common law" copyright, the author was considered to be the original owner of the work, and he and his heirs enjoyed the perpetual right to determine the work's first publication. Then, if the work became published,[273] it shed its state law protection, and either gained a federal "statutory" monopoly—which was limited in duration—or lost all protection entirely.[274]

It has been argued persuasively that before the 1976 statute, much of the French *droit de divulgation* was protected in the United States by "common law" copyright.[275] Indeed, we may observe a touch of the "natural right" character of *droit d'auteur* in the perpetual right of disclosure offered by the common law.

The 1976 statute effectively abolished "common law" copyright for all works created on or after January 1, 1978. Now, federal statutory protection begins not at publication, but rather at the time of creation, and endures until fifty years after the author's death.[276] The result is that the right of first publication still belongs to the author, so long as he has not transferred his copyright,[277] but the right no longer is perpetual, and it is a matter of federal, not state, law. Thus, the right of first disclosure still is protected in the United States, but the elimination of any perpetual right removes the American concept even farther from the French. Moreover, the federalization of the right seems to undermine whatever "natural right" character the prerogative may have had under the common law.

In addition to protection afforded by copyright, *droit de divulgation* has analogues in other aspects of United States law. We already have

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occurred was a central issue of the pre-1976 copyright system. Generally, *see id.* § 2.02.

[272] § 12 of the 1909 Copyright Act, however, provided for optional registration of unpublished works. Copyright Law of the United States of America § 12 (1909), *reprinted* in B. KAPLAN & R. BROWN, *supra* note 258, 828-853.

[273] Standards for determining whether or not "publication" of an art work had occurred were a central issue of the pre-1976 copyright system. *Generally, see id.* § 2.02.

[274] To gain statutory monopoly, the author had to comply with certain formalities. *See* 2 *id.* § 7.04. The 1976 statute still requires compliance with formalities. 17 U.S.C. § 401 (1976).

[275] For an excellent comparison of common law copyright and *droit de divulgation, see* Treece, *supra* note 40, at 488-94.

[276] 17 U.S.C. § 302 (1976). The duration of copyright for works created before January 1, 1978, is covered by 17 U.S.C. §§ 303-304 (1976). § 101 specifies that a work is "created" for purposes of federal copyright protection when it is "fixed" in a "tangible medium of expression."

[277] 17 U.S.C. § 201(a) (1976).

observed that courts of equity ordinarily will not grant specific performance for a contract to create,[278] although a negative injunction against performance for another party may be available.[279] A practical difference between French and American law, however, may be that in the United States, courts will more readily assess damages against an artist for his failure to perform without reason.[280]

Treece points out that the right of disclosure is protected by "unfair competition," for an author in the United States may sell all rights to his work, and yet be deemed to have retained the right to continue developing and publishing individual elements of it.[281] For example, in *Warner Brothers Pictures, Inc. v. Columbia Broadcasting System, Inc.*,[282] Dashiell Hammett had transferred all rights in the "Maltese Falcon," but the court held that Hammett could continue to exploit the character of Sam Spade in other works.[283] Moreover, in appropriate situations, the right to prevent unauthorized dissemination of one's likeness has been upheld on the basis of right of publicity.[284]

California, finally, has enacted a limited statutory *droit de divulgation*, which provides that an artist is deemed to have retained the right to reproduce his art work unless that right is expressly transferred by written instrument signed by the artist or his agent.[285]

There are several differences between United States and French law regarding the right of disclosure. First, in the United States, the right readily may be waived, transferred, or sold, especially when the author no longer holds the copyright in his work. Secondly, in community property states, the rights of a surviving spouse to control publication of an art work are broader in the United States than in France.

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[278] *See* discussion at text accompanying note 129, *supra*. *Also see* Sarraute, *supra* note 17, at 485; Roeder, *supra* note 6, at 558-59.

[279] Roeder, *supra* note 6, at 559 n.28.

[280] Sarraute, *supra* note 17, at 485.

[281] Treece, *supra* note 40, at 491-92.

[282] 216 F.2d 945 (9th Cir. 1954), *cert. denied*, 348 U.S. 971 (1955), *discussed in* Treece, *supra* note 40, at 491-92.

[283] An earlier case which utilized the "unfair competition" argument was Fisher v. Star Company, 231 N.Y. 414, 132 N.E. 133 (1918), which involved the cartoon characters of "Mutt" and "Jeff". A case involving the character of Dracula has affirmed this principle. *See* Lugosi v. Universal Pictures Co., 172 U.S.P.Q. 541 (Cal. Super. 1972); 70 C.A. 3d 552 (Cal. App. 1977); 25 Cal. 3d 813, 160 Cal. Rptr. 323, 603 P.2d 425 (Sup. Ct. Cal. 1979). *See* discussion of unfair competition in Diamond, *supra* note 35, at 266.

[284] Price v. Hall Roach Studios, Inc., 400 F. Supp 1032 (S.D.N.Y. 1973), *aff'd*, 508 F.2d 909 (2d Cir. 1974), cited and discussed in *Streibich Part II*, *supra* note 38, at 79. See discussion of right of publicity, *infra* notes 313-316, and accompanying text.

[285] CAL. CIV. CODE § 982 (West).

Also, the federal copyright statute contains provisions for compulsory licensing of cable television transmissions and phonorecords,[286] and it has been argued that the very concept of a compulsory license runs counter to *droit de divulgation*.[287]

The principal difference between American and continental jurisprudence lies in *droit de retrait* and *droit de repentir*. In general, the United States recognizes no right of withdrawal, and at least one writer considers this a fortunate policy.[288] Similarly, the right of an artist to modify a work already made public has never been recognized in this country.[289]

Nevertheless, it should be observed that the common law infrequently has recognized a right to withdraw a work from publication only upon some showing of fault on the part of the publisher.[290] Although one writer believes that this rarely used principle could be expanded,[291] no trend in that direction is discernible.[292] Moreover, the federal copyright law does contain provision for termination of licenses, which in some situations could prove to be analogous to *droit de retrait*.[293]

3. *Droit à la paternité*

American law does pay some attention to the right of authorship, and of the three categories of the French *droit à la paternité*, the second and third are quite well protected in the United States. The second category—the right of an author to prevent others from taking credit for his work—has been upheld not only in suits for copyright infringement, but also in suits based upon unfair competition.[294] In those cases, factors such as lost sales and loss of business reputation have been the basis for awarding damages.[295] The third category of *droit à la paternité*, the right of an author to prevent use of his name on a work he did not

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[286] *See, e.g.*, 17 U.S.C. §§ 111(d), 115.

[287] "May I add that no such compulsory mechanical license is conceivable under the droit d'auteur system; it does not exist in French statute and statutes related thereto." Monta, *supra* note 52, at 180-81. However, the Japanese law, *supra* note 124, art. 69, does provide for compulsory licenses. *See* discussion in Iijima, *supra* note 137, at 399.

[288] Sarraute, *supra* note 17, at 485.

[289] Roeder, *supra* note 6, at 565.

[290] *See, e.g.*, Gale v. Leckie, 2 Starkie 107 (1817), discussed in Roeder, *supra* note 6, at 560.

[291] Roeder, *supra* note 6, at 560.

[292] *See, e.g.*, Autrey v. Republic Products, Inc., 213 F.2d 667 (9th Cir. 1954), discussed in Treece, *supra* note 40, at 500. *But see* Fairbanks v. Winik, 206 App. Div. 449, 201 N.Y.S. 487 (1923), cited in Treece, *supra* note 40, at 500 n.51.

[293] 17 U.S.C. § 203 (1976).

[294] For a discussion and cases, see *Pacific Comment*, *supra* note 14, at 867-71.

[295] *Id.* at 870-71.

create, has been protected under tort theories of libel,[296] right of publicity,[297] and invasion of privacy.[298] In such cases, even damages for mental anguish have been awarded.[299]

However, the first category of *droit à la paternité*—the right to claim authorship—generally has been neglected by American law.[300] The general rule in the United States is that unless an author secures the right by contract, he has no right to claim authorship of his own work.[301] This is true especially in cases of works made for hire,[302] where the copyright statute states affirmatively that, unless otherwise established by contract, the employer is deemed to be the author of the work.[303]

Case law illustrates the American principle. In the leading case of *Vargas v. Esquire, Inc.*,[304] Vargas sold his drawings to the defendant *Esquire* magazine, and the defendant published them without attributing authorship to Vargas. The court held that without a contractual provision requiring that plaintiff's name be used, Vargas had no right to claim authorship.[305]

An early New York case,[306] however, did uphold the right of an author to enjoin publication of a work under his real name, when the stories previously had been published under a *nom de plume*. The court based its decision on the plaintiff's right to privacy.[307] Moreover, a few artists have won the right to claim authorship of their own works by using a contract theory to show that the intent of the parties was to give credit.[308] But for the most part, such cases seldom succeed [309]

From the precedents, it should come as no surprise that United

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[296] *See* discussion in Diamond, *supra* note 35, at 264-265.

[297] *See* cases discussed *supra*, notes 284 and 285, and accompanying text.

[298] *See* discussion in *Diamond, supra* note 35, at 266; *Pacific Comment, supra* note 14, at 871-73.

[299] *Pacific Comment, supra* note 14, at 873.

[300] Treece, *supra* note 40, at 494; Diamond, *supra* note 35, at 255.

[301] *Pacific Comment, supra* note 14, at 856, 863.

[302] The statutory definition of "works made for hire" appears in 17 U.S.C. § 101 (1976).

[303] 17 U.S.C. § 201(b) (1976).

[304] 164 F.2d 522 (7th Cir. 1947), *cert. denied*, 335 U.S. 813 (1948).

[305] *Id.* at 526.

[306] Ellis v. Hurst, 66 Misc. 235, 121 N.Y.S. 438 (Sup. Ct. 1910).

[307] 66 Misc. at 236.

[308] *See, e.g.*, Clemens v. Press Publishing Co., 67 Misc. 183, 122 N.Y.S. 206 (Sup. Ct. App. Term 1910): "Even the matter-of-fact attitude of the law does not require us to consider the sale of the rights to a literary production in the same way that we would consider the sale of a barrel of pork." 67 Misc. at 183. *Also see* discussion in *William and Mary Comment, supra* note 6, at 599-600.

[309] *See William and Mary Comment, supra* note 6, at 600.

States law, unlike French law, liberally allows an author to waive whatever rights of authorship he may have, and indeed, courts have implied such a waiver in cases where the contract involved was silent on the question.[310] While this policy undeniably is harsh on artists' rights, at least one leading American proponent of moral rights feels that the presumption of waiver is consistent with the general policies of tort law.[311]

Interestingly, the right of an author to protect his artistic reputation, while only a questionable component of the right of authorship in France, has received judicial support in the United States under the doctrine of "right of publicity."[312] This right is defined as "the individual's right to take advantage of his existing name and reputation,"[313] and has been recognized as early as 1917.[314] Some writers believe that expansion of this doctrine may be the key to developing an American *droit à la paternité*.[315] Indeed, courts have been quite receptive to arguments based on right of publicity, although jurisdictions are divided on the question of whether or not the right survives the death of the author.[316]

4. *Droit au respect de l'oeuvre*

In France, a publisher or producer who obtains the right to exploit a work has an implied duty to preserve its material integrity. Apart from California's new Preservation Act, however, the general rule in the United States is that the publisher or producer has no such duty, unless

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[310] *See, e.g.*, Vargas, *supra* note 267. Also see discussion in *Georgetown Comment, supra* note 6, at 1543.

[311] Moral rights are akin to those rights in tort which protect the individual against injury. They may not, therefore, be assigned; in general, however, they may be effectively waived before or after violation just as a blood donor, or boxer, waives his right against bodily injury. Waiver may, moreover, be implied from the nature of the work or the type of publication for which it was written.

Roeder, *supra* note 6, at 564.

[312] For an excellent discussion, *see Georgetown Comment, supra* note 6, at 1545-47.

[313] *Id.* at 1546.

[314] Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917). *See also* Uhlaender v. Henricksen, 316 F. Supp. 277 (D. Minn. 1970); discussion in *Georgetown Comment, supra* note 6, at 1546.

[315] *Georgetown Comment, supra* note 6, at 1546-47; *Pacific Comment, supra* note 14, at 883-86.

[316] *See, e.g., Factors Etc., Inc. and Boxcar Enterprises, Inc. v. Pro Arts, Inc. and Stop and Shop Companies, Inc.*, 579 F.2d 215 (2d Cir. 1978) [Elvis Presley's right of publicity held to have survived his death]; *Memphis Development Foundation v. Factors Etc., Inc.*, 616 F.2d 956, U.S.P.Q. 784 (6th Cir. 1980) [Elvis Presley's right to exploit his likeness was not an inheritable property right].

the author has secured the right of integrity by contract.[317] This principle was most clearly enunciated in *Preminger v. Columbia Pictures Corp.*[318] In that case, Otto Preminger unsuccessfully sought to enjoin a distribution of his film, "Anatomy of a Murder," claiming that the distribution contracts, which allowed television broadcasters to make cuts or commercial interruptions in the film, would amount to mutilation of his work.[319]

Although there is no judicially recognized right of integrity in the United States, artists have brought suit successfully for mutilation of their works, under various tort theories. Most notably, alteration of art works occasionally has been actionable as a tort of defamation.[320] This theory, however, has been of limited utility, because courts generally will not grant an injunction against personal libel, and thus, the artist is unable to *prevent* the mutilation of his work.[321]

The right of integrity also has been vindicated on the theory that mutilation of an art work constitutes misappropriation of the author's name, which in some states is actionable under privacy laws.[322] On this theory, John Lennon was able to enjoin distribution of a recording of his music, on the grounds that poor editing and an unartistic cover design amounted to mutilation of his work.[323]

Finally, if the author or artist has retained the property rights in his work, or at least a future residuary interest, some courts have upheld the right to prevent mutilation under the doctrine of waste, which for-

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[317] *Georgetown Comment, supra* note 6, at 1541; *Streibich Part II, supra* note 38, at 80.

[318] 148 U.S.P.Q. 398 (N.Y. Sup. Ct.), *aff'd*, 149 U.S.P.Q. 872 (App. Div.), *aff'd* 150 U.S.P.Q. 829 (Ct. App. 1966), discussed in Treece, *supra* note 40, at 496. *Also see* Melodion v. Philadelphia School District, 328 Pa. 457, 195 A. 905 (1938).

[319] But dictum in *Preminger*, 148 U.S.P.Q. at 402, indicated that if a 161-minute feature were cut to 100 minutes, it would constitute mutilation and entitle the author to an injunction. *Note also* that *Preminger* was limited in *Gilliam*, *supra* note 39, at 23; *see Pennsylvania Comment, supra* note 173, at 633.

[320] *William and Mary Comment, supra* note 6, at 601; *see* dictum in Seroff v. Simon & Schuster, Inc., 6 Misc. 2d 383, 383, 389, 162 N.Y.S.2d 770, 778 (1957).

[321] *William and Mary Comment, supra* note 6, at 601.

[322] *Pacific Comment, supra* note 14, at 875; *see* N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1976).

[323] Big Seven Music v. Lennon, 554 F.2d 504 (2d Cir. 1977), discussed in *Pacific Comment, supra* note 14, at 875. *Also see Georgetown Comment, supra* note 6, at 1548-49.

The right to privacy also has been asserted in terms of the "false light" theory, where the activities of the defendant are shown to shed a "false light" on the plaintiff. *Georgetown Comment, supra* note 6, at 1549. This theory has served better to protect the artist's reputation than to protect the material integrity of his work.

bids a lessee or licensee to damage permanently the leased or licensed property.[324] At least one author believes that this doctrine could be expanded in the search for a judge-made right of integrity.[325]

Whatever right of integrity does exist in the United States has not been carried so far as to protect an artist against complete destruction of his work.[326] Moreover, unlike France, the United States has not recognized a right to be protected against excessive criticism, short of defamation, or even a right to reply to such criticism.[327] In view of the First Amendment considerations which would arise, it is unlikely that such a right will be advocated strongly in this country.[328]

As in France, the United States has found that the artist's interest in preserving the integrity of his work is even more limited in the case of adaptations of the work to another medium. In 1938, for example, a court denied relief to Theodore Dreiser, who claimed that a film adaptation of *An American Tragedy* grossly distorted the character of his work.[329] However, if a copyrighted work is licensed for adaptation with a contract provision against excessive editing, courts generally will re-

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[324] For an excellent discussion of the doctrine of waste and case law in which artists' rights were upheld, see *Georgetown Comment*, *supra* note 6, at 1550-54.

[325] *Id.* at 1554.

[326] *See, e.g.*, Crimi v. Rutgers Presbyterian Church, *supra* note 267; Roeder, *supra* note 6, at 569.

[327] Under the common law the right to criticize is protected and great liberality is shown the critic. . . . The only protection accorded the creator is under the law of libel which does not condemn the libel of a product as much as it does a libel of a person; criticism of a created work, if libellous at all, is regarded as libel of a product, and the plaintiff must prove falsity, malice and damages.

Roeder, *supra* note 6, at 572.

[328] *Pacific Comment*, *supra* note 14, at 860-61 & n.51.

[329] Dreiser v. Paramount Publix Corp., 22 COPYRIGHT OFF. BULL. 106 (N.Y. Sup. Ct. 1938), discussed in *Georgetown Comment*, *supra* note 6, at 1544.

The callous tone of the *Dreiser* court's opinion may well be the low-water mark of American judicial attitudes toward artists' rights:

[T]he producer [will be permitted to] give consideration to the fact that the great majority of . . . the audience . . . will be more interested that justice prevail over wrongdoing, than that the inevitability of Clyde's end clearly appear.

22 COPYRIGHT OFF. BULL. 106, 107, quoted in *Georgetown Comment*, *supra* note 6, at 1544.

In another case, Chamberlain v. Columbia Pictures Corp., 186 F.2d 923 (9th Cir. 1951), cited in Treece, *supra* note 40, at 500 n.51, another court refused to enjoin the use of the name of Mark Twain on a film version of "The Celebrated Jumping Frog of Calaveras County," even when the author's heirs claimed that the film had garbled the original work.

quire that the adaptation be faithful to the original.[330]

Thus, despite the traditional failure of American law to protect the right of integrity as it is known in France, there is little question that at least a right to protect art works from mutilation is emerging in this country.[331] Case law upholds the right under tort and contract theories, and scholars agree that there is ample room for expansion of those doctrines.[332]

The most heralded judicial development in the emerging American right of integrity is the case of *Gilliam v. American Broadcasting System* in 1977.[333] The authors of Monty Python, the British comedy group, sought to enjoin a television broadcast of their film, claiming that the defendants had excessively edited their work. In a landmark decision, the Second Circuit issued the injunction, holding that the distortion of the work had been extreme,[334] and would be actionable under both copyright law,[335] and under section 43(a) of the Lanham Act on trademarks,[336] which prohibits misleading labeling.

Gilliam is significant not only because of its broad application of the Lanham Act,[337] but also because of its implicit recognition that an artist has legally enforceable personal rights which are at least coincident with

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[330] *Pennsylvania Comment, supra* note 173, at 631.

[331] *See* Treece, *supra* note 40, at 505. But precise remedies for violation may differ between the two countries. The right of integrity also is evolving in British law. Roeder, *supra* note 6, at 565.

[332] *Pacific Comment, supra* note 14, at 886-88, for example, suggests the expansion of the right of privacy and the right of publicity as a basis for an American *droit au respect; Georgetown Comment, supra* note 6, at 1561, says that the right of integrity may be best achieved through development of presumptions of non-waiver under contract law.

[333] 538 F.2d 14 (2d Cir. 1976).

[334] *Id.* at 19.

[335] *Id.* at 21.

[336] *Id.* at 24-25. *See* Lanham Trade-Mark Act of 1946, ch. 540, 60 Stat. 427 (codified in scattered sections of 15 U.S.C.). Lanham Act, § 43(a), 15 U.S.C. § 1125(a), provides in part:

> Any person who shall affix, apply, or annex, or use in connection with any goods or services, . . . a false designation of origin, or any false description or representation . . . and shall cause such goods or services to enter into commerce . . . shall be liable to a civil action by any person . . . who believes that he is or is likely to be damaged by the use of any such false description or representation.

[337] This was not the first time that a federal court applied the Lanham Act to cases of mutilation of art works. *See* Rich v. RCA Corp., 390 F. Supp. 530 (S.D.N.Y. 1975); Geisel v. Poynter Prod. Inc., 283 F. Supp. 261, 266-68 (S.D.N.Y. 1968); Yameta Co. v. Capitol Records, Inc., 279 F. Supp. 582, 586-87 (S.D.N.Y. 1968). Also see discussion in *William and Mary Comment, supra* note 6, at 609-10.

economic interests in his created work.[338] This, we should recall, is a rudimentary concept of *droit moral*, and interestingly, the court alluded to the French doctrine in support of its reasoning.[339] While this is not the first case in which an American court has discussed *droit moral*,[340] it demonstrates a new respect for the Civil Law doctrine.[341]

The holding in *Gilliam*, however, should not be oversimplified, nor should its significance be overstated. The decision was based more on the copyright claim than on the Lanham Act argument, and it rested in part on the fact that the contract between Monty Python and the original British licensee had expressly prohibited unauthorized editing of the script.[342] We can only question whether a *droit moral* claim, in the absence of such a contractual provision, would be upheld. Furthermore, writers have observed that the decision was based on assumptions that were not wholly precedented, and on broad interpretations of previous cases.[343] The court also emphasized the excessive nature of ABC's editing, and we must question, again, whether a claim of more moderate editing would have yielded the same result. Finally, we should observe that the court, while it did allude to the French doctrine of moral right, did not in any way indicate that a claim of violation of *droit moral*, without more, would be actionable under the copyright statute or under the Lanham Act. Still, *Gilliam* should reveal the extent to which courts now may go to expand the right of integrity in the United States.

C. The California Art Preservation Act

The California Art Preservation Act[344] creates, for the first time in American law, a statutory right of integrity and right of paternity for California artists. It provides that no person other than the creator of

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[338] *William and Mary Comment*, *supra* note 6, at 610.

[339] 538 F.2d at 24.

[340] *See, e.g., Granz v. Harris*, *supra* note 38, at 590 (Frank, J. concurring).

[341] Our resolution of these technical arguments serves to reinforce our initial inclination that the copyright law should be used to recognize the important role of the artist in our society and the need to encourage production and dissemination of artistic works by providing adequate legal protection for one who submits his work to the public.
538 F.2d at 23.

[342] *See id.* at 17.

[343] The larger holding on unauthorized editing can be viewed as grounded in a presumption that, when the contract is silent, the artist did not intend to permit editing by the licensee.
. . . Although [this] qualification appears to be sound as a matter of policy, its relation to the prior case law is troublesome.
Pennsylvania Comment, *supra* note 173, at 631. *See* discussion *id.* at 631-33.

[344] California Art Preservation Act, *supra* note 8.

a work of fine art[345] may alter or destroy such work,[346] and further, that the artist retains the right to claim or disclaim authorship of it.[347]

At first glance, one would think that the Preservation Act is the genuine Gallic concept of *droit moral*, emerging unruffled and triumphant on the Pacific coast of America. Indeed, although its title could be mistaken for an environmental protection statute, the Art Preservation Act contains a preamble which bears a striking resemblance to the French law of 1957:

> The Legislature hereby finds and declares that the physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation, and artists therefore have an interest in protecting their works of fine art against such alteration or destruction; and that there is also a public interest in preserving the integrity of cultural and artistic creations.[348]

It seems, at last, that the artist's right of personality has been recognized by legislation, at least for works of painting, sculpture or drawing that are not attached to a building.[349]

The Preservation Act, however, differs widely from the unitary concept of *droit moral*, and significantly, the California legislature chose not to call the artist's new prerogatives a "moral right".

The most prominent difference is that the California law applies only to works of fine art, which are defined as "original painting, sculpture or drawing of recognized quality."[350] This is far more limited than the French law, which applies to virtually all art forms, and which contains no restrictions based on the prominence of the artist or the work.

Then, although the preamble demonstrates concern for the artist's reputation and for the public expression of his personality, the artist's rights under the Preservation Act are not of the "natural right" character which we have observed in French Law. While *droit d'auteur* exists solely by virtue of the act of creation, the artist's rights under California law exist because the Legislature has declared them to exist.[351] Furthermore,

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[345] The Preservation Act defines "fine art" as "an original painting, sculpture or drawing of recognized quality" but excludes any "work prepared under contract for commercial use by its purchaser." *Id.*, at § (b) (2).

[346] *Id.* § (c) (1).

[347] *Id.* § (d).

[348] *Id.* § (a).

[349] *Id.* § (h).

[350] *Id.* § (b) (2).

[351] *Id.* § (a).

the preamble makes sure to point out that the interest in preserving art works belongs not only to the artist, but also to the public.[352] Thus, the method which the Legislature has chosen for protecting the artist's and the public's statutorily defined interests is to vest the artist with a right to seek legal and equitable relief—including punitive damages—for mutilation of his created work, or for violation of his right to claim authorship.

Unlike *droit moral*, which is perpetual and unassignable, the California artist's rights expire fifty years after his death,[353] and may be transferred to another party in writing.[354] Moreover, the Act contains a statute of limitations,[355] which further restricts the duration of the artist's prerogatives.

The Preservation Act, like federal copyright law,[356] vests no rights in the artist when the work is made for hire,[357] an exception which proved to be unacceptable to the French system.[358]

It should be observed, finally, that the phrasing of the statute contains a kind of *droit de repentir*, for the Act states that "no person, except an artist who owns and possesses a work of fine art which the artist has created"[359] may alter a work of art. This would imply that an artist who owns his own work does possess the right to alter it, perhaps even if the copyright or other exploitative interest has been transferred to another party. If this does constitute a *droit de repentir*, however, it is more limited than the similar right secured by French law, for the California artist has the right only as long as he retains ownership and possession of the work, and he has no apparent right to repossess, reacquire, or otherwise withdraw a work whose property interests have been transferred.

Although the California statute is more limited than *droit moral*, it also is less problematic. By restricting the scope of the statute to works of visual art, by limiting the duration of the rights and the period for their enforcement, and by making the rights transferable, California has avoided some of the troublesome aspects of *droit moral*, and at the same

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[352] *Id.* § (a).
[353] *Id.* § (g) (1).
[354] *Id.* § (g) (3).
[355] *Id.* § (h) (3) (i).
[356] 17 U.S.C. § 201 (b).
[357] Preservation Act, *supra* note 8, § (b) (2). In federal copyright law, the copyright in a work made for hire vests in the employer. 17 U.S.C. § 201 (b). Observe, however, that by excluding works for hire from the definition of "fine art," the Preservation Act effectively creates no right of integrity for such works, not even a right that vests in the employer or purchaser of the work.
[358] *See* text accompanying notes 193-196, *supra*.
[359] Preservation Act, *supra* note 8, § (c) (1).

time, has created a scheme of rights that is compatible with the scope and duration of federal copyright protection.[360]

This does not mean that the California law is without ambiguity. Like the French 1957 Law, the Preservation Act has joined into a single statute the *droit au respect* and *droit à la paternité*, leaving unanswered the question of whether the Act exists principally to protect artists (as the preamble proclaims) or art works (as the title would have us believe). The Act does not address the problems which we observed in French law, of exercise of moral rights when there is more than one author of a work of art.

Still, the Preservation Act recognizes a rudimentary right of personality, creates a basis for securing the interests of artists beyond copyright, and should serve as a model for the emergence of other, more comprehensive statutory schemes for protecting authors' and artists' rights. And further, the Preservation Act remains mindful of the competing interests of transferees, employers, contracting parties, and real estate proprietors.

Droit moral, at last, has a distant cousin in America.

III. COMPARISON OF ARTISTS' RIGHTS IN FRANCE AND THE UNITED STATES

United States copyright law focuses on economic rather than personal rights in art works,[361] but courts and, recently, legislatures increasingly acknowledge the need to protect the artist's moral prerogatives.[362] As a result, United States law does afford rights which are analogous to at least parts of *droit moral*; in the defense of the artist's reputation, American law may at times provide even broader protection.[363]

On the whole, however, artists' rights receive less respect under the American system than they do in France.[364] *Droit de retrait* and *droit de*

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[360] For example, rights secured under the Preservation Act, like federal copyright, subsist only until fifty years after the artist's death, and do not vest in the artist when the work is made for hire. *See* text accompanying notes 253 and 257, *supra*.

[361] *Pacific Comment*, *supra* note 14, at 855.

[362] *Id.* at 862.

[363] *See* discussion at text accompanying notes 312-316 *supra*.

[364] Although some scholars suggest that these tort remedies provide authors and artists with protection equivalent to the moral right of paternity and integrity, a comparison of French and American case law indicates otherwise.

Georgetown Comment, *supra* note 6, at 1543. *But see* Strauss, *supra* note 6, at 537-38; Treece, *supra* note 40, at 505-06; Monta, *supra* note 52, at 185, all of whom believe that protection of artists' rights in the United States is just as broad as in France.

repentir, although their value is at best questionable, barely exist at all in the United States. The first category of *droit à la paternité*—the right to claim authorship of one's own creation—is underdeveloped in this country, and *droit au respect*, which is considered by the French to be the very essence of an artist's prerogative, is only in its infancy.

Furthermore, whatever moral rights do exist in the United States receive far less weight than they do in France, and although this difference ultimately may reflect only a discrepancy in social status between French and American artists,[365] it also is rooted in legal realities. In the United States, authors' rights may more readily be waived, and they generally cease to exist upon the author's death.[366] This contrasts markedly with the "personal, perpetual, inalienable and unassignable" character of *droit moral*.[367] And in the United States, a contract between the artist and the transferee of his rights is presumed to be the repository of all of the artist's remaining rights in his work; French law will more readily look beyond contractual obligations in order to assert the artist's moral rights.[368]

The question remains whether fuller protection of artists' rights in this country may be best achieved by importing the French system, or by expansion of existing American theories. The American system has the advantage of being of native vintage, but even if it continues to evolve, its full potential may be limited, and its application may be cumbersome:

> The application of so many different doctrines to a subject matter which is so intrinsically homogeneous produces confusion; choice of theory depends on a fortuitous combination of factors, rather than on the basic needs of the problem.[369]

The French system, on the other hand, has the advantages of unity, tradition, and world recognition, and at least one observer believes that it is more adaptable to the invention of new art forms and new methods of exploitation.[370] Yet, as we have seen, the French system, too, can be

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[365] "We have not that respect for art that is one of the glories of France." Tyson & Brothers v. Banton, 273 U.S. 418, 447 (1927) (Holmes, C.J., dissenting).

[366] Giocanti, *supra* note 7, at 643. *But see Streibich Part II, supra* note 38, at 79. Recall that at least one Federal Court of Appeals holds that the right of publicity survives the death of the author. *See* note 316 *supra*.

[367] Sarraute, *supra* note 17, at 485.

[368] *Id.*

[369] Roeder, *supra* note 6, at 575. Also see *Streibich Part II, supra* note 38, at 486.

[370] *Streibich Part II, supra* note 38, at 76-77, 83-84; *Pacific Comment, supra* note 14, at 861. But perhaps the American system, because it is not tied to any

problematic, unpredictable, and frequently impractical, especially when it is applied to collective or collaborative works or to film.

The more difficult question is how readily the French system could be transported to the United States. A few scholars have written that Congress, or at least the courts, could adopt *droit moral* virtually intact.[371] That view, however, overlooks the fundamentally different attitudes with which the two systems approach authors' rights.

French law regards *droit moral* as a natural right, stemming from the special nature of artistic creation and from the mystical presence of the author's personality in his work. In the United States, the same "moral" prerogatives, when they exist at all, are merely applications of principles of tort, contract, and equity—principles which apply equally to other professions, other forms of property, other commercial transactions. It is questionable, in fact, whether American law—other than the Preservation Act—even conceives of these prerogatives as protection of the artist's personality.[372]

Thus, the French concept of *droit moral*, indeed all of *droit d'auteur*, is far more idealistic than any American notion of authors' rights.[373] It proceeds, as we have observed, from a romantic idea of the artist and his work; it treats artists as a special class of laborers, and art works as a special category of property; and at least in theory, it defends artists' rights even against the contract or property interests of third parties.

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one particular statute or doctrine, may be more flexible in accommodating new art forms and new methods of exploitation. *See Concurrence, supra* note 139, at 12-13.

[371] *See, e.g., Streibich Part II, supra* note 38, at 82-83.

[372] The question of whether United States law—apart from the Preservation Act—recognizes the right of personality is disputed. *Streibich Part II, supra* note 38, at 73, says that American courts:

> . . . have steadfastly refused to accept the [moral right] appellation or the doctrine's underlying concept, which is basically concerned with the protection of an author's interests of personality in his own creation.

Pacific Comment, supra note 14, at 857, on the other hand, says that American courts do speak of an artist's right of personality, and quotes the Supreme Court of California in Desny v. Wilder, 299 P.2d, 257, 272 (1956):

> Writing—portraying characters and events and emotions with words, no less than with brush and oils—may be an art which expresses personality. . . . "The [work] is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone."

[373] Observe Monta's amusing statement, *supra* note 52, at 185: "[W]e, as Anglo-Saxons tend to be rational and logical, and more concerned with practical considerations; the French are revolutionary, emotional, and irremediably attached to idealistic principles."

Within the conception of *droit d'auteur, droit moral* takes on a transcendent, even spiritual quality,[374] which even its own name reveals.

In the United States, on the other hand, the protection of artists' rights beyond copyright has developed on a more pragmatic and democratic basis. American law refuses to recognize artists as a special class, and insists on a more equitable balance between the interests of artists and the interests of others who are involved in the exploitation, publication, or adaptation of works of art. Furthermore, American law characterizes the artist's work more as an object of commerce than as a product of the spirit, and the artist's rights of personality in his work generally must be protected by the same legal language which would be applied to any commercial venture.

The argument that *droit moral*, as it is known in France, could be adopted intact in the United States also overlooks the significant differences which we have observed in the historical origins of the two systems, and in the issues which have been the fulcrum of each system's development. In particular, as American copyright has evolved, its principal issues have focused on such questions as whether or not publication has occurred;[375] whether or not copyright formalities have been observed;[376] whether or not statutory definitions can be expanded to include new art forms and technological advances;[377] and whether or not infringement has taken place.[378]

Although American law regards copyright as a right separate from the material object itself,[379] the question of the property character of author's rights'—the question which absorbed the attention of continental scholars—has not been a significant issue in the United States.[380] It goes without saying that British and American scholars have been

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[374] CHILLIDA, *supra* note 50, at 17:

> Let us observe the spiritual primacy of the moral right and its decisive influence not only on the law of contract, but also on the laws of inheritance and of the economic ordering of marriage, more or less altering the classic rules of customary law.

See also id. at 13-14.

[375] For a discussion and cases, *see* B. KAPLAN & R. BROWN, *supra* note 258, at 24-106.

[376] *See* discussion in *id.* at 107-59.

[377] *See* discussion in *id.* at 160-276. *See* M. NIMMER, *supra* note 259, § 1.08.

[378] See discussion in B. KAPLAN & R. BROWN, *supra* note 258, at 276-375, 454-68.

[379] 17 U.S.C. § 202 (1976): "Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied."

[380] P. RECHT, *supra* note 13, at 25-26.

able to ignore the controversy between the monist and dualist views of *droit d'auteur*.[381]

In comparison to the Civil Law system, the American tradition seems mechanical and uncompassionate. But it is important to observe that federal copyright derives from the Constitution, which not only creates the federal power to grant copyright protection, but also recites the basic philosophy on which the American system is based:

> To promote the Progress of Science and the Useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their Respective Writings and Discoveries.[382]

The constitutional mandate reveals that American copyright arises not from a perpetual, natural right of "propriété incorporelle," as in France, nor even from a "right of personality," as in Germany, but rather from the sovereign's interest in promoting a socially desirable end.[383]

This may, in fact, illustrate the most significant difference between the European and American systems. Under the Civil Law, the source of an author's rights is the author himself, and positive law exists to clarify, codify, and guarantee a right which presumably already exists when the author has performed the creative act.[384] In the United States, while copyright cannot be called a mere privilege of the sovereign, it does exist primarily to the extent that positive law creates it,[385] and that law springs not from the author's act of creation, but from a constitutionally recognized social purpose. Then, as we have seen, any further protection of the artist beyond copyright—the American "moral" rights—also must reflect social needs, for those rights may be asserted only by application of legal and equitable principles, which balance the prerogatives of the artist with competing public or private interests.

We see, then, that the "amoral" American copyright actually embodies a system which aims more at social balancing than at unilaterally vindicating the artist's personal interests. This "social balancing" policy

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[381] *Id.* at 90.

[382] U.S. Const. art. 1, § 8, cl. 8.

[383] P. RECHT, *supra* note 13, at 25-26.

[384] Whereas in our [Anglo-American] system it is the statute that creates these rights, in the French system it is not the law that gives birth to these rights, because by the very act of creation of the work the *droit d'auteur* is born in the very person of the author and the author has the exclusive enjoyment thereof. Hence no need that the work should have a body, no formality, no deposit.

Monta, *supra* note 52, at 178.

[385] *See* note 377, *supra*.

is clearly reflected in the 1976 copyright statute, which codifies the doctrine of fair use,[386] expands the use of compulsory licenses,[387] and eliminates perpetual common law copyright,[388] at the same time as it extends the scope and duration of federal copyright protection.[389] The same policy resounds in the California Art Preservation Act, which balances the artist's rights of personality against the competing interests of the artist's employer,[390] the transferee of the work,[391] and the proprietor of the building to which the work has been attached.[392] In this sense, the Preservation Act is not at all a *droit moral* statute, but rather a uniquely American legislation.

Thus, even as American law begins to recognize artists' rights beyond copyright, it does so within a tradition that is concerned for the interests of many parties; the American artist may indeed "sing" his own personality, but his copyright celebrates more than just himself. To adopt *droit moral* in the United States might require us to abandon that notion, and to subscribe to a tradition which our country does not share.[393]

IV. CONCLUSION

In the United States, as in Europe, artists frequently suffer from an inferior bargaining position in the commercial arena, and only the most well-known artists are able to procure by contract those rights which the law has not yet seen fit to protect.[394] Civil Law countries have

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[386] 17 U.S.C. §§ 107-112 (1976).

[387] *Id.* §§ 111(a), 115.

[388] *Id.* §§ 302-305.

[389] *See id.*

[390] Preservation Act, *supra* note 8, at § (b) (2).

[391] *Id.* §§ (b) (2), (c) (1).

[392] *Id.* § (h).

[393] *But see Streibich Part II, supra* note 38 at 76-77:

> While the French and other continental legal systems have explicitly relied on natural law or moral right theory, American courts have traditionally considered themselves limited to notions of property, contract, or tort. This is indeed curious when one recalls that the American republic's whole theoretical justification is "to secure these rights."

[394] *Streibich Part II, supra* note 38, at 77; *Georgetown Comment, supra* note 6, at 1539, 1560; *William and Mary Comment, supra* note 6, at 595 n.6.

Even Mark Twain, a successful writer, observed the plight of American authors in the face of an uncompassionate copyright system:

> The charming absurdity of restricting property-rights in books to forty-two years sticks prominently out in the fact that hardly any man's books ever *live* forty-two years, or even half of it; and so, for the sake of getting a shabby advantage of the heirs of about one Scott or Burns or Milton in a hundred years, the lawmakers of the "Great" Republic are content

chosen to ensure artists' rights through the moral right doctrine, and despite its complexities and inconsistencies, *droit moral* may prove to be successful in achieving that purpose.

The United States also needs to expand artists' rights, and to raise, in the eyes of the law, the dignity of professions in the arts.[395] But, as we have seen, *droit moral* has arisen in a specific legal and cultural context, and it may not be transportable into the Anglo-American system, without a complete overhaul of our copyright law and its implicit conception of the relationship between artists and society. We may find, too, that the moral right doctrine is not worth the ideological transformation which it might require.

A traditional dilemma of the art world has been the conflict between interests of publishers, producers, and exhibitors of intellectual works, and the freedom of the creator.[396] *Droit moral*, as it now is formulated in France, poses formidable challenges to the force of contracts between the artist and the exploiters of his work, but has not yet found a way to protect adequately the interests of the exploiter. Indeed, even zealous proponents of *droit moral* have criticized the failure of the French system to reconcile the interests of the business community with those of the artist under contract.[397] Thus, while *droit moral* achieves certain rights for artists, in practice it also may serve to aggravate the tension between artistic and commercial interests.[398]

The French system also poses theoretical difficulties. It has been criticized for being based on the troublesome assumption that "moral" and "economic" interests can even be separated.[399] The separation does

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to leave that poor little pilfering edict upon the statute-books. It is like an emperor lying in wait to rob a phoenix's nest, and waiting the necessary century to get the chance."

Mark Twain, "Petition Concerning Copyright" (1875), THE COMPLETE HUMOROUS SKETCHES AND TALES OF MARK TWAIN (1961).

[395] *See* statement of the court in *Gilliam, supra* note 39 at 23.

[396] CHILLIDA, *supra* note 50 at 8; CONCURRENCE, *supra* note 139, at 12-16.

[397] CHILLIDA, *supra* note 50, at 8.

[398] *E.g.*, Pakuscher, *supra* note 81, at 71, speaking of a recent German case, writes:

> The reported decision of the Federal Supreme Court will promote the tendency of radio and film corporations to double their contract forms in size because of a desire to cover all conceivable means of exploitation and to have them spelled out in writing or printing.

[399] This division of the right into two—one pecuniary, the other moral—is a false notion, since experience has shown us that moral rights can be pecuniary, and vice versa. In brief, the need has been felt to impose an order on this subject by making a division and arbitrarily separating the pecuniary prerogatives from the moral prerogatives.

P. RECHT, *supra* note 13, at 276. *See also* Diamond, *supra* note 35, at 249.

appear somewhat artificial when we consider that an artist's name, reputation, and personality—like the goodwill of a business—are economic assets, and their violation gives rise to injuries which are at least analogous to business losses.[400] Moreover, the Civil Law doctrine has not yet resolved the question of whether *droit moral* exists primarily to protect the artist or to protect his work, and how far it legitimately may go to protect either.[401]

Finally, *droit moral* seeks to broaden the rights of the artist, but it ignores the fact that society, too, has legitimate interests in a work of art. While the artist may wish to withhold his work from public view or to preserve his creations from alteration or even from criticism, society has an interest in promoting education, in facilitating the diffusion of culture, and in stimulating new ideas, new art forms, and even new methods of exploitation,[402] especially after an author or artist has been deceased for many years.[403] The Anglo-American system, it has been argued,[404] more effectively accounts for these interests.

This author advocates the conscientious legislative and judicial evolution of artists' rights through the expansion of existing American legal doctrines. As California has demonstrated, American legislation can accommodate many of the legal and equitable prerogatives enjoyed by French artists, without unfurling the banner of *droit moral*. As for the courts, what is needed is not so much a unification of the various doctrines into a single theory of "moral right," but simply a clarification of the special factors to be considered as tort, contract and trademark theories continue to be applied to cases involving authors and artists. Such factors may best be studied by giving careful attention to the time-honored experience of the Civil Law.

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[400] *See* CONCURRENCE, *supra* note 139, at 13.

[401] *See* Sarraute, *supra* note 17, at 478-79.

[402] *See generally* Giacobbe, *Interesse Pubblico e Interesse Privato Nella Tutela del Diritto di Autore*, 1975 IL DIRITTO DI AUTORE 520. *See also* CHILLIDA, *supra* note 50, at 8; F. WEY, *supra* note 47, at 11; Roeder, *supra* note 6, at 575.

[403] By analogy, the Rule Against Perpetuities forbids a trust to exist in perpetuity, in part because we believe that people who have been deceased for a great number of years no longer should have firm control over the alienation or uses of property.

[404] P. RECHT, *supra* note 13, at 245.

PART II

LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

1. United States of America and Territories

2. U.S. CONGRESS. HOUSE.

H.R. 6934. The "Computer Software Copyright Act of 1980." Introduced by Mr. Kastenmeier on March 26, 1980; and referred to the Committee on the Judiciary. (96th Cong., 2d Sess.)

This bill would amend section 101 of the Copyright Act to add a specific definition of computer program as follows: "A 'Computer program' is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result". In addition, section 117 would be amended to provide authorization for making copies or adaptations of computer programs provided copies or adaptations are created as an essential step in the utilization of the computer program in conjunction with a machine, or for archival purposes only and all such copies are destroyed in the event that continued possession of the computer program should cease to be rightful. The bill also provides that: "Any exact copies prepared in accordance with the provisions of this section [117] may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations so prepared may be transferred only with the authorization of the copyright owner."

3. U.S. CONGRESS. HOUSE.

H.R. 7448. A bill to amend title 17 of the United States Code to allow nonprofit educational institutions to pay fees for certain performances without the actions of the institutions constituting infringements of copyright. Introduced by Mr. Conable on May 28, 1980; and referred to the Committee on the Judiciary. (96th Cong., 2d Sess.)

This bill would amend section 110(4) of the Copyright Act by adding a new subsection (C): "provided that a nonprofit ed-

ucational institution may pay a fee or other compensation for the performance to any of its performers, promoters, or organizers without such action constituting an infringement of copyright."

4. U.S. COPYRIGHT OFFICE.

Report of the Register of Copyrights on the effects of 17 U.S.C. 108 on the rights of creators and the needs of users of works reproduced by certain libraries and archives; public hearing. Notice of public hearing. *Federal Register*, vol. 45, no. 80 (Apr. 23, 1980), pp. 27588-27590.

In preparation of a report that the Register of Copyrights is to submit to Congress on January 1, 1983, the Copyright Office is conducting the third of a series of regional public hearings on the extent to which 17 U.S.C. 108 has achieved the intended balance between the rights of creators and the needs of users of copyrighted works that are reproduced by certain libraries and archives. These hearings are designed to elicit views, comments and information pertaining to practices under Section 108 as they have developed since January 1, 1978, when the Copyright Act went into effect. Witnesses are asked not to just reiterate positions previously taken with respect to library copying, but to amplify their remarks with a discussion of ways in which the Act has or has not affected their practices. Additionally, the Copyright Office has set out in the notice several specific questions that it is particularly interested in having addressed. The hearings will be held on June 11, 1980 and June 20, 1980 at the Washington Hilton Hotel in Washington, D.C. Anyone desiring to testify should submit a written request along with copies of their written statement to the Office by June 4, 1980. Supplemental statements must be submitted no later than July 20, 1980.

5. U.S. COPYRIGHT ROYALTY TRIBUNAL.

37 CFR 302. Final rule with respect to 1980 filing of claims to cable royalty fees. Final rule. *Federal Register*, vol. 45, no. 79 (Apr. 22, 1980), p. 26958.

As authorized by 17 U.S.C. 111(d)(5)(A), the Copyright Royalty Tribunal amends Sec. 302.7 of its rules governing the content of claims to cable royalty fees for secondary transmissions by cable systems during "calendar year 1979 and subsequent calendar years." As amended, the rule requires that the claims include (1) the name of the person claiming cable fees, (2) the address of such person, (3) a general statement of the nature of the works providing the basis of the claim, (4) identification of at least one

secondary transmission establishing a basis for the claim, and (5) in the case of joint claims, a concise statement of the authorization for the filing of a joint claim.

6. U.S. FEDERAL COMMUNICATIONS COMMISSION.

47 CFR 76. Carriage of subscription television programming of subscription television stations by cable television systems. Order editorially amending the cable television signal carriage rules. *Federal Register*, vol. 45, no. 95 (May 14, 1980), p. 31723.

Under authority of 47 U.S.C. 154, 303, the Federal Communications Commission editorially amends Subpart D of Part 76 of its rules by adding a new Section 76.64. This amendment makes it clear that the cable television signal carriage rules (47 CFR, Secs. 76.57, 76.59, 76.61 and 76.63) were not intended to and do not require cable television system operators to carry subscription (scrambled or pay) television programs broadcast by subscription television stations. Because this amendment is editorial in nature, it is exempt from the prior notice requirements of the Administrative Procedure Act.

7. U.S. FEDERAL COMMUNICATIONS COMMISSION.

47 CFR 76. Editorial amendment relative to the carriage of sports program on cable television systems. Final rule. *Federal Register*, vol. 45, no. 68 (April 7, 1980), pp. 23440-23441.

When the Federal Communications Commission adopted Sec. 76.67 of its rules and regulations on July 22, 1975, the texts of Pub.L. 87-331 (as amended), Telecasting of Professional Sports Contests, and Pub.L. 97-107, Broadcast of Games of Professional Sports Clubs, were inadvertently included in the text of the rule as incorporated in Part 76 of Chapter I of Title 47 in the Code of Federal Regulations. As adopted, Sec. 76.67 imposed restrictions on the carriage of sports programs of distant television broadcast stations by cable television systems. The above-mentioned public laws, which were marked Appendices A and B, respectively, were attached for informational purposes only, and their inclusion in the C.F.R. appears to have been an oversight in the printing process. Accordingly, Sec. 76.67 of the Commission's rules is amended by the deletion of Appendix A and Appendix B, effective April 8, 1980. Since this amendment is editorial in nature, the prior notice procedure and effective date provisions of Section 4 of the Administrative Procedures Act, 5 U.S.C. 553, are therefore inapplicable.

PART III

CONVENTIONS, TREATIES AND PROCLAMATIONS

8. DIPLOMATIC CONFERENCE ON THE DOUBLE TAXATION OF COPYRIGHT ROYALTIES. (Madrid, November 28 to December 13, 1979). General Report. *Copyright*, January 1980, pp. 12-28. (Droit D'Auteur 1980, 12-22)

9. INTERNATIONAL CONVENTION FOR THE PROTECTION OF PERFORMERS, PRODUCERS OF PHONOGRAMS AND BROADCASTING ORGANIZATIONS. Ratification by Ireland. *Copyright Bulletin* (UNESCO), vol. XIII, no. 4 (1979), p. 4.

Ireland deposited its instrument of ratification of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations with the Secretary-General of the United Nations on June 19, 1979.

9a. MODEL BILATERAL AGREEMENT FOR THE AVOIDANCE OF DOUBLE TAXATION OF COPYRIGHT ROYALTIES. *Copyright*, February 1980, pp. 76-83; *Droit d'Auteur* 1980, Texte 1-03, pp. 1-9.

10. MULTILATERAL CONVENTION FOR THE AVOIDANCE OF DOUBLE TAXATION OF COPYRIGHT ROYALTIES. Madrid, December 13, 1979. With Additional Protocol (same date). *Copyright*, January 1980, pp. 29-33; *Droit d'Auteur* 1980, Texte 1-01, pp. 1-5.

11. UNIVERSAL COPYRIGHT CONVENTION. Ratification by Italy. *Copyright Bulletin* (UNESCO), vol. XIII, no. 4 (1979), p. 3.

The instrument of ratification by Italy of the Universal Copyright Convention as revised at Paris on 24 July 1971, and annexed Protocols 1 and 2, was deposited with the Director-General of Unesco on October 25, 1979.

PART IV

JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY

A. Decisions of U.S. Courts

1. Federal Court Decisions

12. MICHAELSON v. MOTWANI, 372 So. 2d 726 (4th Cir. June 5, 1979) (Stoulig, J.). Oestreicher and Whalen, David W. Oestreicher, II, New Orleans, for plaintiffs-appellees; Henrican, James and Cleveland, C. Ellis Henrican, Jr., A. Reed Sharpe, Jr., New Orleans, for defendants-appellants.

Appeal from judgment of preliminary injunction prohibiting defendants from using plaintiff's T-shirt decal designs. *Held*, judgment annulled on the ground that the federal courts have exclusive jurisdiction over all claims relating to copying of the designs because the record does not disclose whether they are copyrightable and an application for copyright registration has been filed.

Defendant ordered for his retail store 2,000 decals to be embossed on T-shirts. Shortly thereafter the order was cancelled. During the 1978 Mardi Gras season, defendants sold T-shirts bearing plaintiffs' decal designs. Plaintiffs' decals bore a "c" and plaintiffs had filed a copyright registration application for the designs. The record does not disclose whether a certificate of registration was issued by the Copyright Office. Plaintiff commenced the instant action for unfair competition seeking injunctive and monetary relief. The trial court issued a preliminary injunction prohibiting the defendants from using plaintiffs' designs.

On appeal, defendants argued that plaintiffs' petition sounded in copyright infringement and the federal courts had exclusive jurisdiction over such claims. Defendants also made an argument based on state statutory grounds.

The Court of Appeals annulled the judgment below and dissolved the writ of preliminary injunction. The court first held

that, although plaintiffs did not assert a claim for copyright infringement, the gravamen of their petition was that defendants unlawfully copied plaintiffs' designs and, therefore, their petition sounded in copyright infringement. The court then stated that 28 U.S.C. § 1338(a) vests the federal courts with exclusive jurisdiction over copyright infringement actions, and *Compco Corp. v. Day-Brite Lighting, Inc.*, 326 U.S. 234 (1964), held that state courts may hear disputes concerning the copying of unpublished or uncopyrightable works. The instant action was held to be within the exclusive jurisdiction of the federal courts because plaintiffs had filed an application for registration of their alleged copyright in the designs and the record did not disclose whether or not the designs were copyrightable.

13. STERLING TELEVISION PRESENTATIONS, INC. v. SHINTRON CO., 454 F. Supp. 183 (S.D.N.Y. June 14, 1978) (Broderick, D.J.). Gerald H. Kiel, Jules E. Goldberg and Taren, McGeady and Stanger, P.C., New York, for plaintiff; David Wolf, Kirschstein, Kirschstein, Ottinger, Frank and Cobrin, P.C. and Wolf, Greenfield and Sacks, P.C., New York, for defendant.

Action for copyright infringement and other causes of action arising from defendant's manufacture and sale of an electronic video typewriter based on plaintiff's copyrighted technical drawings. On motion to dismiss plaintiff's complaint for lack of *in personam* jurisdiction, improper venue and other grounds, *held*, motion denied.

The District Court held, *inter alia*, that (1) a New York court has *in personam* jurisdiction under CPLR 302 (a) (1) over a defendant in a copyright action who has exhibited a machine based on plaintiff's copyrighted technical drawings to solicit sales in New York and has shipped the machine to New York purchasers; and (2) a district in which a corporate defendant "transacts business", as the phrase is used in CPLR 302 (a) (1), is a district in which the defendant "may be found" under the copyright venue statute, 28 U.S.C. § 1400(a), although the defendant does not "do business" in that district.

Plaintiff Sterling Television Presentations, Inc., a New York corporation, designs, manufactures and sells electronic equipment, including electronic video character generators colloquially called "typewriters." Sterling owns the copyrights for technical drawings related to one model of its typewriter—the T1000A. Sterling and defendant Shintron Company, Inc., a Massachusetts

corporation, cooperated in a joint marketing effort of the T1000A from 1976 through 1977. Shintron continued to manufacture and sell its own version of the T1000A after its agreement with Sterling expired. In October, 1977, Shintron exhibited its version of the T1000A in a New York City trade show and shipped at least one typewriter to a New York purchaser. Sterling commenced the instant action in the United States District Court for the Southern District of New York to enjoin Shintron from manufacturing and selling copies of the T1000A. Sterling asserted various causes of action including copyright infringement. Shintron brought the instant motion to dismiss the action for lack of *in personam* jurisdiction, improper venue, and other grounds.

In personam jurisdiction was upheld under New York law—CPLR 302, New York's "long arm" statute. CPLR 302 (a) (1) provides that a New York court has jurisdiction over a non-domiciliary defendant in an action arising from his transaction of business within the state. New York courts have held that solicitation of sales within New York, plus the shipment of goods to New York purchasers, constitutes "transaction of business." The District Court held that it had jurisdiction over Shintron with respect to Sterling's copyright claim because Shintron exhibited its version of the T1000A in New York and shipped at least one to a New York customer.

The court held that venue was properly laid for plaintiff's copyright claim because Shintron "may be found" within the Southern District of New York. 28 U.S.C. § 1400(a) provides that an action for copyright infringement may be brought in the district in which the defendant "may be found." The court adopted from *Mode Art Jewelers Co. v. Expansion Jewelers, Ltd.*, 409 F. Supp. 921 (S.D.N.Y. 1976), the rule that a corporate defendant is "found" in any district where it is engaged in the type of systematic and continuous activity necessary to make it present under *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

14. WARNER BROTHERS, INC. v. O'KEEFE, 468 F. Supp. 16 (S.D. Iowa, December 27, 1977) (Stuart, J.). Robert G. Riley, Duncan, Jones, Riley and Finley, Des Moines, for plaintiffs; Herbert Rosenberg, Des Moines, for defendant.

Action against sole shareholder, officer and employee of a corporation operating a bar for unauthorized performance for profit of copyrighted songs. *Held*, defendant is personally liable for acts of infringement committed by paid performers because

he exercised control over, derived financial benefit from, and established the policies that resulted in the infringing performances.

Defendant Richard E. O'Keefe is the sole shareholder, officer and employee of Richard E. O'Keefe, Inc. The corporation operates a bar called R.E.O.'s R.E.O.'s offers its customers live music performed by local bands. R.E.O.'s also has a jukebox for use when live musicians are not performing. A fee is charged for admission to R.E.O.'s. Plaintiffs are members of ASCAP and have granted that organization the non-exclusive right to license non-dramatic public performances for profit of their copyrighted songs. On several occasions, ASCAP informed the defendant that songs owned by ASCAP members could not be performed lawfully at R.E.O.'s unless R.E.O.'s obtained a license from ASCAP or its members. The defendant refused to obtain a license. Instead, he instructed performers at R.E.O.'s not to play ASCAP songs. Defendant also submitted to ASCAP lists of songs performers intended to play to determine if their copyrights were owned by ASCAP members. ASCAP's replies were received after the songs had already been performed.

Plaintiffs began the instant action for damages for infringement of their copyrights in songs performed by live musicians and on the jukebox at R.E.O.'s. The defendant argued that the performers who performed ASCAP songs in violation of his instructions were the only persons guilty of infringement. Furthermore, if the proprietor of R.E.O.'s was vicariously liable, then only the corporate owner, not the defendant, was subject to such liability. Finally, he argued that ASCAP's failure to provide him with lists of ASCAP songs estopped plaintiffs from bringing the instant action.

The District Court, adopting the opinion of the magistrate before whom the action was tried, by stipulation held that the defendant was personally liable for copyright infringement. The court concluded, without extensive discussion, that plaintiffs' copyrights had been infringed. The issue of defendant's vicarious liability was decided in two stages. First, the court held that the proprietor of an establishment in which acts of infringement are committed is vicariously liable if he exercises supervision and control over the active infringers. Vicarious liability attaches even though the proprietor instructs performers not to commit acts of infringement. The court then held that defendant O'Keefe was personally liable because he was the sole shareholder, officer and employee of the proprietor corporation. In his triple capacity,

O'Keefe derived financial benefit from the performances at R.E.O.'s, established the policies that resulted in the acts of infringement, and exercised personal control over the performances at R.E.O.'s. The court concluded its opinion by rejecting defendants' estoppel defense on the ground that no authority supported the assertion of such a defense.

The jukebox exemption in § 1(e) of the 1909 law was presumably inapplicable because an admission charge was made.

Attorney's fees at $65 per hour, while reasonable, were reduced to avoid their being nearly double the amount of the minimum statutory damage award.

B. Decisions of Foreign Courts

1. Federal Republic of Germany

15. Copyright—Rights of a ballet director—alleged infringement of choreography-photography on record. Munich District Court., GRUR 1979, 852, *European Intellectual Property Review*, vol. 2 (March 1980), p. D-60.

The plaintiff, the director of the folklore ballet group 'Brasiliana', sued for damages, alleging that the picture on the outside of the cover of the record 'Godspell', issued by the defendant, showed his group in the ballet 'Samba on the Hills of Rio de Janeiro' without his permission. The plaintiff's action for damages was denied. The court decided that the copyright protection enjoyed by the director of the ballet under paragraph 81 of the Copyright Act did not extend to photographs. The rights in the choreography were found not to have been infringed since a photograph shows only a frozen moment, and not the sequence of motions which is the essence of choreography.

2. Great Britain

16. AARON SPELLING PRODUCTIONS INC. AND LENARD GOLDBERG PRODUCTIONS INC. V. B.P.C. PUBLISHING LTD., Court of Appeal (19 Feb. 1980), as yet unreported. *European Intellectual Property Review*, vol. 2 (April 1980), D-95.

The plaintiffs were the makers and producers of a series of films intended for broadcasting under the name of 'Starsky and Hutch'. They owned the copyright in the films. The defendants

published in a magazine a number of photographs which were all made from the frames of the films. Originally the court held that there was no infringement. In the appeal, the court held that a true interpretation of the Copyright Act is that a single frame is a part of the film, and by making a print from a single frame the defendants had made a copy of the film within the intendment of the Act. This decision on appeal confirms that a single frame is capable of protection under copyright.

17. BRITISH LEYLAND MOTOR CORP. LTD. ET AL. V. T1 SILENCERS LTD., High Court (April 2, 1980), as yet unreported. *European Intellectual Property Review*, vol. 2 (May 1980), p. D-129.

The plaintiffs claimed to own the copyright in certain drawings relating to exhaust assemblies for various cars, and they claimed the defendants had infringed that copyright by making those component and replacement parts. The plaintiffs had pursued a policy in relation to the grant of licenses to third parties to reproduce the subject matter of their copyright on substantially similar terms. The defendants pleaded three Euro-defenses based on the EEC treaty. The Court held in favor of the plaintiff. As to the first defense, the Court stated that there was no justification for excluding copyright from the scope of the phrase "industrial and commercial property" within the meaning of the Treaty. Moreover, there was no real evidence of arbitrary discrimination by the plaintiffs in their willingness to grant licenses. The Court also discounted the second and third defenses saying the effect of "corralling infringers into taking a license was not to distort competition in the Common Market, but to ensure that all competitors in the UK were placed on equal footing."

18. INFABRICS LTD. AND OTHERS V. JAYTEX LTD. AND OTHERS, Court of Appeal (15 Jan. 1980) as yet unreported. *European Intellectual Property Review*, vol. 2 (April 1980), D-94.

The plaintiffs made printed fabrics for use in the manufacture of shirts and owned the copyright in a particular design called 'Past the Post'. The defendants were wholesalers of shirts in the U.K. Representatives of the defendant purchased a fabric in Hong Kong bearing the 'Past the Post' design. The fabric was made into shirts and dispatched to the defendants in England. On discovering the shirts, the plaintiffs wrote to the defendants stating that they were the owners of the copyright in the 'Past the Post' design and, subsequently, began proceedings for copyright

infringement. The court *held* that the importation and sale after notice had been given constituted an infringement, but that the defendants had not otherwise infringed copyright and were not otherwise liable for the conversion of shirts having the design. The plaintiffs have now appealed.

3. Japan

19. KOJI ITO V. RYOICHI YAMAMOTO AND MATSUSHITA ELECTRIC INDUSTRIES CORP., Osaka District Court (25 September 1979). *European Intellectual Property Review*, vol. 2 (April 1980), pp. 112-113.

The plaintiff Ito and the defendant Yamamoto were both chemical engineers with Matsushita Electric Industries, engaged in research and development work. The plaintiff published the results of his research on several occasions. The defendant submitted to the University of Tokyo a doctoral thesis on the same subject and was awarded a degree of Doctor of Engineering. The plaintiff brought an action in the Osaka District Court against Yamamoto for the restoration of the plaintiff's reputation and recovery of damages. He alleges that the defendant's dissertation invaded and damaged his right to publish his own works, his right to recognition as author of the works, and his right to maintain the integrity of his written material. The Court *held* that Yamamoto's dissertation contained statements that were also to be found in the plaintiff's reports and article. The Court, however, dismissed the plaintiff's action on the ground that copyright protection does not prevent the statement and restatement of scientific principles and technical ideas for utilizing those ideas.

PART V

BIBLIOGRAPHY

A. Books, Treatises and Cassettes

1. United States Publications

20. Flint, Michael F. *A user's guide to copyright.* Butterworths, London, 1979, 226 pp.

This work explains the variety of commercial uses to which copyright is applied within the United Kingdom. The book is divided into two parts. Part I describes copyright law generally and Part II 'Copyright in Use'. The earlier chapters cover, for example, the nature of copyright, originality, terms of copyright, infringement, and the transmission and licensing of copyright. The second part discusses copyright in relation to publication in newspapers, magazines and periodicals. It also discusses reprography; the music industry; publishers and composers in the music industry; drama, ballet and opera production; cinematograph film and television film production; architects and architecture; computer software and character merchandising.

B. Law Review Articles

1. United States

21. Diamond, Sidney A. Sound recordings and phonorecords: history and current law. *The University of Illinois Law Forum*, vol. 1979, no. 2 (1979), pp. 337-372.

Although sound recordings were invented over a hundred years ago, it was not until 1972 that they were protected by any kind of statutory copyright. Then in 1976, with the enactment of the revised Copyright Act, came recognition of the sound recording as a method of fixation of literary, dramatic and musical works. Prior to the 1976 Act, copyright protection was limited to

conventional written or printed notation and this article discusses the distinction between this form of copyrightable works and the sound recording. It also talks about protection for the recordings themselves, the compulsory license for musical works, coin-operated phonorecord players, and the compulsory license for jukeboxes.

22. FINKE, CHARLES L. The Copyright Act of 1976: home use of audiovisual recording and presentation systems. *Nebraska Law Review*, vol. 56, no. 2 (1979), pp. 467–494.

The author discusses VTR systems and the growing practice of videotaping by the American public. The author believes that two areas should be safeguarded: (1) that of a private person taking advantage of the revolutionary new industry in the privacy of his or her home, and (2) that of securing to authors financial incentive through exclusive rights in their work. The author feels there has been little legislative interest in enacting the proper laws to help alleviate the problem. Other areas of discussion include protection under the 1909 Act, protection under the 1976 Act, ownership of copyright in a video program, infringements of copyright in audiovisual works by VTR use under the general revision law, and pre-recorded VTR software.

23. GOHEEN, JOHN. Burden of providing first sale under the Copyright Act of 1976. *Georgetown Law Review*, vol. 67, no. 1 (Oct. 1978), pp. 293-312.

An examination of exclusive rights with a look at the "first sale burden of proof" under the 1909 and the 1976 Acts in both civil and criminal cases. A legislative history of the 1976 Act is also included. The author in his conclusion states that "a plaintiff who owns the copyright to a type of work that generally is sold outright should bear the burden of proving that no first sale occurred."

24. Home Box Office seeks to bar film's telecast. *New York Law Journal*, vol. 183, no. 49 (March 12, 1980), p. 2.

Home Box Office has filed suit in federal court to bar ABC from telecasting the film "Force 10 From Navarone," claiming the showing would be an infringement of its copyright and breach of contract. The plaintiff claimed it had been given an exclusive right by American International to show the film on pay television

until Dec. 31, 1980, and also had obtained the right to prevent telecast of the film on commercial television until March 1, 1981. American International, Home Box Office alleged, "purportedly" had assigned "simultaneous broadcast rights" to ABC.

25. KOHN, ALAN. Award upheld against ABC for violating film copyright. *New York Law Journal*, vol. 183, no. 97 (May 19, 1980), pp. 1, 2.

The U.S. Court of Appeals for the Second Circuit has upheld a damage award of $15,250 plus $17,500 in lawyers' fees against ABC for copyright violations, rejecting a contention that ABC's use of portions of a film represented fair use in telling the history of a public figure. Dan Gable, an Iowa State University wrestler and a candidate for an Olympic medal, was featured on American Broadcasting Companies' Olympic telecasts. The University had charged that ABC used portions of a twenty-eight-minute student film on Mr. Gable entitled "Champion" without permission. The court ruled that "the fair-use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance . . ." [*Iowa State Research Foundation v. American Broadcasting Companies*, 79-7819 (2d Cir. May 12, 1980)].

26. KOHN, ALAN. CBS loses new antitrust test of blanket licenses for music. *New York Law Journal*, vol. 183, no. 72 (April 14, 1980), pp. 1, 2.

The author discusses the latest ruling of the Second Circuit of Appeals in *CBS v. ASCAP*. The court has held that blanket licenses are not a violation under the rule of reason and affirmed dismissal of the suit. The Supreme Court of the United States reversed in 1979 the holding that the licenses were not a per se violation and remanded the case for a determination of whether they were a violation of Section 1 under the rule of reason. [*CBS v. ASCAP*, 75-7600 (2d Cir. April 3, 1980)].

27. KOHN, ALAN. Court defines history-event copyright rule. *New York Law Journal*, vol. 183, no. 59 (March 26, 1980), pp. 1, 2.

The author discusses the recent New York Court of Appeals ruling that the interpretation of an historical event is not copyrightable. The court's ruling came in a case where copyright infringement was charged by an author of a book on the crash and

destruction in 1935 of the German zeppelin Hindenburg against the author of another book on the subject and the producers of a movie based on the second book. [*See Hoehling v. Universal City Studies, et al.*, Dkt. No. 79-7704 (2d Cir. March 25, 1980)].

28. LAWLOR, REED C. A proposal for strong protection of computer programs under the copyright law. *Jurimetrics Journal*, vol. 20, no. 1 (Fall 1979), pp. 18-29.

Mr. Lawlor discusses the final report of the National Commission on New Technological Uses of Copyrighted Works (CONTU) which calls for limited protection of computer programs. It is the opinion of the author that the CONTU proposal, if adopted, would provide weaker protection than the present copyright law to proprietors of computer programs. The author makes some proposals different from those of CONTU and stresses the need for the software industry to act if it wants to preserve what it has "instead of trading it for an empty bag, and if it wants strong protection for computer programs under the copyright law."

29. LIEB, CHARLES H. Estate planning for creators of intellectual property. *The University of Illinois Law Forum*, vol. 1979, no. 2 (1979), pp. 373-400.

Because the estates of creators of intellectual property often include intangible assets such as copyrights and contractual royalty rights, special income and estate tax considerations traditionally have been required when planning any inter vivos or testamentary disposition of these assets. The enactment of the Tax Reform Act of 1976, the Copyright Act of 1976 and the Revenue Act of 1978 has changed even the traditional considerations involved in planning the estates of creative persons. Therefore, this article examines certain of the planning problems peculiar to these estates and suggests techniques that might be employed in dealing with such problems.

30. LOEBER, DIETRICH A. VAAP: the Soviet copyright agency. *The University of Illinois Law Forum*, vol. 1979, no. 2 (1979), pp. 401-452.

This is a comprehensive study of the Vxexoiuznoe Agentstvo po Avtorskim Pravam (VAAP), the Soviet copyright agency. The VAAP has exclusive rights to act as an intermediary in the ne-

gotiation of contracts for the use abroad of works by Soviet citizens and for the use in the U.S.S.R. of works by foreign authors. Although information outside the Soviet Union is incomplete and scattered, the author has attempted to bring together as much available data as possible on the VAAP, its organization, legal nature and activities.

31. MAGGS, PETER B. Some problems of legal protection of programs for microcomputer control systems. *The University of Illinois Law Forum*, vol. 1979, no. 2 (1979), pp. 453-468.

New technology has made it possible for a person to pay under $10 today for computer central processing units that would have cost millions of dollars in the 1950's. This computer price revolution has caused a wide variety of control systems in industrial and consumer products to be replaced by general purpose microcomputers programmed to perform specific tasks. The growing economic importance of microcomputer systems has given rise to the question of whether some form of protection should be given to their programs. This article recommends that protection be extended to computer programs under the patent, copyright and possibly the trade secret laws and suggests that previously explored ideas about the proper modes of legal protection for this new technology be reexamined in light of the microprocessor revolution.

32. NIBLETT, BRYAN. Copyright aspects of legal databases. *Jurimetrics Journal*, vol. 20, no. 1 (Fall 1979), pp. 30-40.

This article examines the copyright aspects of legal databases as they affect mechanised retrieval systems and considers ways in which problems of access may be alleviated. The discussion is limited to the United Kingdom but has points of relevance for other jurisdictions.

33. SCHAFFER, BRUCE. Are the compulsory license provisions of the copyright law unconstitutional? *Communications and the Law*, vol. 2, no. 1 (Winter 1980), pp. 1-24.

This essay discusses the constitutional validity of the compulsory license provisions of the federal copyright law. The reason that compulsory licenses may be unconstitutional is that they are a limitation on the exclusive right of the holders of the copyright. The term "exclusive right" is used in the Constitution

itself. The author concludes that the framers of the U.S. Constitution intended for copyright, as well as patent rights, to be exclusive. The compulsory license provision enacted in 1909 was probably an anomaly caused by Congress responding to the antitrust fever of the day. Although the issues of the constitutional status of the three new compulsory license provisions of the 1976 Act were scarcely raised at all prior to the passage of the new act, the arguments in favor of truly exclusive rights for authors apply with even greater force today.

34. SETON, CHARLES B. Book review: Nimmer on Copyright, by Melville B. Nimmer. *Communications and the Law*, vol. 2, no. 1 (Winter 1980), pp. 87-92.

Mr. Seton gives a review of the four-volume treatise by Nimmer, with emphasis on cases cited therein. He concludes that "as to the numerous inaccuracies in the quotations set forth in these reported cases, the results of the sample spot-checking indicates that it behooves any person using direct quotations from this work to double-check the original sources before copying the quotations in memoranda or briefs. The quantity of errors that are apparent in the case names in the Table of Cases is a different problem. Because the treatise is cited and quoted so frequently in case law, it is desirable that there should be a minimum of erroneous case names set forth as precedents in current and future judicial decisions." Mr. Seton lists some of these errors and suggests that Mr. Nimmer issue a revised Table of Cases or send corrections for the Table of Cases to those who have purchased the work.

35. Supreme Court review of patent and copyright cases is sought. *BNA-Patent, Trademark and Copyright Journal*, No. 478 (May 8, 1980), pp. A14, A15.

The Supreme Court is being asked to overturn a criminal copyright infringement conviction in *U.S. v. Heilman*, No. 79-1577, April 15, 1980. Heilman was found guilty of making unauthorized copies of musical recordings which were fixed prior to February 15, 1972, the effective date of the Sound Recording Act (85 Stat. 391 (1971), 17 U.S.C. Sec. 1(f) of the 1909 Copyright Act). The Seventh Circuit upheld his conviction under 17 U.S.C. Sec. 104 of the 1909 Act, agreeing that he not only had fair warning that his activities were illegal, but that he acted willfully and with criminal intent in making the unauthorized copies.

36. WEHRINGER, CAMERON K. Copyright in brief. *The Practical Lawyer*, vol. 25, no. 5 (July 15, 1979), pp. 77-82.

Mr. Wehringer gives a capsule of the 1976 Copyright Act as well as an explanation on filling out the various forms for copyright registration. This article does not attempt to cover all aspects of the law; however, it does explain some of the key provisions suitable for the layman.

2. Foreign

1. In English

37. BRETT, HUGH. Book review: copyright (CUP, 1980): 40 pages by Christopher Searles. *European Intellectual Property Review*, vol. 2 (Apr. 1980), p. 136.

The reviewer, Hugh Brett, states that this book is a small work that very neatly presents the problems of copyright. It concerns itself with copyright as it may directly affect publishers. It deals in very general terms with U.K. literary copyright, the international conventions and aspects of U.S. copyright. The copyright notice is also discussed at length and some examples of its proper use are given, but the implication is that the copyright symbol is a necessity if copyright protection is to apply at all in the U.S.A., when, in fact, under the new U.S. Copyright Act, an omission of the symbol is no longer disastrous.

38. Copyright—cable television—relaying French films in Belgium. *European Intellectual Property Review*, vol. 2 (April 1980), pp. D-98-99.

The European Court has upheld the submissions of the Advocate General that a requirement under Belgian law forbidding the broadcasting of advertisements was a restriction which was not discriminatory, and, therefore, did not conflict with the "freedom to provide services" as mentioned in Article 59 of the Treaty of Rome. It was therefore held to be permissible under the Treaty to prevent the relay in Belgium of French films containing advertisements since the legislation applied equally to nationals. The European Court, while not following the Advocate-General's reasoning on all points, agreed that a broadcast was an aspect of copyright which should be protected, and could not be exhausted

under Article 36. The broadcast of a film from Germany which was relayed in Belgium was held to be an unjustified infringement of the Belgian copyright owner's right.

39. Copyright—news—UNESCO. *European Intellectual Property Review*, vol. 2 (Mar. 1980), D-71.

The International Copyright Information Center (ICIC) has published its first list of children's books (over 700 titles) which have been made available on favorable terms by the publishers. One of the objectives of ICIC is to "afford developing countries greater access to protected works"; this initiative was timed to coincide with the "International Year of the Child."

40. EDELMAN, BERNARD. Ownership of the image. Routledge & Kegan Paul Ltd. (London), 217 p.

A discussion of photography, property law and copyright and the differences between protection under French law and English law especially in the area of moral rights. The author also provides a historical tracing of copyright in Europe beginning with the Act of 1709.

41. FRANÇON, ANDRÉ. Copyright protection of advertising creations. *Revue Internationale du Droit d'Auteur*, no. 103 (Jan. 1980), pp. 3-50.

An article which explores what advertising is and how it is created. The problems of adding copyright to advertising are discussed, especially when an advertising creation entitled to protection as literary property is involved. The question of who owns the copyright—the creator or the advertising agency—comes into play. The author then proceeds with a lengthy discussion of advertising creations and the concept of a work protected by copyright, citing case law in the field.

42. GAUDEL, DENISE. The eternal excommunicated. The situation of performers in France. *Revue Internationale du Droit d'Auteur*, no. 103 (Jan. 1980), pp. 92-135.

An article reviewing the problems of performers in France, particularly in the area of artists' rights, ineffectual contracts and the unauthorized uses of recordings of artists' performances and the economic consequences of such secondary uses to performers. Case law is cited.

43. HARRIS, BRIAN. The Coditel case—diffusion of broadcasting rights. *European Intellectual Property Review*, vol. 2 (May 1980), pp. 163-165.

A discussion of the Coditel case, dealing with broadcasting and the retransmission of broadcasts by cable which involved several countries. The film in question is "Le Boucher," a French film shown publicly in Belgium. The author discusses the problem that arose when German broadcasting retransmitted the film for showing on German television. Mr. Harris delves into the legal question involving infringement of copyright and the position of the Brussels Court of Appeals on this case.

44. HULTEN, OLOF. Home video—a threat to public-service television? *EBU Review*, vol. XXXI, no. 2 (Mar. 1980), pp. 24-26.

This is a discussion of the possible impact VTRs might have on Swedish public service television. Sweden, along with other European countries, has been gauging what is happening in western households as a result of the new video technology. Sveriges Radio has devoted some time to contemplating what the existence of VTR equipment in Swedish homes on a mass scale might mean to its services. The conclusion of its research as well as the conclusions and recommendations of a special study group commissioned to report on the subject are summarized in this article.

45. LIMPERG, DR. TH. Duration of copyright protection. *Revue Internationale du Droit d'Auteur*, no. 103 (Jan. 1980), pp. 53-91.

An article which includes a listing of the "fixed term" of copyright in various European countries. "Fixed term" is the creator's life plus a fixed term after his death for the copyright protection of his work. Most European countries have a fixed term of fifty years, the Federal Republic of Germany being the exception with seventy years. The countries which have a shorter term of protection include Mexico, which has the life of the author plus thirty years and Poland, which has the life of the author plus 25 years. There is also a discussion of posthumous works, rights of heirs, photocopying and the extension of the duration of copyright in European countries.

46. News—copyright. *European Intellectual Property Review*, vol. 2 (March 1980), p. D-77.

In the September issues of the *EIPR*, Janice Luck discussed

the substantial amendments to the Australian Copyright Act, particularly in the area of photocopying and record piracy and proposed legislation in these areas. As a result of the many objections received by the Attorney-General to the Bill which had been presented to the Parliament on 4 June 1979, it is understood that a number of amendments are being made and a new Bill will be presented.

47. RAHN, GUNTRAM. Reprography and copyright law in Japan. *International Review of Industrial Property and Copyright Law*, vol. 10, no. 6 (1979), pp. 710-729.

The commercial and legal problems of authors and publishers, which have arisen from the increasing use of reprography, have been subjects of world wide discussion in recent years. This article discusses the legal situations in the individual areas of reprography on the basis of an examination of facts, gives a survey of foreign and international developments and, finally, offers suggestions for the solution of the problem of reprography in Japan.

2. In English and French

48. DIETZ, ADOLF. Letter from the Federal Republic of Germany. Report on the development of the copyright between 1972 and 1979. First Part, *Copyright*, February 1980, pp. 85-104 (Droit d'Auteur 1980, pp. 72-92). Second Part, *Copyright* March 1980, pp. 129-150 (Droit d'Auteur 1980, pp. 112-135).

The author, a member of the Max Planck Institute for Foreign and International Patent, Copyright and Unfair Competition Law, first describes the trends towards further improvement of the statutory protection of authors. He then gives an exhaustive report on the case law with respect to the scope of copyright protection, the demarcation between adaptation and free use, the protection of the author's moral rights, droit de suite and public lending right.

The first part of the report concludes with an examination of cases pertaining to the right of distribution, the limits of free quotation and free reporting, the limits of free public communication as well as the reproduction for private use and for school use. The Second Part is devoted to the copyright contract law and labor law, the law of collecting societies, damages for infringement of copyright, protection of foreign authors, transitory problems

arising out of statutory amendments and neighboring rights.

3. In English, French and Spanish

49. KRÜGER-NIELAND, GERDA. The moral right of the author, a particular manifestation of the general personal right. *GEMA News-Nouvelles-Novedades* 1980, pp. 5-16.

This study by the former presiding judge of Civil Part I of the German Federal Court of Justice shows the development of the moral right of the author in German law. By the decision of the highest court dated May 25, 1954, a general personal right had been recognized for the first time as an original, standardized and comprehensive right within the meaning of Art. 823 of the Civil Code. But the subsequent efforts towards a detailed regulation by law of the protection of the individual thus far failed. On the other hand, the Federal Court of Justice has in several decisions called the author's moral right a "specific manifestation" of the general personal right. After examining the differences between the so-called pure personal rights and the author's moral right, Dr. Krüger-Nieland stresses the fact that the latter is bound to an object, the work creation, which by its nature is aimed at being made available to the general public, and reviews various dispositions of the copyright law of 1965 in this connection.

C. ARTICLES PERTAINING TO COPYRIGHT FROM MAGAZINES

1. United States

50. AMOA legal action found still short of goal. *Cash Box*, vol. XLI, no. 48 (Apr. 12, 1980), p. 39.

Jukebox operators have been asked to continue supporting the AMOA's legal action fund. The fund was established to pay legal expenses resulting from the Association's suit against the Copyright Royalty Tribunal's location list regulation. $98,442 has been donated so far, but at least $250,000 is needed to continue the suit, which is currently pending in the Court of Appeals. Operators are asked to base their contributions on the approximate number of music and games they have "on location at $1.00 per machine, in the following categories: $100, $250, $500, $750 and $1000."

51. Anti-ASCAP organization formed. *Play Meter* (Mar. 1980).

Ronald Hodges of Boulder, Colorado has formed a new organization called the American Society Assessing Copyright Organizations (ASACO). Its purpose is to challenge the performing rights organizations' distribution systems by gathering, analyzing and evaluating data on their method of assessing, collecting and distributing royalties. This information will be used to develop and provide educational programs to interested individuals and organizations. Hodges has worked for one of the societies, and he feels that their royalty distribution and assessment systems are inequitable. Hodges says that ASACO is for individual creative artists' rights and against the cost factors of the "capricious and arbitrary methods copyright organizations employ in assessing and collecting for use of copyrighted materials." He indicated that something must be done now while the societies are still testing their distribution powers. Therefore, he urges those affected by licensing—the student, the churchgoer, the consumer and even the gridiron—to support ASACO and to join with jukebox operators in opposing what he terms the "umbrella" method of royalty payment under the present Copyright Act.

52. ARCOMANO, NICHOLAS. A dancer's business—choreography and copyright. *Dance Magazine* (Apr. 1980), pp. 58-59.

The author relates the history of copyright protection and lack of it with noted examples as Agnes de Mille's *Oklahoma* (in which her ballets were not considered legal property and therefore she was not entitled to collect performance royalties). The author also lists the requirements for the protection of dance under the 1909 act and the changes the new law has made. He also reviews the historical cases that deal with dance including *Fuller v. Bemis* and *Martinetti v. Maguire.*

53. ARCOMANO, NICHOLAS. A dancer's business—choreography and copyright. Part two. *Dance Magazine* (May 1980), pp. 70, 119.

In this article, the second of two written on copyright and dance, the author places great emphasis on the terms "original" and "fixed." He discusses the use of videotape as a method of fixation and relates the controversy among choreographers concerning videotaping versus notation as a more exact form of recording dance movement. In concluding his article, the author provides information on the proper procedure to register and deposit a work.

54. Beatles videotapes spur an injunction. *Billboard*, vol. 92, no. 16 (April 19, 1980), p. 16.

The U.S. District Court has granted a preliminary injunction against the sellers, manufacturers and distributors of allegedly infringing videotapes featuring 37 copyrighted works by the former Beatles. The suit names Video Tape Network, Media Home Entertainment Inc., Video Shack, Video Communications (the only defendant contesting the court's jurisdiction in the case), and several "John Does." The action was instituted by Northern Songs, Ltd. on March 11 and is said to be the first such legal move by a music publisher in the videotape field. The court also ordered that the videocassettes in question be either turned over to the clerk of the court or erased pending final disposition of the action.

55. BMI sues JP's Cafe. *Cash Box*, vol. XLI, no. 47 (Apr. 5, 1980), p. 14.

Broadcast Music Inc. has filed a copyright infringement suit against Gourmet Diners, which does business as JP's Cafe in California. The complaint charges that defendant performed BMI's copyrighted music without authorization and in violation of the Copyright Act.

56. BMI sues Ohio station. *Variety*, vol. 297, no. 3 (Nov. 21, 1979), p. 144.

Station WAQI in Ashtabula, Ohio, has been sued for copyright violations. The suit, which was brought by Broadcast Music, Inc., charges that 25 BMI songs were played by the station without authorization. Statutory damages are being sought.

57. British publishers seek new ruling on reversionary rights. *Record World*, vol. 37, no. 1714 (May 31, 1980), p. 45.

The House of Lords is hearing an appeal by a consortium of British music publishers. The question being debated involves reversionary rights and several fine points of the British copyright laws. The reversionary rights question has been heard in various courts for several months, but the final ruling, which will affect the rights to thousands of titles in deceased authors' estates, is expected before the end of the session in July.

58. CALLAHAN, JEAN. Copyright Tribunal weighs split of cable TV royalty. *Billboard*, vol. 92, no. 15 (Apr. 12, 1980), pp. 1, 62.

On March 31, 1980, the Copyright Royalty Tribunal heard evidence compiled by ASCAP, BMI and SESAC in support of their claims for cable copyright royalties. ASCAP and SESAC submitted a joint claim that requested a 13.5% share of the fees, and BMI's claim, which was bitterly opposed by counsel for broadcasters, filmmakers and sports claimants, asked for 17%. In addition to the arguments in support of their claim, ASCAP and SESAC argued against broadcasters sharing in the royalty collections because the societies claim that "broadcasters' programs consist almost exclusively of local news and public affairs shows."

59. CALLAHAN, JEAN. C'right Tribunal will hear % royalty debate. *Billboard*, vol. 92, no. 14 (Apr. 5, 1980), pp. 1, 80.

When the Copyright Royalty Tribunal convenes the mechanical rate review hearings, it will consider changing the mechanical royalty rate to one based on a percentage of the suggested retail price of records. The change, which was proposed by the National Music Publishers Assn. with the support of the American Guild of Authors and Composers and the Nashville Songwriters Assn., was strongly opposed by the Record Industry Assn. of America (RIAA). In fact, the RIAA filed a motion asking the Tribunal to declare that any adjustment of the mechanical royalty was beyond its jurisdiction. After hearing oral arguments on the motion, the Tribunal concluded that the arguments in support of the motion were not persuasive. The motion was, therefore, denied. The Tribunal's action on the motion leaves the percentage formula open for consideration in the mechanical rate hearings scheduled for May 6 through May 29, 1980.

60. CALLAHAN, JEAN. Jukebox royalty rate hearings open Wed. *Billboard*, vol. 92, no. 14 (Apr. 5, 1980), p. 94.

Pre-hearing submissions for the Copyright Royalty Tribunal's hearings on the jukebox royalty rate adjustment indicate that the Amusement and Music Operators Assn. will argue to maintain the current royalty rate of $8 per machine per year. ASCAP, on the other hand, submitted filings proposing an initial fee of $70 per year, based on "marketplace consideration." This sum would be paid on a minimal per use basis if no compulsory license existed. In addition to the rate review, the CRT is conducting proceedings to resolve the controversy over distribution of the 1978 cable television copyright payments because the claimants have been unable to reach a voluntary agreement.

61. CALLAHAN, JEAN. Mechanical rate boost gains many supporters: groups offer studies from consulting firms. *Billboard*, vol. 92, no. 6 (Apr. 19, 1980), pp. 3, 88.

The American Guild of Authors & Composers together with the Nashville Songwriters Assn. International, the National Music Publishers Assn. and the Recording Industry Assn. of America have all submitted voluminous economic studies to the Copyright Royalty Tribunal. The reports support their respective points of view on the mechanical royalty rate, which the Tribunal will be reviewing beginning May 6. April 21 is the deadline for responding to the information presented in the reports, which include an economic and sociological profile of a typical songwriter, a financial survey of record companies for the period 1977 through 1979, and an analysis of the impact of inflation on the mechanical royalty rate.

62. CBS loses again on music licenses. *Broadcasting*, vol. 98, no. 14 (April 7, 1980), p. 32.

A three-judge panel of the U.S. Second Circuit Court of Appeals in New York unanimously affirmed a lower court decision dismissing the suit involving CBS and ASCAP. The suit contended that the blanket licenses used by the major music-licensing organizations—specifically those of the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI)—are per se antitrust law violations. CBS is expected to ask the Supreme Court to hear an appeal. If granted, it would be the case's second Supreme Court appearance.

63. Chicagoan alleges 'Deep' is his song. *Billboard*, vol. 92, no. 12(Mar. 22, 1980).

Ronald H. Selle of Chicago has filed suit against the Bee Gees singing group, RSO Records and others for copyright infringement. The suit says that the Bee Gees' 1978 hit "How Deep is Your Love" was copied largely from a tune he wrote entitled "Let It End." Selle's allegation is based on a comparison of lead sheets that have been submitted to the Copyright Office.

64. Christian slaps heavy plagiarism suit on 'Kramer'. *The Hollywood Reporter*, vol. CCLXI, no. 18 (Apr. 16, 1980), p. 4.

Columbia Pictures, Inc., Dustin Hoffman and others are being sued for "plagiarism and copyright conversion." The action

was filed by Jay Christian, a Glendale, Calif. freelance writer. Christian wrote a screenplay entitled "A Touch of Innocence," based on his personal experience as a single parent. He submitted the script to Hoffman in April of 1977, but it was rejected. The complaint charges that the award winning "Kramer Versus Kramer" was developed from the plaintiff's screenplay and cites at least 24 instances where the scenes and dialogue in the "Innocence" script and the motion picture's completed screenplay are similar. The suit seeks $80 million in general damages, $41 million punitive damages and an accounting.

65. CLR $$ to go for IFLA work in copyright conservation. *Library Journal*, vol. 105, no. 8 (Apr. 15, 1980), p. 899.

The International Federation of Library Assns. has been given a grant of $70,000 to support its work in the areas of copyright and conservation. The projects the Federation plans to undertake include such issues as the copyright of bibliographic records and files, and copyright of library materials for the handicapped. At some future date, the question of how copyright should affect IFLA's Universal Access to Publications program may be addressed. IFLA takes the position that ". . . the unconstrained flow of bibliographic records internationally is essential to research and scholarship . . . and exceptional restrictions . . . on such records are detrimental." Therefore, the focus of the copyright projects will be the "conditions of exchange between national bibliographic agencies, the use by (semi) commercial networks of bibliographic descriptions provided by a national bibliographic agency, and the legal responsibility of such an agency in distributing descriptions . . . for regional or national use by library networks." Specialists will be brought in to develop a plan of action for the targeted programs.

66. Copyright collections down, operator non-compliance. *Play Meter* (April, 1980).

Copyright Office records show that in 1978, about 3,239 operators registered their jukeboxes, while the number in 1979 was 3,830. The number of jukeboxes licensed in 1978 totaled 144,368; the 1979 figure, however, was only 136,368. There is much concern about this drop, and Walter Sampson, Chief of the Licensing Division, told *Play Meter* that the Office feels that the underlying reason is noncompliance rather than a reduction in the number of machines. When asked on what his assessment was

based, Sampson indicated that it was the number of copyright infringement suits that have been filed by the "performing arts societies" and "publicly available listings" of jukebox locations that the Office had obtained from cities throughout the country. This information not only proves that there is noncompliance, but that there are "many, many more machines out there" than the Office had thought.

67. Court drops suit against Disney. *The Hollywood Reporter*, vol. CCLXI, no. 40 (May 16, 1980), p. 4.

Walt Disney Prods was granted a summary judgment in a suit involving allegations of plagiarism. Writer Charles Schneider filed the suit claiming that he submitted a story idea to the company in the form of a sound recording and that the defendant used his idea as a basis for the movie "Pete's Dragon". Schneider had asked for a minimum of $600,000 in damages.

68. Court holds author can't copyright historical ideas. *Publishers Weekly*, vol. 217, no. 15 (April 18, 1980), pp. 14, 16, 18.

The New York Court of Appeals has ruled that historical interpretations cannot be protected by copyright. In writing books on historical subjects, the opinion said, it is permissible to make "significant use of prior work" so long as the writer does not "bodily appropriate expression of another."

69. Court upholds cable TV decision. *The Hollywood Reporter*, vol. CCLXI, no. 18 (Apr. 16, 1980), p. 66.

The Federal Court of Appeals in Richmond, Va., upheld an FCC rule allowing cable television to air network programs that duplicate shows already being broadcast by a local station. The rule's implementation had been strongly opposed by local TV stations and broadcast groups. Other changes that the Commission is considering regarding its cable rules include the repeal of regulations limiting the number of distant TV stations that can be carried by a cable system and those that require blackout for syndicated programs.

70. CRAWFORD, TAD. Copyright for graphic design. *American Artist*, vol. 44, no. 455 (June 1980), pp. 74-79.

In this article, Tad Crawford explains why he believes copyright protection should be extended to graphic designs and

what it would mean for artists involved in advertising, publishing and graphic and design firms. He states that the Copyright Office policy toward graphic designs is still being decided but he points out that both the Association of American Publishers and the Authors League expressed fears that "copyright for graphic designs would result in many lawsuits between designers or between publishers who had purchased copyrights from designers." Crawford firmly believes, however, that copyright for graphic designs is no different from copyright for illustrations or for paintings.

71. CRT receives RIAA economic study; report highlights industry difficulty. *Record World*, vol. 36, no. 1708 (Apr. 19, 1980), p. 6.

The Recording Industry Assn. of America has submitted to the Copyright Royalty Tribunal an economic study of the recording industry. The report, which covers the period 1977 through 1979, was compiled by the Cambridge Research Institute for the Tribunal's mechanical royalty rate hearings. The report shows that the industry had a net sales loss of 11.5%; that the number of LP's that have to be sold to recover costs has doubled since 1972; and that 84% of all popular LP's failed to break even in 1979. The comprehensive analysis highlights recent economic difficulties as reflected in questionnaires submitted by companies representing 70.9 percent of 1979 industry sales.

72. DAVIDSON, MARION *and* MARTHA BLUE. A writer's guide to copyright. *The Writer* (Nov. 1979), pp. 18-22.

An article which discusses copyright, common law copyright, the work for hire rule, what can be copyrighted and when to copyright.

73. Editors forum. *Dance Magazine* (April 1980).

In a letter to the editors, a reader questions the licensing fees as applied to dance teachers. The editors state that reduced fee license will be retroactive to January 1979 if 5,000 teachers who are members of participating dance teacher organizations agree to the lower rate by July 1, 1980.

74. FIELD, EUNICE. 4 guilds urge revision of 1976 Copyright Act. *The Hollywood Reporter*, vol. CCLXI, no. 31 (May 5, 1980), p. 15.

Kay Peters of the Screen Actors Guild told the Democratic Party Platform Committee that the 1976 Copyright Act should

be revised to provide adequate payment for the creators of programs. Unless the private property rights of creative people in TV are protected, she said that "new production will dry up." Peters stated that she represented four Hollywood guilds that are in favor of legislation which would provide tax benefits for producers in all of the performing arts in America, government funding for the arts, and establishment of a Department of Cultural Affairs with Cabinet level status.

75. For the graphic arts in 1980: $68 billion; commercial sales: $20 billion. *Printing Impressions* (Mar. 1980).

The Commerce Department predicts that there will be a strong demand for United States printed products in 1980. This demand will push graphic arts industry receipts above $68 billion, a 10% gain over that estimated for 1979. The commercial printing volume will rise to approximately $20 billion, receipts of the U.S. book manufacturing industry should exceed $2.3 billion and receipts for the periodical publishing business are expected to reach $9.22 billion in 1980. Major factors accounting for this increase for the printing and publishing industry include higher levels of personal income and educational attainment, greater demand for printed advertising materials, and growth of U.S. business needs for a variety of printed products. Though the forecast for the industry as a whole is bright, one factor that will be particularly critical to book printers will be the removal of the manufacturing provision of the Copyright Act. Therefore, the Copyright Office is making an extensive study of what economic impact this will have on the industry.

76. French pirate raid. *Billboard*, vol. 92, no. 16 (Apr. 19, 1980), p. 83.

In running a routine check of local shops, the French copyright society SACEM discovered and subsequently confiscated 600 pirated cassettes from three locations in the town of Agen. It is believed that the tapes were imported from Holland and Hong Kong and authorities are hopeful of tracking their source.

77. F.Y.I. copyright law guidelines. *American Educator* (Winter 1979), pp. 16-17.

A discussion of the new copyright law as it applies to educators. The author states that teachers, even for use in the class-

room, should be very careful in reproducing materials. There are examples of single copying and multiple copies for classroom use. Definition of "brevity" as applied to poetry, prose, illustrations and special works are also included. In conclusion, the author lists examples of "prohibited" copying.

78. GANSBERG, ALAN L. Valente charges superstations could be end of free TV. *The Hollywood Reporter*, vol. CCLXI, no. 38 (May 14, 1980), p. 11.

The Caucus for Producers, Writers and Directors is sending four representatives to Washington, D.C. to talk with each FCC commissioner about retransmission consent and syndication exclusivity rules that regulate television broadcasts. The four intend to specifically push for retention of the present rules of syndication exclusivity and for the inclusion in the copyright law of "protection for program suppliers and commercial networks from cable and pay TV operators who make unauthorized rebroadcasts" of their product.

79. GOLD, RICHARD. Goody defense is allowed access to gov't documents/Prosecutors term Goody ploy a 'fishing expedition.' *Cash Box*, vol. XLI, no. 52 (May 10, 1980), pp. 7, 9, 38.

These two articles discuss the counterfeit-related case against Sam Goody, Inc. and two of its executives, George Levy and Samuel Stolon. Though both articles discuss the pre-trial hearing and the court's decision on the defense discovery requests, one focuses more on the defendant's contentions in support of the motion, while the other reports on the government's arguments against it. The discovery was granted, but in doing so, the court noted that no inference as to the admissibility of the materials was to be drawn from the ruling. Still pending is a defense motion to dismiss the indictment on the grounds of "prosecutorial misconduct" and impropriety in "the creation and maintenance of close relationships and affiliations between the FBI and segments of the recording industry," as well as in the "sting" operation that led to the indictments. The government has not yet submitted its response to this filing.

80. Graphic artists guild fights for artist's rights. *Artworkers News* (March 1980).

The Copyright Royalty Tribunal has recommended that

compulsory licensing of artwork be repealed. Compulsory licensing was opposed by both the Register of Copyrights and by the National Endowment for the Arts. Nondramatic literary works were removed from the amendment; but because visual artists' groups failed to form an alliance to oppose the inclusion of their works, the compulsory licensing provision for visual works became law. The Tribunal, in submitting a report to Congress on January 3, 1980 assessing how compulsory licensing had worked since its inception on June 8, 1978, recommended the repeal of the compulsory license as "an important step towards artistic freedom for the visual arts community."

81. GUETTEL, ALAN. CMRRA suit vs. Quality Records on GRT debt centers on 3d party. *Variety*, vol. 297, no. 3 (Nov. 21, 1979), p. 137.

The Canadian Musical Reproduction Rights Assn. and Chappell Music of Canada have filed a third-party class action suit against Quality Records, a Canadian record manufacturer. The suit involves some $500,000 in mechanical royalties owed to Canadian publishers by the now defunct GRT Records of Canada for copyrighted music contained on GRT record product that was pressed by the defendant. The main legal issues in the case concern third party liability, and the precedents in Canada are generally easier on the third party except in cases of gross negligence. Complicating the issue, however, is a recent Canadian Supreme Court decision ruling that the word "make" in reference to the manufacture of records implicated all parties involved in the physical creation of the product—thus there can be more than one manufacturer of a record.

82. HARRISON, ED. BMI & colleges in fees accord. *Billboard*, vol. 92, no. 13 (Mar. 29, 1980), pp. 3, 28.

BMI and educational institutions have completed negotiations on a new 3½-year music use license. Schools have a choice of either a full-time equivalent or a two-tier license. The full-time equivalent license calls for a 7-cent common head fee for the first two years which then escalates to 8½ cents for the third year. Licensing of college radio use is included in the full-time equivalent fee. The two-tier license calls for a common head fee of 5½ cents per full-time equivalent student for the first six months of 1980. The fee increases to 6 cents for the next two years, July 1,

1980 to June 30, 1982, and then to 7 cents for the year July 1, 1982 to June 30, 1983. The second tier of the license is a concert schedule based on seating capacity. There is also a special license designed for community and junior colleges with high enrollment but little music use, by which they are allowed to use BMI's music for a specific purpose.

83. HARRISON, ED. RSO claiming it can detect disks by counterfeiters. *Billboard*, vol. 92, no. 13 (Mar. 29, 1980), pp. 15, 116.

Beginning with the release of the "Bee Gees Greatest Hits" package, RSO Records implemented an additional chemical treatment process, invisible to the naked eye, that allows the company to readily detect counterfeit copies of its product. With this new detection system, the label claims that counterfeit records can be distinguished from legitimate product whether it be in-store, in racks or in returns. Although the method is not considered foolproof, RSO hopes that it will discourage counterfeiters away from its product.

84. HOLLAND, BILL. CRT digs in for 'long, hot summer.' *Record World*, vol. 36, no. 1712 (May 17, 1980), pp. 3, 44.

After one day of hearing testimony, Tom Brennan told *Record World* that he believes that the mechanical royalty rate proceedings will take longer than the six to eight weeks that have been scheduled by the Copyright Royalty Tribunal. The basic position of songwriters/publishers is that the rate should be increased, while the recording industry believes a rate hike is unwarranted. Officials, lawyers, witnesses and consultants for both factions have been attending the hearings and most of them have been armed with supportive briefs, studies, charts and graphs.

85. HOLLAND, BILL. CRT hearings begin; economic study is focus of discussion. *Record World*, vol. 37, no. 1714 (May 31, 1980), pp. 3, 42.

There was much discussion and argument at the Copyright Royalty Tribunal mechanical license royalty adjustment hearings about the study submitted by the National Music Publishers Assn. It was prepared by Robert R. Nathan Associates, Inc., a veteran economic consulting firm. The study concluded that (1) the present interim 2¾ cent mechanical royalty rate should be increased to 6% of the suggested retail list price of records; (2) that the 2

cent rate set by the 1909 Copyright Act is now only worth 1/10 of its original value; (3) that the additional 3/4 cent interim increase has been totally eroded due to inflation; and (4) that the 2 3/4 cent rate has not kept pace with the levels of compensation afforded musicians, arrangers and even industrial workers.

86. HOLLAND, BILL. CRT hearings, format change case are key issues in D.C. this spring. *Record World*, vol. 36, no 1709 (Apr. 19, 1980), pp. 3, 40.

There are several issues that are of importance to the record industry and broadcasters that hopefully will be decided in Washington this spring and summer. Among them are the mechanical royalty rate, radio station format changes and the sound recording performance rights bill, H.R. 997.

87. HOROWITZ, IS. CBS confronts licensing claims: ASCAP and BMI win in court. *Billboard*, vol. 92, no. 16 (Apr. 19, 1980), pp. 1, 19, 60.

In *CBS v. ASCAP/BMI*, the U.S. Court of Appeals has unanimously decided that blanket music licensing of network television does not violate antitrust laws. The Supreme Court had ordered the appellate court to make a determination of possible antitrust violations under the "rule of reason." On April 3, the Appeals Court issued its decision upholding all of the pertinent findings that had been made by the U.S. District Court in 1975 when it dismissed the CBS suit. The Court opined that a per-program license is always the alternative to the blanket license and that CBS could have sought performance licenses directly from individual copyright owners, rather than from the performing rights organizations, but never chose to do so. In rejecting plaintiff's claims of price fixing and restraint of trade, it stated that "CBS has failed to prove that the existence of the blanket license has restrained competition. Since the blanket license is not a per se unlawful arrangement, its restraining effect must be proved before liability can be found. When, after a full trial, such proof is lacking, the challenge to the blanket license is properly dismissed."

88. HOROWITZ, IS. Phone tipsters provide information for RIAA sleuths. *Billboard*, vol. 92, no. 14 (Apr. 5, 1980), pp. 3, 6.

Thanks to the toll-free antipiracy hotline, which is jointly funded by the Recording Industry Assn. of America and the

National Assn. of Recording Merchandisers, investigators have been receiving much useful information on the sale of illicit product. Some of the reports have been quite accurate, and while no raids have resulted as yet, some of the data uncovered have provided new leads and bits of evidence to reinforce ongoing cases. Most of the calls are from anonymous tipsters, and of those who agree to identify themselves, most are retailers. In other instances, the informants are admitted pirates and/or counterfeiters whose aim apparently is to lessen the competition.

89. HOROWITZ, IS. RIAA asks antiduping aid. *Billboard*, vol. 92, no. 13 (Mar. 29, 1980), pp. 1, 28.

Stanley Gortikov has announced the Recording Industry Assn. of America's intentions to solicit proposals from outside researchers for development of a method to curb home taping. He admits that this may be only a fishing expedition, but should a viable method be found and adopted by the industry, the reward could be considerable. The only alternative is to seek a compensatory levy on home taping equipment and/or blank tape. This kind of tax is being actively explored in Europe and is also gaining support in the U.S.

90. IANELLO, JOSEPH. First conviction under the new N.Y. statute finds Paul Winley guilty of piracy. *Record World*, vol. 36, no. 1711 (May 10, 1980), pp. 3, 40.

Paul Winley has become the first record manufacturer convicted under the New York State antipiracy statute. Winley was found guilty on eleven counts of manufacturing unauthorized sound recordings and eleven counts of selling unauthorized sound recordings. He faces fines of up to $10,000 and four years imprisonment. The case involved two gospel albums that Winley produced on his own label and sold in quantity to several retail stores, as well as to an undercover agent posing as a representative of an England-based record company. The records contained eleven tracks with songs belonging to CBS, Nashboro and Savoy Records.

91. IMAMURA, RICHARD. Counterfeit controversy tops issues at 22nd NARM confab: gift of music slogan, logo debuted amidst fanfare. *Cash Box*, vol. XLI, no. 47 (Apr. 5, 1980), pp. 7, 16, 17, 39.

At this year's National Assn. of Recording Merchandisers convention, counterfeiting dominated much of the discussions.

Neil Bogart talked about the problem in his keynote address and the RIAA's Stanley Gortikov delivered a speech lambasting those who sell counterfeit product, many of whom are admittedly record merchandisers. Both men indicated that record companies have been losing millions annually due to counterfeiting, not to mention the losses caused by home taping. The talks also focused on piracy prevention and methods for fighting the problem. At the conclusion of the piracy sessions, the NARM board of directors voted to establish a counterfeiting task force to work on procedures and controls for preventing the acquisition and marketing of pirated properties. Some of the other topics discussed at the convention were the organization's new slogan and logo for its "gift of music" compaign, the video market, the necessity for returns, and computer systems and bar coding for the retail industry.

92. IMIC will probe home tape crisis. *Billboard*, vol. 92, no. 15 (Apr. 12, 1980), pp. 1, 49.

An international panel of experts at the upcoming International Music Industry Conference will explore the impact of home taping on the music industry here and abroad. According to seminar chairman Mickey Kapp, the discussions will cover "views on home taping from various countries including England and West Germany, the effects in such countries of the home taping phenomenon and a profile of exactly who the home taper is." Two of the panelists are expected to briefly discuss figures recently published by the British Phonographic Industry indicating that home taping is responsible for an estimated sales loss of $400 million in the U.K. Other panel topics will include piracy, the state of the industry, future markets, prerecorded television, the publisher's role in artist development, parallel imports and conglomerates versus independents.

93. Injunction granted CBS vs. U.K. firm. *Billboard*, vol. 92, no. 16 (Apr. 19, 1980), p. 14.

Britain's High Court of Justice issued a permanent injunction against Dacrop Ltd., a British direct marketing company, and David Margulies, one of its directors, for copyright infringement. The suit, which was filed by CBS Inc., alleged that the defendants had infringed the U.K. copyright in more than sixty CBS sound recordings marketed in the U.S. in 1971 as part of a multi-record package entitled "120 Music Masterpieces" and "30 Piano Masterpieces." The court also ordered an accounting of profits against

Dacrop and payment of the profits and interest to CBS. Both defendants were ordered to pay court costs.

94. Judge dismisses plagiarism charge against Wiley chemistry text. *Publishers Weekly*, vol. 217, no. 19 (May 16, 1980), pp. 130, 131.

A federal judge has found that the author of an organic chemistry textbook published by John Wiley had not plagiarized an Allyn and Bacon text that had dominated the organic chemistry textbook market for many years. Both books involved in the action are introductory, college-level texts and both are titled "Organic Chemistry". Allyn and Bacon had claimed that there were "massive similarities" between the two texts and that Dr. Solomons "had failed to create his book through his own independent efforts." Judge Lasker noted that his decision turned on the credibility of Dr. Solomons, who testified for 22 days. Among the reasons Judge Lasker cited for believing the testimony of Dr. Solomons was "his comprehensive and impressive grasp of the subject of organic chemistry and his remarkable ability to articulate intelligibly the complex subject matter." The Judge added that "If his five-week testimony was fabricated, it must surely have been the greatest *tour de force* in chemical or educational history."

95. KAHN, HENRY. Home taping dubbed 'scapegoat'. *Billboard*, vol. 92, no. 16 (Apr. 19, 1980), p. 80.

In Paris, Robert Kaplan of the Syndicate des Industries Electroniques de Reproduction & d'Enregistrement (SIERE) recently expressed his views on a blank tape tax. He said that the tape manufacturing members of his organization would not take on the extra responsibility of being "tax collectors." He indicated that there are several key causes of damage to the record trade but strongly denied that home taping is one of them. He attributed the drop in sales to the overall economic crisis, the industry's inability to come up with a new music craze to replace the now dying disco, and escalating retail record prices. Record companies are experiencing "a sales fall of around 20%, after years of continuous expansion," he said; and the industry needs a "scapegoat." It is noteworthy to mention that the 1957 French copyright law permits copying for personal and family use, and there are constant references to this fact in all of the arguments and debates about the controversial blank tape levy.

96. Kastenmeier wants FCC to put a hold on deregulation of cable TV. *Broadcasting*, vol. 98, no. 12 (March 24, 1980), p. 25.

Rep. Robert Kastenmeier, chairman of the Subcommittee on Courts, Civil Liberties and the Administration of Justice, has requested that the FCC delay its proposed deregulation of the cable industry. In a letter to FCC Chairman Charles Ferris, Kastenmeier, whose subcommittee has been examining cable copyright questions, requested that the commission delay any action until the Copyright Royalty Tribunal (CRT) has concluded its review of copyright payments rates to see if they are keeping up with inflation. He said that the CRT was reviewing the statutory royalty structure for cable TV, and this proceeding will be critical in determining confidence in the Tribunal's ability to balance the interests of copyright owners and cable systems under the 1976 copyright law.

97. KIERNAN, LAURA. The tune of $10 million. *The Washington Post*, vol. 103, no. 148 (May 1, 1980), p. F9.

Judge E. Peterson is suing Walt Disney Productions for $10 million for alleged piracy of the song "Zip-a-Dee-Doo-Dah" from the Disney classic "Song of the South". Peterson alleges in the suit that he and another man wrote the song in 1939 but it was pirated by a "long-forgotten impresario" of a Washington theater chain. The promoter eventually "laundered and converted" the true authoship until it was sold to Walt Disney. Peterson says "the true author of this work . . . received neither material compensation nor the equally important public acclaim" for his effort.

98. KLEINFIELD, N. R. Songwriters seek royalty rise. *The New York Times*, vol. CXXIX, no. 44,560 (April 21, 1980), pp. D1, D3.

The author comments on the hearing being held by the Copyright Royalty Tribunal to determine the amount of royalties claimants should be paid. Songwriters argue that it is unfair that their royalties do not increase as record prices do, and they also argue that the state of songwriting, for most practitioners, is hardly a field that lends itself to frequent "Tahiti" vacations. To bolster its case, the trade group commissioned an economic study of songwriters. The study concluded, among other things, that "songwriting is an occupation which has a high degree of risk, a high degree of failure, low chance of success and, in general, miserly rewards . . ."

99. KOCH, WILLIAM H. Status of copyright in journal publishing. *Physics Today* (Oct. 1979) pp. 9-10.

In this comment adapted from an address presented at the annual meeting of the Council of Engineering and Scientific Society Executives in Washington, D.C. (July 1979), the author examines three areas related to copyright: compliance by publishers with the new copyright law; use of copyrighted works by librarians; and the "success" of the Copyright Clearance Center. Mr. Koch states that the CCC is now approaching 50% of the copying volume revenue to be self supporting. Later in his presentation he delves into areas of copyright protection that he believes are vague, for example, the copyright status of works done under federal contracts and grants.

100. KROLL, REBECCA. ILR issues. RQ, vol. 19, no. 3 (Spring 1980), p. 219.

The Subcommittee on Interlibrary Loan Records Summary, RASD Board, ALA, has prepared an interim report on the guidelines for summarizing data from interlibrary loan records before they are discarded after the mandatory three-year retention period specified in the CONTU Guidelines. The report indicates that the Subcommittee feels that the guidelines have not proved unworkable and that the value of the Interlibrary Loan record summary for purposes of collection development was questionable. The Subcommittee has until the New York City conference to submit suggestions for use in summarizing the interlibrary loan information, with a view toward developing a standardized format for participating libraries. The Interlibrary Loan Committee members who attended a copyright hearing on Saturday, January 19, noted that some authors objected to the five-year rule as limiting dissemination of their work. Some of the medical libraries that were represented expressed the feeling that the guidelines should be left unchanged provided they continue to work reasonably well, but some of the publishers were dissatisfied with the first two years under the new law and questioned the efficacy of the guidelines.

101. Lester sentenced for copyright infringements. *The Hollywood Reporter*, vol. CCLXI, no. 20 (Apr. 18, 1980), p. 3.

On March 3, 1980, Hollis Roy Lester, d/b/a/ Darr TV & Appliance Center, appeared before the U.S. District Court for the Northern District of Texas and pleaded guilty to selling unauthorized copies of prerecorded cassettes of "National Lampoon's Animal House" and "Star Wars." On April 16, the Court sen-

tenced Lester to six months in jail, fined him $5,000 and placed him on probation for 9½ years as a result of the guilty plea. Reportedly, this sentence was one of the severest recently imposed by the federal courts for copyright infringement.

102. LICHTMAN, IRV. Bar Assn. is drafting recorder & tape tax. *Billboard*, vol. 92, no. 19 (May 10, 1980), pp. 1, 86.

The American Bar Assn. is in the process of drafting an outline for a tape tax law. Interested persons are invited to submit suggestions to Elizabeth Granville, chairwoman of the ABA's Subcommittee on Legislation of Motion Pictures, Television and Radio. The draft will propose a tax on audio and home video blank tape and recorders. ABA sponsorship and drafting of this proposal is regarded as a forceful element in favor of its enactment. When completed, the outline will be submitted to the new Register of Copyrights.

103. LICHTMAN, IRV. C'right recoveries: hundreds of writers, estates utilizing new retrieval power. *Billboard*, vol. 92, no. 13 (Mar. 29, 1980), p. 3.

Through private agents and/or the American Guild of Authors and Composers, many music writers or their estates are taking advantage of the extended renewal provisions of the 1976 Copyright Act. Under those provisions, a writer can regain for an additional nineteen years a renewal copyright that he has transferred or licensed to a music publisher. There are certain procedures that must be followed to effect the recovery, and the agent will not only perform the requirements but will work out new publishing deals for clients. The AGAC will carry out the termination procedures and administer the recaptured renewal copyright, but it will not negotiate publishing arrangements. Reportedly, renegotiated music publishing deals after recovery can net a composer or lyricist a bonus of up to "six times earnings over a previous five-year period."

104. Mabon copyright suit. *Variety*, vol. 297, no. 3 (Nov. 21, 1979), p. 142.

Songwriter Willie Mabon filed suit against Atlantic Records and Republic Music for copyright infringement. Plaintiff is seeking $1 per infringing copy and $5,000 for each infringement of the song "I Don't Know" prior to Jan. 1, 1978 and $50,000 for

each infringement after that date, which is the effective date of the 1976 Copyright Act.

105. Macau still piracy haunt. *Billboard*, vol. 92, no. 14 (April 5, 1980), p. 76.

The International Federation of Producers of Phonograms and Videograms (IFPI) has admitted that negotiations to curb piracy in the Portuguese colony of Macau have not been very successful. Portugal does not have a copyright law, making what is considered piracy in Hong Kong perfectly legal in Macau. IFPI was hoping that some kind of cooperative antipiracy effort could be worked out because of the colony's proximity to Hong Kong. Hong Kong's strict enforcement of offenders has caused many illegal operators to move their businesses to Macau, but evidently they have been attempting to distribute their illicit product in Hong Kong. IFPI indicated, however, that most of the bogus merchandise has been detected and "The situation is under control."

106. MARTINEZ, MICHAEL. Summer amends suit, asks for rights to all her masters. *Cash Box*, vol. XLI, no. 51 (May 3, 1980), pp. 8, 44.

In January of this year, Donna Summer filed suit against Casablanca Records and Neil Bogart, her former personal manager. The suit sought to terminate the singer's contracts with the defendants on the grounds that she was unduly influenced and the contracts were fraudulently entered into. The original complaint, which asked that all master recordings and other recorded material be transferred to plaintiff and that the defendant company be enjoined from further sale of product containing Summer's performances, has been amended. The amended complaint includes a motion to have all the copyrights and physical possession of all recorded material and masters transferred to a constructive trust, and asks that the defendants be required to "reconvey to plaintiff possession of such physical property and all rights therein and in and to said copyrights." Additionally, Summer notified Casablanca that she was evoking the "key man" clause of her contract due to Bogart's resignation as the label's president. Apparently, this provision allows the singer to terminate her contract because Bogart ceased being an executive officer of the company.

107. MCMASTERS, THERESA. Copyright owners press Royalty Tribunal

re cable. *The Hollywood Reporter*, vol. CCLXI, no. 44 (May 22, 1980), p. 14.

Copyright owners have joined forces to ask the Copyright Royalty Tribunal to adopt a new mechanism to guarantee a compulsory license fee on parity with that "provided in the rate schedule approved in the 1976 Copyright Act." They say that the rate has not kept up with inflation and cable technology even though the Tribunal was given the "latitude and the discretion by Congress" to adjust the rate to "guarantee a constant level of payments by cable systems" that use their product.

108. McMASTERS, THERESA. MPAA vetoes proposal on copyr't fees distribution. *The Hollywood Reporter*, vol. CCLXI, no. 3 (Mar. 26, 1980), p. 26.

Lawyers for program suppliers, broadcasters, sports organizations, music groups and public broadcasters recently submitted a proposal to the Copyright Royalty Tribunal (CRT) recommending a distribution formula for cable copyright fees. Under the formula, suppliers would get 66% of the collections; broadcasters, 13%; sports, 12%; music, 5%; and public broadcasters, 4%. The Motion Picture Assn. of America refused to support the proposal, however, because it felt that the plan had just about no chance of survival after details were leaked to the press before individual firms had seen it or had a chance to ratify it. After rejecting the proposal, the Association filed a royalty claim of its own with the Tribunal seeking 84% of the fees to be paid to program suppliers as a group. Resolution of the fee distribution question will again rest with the CRT, which will probably mean a lengthy and costly proceeding.

109. McMASTERS, THERESA. NAB's Wasilewski asks presidential hopefuls re policies. *The Hollywood Reporter*, vol. CCLXI, no. 6 (Mar. 31, 1980), pp. 1, 21.

National Assn. of Broadcasters president Vincent Wasilewski sent letters to the six presidential candidates asking what policies they intend to adopt for the broadcasting industry. In identical letters, Wasilewski asked what each candidate planned to do in the area of radio deregulation and what their attitudes and possible policy aims were regarding increasing the stability of broadcast licenses. Other questions posed in the letter concerned such matters as Comsat's proposed direct satellite-to-home broadcasts,

the role of special interest groups in being watchdogs over the industry and the proposed performers' royalty.

110. MCMASTERS, THERESA. Valenti blasts low fees cable pays; seeks copyr't act revision. *The Hollywood Reporter*, vol. CCLXI, no. 3 (Mar. 26, 1980), pp. 1, 4.

Motion Picture Assn. of America president Jack Valenti no longer sees retransmission consent as a viable option for compensating program suppliers for what he terms outrageously low cable copyright fees. He now believes that to resolve the problem Congress will have to amend the Copyright Act to mandate syndicated exclusivity, to make all common carriers (including satellite operators who retransmit broadcast signals to cable systems) fully liable for copyright use, and to give the Copyright Royalty Tribunal more power. Though many members of Congress share Valenti's view, there is little hope that the copyright law will be amended again in the near future.

111. MCMASTERS, THERESA. Valenti pleads for compulsory license to pick up signals. *The Hollywood Reporter*, vol. CCLXI, no. 13 (Apr. 9, 1980), pp. 1, 13.

Jack Valenti of the Motion Picture Assn. of America told the Copyright Royalty Tribunal that he supports the claim that it received from program suppliers seeking a "80% plus" share of the cable royalty fees collected in 1978. He recommended that the Tribunal adopt a formula "for distribution based on how much time each of the competing claimants occupied daily on cable programming and on the fee generated." He said that it is becoming increasingly difficult for programmers to recover their investments in network series through syndication due to increasing competition from satellite transmission of programs by cable systems. "If there was no compulsory license," he said, "we'd negotiate in the various markets" and "wouldn't have the problem."

112. Moon church and MIT press settle copyright dispute. *Publishers Weekly*, vol. 217, no. 21 (May 30, 1980), pp. 14, 16.

The copyright infringement suit brought by the International Cultural Foundation, Inc., an affiliate of the Rev. Sun Myung Moon's Unification Church, against the MIT Press and editor Irving L. Horowitz has been settled out of court. The

Foundation had challenged the inclusion of a speech made by Moon in "Science, Sin and Scholarship: The Politics of Reverend Moon and the Unification Church" published by MIT in 1978. Under the terms of the settlement, the Foundation agreed to grant to the Press and to Horowitz the right to reproduce and distribute the speech without royalty or restriction.

113. New license for copyrighted music will reduce red tape but raise prices. *Chronicle of Higher Education* (Mar. 31, 1980).

BMI has completed negotiations on a new three-year music license for colleges and universities. An educational institution may use one of the two model agreements that were developed or negotiate its own. The first model is a two-tier plan "that combines a per student charge with an additional fee for each concert for which the cost of the entertainment is $1400 or more. The first charge will continue at the present annual rate of 5½ cents per full-time student until June 30, 1983. The per-concert fee will range from $15 to $300, depending on seating capacity." The second model is a one-tier plan that charges a "flat student fee of 7 cents per full-time student through June 30, 1980, and 8½ cents per student in each of the two following years." Institutions that have very little music use may negotiate a per-use license on each occasion when music is used on their campuses.

114. Pay damages over bootlegs. *Billboard*, vol. 92, no. 13 (Mar. 29, 1980), p. 106.

The British Photographic Industry (BPI) was awarded $22,000 in damages and costs by the High Court in a case against John and Christine Bingham, the directors of Roquet Rotary Holdings, Ltd. The company was accused of offering for sale by mail order one of the biggest catalogs of bootleg albums found in the United Kingdom. The Binghams gave an undertaking in court that their bootleg activities against BPI members would cease immediately.

115. Personalities. *The Washington Post*, vol. 103, no. 119 (April 2, 1980), p. B2.

The estate of the Rev. Dr. Martin Luther King Jr. has filed a suit charging two New York City firms with copyright infringement for unauthorized recordings of speeches by the late civil rights leader. Dr. King's widow, Coretta Scott King, who administers the King estate, the Motown Records filed the suit in Atlanta

charging the Daydream Productions Inc. and Black Gospel Collections Inc. with producing, recording, and selling sermons and speeches by Dr. King after being denied permission to use the works.

116. PIERSON, DAVID. Mustard artists. *Play Meter* (March, 1980), pp. 43-45.

The 1976 Copyright Act includes a provision which requires jukebox operators to pay a copyright fee of $8 per machine as royalty compensation to songwriters and publishers for the use of their songs. It is pointed out that this royalty is in addition to the "mechanical royalty" that is built into the retail record price that everyone pays. The argument that was used to convince Congress to include a compulsory license provision in the law was based on the theory that it was unfair for a "jukebox operator who is going to use his record for profit to pay the same royalty as someone who buys a copy of the record for his home use." Using the example of a mustard producer that claims restaurants should pay a higher price for mustard because they are using the product for profit, the writer explains how other industries could use this same reasoning to gain additional profits for themselves. It is supposed that songwriters would argue that what they do is art and that they need extra protection for their songs because of modern technology. Mr. Pierson then goes on to discuss Article One of the Constitution, which charges Congress with the responsibility of promoting "the progress of science and useful arts . . .", the Copyright Act, and the question "What is art?" He devotes several paragraphs to arguments that could have been raised to challenge the premise that songwriters today contribute something special to American culture.

117. Pirating equipment seized by FBI. *Record World*, vol. 36, no. 1711 (May 10, 1980), p. 13.

In a raid on the International Record Shop in Dearborn, Mich., FBI agents with the help of local authorities confiscated more than $10 million worth of raw and finished materials and equipment that allegedly was used for pirating sound recordings. Among the items seized were duplicators, mixers, amplifiers, blank eight-track and cassette tapes, blank pressure-sensitive labels and approximately 300 Arabic LPs used as masters. All the raw materials were believed to have been purchased from Tape Tronics.

118. Publishers hail court ruling on Gnomon copyright infringement case. *LJ/SLJ Hotline*, vol. IX, no. 16 (Apr. 21, 1980), p. 4.

As a result of Basic Books' victory in its copyright infringement suit against the Gnomon Corp., the Assn. of American Publishers (AAP) says that it will increase the intensity of its monitoring of the copying activities of commercial firms and not-for-profit institutions. Gnomon, a commercial copying service, had been making and selling unauthorized multiple "reproductions of substantial portions of copyrighted books and periodicals." According to the AAP, the special libraries of some for-profit corporations are also guilty of illegal copying and have not been using the Association's Copyright Clearance Center. Therefore, "it is expected that lawsuits may have to be brought unless reasonable compliance by these for-profit firms is achieved."

119. Publishers sue jukebox owner. *Billboard*, vol. 92, no. 16 (Apr. 19, 1980), p. 89.

Nine publishers have filed a copyright infringement suit against Unomac Service Inc., a Santa Monica juke route operator, and its owner, Norris Hillstad. Defendants are accused of not notifying the Copyright Office of the number of jukeboxes they are operating and of failing to obtain compulsory licenses for the machines as set out in the Copyright Act. The suit asks for an injunction against the defendants and "not more than $10,000 and not less than $250,000 damages for each" violation.

120. The quarreling over copyright. *Broadcasting*, vol. 98, no. 21 (May 28, 1980), pp. 64, 65.

Rep. Robert Kastenmeier, chairman of the House Subcommittee on Courts, Civil Liberties and the Administration of Justice, told the cable television operators at the NCTA annual meeting that he had asked the FCC to hold off on proposals to repeal the distant signal and syndicated exclusivity rules until the Copyright Royalty Tribunal completed a review of the rates charged cable television operators under their compulsory licenses. Kastenmeier said adoption of the Commission's proposals might be construed as altering existing conditions to such an extent as to require a change in the copyright law. He said broadcasting, copyright owners and professional sports interests feel they have been disadvantaged by developments since the act was passed—the success of Ted Turner's satellite-aided superstation concept, for instance.

121. RAINES, HOWELL. Let us now revisit famous folks. *The New York Times Magazine* (May 25, 1980), pp. 38-46.

A look, 44 years later, at the sharecropper children who were the subjects of the 1941 book "Let Us Now Praise Famous Men" compiled by the writer-photographer team of James Agee and Walker Evans. The article points out the question of the right of privacy and royalties. None of the subjects was paid although a single Walker Evans photograph today is worth up to $4,000.

122. RIAA, NMPA, sponsor home taping study. *Record World*, vol. 37, no. 1715 (June 7, 1980), pp. 3, 60.

A recording industry survey of home taping behavior is being co-sponsored by the Recording Industry Assn. of America and the National Music Publishers Assn. The survey, which will be conducted by National Analysts and analyzed by Attitude and Behavior Research Inc., will involve a sampling of more than 2300 people in the U.S. This is the second such study jointly sponsored by the RIAA and the NMPA.

123. Rights holders agree on one thing: cable isn't paying enough. *Broadcasting*, vol. 98, no. 21 (May 28, 1980), pp. 67, 68.

In a joint filing with the Copyright Royalty Tribunal, broadcasters, music licensing groups, sports interests and program producers argued that basic cable rates have not kept up with the rate of inflation—meaning that lower cable royalty payments, which are computed on the basis of gross subscribers revenues, are being collected than should be. A major problem, the claimants added, is that cable companies often have free service tiers, which means that no royalty payments are required. "The law requires copyright owners to be compensated even when cable operators give away their programs or provide them for a very modest charge as a 'loss leader' ". To correct the situation, the claimants suggested that the tribunal adjust the revenue basis, requiring cable systems to compute future royalty payments on the real constant dollar value of their 1976 subscriber charge, with current figures moving up in proportion to the consumer price index.

124. RITZER, DERI. Rep Railsback has no answers to copyr't issues. *The Hollywood Reporter*, vol. CCLXI, no. 13 (May 5, 1980), pp. 1, 13.

The Motion Picture Assn. of America is sponsoring a continuing Motion Picture and TV Assembly series. Congressman

Tom Railsback was the guest speaker at Part VI in the series. His address, "Copyright Legislation with Cable TV," pointed out the issues in the motion picture/TV industries vs. FCC vs. cable TV industry conflicts, but offered no viable solutions. He mentioned that the FCC has been asked to postpone cable deregulation pending a copyright study. If the FCC denies the request and moves its distant signal, rate and syndication exclusivity rules, the Congressman indicated that Congress will be forced to enact laws to regulate the cable TV industry. In the meantime, he urged concerned individuals to forge a "coalition of people who know what's going on and who have the power to do something about it."

125. ROBINSON, RUTH. FBI seeks stiffer piracy penalties. *The Hollywood Reporter*, vol. CCLXI, no. 29 (May 1, 1980), pp. 1, 25.

The FBI is trying to get the law revised to make counterfeiting and piracy of prerecorded music a felony. Currently these violations are misdemeanors and convicted offenders are usually given a small fine and a short jail term or suspended sentence. The Bureau, with the cooperation of such organizations as the Recording Industry Assn. of America, has investigated and raided many pirate operations, but the number of recent convictions indicates that the illegal activity is still increasing.

126. ROBINSON, RUTH. Music arrangers file statement regarding royalties. *The Hollywood Reporter*, vol. CCLXI, no. 12 (Apr. 8, 1980), p. 40.

In January, 1980, the American Society of Music Arrangers petitioned the Copyright Royalty Tribunal (CRT) to create a separate mechanical royalty for arrangers. The Recording Industry Assn. of America, the National Music Publishers Assn. and the American Guild of Authors and Composers strongly opposed the petition, arguing that the Tribunal lacked authority to establish a copyright royalty for arrangers on prerecorded records and tapes. Harris Tulchin recently filed a statement with the CRT on behalf of the arrangers' petition. The statement asserts that "the Tribunal has exclusive jurisdiction to conduct hearings regarding the adjustment of compulsory licenses royalty rates under the congressional mandate; the Tribunal was ordered to hear all issues raised not only by copyright owners but by all interested parties; and that foreign regulations governing the same matters do not require consent of the original copyright owner for the filing of the arranging copyright to occur." Tulchin's filing also

requested that the CRT hold hearings to increase the compulsory license royalty and pay any such additional amounts to arrangers and asked that these hearings be held in Los Angeles.

127. ROBINSON, RUTH. RIAA report on royalty increases will be submitted. *The Hollywood Reporter*, vol. CCLXI, no. 26 (Apr. 28, 1980), pp. 1, 13.

The report that the Recording Industry Assn. of America prepared for the Copyright Royalty Tribunal's hearing on the royalty rate contains information showing that the music industry's net losses in 1979 were in excess of 11%. It also includes information dealing with the rising costs of record production and promotion, the increased lack of opportunity for new artists to succeed and record companies' growing hesitancy to invest in new artists.

128. RUDELL, MICHAEL I. Entertainment law: haunting Lugosi ruling. *New York Law Journal*, vol. 183, no. 3 (Feb. 19, 1980), pp. 1, 2.

This is an in-depth discussion of the Lugosi heirs' suit challenging Universal Pictures' right to exploit the Count Dracula character, which the late Bela Lugosi portrayed under a 1930 motion picture contract with the studio. The trial court concluded that Lugosi, during his lifetime, had a protectible property right in his facial characteristics and the individual manner of his appearance as Count Dracula, and that right survived his death. The Court of Appeals reversed the lower court's decision, holding that the right to exploit one's name and likeness is personal to the artist and must be exercised, if at all, by him during his lifetime. The California Supreme Court agreed with the appellate decision and adopted it as its own. [*See Lugosi v. Universal Pictures*, 5 Med. L. Rptr. 2185 (Cal. Sup. Ct. Dec. 3, 1979)].

129. RUDELL, MICHAEL I. Entertainment law: 'Scarlett Fever' and fair use. *New York Law Journal*, vol. 183, no. 69 (Apr. 9, 1980), pp. 1, 2.

Mr. Rudell discusses a copyright infringement suit involving the novel and film "Gone With The Wind." The defendants wrote and produced a play entitled "Scarlett Fever," which was a play based on the plaintiffs' copyrighted works. They admitted copying the film/novel, but argued that their play was a parody, and, therefore, protected under fair use. The court rejected the ar-

gument, concluding that "Scarlett" was neither a parody nor a satire with respect to fair use protection, and further that even if it were, it would not be protected because it copies more of "Gone With The Wind" than is allowed. The court also concluded that the defendants' play did not warrant fair use protection because it had the same function as the plaintiffs' works and that was to entertain. A parody must do more than entertain; it must "also make some critical comment or statement about the original work which reflects the original perspective of the parodist, thereby giving the parody social value beyond its entertainment function." Since the function of the two works was identical, the court found that "Scarlett Fever" was likely to harm the potential market for or value of the derivative use of "Gone With The Wind" in the form of a theatrical adaptation. [*See Metro-Goldwyn-Meyer, Inc. v. Showcase Atlanta Productions, Inc.*, 479 F. Supp. 351 (N.D. Ga., Oct. 12, 1979)].

130. SACKS, LEO. Suffolk county, N.Y. raids net pirated lps, recording equipment valued at $12 million. *Cash Box*, vol. XLI, no. 46 (Mar. 29, 1980), pp. 7, 20.

On March 18 and 19, Suffolk County (N.Y.) police confiscated $12 million worth of sound recording equipment and pirated albums in raids on M&R Records. Authorities were alerted to the operation, which was housed in buildings in Wyandanch and Deer Park, Long Island, by the RIAA's antipiracy unit. Michael Rascio and Edmund Chaparo were arrested in the raids and charged with manufacturing sound recordings without authorization. Reportedly, M&R was the largest manufacturer of counterfeit albums in the northeast.

131. SAMPSON, JIM. German, Belgian police crack counterfeit ring. *Record World*, vol. 37, no. 1715 (June 7, 1980), pp. 3, 60.

Through the cooperative efforts of German and Belgian tax, customs and police authorities, raids on a network of cassette counterfeiters were successfully carried out. The offices of Decap Sound in Turnhout, Belgium were raided, three men arrested and 6,000 illegally manufactured cassettes seized on May 9th. A subsequent raid on STV Seiberth Tonraegervertrieb in Wuerseln, Germany netted another 13,500 counterfeit cassettes. The final phase of the crackdown concluded with the shutdown of a litho plant, a printing press and several small tape duplication facilities by Belgian police. This was the third major success in three years for Germany's anti-piracy fighters.

132. SAMPSON, JIM. Germany pub group backs anti-piracy. *Record World*, vol. 36, no. 1711 (May 10, 1980), pp. 3, 40.

The German Music Publishers Assn. has adopted an anti-piracy resolution which calls for a ban on the photocopying of sheet music and supports moves to levy a royalty on the sale of blank tape. The resolution will be sent to the Legal Committee of Germany's federal parliament. An omnibus revision of the German copyright law is also under consideration. The Association voted to oppose a proposed artist insurance pension scheme that is being developed in Bonn, however. As drafted, the law would impose an 8% tax on music royalty collections in Germany, for both domestic and foreign copyrights. It was concluded that very few artists would be helped by the new pension plan and that the administrative costs could be exorbitant.

133. Shriners & BMI sign. *Billboard*, vol. 92, no. 13 (Mar. 29, 1980).

BMI and the Shriners have completed negotiations of a music use license. Under the terms of the license, a flat fee will be paid retroactive from July 1979 through June 1981, with automatic renewals. The agreement, which is the first ever reached with a fraternal organization, will cover all 170 of the Shriners' temples throughout the U.S.

134. SILVERS, ED. Sounding a standard alarm. *Billboard*, vol. 92, no. 13 (Mar. 29, 1980).

The 1976 Copyright Act allows authors to recapture for nineteen years copyrights that they have transferred or licensed out to others. In the case of musical works, the transferees or licensees are usually music publishing companies. These companies are often well-established and have broad access to widely exploit the works in television shows and in motion pictures produced by associated companies. Therefore, they can and have in the past been able to offer copyright owners a substantial amount of royalty income. Many of the authors and composers who have already taken advantage of the extended renewal termination provisions of the Act decided to make licensing arrangements with various new companies that were not full-line publishing houses. Consequently, the royalty income that they had depended on for so many years dropped tremendously. To prevent this from happening to other copyright proprietors, Ed Silvers warns them to make sure that any new association has the proper performance outlets before entering into a licensing agreement. Otherwise, they may permanently lose a reliable source of income.

135. SIPPEL, JOHN. Blue Gem suing vocalist, Dreamland, RSO label. *Billboard*, vol. 92, no. 16 (Apr. 19, 1980), p. 16.

Blue Gem Music filed a suit against Shandra Sinnamon and others seeking to enjoin their use of nine songs. The tunes were written by Sinnamon and published by the plaintiff in an upcoming album. The complaint claims that the songs were copyrighted on March 11, 1980 by the plaintiff, that defendant Sinnamon was an employee for hire of Blue Gem Music, and that the defendants illegally recorded the songs. The suit asks $50,000 in damages for each tune. Prior to this federal suit, Sinnamon had a breach of contract suit pending in Superior Court against McKay Productions, Blue Gem and others and, subsequently, has filed a labor complaint against the two companies with the California Labor Commission. In the breach of contract suit, Sinnamon is asking $1 million in damages for defendant's failure to pay her according to the union scale and for their nonobservance of the recording, accounting and payment obligations of the contract. She also claims that the defendants hampered her career by telling third parties that she was under exclusive contract to them.

136. SUTHERLAND, SAM. Motown unveils new counterfeit-detecting product ID process. *Record World*, vol. 37, no. 1713 (May 24, 1980), pp. 3, 71.

Motown has announced its implementation of a new product identification process designed to prevent the counterfeiting of records and tapes. The system, which was developed by the Owner Protection Company (OPROC), utilizes an "elaborate marriage of data processing gear and special electronic devices" as well as a "super secret" coding. Although no detailed description of the system was disclosed, one label executive hailed it as "100% effective." In addition to its antipiracy features, the OPROC process is convertible once it is in use so that it can be utilized for such things as inventory control and research.

BULLETIN

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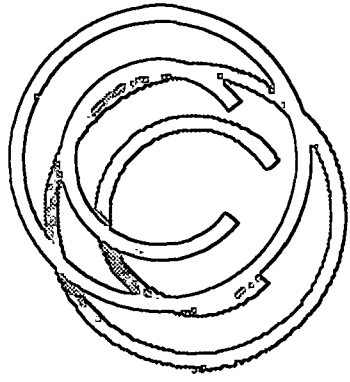

Published at

NEW YORK UNIVERSITY LAW CENTER

VOL. 28, No. 2 DECEMBER, 1980

Published at New York University Law Center, 40 Washington St. South, New York, N.Y. 10012. Printed and distributed by Fred B. Rothman & Co., 10368 West Centennial Road, Littleton, Colorado 80127.
ISSN 0010-8642

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THE BULLETIN of The Copyright Society of the U.S.A. is published 6 times a year by The Society at the Law Center of New York University, 40 Washington Square South, New York, New York 10012; David Goldberg, *President*; Richard Dannay and Alan J. Hartnick,, *Vice Presidents*; Edward M. Cramer, *Treasurer*; Eugene H. Winick, *Secretary*; Milton M. Rosenbloom, *Assistant Treasurer*; Jerold L. Couture, *Assistant Secretary*.

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CITE: 28 BULL. COPR. SOC'Y, page no., Item . . . (1980).

PART I

ARTICLES

137. LIMITATIONS ON THE RIGHT OF PUBLICITY*

By STEVEN J. HOFFMAN**

INTRODUCTION

In 1954, Melville Nimmer wrote a seminal article[1] that did for the right of publicity what Warren and Brandeis did sixty-four years earlier for the right of privacy.[2] Like Warren and Brandeis before him, Nimmer described a wrong involving unconsented use of a person's identity, demonstrated the inadequacy of the existing remedies, and advocated judicial recognition of a new right specifically tailored to remedy the wrong. Describing the scope of the then-nascent right, he remarked: "It is not possible to set forth here in any detail the necessary limitations on the right of publicity which only the unhurried occurrence of actual cases will clearly establish."[3] Now, twenty-six years later, the time is ripe for a thorough examination of the "necessary limitations."

* An earlier version of this article was awarded First Prize in the 1980 ASCAP Nathan Burkan Competition at New York University School of Law. The topic developed out of an interest sparked by the Tenth Donald C. Brace Memorial Lecture on the right of publicity delivered by Harriet F. Pilpel. *See* 27 BULL. COPR. SOC'Y 249, Item 485 (1980).

** The author was a Walter J. Derenberg Fellow in copyright at New York University School of Law. He is presently an associate in the law firm of Arnold & Porter, Washington, D.C.

[1] Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROB. 203 (1954).

[2] *See* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Said to be the most cited law review article of all time, the article led to judicial and legislative recognition of the right of privacy. Similarly, Nimmer's article spurred recognition of the right of publicity and is frequently cited in the publicity case law. Prior to Nimmer's article, a few courts had implicitly or explicitly recognized the need to protect the proprietary interest of celebrities in their names and likenesses, *see* cases cited in Nimmer, *supra* note 1, at 218-21, but only one—Haelan Laboratories v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953)—had explicitly recognized a cause of action under the "right of publicity" rubric.

[3] Nimmer, *supra* note 1, at 216.

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While the right of publicity responds to the needs of the celebrities it protects, and in doing so serves valid social goals, countervailing interests—those of other individuals and of society—mandate cautious enforcement of the right, less it impact too adversely on free expression, free enterprise, and federal supremacy in the area of copyright. One man's right is another man's restraint, and to set levels of protection in the intellectual property and unfair competition fields only in response to the needs of one group (such as celebrities) distorts the function of these laws, whose ultimate goals are to encourage creative endeavors and to promote competition.[4]

This article will first discuss the scope of the right of publicity. It will then analyze the individual and societal interests served by the right of publicity, and the individual and societal interests with which it conflicts. Finally, it will propose two legal mechanisms through which the competing individual and social interests can be accommodated: a durational limit on the right—that is, its expiration upon death of the celebrity—and a more general, equitable limitation loosely adapted from the copyright doctrine of fair use. If and only if countervailing policy considerations are incorporated into its substantive scope can the right of publicity peacefully coexist with, and be enforced consistently with, other legal rights and social policies.

I. SCOPE OF THE RIGHT

The right of publicity protects against the unauthorized commercial appropriation of a person's name, likeness, achievements, or characteristics. It is more accurate to think of it as a *sui generis* mixture of personal rights, property rights, and rights under the law of unfair competition than to attempt, Proscrustean-like, to fit it precisely into one of those categories.

As generally conceived, the right of publicity attaches only to those persons who as a matter of social custom and personal expectation consciously seek pecuniary reward from the exploitation of the publicity value of their names and likenesses. This expectation of benefit may be presumed from their status alone or evidenced by contractual agreements to exploit their fame. Although one need not be a full-fledged

[4] *See* U.S. Const., art. I, § 8 (purpose of copyright and patent laws is to "promote the Progress of Science and useful Arts"); Zacchini v. Scripps-Howard Broadcasting Co. 433 U.S. 562, 576-77 (1977) (purpose of right of publicity, like that of patent and copyright laws, is to encourage the production of works that benefit the public); S. OPPENHEIM & G. WESTON, UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION 3 (3d ed. 1974) (purpose of law of unfair competition is to promote competition by weeding out practices that interfere with competition on the merits).

celebrity to assert publicity rights—a professional model's face and body, for example, may have publicity value even though the model's name is unknown to the public—nearly all right of publicity plaintiffs have been persons who have consciously sought and achieved some degree of celebrity status in the broadly defined entertainment field: singers,[5] actors,[6] authors,[7] professional athletes,[8] and the like.

Thus, the classically conceived right of publicity is intended to meet "the needs of Hollywood and Broadway."[9] Commercially valuable celebrity status, however, is nowadays hardly limited to stars of screen and stage.[10] If, as suggested by some, the right of publicity arises whenever a person enters into a contract authorizing use of his name in connection with his works,[11] then scientists, elected officials, survivors of major catastrophes, and notorious criminals who enter into licensing arrangements in connection with books they have written also possess rights of publicity. Even if, as suggested by others, publicity rights do not arise unless exercised independently of the work for which the person is known,[12] any person achieving fame in any walk of life could obtain a right of publicity by licensing the use of his name or likeness in connection with any collateral product. His decision to exploit commercially the public's interest in his activities would give rise to a right to prevent others from doing so. Furthermore, his right of publicity would be much wider ranging than the scope of the specific licensing contract: once an exploitation contract has been entered into, the publicity right (as distinct from rights under the contract) attaches to the licensor's name and likeness itself.

Therefore, use of the term "celebrity"[13] in this article is not intended

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[5] *See, e.g.*, Memphis Dev. Foundation v. Factors, Etc., Inc., 616 F.2d 956 (6th Cir. 1980) (Elvis Presley).

[6] *See, e.g.*, Guglielmi v. Spelling-Goldberg Prod., 25 Cal. 3rd 860, 603 P.3d 454, 160 Cal. Rptr. 352 (1979) (Rudolph Valentino).

[7] *See, e.g.*, Hicks v. Casablanca Records, 464 F. Supp. 426 (S.D.N.Y. 1978) (Agatha Christie).

[8] *See, e.g.*, Cepeda v. Swift & Co., 415 F.2d 1205 (8th Cir. 1969) (Orlando Cepeda).

[9] Nimmer, *supra* note 1, at 203.

[10] *Cf.* Memphis Dev. Foundation v. Factors, 616 F.2d 956, 959 (6th Cir. 1980) (asking the rhetorical question, "Does the right [of publicity] apply to elected officials and military heroes . . . as well as to movie stars, singers, and athletes?"). One social commentator has defined a celebrity as "anyone *People* [Magazine] writes about." N. EPHRON, SCRIBBLE SCRIBBLE 15 (1979).

[11] *See, e.g.*, Hicks v. Casablanca Records, 464 F. Supp. 426, 429-30 (S.D.N.Y. 1978).

[12] *See, e.g.*, *id.* at 429 n.6 (defendants' position).

[13] Because the statuses of "celebrity" for right of publicity purposes and "public figure" for defamation purposes are not coextensive, use of the latter term should be avoided in the former context.

to imply that those who have attracted the public eye in fields other than entertainment would not be able to assert a right of publicity, even though such persons might not be thought of as celebrities in the traditional sense. On the contrary, in our publicity-conscious society, where anyone may achieve instant fame through media exposure, the large number of potential right of publicity plaintiffs lends credence to this article's contention that the scope of the right ought to be delineated with caution.

The right of publicity typically protects against commercial exploitation of those facets of the celebrity's persona which are most readily identifiable: name (which may be real or a stage name)[14] and likeness.[15] Concomitantly, protection may extend to the publicity value of the celebrity's achievements, such as the career statistics of a professional athlete.[16] Protection may be sought, although usually unsuccessfully, for the publicity value in the celebrity's life story.[17] Even where his name or exact likeness is not used, a celebrity may have publicity rights in his identifying characteristics, such as a professional driver's distinctively decorated racing car,[18] an actor's unique voice,[19] or an amalgam of gestures and setting that connote a bandleader's public personality as "Mister New Year's Eve."[20] In addition, the right of publicity may protect the celebrity's actual performance.[21]

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[14] *See, e.g.,* Cepeda v. Swift & Co., 415 F.2d 1205 (8th Cir. 1969) (real name); Gardella v. Log Cabin Prods., Inc., 89 F.2d 891 (2d Cir. 1937) (stage name).

[15] *See, e.g.,* Grant v. Esquire, Inc., 367 F. Supp. 876 (S.D.N.Y. 1973); McQueen v. Wilson, 117 Ga. App. 488, 161 S.E.2d 63 (Ct. App.), *rev'd on other grounds,* 224 Ga. 420, 162 S.E.2d 313 (1968).

[16] *See, e.g.,* Palmer v. Schonhorn, 96 N.J. Super. 72, 232 A.2d 458 (Super. Ct. 1967).

[17] *See, e.g.,* Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352 (1979); Rosemont Enterprises, Inc. v. Random House, Inc., 58 Misc. 2d 1, 294 N.Y.S.2d 122 (Sup. Ct. 1968), *aff'd mem.,* 32 A.D. 2d 892, 301 N.Y.S.2d 948 (App. Div. 1969); Donahue v. Warner Bros. Pictures Distrib. Corp., 2 Utah 2d 256, 272 P.2d 177 (1954).

[18] *See* Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974).

[19] *See* Lahr v. Adell Chem. Co., 300 F.2d 256 (1st Cir. 1962).

[20] Lombardo v. Doyle, Dane & Bernbach, Inc., 58 A.D. 2d 620, 396 N.Y.S. 2d 661 (App. Div. 1977).

[21] *See, e.g.,* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977); Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (3d Cir.), *cert. denied,* 351 U.S. 926 (1956).

The phrase "name and likeness" will sometimes be used in this article to connote all of these facets: name, likeness, achievements, characteristics, and performance.

The right of publicity has been asserted against myriad types of commercial appropriation. Suits have been triggered, for example, by uses of a celebrity's identity on bubble gum cards,[22] board games,[23] toys and novelty items,[24] posters,[25] calendars,[26] t-shirts,[27] postcards,[28] statuettes,[29] advertisements,[30] motion pictures,[31] novels,[32] nonfiction books,[33] and newscasts.[34]

Because the right of publicity encompasses a wide range of activities, its impact on commercial practices is potentially as broad as that of the laws of copyright, trademark, and unfair competition. These laws grant limited monopolies not only to benefit the protected parties but ultimately to benefit the public at large. They impose an orderly and generally fair regime on the uses of intellectual property. The right of publicity is intended to augment this regime. But there can be, as the saying goes, too much of a good thing.

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[22] *See* Haelan Laboratories v. Topps Chewing Gum, Inc., 202 F.2d 866 (2d Cir.), *cert. denied,* 346 U.S. 816 (1953).

[23] *See* Uhlaender v. Henricksen, 316 F. Supp. 1277 (D. Minn. 1970).

[24] *See* Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

[25] *See e.g.,* Factors, Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978), *cert. denied,* 440 U.S. 908 (1979).

[26] *See* O'Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1942).

[27] *See* Rosemont Enterprises, Inc. v. Choppy Prod., Inc., 74 Misc. 2d 1003, 347 N.Y.S.2d 83 (Sup. Ct. 1972).

[28] *See* McQueen v. Wilson, 117 Ga. App. 488, 161 S.E.2d 63 (Ct. App.), *rev'd on other grounds,* 224 Ga. 420, 162 S.E.2d 313 (1968).

[29] *See* Memphis Dev. Foundation v. Factors, Etc., Inc., 616 F.2d 956 (6th Cir. 1980).

[30] *See, e.g.,* Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974); Namath v. Sports Illustrated, 48 A.D.2d 487, 371 N.Y.S.2d 10 (App. Div. 1975).

[31] *See, e.g.,* Hicks v. Casablanca Records, 464 F. Supp. 426 (S.D.N.Y. 1978); Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352 (1979); Univ. of Notre Dame v. Twentieth Century-Fox Film Corp., 22 A.D.2d 452, 256 N.Y.S.2d 301 (App. Div.), *aff'd mem.,* 15 N.Y.2d 940, 259 N.Y.S.2d 832 (1965).

[32] *See, e.g.,* Hicks v. Casablanca Records, 464 F. Supp. 426 (S.D.N.Y. 1978); Univ. of Notre Dame v. Twentieth Century-Fox Film Corp., 22 A.D.2d 452, 256 N.Y.S.2d 301 (App. Div.), *aff'd mem.,* 15 N.Y.2d 940, 259 N.Y.S.2d 832 (1965).

[33] *See, e.g.,* Rosemont Enterprises, Inc. v. Random House, Inc., 58 Misc. 2d 1, 294 N.Y.S.2d 122 (Sup. Ct. 1968), *aff'd mem.,* 32 A.D.2d 892, 301 N.Y.S.2d 948 (App. Div. 1969).

[34] *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

II. POLICIES FAVORING, AND INTERESTS SERVED BY, THE RIGHT

The scope of the right of publicity ought to be delineated with policy considerations in mind. Three such considerations weigh in favor of an expansive scope. First, enforcement of the right of publicity vindicates certain proprietary and personal interests of the protected individual. Second, it allows talented persons to reap the full reward of their talents, thus encouraging creative efforts that benefit society. Third, it prevents wrongful conduct by those who otherwise would engage in unfair trade practices.

A. *Vindicating the Proprietary and Personal Interests of the Celebrity.* First and foremost, the right of publicity vindicates the economic interests of celebrities, enabling those whose achievements have imbued their identities with pecuniary value to profit from their fame. Preventing economic injury to the celebrity is the primary justification for recognizing a proprietary interest in one's name and likeness; it is the very *raison d'etre* for the existence of the right of publicity as distinct from the right of privacy.[35] The celebrity's proprietary interest in the publicity value of his performance has been analogized to an author's proprietary interest in his copyrighted work;[36] his proprietary interest in the publicity value of his name and likeness has been analogized to a business's proprietary interest in its name and good will.[37] The proprietary injury protected against is at times like that suffered in trade libel cases: injury to reputation resulting in economic harm.[38] Protection of these proprietary interests allows the celebrity to profit from his investment in the human capital required to generate publicity value.[39] The right of

[35] *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 573 (1977); Haelan Laboratories v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir.), *cert. denied,* 346 U.S. 816 (1953); Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323, 336-37 (1979) (Bird, J., dissenting) ("loss of financial gain" called "gravemen" of the harm). *But cf.* Palmer v. Schonhorn, 96 N.J. Super. 72, 232 A.2d 458, 461-62 (Super. Ct. 1967) (protecting celebrity's proprietary interest under "privacy" rubric).

[36] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 575-76 (1977).

[37] Grant v. Esquire, 367 F. Supp. 876, 879 (S.D.N.Y. 1973); *see* Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323, 336 (1979) (Bird, J., dissenting).

[38] *See* Ettore v. Philco Television Broadcasting Co., 229 F.2d 481, 490 (3d Cir.), *cert. denied,* 351 U.S. 926 (1956) (analogy to trade libel); Gardella v. Log Cabin Products, Inc., 89 F.2d 891, 894 (2d Cir. 1937) (injury to professional reputation due to inferior quality of imitation); Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323, 336 (1979) (Bird, J., dissenting) (injury to reputation and alteration of celebrity's professional image).

publicity also protects the economic interests of those with whom the celebrity has contracted for authorized exploitation of his name and likeness.[40]

In addition to purely pocketbook considerations, the right of publicity at times protects personal or "privacy" interests. A celebrity may object to commercial exploitation for purely personal reasons; he may find such exploitation (in general or in a particular instance) offensive, embarrassing, or productive of mental distress.[41] Or, while seeking publicity in his chosen field, he may wish to retain his solitude outside the narrow ambit of his professional achievements.[42] In these cases, he can bring an action for violation of his publicity rights even though a court might find he has waived his privacy rights on account of his publicity-generating endeavors.[43] In a sense, the right of publicity allows a celebrity to control the context and manner in which his persona is utilized as though he had "moral rights" in his name and likeness. His decision to license or not to license, to bring or forebear suit, can be based on principled as well as pecuniary grounds.

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[39] *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 575 (1977) (referring to performer's talents, energy, efforts, and expense); Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323, 336 (1979) (Bird, J., dissenting) (referring to the "considerable money, time, and energy," the "years of labor," the "investment" made by a celebrity to develop a marketable identity); Lombardo v. Doyle, Dane & Bernbach, 58 A.D.2d 620, 396 N.Y.S.2d 661, 664 (App. Div. 1977) (referring to celebrity's forty-year investment in a "carefully and painstakingly built public personality"); Palmer v. Schonhorn Enterprises, Inc., 96 N.J. Super. 72, 232 A.2d 458, 462 (Super. Ct. 1967) (attributing publicity value to a celebrity's talent and hard work, entitling him to the "right to enjoy the fruits of his own industry").

[40] In fact, it is often the celebrity's licensee who brings suit for invasion of publicity rights. *See, e.g.*, Factors, Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979); Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

[41] Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 824 n.11 (9th Cir. 1974); Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323, 328, 337 n.11 (1979) (Bird, J., dissenting). *But cf.* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 573 (1977) (right of publicity not concerned with protecting feelings).

[42] *See* Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323, 337 n.11 (1979) (Bird, J., dissenting).

[43] *See* McQueen v. Wilson, 117 Ga. App. 488, 161 S.E.2d 63, 64 (Ct. App.), *rev'd on other grounds*, 224 Ga. 420, 162 S.E.2d 313 (1968). *But cf.* Booth v. Curtis Publishing Co., 15 A.D.2d 343, 223 N.Y.S.2d 737, 745 n.5 (App. Div.), *aff'd*, 11 N.Y.2d 907, 182 N.E.2d 812, 228 N.Y.S.2d 468 (1962) (celebrity may waive most aspects of privacy, but not rights of privacy against commercial misappropriation).

B. *Fostering Creative Efforts for the Benefit of Society.* Like the copyright and patent regimes, the right of publicity may foster the production of intellectual and creative works by providing the financial incentive for individuals to expend the time and resources necessary to produce them.[44] The benefit of these performances and achievements ultimately accrues to society. As compared to copyright, the benefit to society from the right of publicity is of course one step removed: society directly benefits from the achievements of talented persons rather than from the commercial exploitation of their personae. Nevertheless, the right of publicity does channel additional dollars to celebrities and, by increasing the financial rewards accruing to those who choose publicity-generating careers, it may encourage talented persons to pursue such careers, ultimately spurring the production of creative works and noteworthy achievements. Likewise, to the extent the right of publicity vindicates a celebrity's personal and privacy interests, it encourages principled persons to enter publicity-generating professions by removing two major drawbacks: lack of control over unfettered appropriation of one's name and likeness, and the resulting loss of personal integrity.

C. *Preventing Wrongful Conduct.* The right of publicity serves both individual and societal interests by preventing what our legal tradition regards as wrongful conduct: unjust enrichment and deceptive trade practices.

In taking and profiting from a celebrity's publicity value, the unauthorized user may be endeavoring to "reap where another has sown."[45] The celebrity, as well as those with whom he has contracted, may have expended considerable time and effort in nurturing and marketing his publicity value. The unauthorized user profits without sharing in the cost of generating the publicity value he seeks to exploit and is in that sense unjustly enriched.[46] Moreover, since the unauthorized user secures

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[44] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 575-77 (1977). Since *Zacchini* involved appropriation of an actual performance, it is closer to the realm of copyright than those right of publicity cases involving appropriation of a name or likeness. The latter cases are more analogous to trademark, since they involve protection of titles, names, and other identifying characteristics that have acquired secondary meanings. Nonetheless, the *Zacchini* copyright analogy has been adopted by courts in name-and-likeness cases. *See, e.g.,* Factors, Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 220 (2d Cir. 1978), *cert. denied,* 440 U.S. 908 (1979).

[45] Hirsch v. S.C. Johnson & Son, Inc., 90 Wis. 2d 379, 280 N.W.2d 129 (1979); *cf.* International News Service v. Associated Press, 248 U.S. 215 (1918).

[46] Factors, Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 221 (2d Cir. 1978), *cert. denied,* 440 U.S. 908 (1979); Palmer v. Schonhorn Enterp., Inc., 96 N.J. Super. 72, 232 A.2d 458, 462 (Super. Ct. 1967).

In his dissent in *Zacchini,* Justice Powell viewed the prevention of unjust

the celebrity's publicity value at no cost—that is, without paying royalties or licensing fees—he can compete unfairly with authorized licensees.[17]

Deceptive trade practices are present in many right of publicity cases. Particularly when the celebrity's name or likeness is used without permission in connection with advertising, the public is easily misled into believing the celebrity has endorsed the advertised product.[48] Even the use of the celebrity's name or likeness in a nonadvertising context, such as in a motion picture, may in some instances convey the false impression that the celebrity authorized the use or approved of the viewpoints expressed in the work.[49] Occasionally, defendants have not appropriated the celebrity's name or likeness as such but instead have imitated his appearance, mannerisms, or performing style, in an attempt to "palm off" their work as that of the celebrity.[50] Whenever there is an element of misrepresentation, deception, or passing off, the public as well as the individual celebrity is injured.

D. *Evaluation of the Rationales Underlying the Right.* Before proceeding to the policy considerations opposing the right of publicity, it is necessary to put those favoring the right in perspective. Celebrities, like everyone else, undoubtedly would prefer to reap as much financial reward from their endeavors as possible, both from their creative efforts and from collateral enterprises with which they are associated. Undoubtedly, expansive enforcement of the right of publicity is in their interest. The weight to be accorded their interest must be judiciously determined, however, in light of the countervailing interests at stake.

First, it should be kept in mind that singers, actors, athletes, and other celebrities are compensated for the activities that generate their

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enrichment as the fundamental, if not sole, reason to enforce publicity rights. *See* 433 U.S. at 580 n.2. The *Zacchini* majority did not take this approach, but did state: " 'No social purpose is served by having defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.' " *Id.* at 575-76 (quoting Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?* 31 L. & CONTEMP. PROB. 326 (1966).

[47] *Cf.* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (sanctioning vertical restraints intended in part to eliminate "free riders" who benefit from costly retailer promotions without sharing in their cost).

[48] *See, e.g.,* Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 822 (9th Cir. 1974).

[49] This was the dissent's contention in Univ. of Notre Dame v. Twentieth Century-Fox Film Corp., 15 N.Y.2d 940, 207 N.E.2d 508, 259 N.Y.S.2d 832, 837-38 (1965). Of course, audiences are more likely to conclude this if they assume that such authorization is required by law.

[50] *See* Lahr v. Adell Chem. Co., 300 F.2d 256, 259 (1st Cir. 1962); Lombardo v. Doyle, Dane & Bernbach, Inc., 58 A.D.2d 620, 396 N.Y.S.2d 661, 665 (App. Div. 1977); *cf.* Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711, 712 (9th Cir. 1970), *cert. denied,* 402 U.S. 906 (1971) (secondary passing off).

publicity values in the first place. To the extent this compensation provides them an adequate rate of return on the time and effort they have invested in their human capital, less weight need be accorded their individual interests in reaping additional remuneration for collateral uses of their names and likenesses.[51] Likewise, the societal interest in encouraging creative endeavors may be adequately served by the salaries, royalties, and other forms of compensation celebrities receive for their works and performances. Rewards accruing from collateral uses of their names and likenesses may be more like the proverbial icing on the cake than a necessary inducement.[52] While it is true that many performers and entertainers are not adequately compensated for their works and performances, the likelihood of additional compensation through exploitation of publicity rights varies inversely with the need for additional compensation. The off-Broadway actor, the minor league hockey player, the avant-garde jazzman, the author without a best seller are unlikely to derive income from licensing the commercial use of their names or likenesses. For the most part it is the Elvis Presleys, the Bela Lugosis, the Agatha Christies of the world who benefit from the right of publicity—and these are precisely the persons whose income would be more than adequate even if publicity rights were nonexistent.

Second, one of the more remunerative ways through which a celebrity can benefit from publicity rights is to endorse products or services. Unfortunately, celebrity endorsements and other uses of a celebrity's name or likeness in advertising may have a net social disutility. Such endorsements lead to economically irrational product differentiation, influencing consumers to make decisions on grounds other than price and quality, skewing the demand-price curve, and giving businesses large enough to afford to pay major celebrities an unfair advantage over

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[51] An analogy may be found in the treatment of the "taking" issue in land use cases. Courts allow social interests other than that of the private property owner (*e.g.*, historic preservation and environmental concerns) to prevent the landowner from achieving a *maximum* rate of return on his property, so long as he can with the restrictions achieve a *reasonable* rate of return. *See* Penn Cent. Transp. Corp. v. New York, 438 U.S. 104 (1978); Costonis, *"Fair" Compensation and the Accommodation Power*, 75 COLUM. L. REV. 1021 (1975). This same principle—according proprietary interests less weight at the margin—underlies the progressive nature of our income tax system. The higher one's income, the less weight is accorded one's desire to retain each additional dollar earned. *See* B. BITTKER & L. STONE, FEDERAL INCOME TAXATION 21 (5th ed. 1980).

[52] *Cf.* Memphis Dev. Foundation v. Factors, Etc., Inc., 616 F.2d 956, 958-59 (6th Cir. 1980) (fame is merely an incidental benefit accruing to those whose achievements are motivated by other, more basic concerns).

their smaller but equally efficient competitors.[53] The public, therefore, does not benefit from the celebrity's right to exploit his publicity value in the context of advertising.[54] Joe Namath may have enriched society with his glorious athletic feats, but the same cannot be said of his endorsements of deodorants and popcorn makers. Furthermore, a commercial endorsement by a celebrity is in a fundamental sense deceptive whether or not the celebrity has authorized it. In most cases the celebrity does not actually favor the product he endorses; he is simply a paid pitchman.[55]

In any event, the need for a legally distinct right of publicity is mitigated by the existence of other legal mechanisms with which unfair competition and deceptive trade practices concerning the use of celebrity names and likenesses can be thwarted. These include trade regulation on the state and federal levels and private rights of action under both state and federal law, such as common law rights against unfair competition and the statutory right under section 43(a) of the Lanham Act.[56] Similarly, protection against deliberate falsification of a celebrity's life and character may be available through "false light" or defamation causes of action.[57] Thus, many of the more egregious cases of misuse of a celebrity's name and likeness—those that actually damage his reputation or tend to deceive the public—may be dealt with without resort to the right of publicity. While these remedies by no means completely vindicate the celebrity's or society's interest in these matters, their availability should be factored into an analysis of the net social utility of the right of publicity.

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[53] On the economic disutility of advertising, *see* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 307-09 (1977); *see also* FTC v. Procter & Gamble Co. 386 U.S. 568, 575, 579 (1967).

[54] One commentator reasons that since advertisers would use celebrity names and likenesses even if the celebrity had no power to grant exclusivity, allowing the celebrity such power under the right of publicity at least ensures that consumers will not be misled as to whether the celebrity had truly endorsed the product or service. Treece, *Commercial Exploitation of Names, Likenesses, and Personal Histories,* 51 TEX. L. REV. 637, 647 (1973), quoted approvingly in Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323, 340 n.19 (1979) (Bird, J., dissenting). This view ignores the fact that even authorized endorsements are often deceptive. *See* text accompanying n.55 *infra.*

[55] A recent example is the advertising campaign for Budweiser's Natural Light Beer, in which athletes who formerly appeared in advertisements for Miller's Lite Beer proclaim that they now prefer Natural Light. One need not be overly cynical to assume they switched for reasons other than taste.

[56] 15 U.S.C. § 1125(a) (1976).

[57] *See, e.g.,* Spahn v. Julian Messner, Inc., 21 N.Y. 2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967).

III. COUNTERVAILING INTERESTS, RIGHTS, AND POLICIES

A celebrity's right of publicity conflicts with the economic interests, and sometimes with the proprietary rights, of other individuals—namely, defendants (or potential defendants) in right of publicity cases. His right of publicity also may conflict with the "general weal," that is, with the interest of society as a whole in free enterprise and free expression.[58] As a matter of social policy, such conflicts should be resolved in favor of "the greatest good to the greatest number," unless this resolution cuts too deeply into the rights of the individual.[59] The encouragement-of-creative-efforts rationale for the right of publicity, which is the major societal, as opposed to individual, interest served by enforcement of the right, itself suggests some degree of deference to the goal of dissemination over the goal of protection. In addition, certain applications of the state-created right of publicity may clash with the federal interest expressed in the preemptive provisions of the Copyright Act of 1976.

A. *Promoting Free Enterprise: the Right of Publicity and Competition.* In all areas of commerce, including commerce in intellectual property, our free enterprise system favors competition unless a particular degree of monopolistic control actually enhances competition overall or serves other social goals granted priority by statute or common law.[60] A right against commercial misappropriation of a celebrity's name and likeness has anticompetitive effects, for commercial copying is the "lifeblood of competition . . . . [B]y bringing forward functionally equivalent products and services, [it] is a necessary condition for the competitive forces of the marketplace acting to lower prices, satisfy consumer demand, and allocate production optimally."[61] Although the unauthorized user may

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[58] *See* Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323, 332 (1979) (Mosk, J., concurring).

[59] Donahue v. Warner Bros. Pictures Distrib. Corp., 2 Utah 2d 256, 272 P.2d 177, 183 (1954); *cf.* Berlin v. E.C. Publications, Inc., 329 F.2d 541, 544 (2d Cir.), *cert. denied,* 379 U.S. 822 (1964) (courts "must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science, and industry").

[60] *See* National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679 (1978), in which the Court stressed that the Sherman Act prohibits all restraints of trade other than those that have the net effect of enhancing competition, and that outside the narrow ambit of the "rule of reason," only those restraints that are expressly sanctioned by Congress would be permitted to stand. Congressionally sanctioned monopolies include patents and copyrights.

[61] Letter from Michael M. Uhlmann, Assistant Attorney General for Legislative Affairs, to Congressman Robert Kastenmeier (July 27, 1976), *reprinted in* Fetter, *Copyright Revision and the Preemption of State "Misappropriation" Law,* 25 BULL. COPR. SOC'Y 418, 422-23 (1978).

be reaping where he has not sown, he may have the legal right to do so if his subject is unprotected by copyright, trademark, or patent laws.[62] Moreover, his copying may serve the interests of the consuming public by enhancing competition.[63] In contrast, a grant of a right of publicity is a grant of monopoly. For example, in *Lombardo v. Doyle, Dane & Bernbach,*[64] a New York court held that Guy Lombardo had stated a cause of action for misappropriation of his public persona as "Mr. New Year's Eve" by defendants who featured in their advertisements a bandleader leading a rendition of "Auld Lang Syne" at a New Year's Eve celebration. In effect, the court suggested that Mr. Lombardo had a legally enforceable monopoly in the role of "Mr. New Year's Eve." Whether the court truly intended that anyone who wishes to produce a commercial featuring a bandleader, "Auld Lang Syne," and the trappings of a New Year's Eve party either employ Mr. Lombardo or pay him royalties or damages is not clear, for the court did not explore the anticompetitive ramifications of its decision.

In a more recent right of publicity case, *Memphis Development Foundation v. Factors, Inc.,*[65] the court recognized that overzealous enforcement of the right of publicity can unacceptably encumber free enterprise and competition. The *Memphis* court observed that expansive publicity rights might adversely affect the efficiency, productivity, and fairness of our economic system. Not only might the right of publicity impair the "stock or quality" of goods and services, including those of a creative, informative, or entertaining nature, it might also detract from equal distribution of economic opportunity,[66] which is itself a policy consideration underlying our pro-competition laws.[67]

B. *Protecting Free Expression: the Right of Publicity and the First Amendment.* In *Zacchini v. Scripps-Howard Broadcasting Co.,*[68] the Supreme Court held that defendants who broadcast plaintiff's "human cannonball" act without permission could, consistently with the First Amendment, be held liable for violating plaintiff's right of publicity.[69] The case does not,

[62] Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 231 (1964).

[63] "Sharing in the good will of an article unprotected by patent or trademark is the exercise of a right possessed by all—and in the free exercise of which the consuming public is deeply interested." *Id.* (quoting Kellogg Co. v. Nat'l Biscuit Co., 305 U.S. 111, 122 (1938)).

[64] 58 A.D.2d 620, 396 N.Y.S.2d 661 (App. Div. 1977).

[65] 616 F.2d 956 (6th Cir. 1980).

[66] *Id.* at 960.

[67] L. SULLIVAN, *supra* note 53, at 11 (goals of antitrust include "enhancement of the opportunity for more people to exercise independently entrepreneurial impulses"); *see* Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).

[68] 433 U.S. 562 (1977).

[69] *Id.* at 574-75.

however, eliminate the need to consider the constitutional right of free expression when determining the contours of the right of publicity.

First of all, the *Zacchini* holding is by its own terms limited to misappropriation of an actual performance.[70] As Justice Powell noted in dissent, the Court's opinion practically incants the phrase "a performer's entire act."[71] In contrast, few right of publicity cases involve appropriation of a performer's entire act or even a portion of a performer's act. Most involve appropriation merely of the name, likeness, or identifying characteristics of a celebrity. Second, the Court stressed that Zacchini sought damages only, not injunctive relief, thus minimizing any intrusion on dissemination and free expression.[72] In contrast, most right of publicity plaintiffs *do* seek injunctive relief, raising the specter of restraint of speech. Third, the Court made clear that it was only deciding whether the federal Constitution required states to privilege defendants in the case at hand. The Court invited state courts to extend a free expression privilege to right of publicity defendants as a matter of state constitutional or common law.[73]

While the First Amendment may not be implicated by publicity claims involving merchandise such as board games, bubble gum cards, and posters, many commercial appropriations of a celebrity's persona occur in media of expression such as fictional or nonfictional books and movies. As "vehicles through which ideas and opinions are disseminated," books and movies enjoy a degree of constitutional protection not accorded mere merchandise.[74] The First Amendment protects works that are primarily entertaining as well as those that are primarily informative in nature,[75] not only because entertainment often contributes

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[70] *See* Italian Book Corp. v. American Broadcasting Co., 458 F. Supp. 65, 71 (S.D.N.Y. 1978) (noting that *Zacchini* "turned on narrow facts").

[71] 433 U.S. at 579. For examples of the "incantations," *see id.* at 569, 573 n.10, 574-78.

[72] *Id.* at 573-74, 578. *But see* text accompanying n.84, *infra*. It may be that Zacchini's failure to seek an injunction derived not from his willingness to let defendants broadcast his act upon payment of compensation, but from the fact that an injunction would have been moot. Defendants, having aired plaintiff's act in the midst of a single nightly newscast, presumably had no intention of airing it again.

[73] *Id.* at 578-79; *see* Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352, 362 (1979) (Bird, J., concurring) ("the Supreme Court [in *Zacchini*] recognized each state's authority to prescribe the contours of its right of publicity").

[74] Hicks v. Casablanca Records, 464 F. Supp. 426, 430 (S.D.N.Y. 1978).

[75] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578 (1977); Univ. of Notre Dame v. Twentieth Century-Fox Film Corp., 22 A.D.2d 452, 256 N.Y.S.2d 301, 306 (App. Div.), *aff'd mem.*, 15 N.Y.2d 940, 207 N.E.2d 508, 259 N.Y.S.2d 832 (1965).

to the marketplace of ideas[76] but also because it is a mode of self-expression irrespective of its contribution to political and social thought.[77] Similarly, works of fiction are as deserving of First Amendment protection as works of nonfiction.[78]

Significantly, the First Amendment interest at stake—the right of free expression—is that of the general public, not merely that of the individual defendant in a right of publicity case. The First Amendment protects not only the right of the speaker to speak but also the right of his audience to hear.[79] As the Supreme Court of Utah stated in a right of publicity case involving a motion picture, "The public has an important interest to be served in free and uninhibited expression in all channels of public information," an interest to which the celebrity's proprietary and personal interests must at times be subordinated.[80]

When enforced against the use of a celebrity's persona in media of expression, the right of publicity may conflict with both the defendant's and the public's right of free expression in a number of ways. First, the right of publicity can inhibit free expression by "outlaw[ing] large areas heretofore deemed permissible subject matter for literature and the arts."[81] Second, "reports and commentaries on the thoughts and conduct of public and prominent persons [could] be subject to censorship under the guise of preventing the dissipation of the publicity value of a person's

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[76] *See* Winters v. New York, 333 U.S. 507, 510 (1948) ("The line between the informing and the entertaining is too elusive for the protection of the basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."); Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352, 357 (1979) (Bird, J., concurring).

[77] Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352, 357 (1979) (Bird, J., concurring).

[78] *Id.; see* Hicks v. Casablanca Records, 464 F. Supp. 426, 431-33 (S.D.N.Y. 1978).

[79] *See* Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1976) (consumers' right to receive advertising); Buckley v. Valeo, 424 U.S. 1, 52-53 (1976) (electorate's right to hear political candidates); Procunier v. Martinez, 416 U.S. 396, 408-09 (1974) (addressee's right to receive uncensored mail); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1967) (listeners' First Amendment right prevails over that of broadcaster).

[80] Donahue v. Warner Bros. Pictures Distrib. Corp., 2 Utah 2d 256, 272 P.2d 177, 183 (1954).

[81] Univ. of Notre Dame v. Twentieth Century-Fox Film Corp, 222 A.D.2d 452, 256 N.Y.S.2d 301, 306 (App. Div.), *aff'd mem.*, 15 N.Y.2d 940, 207 N.E.2d 508, 259 N.Y.S.2d 832 (1965); *accord,* Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352, 360 (1979) (Bird, J., concurring).

identity."[82] Third, the threat of liability, or even the threat of costly litigation, may exert a chilling effect on the media, resulting in timid, watered-down works.[83] Fourth, these restrictive and chilling effects can result from imposition of monetary damages alone, regardless of whether injunctive relief is sought. As one commentator has stated, "It is difficult to imagine anything more unsuitable, or more vulnerable under the first amendment, than compulsory payment, under a theory of appropriation, for the use made of [an individual's identity in media of expression]."[84]

On the other hand, certain factors potentially mitigate the conflict between the right of publicity and the First Amendment.

First, the right of publicity, like the copyright laws, arguably does not restrain the dissemination of ideas but only of particular expressions, and so does not conflict with the First Amendment in most cases.[85] Defendants, or so the argument goes, could make a film that parodies the importance attached to college football (the idea) without utilizing the name and insignia of the University of Notre Dame (the expression); that describes the life and loves of an Italian actor who became a matinee idol (the idea) without utilizing the name and likeness of Rudolph Valentino (the expression); or that tells the tale of a mystery writer who engages in a plot to murder her husband's mistress (the idea) without calling the writer Agatha Christie (the expression). This argument is not without merit, at least insofar as it applies to works of fiction such as

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[82] Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352, 360 (1979) (Bird, J., concurring). For example, the University of Notre Dame had in the past licensed the use of its name and insignia in connection with flattering portrayals in films such as "Knute Rockne, All American." Univ. of Notre Dame v. Twentieth Century-Fox Film Corp., 15 N.Y.2d 940, 207 N.E.2d 508, 259 N.Y.S.2d 832, 833 n.2 (Burke, J., dissenting). Defendants in that case, however, used Notre Dame's name and insignia in a film that presented an irreverent, farcical treatment of college football, and one wonders whether the University ever would have licensed this use.

[83] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 580-81 (Powell, J., dissenting); *cf.* Donahue v. Warner Bros. Pictures Distrib. Co., 2 Utah 2d 256, 272 P.2d 177, 182 (1954).

[84] Hill, *Defamation and Privacy under the First Amendment*, 76 COLUM. L. REV. 1205, 1305 (1976).

[85] *See* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 577 n.13 (1977); Nimmer, *Does Copyright Abridge The First Amendment Guarantees of Free Speech and Press?* 17 U.C.L.A. L. REV. 1180 (1970); *cf.* Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323, 343 n.26 (1979) (Bird, J., dissenting) (prohibiting others from appropriating plaintiff's portrayal of the Dracula character would not extend protection to the "idea" of the character).

these, the contention being that since the works do not even purport to be true, they are not really "about" Notre Dame or Rudolph Valentino or Agatha Christie; these names have simply been incorporated into a concocted story in order to enhance its marketability.[86] Nevertheless, the argument should be rejected. The line between idea and expression is even less clear in the right of publicity area than in the copyright area. For example, the defendant's idea in the Agatha Christie film could just as accurately be characterized as a hypothesized account of the unexplained eleven-day disappearance in the life of Agatha Christie. Phrased this way, the idea appears inexorably bound to the name and persona of Agatha Christie. More importantly, these applications of the idea/expression dichotomy should be rejected on policy grounds:

> Contemporary events, symbols, and people are regularly used in fictional works. Fiction writers may be able to more persuasively, more accurately express themselves by weaving into the tale persons or events familiar to their readers. The choice is theirs. No author should be forced into creating mythological worlds or characters wholly divorced from reality. . . . Surely, the range of free expression would be meaningfully reduced if prominent persons in the present and recent past were forbidden topics for the imaginations of authors of fiction.[87]

A second mitigating factor is that many right of publicity cases involve mere merchandise, commercial products such as bubble gum cards, which are not vehicles through which ideas and opinions are regularly disseminated. Here again, the line between protected and unprotected expression is not always clear.[88] In any event, the fact that in some cases the subject matter of the dispute may fall outside the ambit of the First Amendment should not lull courts into sanguinity in those

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[86] *See* Univ. of Notre Dame v. Twentieth Century-Fox Film Corp., 15 N.Y.2d 940, 207 N.E. 2d 508, 259 N.Y.S.2d 832, 840-41 (1965) (Burke, J., dissenting).

[87] Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352, 358 (1979) (Bird, J., concurring). *See generally* Kakutani, "Do Facts and Fiction Mix?" in *N.Y. Times Book Review* 3 (Jan. 27, 1980) (describing widespread use of real persons and real events in works of fiction and quoting author E.L. Doctorow as proclaiming, "[T]here is no longer any such thing as fiction or nonfiction; there's only narrative").

[88] *Compare* Factors, Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 222 (2d Cir. 1978), *cert. denied,* 440 U.S. 908 (1979) (poster of rock star Elvis Presley with the legend "In Memory" not protected by First Amendment), *with* Paulsen v. Personality Posters, Inc., 59 Misc. 2d 444, 299 N.Y.S.2d 501, 507-08 (Sup. Ct. 1968) (poster of comedian Pat Paulsen with the legend "For President" protected by First Amendment).

not infrequent cases where a defendant's work *is* entitled to constitutional protection.[89]

Third, while the specific holding of *Zacchini* can be limited to appropriation of a performer's entire act, the Court's threshold analysis of the interests at stake cannot be so limited—and it is apparent that the Court was not overly impressed by the First Amendment interests. The Court indicated that as compared to privacy rights, the state interest in vindicating publicity rights is more compelling because proprietary rather than personal interests are being protected.[90] Additionally, the Court suggested that free expression suffers less in publicity cases because the celebrity does not object to dissemination but only wishes to be compensated for it.[91] The Court's analysis, however, is unconvincing: the majority opinion gives no reason why a state's interest in proprietary rights should be more compelling than that in personal rights; and it inaccurately assumes that right of publicity plaintiffs do not seek to restrict dissemination. The *Zacchini* Court appeared to be at pains to distinguish the right of publicity from the right of privacy in order to avoid being bound by its decision in *Time, Inc. v. Hill.*[92] In that case, a false-light privacy action against a media defendant was held barred by the First Amendment. Evidently eager to move away from its earlier approach, the Court gratuitously observed that *Time, Inc. v. Hill* was "hotly contested and decided by a divided Court."[93] It is interesting to note that *Zacchini,* too, was hotly contested[94] and decided by a bare five-to-four majority.

C. *Proprietary Rights of Persons Other Than the Celebrity.* A celebrity may have a proprietary interest in the publicity value of his name and

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[89] *Compare* Justice Bird's dissent in Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323, 347 (1979) (no conflict with First Amendment where right of publicity is enforced against mere merchandise), *with* her concurring opinion in Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352, 356-62 (1979) (First Amendment prohibits enforcement of right of publicity against medium of expression); *compare* Rosemont Enterprises v. Choppy Prods., Inc., 74 Misc. 2d 1003, 347 N.Y.S.2d 83 (Sup. Ct. 1972) (no First Amendment conflict, mere merchandise), *with* Rosemont Enterprises v. Random House, 58 Misc. 2d 1, 294 N.Y.S.2d 122 (Sup. Ct. 1968), *aff'd mem.*, 32 A.D.2d 892, 301 N.Y.S.2d 948 (App. Div. 1969) (same plaintiff, but First Amendment prohibits enforcement as to book).

[90] 433 U.S. 562, 573 (1977).

[91] *Id.*

[92] 385 U.S. 374 (1967).

[93] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 571 (1977).

[94] *See* Justice Powell's vigorous dissent, *id.* at 579-82, in which Justices Marshall and Brennan joined. Justice Stevens dissented on the ground that the case was not properly before the Court. *See id.* at 582-83.

likeness. But when the celebrity appears in or performs a copyrighted work, his rights are not the only proprietary rights at stake. Examples abound in the right of publicity case law. In *Lugosi v. Universal Pictures,*[95] defendant produced its copyrighted "Dracula" film under license from the copyright owner of the novel, yet plaintiffs—who had no copyright interest in either the film or the novel—sought to prevent defendant from preparing derivative works based on the movie. Under the right of publicity theory advocated by plaintiffs, Universal Pictures could not, for example, grant a license to others to produce posters or bubble gum cards of its movie stills without express authorization of and payment of royalties to the actors appearing in the stills.[96] In *Sinatra v. Goodyear Tire and Rubber Co.,*[97] an unfair competition case in which plaintiff in effect sought protection for the publicity value of her style of performing a hit song, the court noted that plaintiff sought proprietary rights in " 'her song,' which unfortunately for her was owned by others"—and those others, the copyright owners, had licensed the song to defendants.[98] Plaintiff, the court observed, did not own the copyright in the work and yet sought control over it as though she were the copyright owner.[99] In *Price v. Hal Roach Studios,*[100] plaintiff's decedents had appeared in defendant's copyrighted films. Plaintiffs similarly—and here successfully—sought to prohibit defendants from licensing derivative works in disregard of plaintiff's publicity rights in the characters depicted therein.

Other cases further illustrate the competing proprietary interests at stake in publicity cases. In *Gardella v. Log Cabin Products, Inc.,*[101] a 1937 case that today would be deemed to sound in publicity, plaintiff, who had developed publicity value in her depiction of a fictional character, sought to hold defendants liable for their use of this same fictional character, even though defendants had many years earlier obtained proprietary rights in the character by registering it as a trademark. In

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[95] 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

[96] This problem can of course be addressed in the contract between producer and performer. The scope of the licensing rights granted Universal Pictures by Lugosi's employment contract was disputed in the case. *See id.* at 324 n.2 (majority opinion), 330-31 (concurring opinion), 346-48 (dissenting opinion). The same issue—scope of contractual rights vis-à-vis rights of publicity—arose in Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 840-41 (S.D.N.Y. 1975), and in Cepeda v. Swift & Co., 415 F.2d 1205 (8th Cir. 1969).

[97] 435 F.2d 711 (9th Cir. 1970), *cert. denied,* 402 U.S. 906 (1971).

[98] *Id.* at 716.

[99] *Id.* at 717.

[100] 400 F. Supp. 836 (S.D.N.Y. 1975).

[101] 89 F.2d 891 (2d Cir. 1937).

Geisel v. Poynter Products, Inc.,[102] plaintiff utilized New York's commercial misappropriation statute[103] to assert publicity rights, but the court held that defendants, as copyright owners by assignment of plaintiff's work, had the concomitant right to use plaintiff's name in nondeceptive connection with derivative works prepared by defendants. In *Factors, Etc., Inc. v. Pro Arts, Inc.*,[104] plaintiffs were able to enjoin defendants from selling copies of a copyrighted photograph. Although defendants had purchased the copyright in the photograph, plaintiff's publicity rights in the subject matter of the photograph overrode defendant's proprietary interest.

These cases demonstrate that the publicity rights of a celebrity may clash with the proprietary rights of one who holds copyright in a work in which the celebrity appears. In these cases, plaintiffs' publicity claims, if successful, severely restrict the ability of the copyright proprietor to exploit his rights in the copyrighted work. This conflict impacts not only upon the proprietor who acquired his copyright through assignment or license but also upon the author, who would find the potential market for subsequent uses of his work diminished if prospective licensees had to contract with and pay royalties to celebrities who have obtained publicity rights by performing or appearing in the work.[105]

D. *Protecting Federal Supremacy in Copyright.* A comprehensive analysis of preemption under the Copyright Acts of 1909 and 1976 is beyond the scope of this article. But to the extent the state-created right of publicity conflicts with the federal objectives and policies effectuated by the copyright laws, these federal interests ought to be factored into any policy-based appraisal of publicity rights. The right of publicity may interfere with federal copyright objectives in one or two ways: it may prevent free access to copy what copyright law has left in the public domain; and it may prevent a copyright owner from untrammeled exercise of the rights accorded him under federal law.

The Copyright Act of 1976 preempts all state law granting rights "equivalent to any of the exclusive rights within the general scope of copyright" in works that come "within the subject matter of copyright," but not as to state causes of action "arising from undertakings commenced" before January 1, 1978.[106] It is not clear whether "undertakings

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[102] 295 F. Supp. 331 (S.D.N.Y. 1968).

[103] N.Y. CIV. RIGHTS LAW § § 50, 51.

[104] 579 F. 2d 215 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979). The issue of the copyright in the photograph arose when the case was remanded to the district court. *See* No. 77-4704, slip op. at 10-13 (S.D.N.Y. July 29, 1980).

[105] *See* Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711, 718 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971); Booth v. Colgate-Palmolive Co., 362 F. Supp. 343, 347 (S.D.N.Y. 1973).

[106] 17 U.S.C. § 301.

commenced" refers to plaintiff's activities (the undertaking out of which the asserted right arose) or to defendant's activities (the allegedly infringing undertaking). Whichever way the courts construe this language, the preemption issue in right of publicity cases that arise from undertakings commenced prior to January 1, 1978 should be decided under the 1909 Act, while those arising from undertakings commenced on or after that date are subject to section 301 of the 1976 Act.[107]

Under the 1909 Act, the Supreme Court's decisions in *Goldstein v. California*[108] and *Kewanee Oil Co. v. Bicron*[109] "practically reversed the presumption of preemption put forward in *Sears-Compco*"; thereafter, where Congress was silent in the intellectual property area, the states could act.[110] Therefore it is not surprising that courts deciding pre-1978 publicity cases have met defendants' preemption arguments with a cold stare and a cite to *Goldstein*.[111]

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[107] Courts are not always fastidious in observing the distinction as to which Act applies, however. *See, e.g.*, Esquire v. Ringer, 591 F.2d 796 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908 (1979), in which the court looked to the legislative history of the 1976 Act in deciding a case under the 1909 Act; Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323, 346 (1979), in which the dissenting opinion freely intermingled preemption under the 1909 and 1976 Acts in concluding that plaintiff's publicity rights had not been preempted.

[108] 412 U.S. 546 (1973).

[109] 416 U.S. 470 (1974).

[110] Brown, Jr., *Unification: A Cheerful Requiem for Common Law Copyright*, 24 U.C.L.A. L. REV. 1070, 1091 (1977). *Sears-Compco* had been "widely understood to leave unprotected works that could fall within the copyright-patent clause, but that were unmentioned in the statutes." *Id.; see* Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964); Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964).

[111] *See, e.g.*, Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 846 (S.D.N.Y. 1975) (*Goldstein* "forecloses any argument . . . [that] forms of state protection other than copyright laws" are preempted); *cf.* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 577 & n.13 (1977). The *Zacchini* Court's use of *Goldstein* borders on the obscure. Although the Court did not address the preemption issue, it cited *Goldstein* in support of the proposition that "[t]he Constitution" did not bar state enforcement of plaintiff's publicity rights. Since *Goldstein* was concerned with the preemptive effect of the copyright clause of the Constitution, while *Zacchini* was concerned with privileges arising from the First Amendment, the only similarity between the two is that both addressed constitutional issues. Yet not surprisingly, *Zacchini's* citation of *Goldstein* has led to the misperception that *Zacchini* removed "any doubt" as to whether the right of publicity poses preemption problems. *See* Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323, 346 (1979) (Bird, J., dissenting); *cf.* Factors Etc., Inc. v. Pro Arts, Inc., No. 77-4704, slip op. at 24 (S.D.N.Y. July 29, 1980) (asserting that *Zacchini* recognized that the right of publicity could "co-exist" with federal copyright laws).

Under the 1976 Act, the language and legislative history of section 301 is definitive.[112] Preemption does not occur unless the state cause of action grants rights that are equivalent to copyright in subject matter that is within the statutory subject matter of copyright. If either the rights-equivalency or subject matter tests are not met, there is no preemption.[113] Since the House Report accompanying the 1976 Act mentions the right of publicity as an example of a nonequivalent right,[114] that might be thought to end the matter. The authoritativeness of the Report language is uncertain, however, since it is tied to the ill-fated section 301(b) (3) list of nonequivalent rights that was deleted on the floor of the House subsequent to the Report. If the right of publicity is first and foremost a proprietary right in the fruits of one's intellectual and creative endeavors, to be treated like any other intangible property right and giving rise to a cause of action against nondeceptive copying, an argument can be made that it *is* equivalent to the exclusive rights under copyright.[115] As to subject matter, the right of publicity would not be preempted in cases where the subject matter is a name[116] or a performance that is not fixed in a tangible medium of expression.[117] Where

[112] Since Congress in the 1976 Act expressly preempted equivalent state protection, *Goldstein's* holding that the 1909 Act does not have preemptive effect has no bearing on preemption under the 1976 Act. *See* Fetter, *Copyright Revision and the Preemption of State "Misappropriation" Law,* 25 BULL. COPR. SOC'Y 367, 400-01 (1978). *Goldstein* does, however, retain vitality with respect to its other holding—*i.e.,* that the copyright clause of the Constitution does not in and of itself preempt state protection.

[113] *See* 17 U.S.C. § 301(b).

[114] H.R. Rep. No. 1476, 94th Cong., 2d Sess. 132 (1976), *reprinted in* [1976] U.S. Code Cong. & Ad. News 5659 [hereinafter cited as "House Report"].

[115] *Cf.* Fetter, *supra* note 112, at 409 ("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 . . . ."). The Supreme Court in *Zacchini* thrice noted the similarities between copyright and publicity rights, *see* 433 U.S. at 573, 575, 576, yet dealt with the preemption issue in only the most oblique and obfuscatory manner, *see id.* at 577 n.13. *But see* Factors Etc., Inc. v. Pro Arts, Inc., No. 77-4704, slip op. at 23-24 (S.D.N.Y. July 29, 1980) (right of publicity not equivalent to copyright, and therefore not preempted).

[116] *See* A. LATMAN, THE COPYRIGHT LAW: HOWELL'S COPYRIGHT LAW REVISED AND THE 1976 ACT 35-39 (1979) (titles *per se* are not copyrightable but are protected under the law of unfair competition, and this protection is not preempted by § 301).

[117] Zacchini's "human cannonball" act would be one example. *But cf.* Note, *Human Cannonballs and the First Amendment: Zacchini v. Scripps-Howard Broadcasting Co.,* 30 STAN. L. REV. 1185, 1193 (1978) ("Because Zacchini did not fix his act in [a tangible] medium—as he might have done simply by filming it himself—he had no direct federal cause of action. But the ease with which he could have secured federal protection may argue against giving him any state protection.").

the subject matter of a publicity case is a fictional character such as Dracula, the outcome is less certain because of the unsettled state of the law regarding copyrightability of characters.[118] To the extent a character in a particular work qualifies for copyright protection, the right of publicity as to that character might be preempted. Once a fictional character has entered the public domain, it would not be consistent with congressional intent to allow the creator or portrayer of that character to retain the equivalent of copyright protection under a publicity theory. In addition, where the subject matter of a publicity case is an idea or facts—the life story of a celebrity, for example—preemption might be appropriate notwithstanding the literal language of sections 301(b) (1) and 102(b).[119]

Furthermore, where an application of the right of publicity interferes with the exclusive rights that the copyright law grants a copyright owner,[120] the federal interest in the "protected domain" must be considered. Such direct conflicts between state law and the express provisions of federal law must be resolved in favor of the latter, under the supremacy clause of the Constitution. If federal law grants a copyright owner the right to make derivative works, the state law of publicity may not prohibit him from doing so.

IV. LEGAL BALANCING MECHANISM: TERMINATION OF PUBLICITY RIGHTS UPON THE CELEBRITY'S DEATH

Having examined the interests and policies furthered by the right of publicity in Part II and those hindered by the right of publicity in Part III, this article will now propose two limitations upon the right. This Part will propose termination of publicity rights upon the celebrity's death; Part V will set forth the contours of a "fair use" limitation on publicity rights. Both limitations are advocated as legal mechanisms

[118] *See* Walt Disney v. Air Pirates, 581 F.2d 751 (9th Cir. 1978), *cert. denied,* 439 U.S. 1132 (1979); Warner Bros. Pictures, Inc. v. CBS, Inc., 216 F.2d 945 (9th Cir. 1954), *cert. denied,* 348 U.S. 971 (1955); Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930), *cert. denied,* 282 U.S. 902 (1931); A. Latman, *supra* note 116, at 40. As to preemption of character protection, *compare* Brylawski, *Protection of Characters—Sam Spade Revisited,* 22 BULL. COPR. SOC'Y 77, 91 (1974), *with* Brown, Jr., *supra* note 110, at 1094.

[119] *See* House Report, *supra* note 114, at 131 ("As long as a work fits within one of the general subject matter categories of sections 102 and 103, the bill prevents the States from protecting it even if it fails to achieve Federal statutory copyright because it is too minimal . . . ."); Mitchell v. Penton Indus. Publishing Co., 486 F. Supp. 22 (N.D. Ohio 1979) (cause of action for misappropriation of factual information preempted under 1976 Act); Brown, Jr., *supra* note 110, at 1096-97 (state protection of ideas preempted under 1976 Act). *But see* Bromhall v. Rorvik, 478 F. Supp. 361, 367 (E.D. Pa. 1979) (because ideas are not within the subject matter of copyright, state protection of ideas is not preempted).

[120] *See* text accompanying notes 95-105 *supra,* and cases cited therein.

through which the competing interests at stake can be accommodated.

The right of publicity is frequently labeled a "property" right. This is done not only to distinguish it from the "personal" right of privacy, but also to imbue the right of publicity with the legal rights that accompany property ownership—among them, inheritability.[121] Termination of publicity rights upon death of the celebrity is appropriate, nonetheless, because the personal rights/property rights distinction in this context is misleading.

Deciding a right of publicity issue by applying property law opens the door to questionable syllogisms. Having given the right of publicity the conclusory label "property," the court then reaches the result that flows from its conclusory characterization: the right of publicity is a property right; property is inheritable; ergo, the right of publicity is inheritable.[122] A better perspective was provided by the court in the seminal right of publicity case, *Haelan Laboratories v. Topps Chewing Gum, Inc.*: "the tag 'property' simply symbolizes the fact that courts enforce a claim that has pecuniary worth."[123] While "property" is a broad concept that may potentially extend "to every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value,"[124] property rights do not arise from value alone; they are a creation of the law and exist only to the extent recognized by the courts.[125] Even where a right, proprietary interest, or expectation of

[121] *See* Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 844 (S.D.N.Y. 1975); Gordon, *Right of Property in Name, Likeness, Personality and History*, 55 Nw. L. Rev. 553, 599 (1960). Among commentators, Gordon is one of the strongest proponents of the property-rights approach. *See id.* at 553-55. *See also* Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?* 31 L. & Contemp. Prob. 326 (1966).

[122] *See, e.g.*, Factors, Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 221 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979) (right of publicity is an "intangible property right" which is transferable and descendible "like any other intangible property right"); Note, *The Right of Publicity—Protection for Public Figures and Celebrities*, 42 Brooklyn L. Rev. 527, 545 (1976) ("[O]nce the publicity right is accurately depicted as a property right, the conclusion that it passes on death flows as a matter of course").

[123] 202 F.2d 866, 868 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

[124] Yuba River Power Co. v. Nevada Irrigation Dist., 207 Cal. 521, 523, 279 P. 128, 129 (1929).

[125] Int'l News Serv. v. Associated Press, 248 U.S. 215, 246 (1919) (Holmes, J., concurring) ("Property, a creation of law, does not arise from value . . . . Property depends upon exclusion by law from interference"); *accord*, United States v. Willow River Power Co., 324 U.S. 499 (1945) ("[N]ot all economic interests are 'property gains'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion"); J. Bentham, Theory of Legisla-

wealth is granted the status of "property," the scope of those property rights is constricted and limited by myriad laws that effectuate other rights.

Furthermore, it is not so clear that the right of publicity is entirely distinct from the "personal" right of privacy against commercial misappropriation. Although courts and commentators lament what is alleged to be widespread confusion between the two, often pointing an accusing finger at Dean Prosser for designating commercial misappropriation of name and likeness as one of four invasion of privacy torts,[126] the ostensibly confused parties may have recognized what the others have missed: namely, that the two rights give rise to essentially the same cause of action, or put another way, violation of either right is essentially the same tort. In both publicity cases and privacy-misappropriation cases, the wrong complained of is unauthorized commercial appropriation of plaintiff's name and likeness. Merely because in one instance the plaintiff is a celebrity and in the second instance he is a private person does not indicate that the former case should sound in "property" while the latter case is purely "personal."

It has been suggested that the right of publicity should descend if the celebrity exploited his publicity rights during his lifetime.[127] The "exploitation" requirement represents a valid attempt to limit publicity rights to those who consciously seek aggrandizement from commercial use of their identities. But an individual's economic decision to license the use of his identity should not be determinative of the legal question of the scope of his rights—or his heirs' rights—to prevent others from making similar use.[128] The decision whether the right of publicity is descendible belongs to the courts, not private parties.

The courts so far are split on the question. The Second Circuit, applying New York law, has held the right of publicity descendible;[129]

TION: PRINCIPLES OF THE CIVIL CODE 111-13 (Hildreth ed. 1931) ("[T]here is no such thing as natural property, . . . it is entirely the work of the law").

[126] *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117 (4th ed. 1971).

[127] *See, e.g.*, Felcher & Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1618 (1979); *cf.* Factors, Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215, 222 & n.11 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979) (holding that the right survives if exploited during one's lifetime, but leaving open the question whether inter vivos exploitation is a prerequisite to its survival).

[128] *Cf.* Paulsen v. Personality Posters, Inc., 59 Misc. 2d 444, 299 N.Y.S.2d 501 (Sup. Ct. 1968) (plaintiff's grant of exclusive rights to exploit his name and likeness was not determinative of his right to prevent others from using his name and likeness).

[129] Factors, Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978), *cert. denied*, 440 U.S. 908 (1979); *see also* Price v. Hal Roach Studios, Inc., 400 F. Supp. 836 (S.D.N.Y. 1975).

the California Supreme Court[130] and the Sixth Circuit,[131] applying Tennessee law, have held that the right terminates upon death of the celebrity. An examination of the policy considerations favoring and opposing descendibility of the right indicates that the Sixth Circuit and California view is the sounder of the two.

The considerations that favor allowing the right of publicity to descend are basically those that favor recognition and enforcement of the right in the first place.[132] Each consideration, however, is weaker when applied to descendants than to the celebrities themselves.

Recognition of a post-mortem right of publicity would vindicate the celebrity's proprietary interest, but only indirectly. It is the heirs who would actually reap the financial rewards; the celebrity would benefit primarily in the sense that he would know the publicity value he has created will inure to the benefit of his heirs.[133] The personal, privacy-related interests of the celebrity of course terminate with his death and thus would not be served by allowing the right of publicity to survive.

As to the societal interest in fostering creative works through a system of financial incentives, if the possibility of monetary reward from exploitation of one's publicity value is an incidental rather than basic motivation behind most publicity-generating achievements, then the desire to exploit fame for the commercial advantage of one's heirs is an even less significant motivation.[134] Realistically, it is hard to see how making the right of publicity inheritable could result in an increase in creative endeavors over that which would result if the right were limited to living celebrities.[135]

Finally, as to preventing wrongful conduct, if defendants in publicity cases are accused of unjust enrichment, the accusation might be hurled with equal vigor at the heirs of a celebrity. It is the celebrity, not his heirs, whose labors created the publicity value. If defendant has reaped where he has not sown, then so would the celebrity's heirs if they are entitled to collect royalties or damages for use of their predecessor's name.[136] In fact, where defendant's use of the celebrity's name and

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[130] Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323 (1979).

[131] Memphis Dev. Foundation v. Factors, Etc., Inc., 616 F.2d 956 (6th Cir. 1980).

[132] *See* text accompanying notes 35-40 *supra.*

[133] Memphis Dev. Foundation v. Factors, Etc., Inc., 616 F.2d 956, 958 (6th Cir. 1980). The celebrity might benefit directly as well, because his assignment of publicity rights has greater commercial value if exclusivity can be assured beyond the time of his death.

[134] *See id.* at 958-59.

[135] *Id.* at 959.

[136] Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323, 332 (1979) (Mosk, J., concurring).

likeness derives from a contractual venture that defendant entered into with the celebrity, the equities may be on the side of defendants. For example, in *Lugosi v. Universal Pictures,* defendants were producers of the very vehicle through which Lugosi's fame was established (the movie "Dracula"), yet Lugosi's heirs sought to prevent them from exploiting Lugosi's identity as Dracula.

In contrast, the arguments against recognition of a post-mortem right of publicity appear compelling.

The countervailing interest in competition was stressed by the recent *Memphis Development Foundation v. Factors Etc., Inc.* case, in which the Sixth Circuit characterized plaintiffs as attempting to monopolize the name and memory of deceased rock star Elvis Presley.[137] While the court unhesitatingly accepted the right of a celebrity to control the use of his name and likeness during his lifetime, it had "serious reservations about making fame the permanent right of a few individuals to the exclusion of the general public."[138] Allowing a celebrity's heirs exclusive rights in his name and likeness would not, stated the court, promote the efficiency, productivity, or fairness of our economic system.

> It seems fairer and more efficient for the commercial, aesthetic, and political use of the name, memory and image of the famous to be open to all rather than to be monopolized by a few. An equal distribution of the opportunity to use the name of the dead seems preferable. The memory, name and pictures of famous individuals should be regarded as a common asset to be shared, an economic opportunity available in the free market system.[139]

To the extent that the right of publicity conflicts with the right of free expression,[140] such conflict would be prolonged by post-mortem recognition of the right. And whereas during a celebrity's lifetime the right of publicity effectively protects personal as well as proprietary rights, only the latter are at stake when the right is enforced post-mortem. Thus, whereas a state's interest in providing a right of publicity for a living celebrity lies in protecting personal as well as proprietary rights, its interest in providing a post-mortem right lies in protecting proprietary rights only. Therefore, when engaging in a First Amendment balancing test, less weight should be given the state's interest in the latter case.

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[137] 616 F.2d 956 (6th Cir. 1980).
[138] *Id.* at 957-59.
[139] *Id.* at 960.
[140] *See* text accompanying notes 68-94 *supra.*

Potential conflict with the policies underlying federal preemption would be exacerbated by a post-mortem right of publicity; contrary to the limited duration of copyright protection, a descendible right of publicity would be of unlimited duration.[141] Among other problems, this would create the anomaly where, for example, after Bela Lugosi's movies and Agatha Christie's books fall into the public domain, one could freely reproduce the book or movie but would be prohibited from selling posters of Lugosi as Dracula or of Christie. In addition, a descendible right of publicity raises the specter of "remote descendants of historic public figures" bringing suit,[142] even though "with the passage of time, an individual's identity is woven into the fabric of history . . . [and] the events and measure of his life are in the public domain and are questionably placed in the control of a particular descendant."[143] If the right of publicity is to descend yet not extend to perpetuity, a durational limit must be set. Yet any term of years chosen would be arbitrary, and this sort of arbitrary line-drawing generally is thought to be legislative in function, beyond the power of the courts.[144] On the other hand, a judicial decision as to whether the right of publicity is descendible would be neither arbitrary nor beyond the normal adjudicative function of the courts. Many common law tort actions do not survive the party whose rights were invaded. Defamation actions are one example; actions for invasion of privacy, including the tort of commercial misappropriation, are another. While intangible property rights such as copyrights do descend, the right of publicity is a right in one's fame and reputation rather than in one's works, and "[o]ur legal system normally does not pass on to heirs . . . personal attributes [such as fame], even though the attributes may be shared during life by others or have some commercial value."[145] That a celebrity's heirs may inherit copyrights in the celebrity's

[141] *Cf.* Sears Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 232 (1964) (unlimited duration of state protection against copying unpatentable articles would clash with federal patent regime); Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711, 718 (9th Cir. 1970), *cert. denied*, 402 U.S. 906 (1971) (unlimited duration of state protection against imitating a performer's style would clash with federal copyright regime).

[142] Lugosi v. Universal Pictures, 25 Cal.3d 813, 603 P.2d 425, 160 Cal. Rptr. 323, 328 (1979); *cf.* Schumann v. Loew's, Inc., 135 N.Y.S.2d 361 (Sup. Ct. 1954) (descendants of 19th century composer sue for commercial misappropriation).

[143] Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323, 344 (1979) (Bird, J., dissenting).

[144] *See* Memphis Dev. Foundation v. Factors, Etc., Inc., 616 F.2d 956, 959 (6th Cir. 1980); Lugosi v. Universal Pictures, 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323, 331 (Mosk, J., concurring); *see generally* H. HART & A. SACKS, THE LEGAL PROCESS 664-69 (tentative ed. 1958).

[145] Memphis Dev. Foundation v. Factors, Etc., Inc., 616 F.2d 956, 959 (6th Cir. 1980).

works or may be entitled to royalties from contracts entered into by the celebrity during his lifetime does not suggest that they should also inherit far more amorphous rights in the publicity value that arose as an offshoot of his achievements.

Thus, cutting off the right of publicity at death better accommodates the competing interests at stake, mitigating some of the adverse impact of the right without seriously detracting from its benefits. Recognizing that the right of publicity is a mixed blessing, it terminates the right at a logical point: the death of the celebrity whose name and likeness it protects.

V. LEGAL BALANCING MECHANISM: A "FAIR USE" LIMITATION ON THE RIGHT OF PUBLICITY

If the exclusive rights of copyright, which are authorized by the Constitution and granted by federal statute, are subject to a "fair use" limitation, surely an analogous limitation ought to apply to the exclusive rights granted under the state common law right of publicity. Judicial recognition of a fair use limitation on publicity rights would find its antecedent in the judge-made doctrine of copyright fair use. As an intrinsic limitation on the scope of publicity rights, a fair use doctrine could be applied so as to minimize conflict with the countervailing interests discussed in Part III of this article, particularly that of free expression.[146] The concept of resolving First Amendment conflicts by a finding of fair use has its parallel in the copyright field.[147] Incorporating First Amendment considerations into the right of publicity may be preferable to imposing them externally.[148] Finally, a fair use doctrine is appropriate because right of publicity plaintiffs typically seek injunctive relief, and when a court sits in equity the fundamental issue before it is "whether the acts complained of are fair or unfair."[149]

In copyright law, four separate but interrelated fair use factors have been identified: (1) the purpose and character of the use; (2) the nature of the protected work; (3) the amount and substantiality of the portion used; and (4) the effect of the use upon the potential market for the

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[146] *Cf.* Donahue v. Warner Bros. Pictures Distrib. Corp., 2 Utah 2d 256, 272 P.2d 177, 183-84 (1954) (construing scope of publicity rights to avoid conflict with First Amendment).

[147] *See, e.g.*, Italian Book Corp. v. American Broadcasting Co., 458 F. Supp. 65 (S.D.N.Y. 1978); Keep Thomson Governor Comm. v. Citizens for Gallen Comm., 457 F. Supp. 957 (D.N.H. 1978).

[148] *See* Felcher & Rubin, *supra* note 127, at 1622.

[149] Univ. of Notre Dame v. Twentieth Century-Fox Film Corp., 22 A.D.2d 452, 256 N.Y.S.2d 301, 306 (App. Div.), *aff'd mem.*, 15 N.Y.2d 940, 207 N.E. 2d 508, 259 N.Y.S.2d 832 (1965).

protected work.[150] For the purpose of sketching an outline of a fair use limitation on publicity rights, these four factors will be utilized by name, but the content given to each factor will not necessarily mirror its meaning in the copyright area. In other words, this article does not propose grafting the copyright fair use doctrine onto the right of publicity; it proposes that courts begin to weld the case law limitations on publicity rights into a cohesive fair use doctrine, borrowing the four-factor approach from copyright as an organizational aid.

The Purpose and Character of the Use. Applying this factor, the salient distinction would be between use of a celebrity's identity in a medium of expression—a vehicle through which ideas are generally communicated, such as a book or movie—and use of a celebrity's identity in connection with mere merchandise. If the former, there is a greater need to accommodate First Amendment interests, and such uses should be presumptively permitted. While the line between "media of expression" and "mere merchandise" will occasionally be unclear, the distinction is a basic one and should in many cases be outcome-determinative.[151] In fact, with the exception of *Zacchini,* nearly all the recent cases in which right of publicity violations occurred in a nonadvertising media context were decided for defendants.[152]

Within the "medium of expression" category, no distinction should be made between works that are primarily informative and works that are primarily entertaining. Both types of works are protected by the First Amendment, and in most cases the distinction should not affect the "fairness" of the use. The publicity cases have held that the fictional or entertaining nature of a work does not remove defendant's use of a celebrity's identity therein from privileged status.[153] Put another way, the right of publicity should not include the right to prevent others from

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[150] Meeropol v. Nizer, 560 F.2d 1061, 1068-71 (2d Cir. 1977), *cert. denied,* 434 U.S. 1013 (1978).

[151] *See* cases cited in note 89 *supra.*

[152] *See, e.g.,* Hicks v. Casablanca Records, 464 F. Supp. 426 (S.D.N.Y. 1978); Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966), 385 U.S. 1009 (1967); Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352 (1979); Univ. of Notre Dame v. Twentieth Century-Fox Film Corp., 22 A.D.2d 452, 256 N.Y.S.2d 301 (App. Div.), *aff'd mem.,* 15 N.Y.2d 940, 207 N.E.2d 508, 259 N.Y.S.2d 832 (1965).

[153] *See* Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352, 356-57 (1979) (Bird, J., concurring); Univ. of Notre Dame v. Twentieth Century-Fox Film Corp., 22 A.D.2d 452, 256 N.Y.S.2d 301, 306-07 (App. Div.), *aff'd mem.,* 15 N.Y.2d 940, 207 N.E.2d 508, 259 N.Y.S.2d 832 (1965); Donahue v. Warner Bros. Pictures Distrib. Corp., 2 Utah 2d 256, 272 P.2d 177, 182 (1954).

incorporating one's persona into a fictional work.[154] Neither should a distinction be drawn between works that are serious or artistically meritorious and works that are sensational. In part, this is because courts quite correctly decline to delve into matters of artistic merit,[155] and in part because a celebrity injured by use of his persona in an egregiously sensationalized work has other remedies available: false-light or defamation.[156]

Within the "mere merchandise" category of use would fall not only the merchandise itself but also advertisements. Where the unauthorized use is purely for advertising purposes, there exists little potential for conflict with the First Amendment. Although even purely commercial speech is entitled to some degree of First Amendment protection, deceptive commercial speech is not—and unauthorized use of a celebrity's name or likeness in an advertisement is usually deceptive in that it falsely implies his endorsement of the product. There are two situations, however, in which the use of a name or likeness in advertising is not deceptive and should be deemed fair. The first is where use of the celebrity's identity is only incidental and so raises no implication of endorsement: the fact that an advertisement for "Sports Illustrated" displayed an issue whose cover featured Joe Namath did not violate Namath's right of publicity.[157] The second is where the celebrity's identity appears in an advertisement that nondeceptively states that the celebrity is the subject of a book or movie or other privileged work: if defendants were privileged to produce a fictional film about Rudolph Valentino, they were equally entitled to advertise the film.[158] But on the other hand, use of a celebrity's name or likeness in connection with a medium of expression may at times be in substance an advertising, or mere merchandise, use. For example, if an author writes a book on how to play little league baseball and without the permission of the legendary centerfielder entitles it "The Willie Mays' Book of Little League Baseball," he is merely

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[154] Hicks v. Casablanca Records, 464 F. Supp. 426, 433 (S.D.N.Y. 1978).

[155] *See* Winters v. New York, 333 U.S. 507 (1948); Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481, 490 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956); Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352, 358 (1979).

[156] *See* Sinatra v. Wilson, 2 Media L. Rptr. (BNA) 2008, 2010 (S.D.N.Y. 1977) (cause of action for deliberately or recklessly false biography of celebrity); Spahn v. Julian Messner, 21 N.Y.2d 124, 223 N.E.2d 840, 286 N.Y.S.2d 832 (1967), *appeal dismissed*, 393 U.S. 1046 (1969) (defendant held liable for falsified biography of baseball player under a false-light theory).

[157] Namath v. Sports Illustrated, 48 A.D.2d 487, 371 N.Y.S.2d 10, 11-12 (App. Div. 1975), *aff'd*, 39 N.Y.2d 897, 352 N.E.2d 584, 386 N.Y.S.2d 397 (1976).

[158] Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 603 P.2d 454, 160 Cal. Rptr. 352, 360 (1979) (Bird, J. concurring).

appending Mays' name to his work to exploit Mays' publicity value.[159] Such uses should be deemed unfair.

The Nature of the Protected Subject Matter. One of the issues raised in *Lugosi v. Universal Pictures* was the extent to which the right of publicity protects a performer's portrayal of a fictional character. The concurring opinion suggested that if anyone had rights to the Dracula character, it would be the author of the "Dracula" novel or his successors, not the one who merely portrayed the character, no matter how artful his portrayal: "[Lugosi's] performance gave him no more claim on Dracula than that of countless actors on Hamlet who have portrayed the Dane in a unique manner."[160] The concurring Justice would limit the right of publicity to protection of the celebrity as himself (Lugosi *qua* Lugosi) and to an "original creation of a fictional figure played exclusively by its creator," giving as examples the stage characters of Groucho Marx, Abbott and Costello, and Laurel and Hardy.[161] The *Lugosi* dissent responded that the right of publicity should protect a celebrity's public persona, whether that persona is his real name and natural likeness or a fictional character, with no distinction drawn between a fictional character of the celebrity's own creation and one created by others. Thus, contended the dissent, while Lugosi may not have rights in the underlying Dracula character, he did have publicity rights in his likeness as Dracula (Lugosi *qua* Dracula).[162]

The dissent's point is well taken. If the right of publicity protects against commercial appropriation of a celebrity's public persona, protection should not be denied solely because that persona is a fictional character not entirely of his creation. But the concurring Justice's distinction suggests a valid basis for differentiating the *scope* of right of publicity protection. Where the celebrity's commercially valuable per-

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[159] *Cf. id.*, 160 Cal. Rptr. at 355 n.6 (defendants might be liable "if, for example, [they] had published Rudolph Valentino's Cookbook and neither the recipes nor the menus described in the book were in any fashion related to Rudolph Valentino"). This false implication of a nexus between the celebrity and the work is actionable under the traditional tort of misrepresentation, or "passing off," as well as under the right of publicity.

[160] 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323, 330 (1979) (Mosk, J., concurring).

[161] *Id.* In a case involving Laurel and Hardy, the court in fact noted that its case was easier to decide than the *Lugosi* case "since we deal here with actors portraying themselves and developing their own characters rather than fictional characters which have been given a particular interpretation by an actor." Price v. Hal Roach Studios, Inc., 400 F. Supp. 836, 845 (S.D.N.Y. 1975).

[162] 25 Cal. 3d 813, 603 P.2d 425, 160 Cal. Rptr. 323, 342-43 (1979) (Bird, J., dissenting).

sona is entirely of his own creation, appropriation of that persona is less likely to be fair than if that persona is no more than a portrayal of an already-existing character. Thus, defendant's appropriation of Lugosi *qua* Dracula should not be permitted solely because others have rights in the character, but any use of the Dracula character other than one actually incorporating Lugosi's distinctive visage should not be subject to any rights whatsoever on Lugosi's part. In contrast, where the public persona is entirely of the celebrity's creation, his rights are more far-reaching. Thus, Lugosi would have no publicity rights as to a cartoon series based on the Dracula character, but Laurel and Hardy might have publicity rights in a cartoon series based on the Laurel and Hardy characters. This aspect of the proposed fair use doctrine would, in some cases, ameliorate the conflict between publicity rights and the proprietary rights of others.[163]

In addition, the origin or nature of the celebrity's fame might affect the scope of protection. Where the celebrity is involved in politics and public affairs, uses of his identify that have some nexus with his political status should be given greater leeway because of compelling First Amendment considerations.[164] And the publicity rights of those who have achieved fame through notorious crime[165] ought to be severely limited, since any publicity value in a criminal's name and likeness is the fruit of antisocial conduct, not of creative or intellectual endeavors.[166]

Amount and Substantiality of the Use. Here the salient distinction is one of degree. At one end of the spectrum would be mere imitation of a celebrity's mannerisms or appearance, which should not be actionable

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[163] *See* text accompanying notes 95-105 *supra,* for a discussion of this conflict.

[164] *See* Paulsen v. Personality Posters, Inc., 59 Misc. 2d 444, 299 N.Y.S.2d 501, 507-08 (Sup. Ct. 1968) (scope of comedian's publicity rights severely limited when he enters political arena); *cf.* Keep Thomson Governor Comm. v. Citizens for Gallen Comm., 457 F. Supp. 957 (D.N.H. 1978) (fair use of copyrighted political campaign song).

[165] *See* Memphis Dev. Foundation v. Factors Etc., Inc., 616 F.2d 956, 959 (6th Cir. 1980) (fame "may be created by bad as well as good conduct"). The names, likenesses, and life stories of notorious criminals obviously have great publicity value. In recent years, a spate of books capitalizing on New York's "Son of Sam" have appeared; a television network broadcast a heavily-advertised docudrama on the Reverend Jim Jones; and tales concerning Jack the Ripper continued to captivate the public, as evidenced by two major motion pictures. On a less gruesome note, many of the Watergate defendants have been paid handsomely for their accounts of White House wrongdoings.

[166] *Cf.* Leopold v. Levin, 45 Ill. 434, 259 N.E.2d 250 (1970) (notorious murderer has no right of privacy as against author of fictionalized account of the crime).

in the absence of "passing off."[167] At the other end of the spectrum would be unconsented commercial use of a performer's entire act, as in *Zacchini*. Most cases would fall somewhere in between. Application of this fair use factor would help alleviate the tension between publicity rights and competition[168] by allowing a certain amount of pro-competitive copying.

Effect of Defendant's Use Upon the Celebrity's Potential Market. In applying the final factor, the pertinent issues would be, first, whether plaintiff has in some way exploited his name or likeness so as to create a market in his publicity value, and second, whether defendant's use competes with that of plaintiff in the market plaintiff has created. Thus, the plaintiff in *DeCosta v. Columbia Broadcasting System* was not entitled to relief against defendant's appropriation of his "Paladin" character because, *inter alia,* he had never commerically exploited the character.[169] By contrast, the professional golfers in *Palmer v. Schonhorn Enterprises* were entitled to relief against defendant's use of their names and playing statistics in connection with a board game because, *inter alia,* plaintiffs derived a substantial portion of their earnings from authorized endorsements and uses of their names in connection with commercial ventures.[170] Similarly, one reason the Supreme Court was sympathetic to plaintiff's claim in *Zacchini* was its perception that the broadcast of his entire act "pose[d] a substantial threat to the economic value of that performance."[171] By contrast, in *Booth v. Colgate-Palmolive Co.*, the court was unsympathetic to plaintiff's publicity claim because the alleged misappropriation posed little or no threat to plaintiff's livelihood as a performer.[172] Felcher and Rubin would apply what they have termed this "principle of identifiable harm" across the board in publicity cases: the plaintiff should not obtain relief unless he earns money from the particular attributes appropriated by the defendant and identifies actual economic harm resulting from the appropriation.[173] Thus, this factor would be similar to its counterpart in copyright, but its application would

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[167] *See* Sinatra v. Goodyear Tire & Rubber Co., 435 F.2d 711, 713 (9th Cir. 1970), *cert. denied,* 402 U.S. 906 (1971); Booth v. Colgate-Palmolive Co., 362 F. Supp. 343 (S.D.N.Y. 1973); *cf.* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578 n.13 (implying that the right of publicity could not prevent defendants from imitating plaintiff's act).

[168] *See* text accompanying notes 60-67 *supra.*

[169] 520 F.2d 499, 512-13 (1st Cir. 1975), *cert. denied,* 423 U.S. 1073 (1976).

[170] 96 N.J. Super. 72, 232 A.2d 458, 459 (1967).

[171] 433 U.S. 562, 575-76 (1977). *But cf. id.* at 575 n.12 (admitting that defendant's broadcast may have enhanced rather than diminished the value of plaintiff's act).

[172] 362 F. Supp. 343, 349 (S.D.N.Y. 1973).

[173] Felcher & Rubin, *supra* note 127, at 1614-15.

be more rigorous. In copyright cases, an adverse effect on the plaintiff's potential market is often presumed if other factors, such as the amount and substantiality of use, indicate a clear case of infringement. In publicity cases, the plaintiff should have the burden of proving adverse effect on an actual market, even if his name and likeness or performance has clearly been infringed.

CONCLUSION

The precise contours of the right of publicity continue to be drawn on a case-by-case basis. While the right is one that should be recognized in our publicity-oriented, mass communications-based society, it is not an unmixed blessing. Termination of the right upon death of the celebrity and application of a fair use doctrine would allow the right to be enforced consistently with the countervailing rights of other individuals and policy considerations affecting society as a whole.

138. ART RESALE RIGHTS AND THE ART RESALE MARKET: *An Empirical Study**

By TOM R. CAMP**

The occasion, recorded in E.J. Vaughn's 1974 documentary film, "America's Pop Collector: Robert C. Scull—Contemporary Art at Auction," was an October 1973 Sotheby Parke Bernet, Inc. auction of works from the Robert Scull collection. Robert Rasuchenberg's *Thaw,* which Scull had purchased from Rauschenberg for $900 in 1958, resold for $85,000. The price, although newsworthy itself, was far less important than what occurred after the auction. Artist Rauschenberg approached collector Scull, laughing as if uncontrollably, and gave him a hard but friendly push, saying, "I've been working my ass off for you to make all this profit." Although not eloquently stated, Rauschenberg's comment embodied a sense of frustration and indignation that struck a responsive chord with many other artists and some of the public. It seemed wrong that the artist should have received only $900 for a work of art worth $85,000.

The Rauschenberg-Scull affair crystalizes many of the issues in the current debate about art resale rights and is cited in most discussions about them. Art resale rights give artists a portion of the proceeds from resale of their works. They take several forms. Some resale rights give the artist a share of the total proceeds received by a seller; some give a share only of any price appreciation since the previous sale of the work. Resale rights may be created by contract or by statute. However, contractual resale rights are both difficult to negotiate because of buyer and dealer opposition and are hard to enforce against subsequent purchasers. Most of the recent advocacy has been in support of statutory resale rights.

Several civil law nations have had art resale statutes known as the *droit de suite* for a number of years. The first was enacted in France in 1920. Laws are also on the books in Algeria, Belgium, Chile, the German Federal Republic, Italy, Luxembourg, Morocco, Portugal, Tunisia, Turkey, and Uruguay. Poland once had a *droit de suite,* but seems to have abandoned it in a copyright law revision. Laws related to the *droit de suite*

*This article was awarded First Prize in the 1979 ASCAP Nathan Burkan Competition at Stanford University Law School.

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[1] Law of May 20, 1920.)

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also exist in Czechoslovakia and Yugoslavia. The success of these laws is in doubt and several of them are not even enforced.

California enacted the first art resale right in the United States in 1976.[2] California Civil Code Section 986 applies to original paintings, sculpture and drawings sold during the lifetime of the artist, either in California or by a California resident. Except for resales below a $1000 floor or the seller's purchase price, the law gives the artist a right to 5 percent of the total resale price. California's is currently the only art resale right statute in the United States, although others are under consideration. A bill introduced by Congressman Henry Waxman of California would create a national art resale right and a federal agency to enforce it.[3]

Art resale rights are still a matter of much debate. The policies and theories behind them have been argued extensively and critiqued in legal and art periodicals.[4] But in all the debate, one thing seems largely to have been ignored: There has been very little investigation of the facts. To support their arguments, both sides of the debate make some very broad assumptions about the art resale market and how an art resale right would affect it.

The proponents argue that artists suffer a serious inequity. They often sell their works at low prices only to see them resold at significantly higher prices years later. The paradigm case, which Professor Monroe Price, one of the opponents of the resale right, has characterized as a "romantic notion,"[5] is of the starving young artist creating masterpieces which must be sold to cunning collectors and dealers for a pittance. When the artist has become famous, these masterpieces are then resold at fabulous prices after years of suffering by the artist. The resale right, the proponents argue, will redress this inequity; it will provide an important right for artists and give them their fair share of the value of their works.

The opponents counter that only a very few artists have a significant resale market which would generate a resale right and that the artists with a resale market tend to be the more successful artists least in need of the resale right. Moreover, the opponents argue that the resale right will actually harm the art market: The added cost of the resale right

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[2] Cal. Civ. Code § 986 (West Supp. 1978).

[3] The Visual Artists' Residual Rights Act of 1978, 95th Cong., 2d Sess. (1978).

[4] For a convenient compilation of articles on resale rights, *see* J. MERRYMAN & A. ELSEN, LAW, ETHICS AND THE VISUAL ARTS—CASES AND MATERIALS IV 100 (1978).

[5] Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite,* 77 YALE L.J. 1333 (1968).

will seriously reduce the sales of art subject to it; and more insidiously, the resale right will reduce opportunities for young and unknown artists because of the damage it will do to the art dealers who promote them.

OBJECTIVES OF THE STUDY

This study set out to find some evidence to support or reject the assumptions about the art resale market implicit in the arguments of the proponents and the opponents. Specifically, the study tried to answer, at least tentatively, four questions:

1. How frequently do artists sell their works at very low prices only to see them resold at much higher prices later in their careers?
2. Which artists have a significant resale market and who are they?
3. Would the added costs of a resale right reduce the demand for art subject to it?
4. Would an art resale right reduce opportunities for young and unknown artists because of its effects on art dealers?

THE APPROACH OF THE STUDY

To answer these questions, one has to go to professional art dealers, the source most likely to have information about the art market. Only they have the records of art resales and sufficient contacts with the market, both of which are needed to draw any meaningful generalizations. The most comprehensive records of art resales are contained in the art auction catalogs of Sotheby Parke Bernet, Inc. Since the Rauschenberg-Scull affair grew out of a Sotheby Parke Bernet auction, it seems fitting that those auctions be used to answer some of the issues the Rauschenberg-Scull affair raised. Moreover, auction sales are probably a rough cross-section of the resale market. In any case, they are the only convenient sample of art-resales publicly available and had to form the basic source of statistics for this study.

Starting from the Scull auction in October of 1973 and running through the end of 1977,[6] a record was made[7] of original, unique works of art created by an American artist and resold at a Sotheby Parke Bernet auction for over $500 during the life of the artist or within five years of the artist's death. Records were also kept for 1977 auctions of the works of living and recently dead foreign artists' works resold for over $1000.

[6] *See* Appendix A.
[7] *See* Appendix B.

Since art auctions are only a small portion of the art resale market, it was necessary to find a supplemental source of information. Twelve individuals representing eight art galleries or dealers in the San Francisco Bay area were interviewed in the Spring of 1978 for information about their art resales. The dealers interviewed were selected on the basis of their reputation as significant art resellers. The interviews were generally free-ranging, although loosely directed around the four objectives of this study.[8] Discussions usually lasted about one hour. Dealers were asked both for their opinions and for specific information about their own resales.

The dealers were quite free with opinions and experiences, but quite stingy with their own resale records. Their reluctance is understandable in view of the privacy which surrounds a dealer's sales and the possibility of liability for any resale rights that had not been paid.

The California law has been widely ignored by art dealers. Out of all the interviews, only one art dealer knew of even one case in which a resale right had been paid to the artist. The sale involved a work taken on consignment from a Canadian collector. When informed of the resale law in California, the collector asked the gallery to withhold the resale right and pay it over to the artist.

The possibility of legal liability for unpaid resale rights was a very real concern at the time. By coincidence, a class action suit to collect resale rights was instituted at about the time the interviews were conducted. In fact, one dealer was joined as a defendant just a few days after the interview. In order to relieve some of the apprehensions of the dealers, all interviews were conducted with the express understanding that the names of the dealers would not be revealed and that no statements would be attributed to any particular person.

THE RESULTS OF THE STUDY

The combination of the information from the auction sales and the dealer interviews allows one to draw some interesting conclusions. None of the results have been tested for statistical significance, but they seem to allow at least some tentative generalizations. Overall, one can conclude that both the proponents and the opponents of the art resale right have overstated their cases; both sides seem to have assumed too much.

The problem. The proponents of the resale right see a problem of artists creating works when they are young and unknown and selling them for very little. When the artist is well known, those early works may rise greatly in value giving the buyer fabulous profits while the artist receives nothing. The Rauschenberg-Scull affair is an obvious ex-

[8] *See* Appendix C.

ample. The opponents say this is not a common occurrence, but instead that it is a "romantic notion."

The results of this study indicate that both sides are correct to some extent. The average (mean average) age of artists at the time of the 1977 auction sales was 54 years.[9] That fits reasonably well with the assumption of the proponents that artists sell their works when they are older and better known. But the age of artists at the time the work sold was created averaged (mean average) 43 years. In averaged terms, the works resold are the works of mature artists. There are cases of works created in youth and sold in the artist's old age, but they seem rather uncommon. Two de Koonings were created when the artist was 33, forty years before the resale, but there was also one Wesselmann which was sold at auction during the same year it was created. As Table I shows, the individual cases spread out quite a bit.

TABLE I

AGE OF ARTISTS AT THE TIME OF CREATING THEIR WORKS
(numbers represent resales of living American artists during 1977 only)

age of artist	under 30	30-37	38-48	over 49
number of artists	5	32	47	29

However, most of the artists were at least in their late 30's at the time the work sold was created.

The notion of the starving young artist whose works some day resell at fabulous prices in most cases is fairly "romantic." (From the limited information available for this study, while not statistically valid, it is interesting to note that the lifespan of the successful artists who died within the period studied was no different from the lifespan of the general population.) The average age at death for American artists who died within the period of auction sales studied was 72.[10] The works that resell are more often the work of a mature rather than a young artist. One well-respected dealer had a theory to explain this result. The dealer argued that most of an artist's work is merely experiment and practice for a few truly great works. Today there is a much more willing acceptance of experiments in art, so early works may be sold. But when

[9] *See* Appendix D.
[10] *See* Appendices G & H.

the great works come along, everything that led up to them is only important historically to show the development of the artist. What has continuing value and a real resale market are the great works of art by the mature artist. The auction sales of dead artists' works provide some examples of that. When an artist dies, the art world has a perspective on an entire career and can determine which works were merely the experiments and which the great works. Of the works of Josef Albers sold in 1977, three sold for between $14,000 and $16,000 and were created when Albers was between 70 and 74 years old. A work which sold for $29,000 was created when Albers was 81. Alexander Calder's most valuable works resold in 1977 were created when he was 58, 63, 69 and 71.[11]

While works of art do rise in value after they are sold by an artist in many cases, the idea of starving young artists selling works for a pittance which resell at fabulous prices in the future is not a particularly common problem. To that extent, the opponents of art resale rights appear to be correct and the proponents incorrect in their assumptions about the art resale market.

The beneficiaries. Which artists have a resale market that might generate a resale right? The proponents seem to assume that a large number of artists will benefit, including a number of struggling artists. The opponents contend that very few artists have a significant resale market and that those who do tend to be the more successful artists. Both the auction sales and the dealer interviews indicate strongly that the opponents are correct on this issue.

Assume an art resale right like California's. It applies to the resales of the works of living artists for over $1000 and above the seller's purchase price. Because the auction catalogs do not list the seller's purchase price, that limit has been removed for this study. Over the roughly four years of art auctions recorded, 152 living American artists had resales of original art for over $1000 amounting to total sales of $7,812,250.[12] That is an average (mean average) of $12,849 in sales each year per artist, and a resale right of $642.45, assuming all the resales were at a price higher than the previous sale of the work.

The benefits of the resale right, though not overwhelming, seem real enough: 152 artists receiving about $650 each year. But that is not really the case. Resales are not evenly spread among artists; the resale market is highly concentrated among a very few artists. To begin with, only 152 living American artists had any resales over $1000 at a number of Sotheby Parke Bernet auctions over four years. But the 1970 Census

[11] *See* Appendix G.
[12] *See* Appendix E.

listed 107,476 painters and sculptors in the United States.[13] Only 0.15% of the artists in the United States even made the list!

Even among the 152 artists on the list there is significant concentration of sales. Over the four years recorded, 62 of the artists (41%) had only one resale and 25 (14%) had only two. Thus the list of artists with a significant resale market at the auctions is something less than 64. Table II shows the concentration of resales from the other side. The top five resellers had 193 resales or 27% of the 705 total resales.

TABLE II

TOP FIVE RESELLERS IN TERMS OF NUMBER OF RESALES
(numbers represent resales of living American artists over $1000 only)

artist	number of resales	percent of all resales
Alexander Calder*	57	8%
Willem de Kooning	28	4
Larry Rivers		4
Tom Wesselmann	23	3
Kenneth Noland	19	3
Jules Olitski		3
Frank Stella		3
totals	193	27%**

*Alexander Calder died in 1976 during the sample period
**figures may not total properly because of rounding

The concentration is even more obvious in terms of the dollar value of resales. Table III shows the resales of the top five resellers in terms of the value of their resales. Interestingly enough, Robert Rauschenberg was the number one reseller. Combined, the top five had sales of $2,448,350 or 31.4% of the sales of all living American artists. The 24 artists with sales over $100,000 during the four years had resales totalling $6,043,250; approximately 16% of the artists were responsible for about 77% of the total value of the resales during the period.

[13] (1970 Census of the Population: Subject Reports—Occupational Characteristics 1 (1973) (Table 1).

TABLE III

TOP FIVE RESELLERS IN TERMS OF DOLLARS OF RESALES
(numbers represent resales of living American artists over $1000 only)

artist	value of resales	percent of all resales
Robert Rauschenberg	$608,250	7.8%
Willem de Kooning	574,950	7.4
Alexander Calder*	495,750	6.3
Jasper Johns	404,000	5.2
Frank Stella	365,400	4.7
totals	$2,448,350	31.3%**

*Alexander Calder died in 1976 during the sample period
**figures may not total properly because of rounding

Some proponents of art resale rights have suggested that a $1000 floor is too high. But the results do not change significantly if resales between $500 and $1000 are included.[14] An additional 39 artists would be added to the list, most of whom had only one resale recorded over the four-year period. Another 47 artists who had resales between $500 and $1000 were already on the list because of their resales over $1000. Moreover, the total value of the 128 resales of works of living American artists between $500 and $1000 was on $92,475.

Even when the floor is dropped to $500, the concentration of resales among a few artists continues. Assuming that all of these resales would qualify under a law like California's, an artist would have had to have over $2000 in sales to yield just $100 in resale right over the entire four years recorded. Only seven artists, Edward Avedisian, Ron Davis, Ray Johnson, Larry Rivers, Ed Ruscha, Andy Warhol, and Tom Wesselmann, had at least $2000 in resales between $500 and $1000.

It has also been suggested that the resale right should not be limited to the works of living artists. The proposal is usually to give the resale right the same duration as copyright, the life of the artist plus fifty years. Many of the *droit de suite* have the life plus fifty-years term. To give some idea of which artists have resale markets after their deaths, the auction resales of artists who had died within five years of the resale were also

[14] *See* Appendix F.

recorded.[15] During the four years recorded, eleven dead artists had 58 resales totalling $1,086,800. The same concentration of benefits among a few of the most famous and successful artists continues after the artists' deaths.

One of the rationales for extending the term of the resale right is based on the popular notion that the value of an artist's works rises when the artist dies. Several of the art dealers disputed that notion in the interviews. Only four artists had auction resales recorded both before and after their deaths. Table IV shows that the average prices of their works rose insignificantly or dropped. This study does not involve enough artists or resales of their works to draw any conclusions, but at least the Sotheby Parke Bernet auctions lend no support to the notion that an artist's works rise in value upon the artist's death.

TABLE IV
ARTISTS' SALES BEFORE AND AFTER DEATH
(numbers represent American artists only)

	before death		after death	
artist	number of resales	average resale price	number of resales	average resale price
Josef Albers	12	$23,654	6	$15,583
Alexander Calder	57	8,697	12	8,888
Adolph Gottlieb	7	4,800	6	4,933
Man Ray	4	6,150	1	2,000

So far figures have been given only for American artists. But the California law is not limited to American artists; its benefits extend to artists around the world. The resales of the works of living and recently dead foreign artists over $1000 were recorded for 1977.[16] Seventy-three living foreign artists had resales totalling $1,951,000 in 1977 and nine recently deceased artists had resales totally $1,347,000. The comparable figures for American artists during the same period are somewhat lower: $1,265,300 in sales by 59 living American artists in 1977 and $221,650 in sales by five recently dead artists. Foreign artists clearly have a more significant resale market than domestic artists.

Table V lists the sales of foreign artists' works by nationality of the artist. A significant portion of the dollar amount of the resales would go to the nationals of countries with the *droit de suite*. Presumably, reciprocal arrangements would allow American artists to collect resale

[15] *See* Appendix G.
[16] *See* Appendix H.

rights on their resales in those countries. Thus, although foreign artists are dominant in the American art resale market, the art resale rights paid out of the country on those sales would be offset to some extent by the resale rights American artists would receive on their foreign resales. Nonetheless, the resale right could result in the American art market providing a real subsidy to the more successful foreign artists. That may or may not be harmful, but it certainly is a consideration in any decision to extend resale rights to foreign artists.

TABLE V

NATIONALITY OF FOREIGN ARTISTS
(numbers represent 1977 resales only)

nationality	number of artists	percent of artists	value of resales	percent all sales value
Argentine	1	1.2%	$ 1,700	0.1%
Belgian*	3	3.7	13,700	0.4
British	10	12.2	131,800	4.0
Bulgarian	1	1.2	6,000	0.2
Canadian	2	2.4	27,400	0.8
Chilean*	1	1.2	8,000	0.2
Colombian	1	1.2	85,000	2.6
Danish	1	1.2	8,500	0.3
Dutch	1	1.2	18,100	0.5
French*	21	25.6	1,250,200	37.9
German*	5	6.1	43,500	1.3
Greek	1	1.2	2,100	0.1
Israeli	2	2.4	28,900	0.9
Italian*	9	11.0	106,800	3.2
Mexican**	12	14.6	297,550	9.0
Portugese*	1	1.2	15,000	0.5
Russian	3	3.7	9,850	0.3
Spanish	5	6.1	1,230,900	37.3
Swiss	1	1.2	11,500	0.3
unknown	1	1.2	2,000	0.1
totals	82	100.0%	$3,298,550	100.0%***

*nations with some *droit de suite* whether or not enforced
**a special sale of the works of Mexican artists greatly inflated the Mexican totals over previous years
***figures may not total properly because of rounding

The concentration of resales among a few artists is even more pronounced in the sales of foreign artists' works. As Table VI shows, the top five resellers in terms of the number of resales comprise 29.2% of all the resales of foreign artists' works. That compares with 27% for the top five American artists (although because of a tie, seven artists made the American top five). The concentration in terms of the value of resales is far greater. Table VII shows that the top five foreign resellers were responsible for 72.4% of the total value of foreign artists' resales. That compares with 31.4% for living American artists. Moreover, just ten foreign artists (12% of all the foreign artists on the list) were responsible for $2,711,500 in resales or 82% of the foreign total.

TABLE VI

TOP FIVE RESELLERS IN TERMS OF NUMBER OF RESALES
(numbers represent American resales of living and recently dead foreign artists during 1977 only)

artist	number of resales	percent of all resales
Pablo Picasso	14	6.7%
Jean DuBuffet	12	5.7
Francisco Toledo	10	4.8
Marc Chagall	9	4.3
Andre Dunoyer de Segonzac		3.8
Rufino Tamayo	8	3.8
totals	61	29.2%*

*figures may not total properly because of rounding

TABLE VII

TOP FIVE RESELLERS IN TERMS OF DOLLARS OF RESALES
(numbers represent American resales of living and recently dead foreign artists during 1977 only)

artist	value of resales	percent of all resales
Pablo Picasso	$1,145,500	34.7%
Marc Chagall	603,500	18.3
Jean DuBuffet	379,750	11.5

Rufino Tamayo	166,250	5.0
Andre Dunoyer de Segonzac	96,250	2.0
totals	$2,391,250	72.4%

It seems that no matter how one looks at the auction sales, only a few artists have any resales and only the most important artists have significant resale markets. The dealer interviews confirm that is the case generally in the art resale market. Just the descriptions of the resales of each of the dealers interviewed tells a great deal about the size of the resale market. And these interviews were held with what are generally considered the major art resellers in the San Francisco Bay area.

Gallery A specializes in established twentieth century artists, particularly American. The director agreed to review the invoices of sales for February and March of 1978. Most of the sales were of prints. Only three out of perhaps thirty or 35 sales were of original works by living artists for over $1000. One work by Claes Oldenberg and another by Frank Stella had been purchased directly from the artists for resale. The gallery director refused to believe those sales might be covered by a resale right. Only one resale was of a work that had been purchased on the market. It was a piece by Wayne Thiebaud. The director of Gallery A was amazed at the results. "I always thought I was one of, if not the major reseller in the Bay area," he said.

Gallery B handles almost exclusively modern works generally priced between $1000 and $2000. Resales are a significant portion of the gallery's business, yet the gallery apparently resells only a few works by the most important modern artists.

Dealer C does not have a gallery and its sales are almost exclusively resales. Dealer C claimed that only the works of a few of the most important modern artists could be resold profitably in the Bay area.

Gallery D is a large, aggressive gallery. They both sell new works and handle resales. The director of Gallery D checked their records for the past two years and found only one resale of a living artist for over $1000 and that was the work of an Italian artist.

Gallery E specializes in living Bay area artists. Most of their sales are initial sales on behalf of the artist, not resales. Their few resales are either of artists for whom they are an agent on initial sales or a few of the very best known artists whose works can be resold very quickly. Gallery E views their resales primarily as a service to their customers to encourage purchases of new works.

Gallery F is almost entirely involved in resales. However, the resales are almost exclusively prints and a few graphics. The gallery handles very few paintings and nearly no sculpture. The director of the gallery could not think of any recent resales which would qualify under the

California law for a resale right.

Dealer G is a major reseller. But Dealer G emphasized that the majority of the resales were of prints not covered by a resale right like California's which applies only to original works.

Gallery H was recommended by nearly every other gallery as an important art reseller. However, the director stated that the gallery had nearly no resales and acted almost exclusively as a seller for artists' new works.

If any confident conclusion can be drawn from this study, it is that the art resale market is a very limited one. The opponents of the art resale right are correct—most artists have no resale market, a few artists have a small resale market, and only a few of the most successful artists have a significant resale market. Since the benefits of an art resale right go only to those artists with a resale market, the benefits will go primarily to a very few of the most important artists, who usually already have lucrative initial sales.

Effect of the resale right on purchasers. The other side of the benefits an art resale right might confer are the costs it would impose. The art dealers interviewed indicated that at least part of those costs may be passed on to buyers of art in the form of higher prices. The opponents of art resale rights argue that higher prices will cause buyers to buy less art. Economic theory says that when the price of something goes up, people should buy less of it. However, whether that in fact occurs and the extent to which it occurs depend upon several factors, mainly buyers' sensitivity to price.

The auction catalogs give no information about buyers, so they provide no help on this issue. The dealers interviewed, however, were quite candid in expressing their experiences with buyers. Most of the dealers agreed that the people who buy art from them tend to have mixed motives. Most are not buying art purely as an investment; they are buying art because they enjoy art and want to own it. But the buyers also tend to be knowledgable about prices of art, particularly differences in prices between markets. And although they are not buying solely as an investment, the buyers are aware often of the investment possibilities.

However, two dealers disputed the importance of price to buyers. One argued that art prices are so intangible that a 5% resale right does not matter. Moreover, this dealer seemed to think trust was more important than price. Other dealers sell prints identical to those sold by this dealer, but buyers still prefer to deal with someone they trust. Another dealer argued that a 5% resale right like California's is not important to a buyer because of inflation. With inflation running at better than 5%, the cost of the resale right is covered by the inflation in the value of the work in the first year. However, both dealers changed their

minds when the resale right became a more significant percentage.

The closest thing to a concensus would be that buyers are at least aware of prices and somewhat sensitive to them. But the dealers divided when asked whether the resale right would actually hurt sales. Four dealers said the resale right would reduce the resales of art subject to it, four said it would not and one answered both yes and no at different points in the interview and ended up uncertain.

The impression left after the interviews was that while price is often not the most important factor in an art buyer's decision to buy, it is at least one factor. A five percent resale right like California's probably would not be enough to forestall a very large percentage of sales. However, it would become important in marginal sales, and the dealers indicated it could encourage buyers to go to other markets which do not have a resale right. While the resale right would probably not destroy the art market, it would probably discourage sales of art subject to it to some extent.

Effect of the resale right on dealers. The art dealers interviewed were clearly against statutory resale rights, although one claimed to have sold a number of works with contractual resale rights and was quite happy to sell that way. The opposition of art dealers to the resale right is understandable. The opponents argue that the resale right will effect dealers in two ways. First, they argue that the costs of the resale right will force marginal dealers out of business. Most of the art dealers did not think the resale right would force them out of business, although several claimed they would stop dealing in works covered by the resale right if they were less profitable. However, one dealer, who reputedly is a financially marginal dealer, did feel the costs of the resale right would destroy the gallery's business. The argument may have some force for financially marginal dealers, at least the dealers seem to think so.

Second, the opponents argue that even if dealers stay in business, the added cost of the resale right reduces their ability to develop young and unknown artists. The costs of showing the works of a young or unknown artist often exceed the income from a show. Since new shows are often placed in the front portion of a gallery, they are typically called "frontroom" sales. One dealer provided the income and costs of a recent show to illustrate the problem. Those figures are summarized in Table VIII. The show produced income of only $4,493 while the gallery incurred direct costs of $6,173 for a direct loss of $1,680. On top of the direct costs, the gallery had fixed costs such as staff, rent and utilities. The loss on such showings must be made up elsewhere. Several gallery dealers claimed that the "backroom" resales of established artists' works subsidized a significant portion of losses on new artist's works. If dealers must bear part of the cost of a resale right, their loss of profits would

reduce the subsidies which they can provide to develop young and unknown artists.

TABLE VIII

INCOME AND DIRECT COSTS FOR A NEW ARTIST SHOWING
(an example provided from the books of one gallery)

Income		$4,493.00
(sales of works in the show during the show)		
Costs		
catalog	$3,324.66	
advertisements in art journals	2,235.00	
local advertising	260.68	
food and liquor for opening	744.43	
mailing costs	251.25	
freight	1,161.10	
special services	2,044.55	
total	$10,021.67	
less: expenses shared by others	3,848.82	6,172.85
gain (loss)		$(1,679.85)

The dealers generally agreed that the resale right would reduce the backroom-frontroom sales subsidy. Gallery F has no showings of young or unknown artists; it deals exclusively in resales of established artists' works. If resales do subsidize showings, it would follow that Gallery F should be making far more than other galleries. Gallery F's director answered that question with a very broad, self-satisfied smile.

However, both Gallery E and Gallery H specialize in showings of artists' new works. Neither has significant resales to subsidize those showings. One would think both galleries would be completely insolvent. The reason they are not insolvent is probably that resales of established artists are not the only factors subsidizing losses on some shows of young and unknown artists. Both Gallery E and Gallery H represent some established artists on initial sales and are probably able to use profits on those sales to offset any losses on more speculative artists.

There appears to be some validity to the argument that the art resale right would interfere with the backroom-frontroom sales subsidy. However, the loss of profits caused by a resale right might be made up by subsidies from other activities of the gallery.

CONCLUSION

Both sides of the argument over art resale rights have made assumptions about the art market without properly researching the basis for those assumptions. The conclusions of this study are that those assumptions have not been entirely valid. First, the problem the proponents see with artists selling works for low prices before they become famous, while it occurs, is probably not as significant as it sometimes is made out to be. Cases like the Rauschenberg-Scull affair may be useful as examples for argument, but they do not appear to be typical occurrences in the art market.

Second, the opponents of the art resale right appear to be quite correct that very few artists have any resale market and that those artists with a significant resale market tend to be the more successful artists. Most of the benefits of an art resale right would probably go to a few of the most important artists.

Third, the opponents may have exaggerated the concern over buyers not buying works subject to the resale right because resale rights raise art prices. Buyers do not seem highly sensitive to price. However, the opponents are probably correct that the resale right will discourage at least some buyers and might encourage buyers to go to markets which do not have a resale right.

Finally, the opponents seem to be correct to some extent that if the costs of the resale right fall upon art dealers, some marginal dealers may go out of business and those that stay in business may not be as able to subsidize the promotion of young and unknown artists.

The art resale right seems to benefit only a few artists and entails risks of harming the art market. Whether legislatures are still justified in enacting art resale rights is a matter of policy and philosophy beyond the scope of this study. Nonetheless, this study shows that much of the argument has been based on unsound assumptions about the art market. It is important as the debate over art resale rights continues that people respond not just to the frustration and indignation of the artists like Robert Rauschenberg who have seen their works resold at fabulously appreciated prices, but also to the reality of the art resale market.

APPENDIX A

SOTHEBY PARKE BERNET AUCTION CATALOGS RECORDED

1973 Sales
#3557
3558 (the Scull auction)
3559

1974 Sales
#3617
3630
3632
3633
3634
3652
3681
3682
3683
3684

1975 Sales
#3761
3762
3763
3775
3796
3796A
3796B
3797
3789

1976 Sales
#3848
3880
3881
3882
3883
3907
3908
3909
3910
3935

1977 Sales
#3964
3986
3987
3988
3989
3997 (Mexican art)
4003
4030A
4030B
4031
4032
4033
4064

APPENDIX B

FORM FOR RECORDING AUCTION RESALES

sale	price _____ est. _____ year _____ rel.year _____ city _____ catalog _____ work# _____
artist	name _____ birth _____ death _____ nation _____
work	title _____ medium _____ year _____ rel.year _____ copyright _____ prior owner _____

"price"—price at which the lot was sold; only lots actually sold at the auction were recorded

"est."—estimated prices for resales are provided by Sotheby Parke Bernet, Inc.; these were recorded for a number of the auctions, but since they established no useful trends, this item was abandoned

"year"—the year in which the auction sale occurred

"rel. year"—the year in which the auction occurred in relation to the life of the artist; for living artists it represents the age of the artist at the time of the auction, for dead artists, the number of years after the artist's death that the sale occurred

"name"—name of the artist, or if necessary, artists, who created the work sold

"birth"—birth year of the artist

"death"—year of death of the artist

"nation"—nationality of the artist as listed by Sotheby Parke Bernet, Inc. in the catalog

"title"—name or description of the work sold

"medium"—medium of the work of art, generally painting, drawing or sculpture

"year"—year in which the work was created

"rel. year"—year in which the work was created in terms of the artist's

age; the artist's age when the work was created
"copyright"—any information on copyright of the work was noted
"prior owner"—in some cases, Sotheby Parke Bernet, Inc. auction catalogs list the consignor for sale; however, the prior owner was listed so few times that no valuable results were found

APPENDIX C

NOTES USED BY INTERVIEWER DURING INTERVIEWS TO GUIDE QUESTIONS

PURPOSE: To test hypotheses of the proponents and opponents of art resale legislation such as Cal. Civil Code § 986 (Sieroty bill).

WHAT WANT FROM YOU: Only people involved in it have the information to test the claims. Want your opinions and your help in trying to substantiate several issues.

WARNING: Involves confidential or private information; makes me a bit uncomfortable. Hope you will guide me.

QUESTIONS:

1. *Background on gallery*—limitations or specialties
2. *Place of secondary sales in gallery*—is there a subsidizing effect between primary and secondary?
3. *Persons who buy and sell*—who are they and why do they? How long and how often are works resold?
4. *About artists*—MOST IMPORTANT!!!!! *give hypothetical statute*
   (a) how many (what percent) of your resales would fall within the terms?
   (b) how many artists would be involved?
   (c) who are they?
   (d) estimate magnitude of benefits would receive?

AID: Guidance in how to go about this. Other galleries and dealers should see?

APPENDIX D

AGE OF ARTISTS WHEN WORKS CREATED AND WHEN RESOLD

The following list is compiled from the Sotheby Parke Bernet, Inc. auction catalogs for 1977. It represents the resales of living American artists only. The first column gives the name of the artist. The second column the price at which their works were resold. The third column lists the age of the artist during the year of the sale. And the fourth column lists the age of the artist during the year in which the work sold was created. If a work was created in more than one year, the last year listed was considered the year of creation.

ARTIST	SALE PRICE	AGE AT SALE	AGE WHEN WORK MADE
Anuskiewicz, Richard	$ 2,800	47	36
Baradazzi, Peter	1,000	34	29
Blackwell, Tom	5,500	39	33
Caesar, Doris	3,500	84	69
Christo	4,000	42	36
Daphnis, Nassos	800	63	—
D'Arcangelo, Allan	1,900	47	38
	10,250	47	33
Davis, Gene	2,600	57	45
Davis, Ron	800	40	36
DeKooning, Willem	10,000	73	72
	13,000	73	64
	2,600	73	61
	10,000	73	33
	4,500	73	33
DeLap, Tony	1,500	50	38
De Rivera, Jose	13,000	73	63
	13,500	73	53
Dine, Jim	16,500	42	28
Dzubas, Friedel	8,000	62	57
Estes, Richard	16,000	41	33
Flavin, Dan	6,000	44	38
Francis, Sam	10,500	54	50
Goode, Joe	650	40	36
Goodnough, Robert	5,250	60	53
Held, Al	13,000	49	46

Huntington, Jim	1,500	49	39
Indiana, Robert	11,000	49	45
	1,900	49	42
Jenkins, Paul	4,100	54	48
	650	54	37
	1,000	54	39
Johns, Jasper	20,000	47	43
Johnson, Ray	600	50	42
	750	50	41
Kacere, John	3,750	57	52
Kelly, Ellsworth	42,500	54	41
Krushenick, Nicholas	3,000	48	44
Leete, William	550	48	37
Levinson, Mon	700	51	39
Lewitt, Sol	6,750	49	41
Lichtenstein, Roy	25,000	54	47
	52,500	54	44
	22,000	54	41
	11,000	54	41
	1,100	54	41
Lindner, Richard	10,000	76	66
	750	76	45
Lund, David	1,200	52	33
Marca-Relli, Conrad	4,500	64	—
Marden, Brice	800	39	36
Martin, Agnes	42,500	65	52
Merkin, Richard	800	39	27
Mitchell, Joan	7,500	51	36
Motherwell, Robert	7,500	62	57
	19,000	62	56
	600	62	39
Movitz, Edward	750	48	37
Nauman, Bruce	4,000	36	32
Newman, Barnett	17,000	62	31
Nevelson, Louise	10,000	77	64
Noguchi, Isamu	5,000	73	63
Noland, Kenneth	16,000	53	49
	22,500	53	40
	22,000	53	38
Okada, Kenzo	11,000	75	66
Oldenburg, Claes	37,500	48	33
Olitski, Jules	12,000	48	44

	12,000	48	43
	6,500	48	43
	3,250	48	43
Parker, Ray	3,500	55	38
Poons, Larry	5,250	40	37
	8,000	40	36
	4,000	40	33
Rauschenberg, Robert	7,500	52	48
	7,250	52	43
	90,000	52	39
Rivers, Larry	6,500	54	41
	27,500	54	40
	15,000	54	39
	2,400	54	39
Rosenquist, James	1,500	44	34
Salemme, Attilio	3,000	58	25
Samaras, Lucas	900	41	24
Sander, Ludwig	500	71	55
Scholder, Fritz	1,300	40	—
Serra, Richard	4,500	38	33
Snelson, Kenneth	8,000	50	40
Stamos, Theodores	1,100	55	49
Steinberg, Saul	4,250	63	—
	14,000	63	56
	3,500	63	54
	2,400	63	52
Stella, Frank	13,000	54	51
	7,750	54	49
Still, Clyfford	165,000	73	50
	80,000	73	46
Thiebaud, Wayne	7,500	57	53
Tobey, Mark	6,500	87	70
Trova, Ernest	4,250	48	34
	4,000	48	34
Twombly, Cy	22,000	49	42
	3,500	49	37
	5,000	49	36
Tworkov, Jack	6,500	77	72
Warhol, Andy	1,000	47	—
	6,000	47	34
Wesselmann, Tom	4,500	46	46
	1,700	46	43
	3,000	46	41

	13,000	46	40
	800	46	36
	850	46	32
	800	46	32
	25,000	46	30
	1,700	46	—
Wiley, William	900	47	32
Youngerman, Jack	650	51	45

APPENDIX E
RESALE FOR OVER $1000 OF WORKS OF LIVING AMERICAN ARTISTS

The following list is compiled from the Sotheby Parke Bernet, Inc. auction catalogs from October of 1973 through the end of 1977. It represents a summary of the resales of works of living American artists during that period for over $1000. The first column lists the name of the artist. The second column lists the number of lots resold at auction for each artist over the entire four years. The third column lists the total value of each artist's sales over the four years. The fourth column divides the number in the third column by the number in the first column to determine the average sale price for each artist's works over the four years.

ARTIST	NUMBER OF SALES	TOTAL VALUE OF SALES	AVERAGE SALE PRICE
Albers, Josef (died in 1976)	12	$283,850	$23,654
Anthony, Carol	1	2,000	2,000
Anuskiewicz, Richard	5	15,200	3,040
Artschwager, Richard	2	4,800	2,400
Avedisian, Edward	1	1,100	1,100
Bannard, Walter Darby	5	12,500	2,500
Baradazzi, Peter	1	1,000	1,000
Baziotes, William	2	9,550	4,775
Bearden, Romare	2	3,000	1,500
Bell, Larry	2	16,000	8,000
Benton, Thomas Hart	4	6,200	1,550
Blackwell, Tom	1	5,500	5,500
Bogoshian, Varujan	1	1,000	1,000
Bontecou, Lee	3	15,000	5,000
Boxer, Stanley	1	1,000	1,000
Bradley, Peter	1	1,000	1,000
Brooks, James	1	1,000	1,000
Brumbach, Louise Upton	1	2,200	2,200
Caesar, Doris	1	3,500	3,500
Calder, Alexander (died in 1976)	57	495,750	8,697
Callery, Mary	2	2,400	1,200
Capp, Al	2	16,500	8,250
Chamberlain, John	4	25,500	6,375

Christensen, Dan	10	34,950	3,495
Christo (naturalized during study period)	1	4,000	4,000
Clarke, John Clem	6	12,200	2,033
Conner, Bruce	1	2,500	2,500
Cottingham, Robert	2	34,500	17,250
D'Arcangelo, Allan	3	17,150	5,717
Davis, Gene	2	8,850	4,425
Davis, Ron	4	24,400	6,100
De Kooning, Willem	28	574,950	20,534
DeLap, Tony	1	1,500	1,500
DeMaria, Walter	1	21,000	21,000
De Rivera, Jose	3	41,500	13,834
De Saint-Phalle, Niki	1	3,000	3,000
Diao, David	1	1,000	1,000
Diebenkorn, Richard	1	2,500	2,500
Dine, Jim	9	90,100	10,011
DiSuvero, Mark	2	23,100	11,550
Downing, Thomas	1	1,500	1,500
Dzubas, Friedel	3	10,550	3,517
Estes, Richard	7	104,200	14,886
Feeley, Paul	1	2,200	2,200
Ferber, Herbert	1	3,600	3,600
Flavin, Dan	3	19,500	6,500
Francis, Sam	12	138,600	11,550
Frankenthaler, Helen	6	69,600	11,600
Gabo, Naum	2	129,000	64,500
Goings, Ralph	3	26,700	8,900
Goldberg, Michael	1	3,100	3,100
Goodnough, Robert	1	5,250	5,250
Gottlieb, Adolph (died 1974)	7	33,600	4,800
Graham, John	1	4,250	4,250
Graves, Morris	1	1,300	1,300
Grooms, Red	½	3,250	3,250
Gross, Mimi (joint work)	½	3,250	3,250
Gross, Chaim	2	8,500	4,250
Grossman, Nancy	1	2,000	2,000
Guston, Philip	5	52,300	10,460
Hains, Raymond	1	1,200	1,200
Hanson, Duane	2	45,000	22,500
Held, Al	2	14,500	7,250

Holland, Tom	1	2,250	2,250
Humphrey, Ralph	2	2,300	1,150
Huntington, Jim	1	1,500	1,500
Indiana, Robert	6	71,900	11,983
Jansem, Jean	1	1,500	1,500
Jenkins, Paul	16	53,100	3,319
Johns, Jasper	4	404,000	101,000
Judd, Donald	4	14,800	3,700
Kacere, John	1	3,750	3,750
Katz, Alex	3	8,200	2,733
Kelly, Ellsworth	8	195,500	24,438
Kingman, Dong	1	1,600	1,600
Kleeman, Ron	1	1,200	1,200
Krasner, Lee	1	3,000	3,000
Krushenick, Nicholas	4	10,500	2,625
Lawrence, Jacob	1	2,100	2,100
Leslie, Alfred	1	2,000	2,000
Lewitt, Sol	2	11,000	5,500
Liberman, Alexander	1	1,500	1,500
Lichtenstein, Roy	11	330,100	30,009
Lindner, Richard	10	209,900	20,990
Lipsky, Paul	1	1,200	1,200
Lund, David	1	1,200	1,200
Man Ray (died in 1976)	4	24,600	6,150
Marca-Relli, Conrad	2	12,000	6,000
Martin, Agnes	3	48,800	16,267
Menkes, Sigmund	1	2,000	2,000
Mitchell, Joan	4	19,800	4,950
Morris, Robert	3	27,100	9,033
Moses, Ed	1	1,350	1,350
Motherwell, Robert	16	152,750	12,729
Muller, Robert	1	5,500	5,500
Natkin, Robert	1	4,800	4,800
Nauman, Bruce	2	10,000	5,000
Nesbitt, Lowell	6	16,600	2,767
Nevelson, Louise	11	88,850	8,077
Noguchi, Isamu	5	70,000	14,000
Noland, Kenneth	19	285,300	15,016
Okada, Kenzo	1	11,000	11,000
Oldenburg, Claes	17	158,350	9,315
Olitski, Jules	19	179,850	9,466
Ossorio, Alfonso	1	4,000	4,000
Paris, Harold	1	1,500	1,500

Parker, Ray	1	3,500	3,500
Pearlstein, Philip	1	1,000	1,000
Pettet, William	1	1,600	1,600
Poons, Larry	12	107,100	8,925
Posen, Stephen	2	36,000	18,000
Pousette-Dart, Richard	2	12,400	6,200
Raffaele, Joseph	1	2,000	2,000
Ramos, Mel	2	4,600	2,300
Rattner, Abraham	2	5,500	2,750
Rauschenberg, Robert	12	608,250	50,688
Rickey, George	4	15,850	3,962
Rivers, Larry	28	276,000	9,857
Rosenquist, James	9	126,900	14,100
Ruscha, Ed	13	50,000	3,846
Salemme, Attilio	1	3,000	3,000
Samaras, Lucas	8	56,950	7,119
Sander, Ludwig	1	3,400	3,400
Santamaso, Guiseppe	1	1,800	1,800
Scholder, Fritz	1	1,300	1,300
Seery, John	2	3,050	1,525
Segal, George	3	28,100	9,367
Seligman, Kurt	1	1,400	1,400
Serra, Richard	3	14,500	4,833
Shahn, Ben	4	14,500	3,625
Snelson, Kenneth	1	8,000	8,000
Sonnier, Keith	2	3,500	1,750
Soyer, Moses	1	3,400	3,400
Soyer, Raphael	5	13,550	2,710
Staiger, Paul	1	2,600	2,600
Stamos, Theodores	4	6,000	1,500
Stanczak, Julian	1	2,000	2,000
Stanley, Bob	4	5,100	1,275
Steinberg, Saul	9	42,600	4,733
Stella, Frank	19	365,400	19,232
Still, Clyfford	2	245,000	122,500
Tanning, Dorothea	1	6,000	6,000
Thiebaud, Wayne	2	10,300	5,150
Tobey, Mark	17	102,700	6,041
Trova, Ernest	8	36,750	4,594
Twombly, Cy	11	122,500	11,136
Tworkov, Jack	3	17,600	5,867
Warhol, Andy	18	294,250	16,347
Wesselmann, Tom	23	153,050	6,654

Westermann, H.C.	1	6,000	6,000
Young, Peter	3	21,000	7,000
Zox, Larry	2	2,300	1,150
TOTALS	705	$7,812,250	

APPENDIX F

RESALES FOR BETWEEN $500-$1000 OF WORKS OF LIVING AMERICAN ARTISTS

The following list is identical to the list in Appendix E, except that it is compiled for sales between $500 and $1000.

ARTIST	NUMBER OF SALES	TOTAL VALUE OF SALES	AVERAGE SALE PRICE
Anuskiewicz, Richard	1	$ 950	$ 950
Artschwager, Richard	1	600	600
Avedisian, Edward	3	2,050	683
Bannard, Walter Darby	2	1,450	725
Baskin, Leonard	1	550	550
Bearden, Romare	1	950	950
Benton, Thomas Hart	2	1,350	675
Bertoia, Harry	1	800	800
Bisttram, Emil	1	550	550
Bohrod, Aaron	1	700	700
Brach, Paul	1	800	800
Bradley, Peter	1	750	750
Callery, Mary	1	900	900
Chamberlain, John	1	650	650
Christensen, Dan	1	600	600
Chryssa	1	650	650
Clarke, John Clem	1	500	500
Copley, William	1	500	500
Daphnis, Nassos	1	800	800
Davis, Ron	4	3,250	812
De St. Phalle, Niki	2	1,400	700
Diebenkorn, Richard	2	1,150	575
Dill, Guy	1	950	950
Dodeigne, Eugene	1	600	600
Dzubas, Friedel	1	900	900
Evergood, Phillip	1	800	800
Gatch, Lee	1	750	750
Giobbi, Edward	1	900	900
Goode, Joe	1	650	650
Graves, Morris	2	1,750	875
Guston, Phillip	2	1,500	750

Held, Al	1	850	850
Hinman, Charles	1	850	850
Humphrey, Ralph	1	650	650
Israel, Marvin	3	1,775	592
Jenkins, Paul	2	1,250	625
Johnson, Ben	2	1,650	825
Johnson, Lester	1	900	900
Johnson, Ray	4	2,350	588
Katz, Alex	2	1,550	775
Kauffman, Craig	1	800	800
Kinigstein, Jonah	1	550	550
Koch, John	1	850	850
Krushenick, Nicholas	1	700	700
Leete, William	1	550	550
Leslie, Alfred	1	500	500
Levine, Jack	1	900	900
Levine, Les	1	950	950
Levinson, Mon	1	700	700
Lewitt, Sol	2	1,575	788
Liberman, Alexander	2	1,700	850
Lindner, Richard	1	750	750
Marca-Relli, Conrad	1	850	850
Marden, Brice	1	800	800
McCracken, John	2	1,350	675
Merkin, Richard	1	800	800
Motherwell, Robert	1	600	600
Movitz, Edward	1	750	750
Nutt, Jim	1	750	750
Ossorio, Alfonso	1	800	800
Owen, Frank	1	800	800
Pearlstein, Philip	3	1,850	617
Pereira, Irene Rice	1	800	800
Pettet, William	1	950	950
Prestopinio, Gregorio	1	650	650
Reiback, Earl	1	950	950
Resnick, Milton	1	675	675
Rivers, Larry	3	2,200	733
Ruscha, Ed	3	2,600	867
Samaras, Lucas	2	1,850	925
Sander, Ludwig	2	1,200	600
Segal, George	1	600	600
Self, Colin	2	1,050	525
Shapiro, Joel	1	750	750

Sloane, Eric	2	1,250	625
Sonnier, Keith	1	500	500
Soyer, Raphael	1	600	600
Stamos, Theodoros	2	1,050	525
von Wiegand, Charmion	1	550	550
Warhol, Andy	7	5,000	714
Wesselmann, Tom	3	2,450	817
Wiley, William T.	2	1,400	700
Young, Peter	1	700	700
Youngerman, Jack	1	650	650
Zox, Larry	2	1,650	825
TOTALS	128	$ 92,475	

APPENDIX G

RESALES FOR OVER $1000 OF WORKS OF RECENTLY DECEASED AMERICAN ARTISTS

The following list is identical to the list in Appendix E, except that it is compiled for resales over $1000 of the works of artists who had died within five years of the resale of one of their works.

ARTIST	NUMBER OF SALES	TOTAL VALUE OF SALES	AVERAGE SALE PRICE
Albers, Josef (died in 1976 at the age of 88)	6	$ 93,500	$15,583
Calder, Alexander (died in 1976 at the age of 78)	12	106,650	8,888
Cornell, Joseph (died in 1973 at the age of 70)	14	206,150	14,725
Gottlieb, Adolph (died in 1974 at the age of 71)	6	29,600	4,933
Knaths, Karl (died in 1971 at the age of 80)	1	1,900	1,900
Lipchitz, Jacques (died in 1973 at the age of 82)	11	115,450	10,495
MacDonald-Wright, Stanton (died in 1973 at the age of 83)	1	1,050	1,050
Man Ray (died in 1976 at the age of 86)	1	2,000	2,000
Newman, Barnett (died in 1970 at the age of 55)	4	407,000	101,750
Rothko, Mark (died in 1970 at the age of 67)	1	110,000	110,000
Smithson, Robert (died in 1974 at the age of 36)	1	13,500	13,500
TOTALS	58	$1,086,800	

APPENDIX H

RESALES FOR OVER $1000 OF WORKS OF FOREIGN ARTISTS

The following list is identical to the list in Appendix E, except that it is compiled for resales over $1000 of the works of foreign artists who were living at the time of the sale or had died within five years prior to the sale. This list is limited to resales during 1977.

ARTIST	NUMBER OF SALES	TOTAL VALUE OF SALES	AVERAGE SALE PRICE
Afro (Basadella) (Italian)	2	$ 10,000	$ 5,000
Agam, Yaacov (Israeli)	3	14,300	4,767
Alechinsky, Pierre (Belgian)	1	2,100	2,100
Appel, Karel (Dutch)	3	18,100	6,033
Arman (French)	2	13,000	6,500
Baj, Enrico (Italian)	1	2,200	2,200
Bauermeister, Mary (German)	1	2,500	2,500
Bazain, Jean (French)	1	12,000	12,000
Bolotowsky, Ilya (Russian)	1	1,600	1,600
Botero, Fernando (Colombian)	4	85,000	21,250
Brayer, Yves (French)	1	1,200	1,200
Buffet, Bernard (French)	4	21,200	5,300
Bury, Pol (Belgian)	1	2,100	2,100
Caffee, Nino (Italian)	2	5,000	2,500
Carrington, Leonora (British-Mexican)	4	8,750	2,188
Chadwick, Lynn (British)	1	2,000	2,000
Chagall, Marc (Russian-French)	9	603,500	67,056
Charlot, Jean (French-Mexican)	1	2,800	2,800
Chavez Morado, Jose (Mexican)	1	2,000	2,000
Christo (Bulgarian) (naturalized as American during the sample period)	1	6,000	6,000

Cortes, Edouard (French)	1	1,100	1,100
Corneille (Van Beverloo) (French)	1	16,500	16,500
Cruz-Diez, Carlos (Italian)	1	4,100	4,100
Cuevas, Jose Luis (Mexican)	1	2,500	2,500
Dali, Salvadore (Spanish)	5	21,500	4,300
Da Silva, Maria Elena Viera (Portugese)	1	15,000	15,000
Davie, Alan (British)	1	2,000	2,000
De Chirico, Giorgio (Italian)	1	7,500	7,500
Delaunay-Terk, Sonia (Russian)	1	4,750	4,750
Delvaux, Paul (Belgian)	2	9,500	4,750
DuBuffet, Jean (French)	12	379,750	31,646
Eisendieck, Suzanne (German)	1	1,300	1,300
Etrog, Sorel (Canadian)	1	2,250	2,250
Gerzso, Guenther (Mexican)	2	4,300	2,150
Hajdu, Etienne (French)	1	2,500	2,500
Hambourg, Andre (French)	1	1,600	1,600
Hockney, David (British)	1	2,250	2,250
Jansem, Jean (American-French)	1	1,100	1,100
Jiminez, El (not available)	1	2,000	2,000
Jorn, Asger (Danish)	1	8,500	8,500
Lapicque, Charles (French)	1	1,400	1,400
Le Parc, Julio (Argentine)	1	1,700	1,700
Lorjou, Bernard (French)	3	4,600	1,533
Manessier, Alfred (French)	4	16,600	4,150
Manzu, Giacomo (Italian)	2	63,000	31,500
Marcks, Gerhard (German)	2	5,500	2,750
Marini, Marino (Italian)	2	8,200	4,100
Masson, Andre (French)	4	49,600	12,400
Matta (R. Echaurren) (Chilean)	3	8,000	2,667
Meadows, Bernard (British)	1	1,600	1,600
Merida, Carlos (Mexican)	2	17,500	8,750
Meza, Guillermo (Mexican)	2	2,100	1,050
Minaux, Andre (French)	1	1,100	1,100
Mirko (Balsadella) (Italian)	1	1,100	1,100
Miro, Jean (Spanish)	2	55,000	27,500

Moore, Henry (British)	7	66,000	9,429
Music, Antonio (Italian)	2	5,700	2,850
Nicholson, Ben (British)	3	51,250	17,083
Oudot, Roland (French)	2	2,600	1,300
Pignon, Edouard (French)	3	5,600	1,867
Pissarro, Paulemile (French)	1	1,000	1,000
Riopelle, Jean (Canadian)	4	25,150	6,288
Saura, Antonio (Spanish)	1	1,100	1,100
Schmidt-Rottluff, Karl (German)	1	9,000	9,000
Soudeikine, Sergei (Russian)	1	3,500	3,500
Soulages, Pierre (French)	3	17,000	5,667
Sutherland, Graham (British)	1	1,900	1,900
Takis, Vassilakis (Greek)	1	2,100	2,100
Tamayo, Rufino (Mexican)	8	166,250	20,781
Tinguely, Jean (Swiss)	2	11,500	5,750
Toledo, Francisco (Mexican)	10	15,600	1,560
Turnbull, William (British)	1	1,200	1,200
Zuniga, Francisco (Mexican)	6	22,200	3,700

FOREIGN ARTISTS DECEASED WITHIN THE LAST FIVE YEARS

Berman, Eugen (Russian-French) died in 1974 at the age of 75)	2	2,100	1,050
Carrillo, Lilia (Mexican) (died in 1974 at the age of 44)	1	4,250	4,250
Dunoyer de Segonzac, Andre (French) (died in 1974 at the age of 90)	8	96,250	12,031
Ernst, Max (German) (died in 1976 at the age of 85)	3	25,250	8,417
Grau-Sala, Emilio (Spanish) (died in 1975 at the age of 64)	2	7,800	3,900
Hepworth, Barbara (British) (died in 1975 at the age of 72)	1	2,500	2,500
Picasso, Pablo (Spanish) (died in 1973 at the age of 92)	14	1,145,500	81,821
Rubin, Reuven (Israeli) (died in 1974 at the age of 81)	2	14,600	7,300
Siqueiros, David Alfaro (Mexican) (died in 1974 at the age of 76)	7	49,300	7,043

TOTALS		
living foreign artists	169	$1,951,000
dead foreign artists	40	1,347,550
TOTAL	209	$3,298,550

PART II

LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

1. United States of America and Territories

139. U.S. CONGRESS. HOUSE.

H.R. 6857. A bill to amend title 17 of the United States Code to provide that certain performances and displays of profitmaking educational institutions and nonprofit veterans' and fraternal organizations are not infringements of the exclusive rights of copyright owners. Introduced by Mr. Donnelly on March 19, 1980, and referred to the Committee on the Judiciary (96th Cong., 2d Sess.).

This bill would amend section 110 of title 17, United States Code by (1) striking out "a nonprofit educational institution" in paragraph (1) and inserting in lieu thereof "an educational institution"; and (2) by inserting a new paragraph "(10) performance of a nondramatic literary or musical work by a nonprofit veterans' or fraternal organization, without any purpose of direct or indirect commercial advantage, if the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain", not infringements of the exclusive rights of the copyright owner.

140. U.S. CONGRESS. HOUSE.

H.R. 7572. A bill to amend the Communications Act of 1934 to provide that the broadcasting of appearances by actors in motion pictures or theatrical productions shall not be subject to the requirements of section 315 of such Act. Introduced by Mr. Waxman on June 12, 1980, and referred to the Committee on Interstate and Foreign Commerce. (96th Cong., 2d Sess.)

This bill would exempt television appearances by actors portraying fictional characters from the equal time provisions of Section 315 of the Communications Act. Section 315(a) would be amended to read: "Any appearance by a legally qualified candidate in any motion picture film, video tape, or theatrical production which is created or produced primarily for use as public

entertainment, and which is broadcast by any broadcasting station, shall not be deemed to be a use of such broadcasting station within the meaning of this subsection if such appearance relates exclusively to the portrayal of a fictional character. For the purposes of the preceding sentence, the term 'fictional character' shall have the meaning given it by the Commission [FCC]."

141. U.S. CONGRESS. HOUSE.

H.R. 7587. A bill to repeal section 506 of the Communications Act of 1934. Introduced by Mr. Murphy on June 16, 1980, and referred to the Committee on Interstate and Foreign Commerce. (96th Cong., 2d Sess.)

The bill would repeal section 506 of the Communications Act of 1934 (47 U.S.C. 506. Coercive practices affecting broadcasting; enforcement of contracts; penalties; definitions).

142. U.S. CONGRESS. HOUSE.

H.R. 7747. A bill to amend the Communications Act of 1934 to prohibit the unauthorized interception and use of subscription telecommunications and to protect the privacy of the users of such telecommunications. Introduced by Mr. Preyer on July 2, 1980, and referred to the Committee on Interstate and Foreign Commerce and the Judiciary. (96th Cong., 2d Sess.)

This bill would amend the Communications Act of 1934 by adding a new section 6, making the person who knowingly attempts, conspires or carries out an unauthorized interception of a telecommunication subject to civil and/or criminal penalties.

143. U.S. COPYRIGHT OFFICE.

37 CFR 201. Compulsory license for cable systems. Final regulations. *Federal Register*, vol. 45, no. 130 (July 3, 1980), pp. 45270–45275.

Pursuant to 17 U.S.C. 111, 702 and 708, the Copyright Office announces its adoption of amendments to its revised regulation, Sec. 201.17, governing certain requirements and conditions under which cable systems may obtain a compulsory license to make secondary retransmissions of copyrighted works. The proposed amendments are clarifying and technical in nature and relate to filing of certain notices and Statements of Account. Except for minor changes, the proposed revisions are adopted as published on December 17, 1980 in the Federal Register (44 FR 73123).

144. U.S. COPYRIGHT OFFICE.

37 CFR 201. General provisions; nondramatic literary works; voluntary license to permit reproduction solely for use of the blind and physically handicapped. Final regulation. *Federal Register,* vol. 45, no. 41 (Feb. 28, 1980), pp. 13072–13074).

The public is advised that the Copyright Office is amending Section 201.15 of its regulations, as adopted on Jan. 1, 1978, to reflect the change in the name of the Division for the Blind and Physically Handicapped of the Library of Congress to the National Service for the Blind and Physically Handicapped of the Library of Congress and to correct minor typographical errors in the text of the regulation as it appeared in the Federal Register. This regulation governs the form, duration, terms and conditions of a license by which the owner of copyright in nondramatic literary works may, at the time of copyright registration, grant the Library of Congress permission to reproduce and distribute the work for the use of the blind and physically handicapped. Since the changes are technical in nature, the regulation as issued is final and amended without public comment.

145. U.S. COPYRIGHT OFFICE.

37 CFR 201. General provisions; works consisting of sounds, images, or both: advance notice of potential infringement. Advance notice of proposed regulations. *Federal Register,* vol 45, no. 149 (July 31, 1980), pp. 50823–50825.

The public is notified that the Copyright Office is proposing to amend its regulations by the addition of a new Sec. 201.22 to implement 17 U.S.C. 411(b). This paragraph provides for the service of advance notice of potential infringement for the purpose of preventing the unauthorized use of works consisting of sounds, images, or both, that are fixed for the first time simultaneously with their transmission. Interested parties are invited to comment on the proposed regulation in general and to specifically address the questions that are set out in the notice regarding definitions of the works covered by the regulation, advance notice for multiple works, and the Register's authority to compel registration within three months of its first transmission. Initial comments should be received in the Copyright Office on or before August 29, 1980. Reply comments should be received on or before September 15, 1980.

146. U.S. COPYRIGHT OFFICE.

37 CFR 201. Transfer of unpublished copyright deposits to Library of Congress. Final Regulation. *Federal Register,* vol. 45, no. 120 (June 19, 1980), pp. 41414–41415.

The Copyright Office is adopting a new regulation to implement Section 704(b) of the Copyright Act. Under this section, the Library of Congress is entitled, pursuant to regulations that the Register of Copyrights prescribes, to select any unpublished material deposited for copyright registration for its collections. The rules established by this regulation will permit the Library of Congress to select these deposits at any time before a request for full term retention under the control of the Copyright Office has been granted by the Register in accordance with Section 704(e) of the Act. A facsimile reproduction of the entire copyrightable content will be made before transfer of the deposit to the Library, unless the Register determines that it would be impractical or too expensive to make the reproduction. The Library will take appropriate measures to protect the work against infringement of copyright while the deposit is in its collections. This regulation is being issued in final form without a period of public comment since its impact on the public is slight and the rules established by it are not substantive.

147. U.S. COPYRIGHT OFFICE.

Notice of change in procedures regarding 17 U.S.C. 508 filings. Notice of change in procedures. *Federal Register,* vol. 45, no. 120 (June 19, 1980), pp. 41548–41549.

On June 2, 1978, the Copyright Office published a notice informing the public that notifications of filing, determination of actions and any other items received from the clerks of the courts of the United States pursuant to Section 508 of the Copyright Act would be made part of the public record of the Office by recording them on microfilm. The notice also indicated that the documents would be cataloged and indexed in the Copyright Card Catalog by title of the works involved and by the names of the parties. The procedures and practices that were set out in that notice have caused considerable difficulty to the staff and users. Additionally, members of the public who use these notifications want to look at the actual documents filed in chronological order rather than use the microfilm record. Therefore, the Office is revising its practices and procedures regarding Sec-

tion 508 filings. Beginning immediately these notifications will be filed only by a serial control number and the documents will be indexed under the name of the plaintiff. The notifications will be located and the index maintained by the Certifications and Documents Section of the copyright Office.

148. U.S. COPYRIGHT OFFICE.

Policy decision regarding mandatory deposit of books and other printed works. Mandatary deposit of books and other printed works published with notice of copyright in the United States after first publication abroad. Notice of policy decision. *Federal Register,* vol. 45, no. 145 (July 25, 1980), pp. 49721–49723.

The Copyright Office announces its decision to resume a policy of enforcing its mandatory deposit requirements against foreign books and other printed works published in the United States with notice of copyright. When the 1976 Copyright Act went into effect, the Register of Copyrights initiated a policy of comprehensive enforcement of the law's mandatory deposit requirements, 17 U.S.C. 407 (Deposit of copies or phonorecords for Library of Congress). This policy led to the issuance of written demands to deposit certain printed works that appeared to have been published with notice of copyright in the United States. American publishers, some copyright owners, and other persons upon whom the demands were served raised various questions regarding the application of the mandatory deposit provisions to foreign works. Consequently, the Copyright office decided to refrain from issuing written demands until it had reviewed its mandatory deposit-demand policies, especially as they apply to foreign works. The Office has now completed the review and has decided that Sec. 407 of the current act is applicable to "works published with notice of copyright in the United States after first publication in a foreign country" and that the potential benefits to the Library of Congress of enforcing these provisions against foreign works are large.

149. U.S. COPYRIGHT OFFICE.

Report of the Register of Copyrights on the effects of 17 U.S.C. 108 on the rights of creators and the needs of users of works reproduced by certain libraries and archives; public hearing. Notice of public hearing. *Federal Register,* vol. 45, no. 35 (Feb. 20, 1980), pp. 11279–11281.

The public is notified that the Copyright Office is conducting

the second of a series of regional public hearings on the extent to which 17 U.S.C. 108 (limitations on exclusive rights: reproduction by libraries and archives) has achieved the intended balance between the rights of creators and the needs of users of copyrighted works that are reproduced by certain libraries and archives. The hearing, which will be held on March 26, 1980 in Houston, Texas, is designed to elicit views, comments, and information in preparation of a special report that the Register of Copyrights has to submit to Congress on January 1, 1983 on the effectiveness of Section 108. Interested persons are invited to comment on any issues relevant to library copying and ways in which the provision has or has not affected their practices. Of particular interest to the Copyright Office are the answers to nine questions that are set out in the notice. Anyone desiring to testify should submit a written request to present testimony by March 19, 1980. Supplemental statements will be entered into the record until April 26, 1980.

150. U.S. COPYRIGHT ROYALTY TRIBUNAL.

37 CFR 302. Proposed rule with respect to 1980 filing of claims to cable royalty fees. Proposed rule. *Federal Register,* vol. 45, no. 47 (Mar. 7, 1980), p. 14884.

The Copyright Royalty Tribunal publishes a proposed amendment to Sec. 302.7 of its rules governing the filing and content of claims to cable royalty fees for secondary transmissions by cable systems. The purpose of the proposal is to establish the requirements for the claims that are due to be filed in July, 1980, pursuant to 17 U.S.C. 111(d)(5)(A). Since it is unlikely that prior to the required July filing a determination will be reached with respect to the controversy concerning the royalty distributions for transmissions made during the 1978 calendar year, the Tribunal does not believe that any useful purpose would be served by requiring the 1980 claims to contain detailed entitlement justification. Consequently, the proposed rule only requires the claim to include the basic information that was required for the initial claim filing in July, 1978. Claimants are reminded that the copyright law requires that claims be filed during the month of July in each year. Any claim filed after July 31st will be rejected by the Tribunal.

151. U.S. COPYRIGHT ROYALTY TRIBUNAL.

Cable royalty distribution proceeding. Order. *Federal Register,*

vol. 45, no. 23 (Feb. 1, 1980), pp. 7276–7278.

On December 19, 1979, the Copyright Royalty Tribunal issued an order directing claimants of cable royalty fees to submit pre-hearing memoranda on certain specific subjects relative to the cable royalty distribution proceeding. On January 17, 1980, the National Assn. of Broadcasters petitioned the D.C. Court of Appeals for a review of that order. The Tribunal subsequently received a petition from the NAB on Jan. 18 requesting a stay of the Dec. 19 order and a postponement of all proceedings directed therein to a date three weeks after a final decision on the matter has been published in the Federal Register. After consideration of the arguments put forth in the NAB petition and an examination of the pertinent provisions of the 1976 Copyright Act, the Tribunal concluded that judicial review was precluded at this time in that the Dec. 19 order was not a final decision. Even in the absence of the specific requirements of the copyright law which bar the relief sought by NAB, the Tribunal concluded that the petitioner failed in both law and equity to establish any justification for its request. NAB's petition for a stay of the December 19 Order pending an appeal and for a continuance for three weeks of the proceedings scheduled in the December 19 Order was denied.

152. U.S. FEDERAL COMMUNICATIONS COMMISSION.

47 CFR 76. Adding frequency channeling requirements and restrictions and requiring monitoring for signal leakage from cable television systems; correction. Correction of proposed rulemaking. *Federal Register,* vol. 45, no. 127 (June 30, 1980), pp. 43814–43815.

The Federal Communications Commission has issued a correction notice in connection with its proposed approach to setting criteria for cable system leakage. The error appeared in the Further Notice of Proposed Rulemaking in Docket 21006, FCC 80-126 (45 FR 19578) released March 24, 1980. The beginning of paragraphs 8(4)(b) of the Further Notice should read "Show that 10 log I is equal to or less than 64, when Ei is expressed in microvolts per meter, prior to . . . ," where the original release gave 34 instead of 64 as the criterion for acceptability. This correction is not substantive; it merely corrects the numerical value of the 'I' criterion. The comment and reply dates for this rulemaking, therefore, remain June 25, 1980 and July 10, 1980, respectively.

153. U.S. FEDERAL COMMUNICATIONS COMMISSION.

47 CFR 76. Applications for certificates of compliance and federal, state/local regulatory relationships; order extending time for comments. Order allowing for responsive comments in Docket 21002. *Federal Register,* vol. 45, no. 54 (Mar. 18, 1980), p. 17167.

In the matter of amendment of the Federal Communications Commission's rules pertaining to applications for certificates of compliance and federal, state/local regulatory relationships, the Commission grants the request of the American Television and Communications Corporation and the National Cable Television Association to file joint supplemental comments and an economic study entitled "Removing the FCC Limit on Cable Television Franchise Fees." The study was prepared by the National Economic Research associates, and anyone interested in commenting on this additional research may find copies in Docket 21002. Comments responsive to the study will be accepted until April 7, 1980.

154. U.S. FEDERAL COMMUNICATIONS COMMISION.

47 CFR 76. Cable television services; editorial amendment of rules. Final rule. *Federal Register,* vol. 45, no. 19 (Jan. 28, 1980), pp. 6403–6404.

Under the authority of Section 4(d)(1) and (i) of the Communications Act of 1934, as amended, and Section 0.231(d) of its rules, the Federal Communications Commission issues a final rule amending 47 C.F.R. Sections 76.311(g) and 76.403. The changes are editorial in nature and are meant to clarify and eliminate confusion regarding: (1) the requirement that certain cable television employment units file a copy of their EEO program, and (2) the redesignation of FCC Form 395 to FCC Form 395-A, for use by cable systems in reporting employment data.

2. Foreign Nations

155. BURUNDI. *Laws, statutes, etc.*

Decree-Law regulating the rights of authors and intellectual property in Burundi. No. 1/9 of May 4, 1978. *Copyright,* March 1980, pp. 120–128; *Droit d'Auteur,* March 1980, Texte 1–01, pp. 1–5.

156. MALI. *Laws, statutes, etc.*

Ordinance concerning literary and artistic property. No. 77–46 CMLN, of July 12, 1977, published in Journal Officiel de la Republique du Mali, No/525, of Aug. 1, 1977. *Copyright,* May 1980, 180–191; *Droit d'Auteur,* May 1980, Texte 1–01, pp. 1–12.

157. YUGOSLAVIA. *Laws, statutes, etc.*

Copyright Law of March 30, 1978, published in Sluzbana list SFRJ No. 19, April 14, 1978. *Copyright,* April 1980, 157–170; *Droit d'Auteur,* April 1980, Texte 1–01, pp. 1–14.

PART IV

JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY

A. DECISIONS OF U.S. COURTS

1. Federal Court Decisions

158. MITCHELL BROTHERS FILM GROUP v. CINEMA ADULT THEATER, 604 F. 2d 852 (5th Cir. 1979) [Gobold, C.J.].

Joseph Rhine and Robert L. Thorp, San Francisco, for plaintiffs-appellants; Bennie R. Juarez and Joseph M. Revesy, Dallas, for defendants-respondents.

Appeal from judgment for defendants in action for infringement of a copyrighted film. The District Court found that the film was obscene and held that plaintiffs were barred from relief under the equitable doctrine of unclean hands.

Held, judgment reversed.

Plaintiffs owned the copyright in the film "Behind the Green Door." The District Court found that the film was obscene and awarded judgment to defendants-respondents. The court held that plaintiffs, by distributing an obscene film, were guilty of unclean hands and were barred from relief.

In its reversal, the Court of Appeals first held that the Copyright Act of 1909 grants protection to a work regardless of its subject matter or content. The copyright act does not place content restrictions on copyright protection. The court considered this aspect of the copyright act to be a fortunate one. It viewed courts as ill-equipped to make aesthetic judgments. Furthermore, if content restrictions were placed on copyrightability, obscenity should not be one of those restrictions because standards of obscenity vary from era to era and from place to place.

The Court of Appeals then considered whether the Copyright clause of the Constitution requires all copyrighted works to "promote the Progress of Science and useful arts. . . ." The court held that all copyrighted works need not meet this test. Congress is granted the power to grant copyrights to promote "science and

the useful arts." But Congress may enact any law which is "necessary and proper" for the execution of its enumerated powers. Therefore, Congress may constitutionally grant copyright protection to *all* works as a means to achieve the ends of the Copyright Clause.

Third, the Court of Appeals determined the appropriateness of a judge-made defense that plaintiff's copyrighted work is obscene. The court held that a work's obscenity does not provide a defense to infringers. A court that permitted a defendant to assert such a defense would be adding a defense that was not authorized by Congress and which would be inconsistent with Congress' desire to protect a work without regard to its content. The Court of Appeals questioned whether it was necessary to use copyright law as a means of controlling obscenity, since federal and state laws explicitly dealing with the problem exist. Furthermore, "permitting obscenity as a defense would introduce an unmanageable array of issues into routine copyright infringement actions."

Finally, the Court of Appeals held that even if the obscenity of "Behind the Green Door" could be asserted as a defense, the doctrine of unclean hands would not be a proper vehicle for such a defense. The defense of unclean hands may only be used if plaintiff's wrongful conduct affects the equitable relationship between the parties. A defendant in a patent, trademark, or copyright action may assert the defense of unclean hands because plaintiff has used its government monopoly to injure the public. However, an unclean hands defense based on a public injury rationale may be asserted only if plaintiff's misuse of its monopoly helps it to subvert the policy which underlies the statute creating the monopoly. Defendants-respondents could not rely upon the public injury rationale because the plaintiffs' actions were not inconsistent with the copyright act which protects obscene and non-obscene works.

159. MILLS MUSIC, INC. v. ARIZONA, 591 F.2d 1278 (9th Cir. 1979) [Lucas, D.J.].

Samuel J. Sutton, Cahill, Sutton and Thomas, Phoenix, for plaintiff-respondent; Fred W. Stark III, Phoenix, for defendants-appellants.

Appeal from judgment against the State of Arizona and a state agency for copyright infringement on the ground that the

action was barred by the Eleventh Amendment. Judgment affirmed. *Held,* the Eleventh Amendment does not bar copyright infringement actions against a state or any of its subdivisions.

Plaintiff Mills Music, Inc. owns the copyright for the song "Happiness Is." The Arizona Coliseum and Exposition Board, a state agency, adopted the song as the theme for the 1971 Arizona State Fair, and broadcast it extensively without obtaining Mills' permission. Mills brought the instant copyright infringement action against the Board and the State of Arizona for the unauthorized performance for profit of "Happiness Is." The District Court rendered judgment for plaintiffs and awarded plaintiff damages and attorneys' fees.

Defendants asserted that the Eleventh Amendment barred plaintiff's action in a motion to amend the District Court's Findings of Fact and Conclusions of Law. The motion was denied and defendants appealed. Plaintiff argued on appeal that defendants had waived their Eleventh Amendment defense. Addressing the merits of defendants' appeal, plaintiff argued that defendants were not protected by the Eleventh Amendment because they voluntarily engaged in an activity regulated by federal law.

The Court of Appeals held that defendants had not waived their Eleventh Amendment defense, but that plaintiff's suit was not barred by that provision of the Constitution. The court based its holding on its interpretation of section 101 of the Copyright Act of 1909. Section 101 provides that "any person" who infringes a copyright shall be liable for such infringement. Although the court could cite no case determining whether a state is a "person" under section 101, it concluded that states are included within the defined class. Section 101 uses sweeping language and is part of a comprehensive act regulating copyrights. The court did not find it necessary to find a specific showing of Congressional intent to subject states to liability because (1) the potential effect of its ruling on state treasuries would not be significant, and (2) the Copyright Clause of the Constitution is a specific grant of Congressional authority which inherently limits state sovereignty. The Copyright Clause prohibits states from reducing a copyright owner's rights by statute. Similarly, reasoned the court, a state may not diminish those rights by infringing copyrights without being subjected to liability.

The court also upheld the District Court's award of attorney fees to plaintiff on the grounds relied upon for its affirmance of the judgment of liability.

160. ORTHO-O-VISION, INC. v. HOME BOX OFFICE, 474 F. Supp. 672 (S.D.N.Y. 1979) [Gagliardi, D.J.].

Robert L. Berman, New York, Barry A. Wadler, New York, of counsel, for plaintiff; Cravath, Swaine and Moore, New York, Robert D. Jaffe, Calvin R. House, Marc J. Schiller, Rosalyn D. Young, New York, of counsel, for defendants.

Action by pay television program service affiliate for antitrust violations and breach of contract. Defendant counterclaimed for violation of the Federal Communications Act, unfair competition, New York's Penal Law and copyright infringement. On defendant's motion for summary judgment on its counterclaims and a preliminary injunction prohibiting appropriation of defendant's program service, or, in the alternative, prohibiting infringement of defendant's present and future copyrighted works, *held*: (1) Defendant's program service is not a private communication under the Federal Communications Act; (2) state common law actions for misappropriation are pre-empted by federal copyright law; and (3) a court may enjoin infringement of works not yet created.

Defendant Home Box Office (HBO) transmits a pay television subscription program service in New York City. HBO contracts with affiliates who act as middlemen. Affiliates equip residential apartment buildings with microwave reception equipment and provide HBO programs to individual apartments. Individual subscribers pay monthly fees to HBO affiliates who in turn pay fees to HBO.

Plaintiff Orth-O-Vision, Inc. was an HBO affiliate from April, 1975 through August, 1978. HBO terminated its affiliate agreement with Orth-O-Vision because it failed to pay required affiliate fees and submit subscriber reports. HBO was not technologically able to discontinue transmitting programs that Orth-O-Vision could receive. Orth-O-Vision continued to market HBO programs to individual subscribers. Among these programs were programs originated and copyrighted by HBO.

Orth-O-Vision began the instant action for breach of contract and antitrust violations in June 1977. Orth-O-Vision alleged that the defendants were engaged in a conspiracy to limit its ability to supply HBO programming in the New York metropolitan area. HBO and co-defendnt Time, Inc., HBO's parent company, brought four counterclaims against Orth-O-Vision. The counterclaims were for violation of the Federal Communications Act, unfair competition, New York's Penal Law, and copyright in-

fringement. HBO moved for summary judgment on its counterclaims and for an injunction prohibiting Orth-O-Vision from appropriating HBO programming, or, in the alternative, prohibiting Orth-O-Vision from infringing HBO's copyrights in programs it originates.

The District Court granted HBO summary judgment on its copyright infringement counterclaim and enjoined Orth-O-Vision from infringing HBO's present and future copyrighted works. HBO was denied summary judgment on its other counterclaims.

HBO's first counterclaim was based on section 605 of the Federal Communications Act, which prohibits the interception of private radio transmissions. The court held that HBO's transmissions were not private transmissions. The court relied on a Federal Communications Commission ruling that subscription television transmissions, "scrambled" signals that are unscrambled by special equipment installed in subscribers' television sets, were not private transmissions. The court also found significant that HBO's programming was obviously intended for a mass audience.

HBO's unfair competition counterclaim sounded in misappropriation. The court acknowledged that misappropriation is a recognized cause of action in New York. However, the court held that section 301(a) of the Copyright Act of 1976 preempted New York's law of misappropriation. Section 301(a) preempts state law as to rights in a work within the subject matter of copyright that are equivalent to rights granted by copyright law. In the instant case, HBO was seeking to prohibit the unauthorized public performance of audiovisual works by asserting its misappropriation counterclaim.

HBO also claimed that New York Penal Law section 165.15, which defines as theft the obtaining of cable television service with intent to avoid payment, gave rise to a private right of action against Orth-O-Vision. The court stated that if HBO had a private right of action, the requirement of an additional element—intent—might save the action from pre-emption. However, the court could find no authority for HBO's claim that the law provided a private right of action, and held it did not. Moreover, Orth-O-Vision contended that it intended to defer, not avoid, payment and thus this counterclaim could not be resolved by a motion for summary judgment.

Finally, the court turned to HBO's copyright infringement counterclaim. Orth-O-Vision had retransmitted twelve programs copyrighted by HBO. The Copyright Act prohibits the unau-

thorized public performance of copyrighted works. The court held that the structure and legislative history of the Act established that Congress intended that secondary transmissions be treated as a form of performance. The court granted HBO's motion for summary judgment and enjoined Orth-O-Vision from any future infringements of HBO's copyrighted programs.

Orth-O-Vision argued that the court could not enjoin the infringement of works whose copyrights are not yet registered because registration is a prerequisite to an action for an injunction. The court rejected Orth-O-Vision's argument. It held that it would be inequitable to require HBO to begin a new action each time Orth-O-Vision, a proven infringer, infringed a newly created work.

The court concluded its opinion by rejecting Orth-O-Vision's defenses based on HBO's alleged antitrust violations.

161. DATA CASH SYSTEMS, INC. v. JS&A GROUP, 480 F. Supp. 1063 (N.D. Ill. Sept. 26, 1979) [Flaum, D.J.]

Geraldine Soat Brown, Michael L. Shakman, Devoe, Shadur and Krupp, Chicago, for plaintiff; George H. Gerstman, Pigott and Gerstman, Chicago, for defendants.

Motion for preliminary injunction by plaintiff and motion for summary judgment by defendants in action for copyright infringement and unfair competition. Plaintiff's motion denied; defendants' motion granted in part and denied in part. *Held,* (1) the "object program" of plaintiff's chess playing device is not a copy of its "source program"; (2) plaintiff's action for misappropriation under state law is not pre-empted by federal law.

Plaintiff has manufactured and marketed a computerized chess game called Compu Chess since 1977. Compu Chess is a hand held device with a keyboard and data display. A player enters his moves on the keyboard and the computer's response is shown on the display.

The development of the program involved four phases: First, a flow chart was written. A flow chart sets forth the steps taken in solving a problem. Second, a "source program" was written. A source program translates a flow chart into a computer language such as FORTRAN. A source program is written by, and may be read by, humans. Third, an "assembly program" was written. An assembly program translates the source program into language the computer can read. Assembly programs are virtually unintelligible by humans. Fourth, an "object program" is devel-

oped. The object program is a mechanical device that commands a series of electrical impulses. Plaintiff's object programs (known as the ROM, for "read only memory") is part of the Compu Chess device.

Plaintiff placed a copyright notice on its Compu Chess source program and registered its copyright in the source program. No copyright notice appeared on the Compu Chess device, its packaging or its accompanying literature.

In 1978, defendants began to market the JS&A Chess Computer ("the JS&A"). The JS&A ROM is identical to the Compu Chess ROM.

Plaintiff brought the instant action for copyright infringement and unfair competition. The latter cause of action sounded in misappropriation. Plaintiff brought the instant motion for a preliminary injunction and defendants cross-moved for summary judgment. The District Court denied plaintiff's motion in part and denied defendants' motion in part. The court discussed each of plaintiff's causes of action separately.

The District Court began its discussion of plaintiff's copyright action by quoting section 117 of the Copyright Act of 1976, the applicable statute. Section 117 provides that the 1976 Act does not afford a copyright proprietor any greater or lesser rights with respect to computer uses of a work than he enjoyed under prior law. The court determined that plaintiff's ROM was not a copy of the copyrighted source program under prior law. The court raised the issue *sua sponte*—both parties assumed the ROM *was* a copy of the source program. The District Court held that under common law and the 1909 Act a "copy" is a reproduction of a work which can be read with the human eye. Applying this definition to the matter at hand, the court concluded that the Compu Chess ROM was not a copy of the copyrighted Compu Chess source program. The court concluded that even if defendants copied the Compu Chess ROM, they had not infringed plaintiff's copyright in the source program because the ROM was not a copy of the source program.

The court then considered plaintiff's unfair competition claim. The plaintiff alleged that defendants had misappropriated the Compu Chess ROM. The defendants moved for summary judgment on the ground that plaintiff's misappropriation claim was pre-empted by federal copyright law, relying on *Compco v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964), and *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964). The court held that plaintiff's claim was not pre-empted. The court made no refer-

ence to section 301 of the 1976 Act. It relied instead on *Goldstein v. California.* In *Goldstein,* the Supreme Court held that state protection of sound recordings unprotected by federal law did not conflict with the Copyright Act and was not subject to pre-emption. The District Court held that states may similarly prohibit misappropriation of another person's property right or commercial advantage. Thus, plaintiff had stated a claim under Illinois law. Turning to the factual issues raised by the motions before it, the court held that JS&A failed to establish it was entitled to summary judgment and plaintiff failed to meet the equitable requirements for a preliminary injunction.

162. BROADCAST MUSIC, INC. v. PAPA JOHN'S, INC., 201 U.S.P.Q. 302 (N.D. Ind. 1979) [Eschbach, D.J.].

James E. Hughes, Indianapolis, and William C. Lee, Fort Wayne, for plaintiffs; Stephen Johnson, Marion, Indiana, for defendant.

Motion to strike defendant's request for trial by jury in a copyright infringement action for injunctive relief and statutory damages for unauthorized performances for profit of plaintiffs' musical compositions. Motion granted. *Held, inter alia,* the plaintiffs' claim for statutory damages did not entitle defendant to a trial by jury under the Seventh Amendment because such a claim is not an action at common law.

The Seventh Amendment grants a party to an action at common law in federal court the right to a trial by jury if the amount in controversy is greater than $20.00. A party to an action at equity does not have a constitutional right to a trial by jury. Statutory causes of action may be treated as legal or equitable for Seventh Amendment purposes. The Supreme Court set forth in *Ross v. Bernard,* 396 U.S. 531 (1970), three factors to be considered in determining whether a statutory action is legal or equitable: (a) the custom followed by courts prior to the merger of law and equity; (b) the practical abilities and limitations of juries; and (c) the nature of the remedy sought.

The court applied the *Ross* test to the instant motion, finding that decisional law prior to the merger of law and equity was unclear and lay juries were quite capable of deciding the issues raised in a claim for statutory damages. However, the court concluded that neither factor was determinative and based its decision on its analysis of the nature of statutory damages.

The court examined three aspects of statutory damages and

held that it is an equitable remedy. First, statutory damages are awarded only when plaintiff's actual damages and defendant's profits cannot be proven. Statutory damages therefore represent a codification of the rule of equity that there shall be a remedy for every wrong. Second, statutory damages are analogous to back pay awards in Title VII employment discrimination cases, and the award of back pay has been held to be solely in the discretion of the court. Furthermore, both statutory damages and back pay awards are analogous to the equitable remedy of restitution. Third, the Copyright Act provides that the "court" in its "discretion" may award statutory damages. Although "court" could refer to both judge and jury, the exercise of discretion is the function of a judge rather than a jury.

B. Decisions of Foreign Courts

1. Finland

163. Copyright—paintings derived from photographs. Supreme Court, June 15, 1979, *European Intellectual Property Review,* vol. 1 (Aug. 1979), p. 116.

The Supreme Court of Finland considered whether a photographer's rights had been infringed when a painter used a photograph as 'inspiration' for a picture which was subsequently published and offered for sale. The Court of Appeal held that the photographer's rights had been infringed, but the Supreme Court supported the court of the first instance in concluding that the painting was an 'independent work' although it was based on a photograph. The Court referred to Section 42 of the Copyright Act of 1961 which states that 'ideas' are not the subject of copyright.

2. Italy

164. Copyright/Droit Moral. The Court of Milan, January 8, 1979, Dir. Aut. *European Intellectual Property Review,* vol. 1 (Sept. 1979), p. D-155.

An advertising pamphlet called "Design Collection" featured different photographs of various interior decors all taken by the same photographer. One of these photographs was published

with only minor technical alterations above someone else's signature in a magazine devoted to homes and designs. The original photographer sued because of this false attribution of authorship. It was *held* that the Copyright Act of Italy afforded a right of action in respect of photographs which were conceived and created as an elaboration of some particular subject matter. Mere snapshot photography could not be protected on this basis. The photograph in issue was not a simple photographic record of the materials depicted; it was conceived as a means of enhancing the desirability of the products being advertised. It therefore fell within the category of photographs that could be sued upon if falsely attributed; judgment was for the plaintiff.

165. STEFANI V. SOC. FONIT CETRA. Corto Supreme di Cassazione, Dec. 7, 1977, *Il Diritto di Autore,* vol. 49, no. 4 (Oct.-Dec. 1978), pp. 572–580.

This case analyzed an author's right to profit from a work created in fulfillment of a contractual obligation to a company. The Court found that an author is not entitled to a greater percentage of remuneration than that stipulated in the initial contract even though the value of the work created has increased.

3. Japan

166. TOKYO YOMIURI GIANTS AND SADAHARU OU V. WAKO LTD. Tokyo District Court (Oct. 2, 1978), *European Intellectual Property Review,* vol. 1 (Aug. 1979), p. D-139.

The claimant, Yomiuri Kogy Co., is the owner of a professional baseball team called the Tokyo Yomiuri Giants. Co-claimant Sadaharu Ou, the most distinguished player of the Giants, established a world record of 756 home runs on September 3, 1977. On June 30, 1978, Franklin Mint Co., a well-known medal manufacturer in the United States, entered into an agreement with the claimant company whereby Franklin Mint obtained a license from the latter to manufacture and sell medals commemorating Ou's 800th home run. The claimants filed a petition for a temporary injunction against the respondents' unauthorized manufacture, sale, distribution and advertising of the commemoratory medals. The court granted a temporary injunction, without stating any reason, on the condition that the claimants post a bond in the amount of ¥0,000,000 yen.

4. Netherlands

167. WILLIAM DREEHUIS FOUNDATION V. B.U.M.A. Supreme Court (Mar. 9, 1979), Rechtspraak Van De Week, 1979, No. 42. *European Intellectual Property Review,* vol. 1 (Aug. 1979), p. 120.

The Willem Dreeshuis Foundation owned and managed a home for the aged. Music was played for the residents in the common rooms such as the recreation room and the dining room. The question was whether the Foundation should pay royalties to B.U.M.A. under the Dutch Copyright Act on the ground that the music was being played in public. Section 12 of the Dutch Copyright Act specifies that a performance within a closed circle of people is nevertheless a performance in public unless the performance is confined to a family, friends or a similar circle of people. The court *held* that a 'similar circle' must represent little less than a connection of kinship and friendship between the people concerned. Such bonds do not exist between the old people who gather together in a home for the aged.

5. New Zealand

168. PHONOGRAPHIC PERFORMANCES (NZ) LIMITED V. LION BREWERIES LIMITED. (As yet unreported.) *European Intellectual Property Review,* vol. 1 (Aug. 1979), pp. 138–140.

This is a test case relating to copyright in sound recordings. Phonographic Performances (NZ) Limited claimed royalties from Lion Breweries Limited for the playing of the sound recording "Sweet Wine" in which the plaintiff owned the copyright. The record was played at one of the defendant's 'managed' hotels on sound producing equipment supplied by Mr. Horne, an independent contractor and not an employee of the defendant. The basic question was whether Lion Breweries had caused the recording to be heard, and whether the performance was for profit. The court decided that Lion Breweries was the 'occupier of the premises' and as 'occupier' could commission a 'disc jockey' to perform sound recordings in public without infringement of copyright in recordings either by the disc jockey or by the 'occupier' provided no charge was made for the performance. (It should be noted that United Kingdom law gives more favorable treatment to the owners of copyright in sound recordings than does U.S. law. It requires payment for public performances, whether or not the performances are for profit.)

PART V

BIBLIOGRAPHY

A. Books, Treatises and Cassettes

1. United States Publications

169. Current developments in copyright law - 1980. Practising Law Institute, New York, New York, 931 p.

This book explores the subject matter of copyright, preemption and Copyright Office search procedures. Topics also included are exclusive rights, fair use, reproduction by libraries, transfer of copyright, duration of copyright, and copyright formalities (registration and deposit, notice and the manufacturing clause).

170. Lawrence, John Shelton *and* Bernard Timberg, eds. Fair use and free inquiry: Copyright law and the new media. Ablex Publishing Corporation, Norwood, N.J. (1980), 364 p.

All those interested in fair use should be grateful to J. Sheldon Lawrence and Bernard Timberg for this timely collection of articles on fair use. Although the focus of the collection is the new mass media and "the academy" (the editors' term for teaching and published scholarship), one need not be an academic to learn about fair use from their volume. The views expressed in the book are weighted on the side of users of copyrighted material, but the book is of interest to copyright proprietors as well.

The book contains contributions by twenty-three authors, including Professors Lawrence and Timberg. "Copyright Law, Fair Use, and the Academy: An Introduction," "Donald Duck v. Chilean Socialism: A Fair Use Exchange," and "The Administration of Copyrighted Imagery: Walt Disney Productions" belong to Lawrence; "New Forms of Media and the Challenge to Copyright Law" was written by Timberg; and the final chapter, "Conclusions: Scholars, Media, and the Law in the 1980's" is by both educators. The remaining contributors include copyright owners and users, professors, attorneys from the United States

and around the world, and one Federal District Judge.

The last mentioned contributor is Judge John T. Curtin, whose preliminary injunction against Board of Cooperative Educational services (BOCES)[1] appears in the section of the impact of copyright law on creators, producers, and distributors. Also in this section is a discussion by Eugene Aleinikoff of fair use applications to broadcasters and other users.

Scholars and publishers tell us how the fair use section of the new Copyright Act has affected their output. Carl Belz in "Unwriting the Story of Rock" relates his inability to gain clearance from rock groups and publishers to use lyrics in a book.[2] Leonard Feist, President of the National Music Publishers association, comments on Mr. Belz's tale of woe. There are chapters on difficulties over the importation of a Donald Duck comic book parody (Lawrence's Donald Duck essay); William Stott's "Other People's Images: A Case History" about the reproduction of advertisements in a scholarly work; "Film Study and the Copyright Law" by Gerald Mast; and Douglas Kellner's "Television Research and Fair Use". These pieces complain about barriers erected to use by scholars (and commercial users) of the new media and argue the unfairness of withholding permissions and requesting prohibitive compensation be paid.

Four chapters cover the impact of copyright law on education resource institutions. Cosette Kies writes on "The CBS-Vanderbilt Litigation: Taping the Evening News"; Jeanne Masson Douglas shares the responses she received to requests for advance permissions from publishers in "Seeking Copyright Clearances for an Audiovisual Center." For librarians, there is Jerome K. Miller's "The Duplication of Audiovisual Materials in Libraries" and Billie Grace Herring's "Library and Learning Resources: How Will Copyright Apply?" These last two writers observe that further definitions and guidance are necessary to relieve the frustration faced by librarians conscientiously trying to cope with the law as it applies to use of the new technology.

For those interested in fair use in other countries, this volume contains some interesting contributions by foreign observers. Fair dealing in England is discussed by Harry S. Bloom in "The Copyright Position in Britain", while A. A. Keyes tells us about "Copyright and Fair Dealing in Canada." *L'usage royal* in France

[1] *Encyclopedia Britannica Ed. Corp.* v. *Crooks*, 447 F. Supp. 243, 197 U.S.P.Q. 280 (W.D.N.Y. 1978)

[2] Belz, Carl. *The Story of Rock.* 2d ed. Oxford Univ. Press, 1972.

is explained by Marie-Laure Arié in "Author's Rights and Contemporary Audiovisual Techniques in France". The section is rounded out by "The Freedom to Quote According to German Law" by Demetrius Oekonomidis, and "Copyright in Japan" by Hiroshi Minami.

In the final section of the book on statutory law, constitutional law, and the rights of scholarship, some of the hard questions in the area of fair use and the new technology are provocatively raised and answers are suggested. Bernard Timberg impressively argues that the law has to respond to the current media explosion, as he recounts the rapid growth and spread of the multiple forms of film. Harriet Oler of the Copyright Office in "Copyright Law and the Fair Use of Visual Images" concludes: "Carefully monitored and documented written standards, arrived at and administered with good will, and an understanding of the universal benefit engendered by the copyright scheme, are the best hope at this point for practical resolution of the raging fair use controversy." And in "The American Constitution, Free Inquiry and the Law", Harry N. Rosenfield argues that reasonable use of copyrighted works is protected by the fair use provision and the First and Ninth Amendments to the Constitution.

It is left to Sigmund Timberg to provide us with a revised fair use standard for visual, audio, audiovisual and very short literary works, proposed as a solution to the unworkability of the current one. This well-developed thesis deserves to be widely read.[3]

A prophecy is offered at the conclusion of David Kunzle's contribution on the subject of the Hogarth piracies: "As capitalism disappears, Hogarth's important initiative, although certainly progressive in its time, will be given its proper historical place, and all copyright laws will become historical curiosities." Thus, those awaiting the disappearance of capitalism will also find something of interest in this splendid collection of thoughtful, well-written essays on a fair use dilemma that confronts many of us increasingly. The book is recommended.

KATE MCKAY

[3] An expanded form of this contribution is found in Timberg, *A Modernized Fair Use Code for the Electronic as well as the Gutenberg Age*, 75 Nw. L.Rev. 193 (1980).

171. MILLER, JEROME K. Applying the new copyright law: a guide for educators and librarians. American Library Association, Chicago (1979), 44 p.

Topics covered in this short work on copyright include a brief history of copyright, fair use, library photocopying, obtaining permission and securing copyright protection. The appendix includes guidelines for classroom copying, CONTU's guidelines, inter-library loans and educational uses of music, and the ALA's guidelines for making a copy of an entire copyrighted work for a library, archives or a user.

B. LAW REVIEW ARTICLES

1. United States

172. BEAVERS, LUCIAN WAYNE. Copyright: *Twentieth Century Music Corp. v. Aiken* - Infringement liability of a restaurant owner for the reception of radio broadcasting for the enjoyment of his customers. *Oklahoma Law Review,* vol. 30, no. 1 (Winter 1977), pp. 201–213.

Mr. Beavers presents his views on the distinction between authorized and unauthorized broadcasts and contributory infringement, along with an analysis of both the *Jewel-LaSalle* and the *Aiken* cases. In conclusion, he lists the requirements necessary in order for a hotel or restaurant proprietor to be held liable for copyright infringement for using a radio broadcast of a copyrighted musical composition to entertain customers.

173. 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 76/77), pp. 59–82.

This study presents a history of copyright since 1909 and a look at fair use (including specific examples). Mr. Cardozo discusses the *Williams and Wilkins* case and how the case would have been resolved if the 1976 revision had been in force. In the appendix, the author gives guidelines for teachers for single copying, guidelines for photocopying and interlibrary arrangements affected by copyright regulations.

174. 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.

A look at the traditional approach to the copyrighting of news and other factual writings, protection of the news event along with the protection of the public interest, unfair competition and fair use. The author believes that copyright protection could logically be extended to the factual element of investigative news reporting without interfering with the public's right to know.

175. EISENBERG, JON B. *Lugosi v. Universal Pictures:* Descent of the right of publicity. *Hastings Law Journal,* vol. 29, no. 4 (Mar. 1978), pp. 751–775.

An in-depth look at a California case, *Lugosi v. Universal Pictures,* which has raised the question of whether a right of publicity should descend to heirs. The trial court had held that the right was descendible, but the decision was reversed on appeal. The author discusses the protection of both name and likeness and the evolution of the right of privacy and the duration of descent. There is also mention of a New York case, *Price v. Hal Roach Studios, Inc.,* an action filed by the widows of Laurel and Hardy concerning publicity rights. In the *Lugosi* case the author believes that the Supreme Court should reverse the holding of the court of appeals and uphold the trial court's award of damages and injunctive relief.

176. Federal court of appeals affirms judgment that movie "Macon County Line" did not infringe copyright in script of unreleased movie "Rednek Amerika". *Entertainment Law Reporter,* vol. 2, no. 4 (July 15, 1980), pp. 2, 3.

A Federal Court of Appeals has affirmed a judgment that the movie "Macon County Line" did not infringe the copyright to the script of an unreleased movie entitled "Rednek Amerika, Love It Or . . ." The trial court had concluded that the ideas in the two movies may have been similar, and ruled that copyright protects only the expression of an idea, not the idea itself, or themes or stereotyped characters. [*Midas Productions, Inc. v. Baer,* 437 F. Supp. 1388 (9th Cir., Nov. 19, 1979), affirming CV 76-579-DWW, C. D. Cal. 1977.]

177. FRIEDMAN, Joel L. Comment: Copyright and musical arrange-

ment. An analysis of the law and problems pertaining to this specialized form of derivative work. *Pepperdine Law Review,* vol. 7, no. 1 (1979), pp. 125–146.

A look at musical arrangements, derivative works, the concept of originality, compulsory license problems, imitation of a performer's style, and the right of adaptation. The author mentions in his conclusion the need for Congress to officially recognize the importance of the arranger's work in the field of popular music and allow the arranger to realize performance royalties in the field of sound recordings.

178. GERBER, DAVID A. Review/Nimmer on Copyright: a treatise on the law of literary, musical and artistic property and the protection of ideas (1978). *UCLA Law Review,* vol. 26, no. 4 (Apr. 1979), pp. 925–963.

This review analyzes "Nimmer on Copyright" section by section. One of the areas that is highlighted is the legislative history of the "equivalent rights" condition of section 301(a), which exempts from preemption "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." Other areas under discussion include salvaging state misappropriation law and protection under copyright, including the designs of useful articles, typeface designs and "typeface as a useful article." The areas of copying that are discussed include substantial similarity and the "pattern" test.

179. KOHN, ALAN. Federal judge decides rights of children's book publishers. *New York Law Journal,* vol. 183, no. 115 (June 13, 1980), pp. 1, 3.

A federal judge has divided up rights to publish hard cover and paperback editions of some of the most popular series of children's adventure stories in the U.S., involving such characters as the Bobbsey Twins, Nancy Drew, the Hardy Boys and Tom Swift. Judge Robert Ward has ruled that Simon & Schuster will have the rights to publish all hardcover and paperback versions of any new stories in these and other series of books, whose characters originally were created by Edward Stratemeyer, who died in 1930. Grosset & Dunlap, which has published hardcover editions of the series for nearly eighty years, will have the right to continue to publish hardcover editions that it already has pub-

lished through contracts or implied contracts. Grosset & Dunlap's suit for copyright and trademark violations, unfair competition, common-law violations, $300 million punitive damages and unstated compensatory damages was dismissed. The publisher had sued Gulf & Western Corp., of which Simon & Schuster is a division, and Stratemeyer Syndicate, which had contracted with Simon & Schuster, to publish new editions of various series after a royalty dispute with Grosset & Dunlap.

180. LEE, WILLIAM E. The Supreme Court on privacy and the press. *Georgia Law Review,* vol. 12, no. 2 (Winter 1978), pp. 215–247.

Mr. Lee discusses the right of privacy and provides case background on *Time, Inc. v. Hill; New York Times Co. v. Sullivan; Gertz v. Robert Welch; Cantrell v. Forest City Publishing Co.; Zacchini v. Scripps-Howard Broadcasting Co.,* and *Cox Broadcasting Corp. v. Cohn.* A review of the Judges' opinions, including Justices White's and Harlan's, are provided. The author mentions in his conclusion that the *Gertz* decision and the tone of the *Cox* decision indicate that a majority of the Supreme Court does not support a preferred status for the press in cases dealing with the right of privacy.

181. LIEKWEG, JOHN A. New copyright law and its implications. *The Catholic Lawyer,* vol. 24, no. 3 (Summer 1979), pp. 210–217.

In this address the author analyzes the new Copyright Act and how it affects churches, schools, colleges and hospitals which are both producers and users of materials which are subject to the provisions of the new law. Topics for discussion include the subject matter of copyright, exclusive rights, fair use, exemption for certain performances and displays, duration of copyright and remedies.

182. Notes: An author's artistic reputation under the Copyright Act of 1976. *Harvard Law Review,* vol. 92, no. 7 (May 1979), pp. 1490–1515.

In discussing artists' rights, this article examines the areas of protection of artistic reputation based on civil law and the American copyright law. Areas analyzed include moral rights, protection of artistic reputation under state law and under the Copyright Act of 1976, and the preemption section of the 1976 law. In conclusion, the author believes that protection of an author's right

"must be provided within the copyright law, or derived from state laws which do not conflict with the federal scheme of use and dissemination of literary and artistic works."

183. SMITH, M. ELIZABETH. The public's need for disclosure v. the individual's right to financial privacy: an introduction to the financial right to the privacy act of 1978. *Administrative Law Review,* vol. 32, no. 3 (Summer 1980), pp. 511–535.

The topic "The public's need for disclosure" is presented through a series of Supreme Court cases involved in the question of financial privacy and the public's need to know. The Bank Secrecy Act, *U.S. v. Miller* and other court decisions are analyzed. There is also a summary of the legislative history and the requirements for the financial privacy act. In her conclusion, the author states that "just as the Court was moving in favor of disclosure of governmental records containing information as to individuals, Congress was beginning to withdraw from its earlier position, thereby favoring individual privacy over a need for disclosure."

2. Foreign

1. In English

184. BLESZYNSKI, JAN. Duration of protection of works of joint authorship. *Interauteurs,* no. 190 (1979), pp. 88–91.

An analysis of the importance of the problem of term of protection for works of joint authorship and a comparison of the French and Polish systems of copyright with a brief look at Polish literature and national legislation as it pertains to copyright. The author points out the wide differences in the terms of copyright protection in the area of joint authorship, citing Bulgaria and Germany as examples.

185. FERNAY, ROGER. Will double taxation of copyright royalties someday be eliminated? *Revue Internationale du Droit d'Auteur,* no. 194 (Apr. 1980), pp. 93–137.

The origin of the Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties is discussed along with a look at the Convention's three preparatory committees of ex-

perts and their findings, a mention of the Madrid debates, and a brief analysis of the texts of the findings with recommendations of their future possibilities and their impact.

186. FRANÇON, ANDRE. Article 234 of the Treaty of Rome and the International Copyright Conventions. *Interauteurs,* no. 190 (1979), pp. 80–81.

A look at the provisions within the Treaty that relate to safeguarding national legislation and the provisions on international regulations on copyright. The author analyzes the domain of earlier conventions as well as their scope and the subject of rights and obligations of third party states. There is also a close look at Article 234 and its effectiveness in defending authors' interests.

187. GAUDRAT, PHILIPPE. Protection of the author in relation to a retransmission by satellite of his work. *Revue Internationale du Droit d'Auteur,* no. 104 (Apr. 1980), pp. 3–55.

The author distinguishes between the two basic groups of satellites, conventional and direct broadcast, and the protection provided to the author in each type of transmission. Definitions of copyright according to international conventions are provided and there is a discussion of the protection of the author within the framework of public law. In his conclusion, Mr. Gaudrat states that "[t]he author's protection in connection with a direct broadcast is better assured by direct broadcast than retransmission by conventional satellite could assure."

188. GERBRANDY, SJOERD. Decisions and reflections concerning the object of copyright, concepts of public performance and "publication" and the author's moral right. *Revue Internationale du Droit d'Auteur,* no. 104 (Apr. 1980), pp. 57–91.

In this article, five recent court decisions relating to the Netherlands copyright law are analyzed. Areas of copyright covered include infringement, copying and reproduction of a substantial portion of material, and public versus private performances of musical compositions.

189. NORDEMANN, WILHELM. A right to control or merely to payment?—towards logical copyright system. *International Review of Industrial Property and Copyright Law,* vol. 11, no. 1 (Feb. 1980), pp. 49–54.

Mr. Nordemann discusses the German copyright law and the

problems authors have in controlling their works. He concludes that the disturbing experience German authors have is not peculiar to Germany. It is rather the result of a system which merely accords a right to remuneration. Once the principle of civilized copyright law which gives the author absolute control of his work is abandoned, he finds himself always in the weaker bargaining position, unable to extract really fair remuneration from those who make use of his creation.

190. ROUDAKOV, YOURI. Duration of protection of collective works under Soviet copyright legislation. *Interauteurs,* no. 190 (1979), pp. 96–98.

A short article which begins by explaining the qualifications of a collective work in the USSR. This consists mainly of an agreement of the parties to create a work (whether oral or written) and the creative contribution of the co-authors to the work in question. Further discussion includes copyright in motion pictures or television films (which are not considered collective works), the rights of heirs, and the Soviet concept of "reduced terms of copyright."

191. WALD, MICHAEL H. Soviet and American copyright laws: differential impact on publications abroad by foreign nationals. *The International Lawyer,* vol. 12, no. 2 (Spring 1978), pp. 381–396.

The internal copyright protection of both the Soviet Union and America are compared in this article. Mr. Wald examines the extraterritorial copyright protection now provided by the USSR, citing the case of Sir Arthur Conan Doyle whose works were republished in the U.S.S.R. without any compensation. In his conclusion, the author states that in practice Soviet and American copyright are quite different. The Soviet Union, by retaining the right of control over royalties, has created a copyright system that is highly coercive. The author believes that Soviet accession to the U.C.C. will have very little effect on the access abroad to works by Soviet dissidents.

2. In English and French

192. EMRINGER, E. Letter from Luxembourg. *Copyright,* May 1980, pp. 199–201; *Droit d'Auteur,* May 1980, pp. 159–162.

After stressing the point that the Luxembourg Law of 29

March 1972, which constitutes a veritable revision of the Law of 10 May 1898, takes very large account of the Berne Convention and its versions adopted in Stockholm and Paris, the author gives a historical sketch illustrated by case law and describes the basic provisions of the new law. The rules governing the author's moral rights have been considerably extended. The droit de suite has been introduced into the legislation. Photographic works are included in the list of protected works; their general protection was affirmed by a High Court decision of June 4, 1973. A compulsory license—without surcharge—is provided for with regard to broadcasting in the absence of agreement or arbitration between the parties concerned.

193. HENNEBERG, IVAN. Letter from Yugoslavia. *Copyright,* April 1980, pp. 170–174; *Droit d'Auteur,* April 1980, pp. 142–146.

The author emphasizes at the outset that the new law which entered into force on April 22, 1978 does not represent a general overhaul of the 1968 copyright law but rather harmonizes the latter's provisions with the Federal Constitution of 1974. Nevertheless, the legislators of 1978 amended the existing law by adding a number of new substantive provisions and editorial changes. The new Copyright Law is strictly limited to copyright matters, omits rights of personality and contains no provisions on neighboring rights.

The law of 1978 attributes authorship of cinematographic works not only to the author of the scenario, the director, the principal cartoonist and the composer of the film, but also to the director of photography. Above all, the provisions of the 1968 Law regarding the works created within the context of an employment relationship have been substantially affected by the alignment of the copyright legislation with the provisions of the new Constitution. As to the right of public performance, the new law has laid down the rule that entertainment impresarios and other users of intellectual property must obtain permission for the performance of protected works by supplying the organization of authors or the competent association with the program of works to be performed at least fifteen days from the date of performance and by paying them the royalties for the exploitation of the works.

194. OLSSON, A. HENRY. Administration of neighboring rights: experience in the Nordic countries. *Copyright,* May 1980, pp. 191–198; *Droit d'Auteur,* May 1980, pp. 151–159.

All the so-called Nordic countries—Denmark, Finland, Iceland, Norway and Sweden—have long granted protection in their national legislation for performing artists, producers of phonograms and broadcasting organizations. They all are party to the Berne Convention and the UCC. Denmark, Norway and Sweden have ratified the Rome Convention of 1961 and also the European Agreement on the Protection of Television Broadcasts. Moreover, the Nordic countries, except for Iceland, are all parties to the Geneva (Phonograms) Convention of 1971. After reviewing the protection granted to beneficiaries of neighboring rights under Convention law and national law, the author examines in detail the practical application of the rights in Sweden, Norway and Denmark. He also gives statistics regarding the economic implications of the protection of neighboring rights in Sweden.

3. In English, French and German

195. LIMPERG, DR. TH. Duration of copyright protection. (La duree de protection du droit d'auteur.) *Revue Internationale du Droit d'Auteur* (RIDA) 103, January 1980, pp. 53–91.

The author examines the terms of protection in Austria, Belgium, Denmark, France, the Federal Republic of Germany, Great Britain, Ireland, Italy, Luxembourg, Mexico, the Netherlands and Poland. He also discusses at length the arguments and proposals in favor of retaining or extending the duration of copyright protection of fifty years after the death of the author.

4. In French, English and Spanish

196. FRANÇON, ANDRÉ. La protection des créations publicitaires par le droit d'auteur. (The copyright protection of advertising creations.) *Revue Internationale du Droit d'auteur* (RIDA) 103, January 1980, pp. 2–51.

The author presents a detailed study of the French case law and doctrine on the subject of applying copyright to the field of advertising creations. The evolution of the classic exclusion of ideas from copyright, as well as the implied and limited or automatic and general transfer of the pecuniary rights of salaried authors, are lucidly examined. In conclusion, the author expresses doubts whether the copyright law of 11 March 1957 is well adapted to provide adequate protection to advertising creations and give the creators thereof their legitimately aspired

freedom. On the other hand, he questions whether, though justified when works of "pure" art are concerned, such protection is not somewhat excessive when exercised in connection with applied art, of which advertising creations are a part.

197. GAUDEL, DENISE. Les éternels excommuniés. La situation des artistes interprètes en France. (The eternally excommunicated. The situation of performers in France.) *Revue Internationale du Droit d'Auteur* (RIDA) 103, January 1980, pp. 92–135.

The title of this article correctly announces its topic: excommunicated under the Old Regime (i.e. prior to the Revolution), performers still do not have an enviable lot in present French society; they are neglected by the legislators and the courts. Although the personality of a performer is protected whenever one of his attributes, e.g. his image, name, or private life, is prejudiced, the situation is very different in respect of his economic interests vis-à-vis uses of recordings of his performances. The author analyzes the case law, criticizes the Supreme Court for referring the complaining performer to the common law and discusses the pertinent dispositions of the copyright act, the Civil Code and the Labor Code. In conclusion, a number of suggestions are set forth by the author for amending the laws and establishing civil as well as penal sanctions in order to ameliorate the legal status of the performers.

C. ARTICLES PERTAINING TO COPYRIGHT FROM MAGAZINES

1. United States

198. ABRAMS, EARL B. Gortikov assails new proposals at CRT hearings. *Cash Box*, vol. XLII, no. 7 (June 28, 1980), pp. 5, 57.

In his testimony before the Copyright Royalty Tribunal, Recording Industry Assn. of America president Stanley Gortikov indicated that the organization believes that the compulsory royalty figure should be set to: (1) maximize the disclosure of creative works to the public; (2) ensure a fair return to owners and a fair income to users; (3) reflect the relative role of the owner and the user in such areas as creative and technological contributions, capital investment, cost, risk and the opening of new markets; and (4) minimize disruption of the structure and prevailing practices of the industries involved. He said that it would be unfair

to relate royalty fees to price as recommended by songwriters and music publishers. The RIAA wants the present 2.75 cents royalty rate to be retained.

199. ABRAMS, EARL B. Industry faces expensive future, witnesses tell CRT. *Cash Box,* vol. XLII, no. 10 (July 19, 1980), p. 6.

Stanley Kavan, a former CBS executive, was one of the witnesses testifying at the mechanical royalty rate hearings. He discussed the technical history and future of the recording industry. His appearance as a witness was to bolster "testimony that the industry faced heavy investments to deal with coming technical advances." Other witnesses for the recording industry included Russ Solomon of MTS Inc., Ian D. Thomas of IFPI, and Stanley Gortikov of the Recording Industry Assn. of America.

200. ABRAMS, EARL B. NMPA submits mechanical royalty fee proposal. *Cash Box,* vol. XLII, no. 6 (June 21, 1980), pp. 8, 42.

The National Music Publishers Assn. recently recommended that the mechanical royalty rate be changed from a set rate to 6% of the suggested retail price of a single, album or tape. The recommendation was made in the NMPA's direct testimony during the Copyright Royalty Tribunal hearings. The proposal also included a requirement for the filing of a "notice of intention to obtain compulsory license" and "notice of change in suggested retail list price."

201. ABRAMS, EARL B. Yetnikoff blasts NMPA position at CRT hearings. *Cash Box,* vol. XLII, no. 8 (July 5, 1980), pp. 8, 14.

Testifying before the Copyright Royalty Tribunal, Walter Yetnikoff, president of the CBS Records Group, said that if the mechanical royalty rate is increased, many small recording companies will have to close down. He also introduced evidence which he contended showed that although prices have gone up, the percentage going for copyright payments has remained fairly constant. Other reasons Yetnikoff cited for maintaining the current royalty rate included increased recording costs and fewer artist signings for shorter periods of time.

202. ALBRIGHT, B. MAYNE. The new copyright act and ownership and use of building plans. *North Carolina Architect* (March-April 1980), pp. 23–25.

The author discusses the 1976 Copyright Act and compares various provisions to those of the 1909 Act. Mr. Albright states that the enactment of the Copyright Act of 1976, with its changes, its benefits and its limitations, suggests the need for a review of the current rights of ownership and use of building plans. Protection against the unauthorized use of architectural plans and specifications is of obvious importance to architects and their clients, but, as is often overlooked, of even greater importance to the public. He concludes that although the protection against infringement on copyrighted plans is generally applicable only to the combination or relationship of the design elements, such protection may be available through the U.S. Patent and Trademark Office, either as a "utility patent" or a "design patent" in addition to the copyrighting of the entire plans which themselves generally are not patentable.

203. ARCOMANO, NICHOLAS. A dancer's business. Conclusion: choreography and copyright, part III. *Dance Magazine* (June 1980), pp. 61–63.

The protection a choreographer has once a dance is fixed and the basic rights provided by the new law are some of the topics discussed by the author. There is also a brief mention of fair use, duration of protection, and works-made-for-hire.

204. ARCOMANO, NICHOLAS. A dancer's business: video law—some legal considerations on choreography and videotape. *Dance Magazine* (August 1980), pp. 46–47.

A look at the videotape industry, its growing technology and how this applies to dance. The Recording Industry Association of America has recognized the problems that might arise out of this "videotape explosion" and have announced the formation of a new division, RIAA/VIDEO. Its basic concern will be anti-videotape piracy.

205. Arista announces blank-tape ad policy; others may follow. *Record World,* vol. 37, no. 1716 (June 14, 1980), pp. 3, 98.

In letters to its distributors, Arista Records spelled out its position with respect to the home taping issue. The letter stated that the company was "in complete agreement with other manufacturers who are nonplussed and angered by customers who

would utilize advertising space supplied by manufacturers for the purpose of promoting the sale of blank tape . . . (T)o be in the position of paying for all or part of ads that promote the sale of blank tape is ludicrous and self-deceiving and we cannot permit it." Therefore, effective immediately Arista "will not pay or contribute to print, radio or TV advertising that makes reference to blank tape." Polygram Distribution made a similar announcement a month ago, and other labels have implied that they will be considering some action in this regard in the near future. This move by record companies is the result of industry claims that blank tape sales are up and record sales down because consumers are doing more home taping.

206. ASCAP writers file suit against restaurant owner. *Cash Box,* vol. XLII, no. 9 (July 12, 1980), p. 43.

ASCAP has filed a copyright infringement suit against Lynn Elwood Moore, the owner of Hernando's Hide-A-Way in Memphis. The complaint alleges that a number of plaintiff's copyrighted compositions were performed without authorization at Hernando's from Nov. 2–3, 1979. This suit is in keeping with ASCAP's efforts to license bars and restaurants for the public performance of copyrighted musical works by its members.

207. BROHAUGH, WILLIAM. Photography and the law. *Rangefinder* (Apr. 1980), pp. 59–61.

This article explains in detail a photographer's right, works for hire, North American serial rights, and other legal terms important to photographers. The author urges photographers to register their works not only for cases of infringement but also as a means of recording their work.

208. Cahill sees hassle over FCC move to end exclusivity. *The Hollywood Reporter,* vol. CCLXII, no 34 (July 21, 1980), pp. 1, 18.

Abolishing the Federal Communications Commission's distant signal and exclusivity rules may give members of the Caucus for Producers, Writers and Directors and other affected persons impetus to work towards getting the copyright law amended to protect their product. This was the feeling expressed by Bob Cahill, one of the Caucus members who visited Washington, D.C. in late May to discuss retransmission of commercial programming by cable TV systems.

209. MCMASTERS, THERESA. FCC scuttles distant signal carriage, synd. exclusivity rules. *The Hollywood Reporter,* vol. CCLXII, no. 36 (July 23, 1980), pp. 1, 27.

The Federal Communications Commission abolished its distant signal carriage and syndicated exclusivity rules for the cable television industry. Now a cable operator will be able to pick up signals from wherever he chooses and a local broadcaster who had contracted with a program supplier for any given program will no longer be protected by exclusive showing rights in his area. In taking this action, the Commission denied the request of the Motion Picture Assn. of America for an evidentiary hearing and the petition of the National Assn. of Broadcasters to hold oral arguments before terminating the rules.

210. MCMASTERS, THERESA. Heavy flak over FCC rewrite causes delay in bill's markup. *The Hollywood Reporter,* vol. CCLXII, no. 18 (June 26, 1980), pp. 1,3.

Complaints from broadcasters, newspaper publishers, Comsat and other interested parties have caused the Commerce Committee to postpone the markup on the Senate's new Communications Act revision bill. The groups complained that the Senate was moving too swiftly on the legislation. National Assn. of Broadcasters president, Vincent Wasilewski, said that, while it eliminated all restrictions on cable carriage of distant signals, the bill contained no provision that would correct the imbalance created by the Copyright Act. In the few weeks since its introduction, however, the bill had won hearty endorsement from administration functionaries.

211. MCMASTERS, THERESA. MPAA seeks parties to address copyright issue. *The Hollywood Reporter,* vol. CCLXII, no. 9 (June 13, 1980), pp. 1, 4.

The Motion Picture Assn. of America is attempting to convince Democrats and Republicans to push for revision of the 1976 Copyright Act. The MPAA's Jack Valenti recently prepared a speech in which he asked the Democrats to incorporate a plank that "would provide owners of TV programs with the same rights enjoyed in this country by other owners of private property." He also recommended that the Act be revised to "provide for the establishment of a free and open market for the distribution and licensing of TV programs to cable systems." A similar plea was

presented by the Association's vice president, Fritz Attaway, to the Republican Platform Committee.

212. McMASTERS, THERESA. Music royalty bill dead in Congress. *The Hollywood Reporter*, vol. CCLXI, no. 50 (June 2, 1980), p. 4.

The House Judiciary subcommittee postponed its markup of the Danielson performance royalty rights bill for the second time. No new date was set, which leads to increased speculation that the measure is dead for this session of Congress. The bill would require broadcasters and other users of recorded music to pay royalties to performers and manufacturers.

213. Midway files suit against Universal. *Cash Box*, vol. XLII, no. 8 (July 5, 1980), p. 45.

A copyright infringement suit has been filed against Universal Co., Ltd. and Universal U.S.A., Inc. The complaint, which was filed by Midway Mfg. Co. of Franklin Park, Ill., alleges that the defendants have been creating, importing, and distributing an electronic video game known as "Cosmic Alien," containing audio-visual material that was copied largely from plaintiff's "Galaxian" video game. Universal is also accused of publicly distributing numerous advertising brochures for Cosmic Alien which contain material that was copied largely from Galaxian. Plaintiff is seeking injunctive relief, damages, court costs and attorney fees.

214. Music publishers accuse college in copyright suits. *The New York Times*, vol. CXXIX, no. 44,614 (June 15, 1980), p. 21.

Three music publishers have accused Longwood College, of Farmville, Va., and Dr. Louard Egbert, Jr., a music teacher there, of illegally reproducing copyrighted music by passing out copies to students and having the works performed. The Oxford University Press of Oxford, England, the Theodore Presser Company of Bryn Mawr, Pa., and Novello & Company Ltd. of Kent, England, seek $500,000 in damages. For each asserted violation, they ask for $50,000 from each defendant in statutory damages, plus costs, and injunctions to halt future infringements. Dr. Egbert, the publishers say in the suits, copied, distributed and directed a student performance of such songs as John Rutter's version of "Twelve Days of Christmas" and "Throw the Log On, Uncle John" without obtaining the permission of Oxford University Press and Presser, respectively. Dr. Egbert was also alleged to have used

pirated copies of the songs "Torches", "Here We Come A-Wassailing" and "There is No Rose of Such Virtue" to which Novello says it owns the rights.

215. NAB board says cable should pay. *The Hollywood Reporter*, vol. CCLXII, no. 4 (June 6, 1980), p. 4.

The TV board of the National Assn. of Broadcasters has asked the Federal Communications Commission to abandon its proposed move to abolish its syndicated exclusivity and distant signal rules for cable systems. The board feels that the compulsory license provisions of the 1976 Copyright Act have insulated cable from having to compete for programming in the open marketplace and have given it an unfair and anticompetitive advantage by requiring it to pay only a minimal fee to program suppliers. The rules which the Commission proposes to drop have acted as a balancer for "the present governmentally distorted operation of the marketplace." Another thing that broadcasters and program suppliers believe could help to balance the situation is the proposal the Copyright Royalty Tribunal is currently considering regarding tying the copyright fees to inflation rates.

216. NARM issues anti-piracy memorandum. *Record World*, vol. 37, no. 1721 (July 19, 1980), pp. 165, 209.

An antipiracy memo is being sent to all members of the National Assn. of Recording Merchandisers. The purpose of the memo is to alert merchandisers of their responsibilities and potential liability regarding the distribution and sale of counterfeit sound recordings. It discusses applicable criminal and civil statutes and the penalties under those statutes. Additionally, an outline of possible steps that might be taken to combat counterfeiting is given.

217. NEWMAN, ARNOLD. On copyrighting a photograph. *The New York Times* (July 13, 1980).

A letter to the editor protesting the unauthorized use of Arnold Newman's photo of Picasso which was used to illustrate Grace Glueck's article, "How Picasso's Vision Affects American Artists" in the New York Times of June 22, 1980.

218. News. *Technical Photography* (May 1980), pp. 47–48.

A note mentioning that the Copyright Office recently issued

a new eleven-page "Nuts and Bolts of Copyright" pamphlet about basic protection. Circular R1 deals with what copyright is and the registration procedure.

219. NMPA meet keys on royalties, licensing. *Record World,* vol. 37, no. 1719 (July 5, 1980), p. 6.

The agenda of this year's National Music Publishers Assn. annual meeting included an examination of the impact of home taping, reports on mechanical royalties and new avenues in licensing, and an update on the Copyright Royalty Tribunal hearings in Washington, D.C. NMPA president Leonard Feist chaired the meeting and Albert Berman, president of the Harry Fox Agency, was one of the speakers.

220. Nonnetwork firms win royalty ruling on cable-TV shows. *The Wall Street Journal,* vol. CXCVI, no. 21 (July 30, 1980), p. 9.

After two years, the Copyright Royalty Tribunal has decided movie companies and other television program syndicators should get the biggest share of the copyright royalties paid by cable TV systems. The Tribunal ruled that members of the Motion Picture Association of America and other nonnetwork syndicators should get nearly $11 million, or 75%, of the program royalties paid in 1978 by cable systems. The three major commercial television networks are not eligible for royalties.

221. NST & Oak file suit against 31 for piracy devices. *The Hollywood Reporter,* vol. CCLXII, no. 4 (June 6, 1980), pp. 1, 28.

National Subscription Television and Oak Broadcasting Systems, Inc. filed suit in Los Angeles Superior Court seeking injunctive relief to prevent the manufacture and sale of decoding devices. The suit, which names 31 individuals, corporations and other businesses in L.A. County, alleges that the defendants are "making and selling devices" which intercept plaintiff's ON TV subscription TV signal and permit non-subscribers unlawfully to get access to its programming. ON TV had already brought a similar action against other defendants in federal court when it learned that those named in this action were also selling the decoders. This suit was then filed in state court so as not to interfere with the July 28th trial date for the federal suit.

222. Oak Industries wins first round with ON TV pirates. *The Hollywood Reporter,* vol. CCLXII, no. 32 (July 17, 1980), p. 8.

The U.S. District Court in Phoenix granted Oak Industries, Inc. a preliminary injunction against Pirate Electronics. Defendant is alleged to have pirated an Oak subsidiary's (National Subscription TV's) over-the-air ON TV subscription TV signals. The injunction prohibits Pirate from manufacturing or selling any "device capable of decoding the ON TV signals or rendering the signal decipherable to ordinary TV receivers and from otherwise assisting" non-subscribers to receive ON TV's programming. Oak Industries also brought two similar suits in California. A third that was filed by a company associated with Oak has resulted in criminal charges being lodged against the defendants.

223. PEARSON, LOIS R., *ed.* Publishers cream copy firm for copyright infringement. *American Libraries,* vol. 11, no. 5 (May 1980), p. 247.

A look at the case of *Basic Books, Inc. v. Gnomon Corp.,* concerning the Gnomon Corp.'s photocopying of substantial portions of books and articles and creating photocopied anthologies for sale to students. In Bridgeport, Connecticut, Federal District Judge W. Egenton prohibited Gnomon from photocopying more than one copy of any published, copyrighted work without securing permission from the publisher. A Gnomon representative maintained that the firm was innocent. There was mixed reaction to the judgment in the library community.

224. Presley U.K. bootlegs seized in raid by BPI. *Cash Box,* vol. XLII, no. 4 (June 6, 1980), p. 44.

British Phonographic Industry investigators confiscated large quantities of pirated Elvis Presley cassettes, open-reel tapes and recording equipment from the home of Richard Selwood in Milverton (U.K.). Allegedly, Selwood had been manufacturing the tapes and then distributing them through a Presley appreciation society that he had set up called the Elvis Collector's Club. As a result of the evidence uncovered in the raid, RCA Corporation and RCA Ltd. have initiated a suit against Selwood.

225. Random notes. *Rolling Stone* (June 26, 1980), p. 32.

Carol Hinton, a Michigan housewife, has filed a copyright infringement suit against the rock group Fleetwood Mac, Stevie Nicks and Warner Brothers Records. Hinton claims that she wrote a poem in 1978 entitled "Sara" and, on Dec. 21, 1978, sent a copy to Warner Bros. to see if it would be interested in publishing the work. Hinton never received a response from the label, but last

November heard the Mac's "Sara" on the radio with Nicks credited as the tune's writer. Hinton then registered her unpublished poem with the Copyright Office on April 1, 1980 and filed this action on May 8th, seeking "exemplary and punitive damages."

226. Rewrite bill emerges in the Senate. *Broadcasting,* vol. 98, no. 24 (June 16, 1980), pp. 27, 28.

A bill, S. 2827, has been introduced by subcommittee Chairman Ernest Hollings entitled "The Communications Act Amendments of 1980". Although the bill focuses extensively on common carriers, it also contains a significant number of broadcast and cable sections. Absent from the bill is a spectrum fee, which Hollings had favored in S.611, introduced last year, and which was said to be a major sticking point holding up introduction of a revised bill. The bill extends the license terms for radio and television from three to five years, and authorizes the FCC to use a random selection system, such as a lottery, to choose among qualified competing applicants for broadcast licenses. The commission would also be required to move toward deregulation of radio by eliminating rules concerning news and public affairs requirements, number and frequency of commercials, and maintenance of program logs. A mark-up of the legislation has been scheduled for June 24.

227. RITZER, TERI. RIAA chief Gortikov worried over higher copyright payment. *The Hollywood Reporter,* vol. CCLXII, no. 7 (June 11, 1980), pp. 1, 21.

One of the main topics discussed by Stanley Gortikov at the 1980 Entertainment Industry Conference was the possibility of the Copyright Royalty Tribunal increasing the mechanical royalty rate. He indicated that any price increases would ultimately be passed on to the consumer in terms of higher product costs. Therefore, the industry and the public should push for the creation "in law of a royalty to be paid and distributed ASCAP-style to those involved in the production of original sound recordings—a reciprocal right." Gortikov, who delivered the luncheon address at the day-long conference, also talked about the problem of radio stations playing entire albums, a practice which the industry feels encourages off-air-taping, as well as piracy and counterfeiting.

228. RITZER, TERI. Solution to FCC deregulation is to 'get gov't out'. *The Hollywood Reporter,* vol. CCLXII, no. 15 (June 23, 1980), pp. 1, 13.

Rep. Lionel Van Deerlin told motion picture industry leaders that the solution to the Federal Communications Commission's pending deregulation of distant signal importation and syndication exclusivity rules is to spur Congress to "get government out of the way" in making such decisions. The Congressman, who was the speaker at the seventh Motion Picture Assembly Series luncheon sponsored by the Motion Picture Assn. of America, urged those present to lobby for retention of the rules. The FCC has proposed abolishing the rules on the premise that they have harmed the public. Van Deerlin opposes this position as well as the FCC's and the Copyright Royalty Tribunal's roles in the cable TV controversy.

229. SAMPSON, JIM. Austrians pass first blank tape royalty. *Record World,* vol. 37, no. 1722 (July 26, 1980), p. 40.

The world's first blank tape royalty law was recently enacted in Austria. The law sets a maximum of ten million schillings on annual royalty revenue and provides for a rate schedule based on playing time. It also contains a provision that allots a majority of tape royalty revenues to social welfare programs, such as pension plans, and calls for a royalty on video cassettes. The cable television section of the new law stipulates a legal license for all cable program sources, but does not provide for specific compensation. The overall law goes into effect Jan. 1, 1981, and the effective date for the video cassette royalty provisions is July 1, 1982.

230. SAMPSON, JIM. German mkt. research study helps fuel drive for blank video-cassette royalty. *Record World,* vol. 37, no 1717 (June 17, 1980), pp. 54–55.

The German Performance Rights Society (GVL) commissioned a market research survey on the use of home video recorders. The findings, which show that most German owners use the machines exclusively to record copyrighted material off the air, will be used to lobby for a royalty on blank video tape cassettes. The GVL will also present the survey to lawmakers in Bonn "for their consideration during debate over the proposed revision of the German copyright law." The Society already has broad support for a royalty on blank audio cassettes and hopes to have videotape included in any royalty proposal.

231. SCHIFF, JON. Right of publicity, copyrights and other rights. *Screen Printing,* vol. 70, no. 3 (Mar. 1980), pp. 59–61.

A look at publicity, creative expression and copying as it pertains to screen printing and the T-shirt printing industry. The right of publicity is also discussed with mention of the Elvis Presley case, *Factors v. Pro Arts.* There is also a short discussion on trademarks, what they are, and how they are protected by law.

231a. SULZBERGER, A. O., JR. 2 FCC restrictions on cable TV eased in broad ruling. *The New York Times,* vol. CXXIX, no. 44,653 (July 23, 1980), pp. 1, C21.

The Federal Communications Commission has eliminated two major regulations that have limited the programs that cable television could offer its viewers. The FCC ruling allows cable systems to carry as many stations from outside their franchise areas as they, or their viewers, want. Also ended are rules that allow broadcasters to stop cable operators from televising the same programs that are presented by the local stations. Under the change, cable stations will be able to pick up programs from outside their own areas and they will also be able to pick up and transmit syndicated programs that have been purchased by independent stations or network affiliates. In return, the cable stations pay a percentage of their revenues as royalties into an industry fund. The Commission's decision came after a three-year investigation that concluded that the consumer benefits of eliminating the rules would be substantial.

232. TERRY, KEN. Bergman cites counterfeits, economy as leading issues. *Cash Box,* vol. XLI, no. 46 (Mar. 29, 1980), pp. 8, 89, 90.

According to Barry Bergman, the outgoing president of NARM, record counterfeiting is one of the most important issues facing the music industry right now. The recent indictment of Sam Goody, Inc. and its top two officials has placed all record retailers and merchandisers under a cloud of suspicion. He wants the government to go ahead and issue all of the indictments it intends to issue so that the industry can begin to recover from all the notoriety surrounding the Justice Dept. piracy investigations. Bergman admitted that it is quite possible that merchandisers have unknowingly purchased counterfeit records from their distributional sources, but he feels that it is unfair to label all record merchandisers as "bad because one or two people were" accused of wrongdoing and one company indicted.

233. TERRY, KEN. Jukebox royalty hearings pit AMOA against per-

forming rights societies. *Cash Box,* vol. XLI, no. 52 (May 10, 1980), pp. 8, 41.

Pursuant to the 1976 Copyright Act, the jukebox royalty rate is subject to "periodic review" at ten-year intervals beginning with 1980. In view of that provision, the Copyright Royalty Tribunal is conducting rate hearings to determine whether the current $8 compulsory license fee per jukebox should be increased. The Amusement and Music Operators Association has maintained that due to adverse economic conditions, the present royalty rate should be retained. The performing rights societies, however, are asserting that based on "marketplace considerations," the rate should be increased—ASCAP/SESAC want $70 per machine per year and BMI, $30. In the meantime, the jukebox operators are still resisting the CRT's jukebox location lists regulation pending a decision in their appeal of a District Court order denying them a permanent injunction against the implementation of the rule.

234. Today's people: Who wrote what? *The Washington Star,* vol. 128, no. 155 (June 3, 1980), p. A2.

Writer Ken Follett has filed suit in federal court to block a proposal by the Arbor House Publishing Company to credit him with a book he says he never wrote. Arbor House countered with a suit against Follett and his agent, accusing the writer of suing without grounds in an attempt to discourage its sale of reprint and other rights. His lawsuit involves a book entitled "The Gentlemen of 16 July", which is being published in Britain by Collins. Follett's suit contends that Arbor House, in a U.S. edition of that book, plans to name him without his permission "as author or principal author." Follett said his contribution to the book had been limited to rewriting an English-language translation of what had originally been the work of three French writers. The Arbor House president said he had obtained the rights to the book from the French copyright owners, Star Agency, and that he needed no permission from Follett.

235. TRIAY, CHARLES A. Copyrights, trade secret clauses: use both. *Computerworld,* vol. XIV, no. 13 (March 31, 1980), p. 43.

The author discusses some of the ways to protect computer programs since the Supreme Court has ruled that computer programs are not patentable. He suggests that, by placing a copyright notice on the computer program but delaying the registration of

the copyright, the developer will secure effective copyright protection without jeopardizing the confidential trade secret status of the program's contents. Copyright and trade secret protection are not mutually exclusive in theory and need not be mutually exclusive in practice. The software developer who wants to have both should include a confidentiality agreement in his software licenses and include both copyright and trade secret notices in all of his programs, listings and documentation. If an infringement occurs, the vendor can choose between suing on trade secret misappropriation or registering his copyright and suing for copyright infringement.

236. The TV column. *The Washington Post,* vol. 103, no. 188 (June 10, 1980), p. 88.

A federal appeals court in New York has upheld the dismissal of a $50,000 damage suit involving the "Saturday Night Live" use of the tune "I Love New York" in a May 1978, comedy skit. Elsemere Music Inc. of Bedford Hills, N.Y., publisher and copyright owner, had sued NBC for infringement after the Steve Karmen tune was used for a parody called "I Love Sodom". The suit was dismissed in January by a U.S. district judge, who absolved NBC of liability. At that time, Judge Gerard Gottel had ruled that performers in the skit sang the parody while satirizing Mayor Edward Koch's effort to promote tourism for New York City and therefore made "fair use" of Karmen's tune without violating the copyright. In upholding the dismissal the court said that "believing that in today's world of often unrelieved solemnity, copyright law should be hospitable to the humor of a parody and that the district court correctly applied the doctrine of fair use." [*Elsemere Music, Inc. v. NBC,* 482 F. Supp. 741 (S.D.N.Y. 1980).]

237. Unions file comments with FCC re superstation distribs. *The Hollywood Reporter,* vol. CCLX, no. 49 (Mar. 20, 1980), pp. 1, 41.

The Writers and Directors Guild, AFTRA and the Department of Professional Employees and the Screen Actors Guild, AFL-CIO, asked the FCC to declassify superstation distributors as common carriers. The request was made in comments augmenting those submitted by Metromedia and the Motion Picture Assn. of America, which argued that distribution systems that pick up superstations should not be exempted from copyright liability because of common carrier classification. The comments say that the Supreme Court defines common carrier as a system

by which all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing. Cable system customers of satellite distributors have no choice over the "intelligence" which they receive by means of satellite because the distributor selects the television broadcast station whose signal it relays. The unions go on to say that not only has the Commission "erred as to law" in authorizing satellite distributors to operate as common carriers, but it has formulated bad public policy which has a detrimental effect on their membership.

238. Valenti urges "owner" protection while criticizing compulsory license regulation. *TVC,* vol. 17, no. 13 (July 1, 1980), p. 24.

Jack Valenti, president of the Motion Picture Association of America, in a speech before the 1980 Democratic Platform Committee, urged committee members to "provide the owners of television programs with the same rights enjoyed in this country by other owners of private property." He recommended that the Democrats revise the 1976 Copyright Act to establish a "free and open market" for program distribution and to eliminate licensing. Valenti accused cable of getting "a free ride" at producers' expense and decried the "nominal" license fees paid by cable to producers. Valenti concluded by saying that cable systems "must be required to function within the marketplace" by bargaining for programs along with the networks and affiliates.

239. Van Deerlin says cable can't rest on its laurels. *Broadcasting,* vol. 98, no. 21 (May 28, 1980), p. 65.

In his address to the NCTA convention held in Dallas, Lionel Van Deerlin said that he still feels cable was falling short of its obligation to compensate copyright owners for the programming in retransmits from broadcast stations. Although acknowledging that the 1976 Copyright Act called for "token concessions to full liability", Van Deerlin said the industry would have to go beyond that. Regardless of what the FCC does in response to its own consideration of retransmission consent, he said that Congress, "sooner rather than later," will have to revise copyright policy for cable.

240. VAN GELDER, LAWRENCE. Freeing cable TV by F.C.C. faces first legal challenge. *The New York Times,* vol. CXXIX, no. 44,654 (July 24, 1980), p. C19.

The first legal challenge to the Federal Communications Commission's major step to deregulate the cable television industry has been filed in the United States Court of Appeals for the Second Circuit in New York. The action was filed by Malrite Broadcasting Company, the owner of WUHF-TV in Rochester. Malrite also holds interests in concerns with permits to construct independent television stations in West Palm Beach and Jacksonville, Fla. The basic import of the FCC ruling was to permit cable systems to compete with local stations in the broadcasting of syndicated programs.

241. VOLLMER, JOYCE. Design and knock-out: it may be knocked off. *Pacific Goldsmith* (May 1980), pp. 84–88.

A look at copyright problems in jewelry designs and the recurring instances of "knock offs" in the industry. The steps in securing the copyright of jewelry designs are listed along with a description of the changes brought about by the new copyright law. These include the registration of as many as fifty items at one time, making it possible to copyright an entire line of jewelry.

242. WAGER, WALTER. Copyright simplified for the working musician. *International Musician* (May 1980), pp. 1, 32.

This article focuses on copyright as it relates to the professional musician. The author notes that copyright can be very complex, but he believes that the working musician only needs to be familiar with what he terms a "minor fraction of the copyright law and system." He then proceeds to explain what he thinks this is by first providing a definition of copyright. This is followed by a discussion of the five exclusive rights that are set out in the 1976 Copyright Act and an explanation of how these rights affect musicians.

243. WALLACE, ROBERT. Crisis? What crisis. *Rolling Stone,* no. 318 (May 29, 1980), pp. 17, 28, 30–31.

Is home taping causing a crisis in the recording industry? Most record industry people feel that it is. They consider it to be a cancer eating away at record sales, company profits, the ability to develop new talent, and the general health of the business. However, there are those who claim that there are other possible factors contributing to the current music-business slump. Included among them are increased record prices, poor-quality rec-

ords and prerecorded tapes, and the state of the economy in general. This article gives a rather detailed discussion of the arguments posed by both sides of the home taping issue, analyzes the results of the two studies that were conducted last year on the subject and concludes with a restatement of what the consensus of record company executives perceive to be the only solution to the problem—a royalty tax on cassette players or blank tapes or both.

244. WARNER, PETER. Studios invited to help with Z's pay TV piracy case. *The Hollywood Reporter*, vol. CCLXI, no. 13 (Apr. 9, 1980), pp. 1, 4, 13.

Theta Cable and the Los Angeles-based American Trans-Video Inc. have filed a suit against Pirate Electronics. The plaintiffs seek to enjoin Pirate from selling and promoting antenna and reception gear which enable purchasers to receive Theta Cable's Z Channel pay TV signal over the air, without authorization. Theta broadcasts the signal on a Multipoint Distribution Service microwave frequency in Los Angeles and Orange counties, as well as distributes it through its cable system. Two affiliated companies have been licensed by plaintiffs to equip homeowners and apartment dwellers to receive the Z Channel over the air, in areas where cable has not yet been installed. The case is based on three bodies of law—an FCC statute designed to prevent unauthorized reception and interception of private radio communications; a California statute designed to prevent unfair competition, scams and deceptions; and California's "blue box" statute, which prohibits the sale, transfer or use of devices to bypass the telephone and telegraph companies' billing equipment. Reportedly, defendant's parent company, Pirate TV, was successfully prevented from selling or promoting its microwave reception gear by a federal court in Arizona last fall.

245. WCI begins anti-counterfeiting drive; cash rewards offered for information. *Record World*, vol. 36, no. 1709 (Apr. 19, 1980), pp. 3, 40.

Warner Communications, Inc. (WCI) is offering a cash reward for information leading to the arrest and conviction of pirates, bootleggers or counterfeiters of records and tapes. WCI's David Horowitz indicated that the company hopes that the offer of a money reward will "help spur the flow of information needed" to prosecute those "who disregard the laws prohibiting

illegal duplication of music." Under the reward program, persons with information may send it to the Anti-Counterfeiting Project Office of WCI. The information must be submitted and postmarked no later than May 1, 1981. Where requested, the name of the informant will be kept confidential.

246. WEBSTER, ALLAN. AMPA calls for stiffer copyright law in Australia. *Cash Box*, vol. XLII, no. 5 (June 14, 1980), p. 36.

An Australian court recently fined an admitted copyright infringer $200, the maximum allowed under the law. The accused had been charged with 59 counts of selling unauthorized recordings of concerts and studio performances around the world by mail order. As a result of the outcome of this case, the Australian Music Publishers Assn. has called upon the federal government to impose stiffer penalties for copyright infringement. A report was submitted to Parliament in 1976 recommending radical changes in the copyright law, including increased penalties and greater powers for the court. The amendments were tabled on June 4, 1978 and are still pending.

247. ZORINSKY, EDWARD. Some smaller agencies called wasteful, too. *Tri-City Tribune* (May 29, 1980).

In this article, Nebraska State Senator Edward Zorinsky discusses his feelings about the 1976 Copyright Act, the Copyright Office and the Copyright Royalty Tribunal. He also talks about a bill he recently introduced to amend the Copyright Act to provide an exemption from royalty fees for non-profit fraternal and veterans' organizations. Until the enactment of the current law, these groups were not required to pay for the use of copyrighted material. Zorinski believes that because the community and public service work of these organizations is so commendable and helpful to the public, their exempt status should be restored.

2. Foreign

1. England

248. Authors v. Wilcox and BBC. *The Bookseller*, no. 3873 (Mar. 15, 1980), pp. 1179.

Eight writers, three years after issuing a writ for infringement of copyright, won their case against the BBC and Desmond Wil-

cox. The case centers around the BBC publication "The Explorers", which was based on an award-winning television series of the same name. The writers claimed that their copyright in the television scripts had been infringed in the BBC's book. The judge of the High Court agreed and banned further publication, distribution or sale of "The Explorers".

249. Copyright protection in New Zealand. *The Bookseller* (May 24, 1980), p. 2194.

A discussion on viewdata information transmission and retrieval systems, the provision for the recording of the use of that material, and the payment to the original creator of the information.

250. COWARD, BRUCE. Electronic publishing: Part I. *The Bookseller*, no. 3875 (March 29, 1980), pp. 1430–1432.

Mr. Coward outlines the latest developments for providing information by electronics. *The Society of Authors* has helped to establish the *Authors Lending and Copyright Society* which will administer the collection and distribution of authors' earnings from reproduction by new technology.

251. COWARD, BRUCE. Electronic publishing: Part II. *The Bookseller*, no. 3876 (Apr. 5, 1980), pp. 1557–1559.

This is the second article of a two-part series on providing information by electronics. The author states that the British Copyright Council has issued a guide to those involved in viewdata systems which makes it clear that the British Copyright Act of 1956 protects the copyright owner of original literary, dramatic, musical and artistic works (including especially arranged lists of football scores or stock market information) when it is transmitted by a viewdata system. A list of the Council's recommendations is also included.

252. MACHIN, DAVID. The pirates of Philadelphia. *The Author*, vol. XCI, no. 1 (Spring 1980), pp. 33–36.

David Machin's article illustrates the importance of going through the necessary formalities to protect U.S. copyrights. He also recalls that any American copyright originally registered in the renewal term of 28 years. The author discusses the legal position of authors, their heirs and dependents, the question of

royalties and infringements, and the particular problems that British publishers and literary agents have with the U.S. Copyright Law.

253. Pirates arrested. *The Bookseller,* no. 3877 (Apr. 12, 1980), p. 1635.

In Hong Kong, 3,813 pirated copies of *Oxford's Advanced Learner's Dictionary of Current English* (English-Chinese edition) were seized during raids by the Copyright Protection Sub-Division. The syndicate had operated since 1977 and reaped thousands of dollars. The writer of the article in the *South China Morning Post,* I. Fernandez, hopes that Hong Kong will provide sufficient action to deter these practices as now that is not the case in the remainder of Southeast Asia.

254. Publishers Association annual report. *The Bookseller,* no. 3876 (Apr. 5, 1980), pp. 1547–1550.

The question of new technologies and their challenge to copyright is one of the questions the Publishers Association is addressing in its report. Some other areas of discussion include the "net book agreement" for school books and libraries and the licensing of copyright with the European Commission to find solutions to "certain difficulties which involve legal, economic, and cultural considerations for the industry as a whole." There is also a brief mention of the Book Marketing Council and its accomplishments.

255. Unauthorized photocopiers of sheet music warned. *The Times* (June 25, 1980), p. 4.

The London Music Publishers Association has warned schools, universities and public libraries that making unauthorized photocopies of sheet music could result in a lawsuit against such infringers. John Wilmers, a spokesman for MPA, said that "since the advent of the photocopying machine, the MPA had been concerned about protecting its rights, on which the living of composers, writers and music arrangers depend."

256. Wolfenden Committee proposes licenses to counter photocopy threat. *The Bookseller,* no. 3878 (April 19, 1980), pp. 1715–1716.

The British Committee of Copyright Owners has produced a series of licenses which it has offered to local authorities to cover copying of books and other literary works in their institutions.

The form of the licenses has been agreed to by all of the main organizations representing owners of literary copyright including the Society of Authors and the Writers Guild. Three different types of licenses will be available depending on the need of the particular organization.

2. Switzerland

257. SCHULZE, ERICH. Does the copyright law keep pace with technical developments? *GEMA*, no. 20 (1980), pp. 17–23.

In this address delivered by Professor Schulze during the Congress of the International Music Center which was held in Vienna from November 15–17, 1979, the professor states that he believes copyright law does not keep pace with technical developments. The author cites the Austro-Mechana case in Vienna, a case of recording of television broadcasts by means of video recorders and cites the Vienna Supreme Court decision on the issue. German cases and the California bill for a levy on blank tapes are also discussed. Prof. Schulze states that he wishes to appeal to legislators that "in their lawmaking, they keep pace with technical developments and not leave it to the aggrieved party to conduct time-consuming and costly litigations."

3. U.S.S.R.

258. SITNIKOV, VASILY. Books promote understanding between nations. *Books and Art in the USSR*, 1 (24) 1980, pp. 23–24.

A discussion of the International Book Fair in Moscow along with the author's belief that this fair has helped to promote contact between Soviet and foreign publishers. Areas discussed include collectively written books, books for children and export-import activity in book trading.

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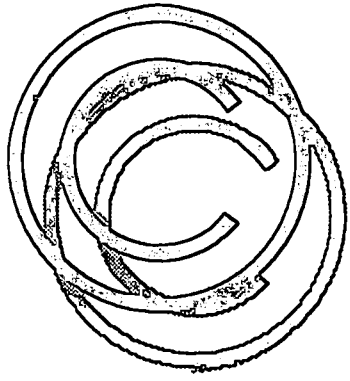

Published at

NEW YORK UNIVERSITY LAW CENTER

VOL. 28, No. 3 FEBRUARY, 1981

Published at New York University Law Center, 40 Washington St. South, New York, N.Y. 10012. Printed and distributed by Fred B. Rothman & Co., 10368 West Centennial Road, Littleton, Colorado 80127.

ISSN 0010-8642

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THE BULLETIN of The Copyright Society of the U.S.A. is published 6 times a year by The Society at the Law Center of New York University, 40 Washington Square South, New York, New York 10012; Stanley Rothenberg, *President*; Richard Dannay and Alan J. Hartnick, *Vice Presidents*; Theodora Zavin, *Treasurer*; Jerold L. Couture, *Secretary*; Henry R. Kaufman, *Assistant Treasurer*; Raymond D. Weisbond, *Assistant Secretary*.

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CITE: 28 BULL. COPR. SOC'Y, page no., Item . . . (1981).

PART I

ARTICLES

259. COPYRIGHT AND COMMUNITY PROPERTY: THE QUESTION OF PREEMPTION*

By WILLIAM PATRY**

Eight[1] of the United States have embraced the civil law community property system, a system which dates back at least to the Fuerzo Jugo of Visigothic Spain.[2] Although the various state statutes are far from identical, there are, nevertheless, certain common principles.

Central to the community property concept is the characterization of property as either "separate" or "community."[3] Generally, property acquired before marriage as well as property acquired during marriage by gift, devise or descent is considered separate, while property otherwise acquired during marriage is considered community.[4] Each spouse

*This paper won first prize in the 1980 Nathan Burkan Memorial Competition at the University of Houston, Bates College of Law.

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[1] These states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. Due to space limitations, I have confined the present study to Texas and California.

[2] *See generally* W. DEFUNIAK & M. VAUGHAN, PRINCIPLES OF COMMUNITY PROPERTY (2d ed. 1971) (hereinafter cited as "DEFUNIAK & VAUGHAN").

[3] It has been stated that the Spanish practice was to first define community property and then characterize the property excluded therefrom as separate. DEFUNIAK & VAUGHAN 114–15; *cf.* TEX. FAM. CODE ANN. §5.01 (Vernon 1975) with CAL. CIV. CODE §5110 (West Supp. 1980). It must be noted that the present definitions of separate and community property are rooted in the state constitutions. These constitutional definitions may impose severe limitations on legislative and spousal attempts to alter the characterization of property. Hilley v. Hilley, 161 Tex. 569, 342 S.W.2d 565 (1961); Williams v. McKnight, 402 S.W. 2d 505 (Tex. 1966); Graham v. Franco, 488 S.W.2d 390 (Tex. 1970).

[4] CAL. CIV. CODE §§5107, 5108 (West 1970); TEX. FAM. CODE ANN. §5.01. It is often said that there is a presumption that property acquired during marriage is community. TEX. FAM. CODE ANN. §5.02; Arnold v. Leonard, 114 Tex. 535, 273 S.W. 799 (1925); CAL. CIV. CODE §5110; In Re Marriage of Mix, 14 Cal. 3d 604, 536 P.2d 479, 122 Cal. Rptr. 79 (1975).

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owns a present, undivided one-half interest in the community irrespective of his or her actual contribution.[5]

This must be contrasted with the common law practice under which a spouse's acquisitions during marriage continued to be the separate property of that spouse[6]; and, with the more modern approach of equitably distributing property upon divorce on the basis of the needs and contributions of each party.[7]

Given the hoped-for bonds of mutual love and respect during marriage, it should make little difference how property is characterized during marriage in a community property state. Upon dissolution of the community by death or divorce, however, the effects of characterization do come into play.

Spouses may of course freely devise their one-half interest in the community to each other, or to anyone else for that matter. In the event of intestacy, state laws vary. In Texas, separate personalty goes one-third to the surviving spouse, two-thirds to the children. If there are no children, the surviving spouse receives all of the personalty.[8] In the case of community property, the surviving spouse receives one-half of the property, the children the other half.[9]

In California, if there is one child, the surviving spouse and that child each receive one-half of all separate property; if more than one child, one-third goes to the spouse, the remainder in equal shares to the children.[10] If there are no children, one-half of the separate property goes to the spouse and one-half to the decedent's parents in equal shares.[11] In the case of community property, the surviving spouse receives the entire interest in the community.[12]

If the community is terminated by reason of divorce, the community assets may simply be divided up fifty-fifty.[13] In a strict construction state

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[5] Arnold v. Leonard, *supra* n. 4; Graham v. Franco, *supra* n. 4; CAL. CIV. CODE §5105 (West Supp. 1980).

[6] Subject, though, to the rights of dower and curtesy.

[7] *See for example*, New York's recent enactment reported in 6 FAM. L. REP. 2556 (BNA); 6 FAM. L. REP. 2604 (BNA).

[8] TEX. PROB. CODE ANN. §38 (Vernon 1956).

[9] TEX. PROB. CODE ANN. §45 (Vernon 1956).

[10] CAL. PROB. CODE §221 (West 1956).

[11] CAL. PROB. CODE §223 (West 1956).

[12] CAL. PROB. CODE §202(a) (West Supp. 1980).

[13] *Compare* CAL. CIVIL CODE §4800 (West Supp. 1980) which mandates an equal division of the property with TEX. FAM. CODE ANN. §3.63 (Vernon 1975) which has been construed to give the family courts the equitable power to award unequal divisions of the community, subject only to a "manifestly unfair abuse of discretion." *See* Hooper v. Hooper, 403 S.W.2d 215 (Tex. Civ. App.-Amarillo 1966, writ dism'd) (award to wife of 85% of assets including the husband's principal business).

like Texas in which alimony may not be awarded and which forbids divestment of separate realty[14] and personalty,[15] a spouse's one-half interest in the community may quite literally be all that spouse will receive. Under these circumstances, the characterization of property takes on great significance.

Our problem arises at the intersection of the Copyright Act's[16] exclusive grant of rights to authors and a state's characterization of those rights as a community asset. Specifically, the following questions may be posed:

(1) Do the state community property laws by their own terms apply to copyright?
(2) If so, would the application of those laws be preempted by the Supremacy Clause of the Constitution[17] by operation of Section 201(a)'s[18] vesting of title in "authors"?
(3) Would the application of community property laws be pre-empted by the Supremacy Clause by operation of Section 201(e)'s[19] prohibition against involuntary transfers?
(4) Regardless of Congressional intent, are the community property laws pre-empted by the Supremacy Clause by virtue of the Copyright Clause's[20] limitation to "authors"?

I. Do the State Community Property Laws Apply to Copyright?

Under Section 106 of the Act[21], the owner[22] of copyright has the exclusive right to do and authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;
(2) to prepare derivative works based on the copyrighted work;

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[14] Eggermeyer v. Eggermeyer, 554 S.W.2d 137 (Tex. 1977).
[15] Campbell v. Campbell, 23 Tex. Sup. Ct. J. 391 (June 4, 1980). *But cf:* CAL. CIV. CODE §4800(b) (1) (West Supp. 1980) which provides that ". . . when economic circumstances warrant, the court may award any asset to one party on such conditions as it deems proper to effect a substantially equal division of the property."
[16] 17 U.S.C. §§1 *et seq.* (1978) [hereinafter cited as "the Act"].
[17] U.S. CONST., art. VI cl.2.
[18] 17 U.S.C. §201(a) (1978).
[19] 17 U.S.C. §201(e) (1978).
[20] U.S. CONST., art. 1 cl.8. The author acknowledges his debt to Professor Nimmer for posing questions 1, 2, and 4. *See* 1 M. NIMMER ON COPYRIGHT §6.13 (1979) (hereinafter cited as "NIMMER").
[21] 17 U.S.C. §106 (1978). These rights are qualified, though, in §§107–18.
[22] Section 106 speaks of the "owner" of copyright rather than of the "author" since the copyright may have been assigned under Section 201(d).

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or 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, pictorial, graphic or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

While the primary purpose of copyright is not to financially reward the author, but rather to secure "the general benefits derived by the public from the labors of authors,"[23] the economic philosophy underlying copyright is that "encouragement of individual effort by personal gain is the best way to advance the public welfare";[24] or as the Supreme Court summed it up in *Goldstein v. California*[25]:

> . . . to encourage people to devote themselves to intellectual and artistic creation, Congress may guarantee to authors and inventors a reward in the form of control over the sale and commercial use of copies of their work.[26]

This commercial exploitation may take the form of sale of the material object in which the work is embodied,[27] assignment of exclusive and non-exclusive rights to use or reproduce the work,[28] as well as any of the other rights enumerated in Section 106.

Whether the financial benefit is derived from the sale of the physical work, sale of copies of the work, or royalties from performance or use of the work, these benefits arise out of a contractual relationship of some sort between the copyright owner and the user, and as such clearly vest the copyright owner with a valuable contract right. But copyright is generally regarded as a form of property.[29] Derived from the author's

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[23] Fox Film Co. v. Doyal, 286 U.S. 123, 127 (1932); Twentieth Century Music v. Aiken, 422 U.S. 151, 156 (1975).
[24] Mazer v. Stein, 374 U.S. 201, 219 (1954).
[25] 421 U.S. 546 (1973).
[26] 421 U.S. at 55; 1 NIMMER §1.03; L. SELTZER, EXEMPTIONS AND FAIR USE IN COPYRIGHT 8–17 (1978).
[27] 17 U.S.C. §202 (1978).
[28] 17 U.S.C. §201(d) (2) (1978).
[29] In European countries, due to the recognition of the moral rights of authors, copyright is viewed as a combination of property and personal right.

intellectual processes, it subsists independent of the material object in which it is embodied.[30]

The classic definition of these special characteristics of copyright as property was given by Justice Holmes in his concurring opinion in *White-Smith Music Publishing Co. v. Apollo Co.*:[31]

> The notion of property starts, I suppose, from the confirmed possession of a tangible object and consists in the right to exclude others from interference with the more or less free doing with it as one wills. But in copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is now in vacuo, so to speak. It restrains the spontaneity of men where, but for it, there be nothing of any kind to hinder their doing as they saw fit. It is a prohibition of conduct remote from the persons or tangibles of the party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong.[32]

With the pre-emption of common law copyright,[33] and the supremacy of federal law requiring state recognition as property works commanding copyright,[34] it follows that if a work conforms to the state community property laws as to the time and manner of acquisition, the work will be considered community property. An initial inquiry, therefore, must be directed to the time and manner of acquisition of the copyright.

At first blush, this seems to be a non-issue, since under Section 102(a) of the Act:[35]

> Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression. . .

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[30] 17 U.S.C. §202 (1978).
[31] 209 U.S. 1 (1908).
[32] 209 U.S. at 19.
[33] 17 U.S.C. §301 (1978).
[34] 17 U.S.C. §201 (d) (1) expressly states that copyright is to be treated as personal property for purposes of intestate succession. *See also* Sears Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 229 (1964); Sperry v. Florida, 373 U.S. 379 (1963); Herwig v. United States, 105 F. Supp. 384 (Ct. Cl. 1952); 1 NIMMER §6.13(B).
[35] 17 U.S.C. §102(a) (1978).

and since under the definition of "created" in Section 101(9),[36] 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.

Hence, as an introductory statement, we may say for purposes of characterization that copyright subsists when the work or any part thereof is fixed in a tangible medium of expression. When we attempt to transplant this broad federal conceptual framework into the field of state community property law, however, our simple picture clouds quite easily.

Suppose an author writes the first few acts of a play before marriage and on the strength of this work enters into a publishing contract calling for an immediate advance royalty, transfer of exclusive publication rights in the play upon completion thereof, and periodic royalties based on sales of the book.

The author then gets married, completes the play, transfers exclusive publication rights to the publisher, starts to receive the royalties from the book, transfers exclusive performance rights to a repertory theatre in exchange for a cut of the ticket proceeds, and, writes a movie script based on the play. The author then separates from the nonauthor spouse, continues to receive publishing royalties and money from the ticket proceeds. After divorce, the author sells the movie script and rights to a movie studio.

Leaving aside the question of preemption and want of federal jurisdiction in suits to try title and enforce purely contractual obligations,[37] it can quickly be seen how Section 106's exclusive grant of rights to the copyright owner can come into a bewildering series of conflicts with the community property laws, for under the "inception of title" doctrine,[38] characterization of property as separate or community depends on the

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[36] 17 U.S.C. §101 (9) (1978).

[37] T.B. Harms Co. v. Eliscu, 339 F.2d 823 (2d Cir. 1964), *cert den.* 381 U.S. 915 (1965); *but cf.* Frankel v. Stein & Day, 205 U.S.P.Q. 51 (S.D.N.Y. 1979); 3 NIMMER §12.01(A).

[38] This doctrine is applied most stringently in Texas. Welder v. Lambert, 91 Tex. 510, 44 S.W. 281 (1898). *Also note* that §5.01 of the Texas Family Code describes separate property as all property owned *or claimed* prior to marriage.

existence or nonexistence of marriage at the time of the inception of the *right* through which title was or is later acquired.

Accordingly, while property may vest or be conveyed to a spouse after marriage takes place, the property will be considered separate if the right to receive the property was acquired before marriage. However, even if the property is separate, the income therefrom may be community, depending upon whether state law characterizes earnings received during marriage from separate property as separate or community. California characterizes such earnings as separate,[39] Texas as community.[40]

Turning to our hypothetical, it might be argued that since the work was completed during marriage, and registered in this completed form, by operation of the community property system, the nonauthor spouse is entitled to an undivided one-half interest in the copyright.

But under the inception of title doctrine, the right to receive royalties was derived from the contract executed before marriage and, therefore, at least all of the benefits accruing from publication of the play are separate property, even though the work was not completed until during marriage.[41] Focusing on the activities during marriage, there are two ways of looking at the proceeds from the performance rights. We could say that since under Section 201(d) of the Act copyright is divisible, the performance rights are a discrete property right "realized" during marriage, and hence constitute community property. On

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[39] CAL. CIV. CODE §§5107, 5108 (West 1970); George v. Ransom, 15 Cal. 322, 324 (1860).

[40] Commissioner v. Chase Manhattan Bank, 259 F.2d 231 (5th Cir. 1958), *cert. den.* 359 U.S. 913 (1959). The Texas approach adheres to the Spanish practice. DEFUNIAK & VAUGHAN 160 *passim*. On November 4, 1980, however, Texas approved a constitutional amendment which will allow spouses, by written instrument, to agree that the earnings from separate property will remain separate. Absent such an agreement, though, the earnings will continue to be characterized as community.

[41] Busby v. Busby, 457 S.W.2d 551 (Tex. 1971); Davis v. Davis, 495 S.W.2d 607 (Tex. Civ. App.-Dallas 1973, writ dism'd. In Texas, there is an exception to the general rule that income received during marriage from separate property is community, in the case of royalties paid for oil or gas produced from separate property, under the theory that such royalties are payments for the depletion or waste of the separate estate. Norris v. Vaughan, 260 S.W.2d 676 (Tex. 1953). From this, an argument could be made that all royalties or payments received during marriage from separate property copyright should also be separate property since the use by licensees or transferees depletes the copyright owner's further use of the copyright. In support of this argument, it should be noted that the so-called "modern rule" on the duty of co-owners to account for profits obtained from the use of the copyright may be based on this same theory. 1 NIMMER §6.12(A).

the other hand, it could be argued that if the play is separate property, the performance rights are a part of the "bundle of rights" given to the author as a package. Cutting against this is the fact that until the work was completed (and it was completed during marriage), there was nothing to perform.

In Texas, income received during separation continues to be community property if originally community property. In California, though, Section 5118 of the Civil Code provides that the earnings and accumulations of a spouse living apart from the other spouse become the separate property of that spouse. Hence, in Texas all royalties and ticket proceeds received during separation would be community property, assuming they were community property during marriage, whereas in California, they would be separate property regardless of whether they were community property during marriage.

As the movie script was written during marriage (and although a derivative work of the separate property play), it is undoubtedly community property, any benefits flowing therefrom being community property irrespective of the fact that the contract of sale was not entered into until after divorce. In practice, the nonauthor spouse would likely receive a lump sum payment for this property as a part of the property division.

While this discussion is necessarily simplified and further fails to account for the many variations in state law, its purpose is merely to demonstrate that the question of when and how state law will apply to copyright is not an easy one.[12]

II. Would Application of the Community Property Laws be Pre-empted by the Supremacy Clause of the Constitution by Operation of Section 201(a)'s Vesting of Title in "Authors"?

Assuming that state law operates so as to define copyright in a work as community property, we must ask whether the application of that law would be pre-empted by the Supremacy Clause of the Constitution by virtue of Section 201(a) of the Act vesting title in "authors."

Section 201(a) states regarding initial ownership of copyright that:

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[12] Other difficulties are the characterization of benefits as gratuities or non-gratuities. Ex Parte Johnson, 591 S.W.2d 453 (Tex. 1979); Perez v. Perez, 587 S.W.2d 671 (1979); and, whether the property interest is a contingency or an expectancy. In Re Marriage of Brown, 15 Cal.3d 838, 126 Cal. Rptr. 633 (1976); and, whether the property interest is a contingency or an expectancy. In Re Marriage of Brown, 15 Cal.3d 838, 126 Cal. Rptr. 633 (1976); In Re Rister, 512 S.W.2d 72 (Tex. Civ. App.-Amarillo, no writ 1974).

[13] 17 U.S.C. §201(a) (1978).

> Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowners in the work.[43]

"Author," however, is left undefined, so we must turn to the relevant case law. The starting point of any definition of authorship is that of Lord Justice Cotton in *Nottage v. Jackson*:[44]

> In my opinion, "author" involves originating, making, producing, as the inventive or master mind, the thing which is to be protected . . .[45]

and of Lord Brett in the same case:

> (The author) is the person who effectively is as near as he can be (to) the cause of the picture which is produced; that is the person who has superintended the arrangement, who has actually formed the picture by putting the persons in position, and arranging where the people are to be—the man who is the effective cause of that.[46]

In *Nottage* the controversy involved a work for hire. The issue was whether the London establishment which arranged and paid for the photographing of an Australian cricket team was the "author," or the photographer in Australia who actually snapped the shot. Based on the above-quoted reasoning, the court held for the photographer. This did not mean that the employer could not be the owner of the copyright, but rather that it could not be considered the author.

In the United States, Section 26 of the 1909 Act[47] provided that "the word 'author' shall include an employer in the case of works made for hire."[48] This statutory concept was based on the specific contractual relationship between the employer and employee and was initially considered limited to works made by salaried employees in the regular course and scope of their employment.[49]

Giving this understanding, it is evident that if a nonauthor com-

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[44] 11 Q.B.D. 627 (1883).
[45] 11 Q.B.D. at 635.
[46] 11 Q.B.D. at 635.
[47] 17 U.S.C. §26 (repealed 1978).
[48] *Id.*
[49] B. VARMER, WORKS MADE FOR HIRE 130, COPYRIGHT OFFICE STUDY NO. 13 (1958).

munity property spouse is deemed to own a one-half interest in the copyright, it will not be on the theory of a work for hire, since there is no "employment" involved, but rather on the basis of an implied status as a joint author.[50]

The Concept of Joint Authorship

The 1909 Act did not refer to joint authorship.[51] Nevertheless, responding to the realities of creative endeavors, the courts went ahead and fashioned such a status. In the first American case, *Maurel v. Smith*,[52] Learned Hand had recourse to the earlier English decision in *Levy v. Rutley*,[53] in which it was said:

> If two or more persons undertake jointly to write a play, agreeing on the general outline and design and sharing the labor of working it out, each would be contributing to the whole production, and they might be said to be joint authors of it; but to constitute joint authorship, there must be a common design.

This definition was pretty much the standard until *Shapiro, Bernstein & Co. Inc. v. Jerry Vogel Music Co., Inc.* (the "Melancholy Baby" case)[54] and *Shapiro, Bernstein & Co. Inc. v. Jerry Vogel Music Co., Inc.* (the "12th Street Rag" case)[55] in which the Second Circuit expanded the definition of joint authorship well beyond the one given in *Levy* and previous American cases. The *12th Street Rag* case was especially the subject of extensive criticism,[56] and was disapproved of in the 1976 Act, Section 101(5) of which defines a "joint work" as

> 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.[57]

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[50] For more on work for hire *see* text at n.60–72 and 182–186, *infra*.

[51] An unsuccessful attempt at inclusion was made in the Dallinger bills of 1924.

[52] 220 Fed. 195 (S.D.N.Y. 1915), *aff'd*, 271 Fed. 211 (2d Cir. 1921).

[53] L.R., 6 C.P. 523 (1871).

[54] 161 F.2d 406 (2d Cir. 1946), *cert. den.*, 331 U.S. 820 (1947).

[55] 221 F.2d 569 (2d Cir.), *on rehearing* 223 F.2d 252 (2d Cir. 1955).

[56] G. CARY, JOINT AUTHORSHIP OF COPYRIGHTS 117–18, COPYRIGHT OFFICE STUDY NO. 12 (1958) and accompanying comments; 1 NIMMER §6.06.

[57] 17 U.S.C. §101(5). *See also* H.R. REP. No. 94–1476, 94th Cong., 2d Sess. 120 (1976) (hereinafter cited as "House Report); S. REP. No. 94–473, 94th Cong., 1st Sess. 103–04 (1975) (hereinafter cited as "Senate Report") which state in identical language that the touchstone is the intent at the time the writing is done that the parts be merged into an integrated unit; 1 NIMMER §§6.01–6.04.

All of the support, moral and otherwise, of a nonauthor spouse notwithstanding, it would be the grossest fiction to say that the intent of both spouses was to merge their "contributions" into a unitary whole. The Act speaks of "parts," not metaphysics.

Neither the Act nor the Committee Reports address the issue of a joint authorship status for nonauthor spouses in community property states. Hence, in order for such a non-author spouse to be considered a joint author, we could assume that Congress was aware that copyright would vest equally in an author and his or her nonauthor spouse in the community property states, and, by not providing to the contrary, impliedly approved of a joint authorship fiction.

An alternate fiction, though a fiction nonetheless, is to assume that Congress impliedly granted to nonauthor community property spouses an assignment of a one-half joint ownership. It will be remembered that in its grant of exclusive rights, Section 106 speaks to the owner of copyright, not to the author.[58] Joint ownership is a broader term than joint authorship for although joint authors are joint owners, a nonauthor may become a joint owner in a copyright by assignment, devise or intestate distribution.[59] We could say, then, that Congress was aware of the vesting of equal rights in community property states, and by its silence allowed an implied assignment of a one-half interest to the nonauthor spouse by operation of the community property laws.

Precisely such a fiction of implied assignment was indulged in by Congress in Section 201(b)'s provision for works-for-hire, which reads:

> In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all the rights comprised in the copyright.[60]

Section 101(33) (1)[61] supplies the relevant[62] definition of a "work made for hire" as "a work prepared by an employee within the scope of his or her employment."[63] Neither the Act nor the Committee Reports offers, however, a definition of the important terms "employee" and

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[58] 17 U.S.C. §106 (1978).

[59] 1 NIMMER §6.01; Register of Copyrights Supp. Rep. 60 (1965) (hereinafter cited as the "1965 Report").

[60] 17 U.S.C. §201(b) (1978).

[61] 17 U.S.C. §101(33) (1).

[62] The other category of a work for hire is that of a specifically ordered or commissioned work.

[63] *See* n.61.

"scope of employment," doubtless intending these issues to be resolved by reference to the general laws of agency.[64]

Although Section 201(b) expressly provides for the employer to be deemed the author, this status is not based on the belief that the employer is necessarily the "inventive or master mind" in the sense spoken of by the *Nottage*[65] court, but rather is a fiction indulged in out of "convenience and simplicity"[66] and was a "balance struck between these advantages and the conceptual difficulties involved in so doing," in the words of the Register of Copyrights in his 1965 Supplementary Report.[67]

This approach was both hotly contested and contrary to the conclusions of the Register's 1961 Report, which although favoring vesting all rights initially in the employer, expressly indicated that the employer should not be identified as the author.[68]

While the constitutionality of this fiction will be the subject of discussion in Section IV of this study, Professor Nimmer believes that Section 201(b) passes through the constitutional hoop of the limitation of copyright to "authors" by virtue of its provision that the parties may agree otherwise as to who may own the rights comprised in the copyright. As Professor Nimmer sees it:

> Congress has in effect created an implied assignment from the employee-author to his employer—in the absence of an express agreement to the contrary. Thus, the employer may be regarded as at least a "quasi-assignee" and as such entitled to the privileges of the author, even if he may not be regarded as the author himself.[69]

With all due respect for Professor Nimmer, however, this author

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[64] 1 NIMMER §5.03(B).

[65] 11 Q.B.D. 627 (1883). *See* n.44–46 and accompanying text, *supra*.

[66] 1965 Report 66.

[67] *Id.*

[68] Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 87, 87th Cong., 1st Sess., Committee Print (1961). *See also* B. VARMER, WORKS MADE FOR HIRE AND ON COMMISSION, especially 139–40, COPYRIGHT OFFICE STUDY NO. 13 (1958). For discussions by representatives of the various (and opposing) interests, *see* Transcript of Meeting of June 11, 1963 on Preliminary Draft for Revised U.S. Copyright Law: Discussions of §§ 14–18, reprinted in Copyright Law Revision Part 3, Preliminary Draft for the Revised U.S. Copyright Act and Discussions and Comments on the Draft 257–275 (1964); House Report 121; Senate Report 104–05.

[69] 1 NIMMER §1.06(C) footnotes omitted; 1 NIMMER §5.03. What Section 201(b) represents to this writer is an exercise of the relative strength of the parties before Congress. The strongest won.

fails to see how this fiction of assignment is any more constitutional than the fiction of authorship. The idea that the constitutionality of Section 201(b) can be saved by presuming Congress did not really mean author but "quasi-assignee," does not seem very persuasive. As the Supreme Court stated in *Bailey v. Alabama,*[70] "(t)he power to create presumptions is not a means of escape from constitutional restrictions."

If Congress does have the constitutional power to work this fiction of "quasi-assignment" for employers, it is perhaps likely that it has similar power to create a "quasi-assignment" of a one-half interest in the copyright to nonauthor spouses in community property states.

It must be noted, however, that in the case of implied assignment of copyright to a work-for-hire employer, Congress expressly provided for this fiction in Section 201(b). Furthermore, when Congress acted, it did so not on the basis of assignment, but of authorship. This authorship status is rooted in a contractual relationship, as we have mentioned, and has been justified on the grounds that:

> (1) The work is produced on behalf of the employer and under his direction;
> (2) The employee is paid for the work; and,
> (3) The employer, since he pays all the costs and bears all the risks of loss, should reap any gain.[71]

Moreover, it may be that Congress chose to give employers authorship status for two constitutional reasons: (1) because of the Copyright Clause's limitation to "authors"; and, (2) due to 5th and 14th Amendment problems involved in transferring title from the real author to the employer via an implied assignment. This problem is eliminated by vesting title initially in the employer. Since under agency principles we may say that the employee is acting for the employer-principal in the employment context, the fiction of the employer qua author is not too attenuated.

The same may not be said, however, for considering the community property nonauthor spouse a joint author. Again, metaphysics aside, none of the three grounds listed above as justification for vesting authorship in the employer is present in describing a community property nonauthor spouse. As the Act and legislative history are silent on the subject, we must seek to create an implied joint authorship from either of two sources: (1) the lack of an underlying Congressional purpose

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[70] 219 U.S. 219, 239 (1911), cited in 1 NIMMER §1.06(C) n.18 at p.1–4.
[71] 1961 Report 85.

evincing an intent to preempt the community property laws; and/or, (2) public policy. Some light may be shed on the first of these sources by examining prior case law in which community property laws were preempted in situations where there was a similar lack of Congressional guidance.

Past Preemption of Community Property Laws

Preemption occurs under the direction of the Supremacy Clause,[72] in order to invalidate state regulation in conflict with federal legislation; or, in order to effectuate Congressional occupation in a particular area regardless of whether the occupation is total.

These statements are difficult to translate into objective tests, and the difficulty is compounded by the vacillating emphases of the Supreme Court, i.e.: the Warren Court's strong federalism as contrasted with the Burger Court's solicitude for state interests.[73] As recently stated by the 9th Circuit:

> With respect to preemption the Supreme Court's emphasis varies from time to time. At times the preemption doctrine has been applied with nationalistic fervor while during other periods with generous tolerance of state involvment in areas already to some extent the subject of national concern.[74]

Hence, at one time a state law may be invalidated when it obstructs the "accomplishments and execution of the full purposes and objectives of an Act of Congress,"[75] or where there is a conflict regardless of the importance to the state of its own law,[76] or only when the exercise of power by the state would be "absolutely and totally contradictory and repugnant"[77] to "matters which are necessarily national in import."[78]

Weaving their way through these decisions are requirements of a

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[72] 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."

[73] *See generally: Note, The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court,* 75 COLUM. L. REV. 623 (1975).

[74] Morseburg v. Balyon, 621 F.2d 972, 976 (9th Cir. 1980), *cert. den.*, 49 U.S.L.W. 3343 (U.S. Nov. 10, 1980).

[75] Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[76] Free v. Bland, 369 U.S. 663, 666 (1962).

[77] Goldstein v. California, 412 U.S. 546, 553 (1973).

[78] 412 U.S. at 554.

"clear intent" to occupy a field, "actual conflict"[79] and presumptions of the validity of state law[80] or federal law.[81] Cyclical characteristics and presumptions notwithstanding, some of the choice of emphasis is heavily influenced by the field of law in which the issue arises. With copyright, Congress has, pursuant to Article I, §8, cl. 8 of the Constitution, the power to "secure for limited times to authors the exclusive right to their writings." It has long been settled, though, that by enacting such legislation, Congress did not sanction a pre-existing right, but rather, created a statutory one.[82]

As such, copyright is a federal[83] right which may be taken away or limited as Congress sees fit. Offset against this federal province, however, is that of the states in their power over property and domestic relations. As the Supreme Court said in *In Re Burrus*:[84]

> The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States, and not to the laws of the United States.[85]

and in *DeSylva v. Ballentine*:[86]

> The scope of a federal right is of course a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern.[87]

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[79] Mintz v. Baldwin, 289 U.S. 346, 350 (1933); Maurer v. Hamilton, 309 U.S. 598, 614 (1940).

[80] Rice v. Santa Fe Elevator Co., 331 U.S. 218, 230 (1947).

[81] Hines v. Davidowitz, *supra* n. 75.

[82] Wheaton v. Peters, 33 U.S. (8 Peters) 591, 661, 663 (1834); Caliga v. Interocean Newspaper Co., 215 U.S. 182, 188 (1909); Fox Film Co. v. Doyal, 286 U.S. 123, 137 (1932); Mazer v. Stein, 347 U.S. 201, 214 (1954). For the English approach see Millar v. Taylor, 4 Burrows 2303, 98 Eng. Rep. 201 (1769 K.B.) *and* Donaldson v. Becket, 4 Burrows 2408, 98 Eng. Rep. 257 (1774 H.L.). For the effect of these decisions on our constitution's copyright clause, *see* Whicher, *The Ghost of Donaldson v. Becket*, 9 BULL. COPR. SOC'Y 124–41 (1961); THE COPYRIGHT LAW: HOWELL'S COPYRIGHT LAW REVISED AND THE 1976 ACT 21 (Latman, ed., 5th ed. 1978) (hereinafter cited as LATMAN); and, 1 NIMMER §4.02.

[83] This is especially true for works created on or after January 1, 1978.

[84] 136 U.S. 586 (1890).

[85] 136 U.S. at 594.

[86] 351 U.S. 570 (1956).

[87] 351 U.S. at 581.

DeSylva, a copyright renewal case coming up from California, involved two questions of statutory construction under Section 24 of the 1909 Act.[88] The first question was whether a widow took wholly for herself the right of renewal, or, whether she took as a class with the children. The Supreme Court held that the widow took as a class with the children. The second question was whether "children," as used in that section, included illegitimate offspring. Declining Justices Douglas and Black's invitation to declare regardless of state law that illegitimates were "children," the Court indicated that reference would have to be made to state law.[89]

In deciding that the widow and the children took as a class, the Court preempted contrary, including California law, since these laws purported to give to the widow the entire copyright interest. This preemption was, however, in the face of a statutory provision to such effect. Since we have no such statutory guidance and are primarily concerned with division of property upon divorce, *DeSylva* is of limited value.

On at least five other occasions,[90] the Supreme Court has held the application of state community property laws preempted, most recently in the case of California's attempt to characterize railroad retirement benefits as community property.[91]

As noted in *Wetmore v. Markoe*,[92] and reaffirmed in *Hisquerdo v. Hisquerdo*,[93] the Supreme Court has limited review under the Supremacy Clause to determining whether Congress has "positively required by direct enactment"[94] that state law be pre-empted. In *United States v. Yazell*,[95] also reaffirmed in *Hisquerdo*, the Court held that a mere conflict in words is not sufficient. Rather, the "state family and family-property law must do 'major damage' to 'clear and substantial' federal interests,"[96] before the Supremacy Clause demands preemption. It is to the prior preemption cases that we now turn.

McCune v. Essig

In the first such preemption case, *McCune v. Essig*,[97] a husband and

[88] 17 U.S.C. §24 (repealed 1978).
[89] 351 U.S. at 581.
[90] McCune v. Essig, 199 U.S. 382 (1905); Wissner v. Wissner, 338 U.S. 655 (1950); Free v. Bland, 369 U.S. 663 (1962); Yiatchos v. Yiatchos, 376 U.S. 306 (1964); Hisquerdo v. Hisquerdo, 99 S.Ct. 802 (1979).
[91] Hisquerdo v. Hisquerdo, 99 S.Ct. 802 (1979).
[92] 196 U.S. 68 (1904).
[93] 99 S.Ct. 802 (1979).
[94] 196 U.S. at 77, *cited* in 99 S.Ct. at 808.
[95] 382 U.S. 341 (1966).
[96] 382 U.S. at 352, *cited* in 99 S.Ct. at 808.
[97] 199 U.S. 383 (1905).

wife entered onto public domain land in the state of Washington subject to the federal homestead law. After filing a claim to the homestead, the husband died intestate, leaving his wife and daughter as his only heirs. These continued to live on the land for five years, the requisite period for perfecting the patent. A patent was subsequently issued upon the wife's application pursuant to statutory authority giving the wife the patent right in cases where the husband dies first. Three years after fulfilling the residency requirement, the widow remarried and conveyed the land to a third party.

The daughter, however, contested the conveyance, claiming under the Washington statutes governing the intestate distribution of community property. Looking solely to the "clear, unambiguous language" of the federal law, the Court, with surprisingly little discussion, held the state powerless to impose a limitation upon the title not imposed by the federal enactment, thereby reversing the Washington court's judgment for the daughter.

Wissner v. Wissner

Under the inception of title doctrine, we have noted that characterization of property depends upon when the right to claim the title is acquired, regardless of conditions precedent to the actual vesting of title. This is generally applicable in the case of life insurance policies. In Texas, and the majority of community property states, if the policy is taken out before marriage, the proceeds therefrom will be deemed separate property, irrespective of whether the premiums were paid with community funds. The community is entitled to reimbursement for the amount of such funds expended. In California, though, the inception of title doctrine does not apply to life insurance policies, and instead the community is given a pro tanto interest in the proceeds in the ratio which the separate and community payments bear to each other.[98] In *Wissner v. Wissner*,[99] the military husband took out, during marriage, a life insurance policy issued under the authority of the National Service Life Insurance Act of 1940, and paid for it with community earnings. As the right to the proceeds was acquired during marriage, state law characterized the policy as community property. After becoming disaffected with his wife, without her consent or knowledge, the husband substituted his mother for his wife as the principal beneficiary. Upon his death, the Veteran's Administration paid the proceeds to the mother.

In a suit for the proceeds, the California courts held the widow

[98] McCurdy v. McCurdy, 372 S. W. 2d 381 (Tex. Civ. App.–Waco 1963, writ ref'd); Forbes v. Forbes, 118 Cal. App. 324, 257 P.2d 721 (Cal. Ct. App. 1953).

[99] 388 U.S. 655 (1950).

entitled to one-half. The Supreme Court reversed, citing the statutorily provided absolute right to designate the beneficiary, and the seizure exemption clause.

Free v. Bland

Free v. Bland[100] saw the preemption of Texas' attempt to characterize as community property Series "E" and "F" United States Savings Bonds. In this case, the federal enactment was a Treasury regulation giving co-owners of the bonds the status of joint tenants with a right of survivorship, an arrangment the Texas supreme court held contrary to the state constitution, absent first partitioning the bonds into separate property.[101] In language far broader than that found later in *Hisquerdo v. Hisquerdo,*[102] the Court wrote:

> The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail. Article VI, Clause 2.[103]

Thus the Court's inquiry was directed merely toward "whether there is a valid federal law, and if so, whether there is a conflict with state law."[104] In so doing, the Court expressly rejected the Texas Supreme Court's holding that preemption was not appropriate "in matters of purely private ownership where the interests of the United States are not involved."[105] In rejecting this Texas approach, the Court went on, however, to find a federal interest in the management of the national debt through the sale of savings bonds. Relying further on *Wissner,* the Court found in the survivorship provision a federal law not to be defeated solely because the purchase price was paid for out of community property.

Yiatchos v. Yiatchos

Yiatchos v. Yiatchos,[106] again involved the savings bond survivorship provision. In *Yiatchos* the deceased husband had purchased the federal

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[100] 369 U.S. 663 (1962).

[101] Bland v. Free, 162 Tex. 721, 344 S.W.2d 435 (1961). This decision was based on the Texas court's then recent decision in Hilley v. Hilley, 161 Tex. 535, 342 S.W.2d 565 (1961). *Hilley* was later reaffirmed in Williams v. McKnight, 402 S.W.2d 505 (Tex. 1970).

[102] 99 S.Ct. 802 (1979).

[103] 369 U.S. at 666.

[104] *Id.*

[105] 161 Tex. at 577, 342 S.W.2d at 570, *cited* in 369 U.S. at 666.

[106] 376 U.S. 311 (1964).

bonds out of community funds, payable upon death to his brother. The deceased's will, however, disposing of "all cash and bonds," named not only his brother, but four sisters and a nephew as well. The brother brought an action in a Washington state court to establish his ownership of the bonds. The Washington courts held that as the bonds were purchased with and were community assets at the time of the death of the decedent, they had to be divided into two equal parts, one-half to the hitherto-excised wife, the other in accordance with the will.[107]

Reversing, the Supreme Court found the state court holdings to be nothing more than a "state prohibition against utilizing savings bonds to transmit property at death," contrary to *Free v. Bland.*[108]

Hisquerdo v. Hisquerdo

The latest Supreme Court case, *Hisquerdo v. Hisquerdo,*[109] reversed California's characterization of benefits received under the Railroad Retirement Act of 1974[110] as community property. The history of the case is interesting because many of the arguments made parallel those likely to be made in a similar copyright case.

In a divorce action, the California trial court refused to list Mr. Hisquerdo's expectation of railroad retirement benefits as an item of community property subject to division upon dissolution of the marriage.[111] The California court of appeals affirmed[112] on the grounds that (1) the pension program could be terminated at will by Congress, thereby depriving Mr. Hisquerdo of an enforceable contract right; and, (2) because under the Supremacy Clause Congress has the power to determine the character of a federally created benefit.[113]

In her appeal to the California Supreme Court, Mrs. Hisquerdo argued that

> there is absolutely no evidence that Congress ever intended to prevent a community property state from recognizing a spouse's community interest in a Railroad Retirement Act railroad retirement plan.[114]

Agreeing, that court unanimously reversed, holding that because the benefits would

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[107] 376 U.S. at 308.
[108] *Yiatchos* also involved questions of fraud not directly relevant here.
[109] 99 S.Ct. 802 (1979).
[110] 45 U.S.C. §231 *et seq.* (West Supp. 1980).
[111] 99 S.Ct. at 807.
[112] 133 Cal. Rptr. 684, 63 Cal. App.3d 231 (Ct. App. 2d Dist. 1976).
[113] 99 S.Ct. at 807.
[114] Petition for Hearing in LA 30712 (Cal. Sup. Ct.) 14, *cited* in 99 S.Ct. at 807.

> flow in part from (the husband's) employment during marriage, they were community property even though under federal law (he) had no enforceable contract right.[115]

Neither Mrs. Hisquerdo nor the California Supreme Court proved persuasive before the U.S. Supreme Court, however, as the Court in the context of an admittedly "sparse"[116] legislative history found an absence of any intent to put community property claims within the ambit of anti-attachment exceptions contained within the Act.[117] This, of course, is the reverse approach from that argued by Mrs. Hisquerdo and the California Supreme Court: namely, absent any intent to preempt, do not preempt.

There have been a number of lower court decisions subsequent to *Hisquerdo* concerning the preemptive effect of ERISA[118], disability compensation benefits from the Veteran's Administration[119], and military readjustment benefits.[120] The Texas courts have shown the greatest propensity to find preemption,[121] California courts the least.[122]

In *Perez v. Perez,*[123] the Texas Supreme Court faced the issue of preemption of military readjustment benefits provided a member of the Army reserve involuntarily released from active duty. Reversing both the trial court and the court of appeals' characterization of those benefits as community property, the Texas Supreme Court found them to be an "unearned gratuity." The court then translated this in community property terms into a gift, gifts being traditionally separate property. Citing *Hisquerdo,* the court noted that state law must fall when the state rule results in "consequential injury" to the objectives of the federal program, in the instant case that of encouraging younger officers to remain with the military beyond their original term.[124]

In *Ex Parte Johnson,* a case coming to the Texas Supreme Court via

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[115] 99 S.Ct. at 808.
[116] 99 S.Ct. at 811.
[117] *Id.*
[118] Stone v. Stone, 450 F. Supp. 919 (N.D. Cal. 1978), *appeal noted;* Senco of Florida, Inc. v. Clark, 473 F. Supp. 902 (M.D. Fla. 1980).
[119] Ex Parte Johnson, 591 S.W.2d 453 (Tex. 1980).
[120] Perez v. Perez, 587 S.W.2d 671 (Tex. 1979).
[121] *See* n. 119 and n. 120.
[122] Milhan v. Milhan, 27 Cal. 3d 765, 166 Cal. Rptr. 553, 613 P.2d 812, *cert. requested,* 49 U.S.L.W. 3304 (U.S. Oct. 28, 1980); Henn v. Henn, 26 Cal.3d 323, 665 P.2d 10, 161 Cal. Rptr. 502 (1980).
[123] 587 S.W.2d 671 (Tex. 1979).
[124] 587 S.W.2d at 673.

a writ of habeas corpus,[125] the court again found preemption appropriate. Here, relying heavily on parallel provisions found in *Hisquerdo,* the court found a strong prohibition against attachment and anticipation of benefits, as well as a non-assignability clause. The presence of these factors led the court to disallow treatment of the husband's anticipated future disability benefits from the Veteran's Administration as "property" subject to division upon divorce.

There has been considerable litigation before the California Supreme Court over the characterization of military retirement benefits. In the most recent case, *Milhan v. Milhan,*[126] the California court held that *Hisquerdo* had not impliedly overruled its earlier decision in *In Re Fithian*[127] that:

> federal military retirement pay is properly the subject of California community property law . . . the application (of which) (does not interfere) in any way with the administration or goals of the federal military pay system.[128]

This has been the position of the California high court since at least *In Re Marriage of Brown.*[129] The validity of this position is doubtful, though, since *Hisquerdo* seems to have already rejected the same approach. The U.S. Supreme Court has recently granted certiorari in another California case[130] similarly characterizing such benefits as com-

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[125] The divorced husband was held in contempt and committed to jail for failure to comply with the provisions of the divorce decree awarding fifty percent of his anticipated disability benefits.

[126] 27 Cal.3d 765, 166 Cal. Rptr. 533, 613 P.2d 812, *cert. requested,* 49 U.S.L.W. 3304 (U.S. Oct. 28, 1980). This is "Milhan II." "Milhan I" is reported at 13 Cal.3d 129, 117 Cal. Rptr. 809, 528 P.2d 1145 (1974), *cert. den.,* 421 U.S. 976 (1975).

[127] 10 Cal.3d 592, 111 Cal. Rptr. 370, 517 P.2d 450, *cert. den.,* 319 U.S. 825 (1974).

[128] 10 Cal.3d at 595, 604, 111 Cal. Rptr. at 270, 277, 517 P.2d at 450, 457.

[129] 15 Cal.3d 838, 126 Cal. Rptr. 633, 544 P.2d 561 (1970).

[130] McCarty v. McCarty, *cert. granted,* 49 U.S.L.W. 2380 (U.S. Oct. 21, 1980). Idaho, in Ramsey v. Ramsey, 535 P.2d 53 (Idaho 1975) also held these benefits to be community property, as did Texas in a pre-*Hisquerdo* case, Dominey v. Dominey, 481 S.W.2d 473 (Tex. Civ. App.–El Paso), *cert. den.,* 409 U.S. 1028 (1972). One common law state, New Jersey, in Kruger v. Kruger, 375 A.2d 659 (N.J. 1977), held these benefits to be property subject to division upon divorce, while four other common law states, Kentucky, Russel v. Russel, 7 FAM. L. REP. 2001 (BNA); Alaska, Cose v. Cose, 592 P.2d 1230 (Alas. 1979); Arkansas, Fenney v. Fenney, 537 S.W.2d 367 (Ark. 1970); and Colorado, Ellis v. Ellis, 552 P.2d 506 (Col. 1970), have held to the contrary.

munity property, so we can assume a definitive ruling on this issue will be forthcoming.

In a seeming rerun of *Wissner*, the Maine Supreme Judicial Court held, in *Ridgway v. Prudential Insurance Co. of America*,[131] that federal law allowing servicemen to designate any beneficiary desired on a military life insurance policy does not preempt a state court, as a part of a divorce settlement, from imposing a constructive trust on the life insurance proceeds.

In *Stone v. Stone*,[132] and *Senco of Florida, Inc. v. Clark*,[133] two federal district courts held ERISA[134] not subject to preemption, a point expressly reserved in *Hisquerdo*.[135] In its appeal of *Stone* to the 9th Circuit, the Department of Labor has taken the position that the legislative intent of Congress was for an

> absolute preemption in the regulation of benefit plans in order to avoid administrative problems that would result from inconsistent state laws.[136]

Interestingly, the Department of Labor has also argued that while community property laws should be preempted, an implied exception to ERISA's anti-assignment provisions should be extended for enforcement of a state court decree to satisfy a claim under community property law.[137]

In summary, then, in deciding whether preemption is called for, we find the courts giving considerable importance to the presence of non-assignability, attachment, and garnishment provisions in federal statutes. The relationship of these provisions to Section 201(e) of the Copyright Act will be discussed below in Part III.

In addition to analyzing the anti-attachment provisions in the various federal laws under scrutiny, though, the Supreme Court has gone to great lengths to rest its decision on the ground of frustration of Congressional policy. Despite the language of the *Hisquerdo* majority to the effect that preemption will not occur absent a determination that Congress has "positively so required by direct enactment," the result in

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[131] 6 FAM. L. REP. 2954 (BNA).
[132] 450 F. Supp. 919 (N.D. Cal. 1978), *appeal noted.*
[133] 473 F. Supp. 902 (M.D. Fla. 1979).
[134] 29 U.S.C. §1001 *et seq.* (1974).
[135] 99 S.Ct. Rptr. 802, n. 24 at 813.
[136] Cited in *Senco*, 473 F. Supp. at 907.
[137] *Id. See also* Flynn, *ERISA Preemption of California Property Laws*, 4 INDUSTRIAL RELATIONS L.J. No. 1 (forthcoming 1980).

Hisquerdo is to the contrary, since as the majority admitted, the legislative history was sparse.[138] The dissent by Justices Stewart and Rehnquist belittles the "policies" found to require preemption as

> little more than the commonplace that retirement benefits are designed to provide an income or retirement to the employee. There is simply nothing in the Act to suggest that Congress meant to insulate these pension benefits from the rules of ownership that in California are a normal incident of marriage.[139]

What then are the policy arguments to be made for and against preemption of copyright in community property states? It is to these considerations that we now turn.

Policy Arguments for and Against Preemption

One argument against preemption is that advanced by Professor Nimmer,[140] who sees a contradiction between the statutory concern shown for the rights of the surviving spouse in the renewal[141] and termination of transfer[142] provisions and preemption of community property laws. As facially attractive as this argument is, it must be noted that the Railroad Retirement Act provided for child support, alimony and certain spousal benefits. This can scarcely be described as a lack of concern for the non-employee railroad spouse. This concern, however, did not prevent the Court from preempting California's characterization of the retirement benefits as community property.

But Nimmer's argument to the concern shown in the renewal and termination of transfer rights also omits another aspect of Congress' approach to the subject, namely the express preemption of community property intestate laws by operation of Sections 203(a) (2) (A) and 304(c) (2) (A), which read in relevant part:

> §203(a) CONDITIONS FOR TERMINATION.—In the case of any work other than a work made for hire, the exclusive or non-exclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination under the following conditions:

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[138] 99 S.Ct. Rptr. at 811.
[139] 99 S.Ct. Rptr. at 813.
[140] 1 NIMMER §6.13(A).
[141] 17 U.S.C. §3.04(a); 2 NIMMER §9.04.
[142] 17 U.S.C. §§203, 304(c); 3 NIMMER §11.

(2) Where an author is dead, his or her termination interest is owned, and may be exercised, by his widow or her widower and his or her children or grandchildren as follows:

(A) the widow or widower owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest;[113]

§304(c) TERMINATION OF TRANSFERS AND LICENSES COVERING EXTENDED RENEWAL TERM.—In the case of any copyright subsisting in either its first or renewal term on January 1, 1978, other than a copyright in a work made for hire, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated by the second proviso of subsection (a) of this section, otherwise than by will, is subject to termination under the following conditions:

(2) Where an author is dead, his or her termination interest is owned, and may be exercised, by his widow or her widower and his or her children or grandchildren as follows:

(A) the widow or widower owns the author's entire termination interest unless there are surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest;[111]

Preemption occurs because these sections are in direct conflict with intestate laws such as that found in California Probate Code Section 202(a),[115] which purport to give to the surviving spouse the entire community.[116]

Obscurely tucked away in Section 304 of the Act[117] is another possible preemption of community property laws in the renewal context, that found in Section 304(a)'s[118] provision for renewal of posthumous

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[113] 17 U.S.C. §203(a) (2) (A) (1978); 2 NIMMER §§9.04, 9.05; 3 NIMMER §10.06.

[111] 17 U.S.C. §304(c) (2) (A) (1978). For an exquisitely lucid explanation of these two sections *see* LATMAN 91–93, 103–106; *also,* Curtis, *Caveat Emptor in Copyright: A Practical Guide to the Termination of Transfers Under the Copyright Act of 1976,* 25 BULL. COPR. SOC'Y 19 (1977); Nimmer, *Termination of Transfers Under the Copyright Act of 1976,* 125 U. PA. L. REV. 947 (1977).

[115] CAL. PROB. CODE §202(a) (West Supp. 1980).

[116] This result was in practice effectuated in 1956 by the Supreme Court's decision in DeSylva v. Ballentine, 351 U.S. 570, discussed in text at n.86–90, *supra.*

[117] 17 U.S.C. §304 (1978).

[118] 17 U.S.C. §304(a) (1978).

works. The important point here is not so much the provision itself, but the prior case law, which, according to the House Report, is codified therein.[149] The case law referred to is *Bartok v. Boosey & Hawkes, Inc.*[150]

Without leading us too far afield, *Bartok* concerns an author's ability, by will, to cut off the widow(er) and children's right to renewal. The facts in *Bartok* may be briefly summarized. In 1943, composer Bela Bartok wrote his famous Concerto for Orchestra. The first performance of the work took place on December 1, 1944. Bartok then assigned the rights to his publisher, Boosey & Hawkes. However, before Boosey & Hawkes published, and under the 1909 Act, obtained copyright in the work, Bartok died. Upon expiration of the original term, a battle arose as to whether the work was a "posthumous" one within the meaning of Section 24 of the 1909 Act.[151] If the work was posthumous, the publisher was entitled to the renewal, if not, the wife and son of the composer.

In holding the work not to be posthumous, the 2nd Circuit apparently confined posthumous works to cases in which

> No copyright assignment or other contract has occurred during an author's lifetime, rather than one which is simply first published after the author's death.[152]

The decision of the *Bartok* court rested on the renewal provision's policy of protecting an author's surviving spouse and children against a third party who may have been assigned the copyright and is the "proprietor," as the 1909 Act termed it, of the copyright at the expiration of the original term. This protection is, of course, unnecessary if the author never conveys the copyright during his or her lifetime, so that upon death, it passes by devise or intestate distribution to the surviving spouse and children.[153]

It was to protect these rights that the *Bartok* court ruled as it did. However, as Professor Nimmer has pointed out:

> The *(Bartok)* rationale assumes it will be the widow and children who inherit a deceased author's copyright. If the author wills his

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[149] House Report 139; 2 NIMMER §9.03(A).

[150] 523 F.2d 941 (2d Cir. 1975).

[151] 17 U.S.C. §204 (repealed 1978).

[152] The language here is actually from the House Report, p. 139, in its characterization of *Bartok*. *See* Professor Nimmer's excellent and extensive discussion of *Bartok* at 2 NIMMER §9.03(A); and, LATMAN 77; 51 N.Y.U. L. REV. 332 (1976).

[153] 2 NIMMER §9.03(A) at p. 9–29.

> copyright to a third party, as he clearly may, under *Bartok* the work will be "posthumous," but the proprietor entitled to renewal will not be the author's widow and children, but the third party or his assigns . . . (this) permits some very odd results. Suppose, for example, that a work is published during the author's lifetime, but the author retains the copyright. In those circumstances the work might be regarded as "posthumous" under the *Bartok* rule, which means that the author could transfer renewal rights by will to whomever he chose, thus cutting off the statutory rights of his widow and children.[154]

If such was the intent of Congress by adopting the *Bartok* rule,[155] it may be argued that Congress was aware of precisely the results referred to by Professor Nimmer above, and sanctioned them. The implication of this is that the rights given to authors to alienate copyright are absolute: if the author chooses to transfer or devise the copyright or renewal or termination of transfer rights to a third party, thereby cutting off the other spouse, (s)he may.[156] In a community property state, such an attempt to devise the other spouse's one-half interest in the community would be invalid, setting the stage for a preemption battle. We have already seen in our discussion of *Wissner v. Wissner*[157] and *Yiatchos v. Yiatchos*[158] how the Supreme Court struck down other state efforts to restrict alienation of federal benefits. It is possible that the same result could be reached with state attempts to limit the alienation of copyright.

In summary, then, the argument that the Congressional concern shown surviving spouses and children in the renewal context somehow clashes with preemption is not as strong as it initially appeared: other statutes showing similar concern have been preempted; in the case of renewal rights and termination of transfers, Congress has actually preempted state laws of intestate distribution which give the surviving spouse the entire community; and lastly, there is some evidence to sug-

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[154] 2 NIMMER §9.03(A) at pp. 9–29 through 9–30, footnotes omitted.

[155] "Although the bill preserves the language of the present renewal provision without any change in substance, the Committee intends the reference to a 'posthumous work' in this section as the meaning given to it in Bartok . . ." House Report 139.

[156] Contingent upon the author surviving into the renewal year, this was apparently the law under the 1909 Act. Fred Fisher Music Co. Inc. v. M. Witmark & Sons, 318 U.S. 643 (1943); Miller Music Corp. v. Charles N. Daniels, Inc., 362 U.S. 373 (1960).

[157] *See* text at n.98–99.

[158] *See* text at n.106–108.

gest that the right to devise copyright is an absolute one.

A second argument against preemption may be called the "joys of diversity" argument, since it is built on the belief that there is some intrinsic benefit in allowing state property laws to treat the federal copyright according to the vicissitudes of whatever state the author may reside in. According to this position, there is some good in having a nonauthor spouse in California receive one-half of the financial interests of the copyright, while simultaneously denying any such interest to a nonauthor spouse in a common law state.

In *Goldstein v. California*[159] and *Kewanee v. Bicron Corp.*,[160] the Supreme Court lent support to such an argument by language such as this:

> No conflict will necessarily arise from a lack of uniform state regulation, nor will the interest of one State be significantly prejudiced by the actions of another.[161]

Would not the implication of this approach lead in our case to domicile-shopping, with authors leaving community property states in favor of the more hospitable common law states? Moreover, it must be noted that both *Goldstein* and *Kewanee extended* the states' power to protect intellectual property, in order to further the constitutional purposes of the Copyright and Patent Clause. No such extension would occur by vesting the nonauthor community property spouse with a one-half interest in copyright, and indeed, it may be that the opposite effect from that desired in *Goldstein* and *Kewanee* would occur. Despite the heavy emphasis on states' ability to operate in the copyright field, there is some language in *Goldstein* which might indicate that an actual restraint on copyright would be preempted:

> Where the need for free and unrestricted distribution of a writing is thought to be required by the national interest, the Copyright and Commerce Clause would allow Congress to eschew all protection. In such cases, a conflict would develop if a State attempted to protect that which Congress intended to be free from which Congress had protected.[162]

This sentiment is more in accord with that expressed in the earlier case of *Sears, Roebuck & Co. v. Stiffel Co.*,[163] in which it was said:

[159] 412 U.S. 546 (1973).
[160] 416 U.S. 470 (1974).
[161] 412 U.S. at 560.
[162] 412 U.S. at 559.
[163] 376 U.S. 225 (1964).

> When state law touches upon the area of these federal statutes, it is "familiar doctrine" that the federal policy "may not be set at naught, or its benefits denied" by the state law. *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 172, 176, 63 S.Ct. 172, 173, 87 L.Ed. 165 (1942). This is true, of course, even if the state law is enacted in the exercise of otherwise undoubted state power.[164]

Although the continued vitality of *Goldstein-Kewanee* is open to question,[165] the federalism found in Section 301(a)'s prohibition against extending

> legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified in section 106 . . .[166]

makes it quite clear that copyright is the sole province of Congress, regardless of whether Congress has chosen to extend protection to "X" or not. This concept hearkens back to the *Sears-Compco* doctrine which was cited with approval in the Committee reports.[167] This federalism also comports with a fundamental purpose of the Copyright Clause of

> promot(ing) national uniformity and avoid(ing) the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various states . . .[168]

When we remember how complicated is the question of when and to what extent state community property laws may apply to copyright,

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[164] 376 U.S. at 229.

[165] The House Report at 129 reiterates as a fundamental purpose of the copyright clause the providing of national uniformity, thereby indicating its disagreement with the *Goldstein* court. *Kewanee* has not survived unscathed either, at least by implication. In Avco Corp. v. Precision Air Parts, Inc. (M.D. Ala. Civ. No. 79–275–N, Sept. 4, 1980, *appeal noted* No. 80–7772, 5th Cir., Oct. 23, 1980), a district court in Alabama held, against a backdrop of no state case law, that a cause of action for misappropriation of trade secrets in the form of proprietary drawings and specifications for airplane engines, was preempted by the Copyright Act. For an excellent critique of *Goldstein*, *see* 1 NIMMER §1.01(A).

[166] 17 U.S.C. §301(a) (1978).

[167] Sears Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964); Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964); House Report 131; Senate Report 115.

[168] 1965 Report of the Register of Copyrights 82.

an argument may be derived from Madison's famous comments in the Federalist,[169] that it would greatly avoid the practical difficulties of determining and enforcing an author's or his assignee's rights if the community property laws were preempted and the author deemed to possess wholly all copyright interests in his or her work.[170]

In this love for uniformity, however, we should not forget that the "true" purpose of copyright is "to promote the progress of Science."[171] While this is accomplished by granting the author a financial reward, we have previously observed that this is but the carrot of encouraging individual effort via personal gain in order to advance the public welfare. So, crudely perhaps, we may ask what difference it makes to the public whether the author owns the entire copyright or only half, as long as he or she still creates. Indeed, empirical evidence suggesting wholesale emigration from California in the event of preemption would likely be difficult to come by.

A third, though surely not final argument, is that public policy is not in favor of throwing a nonauthor spouse on to the dole while allowing his or her author-spouse to enjoy the entire fruits of the separate, nondivestible copyright. Yet, by denying Mrs. Hisquerdo half of her husband's railroad retirement benefits, the Supreme Court has apparently said that if Congress makes such a decision, it is not within the power of the states to obviate the resultant harm.

In looking at the national objectives cited to support preemption of community property laws in previous cases, we have found managing the national debt, keeping young officers in the military after their original term of service is expired, and retaining workers in the railroad industry. Whether promoting the progress of "Science" through copyright is as important as these is a question only a philosopher would entertain.

III. Would the Application of Community Property Laws be Preempted by the Supremacy Clause by Operation of Section 201(e)'s Prohibition Against Involuntary Transfers?

The Railroad Retirement Act adjudicated in *Hisquerdo* contained prohibitions against assignment, taxation, garnishment, and anticipation, although it allowed the benefits to be reached to satisfy a legal obligation for child support or alimony.

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[169] MADISON, THE FEDERALIST No. 43; LATMAN 4–5; 1 NIMMER §1.01.

[170] For an early example of this *see* Hudson & Goodwin v. Patten, 1 Root 133 (Conn. 1789).

[171] For a discussion of whether "Science" in the Copyright Clause refers to copyright or patent, *see* 1 NIMMER §1.03(A) n. 1 at p. 1–28.

We have already discussed in some detail the assignability of copyright. On this ground, therefore, *Hisquerdo* is distinguishable as to copyright, since copyright is freely assignable.

Section 201(e),[172] however, is entitled "Involuntary Transfer," and read upon passage in 1976:

> INVOLUNTARY TRANSFER.—When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not been previously transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title.

This provision, which has been called "curious"[173] and less generously, "a bizarre rule of nullification,"[174] may be traced to the 1973 adherence of the U.S.S.R. to the Universal Copyright Convention. It was feared by some that this adherence would result in the use of copyright by the Russian government to suppress Soviet dissidents.[175] Such concern led to the introduction of a provision refusing to give effect to the actions of foreign governments in seizing, expropriating or otherwise transferring ownership in copyrights. Upon the suggestion of the Author's League of America, the provision was revised along more general lines, by including within the sweep of the section actions by domestic governments.[176]

The Register of Copyrights, in her Second Supplemental Report, stated that the purpose of the provision is:

> . . . to reaffirm the basic principle that the individual author is the fountainhead of copyright protection, and that his copyright cannot be taken away from him involuntarily . . .[177]

The House Report repeated this reaffirmation and went on to add that "traditional legal operations" such as bankruptcy proceedings and

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[172] 17 U.S.C. §201(e) (1978).

[173] 3 NIMMER §10.04.

[174] P. Goldstein, *Pre-Empted State Doctrines, Involuntary Transfers and Compulsory Licenses.* 25 U.C.L.A. L. REV. 1107, 1124 (1977).

[175] 25 U.C.L.A. L. REV. 1123–24.

[176] *Second Supplemental Report of the Register of Copyrights,* Chpt. 1, pp. 8–9, Chpt. XI, pp. 8–9 (1965).

[177] *Id.,* Chpt. XI, p. 9.

mortgage foreclosures are not within the scope of the section, for the reason that in such cases the authors have voluntarily consented to the legal processes by overt acts.[178] The exception for bankruptcy was made explicit in 1978 amendments which added "except as provided under Title 11" to the provision as quoted above.[179]

The implications of Section 201(e) are two-fold: first, by its sheer presence it evinces the type of anti-attachment intent found so important in *Hisquerdo*. Faced as we are with no legislative history on the preemption of community property laws, a court might well find such intent by the inclusion of Section 201(e). Second, by Section 201(e)'s extension to domestic actions, it would appear that a divorce or probate court in *any* state is disabled from awarding to a nonauthor spouse interests in his or her author spouse's copyright involuntarily, for the award as an enforceable state action would work an involuntary transfer within the meaning of 201(e). In the case of community property states, this disability would render nugatory such a state's characterization of copyright as community property.

IV. Regardless of Congressional Intent, are the Community Property Laws Preempted by the Supremacy Clause by Virtue of the Copyright Clause's Limitation to "Authors"?

Article I, §8, cl. 8 provides that Congress shall have the power

> to promote the progress of Science and the Useful Arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.[180]

From this limitation to "authors," an argument may be advanced that constitutionally, copyright may be vested, initially, only in the "true" author, the author spoken of in *Nottage v. Jackson*.[181] This would, of course, eliminate the work-for-hire doctrine, as that doctrine vests initial authorship in the employer.

Only once, as far as this writer knows, has a litigant challenged the constitutionality of the work-for-hire doctrine. In *Vitaphone Corp. v. Hutchinson Amusement Co.*,[182] the defendant made a belated post-trial attack on Section 26 of the 1909 Act,[183] the predecessor of our current

[178] House Report 123–24.
[179] 17 U.S.C. §201(e) as amended, PL 95–598, Title III §313, Nov. 6, 1978, 92 Stat. 267.
[180] U.S. CONST., art I, §8, cl. 8.
[181] 11 Q.B.D. 627 (1883). *See* text at n.40–46, *supra*.
[182] 28 F. Supp. 526 (D. Mass. 1939).
[183] 17 U.S.C. §26 (repealed 1978).

Section 201(b).[184] Dismissing the assault as untimely, the court in that case stated by dictum its belief that such a challenge was without foundation.

More recently, in *Scherr v. Universal Match Corp.*,[185] Judge Friendly in a dissenting opinion brought up the issue *sua sponte,* suggesting constitutional limitations on Congress' ability to grant employers authorship status. In relevant part, he wrote:

> Although the course of decision has gone past the point where an argument could be mounted on the failure of the definition to say that the word "author" shall *not* include the true author in the case of "works made for hire," a position the majority's opinion necessarily entails, it is worth reflecting why the statute is phrased in the curiously back-handed way it is. The rather obvious reason is that the Constitution, Art. I, § 8, authorizes only the enactment of legislation securing "authors" the exclusive right to their writings. It would thus be quite doubtful that Congress could grant employers the exclusive right to the writings of employees regardless of the circumstances. In line with that it has been suggested that, in order to be constitutionally viable, § 26 must be limited to instances where an assignment of future copyright may fairly be implied. Nimmer, Copyright § 6.3 (1968). However that may be it is surely true that, both in the Constitution and in the Copyright Act, the emphasis is on protecting the "author" and that any principle depriving him of copyright and vesting this in another without his express assent must thus be narrowly confined.[186]

Our question is whether the vesting of one-half of the copyright in a nonauthor spouse by operation of state community property law is narrowly confined within the limits suggested by Judge Friendly. Unfortunately, we are not given any guideposts to indicate where those confines begin or end.

The easy approach would be to say that by residing in a community property state, the author has impliedly agreed that the nonauthor spouse shall be considered a joint author. The difficulty with this, as we have noted, is that nothing the nonauthor spouse does even approximates the requisite interdependent contribution necessary for statutory

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[184] 17 U.S.C. §201(b) (1978).
[185] 417 F.2d 497 (2d Cir. 1969) (Friendly, J. dissenting).
[186] 417 F.2d at 502.

recognition as a joint author.[187] This may not seem to be of great importance; however, as Professor Nimmer has pointed out:

> If Congress may "deem" an employer to be the author, is there any limit to the other classes of persons (besides the true author) who may be the recipient of Congressional beneficence in this manner?[188]

Additionally, there is serious question as to the constitutional validity of delegating implied powers of defining authorship to the states. One solution, though, would be to consider the author to have voluntarily consented to a transfer of ownership under the traditional operations of law spoken about in connection with Section 201(e). This approach is perhaps the cleanest constitutionally, since it avoids the issue of authorship and is furthermore desirable as it is provided for in the Act.

A final possibility would be to deem the author a constructive trustee for his or her nonauthor spouse's one-half interest. In *Frankenheimer v. Frankenheimer,*[189] a California case, we find an interesting mixture of inception of title and constructive trust questions. Pursuant to a property settlement agreement, the author husband and his nonauthor spouse agreed that upon divorce each party would own an undivided one-half interest in all assets including those later discovered to have been assets. At the time of separation, the husband was negotiating for the motion picture rights to "Seven Days in May." The wife, upon discovering this, claimed a one-half interest in the literary property. Affirming the trial court's judgment for the husband, the California Court of Appeals held that while inchoate title does relate back when title is later completed, there was no authority for the wife's contention that an inchoate title acquired by preliminary negotiations relates back. Accordingly, since the husband was only in the process of negotiating, he held no inchoate title and hence owed his wife no fiduciary duty. The implication of this is that if the husband had possessed inchoate title, a constructive trust would have been appropriate.[190] Nevertheless, it is doubtful if a state could by constructive trust accomplish what it is forbidden to do at law.[191] Additionally, in *Frankenheimer,* the literary property was deemed to be community property based on a written agreement between the spouses,

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[187] *See* n.51–71 and accompanying text, *supra.*

[188] 1 NIMMER §1.06(C).

[189] 41 Cal. Rptr. 636 (Ct. App. 1964).

[190] For examples of constructive trusts of copyright, *see* Manning v. Miller Music Corp., 174 F. Supp. 192 (S.D.N.Y. 1959); April Productions, Inc. v. G. Schirmer, Inc., 308 N.Y. 366 (Ct. App. 1955).

[191] *But see* Ridgway v. Prudential Insurance Co. of America, text at n.131, *supra.*

something permissible under California, but not Texas law.[192]

One final problem needs be mentioned, that of management, control and disposition of community property. Co-owners of copyright are deemed to be tenants-in-common, and one may grant a non-exclusive license in the copyrighted work without first obtaining the consent of the other,[193] subject only to a duty to account for profits,[194] and provided the licensing does not cause destruction of the work.[195]

In the case of transfer of copyright, while the co-owner may freely transfer his or her interest in the copyright, he or she may not transfer the interest of the other without the latter's consent.[196] How does this fit into state community property laws on the management, control and disposition of community property? The answer varies from state to state.

In Texas, there exists for purposes of management, control and disposition only, a category of so-called "special" community property. This is provided for in Section 5.22(1) of the Family Code which states in relevant part:

> (a) During marriage, each spouse has the sole management, control and disposition of the community property that he or she would have owned if single, including but not limited to:
> (1) personal earnings
> (2) revenue from separate property . . .
> (4) the increase and mutations of, and revenue from, all property subject to his or her sole management, control and disposition.[197]

California, however, in Section 5125(a) of the Civil Code, gives to *either* spouse

> . . . the management and control of the community personal property . . . with the like absolute power of disposition, other

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[192] Gorman v. Gause, 56 S.W. 2d 855 (Tex. Comm'n App. 1933); Strickland v. Webster, 112 S.W. 1047 (Tex. Comm'n App. 1938). In California, under the "rule of transmutation" these agreements may even be oral.

[193] House Report 121; 1 NIMMER §6.10 and cases cited therein.

[194] 1 NIMMER §6.12(B).

[195] 1 NIMMER §6.10(A).

[196] 1 NIMMER §§6.11, 10.03. Note also that under the definition of "transfer of copyright ownership" found in Section 101(26), 17 U.S.C. §101(26) (1978) is mortgage of copyright.

[197] TEX. FAM. CODE ANN. §5.22(a) (1975).

> than testamentary, as the spouse has of the separate estate of the spouse.[198]

The only limitations on this absolute power are found in paragraph (b) which states:

> a spouse may not make a gift of community personal property, or dispose of community personal property without valuable consideration . . .[199]

and paragraph (e) which reads:

> Each spouse shall act in good faith with respect to the other spouse in the management and control of the community property.[200]

There seems to be no apparent conflict between the Texas and federal approaches, except that the Texas approach is more restrictive, giving as it does sole management, control and disposition to the author spouse. It is unlikely that this restrictiveness would subject the Texas approach to pre-emption, since it is a limitation on the one-half interest given to the nonauthor spouse, which interest would not exist but for state law.

The same may not be said for the California approach, however, which subject to good faith and valuable consideration, gives unto the nonauthor spouse absolute power to dispose of in part or in whole the community property copyright, without the author's consent.

It is the opinion of this writer that the more limited powers given to co-owners under copyright law should pre-empt the absolute California approach. Such pre-emption would not deprive the nonauthor spouse of his or her one-half interest in the copyright but rather would prevent the author spouse from being deprived of control over his or her interest in the copyright.

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[198] CAL. CIV. CODE §5125(a) (West Supp. 1980). There are exceptions for a spouse who is operating or managing a business in §5152(d). In these instances, the spouse has sole management and control over the business. Hence, a "professional" author could seemingly qualify for the §5125(d) sole management exception. What a "professional" is is naturally a question of fact, leaving as Professor Nimmer describes it "some difficult grey areas." 1 NIMMER §6.13(C).

[199] CAL. CIV. CODE §5125(b) (West Supp. 1980).

[200] CAL. CIV. CODE §5125(e) (West Supp. 1980).

SUMMARY AND CONCLUSIONS

In tracing the nature of copyright as property, we have observed that as long as copyright conforms to a community property state's rules on time and manner of acquisition, it will be treated as community property, vesting in both the author and the nonauthor spouse a present, undivided one-half interest therein. This automatic vesting in the nonauthor spouse is in possible conflict with the Copyright Act's grant of exclusive rights. In this regard, though, we have seen how Section 106 speaks to the "owner" rather than to the "author" of the copyright, due to the free alienation provided for in Section 201(d).

We have also noted how Section 201(e) contains many of the prohibitions found important in *Hisquerdo v. Hisquerdo,* leaving open the threat of preemption of any state attempt to characterize copyright as community property. Additionally, in Sections 203(a) (2) (A) and 304(c) (2) (A), Congress has preempted community property intestate laws, suggesting too that the right to devise copyright under Section 201(d) may be absolute.

The preemption of community property laws in toto would be most unfortunate, though. As progressive protection for those spouses who devote their time, energy, talent and love to their marriage, it would be a cruel irony to leave intact the regressive common law, while preempting community property laws precisely because of their progressiveness.

Obviously, express provision by Congress allowing application of community property laws would be the most desirable approach. If such legislation is not forthcoming, a court faced with a preemption challenge would be well advised to find an implied voluntary transfer under the traditional operations of law permitted under Section 201(e), while distinguishing *Hisquerdo* on the ground that copyright is freely alienable.

260. COPYRIGHTING ART RESTORATIONS*

By REID A. MANDEL**

INTRODUCTION

Like all tangible things, works of fine art are impermanent, succumbing to hostile environments, maltreatment, and the inherent instability of their constituent materials. While some signs of aging may be valued for the veneer of authenticity they lend, even considered aesthetically pleasing, physical deterioration inevitably threatens the integrity of a work, and eventually its very existence. Art conservation is the profession of arresting and repairing that deterioration. Conservation demands tremendous skill, extensive training and study, and significant artistic talent. When a work is severely damaged, necessitating substantial restoration, that restoration constitutes an original contribution by the conservator to the work itself. Such restoration qualifies for copyright protection.

Some minds might inquire how granting copyrights in restorations will promote the progress of science and the useful arts, the constitutional mandate upon which copyright law relies.[1] How can the mere repair and maintenance of existing works, if restoration may be so construed, promote the creation of new works? Put this way, the benefits of copyrighting restorations are easily seen. As Justice Story had occasion to observe,

> the thoughts of every man are, more or less, a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection. . . . Virgil borrowed much from Homer; Bacon drew from earlier as well as contemporary minds; Coke exhausted all the known learning of his profession; and even Shakespeare and Milton, so justly and proudly our boast as the brightest originals, would be found to have gathered much from the abundant stores of current knowledge and classical studies in their day.[2]

It is the survival of these stores of knowledge, these founts of accumulated wisdom to which conservators dedicate themselves. Art con-

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[1] U.S. CONST., Art. 1, Sec. 8, Cl. 8.

[2] Emerson v. Davies, 8 Fed. Cas. 615, 619, Case No. 4,436 (1845).

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servators are the custodians of the cultural heritage of mankind, and it is the maintenance of that heritage which makes true progress possible. Investing conservators with copyrights in restorations would aid them enormously in this worthy endeavor by permitting them some control over the treatment works receive after leaving their hands, and by providing museums with an economic incentive for restoring their collections. Unfortunately, little is known by the public and the legal profession about art conservation. Presenting the case for recognizing copyrights in restorations in a coherent manner hence requires a rather involved discussion of the training conservators receive and of the history, principles and contexts of the profession they practice.

I. THE PRACTICE OF CONSERVATION.

A. The Need for Restoration.

The instant a painter's brush leaves the canvas or a potter's vessel the kiln, the deterioration of the work commences. This may be a slow process, unnoticeable in one lifetime, or it may be a rapid degeneration whose advance can be measured in days. Each constituent of a work has a unique lifespan, as immutable as radioactive decay. If a work of art was constructed of one or two materials, the cause of the breakdown would be more readily discernible, but paintings, pottery and sculpture are salmagundian creations.

> A painting is a complex stratified construction of organic and inorganic substances. Each of its layers is subject to deterioration; and the deterioration of each layer affects the others. The paint film, which is itself composed of many layers from the priming through the toned glazes, undergoes chemical processes that transform the colors and thus destroy the original harmony of the picture, as if the chords of a symphony had turned to discord.[3]

The natural lifespans of materials are often shortened by environmental agents. Pottery may be weakened by the hydraulic leaching of minerals from its clay or its glaze marred by bacterial attack;[4] sculpture is vulnerable to corrosion induced by industrial pollutants.[5] Finally, plain

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[3] Hochfield, "Conservation: The Need is Urgent," *Art News* (Feb. 1970), p. 28 (hereafter "Hochfield").

[4] H. M. HODGES, PROBLEMS AND ETHICS OF THE RESTORATION OF POTTERY, Preprint of the Contributions to the Stockholm Congress, June, 1975, International Institute for Conservation of Historic and Artistic Works (hereafter "IIC"). (Hereafter this article will be cited as "Hochfield.")

[5] J. C. SMITH, CAUSES AND PREVENTION OF CORROSION IN COPPER ALLOY SCULPTURE, Monograph, Johnson/Atelier Technical Institute of Sculpture, Princeton (1980).

maltreatment by a work's custodians aggravates the destructiveness of inherent instabilities and pernicious environments.

This brief explanation of the various causes of deterioration of artworks cannot begin to impart a sense of the real challenge art conservators face. Perhaps it would be more apt to think of conservators "as the medical end of the art world."[6] The agents of decay to which artworks are subject are as multifarious as the diseases of man. Like a human being, a painting or sculpture has a finite lifespan, within which it passes through distinct stages of maturation. Being able to detect, diagnose, cure and prevent the ailments afflicting each, and learning how to postpone the inevitable decline is a science in itself, masterable only after years of study and practice. And like medical science, art conservation is beset by imponderables and uncertainties engendered by the incredible complexity of the task undertaken.

B. Training of Conservators.

Years of arduous study are needed to train a conservator.

> Ideally, the conservator should have the combined skills of the art historian, artist and scientist, and each of these disciplines should be so thoroughly a part of the conservator that he thinks and speaks naturally of the object in historic, aesthetic and scientific terms. The conservator should also be something of a linguist to enable him to consult the technical literature in languages other than his own, as well as to confer with foreign colleagues. . . .[7]

Three graduate programs in conservation presently exist in the United States, graduating an aggregate of approximately thirty students annually.[8] To qualify for these programs, students must have college credits in inorganic, organic and physical chemistry, calculus, art history and studio arts, and must demonstrate significant artistic ability and sensi-

[6] Caroline Keck, "The Role of the Conservator," in PRESERVATION AND CONSERVATION: PRINCIPLES AND PRACTICES. The Preservation Press, National Trust for Historic Preservation in the United States (1976) (hereafter "PRESERVATION AND PRACTICES"), 27–28; Majewski, "The Education of Art Conservators," in PRESERVATION AND PRACTICES, 481 (hereafter "Majewski").

[7] Majewski, at 481.

[8] These programs are the Conservation Center of the Institute of Fine Arts, New York University, the Cooperstown Graduate Programs, State University of New York at Cooperstown, and the University of Delaware/Winterthur Museum Program in the Conservation of Artistic and Historic Objects. *See* Michaels, "Accreditation, Certification and Licensing of Art Conservators," (hereafter "Michaels"), in PRESERVATION AND PRACTICES, 435, 439.

tivity.[9] Typically, several years of post-graduate apprenticeship in museums, conservation laboratories, or artists' studios are also required.[10] Accumulating these abilities and knowledge takes time; students just entering the American conservation programs average 27 years of age.[11]

The conservation programs themselves continue developing the students' artistic skills, with courses in painting, ceramics, carpentry, metalworking, papermaking and photography.[12] These courses provide both instruction in general technique and a survey of methods used historically by artisans. Students learn, for instance, how Titian ground his pigments, what methods Da Vinci used to fabricate his panels, and where the Attic potters mined the clay for their red-figure ware. The masters' methods are not merely studied but also reproduced, and the strengths and weaknesses of these and their materials are analyzed with modern scientific techniques. This work is augmented with research on particular artists' styles as well as on the aesthetic values and common motifs of artistic genres and cultural epochs, for conservators must be aware not only of what methods the masters used but also of the ends they pursued. Of no less importance is a knowledge of the methodology, materials and philosophy of conservators in centuries past, for it is a rare work which has not been restored at least once.[13] Modern conservation theory, practices and standards are ingrained and the students specialize in a single area, such as paintings, paper, or objects.[14] After graduation, conservators are expected to conduct original research and

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[9] Majewski, at 483. For a clear illustration of the need for such extensive scientific education, *see* the list of the major equipment found in a modern conservation laboratory at Majewski, 489.

[10] Calouste Gulbenkian Foundation, TRAINING IN THE CONSERVATION OF PAINTINGS, London (1972), 24.

[11] Personal communication with students at the annual COnservation Students Conference, Winterthur Museum, April 28–29, 1980.

[12] *See generally,* National Conservation Advisory Council, REPORT OF THE STUDY COMMITTEE ON EDUCATION AND TRAINING (1979), Appendices B, C, and D; for current training in Europe, *see* UNESCO, PRESERVING AND RESTORING MONUMENTS AND HISTORIC BUILDINGS, Paris (1972), 257–259.

[13] *See* SHELDON KECK, FURTHER MATERIALS FOR A HISTORY OF CONSERVATION, Preprints of Papers Presented at 4th Annual Meeting of the A.I.C., Washington, D.C. (1976) (hereafter "Sheldon Keck"); I.A. KHAZANOVA, SOME PROBLEMS CONCERNING REPEATED RESTORATION OF ANTIQUE PAINTED VASES, Preprints, ICOM 5th Triennial Meeting, Zagreb (1978) (hereafter "KHAZANOVA"); Ruhemann, "Criteria for Distinguishing Additions from Original Paint," 3 STUDIES IN CONSERVATION 4 (Oct., 1968) (hereafter "Ruhemann").

[14] Majewski; REPORT OF THE STUDY COMMITTEE ON EDUCATION, *see* note 12 *supra.*

regularly attend conferences and continuing education programs.[15]

Most American-trained conservators belong to the American Institute of Conservation of Historic and Artistic Works (AIC), a professional association now comprised of approximately 500 members.[16] The AIC has promulgated a Code of Ethics and Standards of Practice for the profession and is actively lobbying for the accreditation, certification and even licensing of conservators.[17] The professional practices of conservators fall into three groups: museum staffs, private practice, and archeological projects. Each of these contexts presents unique problems and functions for the conservator, and the legal implications of his work may be distinguished accordingly. (This is discussed in greater detail later.) These contexts do not define the limits of the individual's experience, however, for as is common for lawyers, doctors and other professionals, conservators travel freely from one institutional role to another, perhaps first working in a museum, then entering private practice, and occasionally teaching or joining archeological digs.

C. History of Restoration.

It is in these contexts and with this preparation that conservators approach the problem of restoration, and the precepts and standards under which restoration is practiced are largely determined by scientific theory, historicism, and the purpose for which a work is preserved. But of equal importance to the development of modern restoration principles is the background of scandals and abuses in which restorers have been involved historically. While every known civilization that valued its cultural heritage made attempts to conserve its art,[18] post-Renaissance conservators more often than not destroyed artworks in their efforts to restore them. As Delacroix wrote in 1854,

> Each so-called restoration is an injury far more to be regretted

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[15] National Conservation Advisory Council, CONSERVATION OF CULTURAL PROPERTY IN THE UNITED STATES, Washington, D. C. (1976), 10; CODE OF ETHICS AND STANDARDS OF PRACTICE OF THE AMERICAN INSTITUTE FOR CONSERVATION OF HISTORIC AND ARTISTIC WORKS, AIC (1980), section II(G) (hereafter "AIC Code of Ethics," "AIC Standards of Practice").

[16] Michaels, at 435. The international association of conservators, the IIC, has approximately 2,000 members, including Americans. Conservators may belong to both groups.

[17] *See* note 15 *supra* and Michaels. Another publication relevant to the present inquiry is the professional code of museum curators, MUSEUM ETHICS, promulgated by the American Association of Museums, Washington, D. C. (1978).

[18] SHELDON KECK.

> than the ravages of time, for the result is not a restored picture, but a different picture by the hand of the miserable dauber who substitutes himself for the author of the original which has disappeared under his retouching.[19]

Even today, the word "restoration" has pejorative connotations for most conservators, synonomous with alteration rather than reconstruction.[20] Against this tradition, modern conservators regard themselves as conservative reactionaries.

The maleficent practices for which restorers were infamous can be laid to the all too common traits of ignorance, incompetence, arrogance and subservience. Scientific knowledge prior to the twentieth century was not advanced enough to permit proper treatment, and conservators were usually profoundly ignorant of the history of a work and of the period in which it was produced.[21] These shortcomings of the era were aggravated by the fact that most restorers were artists who were otherwise incompetent to earn a living. "[T]hose not gifted enough to execute acceptable work were paid pittances for abusing and embalming the productions of their betters."[22] Just as destructive as the incompetence of many restorers was the arrogance of those who boasted they could repaint better than the old masters, and who indulged the temptation to cover up, reconstruct and improvise according to their own tastes.[23] Paintings had figures and motifs added, landscapes altered, and entire skies given new, more 'harmonious' tints.[24] And the scope of restoration was directly proportional to the restorer's opinion of his own talent.

Even a restorer wishing to retain the integrity of a master would find his scruples subjugated to the parochialism and caprices of his patron. Paintings were enlarged or reduced to fit into particular dec-

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[19] Hochfield, at 29.

[20] Caroline Keck, *see* note 6 *supra* (hereafter "Caroline Keck"), at 25; F. KELLY, ART RESTORATION. McGraw-Hill (1972) (hereafter "F. KELLY"), 39.

[21] For example, dangerously strong solvents were used to clean paintings (Hochfield, at 29; F. KELLY, at 35–37), ceramics were repaired with mastics that eventually discolored them or produced stress cracks (KHAZANOVA), and prints were degraded by the acidic content of their remountings (A. F. CLAPP, CURATORIAL CARE OF WORKS OF ART ON PAPER, Rev. Ed., Intermuseum Laboratory, 1973, at 15).

[22] Caroline Keck, at 28.

[23] E.G. Packard, "Changing Approaches and Materials in Inpainting," Precise of Papers Presented at 4th Annual Meeting of the A.I.C., Washington, D. C. (1976), 124.

[24] Hochfield, at 29.

orative schemes of their owners.[25] Nude figures carved in the sixteenth and seventeenth centuries were sanitized with drapes and fig leaves by the Victorians.[26] In one instance, a Holbein painting of the owner as a young man was restored at his order to depict him in his dotage.[27] And of course objects could demand a higher price if their blemishes were concealed, if for example, the missing handle and spout of a vase were replaced with parts from other vases and the entire work repainted.[28] Under the theory that "a good picture, like a good fiddle, should be brown,"[29] many paintings were repeatedly coated with tinted varnish or soot to give them a "patina of time."[30]

D. Modern Conservation Practices.

It is against this background of desecration, misrepresentation[31] and incompetence that modern conservation theories and principles have been fashioned. Contemporary scientific and historical knowledge permits artistic works to be analyzed and treated with minimal harm. To insure such knowledge is properly applied, conservation schools and the AIC Standards of Practice mandate that a conservator prepare a condition report, treatment proposal, and treatment record for every work conserved.[32] These reports are extremely detailed, recording the appearance and condition of the work when the conservator receives it, procedure, methods and materials used to prepare it for restoration, its appearance before restoration, the kind, extent, and location of restored

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[25] Gilberte Emile-Mâle, THE RESTORER'S HANDBOOK OF EASEL PAINTING, Switzerland (1976) (hereafter "EMILE-MÂLE"), 9.

[26] Hochfield, at 29. "Typical illustrations of morals and retouching are Michaelangelo's paintings in the Sistine Chapel. Outraged Church officials demanded the addition of modesty veils to the nude figures. The artist summoned to add these embellishments became known as the 'Pants Man.' " F. KELLY, at 182.

[27] SHELDON KECK, at 16–17.

[28] KHAZANOVA; Caroline Keck, at 26.

[29] Quotation attributed to Sir George Beaumont, a famous nineteenth century collector, in F. KELLY, at 32.

[30] EMILE-MÂLE, at 9; Hochfield, at 29.

[31] The dividing line between restoration and forgery has occasionally been reduced to a matter of intent. *See* "Forgery," chapter X in F. KELLY. Note that the AIC Code of Ethics, section V(C)–(E), and Standards of Practice, section II(F), prohibit conservators from engaging in the authentication, selling, purchasing or appraising of artistic works on a paid or professional basis; such practices are considered to pose a conflict-of-interest for conservators.

[32] AIC Standards of Practice, sections III, Iv. For a model condition report, *see* Buck, "Formal Procedures; Their Effect on Performance Standards in Conservation," in PRESERVATION AND CONSERVATION, 403 ff.

portions, and its final appearance.[33] While on the one hand the conservator is expected to exercise independent judgment in his analyses, proposals, and procedures, on the other he is required to garner approval of his proposals from the work's owner and, where possible, its creator, and to turn over copies of his records to the owner when the restoration is completed.[34]

E. Principles of Conservation.

Precise record keeping allows some preservation of the image a work presents at a given point in time. It documents for the future what was inherited and how it was altered to permit its survival.[35] This is an improvement on historical practices in the field, but it does nothing to protect the physical and artistic integrity of the work itself. To that end, conservators generally observe the principles of *reversibility* and *limitations on aesthetic reintegration.*[36] Reversibility demands that whatever materials are added to a work in the restoration process must be readily removable without endangering the original.[37] The latter principle dictates that no

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[33] *Id.*

[34] AIC Standards of Practice, sections VI, V; AIC Code of Ethics, section III(D)–(F).

[35] Caroline Keck, at 27.

[36] AIC Code of Ethics, section II, paragraphs (E) and (F) state:

> E. Principle of Reversibility
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> The conservator is guided by and endeavors to apply the 'principle of reversibility' in his treatments. He should avoid the use of materials which may become so intractable that their future removal could endanger the physical safety of the object. He also should avoid the use of techniques, the results of which cannot be undone if that should become desirable.
>
> F. Limitations on Aesthetic Reintegration
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> In compensating for damage or loss, a conservator may supply little or much restoration, according to a firm previous understanding with the owner or custodian and the artist, if living. It is equally clear that he cannot ethically carry compensation to a point of modifying the known character of the original.

California's "Art Preservation Act," Chapter 409, Laws of 1979—1980 Reg. Sess., codified as section 987 of the Civil Code, contains an analogous prohibition against altering the known character of a work in what incidentally is one of the rare instances of legislative recognition of art conservation. Section 987(c)(2) reads in pertinent part:

> no person who frames, conserves, or restores a work of fine art shall commit, or authorize the commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art by any act constituting gross negligence.

[37] EMILE-MÂLE, at 8. The problems caused when permanent adhesives are used in reconstructing objects is well described in KHAZANOVA.

artwork be restored to the point of modifying the known character of the original. The real significance of these principles is to be found in the word "original."

"Original" in this context means the work as it appeared when it left its creator's hands. But for artwork which has existed for a substantial number of years, the effects of aging and past restoration have wrought irremediable changes.

> We are all aware that pictures deteriorate as they age, but our awareness is so vague and uninformed that we talk about them as if they were still pristine; even art historians, who ought to know better, discuss paintings as if they were still as fresh as the day they left the studio. If we think about conservation at all, we imagine that it involves the restoration of a damaged or darkened picture to its original state. In fact, that is impossible.
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> We would be closer to the mark if we realized that every old picture is the work not only of the artist who created it but also of a host of unchosen collaborators. Time is the most powerful of these—and the most inexorable. But there are others—perhaps twenty or thirty others in the case of old paintings; they are the restorers who have been patching up the painting since it was painted. Everything they have done to it has changed it.[38]

The abuses inflicted by past restorations have been described above. However, otherwise beneficial restorations may also permanently alter the original appearance if the added elements cannot be safely removed.[39] Even a work that has never undergone restoration bears the chemical accretions and physical losses caused by natural aging. Any attempts to remove this 'patina' will necessarily result in further alteration of the material formed by the original artist.[40]

But what if all the material added by restorers could be removed

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[38] Hochfield, at 26.

[39] Or if the added elements themselves are worthy of preservation:

> "A Painting by Rubens depicting Aesop's fable *The Lion and the Mouse* hangs in the British Prime Minister's country house at Chequers. According to former Prime Minister Harold Wilson, during Winston Churchill's World War II residence there, the great man, unable to see the mouse properly, took up his brush and retouched it. When Mr. Wilson was asked if he would attempt to improve the mouse, which was still rather faint, he replied, 'I wouldn't touch up a Rubens, still less a Rubens touched up by a Churchill.' "
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> F. KELLY, at 181.

[40] Philippot, "Historic Preservation: Philosophy, Criteria, Guidelines," (hereafter "Philippot") in PRESERVATION AND CONSERVATION, 367, 374.

from a work, and all layers of corrosion or discolored varnishes cleaned from the surface of a sculpture, pot or picture, totally revealing what remains of the original artist's work? What would then be exposed is not the work of the creator but its decomposed remnants, for the erosions of time effect an "irreversible metamophosis," the nature and extent of which cannot be precisely determined.[41] "It is an illusion to believe that an object can be brought back to its original state by stripping it of all later additions."[42] Further, methods developed to permit precise analysis and reversal of the effects of aging could not regenerate material lost from a work, flakes from paintings or limbs of a sculpture. Of course, no accurate visual records exist for works antedating the invention of color photography, and even if one is satisfied with the accuracy of photochemical dyes, photographs of modern works cannot communicate the surface texture of an object or impasto of a painting. Under these circumstances, conservators have concluded that "We simply do not know, we cannot know with certainty, what the old masters with which we are so familiar looked like when they were newly painted."[43] The logical corollary to this conclusion is that "the original state is a mythical, unhistorical idea, . . . an abstract concept . . . a state that never existed."[44]

F. Originality of Restorations.

Knowing that the contemporary appearance of a work is not its original one, and that human perceptions are unavoidably subjective,[45] what do conservators see as the goal of restoration? It is to reimbue a work with the aesthetic, emotional and intellectual impact which, as far as the conservator can determine, its creator intended it to have. Any determination as to an artist's intent can be no more than an educated guess,[46] and the conservator must substitute his own artistic and aesthetic

[41] Hochfield, at 33.

[42] Philippot, at 372.

[43] E.H. Gombrich, as quoted in Hochfield, at 28.

[44] Philippot, at 372.

[45] As "each generation will interpret the work of the past in subjective terms," the aesthetic and emotional impact of a work will be perceived differently by conservators than by a work's creator. Caroline Keck, at 26. "However skillful he may be, a restorer unwittingly puts something of the style of his period into his work. This becomes more apparent with time." Ruhemann, at 147. "The spirit of the dead workman cannot be summoned up and commanded to direct other hands, and other thoughts." John Ruskin, THE SEVEN LAMPS OF ARCHITECTURE, London (1925), chap. VI, aphorism 3, pp. 353–354.

[46] E.H. Gombrich, as quoted by Hochfield, at 28; *and see* R. LEPELTIER, THE RESTORER'S HANDBOOK OF DRAWINGS AND PRINTS, Switzerland (1977) (here-

sensibilities for the inevitable shortcomings in historical materials.[47] Moreover, while the primary demand of restoration remains a return to "completeness," now a work is considered complete if it possesses *aesthetic integrity,* a standard requiring varying degrees of restoration. "The *Venus di Milo* is acceptable without arms; the *Mona Lisa* with a great hole would not be tenable."[48] The aesthetic integrity standard is also of varying application. Some conservators argue restoration is permissible only to the extent necessary to make a work "legible," or intelligible, while at the other end of the spectrum are those who attempt to return its emotional content.[49] All agree, however, that restoration injects into a work an original element, foreign to the hand of the work's creator.[50]

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after "Lepeltier"), who recommends at 97 that when no records exist, the restorer should use art works 'in the same style' as a guide.

[47] As John Brealey, Head Conservator of the Metropolitan Museum in New York puts it,

'Pictures are terrifying in their demands on you. You can't hope to do the right thing by an artist by simply removing discolored varnish and attending to mechanical defects, reducing the work of art to a laboratory specimen. Everything that you do to a painting has esthetic consequences. It's a matter of interpretation, not hygiene. A pianist stands or falls on his understanding of the composer's intention. To pretend that it's not a matter of interpretation is incredibly naive, and it's the same with a conservator. . . . Technical problems are very important, but they're only 10% of the thing. The real problem is to understand the artist's intention. If you don't, everything you do will be subtly off.'

Quoted in Hochfield, at 31.

[48] Caroline Keck, at 26–27.

[49] *Compare* LEPELTIER, at 94 (". . . the restorer modestly reconstructs lines and colours. He only wants his contribution to make the work look acceptable. . . ."), with V. T. LEIGH, SOME THOUGHTS ON AESTHETIC ASPECTS OF PICTURE CLEANING, Preprint, International Council of Museums 4th Triennial Meeting (Zagreb, 1975) (". . . it remains imperative that it [the emotional content] be assessed because it is, as we all realize, the raison d'etre of the work of art. . . ."). *See, too,* Philippot, at 375–377, who suggests that restoration be limited to what Gestalt psychology deems is necessary to communicate the image of a work in an intelligible fashion.

[50] "[H]owever we conservators may strive to avoid hypocrisy and shun exploitation in our preservation zeal, we who are gathered here are partners in the manufacture of illusions. This is unavoidable. Anything we do or do not do in our preservation efforts expresses a decision made in the light of our time. The dilemma that confronts us is that fabrications of man have a dual nature. They are constructed of matter and, as such, deteriorate according to the laws that govern all matter. They are also imbued with an immaterial content, the fusion of an artist with his environment. . . . While we may find that determining how to restrain or reverse the changes inflicted by deterioration is far from cut and dried, there is greater unanimity regarding these procedures than there will be in specifying the correct quality of an

The conclusion that restoration constitutes an original contribution is buttressed by the self-imposed constraints conservators observe when restoring a work. In this light, a primary rationale for the reversibility requirement is that a conservator's restoration is only an interpretation of the work which future historical research and scientific discoveries may prove to be less than definitive.[51] The extensive records modern conservators maintain of their work assist in the undoing of a restoration cast into doubt.[52] A protective measure widely practiced is the "six inch-six foot" rule, under which restored portions of a work are given a neutral tone or texture which causes those portions to blend into the existing work when seen from several feet but permits even a layman to distinguish the restoration upon close inspection.[53] Another constraint is the admonishment that restoration should be limited to damaged areas. For instance, when patches of pigment are missing from a painting, the conservator should limit restoration to filling in the areas of loss (or *inpainting*) and assiduously avoid covering any extant material (or *overpainting*).[54]

A more general constraint often voiced is that large areas should never be reconstructed. As one conservator opined, "It would never enter the head of a good conservator to redraw the missing part of a black chalk drawing or etching which had been cut in half."[55] This view judges the propriety of a restoration by what proportion new areas bear to extant areas, too high a proportion purportedly tending to pit the conservator in 'competition' against the work's creator. In actual practice, conservators tend to let the purpose for which a work is valued determine the limit of permissible restoration. Works valuable for their historical connotations, for example, James Madison's reading chair or college alumni portraits, admit much more extensive restoration than an 'artistic' work.[56] Archeological remains are commonly subjected to massive restoration; many museums possess pots in which as little as 5%

original impact. *It would be senseless to deny that the forms that result from our activities will not color the face of history.*" Caroline Keck, at 25–26. (Emphasis added.)

[51] LEPELTIER, at 94.

[52] *Id.*, at 96.

[53] The practice is well-illustrated in KHAZANOVA. EMILE-MÂLE describes similar schemes for retouching paintings at 91–100.

[54] LEPELTIER, at 94; EMILE-MÂLE, at 91.

[55] LEPELTIER, at 96.

[56] Hodges, at 38; *contra* KHAZANOVA; *and see* LEPELTIER, "One cannot help noticing the differences in the attitude of the restorer who works for public bodies and the one who works for a clientele of private collectors or dealers. The former are sometimes over-cautious while the latter take too many risks."—at 93.

of the clay is formed by ancient sherds, the other 95% being new material added by a conservator.[57] Apparently, massive restoration is less objectionable when a work lacks artistic pretensions, another indication of the element of originality in restorations.

II. RESTORATIONS AS COPYRIGHTABLE WORKS.

A. Requirements for Copyright.

No legislature, court or legal commentator in the United States, England or Canada has ever addressed the issue of copyright protection for art restoration.[58] There are thus no overt barriers to such a development in the law. The 1976 Copyright Act states that "Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived. . . . Works of authorship include . . . (5) pictorial, graphic and sculptural works."[59] Traditionally, the courts have been more willing to recognize a thing as a work of art "if it appears to be within the historical and ordinary conception of the term art."[60] Since the discussion here concerns restoration of the fine arts, and more specifically, restoration which affects the *appearance* of a work of fine art, it fits under the rubric of artistic endeavor in a traditional sense. If the other requirements of copyrightability are satisfied, the inclination of the judiciary arguably will be to grant a copyright to a conservator whose cause is meritorious.

(1) Fixation.

The requirements for copyright are originality of expression and fixation in a tangible medium. The requirement of fixation in a tangible medium provides an opportunity for discussing an interesting conceptual point about restorations. Unlike writings, songs, and the other categories of essentially intangible works of authorship in Section 102 of

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[57] Hodges; personal observation based on research in the Winterthur collection of slides of neo-Corinthian pottery.

[58] In addition to American statutes, cases and academic journals, I have reviewed annotated versions of English and Canadian copyright statutes. I have been informed by conservators of malpractice suits brought against members of their profession but this may be mere rumor, as digests and indices list no such cases.

[59] Copyright Revision Act, 17 U.S.C. 101 et seq., section 102, "Subject matter of copyright; In general." (Hereafter, I shall refer to the new copyright act as "the 1976 Copyright Act," or as "the 1976 Act," and citations will be made to the Act's sections directly, not to the United States Code designations.)

[60] Bailie v. Fisher, 258 F.2d 425, 426 (D.C. Cir. 1958), quoting with approval Rosenthal v. Stein, 205 F.2d 633, 635 (9th Cir. 1953).

the 1976 Copyright Act, paintings, sculpture and pottery have a dual nature. A work of fine art is both a unique, valuable chattel and an artistic image or expression.[61] Restoration conserves the chattel but changes the artistic image it possesses. This presents the paradox that under copyright law, the same object can be two different "works," one work being its appearance before restoration and the other its appearance after. Since it is substantially composed of the original work, indeed being a physical transformation or recasting of the original, a restoration is a "derivative work" under the 1976 Copyright Act,[62] with consequences to be discussed later herein.

(2) Originality.

The paramount requirement for copyright is originality, meaning independent creation as opposed to novelty or invention.[63] The Copyright Act nowhere defines "originality," instead incorporating the standards established by the courts under prior law.[64] Fortunately, despite the caveat of Justice Holmes that "it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations,"[65] the case law suffers no lack of pronouncements of the definition of originality. A useful starting point is the famous case *Emerson v. Davies,* in which Justice Story declared,

> . . . in literature, in science and in art, there are, and can be, few, if any, things which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before. . . . He . . . who by his own skill, judgment and labor, writes a new work, and does not merely copy that of another, is entitled to a copyright therein; if the variations are not merely formal and shadowy from existing works.[66]

Justice Story's test for originality sufficient to support a copyright has

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[61] Other consequences of this dual nature are discussed in Brenner, *Copyrighting the Fine Arts,* 24 BULL. COPR. SOC'Y. 85 (1976).

[62] A work is derivative when it is "substantially copied from a prior work." M. NIMMER, COPYRIGHT, section 3.01 (1978) (hereafter "NIMMER"); 1976 Copyright Act, section 101, "definitions."

[63] Mazer v. Stein, 347 U.S. 201, 218, 74 S. Ct. 460 (1954); L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486 (2d. Cir. 1976); House of Representatives, H. R. Rep. No. 94–1476, 94th Cong., 2d Sess., (hereafter "House Report"), p. 51.

[64] S. Rep. No. 94–473, 94th Cong., 1st Sess., (hereafter "Senate Report"), p. 50.

[65] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

[66] 8 Fed. Cas. 615, 619, case no. 4,436 (1845).

been restated in recent cases as a "distinguishable variation,"[67] and a "substantial as opposed to trivial variation" from pre-existing material.[68]

(3) Absence of Copying.

Copying is, of course, the antithesis of originality and anathema to a recognition of copyright.[69] But any contention that restoration may be copying can be readily dismissed. First, since restoration is performed to replace areas of a work which are missing or deteriorated, the conservator obviously cannot copy from the original work. Second, as a practical matter, the degree of restoration a work requires is usually a function of its age.[70] Restoration extensive enough to merit copyright would be required almost exclusively by works created long before the advent of color photography.[71] Other forms of accurate visual records, such as paintings, drawings or models ostensibly copied from the original, are unavailable for any but the most famous masters. Thus for the vast majority of works needing significant restoration, the conservator has nothing to copy *from.*[72] Finally, even if a record of the appearance of a work exists which could be copied, it is unlikely the conservator would do so, for many of the ethical constraints he observes prevent him from attempting to return a work to its purportedly original state.[73]

B. Qualifying Restorations for Copyright.

(1) Standards of Reference for Measuring Variation.

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[67] Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 102 (2d Cir. 1951) (Frank, J.).

[68] L. Batlin & Son, Inc. v. Snyder, 536 F.2d at 490.

[69] *Id.*

[70] As discussed *supra,* text at n.38, aging is the paramount cause of deterioration in artistic works, but in the case of works damaged by maltreatment the observation made in the text is less pertinent.

[71] Color photography was invented in 1893, but did not become available commercially until 1935. NEWHALL, THE HISTORY OF PHOTOGRAPHY, 4th ed., New York (1978), 192–193. Note that very few modern works have been subjected to color photographic studies sufficiently detailed and reliable to permit the conservator to 'copy' them. Further, pictures cannot record texture, depth or true color.

[72] Compare the discussion of 'access' as circumstantial evidence supporting a finding of copying in Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946) (Frank, J.).

[73] For example, the prohibition against overpainting noted in text at n. 54, *supra* would prevent a conservator from reversing discolorations in extant pigment in a painting. The proscription against disproporationate restoration could prevent remodeling limbs or features missing from a sculpture. And the six inch-six foot rule would limit the extent to which added materials could be disguised.

Again, it must be emphasized that an artistic work's "original state" is apocryphal, an artificial construct. This raises a complicated question: To what image does a court refer in determining whether a restoration significantly varies from pre-existing work known to the conservator? As a work of fine art in the public domain ages, each new image it manifests through the transmutations of deterioration also enters the public domain.[71] Alterations effected by previous restorations are in the public domain, too. And while a conservator can almost never know, for reasons already related here, what the 'original state' of the work was, he *can* discover some of the appearances the work eventually assumed. He assuredly knows what the work looks like when he receives it. If the work is famous, it probably was photographed on several occasions in this century. Prior stages of deterioration may be revealed by stripping away decomposition products, protective lacquers and previous restorations. Thus a conservator, and a court for that matter, can determine some of the facades a work assumed during the course of its existence. As the originality of the conservator's efforts must be measured by comparing the results of his work to the facades that were ascertainable and accessible to him, what should a court use as its yardstick for adjudging whether a contemporary restoration constitutes a copyrightable 'variation'?

Resolving this dilemma will be easier if the process of restoration is reduced into several categories:

A. Restoration in which exterior layers and prior restorations are uniformly removed, leaving only what remains of the original artist's work;
B. Restoration in which the conservator both strips a work down to what remains of the original artist's labors and then adds a significant amount of new material;
C. Restoration in which exterior layers and prior restorations are only partially removed, the conservator leaving intact those decomposition products and areas of prior restoration he considers beneficial to the aesthetic integrity of the work;

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[71] Query whether an artist's copyright in a work of fine art covers all the various appearances his work may acquire through aging or accident. Should it matter whether he could foresee the precise impact of time? What if he planned, as do sculptors using Cor-ten steel or untreated wood outdoors, on his work developing a veneer composed of corrosion or deterioration products? The Copyright Office refers to this issue as the "edible cookie" problem. Personal communication with Lewis Flack, International Copyright Officer, Copyright Office.

D. Restoration in which archeological fragments are reconstructed with large expanses of new material.

These categories are simplifications perhaps, in that restoration of a single work may not fit completely into any one of them. On the other hand, these categories faithfully reflect the current schools of thought among conservators regarding conservation theories.[75] They fairly characterize most restorations.

Cleaning old varnish from paintings, distinguishing inpainting from original paint and digging it out, removing anachronistic additions from pottery, reversing corrosion of metal sculpture through electrolytic reduction—all these conservation techniques demand tremendous skill and knowledge and painstaking labor. The fact that high degrees of craftsmanship, labor and artistic sensitivity are required to produce a work has been mentioned often by the courts as an element favoring recognition of copyright.[76] Nevertheless, when employed solely to 'rediscover' a work, no amount of skill and judgment can justify the granting of a copyright. Finding the Dead Sea Scrolls was a boon to humanity, but the finder did not thereby earn a copyright in them. Similarly, stripping away layers of overpaint from a painting may reveal a work of genius otherwise lost to history, but it cannot form a basis for copyright. Hence, restoration performed in accord with category A above would clearly not be copyrightable.

Category B above presents a simple case, too. By completely stripping a work down to what remains of its original material, a conservator begins with a work all of whose constituents date from the same point in time. Then by adding new material with his own hand to restore the aesthetic integrity of the work, a conservator injects into it an original element.[77] At least, conservators consider these additions 'original' work under the reasoning related earlier. While a court need not attend to the opinions of conservators as to whether restored portions are 'original,' judges probably would accept that notion so long as the conserv-

[75] Hochfield offers a fine description of the difference in viewpoint of the first three restoration theories.

[76] *See* Oppenheimer, *"Originality in Art Reproductions,"* 26 BULL. COPR. SOC'Y 1, 15–17 (1978) (hereafter "Oppenheimer").

[77] Conceptually, these other restorations of the work are themselves derivatives of the original work. By stripping away prior restorations, the conservator is destroying these derivative works while revealing the original. The conservator then creates his own derivative of the original by adding new material in restoring it. So long as he does not try to duplicate the images the work assumed under prior restorations and decomposition, he is not copying.

ator's contributions as a whole wrought a significant variation from the material of the work's creator.[78] Since the conservator was starting with and working from the remains of the creator's work, those remnants would be the point of comparison, the baseline for determining whether the restored work varied sufficiently for copyright. The several appearances the work assumed under prior restorations and stages of deterioration would be relevant only if the conservator copied them in his own restoration. As explained above, such copying is unlikely.

Under the procedure described in category C above, the conservator selectively subtracts material rather than adding any to the work. Pursuant to this technique, some portions of a work may be cleaned down to the original materials, some additions from prior restorations may be left intact, and some areas of the work may be left untouched. The resulting restoration is a hodge-podge of materials, with visible areas of the work actually dating from different points in time.[79] Here the original contribution of the conservator is in the selective revelation of existing materials. Such effort may merit copyright protection, for as Justice Story observed in *Emerson v. Davies,*

> He who constructs by a new plan and arrangement and combination of old materials . . . has a title to copyright, which cannot be displaced by showing that some part of his plan, or arrangement or combination has been used before.[80]

To constitute a significant variation worthy of copyright, the restoration must be differentiable from the sources of its constituents. To illustrate, imagine an old painting whose original pigment is covered by four complete layers of paint added by successive restorations.[81] A modern

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[78] *See* the discussion Part B(4) *infra* on types of evidence which should be received by courts considering the issue of originality of restorations.

[79] One might go as far as to call the resulting work a "compilation." *See* definition of compilation in section 101, 1976 Copyright Act.

[80] 8 Fed. Cas. at 619.

[81] Compare this illustration with a passage from SHELDON KECK, at 14:

> An example of medieval restoration was elegantly brought to light some years ago in Florence, Italy, by the skilled hand of Leonetto Tintorini. His preliminary examination . . . revealed that under the paint seen on the surface, consisting largely of restorations dating from the fifteenth to nineteenth centuries, were indeed two earlier layers each in reasonably good state of preservation. Tintorini first removed the top layer of crude provincial restorations to uncover the upper of the two early layers. The surface revealed could be dated stylistically about the last decade of the thirteenth century. Still covered by this restoration was the original painting of about 1250.

conservator decides that each of the paint layers has something to offer, and accordingly uncovers portions of each to form the final work. To determine whether the final appearance thus obtained comprises an original work, it should be compared to the image each layer of paint would display were it completely revealed.[82]

Archeological remains, category D above, have traditionally offered conservators opportunities for restorations of the greatest scope. The reasons for this are several. First, few archeological objects are discovered intact and rarely are all fragments from a piece retrieved. Massive amount of new material must be added simply to reconstruct an object into an intelligible form. Second, the historical or ethnographical significance of antiquities often eclipse their aesthetic value. Commonly, the goal of conservators is to reveal the possible social and utilitarian aspects of such objects, not to revive their aesthetic integrity. Work of this nature has occasioned the fashioning of restorations in which the vast preponderance of each object is formed by material added by the conservator. The authenticity of the form, texture, color and construction of these restorations is totally a matter of academic conjecture. More to the point here, in restorations of such proportions the archeological fragments actually integrated into the completed work cannot serve as a basis of comparison for determining the degree of variation the conservator's additions evince. Instead, a court must look to the same sources of information a conservator does when embarking upon such projects, museum collections of similar antiquities and archeological treatises. It seems safe to conclude that in virtually every case such extensive restorations will contain enough of the conservator's own hand to merit copyright protection.

(2) Copyrightability of Utilitarian Antiquities; A Special Problem.

This discussion lends itself to consideration of a special problem, the copyrightability of restorations performed on objects of utilitarian origins. The 1976 Copyright Act defines utilitarian objects as "useful articles," or articles "having an intrinsic utilitarian function that is not merely to portray . . . appearance . . . or to convey information."[83] Design elements of useful articles, configuration, construction, surface tone and the like, are eligible for copyright as pictorial, graphic or sculptural work only if such artistic features can "be identified separately from, and are capable of existing independently of, the utilitarian aspects of

[82] Compare this to the process of analysis used in Davis v. E.I. Dupont de Nemours & Co., 240 F. Supp. 612 (E.D.N.Y. 1965).

[83] Section 101, 1976 Copyright Act.

the article."[84] This rule is relatively easy to apply when the utilitarian aspects of an object are obvious. Stained glass windows will always admit light; statuary lamps remain illuminating; bas-relief doors are no less secure for their ostentation.[85] But when the utilitarian functions of an object recede in importance or are forgotten altogether, can it become copyrightable?

In *Ted Arnold Ltd. v. Silvercraft Co.*,[86] a model antique telephone housing a pencil sharpener was granted copyright protection. The court reasoned that the model telephone was independent of the unit's function as a pencil sharpener and indeed, physically separable from the sharpener. Also emphasized was the high cost of the unit; customers clearly were paying for how it looked rather than what it did. Similarly, candlesticks have been accepted for registration by the Copyright Office as part of a "small special category of articles . . . whose utilitarian function . . . has now atrophied."[87] Thus, articles which once were strictly utilitarian can be accepted for copyright when they have been adapted to uses unrelated to their design or when their utility has declined. Of course, the antique telephone and candlesticks referred to here were crafted by contemporary artisans following older archetypes. Conservators, in contrast, work with genuine antiquities. Still, the analogy remains apt. A suit of armor, once so necessary for the maintenance of life and limb, is now no more than a conversation piece. Bronze age tools are esteemed by institutional collectors for the ingenuity of design and quality of workmanship they display. Many artifacts kept by museums have no proven use, being retained because they demonstrate such things as ancient calligraphy or early industrial methods. The utilitarian origins of such artifacts should be no barrier to copyrighting their restorations.

(3) Degree of Variation Required.

Assuming a court finds pursuasive the above-suggested standards of reference for determining the degree to which a restoration consti-

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[84] *Id.*, definition of "pictorial, graphic and sculptural works." The evolution of this doctrine from Mazer v. Stein, 347 U.S. 201, 74 S.Ct. 460 (1954), through Copyright Office Reg. 202.10(c), 37 C.F.R. 202.10(c) (1959), to Esquire v. Ringer, 591 F.2d 796, 192 U.S. App. D.C. (D.C. Cir. 1978), *cert. den.*, 99 S.Ct. 1217, *reh. den.* 99 S.Ct. 2019, is well presented by NIMMER, section 2.08(B) (3).

[85] These examples of utilitarian objects with copyrightable elements appear in Stein v. Mazer, 204 F.2d 472, 477 (4th Cir. 1953), *aff'd*, 347 U.S. 201, 74 S.Ct. 460 (1954).

[86] 259 F. Supp. 733 (S.D.N.Y. 1966).

[87] Esquire v. Ringer, 591 F.2d at 802, n. 20.

tutes a variation from pre-existing work, how great a variation would be demanded for copyright to issue? There is debate over whether the variation must be *substantial* or merely *distinguishable*,[88] the former standard being enunciated in *L. Batlin & Son, Inc. v. Snyder*,[89] and the latter in *Alfred Bell & Co. v. Catalda Fine Arts*.[90] Both these cases dealt with the copyrightability of reproductions of fine art, a problem highly relevant to the matter at hand. The resolution of this question might have the effect of including within or excluding from the ambit of copyright vast numbers of restorations, and so merits discussion.

The term "distinguishable variation" has been invoked repeatedly in copyright cases, with *Bell v. Catalda* being the most salient precedent, a status it owes to the prominence of its author, Judge Frank, and to the concision with which it summarizes earlier case-law. In holding a mezzo-tint reproduction of a public domain painting to be copyrightable, Judge Frank held that a copy of something in the public domain will support a copyright if it is a distinguishable variation such that the author contributed something more than merely trivial, something recognizably his own.[91] The author's skill and talent are irrelevant in theory; variations accidentally or mistakenly created are equally worthy of protection.[92]

It has been argued that this minimal standard was necessitated by the paradox Congress created when it included "reproductions" among the classes of copyrightable works in the 1909 Act,[93] the paradox that a reproduction could be original.[94] Although a lowered standard of originality may better effectuate Congressional intent, it creates the danger that unscrupulous individuals will copyright reproductions with variations so subtle that innocent copyists will be deterred from copying an underlying public domain work by fear of infringing upon the reproduction.[95] The prospect of this 'chilling effect' is reduced to an extent by the condition that variations must be more than trivial to be distinguishable. Introducing slight differences into an otherwise slavish copy will not produce copyrightable material.[96] Moreover, the courts have

[88] *See* Oppenheimer, at 1–4.
[89] 536 F.2d 486 (2d Cir. 1976).
[90] 191 F.2d 99 (2d Cir. 1951).
[91] *Id.*, at 102–103.
[92] *Id.*, at 104–105.
[93] 17 U.S.C. 5(h) (1970).
[94] Oppenheimer, at 1–2.
[95] *See* Snow v. Laird, 98 Fed. 813 (7th Cir. 1900); Oppenheimer, at 13.
[96] *See* Gerlach-Barklow Co. v. Morris & Bendien, Inc., 23 F.2d 159 (2d Cir. 1927), where a painting was copied with slight alterations and given a new title, and Gross v. Seligman, 212 Fed. 930 (2d Cir. 1914), where a photographer added a cane to a figure in a photograph.

been quick to deny copyright on the basis of triviality in cases where overt misappropriation is evident.[97]

In *L. Batlin & Son,* both misappropriation and the problem of the unscrupulous copyist were alluded to in the court's finding that the variations introduced in the work by the defendant were trivial, and it was in this context that the court stated its test of copyrightability as substantial, not merely trivial variation.[98] Also dwelled upon was the degree of skill required to create the reproduction at issue. The court opined that mere physical skill and special training would not suffice; true *artistic* skill is demanded for copyrightability.[99] Pointing out that the mezzo-tint in *Bell v. Catalda* was a product of great labor and talent, the court implied that both the degree of variation and the skill required to create it were relevant.

Distinguishable or substantial variation?—the conflict between *Bell v. Catalda* and *L. Batlin & Son* in this regard appears irreconciliable. They cite identical precedents in applying the same statute to similar subject matter. The latter case relies directly on the former and never expressly indicates an intent to overrule or modify its predecessor. Cases subsequent to the two cite them both without adhering consistently to the standard of either. It would be helpful if one could isolate the confusion these two cases create by limiting their applicability to art reproductions or to works falling under the 1909 Copyright Act. Unfortunately, *L. Batlin & Son* denies outright that the underlying principles of originality are any different for reproductions of a work of art than for works of art themselves, and the 1976 Copyright Act is said by its legislative history to include art reproductions in its definition of pictorial, graphic and sculptural works.[100] As the more recent case, *L. Batlin & Son* might be deemed more compelling authority. However, its introduction of the elements of skill and labor into the determination of originality departs from the weight of precedent in considering factors *unobservable* in the final work. And while it uses the term "substantial variation" to describe its threshold standard of originality, the same ad hoc analysis of visible variations is followed by the court as was used in *Bell v. Catalda.* With the exception of the insistence upon a showing of artistic skill and labor, *L. Batlin & Son* adds nothing articulable to the "distinguishable variation" test of *Bell v. Catalda.*

It is difficult to conceive of a task demanding greater artistic skill,

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[97] *See, e.g.,* L. Batlin & Son, Inc. v. Snyder; Gerlach-Barklow Co. v. Morris & Bendien, Inc.; Gross v. Seligman.

[98] 536 F.2d at 492.

[99] *Id.,* at 490.

[100] *Id.;* Senate Report, p. 53; House Report, p. 54.

labor and judgment than restoration of a work of art. In truth, restoration of individual works might be so minimal as not to merit copyright, but with such modest efforts the observable variation in the work will be commensurably limited. Some conservation involving intense labor may produce no observable alterations in a work at all, as when a painting is relined or a panel cradled.[101] Yet it is safe to say that a restoration which effects significant observable changes in the appearance of a work represents a substantial expenditure of time and artistic skill and labor. And as restorations are undertaken to insure the survival of works of art, not to produce commercially exploitable reproductions, conservators cannot be accused of misappropriation or other inequitable conduct. This seems to meet all the elements of the "substantial variation" test set forth in *L. Batlin & Son* except for the problem of the unscrupulous copyist. Unless a conservator has followed the six inch-six foot rule, thereby delineating portions added during the restoration by discoloring them slightly, it will be well-nigh impossible for an innocent copyist to determine what portions of a work are in the public domain. Fear of infringing upon the conservator's copyright could render a great deal of art inaccessible to the public.

Affixing a copyright notice in an obvious place would put copyists on guard as to the presence of protected alterations added through restoration, and they might then inquire at the Copyright Office for records revealing the extent of protected material. Or conservators could post such records wherever a restored work is displayed. Unfortunately, neither of these proposals is tenable, for conservators emphatically refuse to affix labels to an area open to display, believing it both mars a work and detracts from the recognition due the actual artist,[102] and there is no way to guarantee any records not so affixed would remain with the work. A more promising solution is to invoke the doctrine of fair use and declare that copying of a public domain work which has been restored does not infringe the conservator's copyright unless done for commercial purposes or accomplished in a manner which threatens to harm the work. (This idea will be developed more fully later herein.) This would free the vast majority of the public, the casual, innocent copyists, from any concern regarding infringement.

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[101] Wood panel paintings tend to split. To correct this, the panel is shaved from the back to near paper-thinness and then affixed to a "cradle" composed of laminated balsa blocks. Personal communication, Deborah Dyer, University of Delaware/Winterthur Museum.

[102] Personal communication, Michael Heslip, University of Delaware/Winterthur. Conservators would feel no compunctions about affixing such a notice to a hidden area of a work, however. *See* note 115, *infra*.

Restoration transforms many works in so startling a manner that the variation is, in the plain use of the word, 'substantial.' According to the above analysis, however, the "substantial variation" test demands less than its name portends, requiring instead distinguishable variations accomplished through artistic skill and labor without inequitable conduct. As has been shown, these intangible elements are present in virtually all restorations, so the test descends to whether they exhibit a distinguishable variation, a burden easily met by definition. Yet this conclusion must be tentative, for the case law on the issue is confused and the court's determination is arrived at, in any event, through an ad hoc analysis. In pragmatic terms, it may be of little consequence whether one court demands substantial variations and another merely distinguishable ones. With this settled, it is possible to address the question of who the finder-of-fact should be to apply these standards.

(4) Appropriate Fact-Finder.

Who is to determine the existence and sufficiency of variation between a restored work and its precursors, a judge, a jury of laymen, conservators or art connoisseurs?[103] Some courts have used the "ordinary observer" test as applied by bench or jury.[104] Jurists of greater insight in the matter have taken pains to point out that the ordinary observer test is called for in actions for infringement, not in those for grant of copyright. Addressing this point in *Puddu v. Buonamici Statuary, Inc.*, Judge Friendly commented that "Originality sufficient for copyright protection exists if the 'author' has introduced any element of novelty as contrasted with the material previously known to him."[105] This he distinguished from the test for infringement, which asks whether "the ordinary observer, unless he set out to detect the disparities [between two works], would be disposed to overlook them, and regard their aesthetic appeal the same."[106] The inference here appears to be that the presence of variation necessary to support a copyright is to be determined either by non-laymen, perhaps by the court's acceptance of expert testimony on the issue of originality, or by laymen "who set out to detect disparities."

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[103] *Cf.* Gross v. Seligman, 212 Fed. at 931, "The eye of an artist or connoisseur will, no doubt, find differences between these two photographs," but they would seem to be copies "to the ordinary purchaser who did not have both photographs before him."

[104] *See, e.g.*, Gardinia Flowers, Inc. v. Joseph Markovits, Inc., 280 F. Supp. 776, 782 (S.D.N.Y. 1968).

[105] 450 F.2d 401, 402 (2d Cir. 1971).

[106] *Id.*

Although no cases on copyrightability have discussed this issue directly, some have accepted expert testimony as to the degree and nature of variations between works.[107] Conservators would be better served if expert testimony were received on the issue of originality in restorations, but it might suffice if a court admitted records of restoration supported by testimony as to their significance and manner of creation. Comparing before-and-after photographs highlights alterations. Restoration performed according to the six inch-six foot rule permits added portions to be perceived by close inspection of intimate photographs of the work. Other more technical methods of identifying spurious material, such as ultraviolet photography and chemical analysis, are also available.[108] Provided with these records, and aided by testimony as to how they were made and what they reveal, laymen should have no difficulty detecting variations where they exist. The issue of the sufficiency of these variations would then be left to judge or jury. Worth mentioning is that since copyright in derivative works extends solely to those elements added to the pre-existing work,[109] conservators accordingly could acquire rights only in those elements added by restoration. The extensive records maintained by conservators during restoration thus offer a source of evidence for both establishing copyrightability and setting the limits of protected material.

C. Deposit and Registration Requirements.

Conservators' restoration records also offer a mode of satisfying the deposit and registration requirements under sections 407 and 408 of the 1976 Act. Section 407 permits the Register of Copyrights to either exempt owners of copyrights in pictorial, graphic or sculptural work from the deposit requirement, or to accept alternative forms of deposit.[110] This provision is designed both to avoid the problem of authors being forced to forfeit copyright protection rather than bear the expense of depositing original art works, and to ease the administrative burden

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[107] *See, e.g.*, L. Batlin & Son, Inc. v. Snyder, 536 F.2d at 489, in which expert testimony was received as to the substantiality of variations and the skill necessary to create them; Alva Studios, Inc. v. Winninger, 177 F. Supp. 265, 267 (S.D.N.Y. 1959), in which experts testified as to the skill and 'originality' demanded in making a scale reproduction of a sculpture. Expert testimony is also admissible on the issue of variation so far as it relates to proof of copying under Learned Hand's famous "abstraction test," but here, remember, the question is whether a work is copyrightable, not whether it infringes.

[108] *See generally*, Ruhemann, note 13, *supra*.

[109] Emerson v. Davies, 8 Fed. Cas. at 619; Wihtol v. Wells, 231 F.2d 550 (7th Cir. 1956); NIMMER, section 3.02; 1976 Copyright Act, section 103(b).

[110] Section 407(c).

of registering three-dimensional objects.[111] Submission of the photographic records described above should satisfy the deposit requirements.[112] The Copyright Office then could release these records to persons wishing to copy the public domain aspects of the restoration.

D. Restoration as Infringement.

An administrative problem of a more intractable nature than registration requirements is posed by the restoration of works in which a viable copyright subsists. As a derivative work, a restoration would infringe that copyright, and both the conservator and the owner of the art work, assuming the latter does not possess the copyright, would be potentially liable to suit.[113] To avoid this predicament, conservators would have to gain the permission of the copyright holder before attempting a restoration of a significant nature. Since the conservator's immediate contact with a work is initiated by its owner, and the owner of a work often is not the copyright holder,[114] this might prove a restraint on restoration. Fortunately, as already noted, the scope of restoration required is generally proportional to the age of the work, and hence works needing extensive restoration most probably have passed into the public domain. Moreover, contemporary artists tend to shun copyright, considering its commercial connotations demeaning and the copyright notice disfiguring, with the result that the preponderance of modern artistic works are not copyrighted.[115] Finally, the AIC Code of Ethics and Standards of Practice mandate that a conservator consult a work's creator as well as its owner regarding the permissible extent of restoration.[116] Thus the consent of the two persons most likely to own the copyright must be garnered before restoration can commence, providing

[111] House Report, at 151, 154.

[112] One deposit can satisfy both the mandatory Library of Congress provision of section 407, and the permissive Copyright Office provision of section 408. *See* section 408(b), 1976 Copyright Act.

[113] Both owner and conservator participate in the creation of the derivative work, violating the copyright holder's exclusive right under section 106(2) of the 1976 Act.

[114] *See* 1976 Copyright Act, section 202.

[115] Sheehan, *Why don't Fine Artists Use Statutory Copyright?* 22 BULL. COPR. SOC'Y 242 (1975). Another possible reason for artists' antipathy toward copyright is the onerous mandatory deposit requirement under the 1909 Act. *See* House Report, at 151, 154. My conversations with conservators indicate no such reluctance on their part to affixing a copyright notice to a work, so long as it is attached to a part not normally displayed, such as to the back of a painting. A notice placed in that position would be effective. NIMMER, section 7.10(A).

[116] *See* note 36, *supra*.

the perfect opportunity for settling questions of infringement.

The problem of infringement should not be casually disregarded, however. Just the prospect of a suit, irrespective of its likelihood, could deter conservators from performing needed treatments. Inevitably, whenever copyright protection is extended, the question of infringement arises and must be met. Here the best course for conservators is resort to the doctrine of fair use. The House and Senate Reports to the 1976 Act suggest as much in passages lauding preservation efforts directed at motion pictures made on nitrate-based films which are rapidly decomposing. The legislative history to section 107, "Fair Use," provides that "The making of duplicate copies for purposes of archival preservation certainly falls within the scope of fair use."[117] In section 108 of the 1976 Act, the fair use provision for libraries and archives, express permission is given to duplicate works to replace, among other things, damaged or deteriorating copies,[118] and this applies to fine art works, too.[119] Moreover, the Copyright Office has accepted for registration restorations of motion pictures, restorations not all of which were performed by non-profit archival institutions.[120]

These precedents demonstrate some recognition of the same problems faced by the fine arts, but they are not directly apposite. A work of fine art is a unique chattel while motion pictures are produced in untold numbers of copies. Permitting one individual to restore a decomposing film will not hinder another from doing the same to his own copy. In contrast, a restoration always alters a fine art work in some respects (hopefully salutary), denying the public access to what previously appeared. This militates against blindly encouraging restorations of fine art works by sheltering them under the fair use doctrine. Conversely, permitting an unlimited number of individuals and institutions to each make one copy of a film or publication threatened by decomposition must hurt the market for those works. Restoration of a fine art work has no adverse economic consequences to the copyright owner; on the contrary, it enriches the latter by prolonging the useful life of the property in which his rights are vested. Distinctions such as these necessitate considering as a separate problem applying the fair use doctrine to restorations of the fine arts.

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[117] House Report, at 73; Senate Report, at 66.

[118] 1976 Copyright Act, section 108(c).

[119] 1976 Copyright Act, section 108(h). The debate regarding the respective scopes of sections 107 and 108 and their interrelationship is here acknowledged, but that issue is largely tangential to the topic at hand.

[120] Personal communication with Lewis Flack, International Copyright Officer, Copyright Office. The films are registered as "revisions" or "additions" rather than as "reprints."

The doctrine of fair use, although given express statutory recognition in the 1976 Act, has never been completely defined. It is a creature of the common law, applied through example and analogy as the equities of each case demand.[121] The codification of fair use in the 1976 Act is a restatement only, and was not intended to modify the doctrine or affect the course of its development in any way. Certain purposes for copying are enumerated in section 107 as protected classes, criticism, comment, news reporting and the like, but these were listed to illustrate, not limit judicial application of the doctrine.[122] A court is free to consider the eligibility of restorations for protection from infringement actions under fair use so long as the following factors are examined:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.[123]

These factors shall now be considered seriatim.

Conservators are generally well-paid for their labors and in this sense restorations are executed for commercial gain. Yet their efforts do not multiply the number of extant copies of a work. The existing copy of the work is consumed in producing the derivative work, the restoration. Properly speaking, no *reproduction* occurs, as that term is used in sections 107 and 108 of the 1976 Act,[124] and no commercial gain accrues to the conservator from the sale or distribution of an additional copy. Some profit could be derived if the conservator were granted a copyright in the restoration and then charged others for the right to reproduce his portions of the work.[125] However, as will be argued later

[121] House Report, at 65.

[122] *Id.*, at 66.

[123] 1976 Copyright Act, section 107(1)–(4).

[124] The term "reproduction" is nowhere defined in the 1976 Act. In the legislative history the term is used in the sense of duplication, replication, photocopying and reissuance, or in other words, the creation of distinct additional copies. *See* House Report, at 72–78; Senate Report, at 65–69.

[125] Conservators have this right in any event under section 103(a) of the 1976 Act, which grants protection even to infringers for any material not used unlawfully. However, exploitation of a work in reliance on this section would constitute inequitable conduct and thus work against an extension of fair use to restorations.

herein, the conservator would exercise his copyright to preserve a work, not to reap profits from its exploitation. Thus preparation of a derivative work through restoration of fine art is non-commercial in nature within the contemplation of the copyright laws.

The nature of the fine arts, unique, valuable chattels subject to deterioration, militates for encouraging restoration through protection by the fair use doctrine. The specific recognition in the legislative history of the 1976 Act of the urgent need for duplication of nitrate-based motion pictures supports this view. On the other hand, granting blanket immunity to restoration efforts may backfire. Conservation is a young profession of low visibility. No licensing exists and certification by the national association, the AIC, is of recent origin. There are many people at large practicing conservation who lack the training, skill and ethical standards which modern restoration demands. The fair use doctrine must be used to channel works away from the quacks and toward qualified conservators. With this caveat in mind, the suitability of the nature of restoration for fair use protection can be reaffirmed.

A restoration incorporates the pre-existing work in its entirety and is by no means a modest or trivial 'taking.' This consideration, section 107(3) of the 1976 Act, must be applied in tandem with section 107(4) in these circumstances. The latter clause inquires into the effect of restoration upon the market for or value of the copyrighted work. The condition of a work of fine art always plays a role in determining its value and restoration is an absolute necessity for sustaining that value. Proper restoration can only improve the potential market for a work and for reproductions of it. Hence, while restoration involves a complete taking of a work, it is an entirely benign appropriation. With these last two factors favorably resolved, it can be concluded that the doctrine of fair use should be invoked to protect the professionally trained and certified conservator from fear of actions for infringement.

E. Ownership of Copyright in Restorations.

Who will initially own the copyright in a restoration? The 1976 Act continues the rebuttable presumption originating in the common law and codified in the 1909 Act that works created within the scope of employment are "works for hire," copyright in which vests in the employer.[126] The existence of the employment relationship is said to be determined according to general agency principles of master and servant.[127] These include whether the alleged employer instigated the work,

[126] 1976 Copyright Act, section 201; May v. Morganelli-Heumann & Assoc., case no. 28–1571 (9th Cir. May 15, 1980), CCH Copyright Law Reports paragraph 25,155.

[127] NIMMER, section 5.03(B) (1) (a).

provided the materials and facilities for producing the work, had the right to direct and supervise the putative employee in his work, and generally would acquire the copyright under the customs and usage of his trade.[128] The mere fact an artist is an independent contractor or demands creative freedom in his work will not defeat the "works for hire" doctrine, for the doctrine is based on the presumed intent of the parties. The overall circumstances of the relationship control.[129]

A conservator working for a museum fits perfectly within the definition of employee. The museum assigns her work, provides her with materials and facilities, and as a rule dictates policy as to the extent and nature of permissible restoration. Any copyright created through restoration would clearly vest in the museum under section 201 of the 1976 Act.[130] In contrast, a conservator in private practice provides her own facilities and materials, decides the nature and scope of restoration, and generally exercises much more independence and creativity in her work.[131] A client instigates her work and compensates her for it, but, as copyright has never been claimed in a restoration of fine art, transfer of a copyright has never been part of the bargain. Relevant trade customs and implied understandings do not exist. Here the better argument is that the private conservator works on *commission,* rendering the "works for hire" doctrine inapplicable.[132]

Conservators on the staff of archeological digs occupy a bizarre legal niche. They are usually working in a foreign country whose laws decree that all artifacts discovered belong to the state. They might be employed by the head of the dig, the institution which sponsored it, or the government of the nation where it is located. In this context, the conservator is completely unsupervised and is permitted both by the standards of her profession and the exigencies of the circumstances to perform restorations of massive scope and originality. The legal com-

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[128] May v. Morganelli-Heumann & Assoc.; Murray v. Gelderman, 566 F.2d 1307, 1309 (5th Cir. 1978); Scherr v. Universal Match Corp., 297 F. Supp. 107, 112 (S.D.N.Y. 1967).

[129] Murray v. Gelderman, 566 F.2d at 1310–1311; May v. Morganelli-Heumann & Assoc.

[130] Note that no copyright would be created in works restored by conservators working for national museums, as U.S. Government works are ineligible for copyright. 1976 Copyright Act, sections 101, 105. *Cf.* Scherr v. Universal Match Corp., 297 F. Supp. at 110, which held that this prohibition applied only to printed works, not fine art works, under the 1909 Act, 17 U.S.C. 8 (1970).

[131] *See* note 56, *supra.*

[132] Restorations do not fall within the enumerated classes of commissioned works presumptively considered works for hire under paragraph 2 of the definition of "works for hire," section 101, 1976 Copyright Act.

plexities this presents are awesome and must await a future article for proper discussion.

Conservators and their clients may of course resolve all doubts regarding ownership of any copyright created by restoration by drafting a written agreement.[133] Conservators might prefer not to claim every right that accrues with copyright, for fear the prospect of creating copyrights in others will prevent the owners of artistic works from having them restored. A sound policy for conservators would be to abrogate all rights of commercial exploitation while retaining those rights which aid them in the preservation of the work. These rights are discussed below.

F. Benefits of Copyrighting Restorations.

Their inability to protect works after they have left their hands is a source of tremendous frustration to conservators. Their journals are replete with horror stories about works irrevocably damaged through the ignorance, negligence or misfeasance of their custodians. Copyright offers a means of controlling the treatment a work receives and this is the great virtue of recognizing copyrights in restorations. Admittedly, such recognition would not be a total panacea, for until the United States adds moral rights to its copyright law a work's owner has much more meaningful control over its particular disposition than does the copyright holder.[134] Nevertheless, the rights which are available under American law would be warmly embraced by conservators, specifically the rights to authorize display, reproduction, and the preparation of derivative works.

The display right, first granted to copyright holders in the 1976 Act,[135] confers upon them the exclusive right to authorize the public display of a fine art work.[136] This right is limited by section 109 of the Act, which gives owners of individual works the privilege of displaying their copy directly or by transmitting single images of it.[137] With this power, conservators could prevent mistreatment of a work by refusing to authorize its public display under harmful conditions, such as exposure to klieg lights during television broadcasts. Similarly, under the

[133] Section 201(b) of the 1976 Act suggests just such a remedy.

[134] The possibility of the United States adopting moral rights, and the analogues to moral rights presently recognized under American law are discussed in Gabay, *The United States Copyright System and the Berne Convention*, 26 BULL. COPR. SOC'Y 202 (1979).

[135] NIMMER, section 8.02(A).

[136] 1976 Copyright Act, section 106(5).

[137] Note that persons possessing a work under rental, lease or other arrangment without having title do not enjoy this privilege.

right to authorize reproductions of a work, conservators could insure the safety of the methods used. Conservators could augment their powers under these rights by contract with their clients, too.[138]

Since a restoration which effects significant alterations is a derivative work, any restoration is a derivative of prior restorations if it contains elements added during the latter.[139] The right to authorize derivative works empowers a conservator to require that subsequent restorations of a work he has treated be performed by certified conservators. As argued earlier, restoration by a trained and certified conservator should be deemed fair use,[140] but restoration by unqualified individuals would be an infringement and this the conservator could prevent. She may also prevent the wrongful attribution of her work, which permits her to suppress schemes for forgery and palming off involving works she has restored.[141]

Apart from the powers they stand to gain, conservators will favor copyrighting restorations because it encourages museums to maintain the condition of their collections. Currently, many museum collections are deteriorating faster than new works can be acquired.[142] Lack of conservation facilities and staff is the primary cause of this. As any restoration performed by staff conservators would invest the museum with a copyright in the work under the "works for hire" doctrine, museums have a direct financial incentive to establish conservation facilities. This would advance both the profession of conservation and the objects of its dedication.

III. CONCLUSION.

Art conservators are the custodians of the cultural heritage of mankind. Their education and aptitudes uniquely qualify them for the responsibility of preserving and protecting artistic works in a form which maintains their aesthetic integrity. Granting conservators copyrights in restorations would aid them enormously in this worthy endeavor. The concomitant benefits society would derive from this development in the law should make the same idea attractive to the courts.

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[138] The reproduction is set forth in section 106(1) of the 1976 Copyright Act. The possibility of modifying these rights by contract is discussed in House Report, at 79.

[139] *See* category C, text at n.75, and discussion, text at n.79–82, *supra*.

[140] *See* text following n.120, *supra*.

[141] *See* NIMMER, section 8.21(D) (2), and cases collected thereunder.

[142] Hochfield, at 28.

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PART II

LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

1. United States of America and Territories

261. U.S. COPYRIGHT OFFICE.

37 CFR 202. Registration of claims to copyright; notice of termination of inquiry regarding blank forms. Notice of termination of inquiry. *Federal Register,* vol. 45, no. 187 (Sept. 24, 1980), pp. 63297–63300.

The Copyright Office is terminating its inquiry on the subject of registration of claims to copyright in blank forms. The Office elicited public comments, views and information to assist it in a review of the validity of the blank form regulation under the new Copyright Act and relevant judicial precedent. All of the responses, but one, were in favor of a liberalization of the policy. After careful review of these responses, along with other legal and policy considerations, the Copyright Office has concluded that the principle of the existing regulations remains valid under the current law. A rewording of the regulation in connection with a later rulemaking proceeding on noncopyrightable subject matter generally may be proposed. This rewording would not be intended to change the basic principle of the Office's present position that registration cannot be made for mere blank forms, however.

262. U.S. COPYRIGHT OFFICE.

Privacy act of 1974; annual notice of systems of records. *Federal Register,* vol. 45, no. 182 (Sept. 17, 1980), p. 61821.

In compliance with the Privacy Act of 1974 (5 U.S.C. 552a(e)(4)), the Copyright Office publishes its annual notice of the existence and character of its systems of records. The Office last published the full text of its systems of records on September 4, 1978 (43 F.R. 41165). No further changes have occurred; therefore, the systems of records remain in effect as published at that time.

263. U.S. COPYRIGHT OFFICE.

Report of the Register of Copyrights on the effects of 17 U.S.C. 108 on the rights of creators and the needs of users of works reproduced by certain libraries and archives; public hearing. Notice of public hearing. *Federal Register,* vol. 45, no. 164 (Aug. 21, 1980), pp. 55874–55876.

On Oct. 8, 1980, the Copyright Office is conducting the fourth in a series of regional public hearings on the effects of 17 U.S.C. 108 on the rights of creators and the needs of users of works reproduced by certain libraries and archives. Sections 107 (fair use) and 108 represent a balance between the positions advocated by the proprietor and user communities during the Congressional hearings on the 1976 Copyright Act. Uncertainty about their current and future effectiveness led Congress to mandate that the Register of Copyrights prepare impact reports at five-year intervals. In preparation of the first report, which is due January 1, 1983, the Copyright Office is holding public hearings and is considering the possibility of conducting an empirical survey to provide objective data on the effects of Sec. 108. The purpose of this hearing, which will be held in Anaheim, California, is to examine the development of practices under the section. Those interested in testifying are asked not to simply reiterate positions previously expressed with respect to library copying but to amplify their remarks by discussing ways in which the Act has or has not affected their practices and by answering the questions set out in the notice.

264. U.S. COPYRIGHT ROYALTY TRIBUNAL.

37 CFR 304. Cost of living adjustment for compulsory royalty rates paid by non-commercial broadcasting. Final rule. *Federal Register,* vol. 45, no. 150 (Aug. 1, 1980), p. 51197.

In accordance with Part 304.10 of its final rule published June 8, 1978 (43 F.R. 25068), the Copyright Royalty Tribunal publishes a revised schedule of rates to be paid by non-commercial broadcasting for the use of certain copyrighted works. The increased dollar amounts set out in the revised schedule reflect a 14.4% cost of living adjustment as determined by the Consumer Price Index (all urban consumers, all items) from the Index published June 26, 1979, to the last Index published prior to August 1, 1980. The new rates go into effect Sept. 1, 1980.

265. U.S. COPYRIGHT ROYALTY TRIBUNAL.

Cable royalty distribution proceeding. Notice. *Federal Register,*

vol. 45, no. 148 (July 30, 1980), p. 40621.

The Copyright Royalty Tribunal announces its conclusion of Phase I of the cable royalty distribution proceeding. The purpose of this portion of the proceeding was to make certain determinations with respect to the allocation of cable royalties to specific groups of claimants. In making these determinations, the Tribunal first proposed that the royalty fees be distributed on the basis of the entire record made in this proceeding. It then decided that, in current and any subsequent cable distribution proceedings, the royalty fees will be distributed by applying a combination of the factors set out in this notice to the record of the proceeding. Finally, it made certain findings of law and record with respect to the eligibility of the various groups of claimants. In accordance with these findings, the Tribunal, in its final determination, will provide for distribution of the cable collections to: (1) Motion Picture Assn. of America, Christian Broadcasting Network, and other program syndicators—75%; (2) Joint Sports Claimants and N.C.A.A.—12%; (3) Public Broadcasting Service (for all purposes)—5%; (4) Music Performing Rights Societies—4.5%; (5) U.S. and Canadian Television Broadcasters—3.25%; and (6) National Public—.25%. Phase II of this proceeding, the purpose of which will be to allocate cable royalties to individual claimants within each group, commences on Aug. 18, 1980.

266. U.S. COPYRIGHT ROYALTY TRIBUNAL.

Compulsory license for making and distributing phonorecords: royalty adjustment proceeding; correction. Closed meeting. *Federal Register,* vol. 45, no. 196 (Oct. 7, 1980), p. 66495.

By a four to one vote, the Copyright Royalty Tribunal decided to hold a closed meeting on a matter that may relate to the compulsory license for making and distributing phonorecords—royalty adjustment proceeding. Those invited to attend the meeting included counsel for all of the parties to the phonorecord adjustment proceeding and the president of the Recording Industry Assn. of America.

267. U.S. COPYRIGHT ROYALTY TRIBUNAL.

1978 cable royalty distribution determination. Notice of final determination. *Federal Register,* vol. 45, no. 186 (Sept. 23, 1980), pp. 63026-63044.

The Copyright Royalty Tribunal gave notice of its adoption

of a final determination in its 1978 cable royalty distribution proceedings. The proceeding was conducted in two phases—Phase I dealt with the distribution of cable royalties to specific claimant groups and Phase II, the allocation to individual claimants within each group. Under the scheme adopted by the Tribunal, program syndicators will receive 75%; joint sports claimants and the NCAA, 12%; public broadcasting service, 5.25%; music performing rights societies, 4.50%, with 60% of that going to ASCAP, 37% to BMI and 3% to SESAC; and U.S. and Canadian television broadcasters, 3.25%.

268. U.S. FEDERAL COMMUNICATIONS COMMISSION.

47 CFR 76. Cable television services; registration statement; clarification. Clarification and amendment of rules. *Federal Register,* vol. 45, no. 153 (Aug. 6, 1980), pp. 52153–52154.

A review of Sec. 76.12 of its rules has prompted the Federal Communications Commission to issue an order explaining the circumstances under which a cable facility serving less than fifty subscribers is obliged to comply with the registration requirement of this section. For the purpose of clarification, the order also discusses the FCC's policy with respect to Sec. 76.12(d) and amends Sec. 76.12(e) to remove any implication that more than one cable television system community unit may be listed on a single registration statement. Because this clarification and amendment are interpretive in nature, the prior notice and effective date provisions of the Administrative Procedure Act are inapplicable.

269. U.S. FEDERAL COMMUNICATIONS COMMISSION.

47 CFR 76. Cable television syndicated program exclusivity rules. Final rule; report and order in Dockets 20988 and 21284. *Federal Register,* vol. 45, no. 178 (Sept. 11, 1980), pp. 60186–60303.

The Federal Communications Commission has eliminated its rules limiting the number of distant television signals that cable television systems may distribute to their subscribers, as well as its syndicated program exclusivity rules requiring the deletion of individual programs from distant signals that are otherwise available for carriage. This decision follows a formal review of the purpose, effect and desirability of the rules; economic impact reports from which the Commission concluded that the rules do not benefit the public and should be eliminated; a proposed rule-

making proceeding on the elimination; and a careful review of the comments and relevant information submitted in response to the rulemaking proposal. Proposals for alternative rules requiring cable television system operators to obtain individual permissions—retransmission consents—for the distant television broadcast stations carried were also reviewed. The Commission felt that this was essentially a copyright matter, however, and beyond its jurisdiction. Effective October 14, 1980, therefore, the FCC's distant signal and syndicated program exclusivity rules are abolished.

2. Foreign Nations

270. DENMARK, *Laws, statutes, etc.*

Copyright Act, 1961 (Act No. 158, of May 31, 1961) as amended by Act No. 174 of March 21, 1973 and Act No. 240 of June 8, 1877. *Copyright* (Sept. 1980), pp. 283–290. (2 *Droit d'Auteur.* Sept. 1980), Texte 1 – 01, pp. 1 – 9.

Revised English translation furnished by the Danish Ministry of Cultural Affairs.

271. DENMARK. *Laws, statutes, etc.*

Act on Rights in Photographic Pictures, 1961. (Act No. 157, of May 31, 1961) as amended by Act No. 175, of March 21, 1973 and Act No. 239, of June 8, 1977. *Copyright* (Sept. 1980), pp. 290–292. *Droit d'Auteur* (Sept. 1980), Texte 2 – 01, pp. 1–3.

Revised English translation furnished by the Danish Ministry of Cultural Affairs.

272. ECUADOR. *Laws, statutes, etc.*

Law on the Occupational Protection of Performers. *Copyright* (Oct. 1980), pp. 307–310. *Droit d'Auteur* (Oct. 1980), Texte 1–01, pp. 1–4. Published in the *Registro Official* No. 798 of March 23, 1979.

This law, which entered into force on March 23, 1979, purports to protect the working relations of Ecuadorian performers and those of foreigners resident in Ecuador. Contracts engaging foreign performers, musical ensembles or orchestras are subject to the approval of the Ministry of Social Welfare and Labor. For-

eign musicians with more than three years of legal residence in Ecuador and foreign musicians married to Ecuadorian nationals are not obliged to seek authorization for the exercise of their activity in Ecuador.

273. SRI LANKA. *Laws, statutes, etc.*

Code of Intellectual Property Act (No. 52 of 1979) Secs. 1, 6–24, 144, 153, 161–171, 187–192 (relating to copyright). *Copyright* (June 1980), pp. 206–212. *Droit d'Auteur* (June 1980), Texte 1–01, pp. 1–8.

This Code, repealing the Copyright Act 1911 of the United Kingdom and the Copyright Ordinance (Chapter 154), entered into force on January 2, 1980.

274. THAILAND, *Laws, statutes, etc.*

Copyright Act, B.E. 2521 (1978). Official English translation published in the Government Gazette, Vol. 95, Part 143, Special Issue, dated Dec. 18, 1978. *Copyright* (July–Aug. 1980), pp. 242–247. *Droit d'Auteur* (July–Aug. 1980), Texte 1–01, pp. 1–6.

This Act, repealing the Act for the Protection of Literary and Artistic Works, B.E. 2474 (1931), came into force on December 19, 1978.

275. UNITED KINGDOM, *Laws, statutes, etc.*

The Copyright (International Conventions) Order 1979 (No. 1715, of Dec. 19, 1979). *Copyright* (June 1980), pp. 212–216. *Droit d'Auteur* (1980), Texte 1–01, pp. 1–5.

This Order, superseding the Copyright (International Conventions) Order 1972 and its amendments of 1973 to 1979, came into operation on January 24, 1980.

PART IV

JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY

A. Decisions of U.S. Courts

1. Federal Court Decisions

276. HOEHLING v. UNIVERSAL CITY STUDIOS, INC., 618 F. 2d 972 (2d Cir. March 25, 1980) [Kaufman, C.J.].

James C. Eastman, Washington, D.C., for plaintiff-appellant; Eugene L. Girden, Coudert Brothers, New York, for defendant-appellee Universal City Studios, Inc.; Peter A. Flynn and Myron M. Cherry, Cherry, Flynn and Kanter, Chicago, Hervey M. Johnson, White Plains, N.Y., and James J. McEnroe, Watson, Leavenworth, Kelton and Taggert, New York, for defendant-appellee Michael M. Mooney.

Appeal from judgment for defendants in copyright infringement action brought by the author of *Who Destroyed the Hindenburg?* Judgment affirmed. *Held,* neither plaintiff's theory about the destruction of the Hindenburg nor facts uncovered by plaintiff through original research, nor stock elements appearing in plaintiff's book, are protected by copyright.

Plaintiff A.A. Hoehling is the author of a book entitled *Who Destroyed the Hindenburg?* about the destruction of that airship at Lakehurst, New Jersey, on May 6, 1937. Plaintiff's book, based on investigative reports, prior books and interviews with survivors of the disaster, is written in an objective, reportorial style. In the final chapter, Hoehling concludes that the Hindenburg was destroyed by a bomb placed by Eric Spehl, a rigger on the airship, to please his communist girlfriend. The book was published in 1962.

The Hindenburg, written by defendant Michael MacDonald Mooney, was published in 1972. Mooney's book is written in a more literary style than Hoehling's. Thus, Mooney contrasted the symbolic themes of the natural beauty of the month of May with

the cold progress of technology. The destruction of the Hindenburg is attributed to a bomb placed by Spehl. Although Mooney acknowledges that he consulted Hoehling's book, he claims he first discovered the "Spehl theory" in another book.

Defendant Universal City Studios, Inc. released a film based on Mooney's book in 1975. In the film, a rigger named Boerth, with an anti-Nazi girlfriend, plots to sabotage the Hindenberg. An intelligence officer discovers Boerth's plan, but is persuaded to join Boerth. The film also depicts a number of other characters involved in subplots, in the manner of other "disaster" movies.

In his appeal from summary judgment, plaintiff argued that defendants had copied his book's basic plot, i.e., that Spehl sabotaged the Hindenburg to impress his anti-Nazi girlfriend; copied historical facts uncovered by his original research; and copied specific scenes and dialogue.

The Court of Appeals held that plaintiff's plot is not protected by copyright because copyright law protects an author's expression of his ideas, not the ideas themselves. The court acknowledged that the line between idea and expression is often a fine one when a work of fiction is under review. However, plaintiff's plot is an interpretation of an historical event and is therefore not copyrightable as a matter of law. Authors who write about historical events should be granted broad latitude in using works about the same subjects, the court reasoned, because the public benefits from the publication of such works. The court applied the same reasoning to the facts plaintiff uncovered through original research. The court held that an author *may* save time and effort by using facts uncovered by his predecessors. Finally, the court held that the scenes and dialogues plaintiff claimed were copied from his book were standard elements of books about the Nazi era and were therefore not copyrightable.

The court cautioned that "[b]y factoring out similarities based on non-copyrightable elements, a court runs the risk of overlooking wholesale usurpation of a prior author's expression". It advised courts to "assure themselves that works before them are not virtually identical." However, the court held that the works in the instant case were not identical.

The Court of Appeals also affirmed the District Court's rejection of plaintiff's unfair competition claims. The court held that historical facts and theories which are not copyrightable may not be protected by state law because states are pre-empted from affecting the public domain status of such material.

277. KIESELSTEIN-CORD v. ACCESSORIES BY PEARL, INC., Not yet reported (2d Cir. Sept. 18, 1980) [Oakes, C.J.] [Weinstein, D. J., dissenting].

Janet P. Kane, Ronald J. Levine on the brief, Phillips, Nizer, Benjamin, Krim and Ballon, New York, for plaintiff-appellant; William F. Dudine, Jr., David R. Francescani on the brief, Darby and Darby, P.C., New York for defendant-appellee; Charles R. Reeves, John C. McNett, C. David Emhardt, Woodward, Weikart, Emhardt and Naughton, Indianapolis, for amicus curiae.

Appeal from summary judgment for defendant in action for infringement of plaintiff's copyright in a belt buckle. Judgment reversed. *Held*, plaintiff's belt buckles are copyrightable because they contain artistic elements conceptually separable from their utilitarian aspects.

Plaintiff designs, manufactures and sells fashion accessories. The subject of the instant action are two belt buckles—called the "Winchester" and the "Vaquero." Both buckles are sculptured with several surface levels. No identifiable objects are portrayed on the buckles. Plaintiff manufactured the buckles in silver and gold and sold them to high fashion clothing and jewelry stores. Short belts with the Winchester buckle were sold to be worn elsewhere than on the waist. Defendant manufactured and sold copies of plaintiff's buckles in ordinary metals.

In this action for copyright infringement, trademark infringement and unfair competition, plaintiff moved for a preliminary injunction and both parties moved for summary judgment on the copyright claims. The District Court found that defendant *had* copied plaintiff's buckles but granted defendant's motion because it held that the buckles were not copyrightable. The court held that the buckles were useful articles without separable and independent artistic features, and therefore were not copyrightable.

The Court of Appeals described the case as one "on the razor's edge of copyright law." Under both the 1909 and 1976 Acts a useful article may not be copyrighted except to the extent that it has separately identifiable artistic features. The court discussed both laws because the copyright in the Winchester buckle was registered before January 1, 1978. The court treated the House Report of the 1976 Act (H.R. Rep. No. 94–1476) as providing the definitive interpretation of that Act. The court specifically relied on the part of the report recognizing protection for elements of a useful article that are *conceptually* separable from its functions.

The court ruled that the ornamental aspects of the buckles were conceptually separable from their function, and were therefore protectible by copyright.

The action was remanded to the District Court for consideration of other issues raised before that court.

Judge Weinstein, dissenting, was of the opinion that the design of a useful article may be copyrighted only if its artistic features may be identified separately from, and are capable of existing independently of, the article's utilitarian functions. Judge Weinstein acknowledged that under this principle, modern utilitarian designs may not be protected by copyright, but concluded that the law could only be changed by Congress. He noted in some detail the disinclination of Congress thus far to make such change, by way of industrial design legislation.

278. MEMPHIS DEVELOPMENT FOUNDATION v. FACTORS ETC., INC., 616 F. 2d 956 (6th Cir. March 6, 1980) [Merritt, C.J.].

David J. Cocke and Ronald S. Borod, Rosenfield, Borod, Bogatin and Kremer, Memphis, Tennessee, for plaintiff-appellant; Kenneth R. Masterson, John J. Thomason, W. Frank Crawford, Thomason, Crawford and Hendrix, Memphis, and Danial L. Lidman, Beverly Hills, California for defendant-appellant.

Appeal from judgment granting a preliminary injunction against the distribution of statuettes of Elvis Presley by a corporation not licensed to do so by the heirs or assigns of Presley. Judgment reversed. *Held,* the right of a celebrity to control, and profit from, the use of his name and likeness does not pass to the heirs or assigns of the celebrity after the celebrity's death.

Prior to his death, Elvis Presley assigned his right to control and profit from the use of his name and likeness to the firm of Boxcar Enterprises. Two days after Presley's death, Boxcar sold an exclusive license to exercise its rights in Presley's name and likeness to defendant-appellee Factors Etc., Inc. Also after Presley's death, plaintiff-appellant Memphis Development Foundation laid plans to erect a statue of Presley in Memphis. Public contributions were solicited and replicas of the planned statue were given to contributors of $25.00 or more.

The Foundation began the instant action seeking a declaratory judgment that Factors' license does not preclude the erection of the statue and distribution of the replicas. Jurisdiction was founded on diversity of citizenship. Factors counterclaimed for

damages and an injunction to prohibit distribution of the replicas. The District Court held that upon Presley's death, his right of publicity passed to his heirs and assigns. Therefore, only Factors, as exclusive licensee of Presley's right of publicity, may reap financial benefits from Elvis Presley's likeness. The court issued an injunction prohibiting the Foundation from manufacturing and distributing Presley statuettes. The Foundation was not prohibited from erecting the planned statue.

The Court of Appeals reversed the judgment below. The court held that a celebrity's right of publicity does not survive his death. This decision was not based on Tennessee statutory or decisional law. Since the issue had not been addressed by Tennessee courts, the Court of Appeals rendered judgment in light of practical and policy considerations. The court weighed these considerations and concluded that the right of publicity should not be devisable even if the right is exercised during a celebrity's life.

The court identified one possible benefit to society which would result from recognition of a post-mortem right of publicity–the encouragement of effort and creativity. The court concluded that recognition of such a right would not significantly add to the incentives provided by *inter vivos* succession.

The court found strong reasons for not recognizing an inheritable right of publicity. First, numerous practical problems would arise if such a right were recognized. These problems would include determination of the term of the right, the First Amendment restrictions on judicial enforcement of the right, and definition of the scope of the right. Second, the law generally does not regard personal attributes such as reputation as descendible; for example, a decedent's heirs have no cause of action for defamation of the decedent.

PART V

BIBLIOGRAPHY

A. Books, Treatises and Cassettes

1. United States Publications

279. Henn, Harry G. Copyright primer. Practising Law Institute, New York, New York (1979) 785 p.

An analytical guide to the new copyright law with commentaries on new legislation which appeared shortly after the legislation came into force. The book is divided into two main sections: commentary and source material. Chapters cover fair use, exemptions, infringement, compulsory licenses, notice and deposit.

280. Taubman, Joseph. In tune with the music business. Law-Arts Publishers, Inc. 278 p.

Prior to her appointment as Secretary of the Department of Health, Education and Welfare and during office as a member of the U.S. Court of Appeals for the 9th Circuit, Shirley Hufstedler noted:

> "We are robed with affluence, despite the holes in some of our pockets. Our young people are rebelling, passively and violently, to a system of priorities in which property and investment values are scaled above their 'people values'. Activist youths have dealt us the cruelest cut by telling us, not just that our values are wrong, but that they are irrelevant."

She made an optimistic comment of continuing value regarding the state of encouragement of creative potentials through law. She commented upon the *Sears* and *Compco* decisions as part and parcel of an encouraging pattern of diminishment of protection to "the corporate purveyor of the artist's products" and an emphasis upon

> "Growth in the protection of the individual artist as a creative personality, that is to say, a growth in the law which started out as a right of privacy and has since been refined into a host of protectible personality components, including elements of personality which have commercial exploitability."

The music business has been a particular beneficiary of this attraction of otherwise disenchanted young people.

Since the mid-1960's, there has been a sub-industry within the music business industry, namely business education.

Many young people who rebel against 9-to-5 jobs in conventional retailing, insurance or construction are attracted to the business of music. Once involved, they are frequently so deeply involved that all-night recording sessions, 20-hour days of promotion and exhausting tour itineraries are accepted as necessary occupational hazards. Getting the initial job in the music business, however, is increasingly competitive, and instruction at schools such as U.C.L.A., N.Y.U., The University of Miami, Five Towns Community College, Berkeley School of Music and The New School of Social Research have been developed to train and develop music business skills.

In the forefront of this activity has been Dr. Joseph Taubman who has conducted seminars for N.Y.U., lectured at the New School of Social Research and served as editor and founder of PERFORMING ARTS REVIEW.

This new book in original paperback edition presents in 278 pages an overview of the entire music business in its many diverse activities, music publishing, labor unions, not-for-profit organizations, taxation and even anti-trust and trade regulation.

The chapter entitled "Live Performance" presents, in 21 pages, a unique and valuable guide for both student and practitioner in the music business. As in many other sections of the book, practical advice is given on essentials as well as incidental matters of interest.

In the course of reviewing the business side of live performances, Dr. Taubman covers the essentials of payments by certified check, bank check or cash, problems of foreign currency, promotion and advertising and even the skills of scaling of the house for prices of tickets.

In contrast with these more significant aspects is the down-to-earth advice given to the intelligent promoter. For example, he explains that it is good business and not merely compassion to supply the artist with elementary things such as food and facilities for changing clothes in order to enhance the quality of the performance. Dr. Taubman also advises and allocates responsibility for special flower arrangements for the performance and the additional arrangements for presentation of flowers at the end of a concert through appropriate ushers in the hall.

Dr. Taubman is at his best when explaining the differences in the mode of operations of sole proprietorships, partnerships, limited partnerships, joint ventures, business corporations, trusts and not-for-profit organizations. His expertise in this area has

been previously shown in learned law articles and in his doctoral thesis on the subject. In this volume, he sets forth in cogent fashion the reasons behind selecting one or another form in the business of music.

One problem with the book is that the differences between the fields of serious music and popular music are not sufficiently clarified. Confusion sometimes sets in when discussing manager roles, rates and costs in these highly divergent aspects of the music business. Hopefully, in future editions of the book, these differences will be clarified.

The most readable chapters are those on live performance, managers and agents and music for theatre, dance, motion pictures and television. However, Dr. Taubman, having been personally involved in editing the ANTI-TRUST BULLETIN and as author of the text COPYRIGHT AND ANTI-TRUST, assumes that the students to whom this text was directed would be capable of easily comprehending anti-trust laws and trade regulations. The chapter on this subject, in twenty pages, attempts to cover the Sherman Act, the Robinson-Patman Act and the activities of the Federal Trade Commission. It is a difficult assignment. But, this chapter is merely introductory and historical, and perhaps may serve merely to caution the potential music business moguls among the students in the audience.

The text has valuable and adequate general information concerning copyright, music publishing, record artist contracts and management and agency contracts. No sample contracts are included, but valuable instruction and background is given regarding provisions of "so-called standard contracts" which are to be further negotiated.

In the course of the book, comprehension of music industry terms such as "gig," "green room," tenpercentary" and "cross-collateralization" are presented in valuable form. These terms and other subjects are well-indexed in 26 pages which will be of great value to the student and practitioner. The book itself has no citations except text citations when statutes are discussed and is not intended for law students except as an adjunct to other and more conventional texts.

All of the materials in the book are presented in a non-technical and easily comprehended fashion; and the style of the book is consistent with the designation "Student Edition."

The most unfortunate aspect of the new book is its price of $18.75 for a paperback student edition, and $28.75 for hardcover.

The audience to which the book is directed is acknowledged

in the forward by Dr. Taubman as those similar to his past students in courses including "The Business of Music." The availability of this text for others of the now hundreds of music business courses in community colleges, colleges and universities will be a valuable contribution. It is safe to say that in the light of technological and cultural advances reflected in this text, college students will no longer view with sympathy the Adam Smith characterization in the Wealth of Nations that musical performance is merely

> "an activity which does not fix or realize itself in any permanent subject or vendable commodity which endures after the labor is passed." (WEALTH OF NATIONS, 1776, Book II, Chapter 3)

By WILLIAM KRASILOVSKY

1. Foreign

1. Netherlands

281. KASE, FRANCIS J. Dictionary of industrial property legal and related terms. English, Spanish, French and German. Sijthoff & Noordhoff, 1980. 216 p.

This multilingual compilation of industrial property legal and related terms should be useful to those engaged in practice or research in this highly specialized field of law. English is the basic language, followed by equivalents (or similar expressions) in Spanish, French and German. There are separate indexes for the latter three languages.

B. LAW REVIEW ARTICLES

1. United States

282. Computers and copyright: ROMS recover. *Copyright Management*, vol. III, no. 9 (Sept. 1980), p. 1.

A discussion of the Data Cash Systems, Inc. copyright infringement case. The defendant, JS&A Group, Inc., marketed a computer chess game that it had copied from one introduced a year earlier by plaintiff. The District Court found that there could be no infringement in copying a read-only memory. On appeal, the case was affirmed, but for a different reason. It was held that

the plaintiff's game was marketed without a copyright notice, invalidating whatever copyright the author might have had. Plaintiff still has an unfair competition claim pending in the lower court which it will probably now pursue.

283. Copyright in China: the Britannica collection. *Copyright Management,* vol. III, no. 9 (Sept. 1980), p. 2.

Encyclopedia Britannica and the China Publishing Company have entered into a joint venture to publish an eight-volume encyclopedia in China. Translating and editing will be done by Chinese staff in Peking, while an editorial review board of Chinese and American scholars will supervise policy decisions regarding articles. Even though China does not have a copyright system, the China Publishing Company has agreed to pay a copyright royalty to Britannica on a per-sale basis. Britannica will also have sales rights outside China where copyright systems do exist.

284. Copyright notice: APLA moving for abolition. *Copyright Management,* vol. III, no. 9 (Sept. 1980), pp. 5–6.

Fred Koenigsberg of ASCAP stated that the Copyright Committee of the American Patent Law Assn. is pushing for abolition of the notice requirement in the Copyright Act. Citing the United Kingdom as an example, he said that adequate means exist or could be developed for satisfying the reasons for maintaining the requirement. He indicated that abolishing the notice requirement would not only remove an "area of doubt and ambiguity" from America's copyright law but would have international benefits as well—with basically only the moral right issue remaining, the U.S. would be a step away from Berne.

285. FISCHER, MARK A. Communications and the law: the right of publicity. *Copyright Management,* vol. III, no. 8 (Aug. 1980), pp. 5–8.

This article discusses the right of publicity—how it developed, the property interest involved, its legal basis, its limitations and some recent case law on the subject. Because there are no governing legislatively enacted statutes, virtually all of the law in this area has come out of a few court decisions which vary in approach from state to state. The author believes that the inconsistencies in dealing with the right of publicity could be cured by bringing it under federal jurisdiction. This, he suggests, could be accomplished by amending the copyright law to include the right of

publicity. An individual would then have the right to exploit his or her name, likeness and reputation for life plus fifty years, just as for a conventional copyrighted work.

286. FOIA: copyrighted photos which are agency records may be disclosed. *Copyright Management,* vol. III, no. 9 (Sept. 1980), pp. 4–5.

This article focuses on the FOIA suit brought against the Department of Justice to get copies of the copyrighted photographs taken at the scene of Martin Luther King's assassination. The pictures were taken by Joseph Louw who sold them to Time, Inc. Time then gave copies of the photos to the FBI for investigation purposes. The main issue decided by the court was whether the copyrighted photographs were also agency records which could be disclosed to the public under the Freedom of Information Act. It was held that they were; and since plaintiff wanted the photos for scholarly purposes, they could be disclosed under the FOIA. The FBI was, therefore, ordered to provide plaintiff with copies.

287. GOHEEN, JOHN C. Burden of proving first sale under the Copyright Act of 1976. *The Georgetown Law Review,* vol. 67, no. 1 (Oct. 1978), pp. 293–312.

A look at the allocation of the "first sale burden of proof" under the 1909 Act along with an analysis of *U.S. v. Wells* and *U.S. v. Bily.* The author analyzes the legislative history of the 1976 Act and the placement of the burden of proof in civil and criminal cases under the 1976 Act. Guidelines for applying the burden of proof theory are also listed.

288. KADDEN, RONALD S. Recent judicial developments in the copyright law of the United States of America. *Copyright,* vol. 16, no. 6 (June 1980), pp. 217–233.

This article discusses recent judicial and legislative developments in copyright law, especially questions likely to arise under the 1976 Act. Part I discusses recent developments regarding the copyrightability of designs of useful articles. Part II deals with the ownership of rights in derivative works and works made for hire. Part III analyzes recent cases that discuss issues related to copyright infringement, namely the idea-expression doctrine, fair use, the First Amendment, obscenity, and the first sale doctrine.

289. PAGE, PHILLIP EDWARD. Copyright protection for book designs.

Memphis State Law Review, vol. 10, no. 1 (Fall 1979), pp. 37–57.

This twenty-page article examines the copyright protection which may be available to the designer of a literary text. The author states that the few times where copyright protection has been sought for a book design it has been denied. Until fairly recently the independent freelance designer was uncommon in the publishing industry. The role of the designer and the illustrator is outlined along with a brief summary of several cases. *Grove Press, Inc. v. Collectors Publication, Inc.* and *Alfred Bell Co. v. Catalda Fine Arts, Inc.* are included. The author divides those areas he feels are the functional considerations and those that are the creative contributions: layout design, use or design of a particular typeface, arrangement of the material, and contributions of an editorial nature.

290. THOMPSON, EDWARD. Piracy of phonograms. *Copyright,* vol. 16, nos. 7–8 (July-Aug. 1980), pp. 248–254.

Mr. Thompson presents an outline of the problems of piracy, as experienced by producers of phonograms, and sets out what these producers have done and are doing to solve it. He concludes that the Rome Convention and the Geneva Convention should be much more widely ratified, adequate national legislation for the protection of phonogram producers should be adopted where it does not already exist, and existing legislation should be strengthened where necessary.

2. Foreign

1. In English

291. BANKI, PETER. Working group on the intellectual property aspects of folklore protection. *Bulletin of the Australian Copyright Council Ltd.*, no. 32 (May 19, 1980), pp. 1–6.

A background of copyright protection of works of folklore in Australia and internationally is provided. Working committees of both WIPO and UNESCO continue to work on the areas of national protection of folklore not protected by copyright. The areas of contention that remain include the collection of fees and the definition of folklore. Further study is necessary since existing

law does not protect folklore adequately. In Australia the control of the use of folklore is limited and ill-defined.

292. BRAUBACK, ROBERT. Computer software - international protection. *European Intellectual Property Review*, vol. 2 (July 1980), pp. 225–229.

It is now generally accepted that computer programs cannot in principle be protected under the patent system. This article reviews the attitude of the major trading nations concerning the problem of protecting computer software, and considers alternative means of protection in copyright or unfair competition law, with which the Commission is openly concerned in the light of harmonization pressures.

293. CANNON-BROOKES, PETER. Droit de suite - the mirage of resale royalty rights. *European Intellectual Property Review*, vol. 2 (June 1980), pp. 175–177.

An essay on the problems of resale rights, including the justification and desirability of exacting from a vendor a percentage of any resale profit made over and above any taxes payable on that profit even if the artist himself receives little or nothing of the proceeds. The author believes that resale royalty rights benefit only the administrators of the system. In Germany, many leading artists have in effect been contracted out of the scheme.

294. Copyright - transnational broadcasting of copyright works. *European Intellectual Property Review*, vol. 2 (June 1980), p. 155.

In Switzerland there is a case pending in which authors are seeking to establish the right to further remuneration for the dissemination of their copyrighted works by cable television. The question is whether the onward transmission of television signals by cable should be subject to the payment of fees to copyright owners; and if so, whether such fees are payable even though the subscribers who have had the broadcasts relayed to them by cable could have picked up the broadcasts on their own television sets without the assistance of cable. The Court of Appeals of Zurich decided that the onward transmission of a signal within an area in which direct reception of the original broadcast was possible is not subject to the payment of fees by the company which is relaying the signals it receives. Cable television companies, which merely receive broadcasts and relay them to others, are not broadcasting the programs they disseminate within the meaning of the

Swiss copyright law. This decision is now the subject of an appeal.

295. Copyright - whether dissemination of a signal by cable is broadcasting. *European Intellectual Property Review*, vol. 2 (June 1980), p. 155.

The plaintiff is an Austrian television company and the defendants are the Swiss telephone, television and radio companies and Rediffusion SA. The Swiss radio and television company covers the whole of Switzerland by means of a network of transmitters. Those situated near the Austrian border can also receive and transmit the signals put out by Austrian television. These signals are then transmitted to Berne, where Swiss radio feeds the programs into Rediffisuion's cable network. Although the case has not yet been decided by the courts, there is discussion on two issues—1) Is the Austrian radio company entitled to complain about infringement of other people's copyright or does a broadcaster create a work which itself deserves protection under copyright law? 2) Is Swiss radio and Rediffusion infringing copyright or are they merely intermediaries commissioned by their customers to receive signals on their behalf?

296. DIETZ, ADOLF. Copyright and the EEC - harmonization of national laws. *European Intellectual Property Review*, vol. 2 (June 1980), pp. 189–193.

The harmonization of intellectual property law including copyright is now under way. Dr. Dietz reviews the possible means of harmonization and also the relevance of the principle of the 'free flow of goods' to the cultural aspects of copyright. The present position of copyright within the EEC, the conflicts between national copyright laws and the Treaty of Rome, and the interests of authors and other copyright owners are also investigated.

297. Group of independent experts on cable television and copyright. *European Intellectual Property Review*, vol. 2 (July 1980), p. D-195.

This group, convened jointly by WIPO and UNESCO, was comprised of experts from Austria, Belgium, Germany, Italy, the United States and the USSR under the craftsmanship of Mr. William Wallace, the former Asst.-Comptroller at the Patent Office, London. The group received the views of all the important international bodies concerning: 1) the impact of cable television on copyright and neighbouring rights; 2) a proposed world-wide

forum on the piracy of phonograms, motion pictures and other audiovisual recordings.

298. IVANCEVIC, NEDJELJKO. Legal section: survey of the Yugoslav copyright act with a review of the position of broadcasting in the application of this act. *EBU Review,* vol. XXXI, no. 3 (May 1980), pp. 51–56.

After a brief general review of Yugoslavia's Copyright Act, Mr. Ivancevic provides a critical analysis of the law, as it relates to broadcasting. He says that the Act, which has been in force for two years now, presents a number of problems for broadcasting organizations. Among these problems he lists: (1) the inclusion of the chief cameraman as one of the authors of a cinematographic work and, when music is an essential element, the inclusion of even the composer of the music as an author of the film; (2) the contradiction between a provision prohibiting an author from applying economic rights which he has transferred to another person with at least three provisions which grant remuneration to an author; (3) the contradiction between a provision granting the author of a literary work the exclusive right to permit public recitals of his work with a clause "which authorizes the author's organization of associated labour to administer *petits droits* even without the author's mandate"; and (4) the requirement that fees for individual public performances and presentations of non-scenic musical and literary works, including radio and TV broadcasts, be negotiated by some five special interest and governmental bodies. Mr. Ivancevic concludes that because exploitation of copyrighted works via radio and TV is widespread, the Act should offer protection not only to fixed works but to live programs as well. He suggests that this critique might be used to draft legislation in this area.

299. JEHORAM, HERMAN COHEN. Licenses in intellectual property—a review of Dutch law. *European Intellectual Property Review,* vol. 2, (June 1980), pp. 175–177.

The licensing of rights is a common feature to all parts of intellectual property. This article considers the overall position of patent, copyright and trademark licenses in the Netherlands. Compulsory licensing, "public interest" licenses, photocopying and 'know-how licenses' are also included.

300. KRUGER-NIELAND, GERDA. The moral right of the author, a par-

ticular manifestation of the general personal right. *GEMA*, no. 20 (1980), p. 5–16.

A discussion of National Socialism and its disregard for the values of the individual and a look at moral rights and how they are protected today in the Federal Republic of Germany. The author states that since there is no comprehensive regulation by law of the protection of the rights of the individual, the courts are faced with the task.

301. News—European Commission—copyright meetings—resale rights—duration of copyright. *European Intellectual Property Review*, vol. 2 (June 1980), p. 159.

Under its 1980 Program, the European Commission is required to consider, *inter alia*, possible directives on the harmonization of copyright in respect of: 1) resale rights and 2) duration of copyright. With this in mind, the Commission has called two meetings of interested parties in Brussels. One was held June 20th (resale rights) and the other July 8th (duration of copyright).

2. In English and French

302. ARDALLA, EZZEDIN. Letter from Egypt. *Copyright* (July–Aug. 1980), pp. 255–262. *Droit d'Auteur* (July–Aug. 1980), 207–214.

Professor Ardalla, member of the Cairo Bar, first gives a history of the protection of authors' rights in Egypt and this country's participation in international conferences. He then proceeds to an explanation of the basic provisions of the 1954 Law No. 354 relating to the protection of copyright. The author discusses the extent of the protection provided by the statute, the duration of copyright, moral rights and economic rights, copyright protection at the international level and the sanctions, civil and penal, for violations of the copyright holder's rights.

303. DIAZ, JOSE MARIA. Letter from the Philippines. Important features of Presidential Decree No. 49. *Copyright* (June 1980), pp. 187–191.

The present copyright law of the Philippines—Presidential Decree No. 49, also known as Decree on the Protection of Intel-

lectual Property—took effect on December 6, 1972. It repealed Act 3134 which had entered into force on March 6, 1924 and was patterned on the U.S. 1909 Copyright Act. The author discusses the rights of the copyright holder conferred by the Decree, the works protected, the rights of employees and employers, fair use, droit de suite, moral rights as well as the dispositions relating to copyright transfer and infringement.

304. LIMPERT, TH. Employees' rights in their capacity as authors. *Copyright* (Sept. 1980), pp. 293–300. *Droit d'Auteur* (Sept. 1980), pp. 235–243.

In this in-depth article accompanied by an extensive bibliography, the problems of authors under permanent employment are examined as they arise in comparative and international copyright law. There are three approaches to determining who is originally or primarily entitled to the copyright. The Roman legal approach, followed by, among others, France, Belgium, Italy, Switzerland, the Federal Republic of Germany, the Nordic countries and the Soviet Union, implies that copyright vests originally in the author of the work except when, in the employment contract, the author and the employer have agreed to the contrary. In the Anglo-Saxon system, adopted mainly by the United States, Great Britain, Canada, the Netherlands, Ireland, Turkey, India, Liberia, Kenya and Australia, the employer is considered to be the maker and consequently the original copyright holder. In a third category of legal regulations, the author-employee is regarded as the primary copyright holder but as having assigned his rights to certain organizations or institutions or certain employers. The various laws leave room for contractual provisions either through individual agreements or collective contracts. Many practical problems of interpretation remain for the courts to decide.

305. MALHOTRA, DINA N. Copyright aspects of publishing in developing countries. *Copyright* (Oct. 1980), pp. 310–314. *Droit d'Auteur* (Oct. 1980), pp. 252–256.

The author emphasizes at the outset that publishing in developing countries started advancing only when these countries became free from the rule of the colonial powers. The developing countries must create strong national publishing industries if they want to raise the quality and calibre of their citizenry. Development of local authorship is essential and in turn necessitates the protection of authors' interests through comprehensive copyright

laws. On the other hand, the developing countries intend to remain within the international copyright systems but also realize that the international conventions in their existing form could not serve their purpose. Unfortunately, the Stockholm Protocol for Developing Countries that was added to the Berne Convention has not been ratified even by those advanced countries which had agreed to it at the Stockholm Conference of 1967. The Paris Act of 1971 has still to prove its usefulness in view of the fundamental differences in the working of the publishing industry in the advanced countries and the developing countries where publishing is done by small units.

306. THOMPSON, EDWARD. Piracy of phonograms. *Copyright* (July–Aug. 1980), pp. 248–254. *Droit d'Auteur* (July–Aug. 1980), pp. 199–206.

At the outset, the terms "piracy" and "bootlegging" are defined. Originally, the word "piracy" was used to refer to the unauthorized duplication of an original phonogram; later, it also included 'counterfeits", i.e., duplicates reproducing both the original phonogram and its packaging. "Bootlegging" means the unauthorized recording of an artist's performance. Phonogram piracy, which the author calls "the illegitimate child of technological progress," has only become a major problem since the mid-1960's when the cassette began to be generally marketed. The total retail value of pirate phonograms throughout the world has been estimated at more than 2 billion dollars. Reproducing the IFPI tables of the latest estimates of phonogram piracies in Western Europe, North America, Middle East and Africa, Asia and Australia, the author quotes the guidelines adopted by the International Federation of Producers of Phonograms and Videograms for anti-piracy campaigns and adds in conclusion his own proposals for a successful fight against phonogram piracy.

3. In French, English and Spanish

307. GAUDRAT, PHILIPPE. La protection de l'auteur lors d'une retransmission spatiale de son oeuvre. (Protection of the author in relation to a retransmission of his work by a satellite.) *RIDA*, no. 104 (April 1980), pp. 3–56.

The author notes at the outset that there is general agreement in classifying telecommunication satellites into two basic groups: "conventional" and "direct-broadcast" satellites. In this in-depth

article, the protection of the author on the occasion of retransmission by either type of satellite is examined together with an analysis of the international conventions, particularly the Brussels Convention of 1974 and the World Administrative Conference on Telecommunication of 1977. The author's protection vis-à-vis a direct broadcast is considered to be better assured than in the case of retransmission by conventional satellite.

307a. GERBRANDY, SJOERD. Nouvelles des Pays-Bas. (News from the Netherlands.) *RIDA*, no. 104 (April 1980), pp. 57–91.

In this article, the Vice President of the Court of Appeals of Amsterdam presents decisions and annotations concerning the object of copyright, the concepts of public performance, "publication" and the author's moral right. He summarizes and thoroughly analyzes five recent court decisions relating to these fields in light of the law of October 27, 1973 amending the Act of 1912.

C. ARTICLES PERTAINING TO COPYRIGHT FROM MAGAZINES

1. United States

308. ABRAMS, EARL B. David Lowell Ladd: Register of Copyrights well versed on industry matters. *Cash Box*, vol. XLII, no. 18 (Sept. 13, 1980), pp. 8, 31.

An interview with David Ladd, the new Register of Copyrights. He talks about such copyright issues as performance rights legislation, mechanicals, the exemptions to copyright liability and cable television. There is also a discussion of what he sees as the three major areas facing him—participation in policy development and legislation; internal organization problems that the Copyright Office is experiencing as a result of the 1976 Copyright Act; and the international aspects of copyright. A brief biographical sketch of Mr. Ladd is provided at the end of the article.

309. Appeal, more suits planned to stop pay-see decoders. *Daily Variety*, vol. 188, no. 44 (Aug. 7, 1980), pp. 1, 5.

A federal court dismissed the suit in which Oak Industries and National Subscription TV sought to stop the manufacture of decoders that allowed nonsubscribers to pick up over-the-air pay-

TV signals. The companies had filed and won similar cases in federal courts in Michigan and Arizona, but the judge in this action held that an FCC license to send signals did not grant a monopoly over the signal itself. Both of the plaintiffs have indicated that they will appeal the dismissal.

310. ARCOMANO, NICHOLAS. Videolaw, some legal considerations on choreography and videotape. *Dancemagazine* (August 1980), pp. 44–48.

A discussion of video technology and its impact on the arts, particularly in the area of dance. The author states that Merce Cunningham's *Locale* was specifically choreographed for videotape in 1979 and Ballanchine has been approached by a major company to create a new ballet for videodisc—the latest development in video technology. The author mentions the new copyright act and states that a videotape program is copyrightable as an audiovisual work, but it cannot be created without the contribution and authorization of the "authors," the choreographer, the composer, etc. Permission must be received from the authors and contracts must be carefully drawn. A look at the problems of home taping, blank tapes and royalty taxes is also included.

311. Aussie FM royalty push gains support. *Daily Variety*, vol. 189, no. 15 (Sept. 26, 1980), p. 18.

Australia's Copyright Tribunal has been asked to determine the royalties payable to the Phonographic Performance Company of Australia Limited (PPCA) by new commercial FM radio stations in Sydney, Melbourne, Brisbane, Adelaide and Perth. The PPCA has been and will continue granting interim music use licenses to the stations in order for them to air copyrighted recordings pending the Tribunal's determination of the fee.

312. 'Beatlemania' wins another round in continuing legal battle with imitators. *Record World*, vol. 37, no. 1725 (Aug. 16, 1980), p. 19.

Leber-Krebs, Inc., the producer of Beatlemania, and the copyright proprietors of the Beatles' music were granted a series of permanent injunctions against performers and producers named in copyright infringements suits filed in the United States and Japan. Plaintiffs charged that unauthorized dramatic uses were being made of the Beatles' songs and that "new stage presentations were being developed to trade on the success of Beatlemania." The injunctions prohibit the defendants from advertising, mer-

chandising, implying or stating any connection with the authorized Beatlemania presentations. Any title resembling Beatlemania is also prohibited.

313. BMI settles copyright infringement lawsuit. *Cash Box*, vol. XLII, no. 18 (Sept. 13, 1980), p. 18.

A settlement has been reached in Broadcast Music Inc.'s copyright infringement suit against KSRT Broadcasting, Inc. and Augustin Soto, Sr. Details of the stipulation were not disclosed, but, reportedly, there was a cash settlement as well as an acknowledgment by the defendants that radio station KSRT was obliged to obtain a license to continue broadcasting BMI's music.

314. BRATT, SUSAN. Alas. All that lovely music is not free. *Today's Spirit* (Aug. 15, 1980).

ASCAP, BMI and SESAC are performing rights organizations. They work toward protecting their members—songwriters, arrangers and music publishers—by collecting license payments from music users. These payments are then paid out to the members in royalties. This article talks about this licensing from the perspective of the licensor (performing rights society) and the licensee (restaurant, nightclub, hotel, skating rink, etc.). It also attempts to discuss the 1976 Copyright Act as it applies to musical works.

315. Calif. lawmakers vote penalties for piracy of feevee. *Daily Variety*, vol. 188, no. 59 (Aug. 18, 1980), p. 1.

The California legislature adopted a bill, AB 3475, which, if enacted, will prohibit the manufacture, sale and use of devices that decode over-the-air subscription TV signals. The measure, which was authored by Assemblyman Mel Levin (D.-West Hollywood), carries penalties consisting of fines of up to $2500, a jail term or both.

316. Calif. outlaws unauthorized decoder boxes. *Daily Variety*, vol. 189, no. 19 (Oct. 2, 1980), p. 1.

California Governor Jerry Brown has signed AB 3475, a bill prohibiting the manufacture, distribution or sale of unauthorized decoder devices that intercept over the air subscription TV signals. Violators can be fined $2500 or imprisoned for up to ninety days. The legislation is not only aimed at stopping the manufacturers, distributors and sellers of the decoders, but at those who handle

what is called "decoding plans or kits" as well.

317. Church publishers favor percentage basis for record royalties. *Record World,* vol. 37, no. 1719 (July 5, 1980), p. 53.

Church Music Publishers Convention president Hal Spencer announced that the CMPC voted to support a record royalty based on a percentage of the retail price. The group will express its position when it endorses the National Music Publishers Assn.'s presentation to the Copyright Royalty Tribunal calling for a royalty of at least six percent of the price of disks or tapes.

318. Communications Act revision to include pay piracy. *The Hollywood Reporter,* vol. CCLXII, no. 43 (Aug. 1, 1980), pp. 1, 4.

The House Commerce Committee attached Rep. Richardson Preyer's bill to prohibit the piracy of pay TV material to the Van Deerlin Communications Act revision bill. The Preyer amendment, which the full committee passed on a voice vote, establishes a civil remedy that would permit pay TV operators to sue pirates for damages and further sets stiff criminal penalties with fines of up to $250,000 to be leveled against commercial pirates and $25,000 for individuals. An amendment that was offered to the Preyer amendment by Rep. Timothy Wirth would exclude subscription TV from the piracy provisions, however.

319. Companies fighting over right to sell Elvis Presley posters. *Record World,* vol. 37, no. 1726 (Aug. 23, 1980), p. 49.

The U.S. Court of Appeals for the Second Circuit has upheld a district court decision permanently enjoining Pro Arts from making and selling Elvis Presley posters. The action was initiated by Factors Etc., a company which claims sole right to exploit Presley's name. Pro Arts, the defendant in the suit, unsuccessfully argued that the right of publicity did not survive a celebrity's death.

320. Copyright dating practices vary among school publishers. *Educational Marketer* (June 15, 1980), pp. 1, 6.

A recent survey shows that some school publishers are interpreting Sec. 406(b) of the 1976 Copyright Act to mean that they can sell books up to a year prior to the date in the copyright notice. Reportedly, one example of this practice is Follett's spelling program, which was introduced at the November 1979 National

Council of Teachers of English meeting and is currently being sold with a 1981 copyright notice. Follett president Philip Laleike could not be reached for comment. When asked if his organization had issued an official policy statement on this matter, Henry Kaufman, counsel for the Assn. of American Publishers, said that the AAP had "decided the issue was too uncertain and had too many ramifications" for them to get involved. He also stated that the AAP had not taken a position.

321. A Copyright Office public hearing. *BP Report* (June 30, 1980).

Theodore Caris, publisher of the Aspen Systems Corp. of Germantown, Md., has asked the Copyright Office to investigate the current photocopying practices of government libraries, especially the National Institute of Health and the National Library of Medicine. Caris made the request at one of the Office's public hearings on the effects of Section 108 of the new copyright law concerning photocopying on the rights of creators and the needs of users of copyrighted works. He claimed that neither of the institutions had registered with the Copyright Clearance Center nor had they sought the permission of publishers of medical journals to photocopy their materials.

322. Copyright owners urged to speak up. *Publishers Weekly*, vol. 217, no. 22 (June 6, 1980), pp. 34, 36.

Charles Butts, chairman of the AAP Copyright Committee, says that educators and librarians have been "heavily represented" in recent hearings on Section 108 of the Copyright Act, while publishers have provided very little testimony by comparison. Explaining that most of the meetings so far have been timed to coincide with events held by librarians and educators, Butts said that the first meeting geared for the convenience of publishers will not be held until January, 1981, in New York. Butts noted that publishers should not "sit back and wait" for that date before testifying. "What publishers' testimony has been given so far," he said, "comes primarily from the technical, professional, scientific, and scholarly publishers"—whose works are probably the most photocopied.

323. Copyright suits filed against Virginia school. *Daily Variety* (June 5, 1980).

A copyright infringement action has been initiated by the Theodore Presser Co., Oxford University Press and Novello &

Co. against the Visitors of Longwood College and Dr. Louard Egbert of the school's music department. The suit charges that Egbert, students and other college personnel have been making unauthorized photocopies of five of plaintiffs' musical works. The plaintiffs are seeking injunctive relief, damages of $50,000 for each work, and court costs and attorneys' fees.

324. Court lets piracy conviction stand. *The Hollywood Reporter*, vol. CCLXII, no. 11 (June 17, 1980), p. 4.

In seeking Supreme Court review of his piracy conviction, former E-C Tape Services, Inc. president David Heilman maintained that he was a "victim of selective prosecution" because of his outspoken opposition to copyright law and said that the law is too vague to be used for a valid criminal prosecution. Nevertheless, the Court Declined to overturn the conviction. Heilman is the first person ever prosecuted for the unauthorized duplication of copyrighted recordings. He was sentenced to six months in jail and fined $9,000.

325. Court rules in Harlequin's favor. *The Hollywood Reporter*, vol. CCLXIII, no. 25 (Sept. 16, 1980), p. 15.

Simon & Schuster reportedly has been enjoined from selling its newly introduced silhouette romance fiction series under its current cover design. U.S. District Judge Richard Owen issued a preliminary injunction against the firm after finding that its cover design infringed on and was "confusingly similar" to one belonging to Harlequin Enterprises, Ltd. The injunction also prohibits Simon & Schuster from affixing the cover to any new books.

326. Disney wins suit on 'Cat' feature. *The Hollywood Reporter*, vol. CCLXIII, no. 7 (Aug. 21, 1980), p. 3.

A U.S. District Court has denied the copyright infringement claims of Frank G. Nordstrom, a Colorado man who had charged that Walt Disney Productions' film "The Cat From Outer Space" had infringed upon his works. The court concluded that the allegations were unfounded and that Nordstrom could prove neither substantial similarities between his works and the film nor that Disney had access to his works.

327. Everybody wants the biggest piece of the copyright pie. *Broadcasting*, vol. 99, no. 2 (July 14, 1980), pp. 45, 46.

In response to a request from the Copyright Royalty Tri-

bunal, various groups claiming royalties collected in 1978 have submitted numerous formulae on how the monies should be distributed. In requesting the final comments, CRT chairwoman Mary Lou Burg asked each claimant to submit a complete allocation plan for the money with "appropriate support and rationale." Commissioner Thomas Brennan said a decision on phase two—how the money should be divided by the groups or individual companies within the categories—will be made some time in September.

328. FALLOON, VAL. House of Lords dismisses appeal in reversionary rights dispute. *Record World*, vol. 37, no. 1723 (Aug. 2, 1980), pp. 3, 43.

The House of Lords has dismissed the appeal by a consortium of major music publishers challenging a Court of Appeals ruling which concluded that songs are not collective works under the U.K.'s Copyright Act. This ruling only applies to copyrights granted before June 1, 1957, the term for which was life of the author plus 25 years, with the last 25 years reverting to the estate. Collective works were exempted from the reversionary provision, and now numerous songs that were considered to be collective works will revert regardless of any deals the writer may have made with his publisher during his lifetime.

329. FBI agents in Ohio raid tape operation. *Record World*, vol. 37, no. 1730 (Sept. 20, 1980), p. 15.

A two-year FBI investigation has concluded with raids on what is believed to be the largest tape pirating and counterfeiting operation in the midwest. The seizures, which took place at two Ohio locations, netted more than $20 million worth of cassettes, eight-track masters, labels, illegal tapes and mastering, labeling and packaging equipment. The investigation also turned up evidence indicating that these counterfeiters were doing business in at least forty states.

330. FBI Modsoun probe yields new indictment. *Record World*, vol. 37, no. 1721 (July 19, 1980), p. 180.

Velma Hydock has been convicted on five counts of wire fraud and one count of mail fraud as a direct result of the undercover and grand jury investigations into the manufacture and sale of counterfeit recordings. The indictment alleges that Hydock made and sold counterfeit records individually and through a

non-legal entity which she wholly owned and controlled. If convicted, she faces a maximum penalty of thirty years' imprisonment.

331. FBI hunting 15 in 'operation turntable.' *Record World,* vol. 37, no. 1726 (Aug. 23, 1980), pp. 4, 45.

The joint investigate efforts of the FBI and the Jacksonville (Fla.) sheriff's office have resulted in the return of a 78-count indictment against eighteen persons. One of the primary targets of the investigation, titled "Operation Turntable," was a multistate tape pirate ring operating in states from Maine to Florida. "Turntable" was first disclosed to the public on April 25, 1979, when a four-state raid led to the seizure of $800,000 worth of illegal tapes. The charges in the indictment include racketeering, interstate transportation of stolen property, fraud by wire, and copyright infringement.

332. FCC cable pickup ruling defended. *The Hollywood Reporter,* vol. CCLXII, no. 41 (July 30, 1980), p. 26.

Marc Nathanson, the vice-president of the California Community TV Assn., applauded the Federal Communications Commission's recent rescinding of its distant signal importation and syndicated exclusivity rules. He said "the ruling was long overdue and will force local commercial stations to improve their service." He predicted that cable TV will experience a rapid boom within the next year, and with it will come the creation of thousands of new jobs.

333. FCC doesn't alter its common carrier c'right definition. *Daily Variety,* vol. 188, no. 41 (Aug. 4, 1980), p. 4.

The Federal Communications Commission has declined to redefine the term common carrier to specifically require that copyright payments be paid by such resale common carriers as Southern Satellite Systems. Metromedia Broadcasting had requested that the Commission rule that these firms do not meet the passive common carrier definition, a position with which FCC staff members reportedly agree. The decision is all part of a proposal by the Commission to deregulate common carriers where possible to permit them to respond more quickly to demands of the marketplace.

334. 50 musical acts: silk-screen bootleg op uncovered. *Daily Variety,* vol. 189, no. 4 (Sept. 11, 1980), pp. 1, 6.

A search of the premises of Grand Illusion Designs, Inc., an Illinois firm, uncovered more than 600 allegedly unauthorized silk screens used in the manufacture of celebrity T-shirts. Bootleg merchandise of at least fifty musical acts was found, including that of Kenny Rogers who already had a copyright and trademark infringement suit pending against the company. Winterland Products, a concert-merchandising firm, and attorneys for Rogers and his label, Liberty Records, assisted in the investigations that led to the search.

335. The Four Aces Litigation: What's in a name. Albertini v. Giglio. *Art & the Law*, vol. V, no. 3, pp. 67–68.

In a recent court decision, *Albertini v. Giglio,* (E.D. Pa. 1979), the court held that the original members of the "Four Aces" singing group had relinquished to their successors in the group (including Joseph Giglio) all rights in the group name and logo. The article gives an extensive history of the case and includes the argument surrounding the theories of "partnership" and "working partnerships."

336. Four Carolina dupers guilty in U.S. trial. *Cash Box,* vol. XLII, no. 18 (Sept. 13, 1980), p. 12.

The U.S. District Court in Greenville, S. C. found George Washington Cooper, III, guilty of criminal copyright infringement in connection with the unauthorized manufacture of records containing the song "I want to be your lover." Cooper's three co-defendants, Donald D. Mull, William R. Johnson and Carol Owens, pleaded guilty to five counts of unauthorized manufacture. Prosecution of the defendants stemmed from an FBI raid on Cooper's warehouse.

337. 14 Canadian colleges await court's ruling on piracy issue. *The Hollywood Reporter,* vol. CCLXII, no. 47 (Aug. 7, 1980), p. 23.

No decision has been rendered in the Canadian copyright infringement suit involving the unauthorized copying of audio-visual material by fourteen Quebec junior colleges. The suit, which was brought by the Society for Advancement of A-V Rights, alleged that the schools had been renting films and transferring them to cassettes as well as off-air taping without the consent of the copyright owners. Apparently, the Society, and the Minister of Education, had unsuccessfully tried to develop a formula for compensating the owners prior to the filing of this action. Pending

the outcome of the suit, the Society persuaded the court to enjoin the schools, some of which are claimed to have published catalogues containing more than 50,000 illegally recorded programs and films, from destroying any of the tapes and films in question. The Society was also granted permission to have access to the schools to prepare an exhaustive inventory of the pirated material.

338. FRIEDMAN, MEL. Copyright holders endure hunger pangs as they squabble over slices of cable royalty pie. *Television Radio Age*, vol. XXVII, no. 19 (May 19, 1980), pp. 44–47, 76, 78, 80, 81.

The author discusses the current negotiations being held between the principal claimants to the 1978 cable royalty fund, now worth more than $14.3 million, including interest. The current royalty treasury is the first to be distributed under the new copyright law, which went into effect January 1, 1978. While no parties to the present dispute categorically rule out the chances of a voluntary settlement being reached outside CRT auspices, these hopes grow increasingly dim as time goes on.

339. GANSBERG, ALAN L. Valente optimistic on talks with FCC re copyright laws. *The Hollywood Reporter*, vol CCLXII, no 3 (June 5, 1980), pp. 1, 25.

Renee Valente recently met with Federal Communications Commissioners to discuss copyright laws and syndication exclusivity. Valente, Grant Tinker, Jack Valenti and Bob Cahill all went to Washington on behalf of the Caucus for Producers, Writers and Directors. The Caucus wants the FCC to maintain its syndication exclusivity rules until Congress has had a chance to thoroughly review the situation and to take appropriate action. The rising number of cases of unauthorized retransmission of programming has caused Caucus members to become concerned about their ability to financially survive, since most of them make their income from syndication. They contend that Article I of the Constitution should be interpreted as empowering Congress to extend protection for broadcasts as well as printed matter. Therefore, Congress should have time to work with the Copyright Royalty Tribunal to iron out the problems before the Commissioner abolishes its cable rules.

340. GELMAN, MORRIE. Re-examination of royalty fees for creators urged. *Daily Variety* (July 14, 1980).

Speaking at a Motion Picture Assembly luncheon, Rep. Ro-

mano L. Mazzoli said that he believes that the 1976 Copyright Act and the Copyright Royalty Tribunal's fee structure should be reexamined. Admitting that the current rate was "out of balance," he indicated that the 1% figure was merely a starting point and that future rates will be more realistic. Sam Sacks, another speaker at the luncheon, talked about the abolition of the FCC's syndicated exclusivity and distant signal regulations. He warned that abandonment of the rules could lead to the possible demise of free TV.

341. George Schlatter loses $4.6-mil 'Laugh In' suit. *Daily Variety,* vol. 189, no. 2 (Sept. 9, 1980), p. 19.

An L.A. Superior Court jury has reportedly rendered a verdict for Dan Rowan and Dick Martin in their $4,600,000 plagiarism suit against producer George Schlatter. The judge presiding over the case, which arose out of a controversy over the "Laugh-In" series, has not rendered his judgment on the jury's decision, however.

342. Goldwag wins $3,000 Burkan award. *Billboard* (July 19, 1980).

A Columbia University law school graduate won the 1979 Nathan Burkan Memorial Competition for outstanding law school essays on the copyright law. The winner, Celia Goldwag, received $3,000 for her paper entitled "Copyright Infringement and the First Amendment." Phyllis Amarnick, a Harvard Law School graduate, won second prize, and Carol Ellington, Jeffrey Liebowitz and John Craig Oxman tied for third.

343. GRAHAM, SAMUEL. Feist's address to publishers forum keyed to current CRT developments. *Record World,* vol. 37, no. 1722 (July 26, 1980), p. 10.

The Copyright Royalty Tribunal mechanical royalty hearings were the subject of a speech Leonard Feist of the National Music Publishers Assn. delivered at a recent meeting of the Music Publishers Forum. Since most of those attending the meeting were young publishers, Feist explained the purpose of the hearings and talked about the arguments being posed by publishers and writers on one side and record companies on the other. He refrained from making any predictions as to the outcome of the proceedings, however.

344. GROSS, KAREN. The new copyright law and the art community.

Professional Arts Guide (May–June 1980), pp. 23–29.

The author points out the differences between copyright, trademarks, and patents and how these rights apply to artists. Background surrounding the new copyright law as well as highlights of the new law are discussed. There is a special section on acquisition, transfer, and sales. Hypothetical copyright problems are analyzed, with the author also providing graphics to illustrate these problems.

345. HARRIS, PAUL. FCC change of rules stings broadcasters. *Daily Variety*, vol. 188, no. 35 (July 28, 1980), pp. 14, 18.

As a result of the Federal Communications Commission's recent repeal of its distant signal and syndicated exclusivity rules, broadcasters filed an appeal with the Second Circuit Court of Appeals. Other fallout from the removal of the two cable rules is expected from program suppliers/TV stations on the one hand lobbying for revocation of the cable compulsory license, and the cable TV industry on the other campaigning against such a move.

346. HARRIS, PAUL. Pirates likely big winners in new b'cast bill. *Daily Variety*, vol. 188, no. 59 (Aug. 28, 1980), pp. 1, 15.

Rep. Richard Preyer unexpectedly withdrew his STV antipiracy bill from broadcasting legislation that is currently undergoing markup in the House Commerce Committee. The sudden withdrawal of the amendment, which provided stiff penalties for video pirates, was attributed to mounting opposition by home owners and the electronics industry. It was unanimously approved by the Committee a few weeks ago in a common carrier bill, but that measure only applied to satellite transmissions and not to subscription TV.

347. HEATHCOTE, GRAHAM. You can go Holmes again: Sherlock enters public domain, gets the treatment. *The Washington Post*, vol. 103, no. 216 (July 8, 1980), pp. B1, B6.

The British copyrights on the adventures of Sherlock Holmes have expired, and new exploits of the world's most famous detective are expected. Holmes and his faithful friend Dr. Watson, their arch foe Moriarty, and the other inventions of Sir Arthur Conan Doyle can now be used in books, plays, and films without paying royalties to Conan Doyle's heirs or his publisher.

348. HEHMAN, MAUREEN. Cable TV: what's in it for you? *Cincinnati* (May 1980), pp. 46–51.

The author discusses the growth of the cable television industry with emphasis on the effects it has had on the city of Cincinnati. Ms. Hehman says the industry is growing so fast that experts predict that one of three TV households will be hooked into cable by 1981. She concludes that "cable can be used as a giant network to tap into computer information banks: type a question into a home console and see the information on TV from the Library of Congress, your local library or a medical computer bank."

349. Hindenburg disaster story raises copyright-of-research issue. *Authors Guild Bulletin* (May–June 1980), p. 13.

The question of original research by an author and whether it is subject to copyright protection was the issue in a recent court decision involving two books and a film about the 1937 Hindenburg dirigible disaster. The U.S. Court of Appeals in New York ruled that historical interpretation cannot be protected by copyright. The case, which was brought by A.A. Hoehling, was dismissed. Hoehling had brought suit against Michael MacDonald Mooney and Universal City Studios charging that they had made a book and movie whose plot followed the theory of Hoehling. Hoehling wrote that the Hindenburg was sabotaged by Nazis rather than struck by lightning as was formerly proposed by other experts.

350. HOFFMAN, BARBARA. The California Art Preservation Act. *Art & the Law,* vol. V, no. 3 (1980), pp. 53–59.

A look at the California Act and the areas in which it offers protection and where it is limited. The author defines what is an artist and what is fine art and writes about the right of integrity, the right of paternity, enforcement of these rights, and preemption and the new copyright act. In her conclusion, Ms. Hoffman states that it is her view that a "well drafted amendment to the Copyright Revision Act is a more appropriate source for protection of the artist" than the California Act. She offers alternatives to the California Act that she believes should be considered by other state legislatures when they are seeking a model for legislation concerning artists' rights.

351. Hoffman stresses strength of international publishing ties. *BP Report* (May 19, 1980).

A synopsis of addresses given by Alexander Hoffman and Townsend Hoopes to the Association of American Publishers annual meeting. Hoffman noted that considerable progress has been made in our relations with China. In the area of intellectual property, the Chinese are now drafting a copyright law and have requested the aid of the U.S. in refining the draft. They have also indicated that they will join the Universal Copyright Convention as soon as the law is enacted. Hoopes' talk focused on the problem of copyright enforcement and the importance of publishers placing their publications within a copyright clearinghouse mechanism.

352. HOLLAND, BILL. Cambridge Institute's Kizer tells CRT a royalty increase is not necessary. *Record World*, vol. 37, no. 1723 (Aug. 2, 1980), pp. 3, 50.

Testifying on behalf of the recording industry, David Kizer, president of the Cambridge Research Institute (CRI), told the Copyright Royalty Tribunal that an increase in the mechanical royalty rate is not necessary. Among his reasons for coming to this conclusion were CRI data which showed that an increase in the rate could exacerbate the imbalance between the supply of tunes by songwriters and the supply of record releases. It also showed that a rate increase would cause distributors and retailers to pressure record companies to raise list prices. During this week's testimony, the CRT did not move on the joint motion of the American Guild of Authors and Composers and the Nashville Songwriters Assn. International to strike from the record the economic study that CRI prepared for the RIAA.

353. HOLLAND, BILL. CRT hearings continue. *Record World*, vol. 37, no. 1719 (July 5, 1980), pp. 10, 39.

During the Copyright Royalty Tribunal royalty hearings, the commissioners attempted to obtain more detailed financial information connected with the Recording Industry Assn. of America economic study that was conducted by the Cambridge Research Institute. The study indicated that record companies have been hit by rising costs in the last few years and that break-even costs have more than doubled the 1972 figures. Therefore, the Tribunal was particularly interested in the availability of company-

by-company data on these economic conditions. Commissioner Thomas Brennan indicated that the record industry testimony will continue into July.

354. HOLLAND, BILL. NAB committee states opposition to recording performance rights bill. *Record World,* vol. 37, no. 1716 (June 14, 1980), p. 6.

Although the markup of H.R. 997, the performance rights bill, was postponed, the Small Market Radio Committee of the National Assn. of Broadcasters went on record against it. The Committee indicated that it was "opposed in principle to any legislation that would require broadcasters to pay royalties to performers for records played over the air." The group also expressed opposition to the Federal Communications Commission's easing of the administrative burden of stations in complying with its rules governing equal opportunity hiring. The NAB feels that without "rational examination of the means by which EEO goals are achieved through a complete rule-making proceeding, public support of the program will be eroded."

355. HOLLAND, BILL. NMPA royalty proposal criticized by RIAA. *Record World,* vol. 37, no. 1718 (June 28, 1980), pp. 5, 83.

The Recording Industry Assn. of America criticized the National Music Publishers Assn.'s proposal for a mechanical royalty fee of 6% of the suggested list retail price of records or tapes. RIAA attorney James Fitzpatrick particularly attacked the plan's time cut-offs in the unit allocations scheme, its use of the "suggested retail list price" concept and its requirement for filing of a notice of change in such retail list price with the Copyright Royalty Tribunal. Fitzpatrick also pointed out the inherent accounting red tape that would be involved if such a plan were approved.

356. HOLLAND, BILL. Performance rights royalty bill shelved. *Record World,* vol. 37, no. 1719 (July 5, 1980), pp. 3, 39.

H.R. 997, the sound recording performance rights royalty bill, will have to wait until the next session of Congress. The bill had made it to full subcommittee markup meetings back in May, but rescheduling problems caused the sessions to be postponed until late June. Then this past week, Rep. George Danielson, who was managing the bill, sent a letter to the chairman of the judiciary subcommittee suggesting that it would be best to hold the bill until

the next Congress. An overflow of work in other areas was cited as the reason for the postponement. Broadcast officials, however, who were strongly opposed to the bill, cited the upcoming conventions as another reason for the delay.

357. HOLLAND, BILL. Publishers ask CRT to strike RIAA study. *Record World,* vol. 37, no. 1722 (July 26, 1980), pp. 3, 42.

The American Guild of Authors and Composers and the Nashville Songwriters Assn. International have filed a motion with the Copyright Royalty Tribunal to "strike from the record" the economic study that was submitted by the Recording Industry Assn. of America at the royalty rate hearings. The study was entered as supportive evidence for the RIAA's position to maintain the current mechanical royalty rate, but the Association has refused to produce the input data on which the study is based. In the motion, the songwriters contend that this refusal "violates the rules of the Tribunal . . . denies other parties the ability to conduct such cross examination as is necessary to disclose the facts fully and truthfully, and deprives the Tribunal of the ability to determine the accuracy, reliability and truthfulness of the statements made" in the study. The motion requests that related reply comments and statements that were submitted along with the economic study be stricken as well.

358. HOLLAND, BILL. RIAA requests data on NMPA finances. *Record World,* vol. 37, no. 1722 (July 26, 1980).

The Recording Industry Assn. of America has filed a motion with the Copyright Royalty Tribunal requesting that the National Music Publishers' Assn. submit more financial data at the mechanical royalty rate hearings. The data being sought are (1) domestic revenues from record-relating sources, (2) foreign revenues from the same sources, (3) expenses and (4) pre-tax profits from recording-related sources. This information is to be representative of a sampling of publishers for the past four years.

359. House of Lords copyright decision clarified U.K. status of 50,000 titles. *Cash Box,* vol. XLII, no. 13 (Aug. 9, 1980), p. 37.

As a result of a recent House of Lords ruling, the rights to more than 40,000 songs will revert to the estates of the original copyright owners. The controversy arose over the interpretation of collective work under the U.K.'s copyright law. In 1978, the Court of Appeals ruled that songs with separate composers and

lyricists were to be treated the same as songs with a single composer/lyricist, with song rights to revert to the original copyright owner's estate during the last 25 years of the copyright term, which was life of the author plus 25 before the current act went into effect. EMI Publishing and Chappell Music argued that such songs were collective works, which are ineligible for reversionary rights. Noting that the copyright law defined a collective work as an encyclopedia, a collection of short stores or a magazine, the House of Lords refused to accept EMI/Chappell's interpretation and thus upheld the appellate decision.

360. HUDSON, RICHARD L. Distribution of cable TV's royalty fees threatens to revive copyrights conflict. *The Wall Street Journal*, vol. CXCVI, no. 11 (July 16, 1980), p. 7.

The author discusses some of the issues surrounding the controversy over how much royalties should be paid each copyright claimant. With the law intentionally silent on how the agency should split the royalties, each of the major claimants is urging its own distribution formula on the Copyright Royalty Tribunal.

361. Illegal duplicator found guilty by district court. *The Hollywood Reporter*, vol. CCLXII, no. 35 (July 22, 1980), p. 18.

The U.S. District Court in Houston has found Ralph Smith guilty on 34 counts of copyright infringement and interstate transportation of stolen property. The conviction is the result of an FBI raid on Smith's videotape operation. More than 500 master videotapes of copyrighted motion pictures were confiscated, along with records indicating that he had shipped illegally duplicated tapes to other countries. The court found that Smith had been videotaping the motion pictures off TV and renting them to multinational corporations for use by their overseas employees.

362. Incentive to create. *Salem, Inc. Democrat* (July 30, 1980).

A note of reflection upon the incentive to further creation that the copyright law has provided. More than thirteen million works have been registered since the Library of Congress became the nation's first central repository of copyrights in 1870. Prior to that time, that responsibility rested with various governmental offices—federal courts, the Patent Office, the Smithsonian Institution. Books and other writings were the sole subject of copyright when the law was first enacted in 1790. Since that time, the subject matter of copyright has broadened to include prints, movies,

musical works, video recordings, fabric designs, electronic music and computer tapes.

363. Injunction issued in Natl. Music case; anti-trust claims against RIAA dropped. *Record World,* vol. 37, no. 1721 (July 19, 1980), pp. 170–200.

In 1975, a federal court in California granted Capitol Records a permanent injunction prohibiting Joseph Martin from duplicating copyrighted sound recordings. In 1977, RCA Corp. and Atlantic Records brought a similar action against National Music and Pearl Music in the District Court in Connecticut. Meanwhile, the court in the California case found Martin guilty of contempt of the 1975 injunction in that he was involved with both of the companies named in the Connecticut suit. Pearl Music, Martin, National Music and three other sales companies then brought an antitrust action against the Recording Industry Assn. of America. A summary judgment was entered for the RIAA and four of the plaintiffs appealed. On June 24, Judge Ellen Burns signed a stipulation in the Connecticut action in which Martin and the other companies agreed to release the RIAA and any of its members that were the original or subsequent plaintiffs in the Connecticut suit from all antitrust claims. Under the terms of the judgment, Martin and the other defendants are also permanently enjoined in a related New Hampshire case that was consolidated with the instant case and must pay damages to RCA and Atlantic Records.

364. Iowa State is winner in copyright dispute. *Higher Education and National Affairs* (May 30, 1980).

A United States Court of Appeals has upheld a damage award of $15,250 plus $17,500 in attorneys' fees to the Iowa State Research Foundation in its copyright infringement suit against ABC-TV. The Foundation, which is the copyright proprietor of a 28-minute film about Olympic gold medalist Dan Gable, charged that the network used portions of the film on three telecasts without authorization. Apparently, ABC offered fair use as a defense to its airing of the film, but the appeals panel unanimously agreed that "the fair-use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance." The court then opined that ABC probably would not accept the fair-use defense if another litigant sought to apply it to the unauthorized use of the ABC evening news.

365. JASPERT, W. P. Sudden liking for U.S. printing expressed by British publishers. *Printing News* (June 21, 1980).

A study of book publishing and its complete turnaround in manufacturing centers. At present, plants in the U.S. tend to be more productive than the European book manufacturers. The author believes, however, that some of the British book manufacturers have managed to hold on to a good share of the international coedition market because of the disappearance of restrictions posed by the Copyright Act.

366. JD giving high priority to pic, tape pirating. *Daily Variety*, vol. 189, no. 5 (Sept. 12, 1980), p. 1.

The Justice Department is launching a campaign against film, video and tape pirating. This effort is part of an overall crackdown on white-collar crimes that are believed to be linked to organized crime. According to a JD official, a recently released report shows that the FBI considers the illegal use of copyrighted material to be one of its top five crimes. The Department will be increasing its use of undercover operations and expanding its economic crime prevention program in its endeavor to squelch this problem.

367. Judge finds Tucker guilty of lying to jury, obstruction. *Daily Variety*, vol. 189, no. 4 (Sept. 11, 1980), pp. 1, 6.

A Brooklyn Federal Court has found George Tucker guilty of making false statements to a grand jury in December, 1979, and of obstructing justice by impeding the government's investigation of tape and record counterfeiting. Tucker, who had pleaded guilty to wire fraud and copyright infringement charges in August, 1979, had agreed to cooperate with the authorities in their investigation of interstate trafficking of counterfeit record and tapes. When he testified before the grand jury, however, he lied about having business dealings with Norton Verner. He then tried to convince Verner to lie to the grand jury about their relationship. Verner was the middleman for the counterfeiters and retailers.

368. Kaiser Co.'s topper accuses TV of short-changing the public. *Variety*, (Aug. 6, 1980).

National Assn. of Broadcasters president Vincent Wasilewski delivered the keynote address at a three-day conference of the California Broadcasters Assn. He told Assn. members that the Federal Communications Commission's justification for removal

of its cable rules was "nothing less than hypocrisy." The justification was based on the cable provisions of the copyright law, but Wasilewski contended that these provisions were intended to act in conjunction with the Commission's cable rules as the "overall governmental regulatory balancing mechanism between cable and broadcasting." He said that Congress passed the Copyright Act with that understanding.

369. KARLEN, PETER H. Art Law. *Artweek* (May 31, 1980).

This article is the first in a series which discusses the nature and subject matter of copyright, copyright ownership, duration of protection, publication and notice, infringement and remedies for infringement. The author points out that copyright, as a right affecting an artistic work, is "not only severable, but is also inheritable and transferable" as are other types of property.

370. KARLEN, PETER H. Copyright, Part II—Subject matter. *Artweek* (Aug. 16, 1980).

An analysis of Section 102 highlighting the concepts of originality, works of authorship and fixation. Translations of literary works, arrangements of musical works and artistic reproductions are analyzed as to their qualification for copyright. The author comments that beauty, craftsmanship or skill in production is not a consideration in qualifying.

371. KARLEN, PETER H. Art law—Copyright: Part IV—Ownership. *Artweek* (August 30, 1980).

The author's interpretation of a "work made for hire" is presented along with that of joint ownership. The author states that a joint copyright owner may license the use of the copyright work without the permission of the owner. He reminds freelance writers who submit articles to a periodical that they do not lose copyright in the article when it is published in the collective work even if the writer's copyright notice does not appear and the publisher's notice is used to protect the collective work.

372. Kenny Rogers files copyright, trademark infringement suit. *Daily Variety*, vol. 188, no. 54 (Aug. 21, 1980), p. 20.

Kenny Rogers filed suit against Grand Illusion Design Inc., an Illinois firm that allegedly had been supplying bootlegged T-shirts and other souvenir items to vendors in the midwest. The charges listed in the complaint include copyright infringement,

trademark infringement, unfair competition and violation of the right of publicity. Rogers' manager, Ken Kragen, hopes this suit will deter other bootleggers.

373. KIRKEBY, MARC. Writers, industry fight over royalties. *Rolling Stone* (June 26, 1980).

In this brief discussion of the mechanical royalty rate increase issue, Mr. Kirkeby sums up the arguments of record companies on the one hand and songwriters and music publishers on the other. The latter want the rate changed to a percentage of the list of records and tapes, while the former want the current 2 3/4-cent rate to be maintained. Out of the many complex issues involved in this royalty rate controversy, Kirkeby indicates that only one is clear—if writers win a royalty increase, manufacturers will almost certainly pass it along to consumers in the form of higher record and tape prices.

374. KOLOFF, KEVIN N. Performance rights in sound recordings. *Art & the Law,* vol. V, no. 3 (1980), pp. 63–66.

A discussion of the proposed Sound Recordings Performance Rights Amendment and a look at why the performance rights amendment was originally shelved in 1976. There is mention of the copyrightable nature of a performance, the substantive fairness of granting performance rights, and the economic considerations and the economic impact on artists, record companies and broadcasters that could result from the proposed amendment.

375. MADOFF, EMILY. The fine art of protecting your creation. *Savy* (August 1980), pp. 22–23.

An explanation of copyright for the novice, touching mainly on the areas of fair use, registration, transfer and licenses. A brief look at the copyright infringement case involving the Chiffons' song "He's So Fine", and the Beatles' "My Sweet Lord" (*Bright Times Musical Company v. Harrisong Music Co.*) is also included.

376. Manufacturer fined under N.Y. state antipiracy statute. *Record World,* vol. 37, no. 1719 (July 5, 1980), p. 10.

Convicted record pirate Paul Winley was fined $12,500 and given five years probation at his sentencing on June 23. Winley, the first record manufacturer found guilty of unauthorized du-

plication of sound recordings under the new New York state antipiracy statute, was also ordered to "make available immediately to the Record Industry Assn. of America all books, records or other documentation regarding his business to enable the RIAA to determine and calculate royalties owed to any record companies."

377. MARTINEZ, MICHAEL. Recording piracy convictions gain momentum nationwide. *Cash Box*, vol. XLII, no. 8 (July 5, 1980), pp. 7, 10.

This article gives an update on the progress that the FBI, local police and the recording industry have made toward abating record/tape piracy and counterfeiting. The number of raids, indictments, prosecutions and convictions for these offences has increased in recent months. Jules Yarnell of the Recording Industry Assn. of America indicated that the severity of the punishment, especially in the case of repeat offenders, will probably increase also.

378. MCA files complaint against Steely Dan. *Record World*, vol. 37, no. 1722 (July 26, 1980), p. 9.

MCA Records filed suit against the Steely Dan rock group to enjoin it from releasing its forthcoming album under any other record label. MCA claims that it has already committed one million dollars in production funds for the album, the rights to which were acquired via its purchase of the group's former label, RCA Records. Steely Dan's manager declined to comment on the suit, but reportedly, it was initiated as the result of a contract dispute. MCA is claiming that the group is obligated to make one more album under the contract, while Steely Dan is alleging that the label's failure to pay several million dollars in royalties breached the contract.

379. MCGEE, DAVID. PLI panel debates video's future. *Record World*, vol. 37, no. 1719 (July 5, 1980), pp. 8, 39.

The Practicing Law Institute sponsored a seminar on the legal and business aspects of the music industry. Among the topics discussed at the session were the copyright law, royalty compensation for material used in video software, home taping, and pay cable television. The discussions were conducted by a panel of entertainment lawyers, publishers and television executives.

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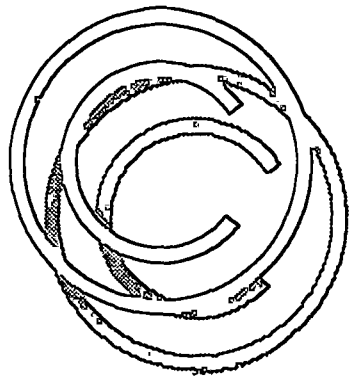

Published at
NEW YORK UNIVERSITY LAW CENTER

VOL. 28, No. 4 APRIL, 1981

Published at New York University Law Center, 40 Washington St. South, New York, N.Y. 10012. Printed and distributed by Fred B. Rothman & Co., 10368 West Centennial Road, Littleton, Colorado 80127.
ISSN 0010-8642

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THE BULLETIN of The Copyright Society of the U.S.A. is published 6 times a year by The Society at the Law Center of New York University, 40 Washington Square South, New York, New York 10012; Stanley Rothenberg, *President*; Richard Dannay and Alan J. Hartnick, *Vice Presidents*; Theodora Zavin, *Treasurer*; Jerold L. Couture, *Secretary*; Henry R. Kaufman, *Assistant Treasurer*; Raymond D. Weisbond, *Assistant Secretary*.

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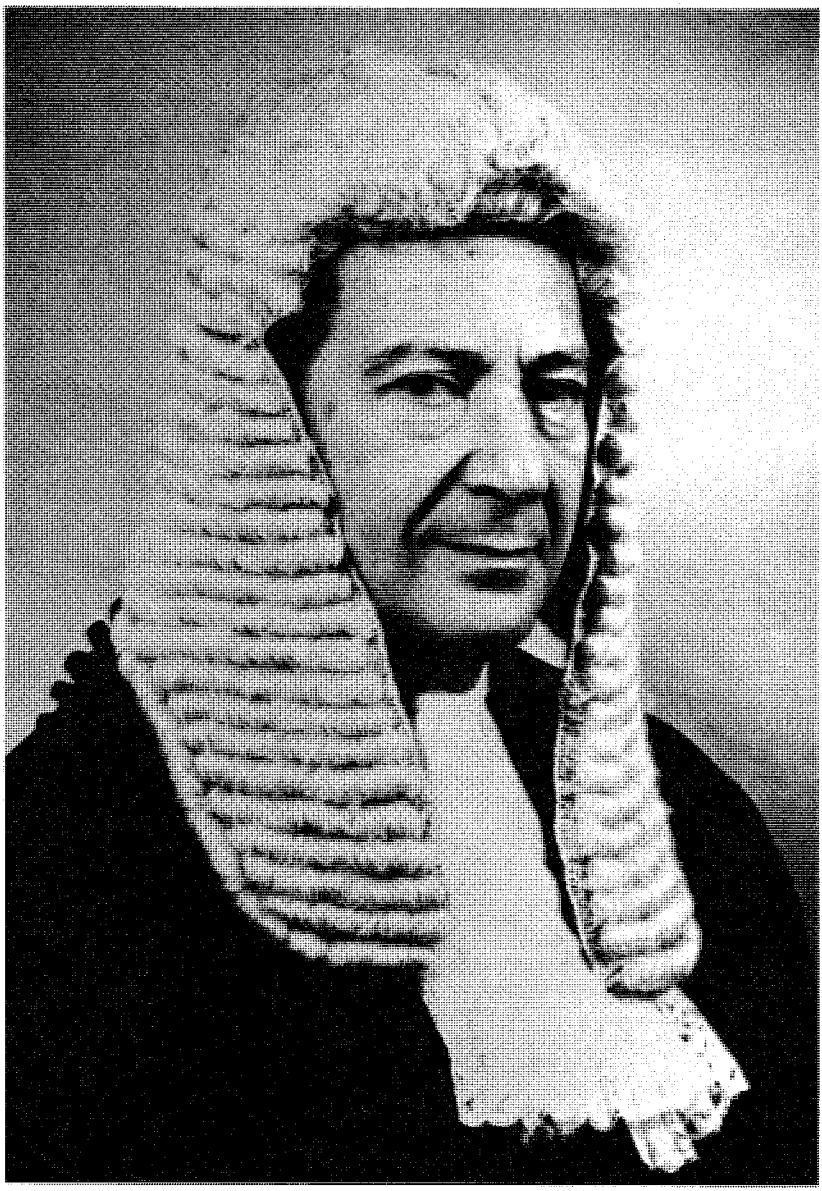
CITE: 28 BULL. COPR. SOC'Y, page no., Item . . . (1981).



STEPHEN STEWART, Q. C.

PART I

ARTICLES

380. INTERNATIONAL COPYRIGHT IN THE 1980s—*The Eighteenth Annual Jean Geiringer Memorial Lecture**

By STEPHEN STEWART**

INTRODUCTION

Thank you for inviting me to deliver this memorial lecture. I consider it a great honour firstly because of the distinguished audiences attending these lectures; secondly because your lecturers have included such eminent jurists as Professor Bodenhausen and Professor Ulmer, such great practitioners of copyright as Erich Schulze and Jean-Loup Tournier, such great public servants as Elisabeth Steup and William Wallace; and last but not least because of the great admiration I have always had for the achievements of Jean Geiringer.

When your former President invited me he asked me with typical generosity to suggest a topic. I chose International Copyright in the 1980s because I believe that the whole copyright system is approaching a crisis and that an analysis of the underlying causes of this crisis may help to overcome it. If I get it wrong there will be many in this audience, and even more outside, to put me right. If, however, the attempt of an analysis fosters an informed debate on how to deal with the crisis the choice will have been justified and, I think, Jean Geiringer would have approved.

Consider that copyright, to be viable in the 1980s, has to be truly international and that international copyright as we understand it is of fairly recent vintage. There have been periods of great flowering of Western civilisation such as the Greek city state, the Roman Empire, the European Renaissance, during which copyright did not exist. There are still many countries today where copyright either hardly exists or where it does not effectively operate. Practical enforcement of international conventions, even in such vital matters as health or sea or air law, is

*This lecture was delivered in the Auditorium of New York University School of Law on November 17, 1980.

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0010-8642/81/02/351 - 29/$2.00/0

proving very difficult. Consider further that copyright deals with the theft of immaterial or intellectual property which is a concept much more difficult to grasp than ordinary theft and far less deep rooted in the public consciousness of what is right and what is wrong. It is on that public consciousness that all laws and particularly those with a criminal content are based. Convincing the general public even in the great democracies that copyright infringement is theft is a long and arduous process, scarcely begun. Consider finally that technological development in the last twenty-five years has probably been faster and more far reaching than in any previous period of our history. Legislators will have constantly to be persuaded to revise copyright legislation to catch up with technology, when they have been used to doing it only every fifty years and, according to their lights, have "more important things to do." Taking all of this into consideration, you may, before you leave this hall, agree with me that we are entering a crucial period in the development of international copyright. To describe it as a crisis is not alarmist; to treat it as such is merely prudent.

I. The Challenges of the 1960s and '70s

Before analysing the crisis of the 1980s and trying to see how it can be met, I would like to ask quite briefly what the challenges of the 1960s and 1970s have been. I would suggest that they were of three kinds, two of which have been largely met and one of which has not.

The *first* challenge to international copyright in the 1960s and 1970s was the fear that a totalitarian philosophy may negate the whole concept of intellectual property on the grounds that all creative people should find their fulfilment in dedicating their work to the community represented by the state. The state, in return, will look after the artists' material needs. Therefore, in totalitarian countries, individual rights are unnecessary and may be positively harmful. As countries with that sort of philosophy became more common it was feared that the philosophy might spread to other still uncommitted countries and destroy the whole concept of copyright as a private and individual right. Or, it was feared, it would at least gradually reduce the international level of protection.

The U.S.S.R., which was regarded as the original exponent of this philosophy, did not press the attack. And, although the Russian system differs in several material aspects from the patent and copyright systems of the Western countries, the U.S.S.R. has in the 1960s and 1970s joined both the Paris Union and the Universal Copyright Convention. The Russians struck a hard bargain. Since they joined the UCC in its original form and since their ratification was not retrospective, they became entitled to use the whole of the then-existing foreign repertoire without remuneration.

What matters most, however, is that the VAAP, the state-owned monopoly society in the Soviet Union, is building up a network of agreements with foreign collecting societies which are based on copyright principles. These agreements are being meticulously honoured. The fact that the countries of COMECON, with whom the Soviet Union has close trading ties, have old, established and rather sophisticated copyright laws and that these countries were early members of the international conventions has, no doubt, also played a part.

Recent developments in the other major community power, the People's Republic of China, also suggest that the new government of China is not averse to recognising intellectual property rights. Bilateral agreements may be the first step to bringing China into the international copyright community. The day when it may join one of the international conventions is not as far away as it seemed until quite recently.

The *second* challenge to international copyright in the 1960s and 1970s came from the developing countries. This challenge was not based so much on ideological grounds. It was based on the practical proposition that the developing countries needed and welcomed the intellectual property of the western world, but were too poor and certainly too short of hard currency to pay for it in the same way as developed countries did, and further they did not have any copyright material which could readily be offered in exchange. The implied challenge was that if the developing countries could not be accommodated, they might opt out of the international copyright system, at least for the time being. In this case, they would take what they needed without payment, saying that that was, in effect, what the two super-powers had done in the not too distant past.

An attempt to meet this challenge was made at the Stockholm Conference in 1967 and the Paris Revision Conference in 1971. A system of compulsory licences was developed, carefully structured to give mainly to the publishers of the western world an opportunity to meet the needs of developing countries before these compulsory licences come into effect. Although less than a decade is not long enough to judge, there are indications that workable, practical compromises are being found based on this system without actually having to resort to compulsory licences. The untiring efforts of WIPO, the World Intellectual Property Organisation in Geneva, to assist the developing countries in practical ways, and the catalogue of available works established by UNESCO contributed to making a successful solution of these problems in the 1980s and 1990s a practical possibility.

The *third* challenge of the 1960s and 1970s—that posed by rapidly changing technology—has not yet been met. However, the problems posed have been well researched both nationally in several countries and internationally so that the areas where legislative action is necessary have

been identified. Possible solutions which should be adopted in the 1980s are emerging. The most important of the problems are (1) reprography, (2) storage and retrieval systems, (3) the illicit extension of the sphere of private copying as a challenge to the reproduction right, and (4) cable and satellite broadcasting as a challenge to the broadcasting right.

The material copied by reprography which is copyrighted material—and a lot of it fortunately is not—consists mainly of literary works and particularly technical and learned journals. Private copying affects mainly musical copyrights and will affect motion picture copyrights as soon as videograms become widespread. Satellite broadcasting and distribution by cable affect a wide group of copyright owners. Although the problems of new technology affect different copyright owners, I submit that the solutions which are emerging have several essential characteristics in common.

In trying to summarise these emerging solutions I shall probably be guilty of several over-simplifications, for which I apologise. I must also, where there are still differences of opinion, give my own—which I am sure you will scrutinize most critically.

II. THE EMERGING SOLUTIONS

1. Computers

After intensive research and debates it has, I think, been agreed that "software", i.e. the computer programme, is a "work" in the copyright sense and should enjoy copyright protection. It has also been agreed that the copyright owner has a right to control the use of *his* work at the input stage. What is still being debated is whether the copyright owner, in exercising his absolute right, can be left to make agreements with the computer users or whether compulsory licencing systems are necessary. However, these solutions have all been debated against the background of the technology of the 1960s. I believe that possibly already in the 1980s or at latest in the 1990s we may see the computer replacing the printing press to a large extent. Then, the user will be able in his office and perhaps even in his home to have a machine linked to a central information store by which he can have extracts or copies made of the works he wishes to use. Bearing in mind that the modern concept of copyright arose largely from the invention of the printing press, even the partial replacement of the printing press by computers would amount to a revolutionary change. The copyright owner will then have to exercise his reproduction right at the input stage and look to the computer disseminator for his royalties in the same way that he has looked towards his publisher in the past. I susggest that when that stage is reached, the burning question of whether there should be compulsory

licencing or whether the copyright owners can control this new reproduction right through their societies and bulk licencing will assume a second-rate importance for reasons which I hope to show later.

2. Videograms

Videograms have been defined as audio-visual recordings fixed on any form of material support. Under most legislations a videogram will be a cinematographic work, although there is a school of thought originating in French law which takes the view that a mere sequence of images is not necessarily a work. A videogram differs, however, from a motion picture/film because it is intended to be used in the home and not in a theatre and because it will probably be sold as well as hired out. In both these respects it will resemble the phonogram. It is too early to say which material support will appeal most to the public and whether, therefore, videograms will be published mainly as video cassettes or video discs, or both. Video cassettes seem geared mainly to making recordings from television sets and video discs seem to be used with playback equipment, thus offering a wider repertoire at a lower price. If that proves correct, videograms will resemble phonograms in this respect also, using both tape and disc as material support. They will have the same piracy problems as phonograms have had and are still having in some parts of the world and the same problems of private copying, both from borrowed videograms and off the air. The videogram has so far been mainly used in industrial and technical instruction and for educational purposes. When it comes into its own in the entertainment field, it will, having at first used existing material, eventually develop its own art form for audio-visual entertainment and education in the home. The copyright problems it will pose will be those of the phonogram and the motion picture film combined.

3. "Private Copying"

This constitutes a serious challenge to the reproduction right. It was originally viewed as an extension to the "private use" exception which exists in most legislations and in the international conventions. But examination of the history and the extent of the private use exception shows that this form of reproduction, although practiced mainly in the privacy of the home and not for commercial purposes, is in fact not an exceptional use but an abuse of the reproduction right. The proviso of Article 9/2 of the Berne Convention, which is contained *mutatis mutandis* in most copyright legislations, lays down that such exceptionally permitted private use must "not conflict with the normal exploitation of the

work" or "unreasonably prejudice the legitimate interests of the author." "Private copying" clearly prejudices the authors' interests. On the other hand, it is also clear that this practice has come to stay and that any prohibition or attempt to monitor it would constitute an intolerable intrusion into the privacy of the home. Thus, the only remedy is legislation requiring a royalty to be paid which can be levied either on the recording machine or on the blank tape. If proof was needed that only legislation will solve this problem, the *Betamax* case[1] in the United States has provided it. The attempt to spell out an infringement was made and failed. The court held that private copying of this kind was fair use both under the old law and under the 1976 Act.

There has now been legislation of both types, a royalty on the recording machine in Germany[2] and a royalty on blank tapes in Austria.[3] The two solutions need not be mutually exclusive. As a royalty on blank tapes may be passed on to the consumer, the more substantial the royalty is, the nearer the price of the blank cassette will be to the price of a prerecorded cassette and the less would be the incentive to assemble a library of do-it-yourself tapes. Such a royalty is unusual in two respects. First, it is not paid by the user, i.e. the person copying works in his home, and second, it is a royalty for multiple use. Nonetheless, it should be treated as a royalty for the use of the work and not merely as a compensation for loss or damage to the copyright owners. I suggest that if a choice has to be made, a royalty on blank tapes is preferable. Although multiple use is possible because the private user can erase the recording, this in practice will not be done very often, if at all. On the other hand, recording machines may be used for this purpose hundreds of times. A royalty on blank tapes therefore corresponds more closely to the traditional concept of a royalty for a single use.

Royalties will have to be collected by a collecting society, as is provided in both the German and Austrian legislation. The amount of the royalty can either be laid down in the law or left to collective bargaining between the collecting society and the manufacturers or importers of the tapes. Similarly, the sharing of revenue between the various right owners could be laid down in the legislation or left to negotiations. I venture to think that in both cases free negotiations are preferable. If that solution is adopted, adjudication by a Copyright Royalty Tribunal will have to be provided in case the copyright owners and the copyright users fail to agree.

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[1] Universal City Studios, Inc. v. Sony Corp., 480 F. Supp. 429, 203 U.S.P.Q. 656 (C.D. Cal. 1979). An appeal is pending.

[2] Copyright Act 1965.

[3] Copyright Amendment Act 1980.

4. Satellites

Communication satellites are among the most astonishing inventions of modern technology and to see their importance in copyright law in proper perspective, two points have to be made. First, their uses include international telephone traffic, weather forecasting, cartography, agriculture and geology as well as the transmission of programmes, only some of which contain copyright material. The second point is that the main importance of satellites is for their transmission of news and current events, where immediacy is essential. Experience so far seems to show that the main attraction is sports, because the viewer wants to see a sporting event possibly before he knows the result.

The impact of satellite transmitted programmes on copyrights has so far been slight. That is not surprising because such programmes can in most cases be taped and, if sent by air, may arrive within a few hours of the broadcast itself, which would in all but a few cases be in good time.

One must distinguish between "distribution satellites" which operate as vehicles for the transport of signals to broadcasting organisations and, therefore, replace terrestial networks on the one hand and "direct broadcasting satellites" on the other. The latter will transmit on much lower frequencies allocated by international conventions, and the signals are much more high powered and are receivable by members of the public in their homes after an adaptation has been made to their television sets. Someone has called a direct broadcasting satellite "a sort of aerial out in space." That illustrates the legal point that in direct satellite broadcasting, the originating organisation makes the broadcast in the accepted copyright sense by emitting a signal directly receivable by receivers in private homes. I am told that such direct communication satellites may be in service by the mid-1980s. Since the so-called "Satellite Convention"[4] only deals with programmes transmitted by distribution satellites and not with direct broadcasting satellites, it seems technology has overtaken the legal experts. If, as some predict, direct communication by satellite will become the method of ordinary broadcasting for national use in some countries, the protection of programmes received directly from a satellite will in law have to be the same as it is for programmes contained in present day broadcasts. If distribution satellites replace microwave linkages or undersea cables, national legislation will be necessary. In that case, the two model laws worked out under the auspices of WIPO and UNESCO[5] may be very useful.

[4] Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (1974).

[5] E.B.U. REVIEW, November 1979.

However, not many acts of piracy against broadcasters have been reported thus far, and this danger to international copyright may prove not quite as serious as had been feared. Nonetheless, it seems clear that broadcasting organisations will need laws which enable them to control the dissemination of their programmes. Broadcasters will wish to honour their copyright obligations to the contributors to their programmes. If they were unable to control the area in which their programmes are disseminated they would be required to pay for audiences in parts of the world in which they either do not wish their programmes to be received or for which they do not control the rights.

5. Cable Television (CATV)

There has been litigation on this subject in several countries and under more than one legal system.[6] Without going into detail, I submit that the following points have been clarified in the 1970s:

a) The distribution of broadcast programmes by cable is aimed at a different public from that reached by broadcasting without cable, otherwise there would be little need for it (although there is often some overlapping). The distinction between the normal reception zone of a broadcast and the zone where a broadcast can only be received by cable has not proved helpful for the solution of the legal problems because cable services have proved financially viable even in direct reception zones and because technological improvements constantly increase the direct reception zones.

b) Whilst broadcasting and distribution by cable are aiming at different audiences, it is now accepted that distribution by cable is a "communication to the public" under the Berne Convention,[7] and the author's right to authorise the communication of

[6] *U.S.A.:* Fortnightly Corp. v. United Artists Television Inc., 392 U.S. 390 (1968): Teleprompter Corp. v. Columbia Broadcasting System, 415 U.S. 493 (1974). *Cf.* Section 111, Public Law 94-553, 17 U.S.C. § 111 (1976).

Austria: Supreme Court (Oberster Gerichtshof) Judgment of 25th June 1974 (*"Feldkirch"* case); Supreme Court Judgment of 12th November 1979 (*"Plutonium"* case).

Belgium: Appeal Court (Court d'appel de Bruxelles) Judgment of 3rd June 1969.

Federal Republic of Germany: Appeal Court (Hanseatisches Oberlandesgericht) Judgment of 14th December 1978 (GEMA v. Federal Postal Services), appeal to the Supreme Court pending.

For an analysis of the cases up to May 1978, *see* Dietrich Reimer, 10 I.I.C. (INTERNATIONAL REVIEW OF INDUSTRIAL PROPERTY AND COPYRIGHT LAW) No. 5 (1979).

[7] Article 11 (bis).

his work to the public operates and royalties should be payable. However, most countries still need legislation to protect authors and other copyright owners in this respect.

c) Problems will arise over the administration of these rights. They must clearly be administered collectively and preferably by one society because of the large number of works involved and because of the practical impossibility of the user contacting all copyright owners before the communication takes place. This situation, however, is not new and at least in the field of musical copyrights has been handled successfully by performing rights societies in many countries. The open question is once more whether national legislators should introduce statutory licencing systems or leave the rights to free negotiation between the collecting society and the users. The group of experts which met under the auspices of WIPO in Geneva in March 1980 recommended that national laws should introduce such compulsory licences only where "administration of these rights (by the grant of voluntary licences) would not work in practice" and then "subject to the right to equitable remuneration and the respect of moral rights".[8] It is perhaps significant that although the Berne Convention in Article 11 (bis) permits member states to enact a system of compulsory licencing to broadcast, according to the secretariat of WIPO, less than a quarter of the 71 member states of the Berne Convention have availed themselves of this possibility. The group of experts also recommends that in respect of cinematographic works and dramatic and dramatic/musical works, non-voluntary licences should be avoided "because the number of right owners is small and they can usually be found without too much difficulty and the time of showing on television must in any event be co-ordinated with theatrical showings for economic reasons". The experts also recommended an equitable remuneration to performers and producers of phonograms whose performances or phonograms are contained in the broadcast and of course recommended that the broadcasting organisations have the right to authorise the distribution by cable of their programmes. I feel sure that these recommendations are sound and that they will appeal to governments. I also venture to think that the recommendation of preferring freely negotiated collective licencing schemes and resorting to statutory licences only where such licencing "would not work in practice" is the right legislative approach, not only

[8] Statement of the Group of Experts 1/3, *Copyright* (1980), p. 156.

for CATV but also for the other situations created by the new technology.

Once a sufficient number of states have dealt with CATV in their legislations, no doubt Article 13 of the Rome Convention, which was specifically drafted to exclude CATV, will one day have to be revised to include it. No other Convention will need amending, although special agreements under Article 20 of the Berne Convention and Article 22 of the Rome Convention may be suitable in special situations, for instance where there is a re-transmission in adjacent countries where the same language is spoken or where several countries jointly use a communication satellite such as the NORSAT scheme for the Scandinavian countries.

In these remarks I have assumed that we are dealing with a situation where a programme unit or a programme is re-transmitted in its entirety. If changes in the programme are made, which is usually the case when deletions or additions or substitutions of advertising material are made, complex legal situations arise which are beyond the confines of this paper.

The following conclusions can be drawn from this necessarily brief synopsis of the solutions which have emerged to the problems of the 1960s and 1970s:

1. There seems no immediate need for the revision of the two major international copyright conventions.
2. National legislation will be needed in most countries to deal with reprography, private copying of phonograms and cinematograph films, and cable television.
3. Compulsory licences may become necessary in some of these fields but should be used only where the "administration of these rights would not work in practice and then subject to equitable renumeration."
4. As in many situations created by new technology, monopolistic collecting societies will face equally monopolistic user organisations. A "Copyright Royalty Tribunal" will thus be necessary to adjudicate in cases of failure to agree on a royalty, whether there is a compulsory licence or not. This will necessitate legislation in those countries that do not yet have such a Tribunal or where the competence of the existing Tribunal has to be extended.

III. COPYRIGHT ROYALTY TRIBUNALS

I would like to say a few words on the concept of a "Copyright

Royalty Tribunal." This will serve as a bridge between my remarks on the proposed solutions to the problems of the 1960s and 1970s on the one hand and the yet-unsolved problems of the 1980s on the other, as I regard such a Tribunal as an essential part of any modern copyright legislation.

The comments I shall make here I first put forward in a paper to the American Bar Association in Montreal in 1966, when the existing Tribunals were few and restricted to specific situations. In Canada,[9] the "Copyright Board" adjudicated the tariffs proposed by the performing rights societies. In Germany,[10] a Tribunal was provided to settle some disputes on royalties but had only vary rarely been used. In the United Kingdom, the "Performing Right Tribunal,"[11] as its name indicates, dealt with licencing schemes and royalty rates for performing rights only, but to that extent was the most viable model. Since 1966, other countries have legislated, e.g. Australia in 1968[12] and introduced Tribunals of various kinds. Most recently, Chapter 8 of the U.S. Copyright Act of 1976 has created a "Copyright Royalty Tribunal."

My main point was then and is now that the fixing of a fair and equitable rate for the use of copyrighted works should in the first place be a matter for negotiations between the parties—the copyright owners and the copyright users. If the negotiating processes are exhausted and the parties cannot agree, it becomes a justiciable issue for a tribunal. It should never be a legislative issue. Parliament is not the right forum for a royalty rate decision as political considerations and the relative strength of lobbies might influence the issue and the result may not be 'fair and equitable.' If it is agreed that there is a justiciable issue, my next point is that a special Tribunal is in a better position to decide it than the ordinary courts. In most cases it can be said that a fair rate for the use of a copyright is the lowest amount a reasonable copyright owner would accept and also the highest amount a reasonable user would pay. The adjudication therefore requires the weighing both of arguments about the philosophy of copyright and of arguments of a commercial kind. The best Tribunal for such issues, in my submission, is a professional judge as chairman to preside over the procedure and decide points of law and two or three fair-minded and knowledgeable laymen as members. I would submit that you get the best results if the Tribunal deals both with cases where the copyright owner has an absolute right, e.g. the performing right of the author, and also with cases where the right

[9] Copyright Act 1952 section 50.
[10] Copyright Act 1965 Regulations on the Arbitration Commission 1965/70.
[11] Copyright Act 1956 sections 23-30.
[12] Copyright Act 1968 section 136 ff.

is subject to a compulsory licence, e.g. the recording right. When a Tribunal has heard a number of cases on the licencing of a particular right, a "going rate" emerges and the parties know approximately what they can expect and that reduces litigation. I also submit that if the same Tribunal hears cases relating to absolute rights and cases relating to rights subject to a statutory licence, it will probably in its findings apply the same criteria of what is 'fair and reasonable' to both situations. If it does, one of the main objections of copyright owners against some statutory licence systems may disappear, as it will be realised that whether the copyright owner has an absolute right or a right to equitable remuneration the rate would, if there is disagreement, ultimately be decided by the same Tribunal according to the same criteria and presumably with the same results.

I submit that another issue which should go to the Copyright Royalty Tribunal in cases of disagreement between the parties is the proportion of sharing of revenues between copyright owners, e.g. when the makers of blank tapes for "home taping" have paid lump sums which have to be distributed between different right owners.

During the 1980s, when we shall have had experience with such Tribunals in several countries, some ground rules for such Tribunals will emerge. The subject could also greatly benefit from an international in-depth study by independent experts. Apart from the nature, the range of jurisdiction and the constitutional position of such Tribunals the subject of the study should extend to such vital questions as the appointment of the members of the Tribunal, particularly the Chairman, the rules of procedure suitable for such Tribunals, and the right of appeal from the Tribunal to the ordinary courts on points of law. Such a study, together with the experience gained in the common law countries, mainly the United States and the United Kingdom, would be of the greatest value to countries wishing to legislate on copyright and considering introducing Copyright Royalty Tribunals of one kind or another.

IV. OTHER PROBLEMS OF THE 1980s

Having dealt with the problems posed by advanced technology and the solutions proposed to be adopted in the 1980s, let me now turn to the other problems which, as I see it, characterise the crisis of the 1980s. The first of these crises is the loss of control over the work by the right owner, particularly the individual right owner. The second crisis is the trend towards collectivisation of royalties. And the third crisis is the political tendency in the industrialised societies which often militates against copyright as an allegedly monopolistic property right. This I

shall call "Consumerism."

1. Loss of Control

There are two facets to the control problem. The first, which I have already touched on, is that compulsory licence systems are on the increase and that even some of the absolute rights can only be exercised through bulk licencing by large collecting societies. The second facet of the problem concerns enforcement procedures. These will have to be constantly improved and refined if pirates and large scale infringers are not to undermine the control of copyright owners over their works and considerably reduce the copyright owners' incomes.

It has been acknowledged for a long time that some copyrights can only be exercised through a collecting society. What is new, however, is that more and more copyrights come into this category. As we have seen, most of the solutions to the technological problems not only predicate a collecting society but the laws of some countries provide that these rights can only be exercised through a collecting society. In some cases, the laws even provide that the rights can only be exercised through a single collecting society. This places both a heavy technical burden and a great moral responsibility on these societies. Happily, the modern technology which poses these problems also provides some solutions. Having seen the most efficient ones in operation, I feel confident that they can carry the additional burdens. I also feel that it may well be that the more rights the collecting societies administer, the more fully they can use their technology, enabling them to become more cost effective and to keep the charges to their members lower, thus increasing the incomes of copyright owners.

The creation of collection and distribution systems which can be used by a *group* of countries should also be explored. An example of an existing multi-national society is the NCB (Nordic Copyright Bureau) which collects and distributes for Denmark, Sweden, Norway and Finland. The problem of deciding which of the existing societies should become the centre and provide the multi-national service is not a technical one but a political one.

I can only touch briefly in this context on the moral and social responsibility of the collecting societies. Since the invention of the printing press there have been centuries of a system of patronage for authors and privileges for booksellers and then almost two centuries of a direct, very personal relationship between authors and the successors of the early booksellers, the publishers. In many spheres of copyright, collecting societies are now being superimposed on this relationship and in some

countries they also exercise some of the functions of a labour union. It has always been essential to copyright owners that these societies should be highly efficient. It will be vital in the 1980s that they should also be the standard bearers of the ideals of authorship. Barbara Ringer has outlined the problems of individual authorship admirably in her Donald Brace lecture in 1976.[13] I would like to echo her feeling that the discussion of this problem should not be confined to lawyers or to businessmen such as publishers or film or record producers or the representatives of the information industry—it should be carried on with the active participation of the creators themselves. We should remember that the first society of writers was inspired by Victor Hugo and the first important society of composers by Richard Strauss.

Perhaps the most important practical means by which copyright owners can maintain or regain control of their rights is a radical improvement of enforcement procedures. The main areas which will need attention are summary procedures and penalties.

Taking penalties first: A 10% inflation rate per annum which, alas, is not uncommon in the 1980s, reduces a penalty provided by law to about half in just over four years and to a quarter in just over six years. This is, of course, a problem affecting all fines imposed as sentences for crime, but it is particularly serious in the copyright field for two reasons. The first is that in the democracies, Parliaments only found time for copyright revision on average every fifty years, and by then these penalties become derisory. Italian law provides a good example. The copyright law was passed in 1941 and certain penalties were revised in 1980. During the intervening years the value of the lira had dropped to a small fraction. The problem is shown in its acutest form in countries with a 50% inflation rate like some Latin American countries or even in excess of 100% like Israel, when penalties cease being effective after a few years.

The second reason that penalties are a grave problem in the copyright area is that for copyright infringements, as opposed to other offences, fines have until recently been the only penalty imposed. This is because the courts in most countries are very reluctant to impose prison sentences for offences which the man in the street and in some cases the judges do not regard as "real crimes." To choose a recent example from Hong Kong: A record pirate employing five or six operators and up to a hundred tape recording machines in a four- or five-room flat could, a few years ago, have made a million dollars in a year.

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[13] Ringer, *Copyright in the 1980s - The Sixth Donald C. Brace Memorial Lecture*, 23 BULL. COPR. SOC'Y 299 (June, 1976).

If he were caught, he would pay the highest fines the courts could impose out of the petty cash. Judges in serious infringement cases are thus faced with Hobson's choice. They can either impose fines which they know to be no deterrent and sometimes derisory or pass prison sentences which for a variety of reasons they are reluctant to do, certainly in the case of first offenders. I need not tell this audience that to persuade the law enforcement agencies and the courts that copyright piracy is a commercial crime of a major order which can only be curbed by the imposing of prison sentences in serious cases is a major task of education and advocacy which may take many years. Yet these major efforts of education will have to be made by many copyright owners in many countries in the 1980s if their copyrights are not to be seriously eroded.

The other area where enforcement procedures need strengthening is the area of interlocutory relief, particularly injunctions and orders for search and seizure. Whereas penalties can only be increased by Parliaments and prison sentences only imposed by judges, the vigilance of copyright owners and the ingenuity of copyright lawyers can often bring about the dèsired results in this field without statutory law reform. Two examples from Europe will illustrate my point:

It is often essential to the Plaintiff's case against an infringer who is believed to have infringing articles in his possession to inspect such articles. Inspection has the double purpose of preparing the Plaintiff's case and of restraining the Defendant from making or distributing further infringing copies. If the Defendant is given notice in the usual way of an application to the court for an inspection order, he is likely to dispose of the articles or of the relevant documents. In fact, in cases against record or tape pirates, whether brought by the author or by the phonogram producer, this was almost invariably the case. However in England, in the case of *Anton Piller K.G. v Manufacturing Processes,*[14] the Plaintiff obtained an order for inspection including the photocopying of all relevant documents and delivery up of all relevant articles. The application, which is now standard practice, is made *ex parte* and *in camera*. The first the defendant hears of the order is when it is served on him by the Plaintiff's solicitors at the premises to be inspected. The Plaintiff's representatives cannot force the Defendant to let them enter for the inspection but the Defendant may be in contempt of court if he refuses entry. This is explained to him and in fact entry is hardly ever refused. The order is only granted when the Plaintiff has a very strong prima facie case and where there is "a grave danger that vital evidence will be destroyed. . . . and so the ends of justice be defeated." In the large majority of cases the Defendant submits to judgment with costs, thus saving

[14] 1976 Ch 55.

a great deal of judicial time and expense. The effect is probably as close as one can get to a search warrant in a civil case. The scope of the order goes beyond piracy of phonograms and of copyright cases generally and has been obtained regularly since 1976 both in the U.K. and in other Anglo-Saxon jurisdictions. It is an example of how copyrights can be protected by making case law and without having to ask for special legislation. In several countries, courts have been sympathetic to procedures of a similar kind if it can be shown that there is imminent danger the infringing articles will taken out of the jurisdiction.

Another case of imaginative use of existing remedies by copyright lawyers comes from Italy. In the last year there have been four reported cases in the Italian courts, including one in the Appellate Court,[15] in which shopkeepers who sold infringing articles were convicted as receivers of stolen property. If a court can be persuaded that intellectual property is 'property' and that therefore infringing copies are "stolen goods," the copyright owners have gained two decisive advantages. The first is that penalties are far heavier since courts show as a rule less reluctance to impose prison sentences on receivers if the amounts involved are large. The second advantage is that the burden of proving guilty intent, i.e. that the defendant knew that he was handling infringing copies, is less heavy in most countries. In many countries, the burden of proof is reversed, i.e. once it is proved that the property was stolen property, the defendant has to show that he did not know it was stolen property. That means in copyright cases that he must prove that he did not know that the copies he was handling were infringing copies.

2. Collectivisation of Individual Rights and the Creation of Rights Outside the Copyright System

The danger of collectivisation of individual rights arises from the loss of control of the copyright owner over his work. This danger is present both in freely negotiated situations with blanket licences and a clearing house system, and in compulsory licence situations. It will have to be seen clearly and analysed in order to be met. Some examples may elucidate my point.

In any collecting society there are, after the most meticulously carried out distribution, substantial sums which cannot be allocated to a right owner and are classed as "undistributable." There are basically two ways of handling this situation, although there may be several variations on each of the two. One way is to distribute these amounts by working out the relation of the undistributable total to the grand total of income

[15] State v Salvatore Molinari and Antonio Moccia, Court of Appeal of Naples No. 4239/79 of 11 April 1980.

and then adding a percentage as a "bonus" to the receipts of each copyright owner. The other way is not to distribute these funds but to use them for social purposes which may range from pensions for elderly members or their widows to educational support for the young. The main criticism levelled against this "social" method is precisely that it is a form of collectivisation of individual rights. The main criticism of the "bonus" method is that it is giving to the "haves" and not giving to, or possibly taking from, the "have nots." The problem gets even more acute when you have a situation where a substantial proportion or all the revenue collected cannot be individually allocated. Examples in the field of public performance revenue for musical copyrights are royalties collected from juke boxes or discotheques or from radio stations which cannot be persuaded to supply lists of the works used.

An example of collectivisation that seems to be acceptable in the social and political climate of the country is the "Fund Law" of 1956 for Neighbouring Rights in Norway. All public performance users of phonograms and broadcasters are paying a royalty into the Fund for the use of these phonograms. The committee of the Fund decides first on the share which goes to the different right owners, in this case record producers and performers. The share of the record producers is paid to their organisation and distributed as far as possible according to copyright rules. The share of the performers, on the other hand, is distributed to individual musicians and their families, not according to playing time or any other copyright principles, but according to the musicians' financial need.

The problem has existed in the fields of both copyright and "neighbouring rights" for over a quarter of a century and has sometimes been hotly debated. But it will loom much larger in the 1980s as funds will be flowing into collecting societies through blanket licencing and international clearinghouse systems from sources which make them almost by definition difficult to distribute according to copyright rules. The royalty on blank tape for the "home taping" of phonograms is an example. Royalties for the copying of literary and scientific works in public libraries may be another. The problem does not become any easier to solve by the fact that any solution has social and political, as well as legal, implications. All one can say within the framework of this paper is that from a copyright point of view, either the "social" or the "bonus" system sketched out above or a combination of both or indeed any other method of distribution would be acceptable, provided most right owners are members of the collecting society and the decision is democratically arrived at within the membership of the society. However, this only highlights the problem, as can be readily appreciated by anyone who knows how difficult it is to ascertain the collective will of a large membership

with very diverse interests.

Another side of this problem is posed by the new rights arising from technological change: they can be conceived as copyrights, but need not necessarily be introduced as copyrights at all. The "public lending right" or the royalty on recording equipment or on blank tapes for "home taping" may serve as examples.

The impost on recording equipment or blank tapes is a copyright royalty in the sense that it remunerates copyright owners for the use of their works. However, it is, as I pointed out earlier, unorthodox in the sense that the royalty is not paid by the user, i.e. the private person copying a work, but by a third party, the manufacturer or importer of the equipment or the tape. Both the impost on the equipment under German law and the impost on blank tape under Austrian law are conceived as copyright royalties and distributed as such. But it is quite possible to conceive such payments as a kind of levy or tax imposed by the government and distributed in accordance with social or cultural principles for the benefit of the profession adversely affected, a method the French government at one stage wanted to adopt, but was persuaded to abandon.

The public lending right in the United Kingdom is contained in a separate Act of Parliament, the Public Lending Right Act 1978, and is not conceived strictly as a copyright royalty. The payments to authors are not made by the user, i.e. the borrowers of books from public libraries. These provide a free public service, the cost of which is funded out of taxation. The payments to authors are made out of a special government fund voted by Parliament. The fund will however be distributed on the basis of copyright principles, i.e. based on the frequency of the use of the work, by the lending of books.

On the other hand, in Sweden and in Germany the public lending right (PLR) is conceived as a copyright, it is dealt with in the copyright law and the funds are distributed according to copyright rules. One of the consequences of this distinction is that if PLR is conceived as a copyright, the revenue is subject to the international copyright conventions. Thus, foreign right owners will participate according to the principle of national treatment. However, if the right is not conceived as a copyright, the revenue can be shared among nationals only. This is politically defensible if the funds come, as in the United Kingdom case, out of tax-payers' money and not from the users of copyrighted works. When the PLR scheme in the United Kingdom comes into operation, it appears to be intended that there will be agreements with foreign collecting societies on the basis of reciprocity. This means that foreign authors will be paid out of the United Kingdom fund if the author is a national of a country where PLR exists and where United Kingdom

authors are paid when their books are borrowed from public libraries. As more countries introduce PLR and, therefore, more reciprocal agreements are made, this may eventually lead to authors being paid for much of the use of their works abroad and a satisfactory international result may thus eventually be achieved by stages.

On the other hand, if in several countries some of these newly created rights are conceived outside the copyright system, the effectiveness of the international copyright conventions may be seriously undermined. It would be beyond the scope of this paper to deal with possible solutions. I would suggest however that serious thought be given by international copyright lawyers in the 1980s to the possibility of framing these new rights in such a way as to retain them within the ambit of copyright, and distributing the revenues according to copyright principles while at the same time enabling the legislators to overcome political objections to a solution which would allow some foreign right owners to scoop the pool without any flow of funds back to national authors. The problem is not new in international copyright; it is merely an old problem posed in a new form. It is interesting to note in this context that when the Brussels Revision Conference of the Berne Convention in 1948 created a "droit de suite" for works of art, it applied to it the reciprocity rule rather than the general rule of national treatment, probably with similar considerations in mind.

3. Consumerism and Anti-Trust Law

The next challenge is one which goes to the very root of copyright. It is a doctrine which is not new but which assumed much greater importance in the 1960s and 1970s and will, I fear, gather strength in the 1980s as the economic recession develops. It is known as "consumer politics." Applied to copyright, the doctrine means that the consumer should have the widest possible access to all copyright material at the lowest possible cost and, in many cases, free. Almost everybody in our modern society is a consumer of copyrights in several respects: as a reader of books, newspapers, or other printed copyright material, as a listener to music, as a viewer of television or as a parent of a child at school who should have his school books cheap or free, to name only the most common uses. Thus, put in electoral terms, on most copyright issues the overwhelming majority of voters are on one side and a comparatively very small number of voters, who are copyright owners, are on the other side of the argument. Furthermore, only a tiny fraction of this small number of copyright owners become millionaires, but it is those few who are constantly in the public eye. No politician, even if he is the opposite of a popularist, could totally ignore this when taking a

position on a copyright issue. The counter-argument, as you all know, is that without copyright, the liberty of the subject, including the liberty of speech and the freedom of expression in literature and the arts, would be in danger and ultimately some of the values of western civilisation would be at risk. But this counter-argument is not as obvious as the popularist argument of cheap access to copyright works by the general public. Therefore, the copyright argument needs to be put again and again in differing forms and in all countries. Once this is acknowledged, the task of constantly arguing for the maintenance and development of copyright, which may at times appear repetitive, or even tedious, becomes a necessary, even a noble pursuit, humanist in the best sense of the word.

The same challenge is presented by some anti-trust laws. Anti-trust laws are a strange mixture of legal principles and economic and political considerations. The mixture varies according to the economic necessities of the country in question or sometimes according to the political philosophy of the government of the day. Copyright is sometimes looked upon in this context as a monopoly twice over—first because it is a bundle of rights monopolistic in their nature and second because it is increasingly exercised through societies which represent most of the copyright owners and have, therefore, by definition market-dominating positions.

The first part of the above proposition is false; the second is correct. Copyright does not prevent anyone from making the same product as the copyright owner, writing a book or a song or making a film or a record, and subject only to the laws on plagiarism, even a very similar book or song, etc.; it only prevents people from slavishly copying the right owner's work. This distinction is clear enough to copyright lawyers but unfortunately is not well understood by others. It will have to be restated again and again to politicians and to the general public in country after country if copyright is to develop on effective lines.

The second part of the proposition is correct. Most collecting societies have market-dominating positions. This will have to be defended on very practical grounds. First, many copyrights cannot be exercised by any other means. But further, the system is of considerable benefit to users, who are thus legally secure in negotiating one bulk licence for whole repertoires with one society instead of having to find a large number of copyright owners.

I am encouraged on this point by the treatment of copyright in the European Economic Community. Perhaps I ought to preface my remarks by pointing out that the EEC approach to anti-trust, although inspired by U.S. legislation, differs from the U.S. approach. Article 85 of the Treaty of Rome, like section 1 of the Sherman Act, is a general

prohibition of agreements which restrict competition. It also gives, like the Clayton Act, examples of prohibited activities such as price fixing, etc. On the other hand, section 3 of Article 85 creates an exception for agreements and concerted practices which contribute to promoting technical and economic progress while allowing consumers a fair share of the resulting benefit and which do not impose unnecessary restrictions. Article 86, contrary to section 2 of the Sherman Act, does not prohibit monopolies or market dominating positions 'per se', it only prohibits the "abuse" of such a position and the Commission has to show in each case that there is such "abuse." Thus the effect of the exception of Article 85/3 and the "abuse" concept of Article 86 constitute what has been called "a built-in rule of reason."

The European Court first dealt with copyright in the form of the right of record producers, which is classed as a "neighbouring right" in several member states, in the case of *DGG v Metro* in 1971.[16] Since then the European Court has dealt with copyrights as well as patents and trade marks in a long series of judgments which I cannot analyse here. What they seem to be saying to copyright owners as well as other intellectual property right owners, albeit not in such simple language, is, "We know you have an exclusive right exercisable over a very long period. We also know that in many instances your rights are exercised by monopolistic collecting societies. We do not object to that, as long as you and the societies who act on your behalf do not abuse that position." What is and what is not an abuse is a matter of degree and is to be judged in the circumstances of each case.

The Commission of the EEC dealt with the collecting societies mainly in the field of musical copyrights and forced some alterations in their statutes, but it accepted the necessity of one collecting society per country. The collecting societies within the community have continued to operate successfully under their revised statutes.

Lastly, new national laws passed since the Treaty of Rome have provided that new rights given to copyright owners are only exercisable through a monopolistic collecting society. Article 53 of the German Copyright Act of 1965, creating the royalty on reproduction equipment, and the Copyright Amendment Act of 1980 in Austria, creating the royalty on blank tape, are examples.[17]

Thus, the Commission as the main executive organ of the Community, the European Court as the judicial organ and the Parliaments

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[16] Deutsche Grammophon Gesellschaft m.b.H v. Metro- S.B. Grossmarkte G.m.b.H. & Co., CMLR 361 (1971).

[17] Austria is not a member of the Community but has an affiliation treaty which imports the EEC competition rules into Austrian law.

of the states are all coming to terms with the relationship between copyright law and anti-trust and restrictive practices legislation. I submit that the European experience shows that they are terms which modern copyright owners can live with. I would expect that the experience of the last two decades in the EEC will be repeated in the 1980s in other countries in varying forms. This means that the concepts of copyright and anti-trust law can co-exist but the frontiers of copyright and the effective exercise of international copyright will have to be defended in the courts by copyright lawyers in many countries throughout the 1980s.

These then are the challenges of the 1980s. What are the forces to meet these challenges? They are mainly copyright owners themselves, their champions, and those governments concerned with the preservation of authorship in its widest sense as a natural resource. I will deal with the role of government first.

V. THE ROLE OF GOVERNMENT IN COPYRIGHT

It is a truism that the development of copyright necessitates the involvement of government as it is a creature of statute at the national level and of intergovernmental conventions at the international level. Copyright owners therefore ignore the role of government at their peril. Yet the relationship between copyright owners and government in most countries has innate difficuluties.

On the national level in parliamentary democracies, for reasons which I have referred to before, there are no votes in copyright. As a result, in the leading countries comprehensive copyright revision has in the past taken place at intervals of almost half a century: In the United States 1909 to 1976, in German 1909 to 1965, in the United Kingdom 1911 to 1956, in France a century and a half from 1791 to 1957. In a period of rapid technological change this is far too long. I have tried to show earlier in this paper that in the 1980s all major countries will need some copyright legislation or a revision programme if solutions to the problems posed are to be adopted. This will need resolute and concentrated efforts by all copyright owners vis-à-vis government. It may well be that these efforts will only be successful if they are made by all the copyright owners jointly. I shall, if I may, revert to this proposition later.

On the international level the difficulties are considerable. Having observed the reaction of governments to international copyright problems over nearly twenty years, I suggest to you a formula to describe their attitudes to international conventions. A government will ratify an international convention if:

$$E + NPg = I$$

"E" is the total of the country's exports of copyrights and "I" is the total

of its imports. "NPg" is the national prestige attached to the export of the works of national authors. Such works represent a nation's culture heritage, as well as its spiritual aspirations. They are, in a sense, the nation's very own contribution to the cultural achievements of mankind.

One must bear in mind that in most countries imports of copyrights exceed exports. Such countries will thus only ratify a convention if the government is of the opinion that adding the national prestige to the value of exports will balance the import bill. The significance of this equation and part of its fascination is that whereas "E" and "I" should be ascertainable figures, "NPg" is always a matter of personal judgment. It can be defined as the gain to the country derived from the appreciation of its cultural and intellectual achievements abroad. Thus, the main variable in the equation is not measurable, but a matter of judgment by the government of the day or sometimes by eminent persons representing and committing governments at the international level. In this situation the scope of imaginative advocacy when putting the case for copyright owners is very considerable. Success or failure may sometimes depend on the quality of that advocacy.

Although, as I have tried to show, the major task for copyright owners in the 1980s will be to achieve national legislation, there are international challenges as well. I suggest that the 1980s should see the long delayed ratification of the Berne Convention[18] by the United States. When Professor Bodenhausen gave the Geiringer lecture on this subject in 1966[19] he listed three major difficulties: the manufacturing clause; the term of copyright, life plus fifty years; and the formalities. The difficulty over the term of copyright has already disappeared. The difficulty over the manufacturing clause will have disappeared by January 1, 1982. Thus, only the difficulty of formalities remains, and this had been regarded as the least formidable of the three obstacles. Bearing in mind that the members of the Berne Union want the United States to ratify the Convention and bearing in mind that it is in the interest of the United States as one of the largest exporters of copyright to ratify the Convention with the highest level of protection, it should not be too difficult to overcome this last hurdle. There are various possibilities: the suggestion of a separate protocol inserting the Universal Copyright Convention formalities clause[20] into the Berne Convention is one of them. An in-depth study undertaken by American experts would show the

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[18] Berne Convention for the Protection of Literary and Artistic works (Paris Act) 1971.

[19] Bodenhausen, *United States Copyright Protection and the Berne Convention*, 13 BULL. COPR. SOC'Y 215, Item No. 258 (1966).

[20] Universal Copyright Convention (Paris Act) 1971, Article III.

comparative merits of the alternatives and facilitate the choice. If this ratification can be achieved, the major copyright countries would be members of both Conventions. Then, a two-tier structure, with the Berne Convention as the upper tier and the U.C.C. as the lower tier, will emerge. A fusion of the two secretariats, with WIPO as the special United Nations agency, will then become possible with savings in manpower, effort, time and money which are obvious. The ratification by the United States would be a most fitting way to celebrate the centenary of the Berne Convention which occurs in 1986. I submit that we should all work towards this goal.

Of the other international conventions in the copyright field, the Rome Convention may become ripe for revision in the 1980s when what seems to be the traditional 25-year period since the making of the Convention will have elapsed and membership will probably have reached the magic figure of thirty. A revision of the rights of broadcasting organisations, particularly in the field of cable and satellites, to which I have referred, would make the Convention more attractive to the broadcasting organisations whose opposition to it for the first fifteen years of its existence had prevented its ratification in a number of states. The considerable pioneering effect which the Convention has already had in the field of so called "neighbouring rights" is evidenced by the fact that over fifty states have legislated in this field since the Convention was concluded in 1961.[21]

VI. THE ROLE OF COPYRIGHT OWNERS

To deal with copyright in the 1980s without dealing with the new role of the copyright owners would indeed be trying to stage Hamlet without the Prince of Denmark. The first question is: Who are the copyright owners of the 1980s? They are, it is submitted, all copyright owners, old and new, from the traditional mainly individual copyright owners of the nineteenth century to the new and mainly corporate copyright owners of the twentieth. The distinction between "copyright" owners and "neighbouring rights" owners was adopted in the 1940s and 1950s at the international level largely to accommodate the French and some other legal systems which are based on "authors' rights" (droits d'auteurs) rather than "copyrights." This distinction is, however, not very meaningful in Anglo-Saxon or common law-derived jurisdictions where motion picture producers, phonogram producers or broadcasting organisations are copyright owners. The only distinction, I submit, which will stand up to critical examination is the one between copyright owners

[21] ILO/UNESCO/WIPO ICR/SCT/TMP/2 para 72 ff.

who are physical persons and copyright owners who are companies or corporations, a distinction which is most important when considering moral or personal, rather than economic, rights. Another common feature of the new copyright owners, apart from their corporate status, is that they are, increasingly, both right owners *and* right users. This sometimes produces schizophrenic attitudes because, looked at from a purely commercial point of view, their tendency would be to pay as little as possible for the rights they have to buy and to get as much as possible for the rights they sell. It is in my view very important for the successful development of copyright that they should be encouraged in every possible way to resolve this conflict by behaving more and more like copyright owners.

It is perhaps paradoxical that apart from the most valuable work done by some copyright lawyers, a major contribution in this respect was made by the pirates. The old copyright owners realised towards the end of the nineteenth century that they needed strong and internationally exercisable rights. The new right owners reached this position comparatively recently. The history of copyright piracy in the 1960s and 1970s is instructive in this respect. The record producers were the first to be attacked by an enemy from outside. They reacted by using copyrights in their defence where they had them, and acquiring such rights by new legislation where they did not have them, particularly in the United States, Japan and Latin America. Although piracy can never be totally eradicated any more than ordinary theft can, in most industrial countries record piracy has been fought successfully and is being contained. There are still large parts of the world, mainly developing countries, where record piracy is rampant and the fight will have to continue in the 1980s. It has been shown that this is where international conventions can pave the way. The Phonogram Convention,[22] which was agreed upon within eighteen months of being proposed and ratified in less than ten years by over thirty countries, among them all the major markets, shows that the governments of the world can be responsive to the plight of copyright owners in a crisis if their help is enlisted with convincing arguments and at the psychological moment—"There is a tide in the affairs of men. . . ."

The oldest of the corporate copyright owners, the film producers, were attacked next and film piracy is today a serious problem. Film producers are protected by the Berne Convention and by the Universal Copyright Convention and by nearly all national legislations. They are beginning to react and organise their defences. Their severest test will

[22] Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms, 1971.

come when videograms and the equipment to copy them will come on to the market at prices which a substantial proportion of householders in the industrialised world can afford. This is likely to happen in the 1980s. Film producers will then be in the same position as record producers were in the 1970s except that their rights are already firmly established. They therefore start with a great advantage. Their enforcement problems, however, will be similar to those of record producers.

Broadcasting organisations have been large copyright owners of audio-visual material for some time. Co-production with film companies and sometimes record companies, and the opening up of the videocassette market, will put them too in the front line of the defence of their copyrights. They are also large users of copyrights, perhaps the largest single user, as well as copyright owners. Direct satellite broadcasting will make them vulnerable in both capacities.

The new, mainly corporate, right owners discovered their position and their "noblesse oblige" function in copyright only slowly and sometimes at the eleventh hour. The traditional copyright owners, mainly through their societies, were not entirely free from blame either. Some of them have, in the 1950s and 1960s, acted in the sincere belief that the best way to defend and enhance their members' copyrights was to deny rights to others who are actual or potential right owners. I submit that this is a tragic fallacy. It is an essential difference between a vendor and a licensor that, whereas the vendor has no interest in the legal position of his purchaser as long as the latter can raise the purchase money to pay him, the licensor has a vital interest in the strength of the legal position of his licensee. The stronger the latter's legal rights, the better he will be able to defend both his own rights and those of the licensor. Composers and music publishers found in the 1970s when piracy of phonograms became rampant that, in countries where record producers' rights were weak or non-existent, the pirates swept the market and authors and publishers lost a large slice of their royalties. On the other hand, in countries where the record producers' rights were strong and, particularly in the countries where all copyright owners joined forces, piracy was brought under control more quickly and authors' royalties were safeguarded. By the same token, I submit that in the 1980s, when videograms will be used in private homes in large numbers and direct satellite broadcasting becomes a reality, the rights of videogram producers and broadcasters will have to be strengthened as they will be in the front line of the attack by the pirates.

At this stage, a look at the historic development of the corporate right owners, who are sometimes loosely called "media," may be appropriate. It will show that with advancing technology they have moved towards each other in the past and that they may in certain respects

become indistinguishable in the 1980s. Motion pictures started as silent "movies" and later added sound, whereas broadcasting moved in the opposite direction, starting as sound radio and adding pictures to become television. Records, which were the sound-only-medium par excellence, are now becoming audio-visual with the creation of videograms. The result of this for the public of the 1980s will be that most entertainment and a good deal of education and information will be audio-visual. The main difference between these "media" will be that some audio-visual entertainment as well as information will take place in public and some will take place in the home. This constitutes an important shift in the dividing line. From the point of view of the creators, this means that their creations will be disseminated to the public in several forms. Provided they can control their copyrights, the creators may even be able to plan the sequence. A creator may, like a wine grower, reserve his "premier cru" for a video disc, his second "release" for pay-television, his third "edition" for a motion picture and his fourth for ordinary television. I have deliberately mixed my metaphors to make the point that the creators will have separate sources of income if they can control their copyright, whereas from the consumer's point of view all the "media" will compete even more closely than before for his attention, his spare time and his money.

I suggest that numerically the consumers of copyright will keep growing in the 1980s. In the industrialised countries, the age span of each consumer is still growing as people earn earlier and live longer. Working hours continuously shorten and leisure hours increase. The 4½ or even four-day week may seem far away but it may be no further than the two-day weekend was in the 1930s.

However, while the actual number of consumers of copyright will probably continue to increase in the 1980s, their individual purchasing power is probably going to decrease with the recession, at least in the first half of the decade. This is a very significant factor. While the expansion in international copyright, both in the content of rights and in the volume of revenue, in the 1960s and 1970s was far beyond expectations, this occurred against a background of rapidly increasing gross national product and volume of world trade. A defence of these gains in the 1980s will have to be mounted against the economic background of slower growth of national product and a slowing down of world trade. Time for organising the defences is short. I will only mention two practical steps which may be helpful. I would like to see a "Committee for the Defence of Copyright" set up as a matter of urgency, in which all groups of copyright owners, individual and corporate, old and new, should be represented. Such a committee should be concerned with coordinating defence policies in the major markets and on the international

level, and with the pooling and husbanding of resources for the defence of copyright which, particularly if left until rather late, can be a costly business.

It may be argued that such co-operation will be impossible to achieve while in some of the most important markets lawsuits were being fought between some of these parties. I do not share this view for two reasons. The first reason is that such proceedings are now more often not before the courts but before the various Copyright Royalty Tribunals. They eventually lead to the establishment of a "going rate" which make further litigation unnecessary and cause the bruises to heal more quickly. The second reason is that I believe that there is nothing more conducive to peace between two contesting parties than an alliance born of the necessity to defend their respective rights against a common danger. Working together for a common economic as well as moral interest and against common enemies will foster an understanding of each other's position which has often been lacking in the 1960s and 1970s. Based on such an understanding, the whole climate of the relations between different copyright owners would change dramatically.

I would not deny that such an alliance of all right owners in defence of copyright once created may have its teething troubles, but without it the defence in the 1980s of the levels of international copyright protection which we have attained would be very difficult indeed. On the other hand, the moral and economic influence such an alliance would have on governments may prove strong enough to offset the tendencies militating against the development of international copyright which I have outlined.

One would also like to see the lawyers interested in international copyright add to the contributions some of them have made individually by a corporate contribution to the development of copyright in the 1980s. This could perhaps be achieved through a body which would have a similar function in the copyright field to that of AIPPI,[23] the international association for the protection of industrial property in the international patent and trademark fields which was formed in the 1950s and 1960s. Such an organisation would add a valuable private dimension to the outstanding contribution to international copyright which WIPO has made as an inter-governmental body in the 1960s and 1970s under the leadership of Professor Bodenhausen and Dr. Bogsch.

Ladies and gentlemen, the stakes are high. Success may mean that international copyright may reach its highest promise. By that I mean not only intellectual freedom for creators but also economic independence in the sense that successful creators may, perhaps for the first time

[23] Association Internationale pour la Protection de la Proprietée Industrielle.

in our history, be able to take their rightful place among the ranks of other intellectual workers by earning a satisfactory living from their craft without looking either to the state or to other institutions for assistance and without having to take a second job to survive. Nothing short of this should be our aim.

On the other hand, failure may mean a gradual erosion of the international copyright system built up over the last 100 years. I hope to have shown that a good deal will depend on the unity, the wisdom and the foresight of the copyright owners and their chosen representatives. If they and all who deal with international copyright always remember that on the outcome of the struggle the quality of our culture and the degree of our liberties may well depend—we shall not, indeed we must not, fail.

381. "DERIVATIVE WORKS" UNDER THE TERMINATION PROVISIONS IN THE 1976 COPYRIGHT ACT

By JEFFREY A. COHEN*

> The difficulty is that people are faced with a (copyright) law which is so complicated that even most lawyers do not understand it; and even those who practice in the copyright field disagree on what it means.[1]

I. Introduction

The 1976 Copyright Act[2] (hereinafter "the Act") significantly modernized and clarified copyright law, but because those who drafted the statute had to accommodate the concerns of diverse interests and incorporate long-standing copyright principles, inevitably some confusion and complications remain. This is certainly true of various aspects of the Act as they pertain to "derivative works". A "derivative work" is defined in the Act:

> A "derivative work" is a work based upon one or more preexisting works,[3] such as a translation, musical arrangement, dramatization,

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[1] House Committee on the Judiciary, 88th Cong., 1st Sess., Copyright Law Revision, Part 2: Discussion and Comments on the Report of The Register of Copyrights on the General Revision of the U.S. Copyright Law (Comm. Print 1963) (hereinafter "Copyright Revision Part 2") at 107—comments of John Schulman, chairman of the American Patent Law Association Committee on Copyright, speaking about the then existing copyright law during the copyright law revision proceedings.

[2] Pub. L. No. 94-553 (Oct. 19, 1976), 17 U.S.C. 101 et. seq., effective Jan. 1, 1978, except as otherwise expressly provided.

[3] To be "based" upon a preexisting work a derivative work must incorporate in some form a portion of that preexisting work. The reason is that copyright protection extends to the tangible fixation of the expression of ideas in a preexisting work, and not to the ideas themselves. 17 U.S.C. 102; H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976) (hereinafter "House Report") at 56 and 61. (The Senate report for the Act, S. Rep. No. 94-473, 94th Cong., 1st Sess. (1975), contains the same commentary as the House Report ref-

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> 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".[4]

The broad statutory definition of derivative work is appropriate when it is considered that generally, copyright protection is afforded to a broad range of original authorship, and that copyright owners are granted an extensive array of exclusive rights with respect to their works. A broad definition of derivative works allows for copyright protection of the work of original authorship found in derivative works, and permits

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erences throughout this article, and so for simplicity will not be cited.) For example, general literary plots and themes, or stereotypical characters, are not protected by copyright because they are merely ideas and not the expressions of ideas, and other works generally may freely employ such non-copyrighted plots, themes, and characters. While exact copying of the expression of these elements is not necessary to establish copyright infringement, only their use in a work of substantially similar details, scenes, events and characterization would infringe a previously created copyrighted work. *See, e.g.*, Miller Brewing Co. v. Carling O'Keefe Breweries, 452 F. Supp. 429 (W.D.N.Y. 1978); Midas Prod. Inc. v. Baer, 437 F. Supp. 1388 (C.D. Cal. 1977); Reyher v. Children's Television Workshop, 533 F.2d 87 (2d Cir. 1976), *cert. denied*, 429 U.S. 980 (1976); Nikanov v. Simon & Schuster, Inc., 246 F.2d 501, 504 (2d Cir. 1957). *Compare*, note 111, *infra*, on the copyrightability of fictional characters. Similarly, a work merely "inspired" by a copyrighted preexisting work, without incorporating a portion of that preexisting work in some form, would not infringe that work's copyright or be a derivative work of that preexisting work. House Report, at 62. *See* M. NIMMER, NIMMER ON COPYRIGHT, 1979 (hereinafter "NIMMER") at section 3.01, wherein Nimmer notes:

> (A) work will be considered a derivative work only if it would be considered an infringing work if the material which it has derived from a preexisting work had been taken without the consent of the copyright proprietor of the preexisting work.
>
> The preexisting works upon which the derivative works are based must come from within the general subject matter of copyright set forth in section 102 of the Act, regardless of whether the preexisting work is or was ever copyrighted. House Report, at 57.

[4] 17 U.S.C. 101. The House Report, *supra* note 3, at 51, explains:

> The phrase "original works of authorship," which is purposely left undefined, is intended to incorporate without change the standard of originality established by the courts under the present copyright statute. This standard does not include requirements of novelty, ingenuity, or esthetic merit, and there is no intention to enlarge the standard of copyright protection to require them.

copyright owners to possess the exclusive rights to prepare (or to authorize the preparation of) the numerous types of derivative works which may be based upon their preexisting works. Where Congress wanted the Act to treat certain derivative works differently in certain situations, it enacted explicit modifications. This is evident in section 114(b) of the Act, which limits the exclusive right of a copyright owner of a sound recording to prepare derivative works of that recording, and in section 115(a), which limits the protection and extent of derivative works which may be created pursuant to a compulsory license to make and distribute phonorecords of nondramatic musical works.

The meaning of derivative work also is important in sections 203 and 304(c) of the Act; these sections outline the way in which an author may "recapture" rights previously granted in a copyrighted work under a statutory privilege of termination of transfers and licenses.[5] There is a major exception to the recapture privilege: derivative works which were prepared under authority of the terminated grant before statutory termination may continue to be utilized according to the terms of the original grant after such termination, but the preparation after termination of other derivative works under the original grant is not permitted. The author thereby gets a second chance to negotiate a new grant of rights either with the original grantee or with a new grantee. Upon examination of the legislative history of this derivative works exception to the termination of transfers provisions (hereinafter "the Exception"), some commentators suggest that the single statutory definition of derivative work, which embraces many different types of derivative works, is too broad to be consistent with the Congressional purpose behind the Exception. They suggest that only some types of derivative works were intended to be covered by the Exception. This article will deal with this supposed dilemma, and with the validity of a suggested narrowed meaning of derivative work in this context.

Finally, the complex issues resulting from the Exception of what it means for derivative works to be "prepared" before termination, and the extent to which derivative works may be "utilized" in various ways after termination, will be explored.

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[5] Section 304(c) allows those specified in section 304(a) other than the author to recapture rights as well. *See* note 8, *infra*.

[6] Section 101 of the Act provides:

> A "transfer of copyright ownership" is 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.

II. THE TERMINATION OF TRANSFERS PROVISIONS AND THE EXCEPTION FOR DERIVATIVE WORKS

A. The Termination of Transfers Provisions

Section 203 of the Act creates a privilege of termination of transfers[6] and licenses granted on or after January 1, 1978. Section 304(c) of the Act creates a similar privilege regarding transfers and licenses granted for a copyrighted work subsisting in either its first or renewal term before January 1, 1978.[7] Both of these sections enable authors[8] after either thirty-five or forty years to terminate,[9] upon written notice,[10] transfers of rights including the right to prepare derivative works based upon their preexisting works. The termination of transfers provisions do not apply to works made for hire,[11] nor to dispositions by will;[12] the provisions

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[7] On the difference between the two termination provisions, *see* the House Report, *supra* note 3, at 140-142.

[8] Sections 203 and 304(c) allow those parties specified other than the author to recapture rights as well.

[9] For section 203, termination is available for a five-year period commencing thirty-five years after execution of the grant, of if the grant covers a right of publication, either thirty-five years from publication or forty years from the date of the grant, whichever is earlier. 17 U.S.C. 203(a)(3). For section 304(c), the five-year period during which termination is available begins at the end of 56 years of copyright, or January 1, 1978, whichever is later. 17 U.S.C. 304(c)(3).

[10] The notice must state the effective date of termination, which must fall within the five-year period discussed in note 9, *supra*. The notice must be served not less than two nor more than ten years before that date. 17 U.S.C. 203(a)(4); 17 U.S.C. 304(c)(4).

[11] 17 U.S.C. 203(a); 17 U.S.C. 304(c).

Section 101 of the Act provides that:

> (1) a work prepared by an employee within the scope of his employment; or
>
> (2) 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 . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

One commentator has suggested that this provision could lead to increased use by derivative work preparers of works made for hire instead of works prepared by independent authors. This could be a wasteful duplication of authorship. Curtis, *Caveat Emptor in Copyright: A Practical Guide to the Termination of Transfers Under the New Copyright Code*, 25 BULL. COPR. SOC'Y 19 (1977), (hereinafter "Curtis 1977 Article") at 37; Curtis, *Protecting Authors in Copyright Transfers: Revision Bill Section 203 and the Alternatives*, 72 COLUMBIA L. REV. 799 (1972) (hereinafter "the Curtis 1972 Article") at 831. *See also*, Stein, *Termination of Transfers and Licenses Under the New Copyright Act: Thorny Problems for the Copyright Bar*, 24 U.C.L.A. L.REV. 1141 (1977) (hereinafter "Stein") at 1176-79 for an intriguing discussion of when a re-

do not extend the term of any transfer or grant beyond that originally agreed upon;[13] the parties to an original grant cannot "contract away" the right to termination;[14] and termination is not automatic—if it is not exercised by the author within the prescribed period, the recapture right is lost.[15]

The recapture right was deemed necessary "because of the unequal bargaining power of the authors, resulting in part from the impossibility

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servation of rights by an author under special commission could reserve statutory termination as to those rights.

See also note 127, *supra*.

[12] 17 U.S.C. 203(a); 17 U.S.C. 304(c).

[13] House Report, *supra* note 3, at 128 and 142.

[14] 17 U.S.C. 203(a)(5); 17 U.S.C. 304(c)(5), both of which state: "Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant."

See also 17 U.S.C. 203(b)(4) *and* 17 U.S.C. 304(c)(6)(D), *and* the House Report, *supra* note 3, at 127. *See generally*, Curtis 1972 Article, *supra* note 11, at 825-29.

One commentator has noted that a purchaser of derivative work rights could possibly discourage termination by providing in the terms of the original grant for decreasing royalty payments to the author upon termination, and might even be somewhat justified in doing so, considering that before termination the preparer might have had exclusive rights to exploit derivative works in a particular medium that after termination would no longer be exclusive. *Id.*, at 828, n. 142. Curtis 1977 Article, *supra* note 11, at 58-59. *Compare* Stein, *supra* note 11, at 1152, n. 52, on a "negative covenant" and its doubtful legality here, with PRACTICING LAW INSTITUTE, COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY, No. 118, Vol. 2, Literary Purchase Agreement (hereinafter "Literary Purchase Agreement"), section 4(b), and with B. Melniker and H. Melniker, *Termination of Transfers and Licenses Under the New Copyright Law*, 22 N.Y.L.REV. 589 (1977) (hereinafter "Melniker") at 617, where it is observed that the derivative work preparer may have leverage when renegotiating a grant under a 203(b)(4) or 304(c)(6)(D) situation if he is already exploiting derivative works which could compete with derivative works made pursuant to recaptured rights, and thus reduce the potential marketability of those recaptured rights.

See generally, on the rights to royalty payments after statutory termination, Curtis 1977 Article, *supra* note 11, at 63-4.

[15] Those who may terminate grants must comply with the written and regulatory requirements for exercising termination. *See* note 9, *supra*, *and generally*, sections 203(a)(4), 203(b)(6), 304(c)(4), 304(c)(6)(F), *and* the House Report, *supra* note 3, at 128 and 142.

The termination of transfers will not be discussed in further detail, aside from the derivative works Exception and the general intent of the provisions. For exhaustive discussion and analysis of these provisions, *see*, Curtis 1977 Article, *supra* note 11; NIMMER, *supra* note 3, chapter 11; Stein, *supra* note 11; Melniker, *supra* note 14. *See also*, the House Report, *supra* note 3, at 124-128 and 140-142; 37 C.F.R. 201.10.

of determining a work's value until it has been exploited."[16] The second

[16] House Report, *supra* note 3, at 124.

Irwin Karp, representing the Authors' League of America, Inc. at copyright revision panel meetings in 1963 outlined the reasoning which ultimately prevailed in Congress and resulted in the termination of transfers provisions:

> Any prudent, provident author, bargaining to sell or lease rights to a motion picture company, doesn't want to give away his copyright forever. He wants to give a limited grant, because he knows that the value of his rights can't be adequately determined at the time the bargain is made. He knows that in thirty years the rights may be worth many times more . . .
>
> The reason you need a reversion is because the imbalance in bargaining positions makes it impossible for the author to obtain the sort of bargain that he would like to obtain. All the authors' organizations in the world unfortunately haven't been able to get it for him so far . . .
>
> When you get to the book publishing field, you find that most publishers . . . will never give a contract limited to the first term of copyright. The basic terms of a book contract are the same wherever you go. You can't no matter how strongly you bargain as an author, limit the lease of rights to publish a book . . . I think that when you review the whole history of the bargaining for rights in literary property, you find that the author has never been able to obtain a fair bargain—the sort of bargain he would like to have had, and one that he actually would bargain for, if there were a balance of bargaining power when it comes to the term of copyright.

House Committee on the Judiciary, 88th Cong., 2d Sess., COPYRIGHT LAW REVISION, PART 3: PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSION AND COMMENTS ON THE DRAFT (Comm. Print. 1964) (hereinafter "Copyright Revision Part 3") at 286-7.

The comments on rights granted thirty years before the real worth of the rights multiplies, and on contracts not limited to the first term of copyright, indicate the evolution of the termination concept as one substitute for the two 28-year terms of copyright protection (original and renewal) present in the 1909 copyright law and eliminated beginning with the Act. Because many transfers of rights under the old law were for a copyright term of 28 years, or included the renewal term as well, the time when the termination option should commence was first proposed as 20 years after the grant, House Committee On The Judiciary, 87th Cong., 1st Sess., COPYRIGHT LAW REVISION PART 1: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF U.S. COPYRIGHT LAWS (hereinafter "Copyright Revision Part 1") at 94 (a proposal that derivative work preparers considered arbitrary, Copyright Revision Part 3, at 281, Comments of Richard Colby, Motion Picture Association of America, Inc., and unfair, *see* note 21, *infra*.), then as 25 years after the grant, *id.*, at 15-16, and then as 35 years after the grant, House Committee On The Judiciary, 89th Cong., 1st Sess., COPYRIGHT LAW REVISION, PART 5: 1964 REVISION BILL WITH DISCUSSION AND COMMENTS (Comm. Print 1965) (hereinafter "Copyright Revision Part 5") at 10, in order to accommodate derivative work users who considered such extended time as necessary for the preparation of additional derivative

chance an author and his statutory successors have to profit by exploiting his preexisting work was viewed as a redress to an unremunerative transfer by an author and his consequent inability to fairly share in a windfall exploitation of the preexisting work by the grantee.[17] Further, there may have been an unsuccessful or total lack of exploitation of the preexisting work by the grantee which may have deprived the author of substantial royalty revenues.[18]

B. The Exception for Derivative Works

Representatives predominantly from the motion picture industry vigorously protested the termination provisions. Mainly, they feared that termination of the continued use of their laboriously created derivative work motion pictures,[19] works which require a tremendous amount of time, effort, creativity, and organization, would endanger their realization of an adequate profit on the very risky and substantial monetary

works, and for additional exploitation of their works as part of a recoupment of their investment. *See* notes 21 and 49, *infra*. House Committee on the Judiciary, 88th Cong., 1st Sess., COPYRIGHT LAW REVISION, PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE UNITED STATES COPYRIGHT LAW: 1965 REVISION BILL (Comm. Print 1965) (hereinafter "Copyright Revision Part 6"). The Copyright Register's Report, at 75, stated: "The basic 35-year figure represents a compromise which, we believe, is short enough to be of benefit to authors and long enough to avoid unfairness to publishers and other users." *But cf.*, Curtis 1972 Article, *supra* note 11, at 833, n. 161 and accompanying text.

[17] Irwin Karp, representing the Authors' League of America, Inc., explained:

> (The author) knows that if he gets another crack at it he will then get the same chance that everybody else involved with the second remake of the movie gets—of being paid, according to latterday standards, the value of what he contributes. And, as I say, he would never assign the copyright away unless he were forced to. The same holds true in book publishing, and music publishing, and every other kind of publishing . . .
>
> We think it ill-becomes (the motion picture) industry that can spend thirty, forty (and now what is it 45?) million dollars on the making of a single motion picture to quibble too much about whether rights purchased thirty years ago for $10,000 to make a previous version aren't worth a lot more on today's market when the picture is made a second time, and whether those rights shouldn't be adequately compensated for.

Copyright Revision Part 3, *supra* note 16, at 286-7.

[18] *See* comments of Congressman Hutchison, 122 Cong. Rec. 10877 (94th Cong., 2d Sess. 1976).

[19] On the explicit clarification of a motion picture as a derivative work, *see* note 129, *infra*, and accompanying text. It may be noted here that many current motion pictures are derivative works based on stories from preexisting works such as novels. New York Times, March 25, 1979, at section 2, page 17, col. 1: "Why Hollywood Still Goes By The Book."

investment involved in the production and promotion of such works.[20] These representatives stressed the expectations of motion picture producers that they could exploit their work over decades in various media to recoup and profit from such risky investments.[21] They disputed the

[20] E.g., Adolph Shimel, on behalf of the Motion Picture Association of America, Inc., noted:

> In the production of motion pictures literally thousands of people are employed to contribute to the film that goes on the screen . . . Hundreds of millions of dollars are spent in film production . . . To the cost of producing the picture must be added the substantial cost of prints required for the exhibition of the picture in the theaters . . . Additionally there are tremendous expenditures for advertising and exploitation . . .

Hearings before Subcommittee No. 3 of the Committee on The Judiciary of the House of Representatives, 89th Cong., 1st Sess., 1965, Part 2, at 984-5, and also *id.*, at 1048: "It must be borne in mind that motion picture producers may and do risk millions of dollars in the production and exploitation of a film. . . ." *See also* the memorandum statement submitted by the Motion Picture Association of America, Inc, *id.* (hereinafter "MPAA 1965 Statement") at 991, *and generally* on the risks involved in motion picture production, *id.*, at 995, 999, and 1014. (The MPAA at the time was principally composed of: Allied Artists, Columbia, MGM, Paramount, Twentieth Century-Fox, United Artists, Universal, and Warner. These companies, with the exception of United Artists, were the largest producers of motion pictures for theaters in the United States. *Id.*, at 983.)

See generally, M. MAYER, THE FILM INDUSTRIES (1973) (hereinafter "MAYER"), at 199:

> Either a producer has a major hit or he is, in effect, out of business. Coupled with this fantastic selectivity is the near impossibility of prediction of success. A major film is generally planned and prepared at least two years in advance of release. What could be popular at the moment of selection may prove anathema 24 months laer . . . High selectivity is bad enough for business as a whole, but joined to near total unpredictability it comes close to becoming disasterous.

[21] E.g., Harry Olsson of the National Broadcasting Company stated:

> (I) don't see how they can say that the "user"—and I'm thinking of motion picture companies mainly . . . expects or hopes to get his money back on the first picture, or the first release of the first picture . . . I think any user would testify that he hopes to make money back over an indefinitely long period of time . . . He intends to make as much money as he can over any number of releases . . .

Copyright Revision Part 3, *supra* note 16, at 296. *See also*, Seymour Bricker, then Vice-Chairman of the ABA Committee on Copyright Revision, who noted in his letter on the Register's Report, Copyright Revision Part 2, *supra* note 1, at 264, that reference should be made to his 1962 article, *Ownership of Copyright*, 9 BULL. COPR. SOC'Y 451 (1962), wherein he stated that there was no evidence to support the idea that a period of twenty years would be ample to enable the motion picture maker to fully exploit a derivative work and realize the expected return on his investment:

> Anyone familiar with the motion picture industry can testify that many

notion that "the poor author is in a bad bargaining position and every-

companies were saved from financial disaster by the release of their backlogs to television, and anyone familiar with television can testify that many of the motion pictures were more than twenty years old.

Id., at 457.

See, Shimel, 1965 House Hearings Part 2, note 20, *supra*, at 985: "In the past ten years producers and distributors of motion pictures have made available for television broadcasting, from their libraries, some 10,000 feature motion pictures. Approximately 500 to 600 pictures are added annually for that medium." *See generally*, the reference to commercial television exhibition of older motion pictures as early as 1962 in the MPAA 1962 Statement at Copyright Revision Part 2, *supra* note 1, (hereinafter "the MPAA 1962 Statement") at 342; *see generally*, Melniker, *supra* note 14, at 601, n. 68, where the television exhibition of "libraries" of motion pictures, and the repeated theatrical exhibition of "classic" motion pictures is discussed.

But cf., A. BLEUM, THE MOVIE BUSINESS (1972) (hereinafter "BLUEM"), at 59-60, who indicates that although television used to be a "savior" in which unsuccessful motion pictures in theatrical distribution could still be exploited to recoup a significant portion of costs via rental for television exhibition, this is becoming less prevalent with the preparation of increased numbers of made-for-television motion pictures. Nevertheless, rentals of theatrical motion pictures for television exhibition is still quite common as even an infrequent viewer of commercial or cable television can observe, and the thinking of many motion picture industry representatives and derivative work planners during copyright revision still is fully valid.

Further, new means of exhibition for motion pictures, such as the now relatively common cable television systems mentioned above, or home video cassette machines, can become available decades after the first release of the motion picture. The motion picture industry's intent to exploit motion pictures using such means in the future was specifically mentioned in the MPAA 1962 Statement, *supra*, at 343, and in MPAA 1965 Statement, *supra* note 20, at 1001-1002. On how some major motion picture companies are already planning to considerably exploit the new exhibition means such as video cassette machines, *see generally*, BLUEM, at 258-291; New York Times, March 9, 1980, section 3, page 1: "The Mogul-Lawyer of Columbia Pictures."

See also, the MPAA 1965 Statement, *supra* note 20, at 1014, wherein the MPAA pointed out that the related rights in a motion picture grant, such as in live stage or television dramatizations, rights which ordinarily might be exploited a considerable time after the initial preparation and exploitation of the motion picture, "are factors which the producer takes into consideration in undertaking the great financial risk of motion picture production, as well as factors going into its potential exploitation. . . ." And generally, on the skepticism by some in the motion picture industry on how the Copyright Register's Office originally devised permissible periods of preparation of derivative works shorter than the eventually agreed upon period of thirty-five years, *see, e.g.*, the comments of Richard Colby of the MPAA, Copyright Revision Part 3, supra note 16, at 281, and on how the thirty-five year period of permissible preparation of derivative works was only barely acceptable to the industry, *see, e.g.*, note 26, *infra*.

body takes advantage of him."[22] And they argued that the lavish production, large cost, and well-publicized promotion of derivative work motion pictures often substantially increased the value of the preexisting work.[23]

Because of the strong arguments put forth by the diverse contending interests regarding "the most explosive and difficult issue" of copyright revision—the recapture provisions and their scope[24]—the Exception to the termination provisions was devised. It provides:

> A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works

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[22] Comments of Joseph Dubin, representing Universal Pictures Co., Copyright Revision Part 2, *supra* note 1, at 104. *See generally, e.g., id.*, on the position that authors' representatives and bargaining organizations significantly improved authors' bargaining positions, and that authors with very desirable properties could usually obtain very attractive terms from motion picture producers. (*Compare*, comments of Walter Derenberg of the U.S. Copyright Society, *id.*, at 106). There was also much discussion concerning the motion picture industry's view that the termination provisions were an unfair impairment of the freedom to contract of the parties involved, *e.g.*, MPAA 1965 Statement, *supra* note 20, at 996; statements of Irwin Karp, Copyright Revision Part 2, *supra* note 1, at 285-6; and concerning the constitutionality of the termination provisions regarding transfers made before the Act became effective, *e.g.*, comments of Richard Colby of the MPAA, Copyright Revision Part 3, supra note 16, at 280-81; Thomas Robinson, MPAA, *id.*, at 288.

[23] *See, e.g.*, Adolph Shimel, 1965 House Hearings Part 2, *supra* note 20, at 1048:

> It must be borne in mind that motion picture producers may and do risk millions of dollars in the production and exploitation of a film, and by their efforts and expenditures substantially enhance the value of the story, novel, or play which is the basis of the picture.

See also, Thomas Robinson, Copyright Revision Part 3, *supra* note 16, at 298:

> Very often authors write what are probably mediocre stories or novels, and they are taken by a picture company and they're developed and they're promoted into tremendous properties that click with the public and enjoy huge revenues. Now, at the time that the author made his deal with the picture company, he had a windfall. He wakes up and finds out that he not only had a windfall but, according to Mr. Karp, he should be entitled to a big feast of what was reaped through the efforts of the picture company. Now, this doesn't seem . . . fair. . . .

See also, comments of Joseph Dubin, Copyright Revision Part 2, *supra* note 1 at 105.

[24] Copyright Register's Supplementary Report, Copyright Revision Part 6, *supra* note 16, at 71-2.

based upon the copyrighted work covered by the terminated grant.[25]

The Exception was the result of a delicate compromise which made the termination provisions minimally tolerable to the motion picture industry.[26]

III. The Types Of Derivative Works Covered By The Exception

The term "derivative work" is used in the Exception without qualification or limitation. Therefore the Exception operates with respect to all types of derivative works embraced within the broad statutory definition, including relatively "large scale" and "small scale" derivative works; that is, derivative works which are the result of relatively large or small measures of creativity, production, and promotion.[27]

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[25] 17. U.S.C. 203(b)(1); 17 U.S.C. 304(c)(6)(A).

See generally, Rohauer v. Killiam Shows, Inc. and the Derivative Works Exception to the Termination Right: Inequitable Anomalies Under Copyright Law, 52 SO. CAL. L. REV. 635 (1979) (hereinafter "Smith"), at 659, who argues that the decision in Rohauer v. Killiam Shows, Inc., 551 F.2d 484 (2d Cir. 1977), *cert. denied*, 431 U.S. 949 (1977), engrafts a similar "exception" of sorts onto the copyright renewal system of the old 1909 Copyright Act, at least for cases where reversion rights are impliedly included. *Compare* Melniker, *supra* note 14 at 615-616, where the situation of an author's successors upon his death before the renewal term of copyright under the 1909 Copyright Act in "pre-*Rohauer*" conditions is observed to have been considerably better off than after *Rohauer* in some cases, and certainly than after the Exception became effective.

[26] Copyright Register's Supplementary Report, Copyright Revision Part 6, *supra* note 16, at 71-2; House Report, *supra* note 3, at 124. *See*, comments of Adolph Shimel, 1965 House Hearings Part 2, note 20, *supra*, at 1048:

> (T)he provisions of section 203 . . . are accepted by the industry in the spirit of compromise and represent the minimal basis on which the industry can live with this innovation in copyright. I must emphasize that the industry would be strongly opposed if these minimal provisions were changed or diluted to its disadvantage.

See also, the MPAA 1965 Statement, *supra* note 20, at 994, 997, 1018, and at 1035-6.

[27] The measures involved in making a relative assessment of derivative works to determine which are "large scale" and which are "small scale", it is suggested here, are (1) the *creativity* involved in recasting, transforming, or adapting the preexisting work; (2) the *effort* and (3) the *time* involved in the production and promotion of the derivative work, and (4) the *investment risk* involved in acquiring the right to prepare a derivative work from a particular preexisting work, and in the production and promotion of the derivative work. Thus, for example, large scale derivative works are the result of very substantial creativity, a large organization of artistic and business professionals (perhaps scores of people or more), a time of production and pro-

A. Considering A Limitation On The Operation Of The Exception To Large Scale Derivative Works, And A Proposed Royalty Provision For The Exception

There is some confusion concerning future interpretation or modification of the Exception that should be discussed.

One possibly confusing issue is that, arguably, the broad statutory definition of derivative work was not meant to literally and fully apply to the operation of the Exception. Rather, some suggest, since the Exception was devised primarily to allay the fears of motion picture industry representatives, its application to small scale derivative works seems to directly conflict with a particularly strong Congressional intent to provide a "meaningful" right of reversion to authors and their statutory successors; especially for authors of underlying works which are used in small scale derivative versions, the Exception seems to "swallow" the reversion right in that many of the small scale derivative work rights Congress intended to return are of questionable value if previously prepared derivative works may continue to be utilized.[28] Thus some suggest that the application of the Exception to small scale derivative works is unfortunate statutory drafting and contrary to the legislative history of the Exception.[29] Others further suggest that an alternative interpretation must be devised whereby the Exception would apply only to large scale derivative works.[30] Under such a limitation, the copyright owners of small

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motion of at least several months, and an investment risk of at least several hundred thousand dollars. Examples of large scale derivative works are most feature-length motion pictures, some types of publications with much creativity such as extensive editorial work or annotation, or some elaborate or lengthy sound recordings such as many musical albums. Examples of small scale derivative works are most simple arrangements of songs, or simple publications such as most abridgments, or a printed art reproduction.

[28] A. LATMAN, THE COPYRIGHT LAW (1979) (hereinafter "LATMAN") at 93.

[29] *See*, Curtis 1977 Article, *supra* note 11, at 55, n. 113 (the use of the single broad statutory definition here is unfortunate and not very consistent with the purposes of the Exception); Kadden, *Copyright Law*, 1978 NYU ANNUAL SURVEY OF AM. LAW 593 (hereinafter "Kadden"), at 603 (the operation of the Exception over all derivative works may not have been intended by Congress); *compare*, S. SHEMEL AND M. KRASILOVSKY, THIS BUSINESS OF MUSIC (1977) (hereinafter "SHEMEL") who, while discussing the consequences of the Exception over small-scale derivative works at 140-147, seems to be less than fully confident about the coverage of the Exception at 212 (derivative work songs "*may well* qualify the owner-publisher to continue to exercise rights in the entire song"). *See generally,* NIMMER, *supra* note 3, section 11.02(B).

[30] Latman, supra note 28, at 93; Interview with attorney in the music industry, March 1979 (notes on file) (hereinafter "Interview"); *but cf.*, Curtis 1977 Article, *supra* note 11, at 46, n. 90, who, even though expressing doubt that the broad language of the Exception reflects the Congressional purpose, *see*

scale derivative works would not be permitted to utilize those works after termination of the original grant unless a new grant of rights was arranged with the author of the underlying work.

The argument for a limitation of the Exception based on the legislative history is supported to some extent by an assessment of the general business circumstances involved in the creation and exploitation of small-scale derivative works. It may be contended that some types of small scale derivative works such as an arrangement of a song or a printed reproduction of a work of art yield relatively little remuneration to the preexisting work's copyright owner and yet may be the prime or only source of commercial exploitation of the preexisting work.[31] Upon termination it would seem fair that the copyright owner of the preexisting work upon which such small scale derivative works are based should recover the full exclusive right to prepare and utilize new derivative works and should not have to be concerned with the commercial competition from continually utilized previously created derivative works.[32] This would make the reverted rights more attractive to new prospective grantees and thus more valuable to the copyright owner of the preexisting work. And it does not seem very unfair to terminate the right to utilize small-scale derivative works which do not involve the extent of creativity, and the production and promotion costs, of large-scale derivative works.[33]

Another source of confusion regarding the Exception could be its proposed modification incorporating a royalty provision for continued utilization of derivative works. At least one commentator since the enactment of the Act has suggested that a reversion of rights to the author as a result of termination unnecessarily falls short of protecting authors against unremunerative transfers due to their unequal bargaining power relative to derivative work preparers, and that minimum royalties established by the Copyright Royalty Tribunal for different classes of works should be enacted if those who prepare derivative works are to be allowed to continue to utilize the derivative works after termination.[34]

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note 29, *supra*, acknowledges that the Exception cannot be limited to what is essentially referred to in this article as large scale derivative works.

[31] Regarding the musical arrangement, *see*, Interview, *supra* note 30. Regarding the art reproduction, *see* Kadden, *supra* note 29, at 604.

[32] Kadden, *supra* note 29, at 604, notes that an art reproduction, which ordinarily requires faithfulness to the preexisting work and not creative interpretation of it, is not a derivative work which likely could profitably accommodate many competing artistic versions. *But cf.*, note 51, *infra*.

[33] *See generally*, NIMMER, *supra* note 3, section 11.02(B).

[34] Smith, *supra* note 25, at 652-6, and 659-63.

See also the proposal by the Authors' League of America, Inc., during the copyright revision proceedings, discussed at notes 14-16, *supra*..

B. Rejecting A Limitation On The Exception Or A Royalty Provision For The Exception

The suggested limitation on the operation of the Exception could be implemented in two ways: by Congressional amendment or judicial interpretation. The following discussion will show that such a Congressional amendment, or judicial action that would limit the operation of the Exception and essentially create some new meaning for the term "derivative work" in this context, is very unlikely and not necessarily desirable, would be unworkable, and regarding judicial action alone, would be unjustifiable.

A Congressional amendment of the Exception enacting the royalty proposal for continued utilization of derivative works, also not necessarily desirable, is likewise very unlikely.

1. The Clear Statutory Language

The most obvious reason for concluding that Congress said what it meant and that judicial limitations on the Exception would be unjustified is that the term "derivative work," defined in the Act, is used unequivocally in the Exception.[35] Generally, statutory definitions of words used elsewhere in the same statute furnish official and authoritative evidence of the legislative intent, and are usually given controlling effect;[36] thus a "definition which declares what a term 'means' . . . excludes any meaning that is not stated."[37] Ordinarily, only where "definitions . . . produce meanings that are too skewed or applications that are too improbable in comparison to natural and ordinary meanings and applications . . . may they be subject to question";[38] only where "obvious incongruities in the statute would thereby be created, or where one of the major purposes of the legislation would be defeated or destroyed,"[39] should a statutory definition be judicially interpreted to mean other than what it literally says.[40] At the least, a high burden is placed

[35] *See generally*, NIMMER, *supra* note 3, section 11.02(B).

[36] C. SANDS, STATUTES AND STATUTORY CONSTRUCTION (1972), 4th ed. (rev. ed. of SUTHERLAND'S STATUTORY CONSTRUCTION), section 27.01, 27.02; *see*, Walling v. Portland-Terminal Co., 330 U.S. 148, 150-51 (1946).

[37] 2A SANDS, STATUTES AND STATUTORY CONSTRUCTION, section 47.07 (Supp. 1978), cited in Colautti v. Franklin, 439 U.S. 379, at note 10 (1979) (case dealing with a criminal statute).

[38] SANDS, note 36, *supra*, at section 27.01.

[39] *Id.*, section 27.02.

[40] The Supreme Court has stated:

> This Court, in interpreting the words of a statute, has "some 'scope for adopting a restricted rather than a literal or usual meaning of its words, where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute' . . . but it is otherwise

on those seeking to establish a legislative intent contrary to that expressed by the statutory language.[41] Clearly the major purpose of the recapture provisions—to give an author a second chance to exploit rights he otherwise never would have had—is not "defeated or destroyed" by the continued utilization after termination of previously prepared small-scale derivative works.

In any event, the clarity of the statutory language need not prevent further inquiry into the legislative history to determine whether the broad derivative work definition as used in the Exception serves the Congressional purpose; when an aid such as legislative history is available, it may be used.[42]

2. The Legislative History Regarding Small-Scale Derivative Works or a Royalty Provision Under the Exception

a. The References and Rationale for Including Small-Scale Derivative Works Within the Exception

As previously discussed, the Exception was devised primarily to appease motion picture industry representatives concerning the effects of statutory termination on motion pictures.[43] But the legislative history

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'where no such consequences would follow and where . . . it appears to be consonant with the purposes of the Act . . . ' "

In Re TransAlaska Pipeline Rate Cases, 436 U.S. 631, at 643 (1978).

[41] *See generally*, Murphy, *Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUMBIA L. REV. 1299, at 1315 (1975).

[42] U.S. v. Am. Trucking Assns., 310 U.S. 534, 543-4 (1940); Train v. Colorado, 426 U.S. 1, 10 (1976). *See generally*, Cass v. U.S., 417 U.S. 72, 77-9 (1974); *see also*, Ex Parte Collett, 337 U.S. 55, 61 (1948):

"The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Genesco v. Walling*, 324 U.S. 244, 260 (1945). This canon of construction has received consistent adherence in our decisions.

[43] Thus motion picture remake rights are used as the illustration in the House Report (*supra* note 3, at 127) on how the Exception would operate, but it is not a limitation; that is, such an illustration should not be read as delineating the only type of derivative work covered by the Exception. Aside from the absence of any indication of such intent in the language of the House Report, such an interpretation would exclude other large-scale derivative works from being covered by the Exception, works which even those who may suggest that small-scale derivative works should be excluded would acknowledge have the requisite characteristics for meriting coverage under the Exception. Further, if the House Report illustration is read restrictively and literally, only a motion picture based upon a *play*, and not on any other type of preexisting work, is covered by the Exception, a proposition obviously totally

regarding the Exception also reveals that representatives of those who prepare other types of large-scale derivative works such as large-scale publishing ventures also expressed concern about the effect of statutory termination on those works.[44] Further, there are references in the revision discussions about the adverse effects of statutory termination on small scale derivative works such as literary translations[45] or music publishing ventures.[46] The wide-ranging discussions regarding the Exception certainly show that no consensus developed that only large scale derivative works should be covered by the Exception. To the contrary, the Copyright Register's Supplementary Report subsequent to most of the revision discussions regarding the Exception indicates that those who devised the Exception proceeded in explicit recognition of the broad definition of derivative work[47] and of the Exception's moderation of the unfavorable effects of reversion on all derivative work preparers.[48] This belies the notion that an ill-considered or unintended broad application of the Exception was drafted which did not reflect its legislative background.

The general business logic and purpose behind the Exception also supports inclusion of small-scale derivative works within the operation of the Exception. For example, just as the Exception enables the preparers of risky and costly large-scale derivative works to possibly avoid financial hardship through continued utilization of their works, it similarly affects the preparers of small-scale derivative works. It seems as likely that some small-scale derivative works, such as some musical arrangements or certain sound recordings, translations or abridgments of literary works, or art reproductions, could continue to be profitably

unsupportable by the legislative history of the Exception or its language, yet which would logically have to follow if the House Report is read as a strict limitation.

For a typical definition of "remake" in a literary purchase agreement, *see* Literary Purchase Agreement, *supra* note 14, section 16, which states that a remake is "a feature-length theatrical or television photoplay subsequent to the first feature-length theatrical or television photoplay based substantially on the work and/or any theatrical or television photoplay produced hereunder. . . ."

[44] *See, e.g.*, the comments of Bella Linden, representing educational and textbook publishers, Copyright Revision Part 3, *supra* note 16, at 290-1. *Compare* the comments of Irwin Karp, representing the Authors' League, *id.*, at 297.

[45] Comments of Bella Linden, Copyright Revision Part 3, *supra* note 16, at 290.

[46] Comments of Julian Abeles, representing the Music Publishers' Protective Assoc., Inc., Copyright Revision Part 3, *supra* note 16, at 283. *See*, the comments of Phillip Wattenberg of the Music Publishers Association of the United States, *id.*, at 284-5.

[47] Copyright Revision Part 6, *supra* note 16, at 76.

[48] *Id.*, at 72.

exploited thirty-five years after termination as it is likely that some large-scale derivative works could be similarly utilized. It was indicated several times in the revision discussions that these long-term commercially popular "standards" may be relied upon by those in the business of preparing such small-scale derivative works to compensate for investment losses on other projects and for the smaller margin of profit usually involved with the exploitation of individual small-scale derivative works of this sort.[49] To terminate by statute continued utilization of such works could conceivably upset important expectations and business strategies in industries which prepare such works,[50] a result obviously deemed generally undesirable by those who drafted the Exception. Further, just as many large-scale derivative works significantly enhance the commercial exploitation of preexisting works that might have otherwise been quite ordinary, and thus makes it fair to allow those derivative work preparers to continue utilizing their derivative works, some small-scale derivative works likely perform a similar function. For example, a particular mus-

[49] Copyright Revision Part 3, *supra* note 16, at 283; *see*, comments of Julian Abeles, *id.*, at 319; comments of Leonard Feist, 1965 House Hearings Part 1, note 20, *supra*, at 184; and of Leonard Feist at Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary of the House of Representatives, 94th Cong., 1st Sess., 1975, Part 3, at 1652; Curtis 1972 Article, *supra* note 11, at 815, n. 88. (*But cf.*, *id.*, at 833, n. 161, on how business calculations might require a grant for 20 to 28 years, but not necessarily for 35 years, with respect to music publishing grants. Yet it would seem that of the works still utilizable and capable of being re-transformed for additional exploitation after 35 years, a similar amount of small-scale works such as songs could be rearranged as large-scale works such as motion pictures could be remade.) *See also*, regarding the small profitability of small-scale derivative works such as literary translations, A. LINDEY, LINDEY ON ENTERTAINMENT, PUBLISHING, AND THE ARTS, AGREEMENTS AND THE LAW, 2d ed. 1980, vol. I, at 340 (hereinafter "LINDEY").

(With respect to music publishing, it may be noted that termination by composers of the right to create musical arrangements affects two levels of derivative work preparers: the music publisher—who is often assigned the copyright to a musical composition in return for a royalty from payments he receives for licensing the rights to multiple grantees to arrange the preexisting work; and the grantees of the music publisher to use or create an arrangement. *See generally*, Study No. 6 by the Copyright Register's Office. note 16, *supra*. *See generally*, Curtis 1972 Article, *supra* note 11, at 814. *See also*, note 81, *supra*.)

[50] For example, on the effect of a reversion of rights by law without a moderating "Exception" of some sort on the music industry in the United Kingdom and the future dissemination of "standard" songs under British copyright law, *see* Billboard, August 9, 1980, at 4, col. 1: "Reversionary Rights Rule Shocks Publishers: British say Losses To Top $2 Million."

ical arrangement may be the prime reason why an otherwise typical underlying song enjoys commercial success, and thus the creator of such an arrangement deserves to continue exploiting his work.

The suggestion that small-scale derivative works should be excluded from the Exception because such works may be the only source of revenue for the authors of the underlying works fails to convince that such authors deserve special treatment; motion pictures or other large-scale derivative works also may often be the only significant source of revenue for authors of such underlying works as novels, short stories, plays, or screenplays not created in a work-for-hire situation. In fact, contrary to being at a disadvantage, authors who wish to market small-scale derivative work rights after termination may be in a better position than those who want to market large-scale derivative work rights. Since small-scale derivative works are much cheaper and require much less effort to prepare than large-scale derivative works, prospective purchasers of small-scale derivative work rights would generally be more willing to take the relatively smaller investment risk of relatively easily preparing such works, even in view of commercial competition from previously prepared derivative works already being utilized, than would purchasers of large-scale derivative work rights.[51]

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[51] For example, with respect to musical arrangements, popular musical styles prevailing after termination may be drastically different from the musical style of the preexisting arrangement; thus the prospective creator of a disco-style arrangement need not fear the competition from a previously created arrangement in a "big band," jazz, or rock and roll style, etc. Some new small-scale publishing ventures such as an annotated version of a literary work could also similarly be artistically different enough to avoid direct competition. But even for such small-scale derivative works such as translations, abridgments, or art reproductions, where competition is essentially between two very similar versions, the costs and effort of production and promotion may be relatively small enough that several preparers may desire to reproduce a popular art work or prepare some new translation or abridgment of a literary work, and rely upon their promotional and distribution techniques, rather than variety, for commercial success.

The situation is quite different regarding the prospective sale after termination of motion picture remake rights, for example, even though such a situation is the illustrative situation in the House Report regarding the Exception, *see* note 43, *supra*. The very substantial investment risk of preparing a feature-length motion picture for commercial exploitation is even higher if a competing version has already been distributed. *See*, Melniker, *supra* note 14, at 611-612, who notes that generally, if a previously exploited motion picture was commercially unsuccessful, the poor showing would likely deter prospective purchasers of remake rights. If the previous version was commercially successful, this would also likely deter prospective purchasers of remake rights because of the already saturated market, the popular image of that version in the minds of viewers who would compare it with any new

In general, had Congress decided not to balance the termination provisions with the Exception, recaptured rights for *both* large-scale and small-scale derivative works would be more valuable. But clearly, authors who seek to exploit recaptured small-scale derivative work rights do not suffer any greater disadvantage under the Exception than those who desire to exploit recaptured large-scale derivative work rights, and the moderating effect of the Exception on the consequences of reversion similarly affects small-scale as well as large-scale derivative work preparers.

b. The Explicit Proposals to Limit the Exception to Large-Scale Derivative Works and to Establish a Royalty Provision for Continued Utilization of Derivative Works Under the Exception

A proposal to limit the operation of the Exception was explicitly presented in the revision discussions and available for consideration by the drafters of the Act. Irwin Karp, representing the Authors' League of America, Inc., proposed at one point:

> I would suggest that the broad definition of "derivative work" be narrowed down to cover those types of works which might legitimately be entitled to the right to continue on a non-exclusive basis to be shown or published—works, such as motion pictures, which do involve the creation at great expense of something new. I wouldn't like to see included under a "derivative work" an arrangement, abridgment, translation, or other types of works that don't belong in the same category.[52]

Explicit alternative statutory language for the Exception which essentially embodied the proposal of Mr. Karp was presented to those revising the copyright law by the Authors' League. Among other changes, the

version, and the danger of competitive re-release of the original version. Usually remakes would be undertaken only if a new version could contain a significantly altered tone, such as a modernized style, or if the project would be a good commercial "vehicle" for film stars who may themselves assure large revenues for the remake on the basis of their popularity. *Cf. generally, id.*; Curtis 1972 Article, *supra* note 11, at 832, n. 158. The sale after termination of "sequel" rights, in which a second motion picture or television show could essentially expand the story of the first version by employing possibly copyrightable characters and other elements contained in the first version, seems much more likely. *See* notes 104 and 105, *infra*.

[52] Copyright Revision Part 3, *supra* note 16, at 294. *See also* the comments of Irwin Karp, *id.*, at 297:

> I think there are different categories of works . . . I could see a logical definition of the types of derivative works that could continue to be published or exhibited. . . .
>
> *Cf.*, note 54, *infra*.

alternative proposal specifically deleted the broad "derivative works" term from the Exception and substituted only motion pictures. Relevant parts of the proposal and Authors' League comments appear below, with the proposed deletions and substitutions appearing as in the proposal:

> 6. *The exception as to derivative works should be limited to motion pictures.* The reasons for permitting the continued use of a motion picture version of a copyrighted work, after termination of the transfer, grow out of the special economic and creative circumstances involved in that medium. Millions of dollars may be spent in creating a new work, in which underlying work is one of several elements making up the finished product. The same considerations do not apply in the case of other derivative works, and they should not be excepted. *See change VIII, below. . . .*
>
> (VIII) (1) After the termination of a transfer under this section, ~~a derivative work~~ *a motion picture version of a work* prepared before the termination under the authority of the transfer may continue to be utilized under the terms of the transfer, *provided that the transferee shall pay annually to the person or persons who effected the termination, a royalty of 5% of the transferee's gross receipts from said motion picture version, or the compensation provided in the transfer for such continued use, whichever amount is greater,* ~~but this privilege does not extend to the preparation~~. After the termination, *the transferee may not prepare any other motion picture version, or* other derivative works, based upon the copyrighted work covered by the terminated transfer; *and the person or persons who effected the termination may, thereafter, prepare, or authorize others, to prepare and exploit other motion picture versions, or derivative works based upon said copyrighted work.*[53]

[53] Copyright Revision Part 5, *supra* note 16, at 242, 244-245.

The proposal also provided for the continued use of some other large-scale derivative works, such as extensive educational publishing projects, over which concern had been expressed.[54]

Given the explicit proposals for limiting the operation of the Exception essentially to most large-scale derivative works, the omission of such a limitation in the statutory language was clearly intended by Congress,[55] and was not the result of careless drafting. In fact, just about six months after the Authors' League presented its alternative, in the 1965 Copyright Register's Supplementary Report, the Exception was phrased using the language that was subsequently enacted in 1976.[56] The Register seems to have had rejection of the proposals in mind because the Report expressly noted, following the text of the Exception: "The term 'derivative work', under the definition in section 101, includes works such as translations, arrangements, and dramatizations."[57]

The rejection of the Authors' League proposal also bears on the likelihood of a future modification of the Exception requiring minimum royalty payments. Although compensating authors for unforeseen revenue windfalls involved in the exploitation of derivative works thirty-five years after they negotiated the transfer of rights in their preexisting works may be equitable in some cases, it is extremely unlikely that a provision to the Exception requiring such compensation will be enacted by Congress for a number of reasons: A royalty compensation provision was available for Congressional consideration in the Authors' League

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[54] *Id.*, at 243, section 9 of the Authors' League comments entitled "9. *The continued use of contributions to encyclopedias, dictionaries and other composite works, after termination.*" *See also, id.*, at 245, proposed change number X, which stated in part: "After a termination of a transfer under this section, contributions to . . . supplementary materials . . . may continue to be published under the terms of the transfer . . ." It is interesting to note that under the League's proposed definitions for this alternative provision, musical arrangements and translations, ordinarily considered small-scale derivative works, could continue to be utilized after termination as "supplementary materials." This would seem to indicate that a clear cut "logical definition" or categorization of derivative works as either large- or small-scale for purposes of utilization after termination is not easily devised—problematic since some suggest that if *any* derivative works should be excluded from coverage under the Exception, it should be those types of small-scale works mentioned above.

[55] Some may suggest that possibly the inclusion of a royalty provision in the proposal was the cause for its rejection as a proposed limitation on the Exception. But surely, if Congress had favored the idea of a limited operation of the Exception without a royalty provision, it could have easily accepted part of the proposal and rejected part. It should therefore be clear that Congress and others who helped draft the revised copyright law rejected both the limitation and royalty aspects of the proposal.

[56] Copyright Revision Part 6, *supra* note 16, at 76.

[57] *Id.*

proposal discussed above, but was rejected;[58] a study made by the Copyright Register's Office of some European copyright codes which incorporated various forms of royalty provisions for exploitation of an author's work was available for consideration by Congress early in the American copyright revision process;[59] one early proposal by the Copyright Register concerning termination suggested conditioning continued use of derivative works after termination on the payment of royalties[60] and met with much protest from derivative work preparers;[61] and the impracticability of a minimum royalty schedule met with scholarly criticism as late as 1972.[62] Evidently one major reason why royalty payments were not made a condition of the Exception is that they could deter or decrease initial lump sum payments to authors—often the most desirable method of compensation.[63] Further, such a royalty provision could deter the generally desirable dissemination and exploitation of derivative works created years ago, but which might not be worth re-exploiting if new royalties must be paid because the new exploitation might yield only marginal additional revenues. Finally, the Assistant Register of Copyrights noted during revision proceedings that such a provision would lead to either evasion or to many doubts that would "cloud the titles" to copyrights and diminish their value.[64]

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[58] *See* comment 7 of the Authors' League regarding the royalty aspect of their proposal, Copyright Revision Part 5, *supra* note 16, at 242, which essentially states that the inability of an author of a preexisting work to fairly share in windfall income earned by the derivative work preparers after termination should be remedied by the royalty provision, an argument very similar to that put forward by Smith, *supra* note 25; *see* note 34, *supra*.

[59] *See* Study No. 30, "Duration of Copyright", 1957, at 213, prepared by the Copyright Register's Office for the Senate Committee on the Judiciary, subcommittee on Patents, Trademarks and Copyrights, U.S. Senate, 86th Cong., 2d Sess. (Comm. Print 1960).

[60] Copyright Revision Part 1, *supra* note 20, at 94; *cf.*, *id.*, at 93. *Cf.*, Study No. 31, "Renewal of Copyright", 1960, at 189, where an earlier similar proposal is noted.

[61] *See, e.g.*, the MPAA 1962 Statement, *supra* note 21, at 361-2.

[62] Curtis 1972 Article, *supra* note 11, at 840, 844-845. *See* a further discussion on this in the text accompanying note 69, *infra*.

[63] Copyright Revision Part 1, *supra* note 16, at 93; Bricker, *Ownership of Copyright*, note 21, *supra*, at 457-8; MPAA 1962 Statement, *supra* note 21, at 361-2; comments of B. Linden, Copyright Revision Part 3, *supra* note 16, at 291-2. *But cf.*, Smith, *supra* note 25, at 662, who argues that prospective moderate royalty payments 35 years after purchase of rights would have little effect on the initial bargaining between the parties. This would be certain only if the "moderate" royalty payments were indeed minimal, possibly thereby defeating their original purpose of redressing inadequate compensation.

[64] Comments of Barbara Ringer, Copyright Revision Part 3, *supra* note 16, at 278.

Again, the omission of a royalty provision in the Exception after so many presentations of the idea in the revision proceedings, and the reasonable basis for rejecting such a provision as undesirable, clearly indicates that Congress intentionally decided against such a provision. Additionally, even if royalty payments under the Exception would be equitable in some cases, Congress apparently reasoned that the termination of transfers to provide a second chance for authors to market their works was enough of a radical change in copyright law. Considering the argument by those who prepare derivative works that they often substantially increase the value of the preexisting work by their investment in and production of a derivative work, and their expectation of an extended period of utilization in which to recoup their investment, and considering that lump-sum payments are often deliberately bargained for by authors, Congress evidently decided that a further provision for royalty compensation in addition to termination might be too radical an alteration in the bargaining relationship between authors and derivative work preparers. And given the strong contention by representatives of the motion picture industry that termination after thirty-five years was the most drastic change they could tolerate, their specific protests against a royalty provision, and the delicate nature of the compromise provisions of the Exception, it is very unlikely that Congress will amend its previous sensitive balancing of interests and arguments on this issue and add a royalty provision to the Exception.

c. The Implication of the Statutory Treatment of Derivative Works in Sections 114 and 115 of the Act, and of Royalty Provisions in Various Sections of the Act

The express limitation in section 114 of the Act on the exclusive right of the owner of a copyright in a sound recording to prepare certain types of derivative works, and the express limitation in section 115 on the extent and copyrightability of certain derivative works in a compulsory license context, both illustrate that had Congress intended to clarify or limit in any way the operation of the Exception over certain derivative works, it would have done so.

Similarly, compulsory royalty systems in some form are provided for in various sections of the Act.[65] The absence of such a provision in

[65] *See generally*, section 111 (cable television); section 115 (compulsory license for sound recordings of nondramatic musical works); section 116 (jukebox performances); and section 118 (public broadcasting).

the Exception, considering that a Copyright Royalty Commission was to administer other royalty systems anyway, indicates that Congress could have provided for such a system in the Exception without much additional bureaucracy, but chose not to.

3. The Impracticability of a Limitation on the Operation of the Exception or of a Minimum Royalty Provision in the Exception

It would be impracticable to formulate a limitation on the operation of the Exception which would supposedly better reflect the intentions of Congress than does the present statutory language. For example, it would be impracticable for a court to delineate types of large-scale derivative works definitively covered by the Exception, and types of small-scale derivative works definitively not covered by the Exception. Such categorizations would ignore the underlying measures of creativity, production, and promotion involved in individual works which are the real considerations behind the Exception, but which are not necessarily uniform within each type of derivative work. To illustrate: a court would have to acknowledge that motion pictures, as a *type* of derivative work, were intended to be a major target of the operation of the Exception, and thus are subject to its coverage. Yet some motion pictures might be relatively "cheaply" and "quickly" produced and promoted, and therefore, under a large scale-small scale analysis of the legislative history, which considers the measures of creativity, production, and promotion of derivative works, might not merit coverage under the Exception because they are not large-scale "enough." Or, to illustrate further, an elaborate modern-style musical arrangement of a preexisting classical symphony or opera might take many months and great expense to produce and promote. A court could not fairly determine that such a derivative work should not be covered by the Exception, because the qualities of creativity, production, and promotion that, at a minimum, the Exception was designed to promote in derivative works, are present in such a derivative work. Yet, most musical arrangements, as a *type* of derivative work, do not contain what such a court might consider enough large-scale qualities to be covered by the Exception.

The above illustrations show that a large scale-small scale basis for decision-making by a court would create large "gray" areas wherein the amount of creativity, production, and promotion necessary, within the same type of derivative work, to qualify works for coverage under the Exception, would be unknown and subject to case-by-case determinations of the courts. This would eventually lead to the development of "minimum standards" of the required large scale qualities within each type of derivative work for the Exception to operate. The evolution of such a state of law would no doubt create much confusion and unpredicta-

bility, and spur litigation by those who had previously thought that the statute was clear.[66]

Such judicial decision-making could produce two other undesirable results. One result is that a work might be deemed a derivative work and subject to copyright protection because it consists of the requisite original authorship, but deemed not to be a derivative work when it is examined for coverage by the Exception because it fails to meet the judicial requisites for such coverage, despite the single statutory definition of derivative work. The other result might be that once a court felt justified in qualifying the absolute statutory language of the Exception based upon suggestions about its legislative history, it could feel equally justified in qualifying the absolute language of the termination provisions based upon other suggestions about their purposes. Thus, in such a situation, a court might deny the termination privilege to an author whom the court found did not negotiate the original grant from a "poor bargaining position," and who could have determined, as accurately as anyone else could have at the time, the value of subsequent exploitation of the preexisting work. Such an author might be anyone who was able to negotiate terms reasonably better than those provided in authors' collective bargaining agreements.[67]

It should be noted here that one commentator has already described the impracticability of a minimum royalty provision for the Exception.[68] It was observed that a single minimum royalty would not be appropriate for all categories of works, or for all uses of a single kind of work, and therefore it would be necessary to devise a complex series of provisions to cover adequately even only the most "important" categories of works and kinds of uses.[69]

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[66] *See* the comments of Richard Colby of the MPAA Copyright Committee, Copyright Revision Part 3, *supra* note 16, at 278 on the volume of litigation he thought would result from an early proposal for judicial involvement in reforming the terms of transfers; *see generally* on this the Curtis 1972 Article, *supra* note 11, at 835-838.

Cf., *id.*, at 823, on the impracticability of adjusting the length of termination periods varying with the kind of work and the use to be made of it.

[67] *Compare* the comments of Irwin Karp, Copyright Revision Part 3, *supra* note 16, at 286; *compare also* the possibility of a return by an author of money he may have received if a derivative work was not produced based upon his preexisting work, a possibility implied somewhat sarcastically as quite as "justified" as the termination provisions, in the comments of Richard Colby, *id.*, at 280; *see also* the comments of Thomas Robinson *id.*, at 288.

[68] *See* note 62 *supra*.

[69] *Id. See also* note 64 and the accompanying text, *supra*.

C. Summary

It is important to consider suggestions regarding the likelihood of future judicial interpretation or Congressional changes of the Exception so that its meaning can be ascertained with as much confidence as possible. Then, derivative work rights transfers may be negotiated, or projects based upon existing agreements may be undertaken with greater assurance about the relevant copyright law.

Regarding a limitation on the operation of the Exception to large-scale derivative works, such a limitation is extremely unlikely and undesirable. Congress expressed its determination on the complex issues of termination and the Exception in clear statutory language—admittedly in broad provisions which balance general cross-purposes. But Congress and others who may have been involved in the revision of the copyright law were clearly aware of and rejected the proposals that the Exception not cover small-scale derivative works. The major reason was probably that the Exception, designed to promote the creation and exploitation of derivative works by allowing for their extended utilization, can effectively fulfill this purpose for small-scale as well as large-scale derivative works, and does not particularly decrease the value of recaptured small-scale derivative work rights more than it similarly affects recaptured large-scale derivative work rights. Another reason was probably that no practicable way to limit the operation of the Exception could be devised which would better reflect the Congressional purpose and balance of interests, and also result in clear copyright law, than does the present statutory language. A judicial limitation is also extremely unlikely because, considering the legislative history and purposeful operation of the Exception over small-scale derivative works, such judicial action alone would be totally unjustified. It would also be very impracticable and the method of decision-making involved could lead to other undesirable results.

Regarding a royalty provision in the Exception for continued lawful utilization of derivative works after termination, such proposals were clearly available to Congress and others who helped draft the Exception and were rejected. Given this rejection, the reasonable arguments against the royalty provision, the impracticability of devising appropriate minimum standards, and the delicate nature of the compromise between the interests supporting the termination provisions or the Exception, it is very unlikely that such a royalty provision would be enacted by Congress or could be justifiably judicially created in the future.

IV. The "Preparation" And "Utilization" Of Derivative Works Under The Exception

Only a derivative work "*prepared* under authority of the grant before

termination" may, after termination, "continue to be *utilized* under the terms of the grant", but the "*preparation* after termination of *other derivative works*" based upon the preexisting work is not permitted.[70] The parties to a transfer may renegotiate new terms any time after the notice of termination of the original grant is served by the author upon the gratee.[71] But it is clear that if no new terms are negotiated the original grantee may not do after termination what he could not have done under the terms of the grant before termination.[72] Further, the parties to a transfer may clarify, by the terms of the original grant, what utilization may be permissible after termination, if any.[73]

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[70] 17 U.S.C. 203(b)(1); 17 U.S.C. 304(c)(6)(A). The House Report, *supra* note 3, at 127, illustrates this division of rights with an example: "(A) film made from a play could continue to be licensed for performance after the motion picture contract had been terminated but any remake rights covered by the contract would be cut off." *See also* note 43, *supra*. While a derivative work preparer or any of his sublicensees could utilize the derivative work, an unlawful use of the derivative work could infringe both the derivative work and preexisting work copyrights.

It should be noted that there may be more than one grant of rights to use a preexisting work and thus more than one termination of rights a derivative work preparer must be concerned about. For instance, a derivative work may be based upon a preexisting work which itself is a derivative work based upon a preexisting work whose author may terminate rights. *See generally*, Curtis 1977 Article, *supra* note 11, at 29, where he suggests the possibility of warranties by the author or seller of derivative work rights that no other possible termination except that of the author or seller is involved in the transfer. *See also, id.*, at 75, n. 163.

[71] 17 U.S.C. 203(b)(4); 17 U.S.C. 304(c)(6)(D); House Report, *supra* note 3, at 127.

[72] Thus the grantee could not stop making royalty payments to the author for continued utilization of the derivative work after termination, if such an arrangement was one of the terms of the original grant. *Cf.*, Curtis 1977 Article, *supra* note 11, at 58-59, who suggests that in future grants grantees may negotiate for a term that allows for smaller royalty payments for continued utilization after termination justified by the non-exclusivity of their rights if those rights had previously been exclusive before termination. *See* note 14, *supra*. As another example, if the terms of the grant specified use of the derivative work in only certain media or geographic locations, this limitation would still apply to utilization of the work after termination.

Of course, determining the terms of the grant and the derivative work preparer's utilization rights may be very difficult. *See, e.g.*, Rohauer v. Killiam Shows, Inc., note 25, *supra*; G. Ricordi & Co. v. Paramount Pictures Inc., 189 F.2d 469 (2d Cir. 1951); Gilliam v. American Broadcasting Companies, Inc., 538 F.2d 14 (2d Cir. 1976); Davis v. E.I. DuPont de Nemours & Company, 240 F. Supp. 612 (S.D.N.Y. 1965).

[73] Thus while the parties may not "contract away" the recpture right, *see* 17 U.S.C. 203(a)(5) and 17 U.S.C. 304(c)(5), they may do away with any utilization rights after termination. For example, the Popular Songwriters Con-

Questions will arise in future litigation[74] concerning permissible utilization and impermissible preparation of derivative works after termination. The minimal statutory standard of original authorship required to create a derivative work worthy of being protected by copyright would presumably also be used to determine when charges made after termination on a work are extensive enough to constitute a new derivative work. Thus, changes or "preparation" after termination made to a derivative work prepared before termination that are sufficient to afford the altered work separate new copyright protection as a significantly distinctive derivative work, would generally also be enough to constitute impermissible preparation of a new derivative work.[75] But changes made to the first derivative work version which would not constitute sufficient original authorship to merit independent copyright protection—that is, which would be "de minimis"—would be permissible and the slightly altered work would be utilizable after termination.[76]

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tract (1978) used by members of the American Guild of Authors and Composers contains the following clause regarding rights granted after January 1, 1978:

> 13. No derivative work prepared under authority of Publisher during the term of this contract may be utilized by Publisher or any other party after termination or expiration of this contract.

This contract clause would avoid some problems after a section 203 termination right were exercised, but of course does nothing to eliminate confusion after a section 304(c) termination regarding transfers made before January 1, 1978.

For a general discussion on the rights which would terminate under copyright law, and rights which could contractually continue, *see generally*, Stein, *supra* note 11, at 1159-64, especially regarding the continuation of rights in fictional characters which may not be protected by copyright (*see also* note 111, *infra*). *See also*, section 203(b)(5) and section 304(c)(6)(E) which provide that "termination of a grant under this section affects only rights that arise under this title, and in no way affects rights arising under any other Federal, state or foreign laws." *See also* Stein, *supra* note 11, at 1165, n. 103, where he notes that since the Act is only effective in the United States, a contractual clause is necessary to terminate worldwide rights when exercising the statutory right of termination.

[74] The litigation regarding the Exception as it applies to section 203 will not arise until the 21st century, but the litigation regarding the Exception in section 304(c), which relates to the termination of transfers made before January 1, 1978, could conceivably commence in 1980, when the minimum two-year notice period given by an author to a grantee could expire in some situations.

[75] *But see* the discussion on advertising created after termination for the promotion of derivative works prepared before termination, in Part IV (D) of this article.

[76] One commentator suggests that to avoid litigation, no changes should be made

The measures of meaningful or de minimis original authorship are not always certain and identifiable, and determinations of the permissible preparation and utilization of derivative works using such measures are not always predictable. Courts will also have to balance the purpose of the termination provisions—to return possible valuable exploitation rights to the author of a preexisting work, and the purpose of the Exception—to promote the production and exploitation of derivative works by allowing their creators to recoup investments risked and to make a profit through continued utilization. The equitable factors in early cases which call for such determinations may influence the judicial balancing of these cross purposes, and thereby set long-lasting legal precedents.[77]

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in the derivative work after termination. Curtis 1972 Article, *supra* note 11, at 824, n. 128. But profitable exploitation of a derivative work after termination may require that some changes be made to the work, such as editing a theatrical motion picture for commercial television broadcast. *See* the discussion on the permissible extent of such editing in the text at Part IV (B) of this article.

[77] For example, a motion picture producer may have unjustifiably failed, for over thirty years, to produce a motion picture based upon an author's novel. This could have cost the author whatever royalties he may have received from the production and exploitation of a motion picture based upon his novel, and deprived the author of publicity and possible benefits to his reputation which may have increased the success of his career. The author thus sends the producer the notice of termination effective two years later. The producer then tries to rapidly complete the motion picture version and at the same time, "plunders" the rest of the rights he has in the preexisting work by sublicensing all the rights he himself cannot fully exploit during those two years. See Curtis 1972 Article, *supra* note 11, at 825; Curtis 1977 Article, *supra* note 11, at 57, especially notes 116 and 117. While this conduct may be technically legitimate, it could have a seriously adverse effect on the author: it could drastically devalue the recaptured rights because of the glut on the market within a short time of competing versions of whatever types of derivative work rights were sublicensed; it could similarly reduce the value of the motion picture rights that the author hoped to market, and the very threat of glutting the market could enhance the grantee's bargaining position in any negotiations with the author after termination. *See* Curtis 1972 Article, *supra* note 11, at 825. If, at termination, the producer still had not completed the motion picture but had only slightly additional preparation to make to the derivative work, the author, given a possible meager royalty arrangement with the producer, may not wish to renegotiate with him so that the producer may complete the motion picture and exploit it. Instead, the author may wish to sell the motion picture rights to a new producer who may offer better royalty terms, a large lump sum payment, or the prospect of a version more artistically satisfying to the author of the preexisting work than that made by the original producer. The conduct of the original producer outlined above, the possible poor royalty arrangement for the author in the original transfer, and the strong Congressional intent to return valuable rights to the

What follows is an examination of various hard issues regarding permissible preparation and utilization to see how a court should resolve them using the measure of original authorship and balancing the Congressional purposes.

A. Copies and Prints

The producer of a derivative work motion picture needs to make prints to exhibit the work. If the motion picture was fully "prepared" before termination, that is, fully photographed, edited, etc., could the producer make prints of the motion picture after termination, or could he only utilize prints prepared before termination, which, if they exist, may prove grossly inadequate for the potential exploitation?

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author, may all seem to equitably outweigh the producer's right to recoup his investment, and a court may be disposed to strictly interpret the term "prepare" and find that the additional work needed to be done on the producer's motion picture version to make it exploitable was more than de minimis, but would create a new version, and thus is impermissible.

However, in a similar borderline case, where the conduct of the producer generally was in good faith, and where such strict interpretation might work a substantial hardship on the producer without substantially improving the author's financial situation, a court may be disposed to conclude that virtually the same amount of preparation required on such a producer's derivative work version was de minimis, and permissible to enable the producer to exploit the derivative work and recoup his investment. *See* the discussion in the text regarding editing at Part IV (B) of this article.

Whichever of the two above scenarios occurred first in case law would bear on subsequent cases; virtually the same amount of preparation could fortuitously be declared either impermissible or de minimis and precedent established, given the inexact measure of de minimis original authorship required to create a meaningfully distinct version. But such unpredictability is generally limited to the relatively small range of authorship which could arguably be considered either meaningful or insignificant. In cases where such a determination was relatively easier, it would be unjustified for a court to artificially declare meaningful preparation de minimis, or vice versa, merely because of some equitable factors—confused and momentarily convenient copyright law would be the result.

It should be noted here that since the Exception in both termination provisions has one legislative history and one rationale, cases establishing legal precedent based on the Exception to one termination section would probably apply with equal force to the other section. One exception might be if, when a court considers to any extent equitable factors, it considers that a derivative work preparer who negotiated a grant before the Act took effect, without notice of the termination provisions under section 304(c), possibly deserves more of the benefit of the doubt in close cases than does a derivative work preparer who negotiated a grant with notice of the termination provisions in section 203 after the Act took effect.

The producer should be allowed to make prints after termination.[78] Further, if the terms of the original grant permitted the producer to exploit the version in any media then known or later developed[79] and the producer had to make a technologically new type of print or copy for such exploitation, such as a videotape cartridge or cassette of the version for home audio-visual machine use, the producer should be allowed to make such copies.[80] The preparers of other types of derivative works, such as literary translations or art reproductions or sound recordings or sheet music arrangement publications, should likewise be permitted to make copies of these works after termination for continued utilization and distribution of the previously prepared derivative work version.[81]

It is important not to confuse new *copies* of a version previously prepared, with new derivative *versions*—the real concern of the recapture privilege. By making a copy of the derivative work, no artistically new version with original authorship is being prepared from the existing derivative work or the preexisting work. Making a copy merely enables the derivative work preparer to fully exploit his version's exhibition potential and is fully within the Congressional intent of the Exception. Copyright law here establishes legal utilization rights with respect to a particular artistic version, and does not rest simply on whether particular

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[78] See NIMMER, *supra* note 3, section 11.02(B).

[79] See NIMMER, *supra* note 3, section 10.10.

[80] Such forms of exhibition in particular were envisioned by the motion picture industry as important in future copyright considerations, even when such technology was in its early developmental stage. *See* note 21, *supra*.

[81] The type of "copies" again must have been permitted by the terms of the original grant; merely because exhibition or exploitation forms are available does not mean that the derivative work preparer may exploit his version in them. For example, a preparer of a hardcover derivative work literary publication could not necessarily make paperback copies of that work after termination unless the original grant permitted it or a new grant was negotiated. *See*, NIMMER, *supra* note 3, section 10.10. Or adding a new "visual" element after termination to the previously prepared audio derivative work would not be permitted merely as a "copy" of the previous version. Similarly, copies of a published musical arrangement could be sold by the music publisher after termination, but once the author terminates the grant of copyright to the publisher, the publisher may not continue to license other grantees to create their own arrangements of the author's preexisting work. If those grantees have already prepared derivative work recordings utilizing derivative work arrangements of the preexisting work, copies could continue to be made and distributed after termination. *See also* the discussion of compulsory license sound recordings after termination in Part IV (F) of this article.

copies or prints of that version might wear out and become unusable,[82] necessitating new copies or prints.[83] Even though, if no copies could be made after termination and utilization thus stifled, the recaptured rights to make another version might be more valuable because of decreasing distribution of a competing version, any fair reading of the legislative history indicates that Congress did not intend to boost the value of such rights by being excessively harsh with derivative work preparers and essentially diminish the rewards of their good faith effort to exploit and utilize their derivative work versions through attrition.

B. Editing

Editing a derivative work version is often a type of artistic original authorship which leads to the creation of a new artistic derivative version (and therefore a recasting of the preexisting work).[84] Motion picture creators, for example, realize that editing film footage is one of the most important stages of artistic authorship in determining what the final derivative work motion picture will be,[85] and a derivative work motion picture is simply not "prepared" if it still requires substantial editing. Thus significant artistic editing after termination is generally impermissible. But the need for editing may arise from exhibition of a derivative work version in different mediums, such as exhibition of a motion picture on commercial television. This is certainly virtually an indispensable element of any meaningful and commercially successful utilization of a derivative work after termination, as was repeatedly stressed by the proponents of the Exception in the legislative history.[86] If such exhibition

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[82] *See* the MPAA 1965 Statement, *supra* note 20, at 1001, on the limited life of motion picture prints.

[83] *See* NIMMER, *supra* note 3, section 11.02(B). *See also* the House Report, *supra* note 3, at 53, on the "fundamental distinction between the 'original work' which is the product of 'authorship' and the multitude of material objects in which it can be embodied . . [I]t is . . . possible to have a 'copy' or 'phonorecord' embodying something that does not qualify as an 'original work of authorship.' "

[84] The limitation in section 114(b) on the right to prepare new derivative works of sound recordings shows a recognition that editing such as rearranging the sounds creates a new derivative work. An explicit recognition of editing as a type of original authorship used to create a derivative work is found in the House Report, *supra* note 3, at 56, with respect to sound recordings.

[85] *See, e.g.*, the translated comments of Rene Clair, "How Films Are Made", reprinted in TALBOT, D., ed., FILM: AN ANTHOLOGY (1966), at 232-3; *see also,* BUTLER, I., THE MAKING OF FEATURE FILMS (1971), at 149-157, and the comments of Sidney Lumet, *id.*, at 57.

[86] Exhibition of motion pictures on television, for example, was specifically cited in the legislative hearings by those who supported the creation of the Ex-

is permitted by the original grant, it should be considered well within the continued utilization rights Congress intended to provide in the Exception; thus some amount of *editing designed to facilitate such exhibition* should logically be permitted after termination to make a major element of the utilization right meaningful.[87] In general, the Congressional balance of purposes seems to permit minor "preparation" after termination designed to facilitate exploitation of a derivative work substantially artistically prepared before termination, but does not permit changes after termination to an extent that a significantly distinctive artistic version is created.

The question of what constitutes permissible "exhibition" editing and constitutes generally impermissible extensive and significant "artistic" editing will probably cause some litigation which could interfere with the intended utilization of derivative works after termination. But unfortunately, given the delicate balance of Congressional purposes in this instance, there seems to be no justifiably simple way to categorize editing to avoid such litigation. It is anticipated that a court could determine what editing is permissible in this context by examining the purpose of the derivative work preparer in making the alterations—such as to facilitate exhibition—by considering the customary extent and type of exhibition editing for various media, and by judging with a layman's perspective what changes are necessary for exhibition but which do not unfairly create a meaningfully distinctive artistic version; an artistic assessment based upon subjective artistic contentions by the various parties

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ception, since it was recognized as a major source of continuing revenue for theatrical motion picture producers long after the first theatrical distribution of the work. *See* note 21, *supra*. On the specific references to other forms of exhibition such as video cassette machines as future sources of revenue, *see, id. See generally*, MAYER, *supra* note 20, who, when discussing the financial risk of motion picture production, notes that considering the unpredictability of theatrical success, "it is difficult to foresee a viable future (for motion pictures) unless there are other substantial markets for motion pictures." Thus not only does the legislative history and the purpose of the Exception clearly support exhibition in as many mediums as allowed by the grant after statutory termination, but general motion picture industry business conditions do also. *See also*, note 94, *infra*.

[87] A "meaningful" utilization right, for example, would permit alterations of the type allowed to be made to a derivative work in *Rohauer v. Killiam Shows, Inc.*, note 25, *supra*. In fact, the alterations discussed in *Rohauer* would be well within the suggested meaningful utilization right under the Exception, discussed in the text below.

would not be necessary, desirable, or even possible.[88]

One further complex aspect of this issue must be discussed. The obvious purpose of the Exception is to permit utilization after termination such as exhibition of derivative work versions prepared before termination. Moreover, the evidence in the relevant legislative history is that Congress did not intend to unreasonably and harshly restrict obvious and very valuable exhibition of a derivative work version merely to limit its effect on the market for such derivative work a limitation which would increase the value of recaptured rights to make a new derivative work version. Accordingly, a judicially created *limited* exception to the literal prohibition against the preparation of derivative works after termination would be justified.[89] The limited exception should permit exhibition editing which also, *incidentally* creates, comparatively minimally, a new artistic derivative work in this situation. Thus for example, where it would be anomalous under the standard of originality of derivative works for a court not to deem the newly edited-for-exhibition version a new derivative work, such new derivative works should generally be explicitly excepted from the Exception's prohibition. Of course, where an edited-for-exhibition version is *substantially* artistically edited, even only incidentally, it should not be permitted after termination; there is already some case law established in an analogous area of contract law which could prove helpful in determining the proper demarcation between editing which would fall under this judicial exception and that which would create too much of a new artistic version

[88] This method of assessment would presumably accommodate the decision in *Rohauer v. Killiam Shows, Inc.*, note 25, *supra*, which, while not based on a determination of the utilization right under the Exception, noted at id., 494-5, n. 12, that under the Exception, the videotaping of a motion picture necessary for its transmission on television, and the addition of a few new subtitles and newly incorporated music, would not be the preparation of a new derivative work. The observation also illustrates how an artistic assessment may be avoided in such a determination.

[89] *See generally*, notes 40 and 41, *supra*. It is suggested here that an "obvious purpose" of the Exception, considering the legislative history discussed in note 86 *supra*, would be thwarted if the Exception were read absolutely literally in this situation. Compare the discussion in Part IV (D) of this article.

and not fall within this exception.[90]

Another situation which a judicially created exception to the statutory prohibition of new derivative works after termination should justifiably permit is when a derivative work is substantially artistically prepared before termination—where, for example, the principal photography and substantially all the editing and dubbing were finished on a motion picture before termination[91]—but where somewhat slightly more than de minimis artistic "polishing" remained necessary for proper

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[90] *See, e.g.*, Preminger v. Columbia Pictures Corporation, 267 N.Y.S. 2d 594, 49 Misc. 2d 363 (1966), *aff'd without op.*, 269 N.Y.S. 2d 913, 25 App. Div. 2d 830, *aff'd without op.*, 18 N.Y. 2d 659, 219 N.E. 2d 431 (1966). The court in *Preminger* observed that while customary editing of a theatrical motion picture by insertion of commercials and minor cutting could take place under the contract involved, more extensive editing of the motion picture amounting to a "mutilation"—such as cutting the length of the motion picture from 161 to 100 minutes—would probably not be permissible. *Cf.*, Gilliam v. American Broadcasting Companies, Inc., note 72, *supra*, which deals with the extensive cutting of almost one quarter of the work, and which, if litigated as an issue under the Exception, would clearly not be permissible, especially considering the assessment that a significant change in tone and style was created by the cutting, thus creating a new derivative version.

(The dissenting opinion in the Appellate Division affirmation notes that a possible anomaly arises when editing rights are inferred for television exhibition but not for theatrical exhibition under the contract. *Id.*, at 915. When considering the facts in *Preminger* as a hypothetical situation under the Exception, with an analysis of the intent of the Exception substituted for an analysis of contractual intent, the Congressional balance of purposes really does not treat this situation as an anomaly: After preparation, exhibition editing is not ordinarily required for further theatrical exploitation, but is for expected exploitation of the derivative work through other media forms. And even if slight exhibition editing were required for theatrical motion picture exhibition after statutory termination, the suggested judicial exception for exhibition editing would cover that situation and permit that as well.) *See generally*, LINDEY, note 49, *supra*, at 143-146.

It is possible that some authors may argue that the mere exhibition of a derivative work such as a theatrical motion picture on commercial television with commercial interruptions, minor censorship, or even a small cut in the length of the film, is an artistic travesty of the work and constitutes a new artistic version. *Compare, id.* But given the overwhelming commercial value of such exhibition, and the repeated stress placed upon such continued utilization in the legislative history, *see*, note 86, *supra*, editing for such exhibition should be considered well within the intent of the Exception. (It should be reiterated that the terms of the grant on such use may still be subject to dispute.)

[91] *Compare* the alteration of a motion picture involved in Mailer v. RKO Teleradio Pictures Inc., 332 F.2d 747 (2d Cir. 1964), *and* the discussion in note 77, *supra*.

exhibition. This would avoid undue hardship on the derivative work preparer, but would not truly diminish the value of a recaptured right to create another derivative version, except under the most restrictively literal reading of the Exception, a reading which, *in this situation*, in light of the relevant legislative history, would generally be extremely unfair and unreflective of the legislative intent.[92]

The general method of judicial analysis discussed above, as well as the recommended exceptions to the literal statutory language, should allow for greater predictability, if not certainty, as well as a more justifiable assessment based on the legislative history, as to which editing is permissible; this could serve to decrease the likelihood of unnecessary litigation. The following examination of several common editing situations involving derivative works should help to clarify the application of the above analysis and make determinations of this issue more foreseeable.

1. Exhibition Editing

The producer of a motion picture originally made for theatrical exhibition should be permitted to edit the motion picture after termination to allow for its exhibition on television,[93] or for its exhibition in other forms,[94] if such exhibition was permissible under the terms of the original grant. Such editing might include dividing the film for the insertion of commercials and for showing the work over the course of several broadcasts, cutting the length of the motion picture only to an extent that a substantially new version is not created,[95] expurgating or dubbing parts of the film which violate the censorship regulations of the exhibition medium, or other editing designed to suit the technological

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[92] *Compare* the two scenarios discussed in note 77, *supra*, which could similarly fortuitously lead to the initial creation in case law of an exception to permit more than de minimis polishing when the facts before the court were particularly compelling, or the fortuitous refusal by a court to establish such an exception where not absolutely equitable under the circumstances before it.

[93] *See* note 86, *supra*.

[94] If other forms for exhibition of the derivative version are later developed, and the original grant contemplated the possibility and allowed for utilization of those forms (*see e.g.*, Literary Purchase Agreement, *supra* note 14, at sections 2c-f), then the mere fact that they might not have been specifically enumerated in the legislative history of the Exception should not be an obstacle to utilization of those forms by the derivative work preparer. If they are a source of exploitation revenue for the preparer, it seems that editing designed solely to accommodate the exhibition form should be permitted as within the general yet obvious intent of the Exception, and *minor incidental* artistic alteration should be considered insignificant in this situation.

[95] *See* note 90, *supra*.

or commercial exigencies of the exhibition form. But *substantial* artistic editing, even if incidental to an exhibition purpose, would not be permitted after termination. Such editing would include adding or rearranging material for artistic effect (or even only for "clarity"), or any significant changes in plot or the characters by any method, altering a significant segment of the original version, or altering in a meaningful way the style or tone of the version or of the acting performances.

2. Revised Editions

A revised, abridged, condensed, or "modernized" version of a derivative work such as a literary or dramatic work could generally not be prepared after termination;[96] they all would involve significant artistic original authorship resulting in new derivative versions. Similarly, the preparer of a derivative work sound recording before termination could ordinarily rearrange the sounds in the recording, but after termination, anything more than de minimis editing should be impermissible.[97] Thus the derivative work preparer could not cut a sound recording that originally lasted seven minutes down to a three-and-a-half minute recording and market it as such after termination, nor could the preparer re-dub the various vocal or instrumental tracks.[98]

3. Collections

It should be permissible to include an entire derivative work such as a short story or novel, or an entire derivative art reproduction, even reduced in size,[99] in a collection or new volume prepared after termi-

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[96] *See*, the Curtis 1977 Article, *supra* note 11, at 58, which notes the plight of the scholar who wishes to revise a text containing a quote he originally received permission to use, but cannot reuse in a revised edition after termination without creating a new derivative work. *Compare* the discussion on the inclusion of entire derivative works in new collections in Part IV (B)(3) of this article.

[97] *See* note 84, *supra*.

[98] On the original authorship involved in this process, *see generally* the statement of Stanley Gortikov of the Recording Industry Association of America, Inc., Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary of the House of Representatives, 94th Cong., 1st Sess., 1975, Part 2 at 1315. *See also*, note 84, *supra*. *Compare* the discussion of compulsory licenses in Part IV (F) of this article.

[99] Again, some artists may argue that such a reduction is an artistic travesty, similar to the argument discussed in note 90, *supra*, regarding television exhibition. But, similarly, the reduction is a de minimis change of the version and is done merely to accommodate the new form of exhibition, thus within the general intent of the Exception.

nation.[100] Even an entire derivative motion picture could be included in a collection. But editing or cutting of such derivative works, or adding or rearranging material with respect to such versions, which meaningfully alter the artistic impression of these versions, such as reproducing only a detail of an art work by substantially cutting the original derivative version of the entire preexisting work, would be impermissible preparation of new derivative versions. Similarly, sometimes it might be desirable to include portions of previously created motion pictures in a second motion picture supposedly consisting of the "best" scenes of a motion picture genre, or of a particular actor's performances, etc.[101] Such a "best scenes" motion picture could be prepared at any time if done under the "fair use" provisions of the Act;[102] but the radical editing of the previously created derivative works, if done for collection in a commercial effort, should not be permitted after termination.

The issue of whether new derivative work collections of segments or abridgments of previously created derivative works may be prepared after termination is a very close one because the segments of the previous derivative works are, themselves, not altered and thus arguably not a new transformation of the portions of the preexisting works they portray. But when the use of segments of a derivative work is seen in the context of the whole original derivative work version, with the realization that substantial editing of that version creates a new derivative version, editing which is not exigent purely for the exhibition of essentially the whole original derivative version amounts to the preparation of a new artistic version of the original derivative version in severely abridged

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[100] *Compare* Curtis 1977 Article, *supra* note 11, at 57, n. 120. Thus a literary derivative work with a new introduction, or with "fair use" commentary after the derivative work could probably be prepared after termination since it would be a new *collective* work. But commentary newly interspersed within the text of the derivative work, or annotations, which would create a new derivative work, would not be permissible after termination.

[101] This hypothetical was suggested by Stein, *supra* note 11, at 1164, n. 102, who discussed the 1977 action of Williams v. MGM, C. 174344, L.A. County, Ca., Superior Court, where the court permitted such use based on *contractual* "perpetual rights to reproduce and rerecord." The action was dismissed on January 21, 1977, and of course, did not involve the Exception.

[102] *See* section 107 of the Act, which provides that determining whether a use is a "fair use" and not an infringement of the preexisting work's copyright includes consideration of, among other factors, whether the purpose and character of the use is of a commercial nature, and of the effect of the use upon the potential market for or value of the copyrighted work. The use of a new commercial version likely to affect the value of recaptured rights to the underlying work would not be a fair use. *See generally*, the House Report, *supra* note 3, at 65-74.

format. It is, in effect, a new abridged derivative version of the preexisting work, or a part of it. Further, it should be reiterated that even for exhibition purposes, it should be impermissible to substantially edit so that, even incidentally, a meaningfully distinctive artistic version (from a layman's perspective) is created.[103]

C. Sequels And Merchandising Tie-Ins

It should be impermissible after termination to make a derivative work sequel[104] or series[105] based upon plot, scenes, characters, etc. in the preexisting work, if such elements of the preexisting work are copyrightable.[106] But if a motion picture sequel, for example, is based upon plot, characters, etc., which had all been created by the motion picture makers and which could not be found in the preexisting work, such a sequel could be utilized; the new material was never controlled by the author of the preexisting work.[107]

A utilization of the derivative work somewhat akin to sequels in the sense of being a "by-product" or derivative work of the derivative work is the manufacture and distribution of merchandising products which are "tied-in" to the preexisting or original derivative work—in other words, which use some copyrightable aspects of those works.[108] An example of a tie-in derivative work would be a T-shirt prepared with the main character from the story portrayed on the shirt. Such tie-in works could be prepared after termination if the portrayal on the promoted product was only inspired by the underlying work[109] and did not infringe the expression of the preexisting work. Thus, shirts with a picture of the actor playing the part of the character in the preparer's motion

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[103] *See* note 90, *supra*.

[104] A sequel usually consists of "subsequent stories employing the same characters in different plots or sequences" from an earlier version. Landon v. Twentieth Century-Fox Film Corp., 384 F. Supp. 450 (S.D.N.Y. 1974). *See also*, Goodis v. United Artists Television Inc., 425 F.2d 397, 406 (2d Cir. 1970). *See generally*, J. TAUBMAN, PERFORMING ARTS MANAGEMENT AND LAW (1972) (hereinafter "TAUBMAN"), note 19, sections 13.4-13.7; Literary Purchase Agreement, *supra* note 14, section 16.

[105] A television series, for example, "is a related group of television shows . . . with some common format or theme . . ." with many of the same characteristics of a sequel. TAUBMAN, *supra* note 104, section 13.7.

[106] *See* note 111, *infra*, and note 3, *supra*.

[107] The material was likely only "inspired" by the preexisting work and would not be a derivative version of that work. *See* note 3, *supra*.

[108] This hypothetical was suggested by Stein, *supra* note 11, at 1165, n. 103. *See*, the Literary Purchase Agreement, *supra* note 14, section 2k.

[109] *See* note 3, *supra*.

picture might be permissibly prepared after termination[110] if the actor could not be identified as portraying the copyrightable character (assuming the character was protected by copyright).[111] But shirts with a picture of a cartoon character from an underlying cartoon work (that is, the underlying work's "expression") could not be prepared after termination without a further grant from the author of the preexisting work.[112]

D. Advertising And Promotional Works

Advertising necessary to properly promote the exploitation of a work frequently contains extremely small portions of the work. For example, motion picture advertising posters or television commercials or film teasers or trailers[113] may contain photos or segments from the motion picture to entice an audience to see the work.[114] Such advertising, which could contain enough original authorship to be separately copyrightable,[115] might be created by the radical editing of the original derivative work or a rearrangement of available segments or photos, and would therefore be a new derivative work. Whether such advertising should be permissibly created after termination is one of the hardest issues in this examination.

Arguably, this is an instance where a court might justifiably decide that a major purpose of the Exception—to allow for profitable utilization of previously created derivative works—means that advertising of the sort discussed above, which is often so customary and necessary to successful promotion of a utilization effort,[116] could be prepared after ter-

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[110] *See* Literary Purchase Agreement, *supra* note 14, section 2k. *See also,* MAYER, *supra* note 20, at 13.

[111] But rights to a character might be a matter of contract and not copyright law, and thus not be subject to statutory termination. For an analysis of the rather unsettled law on whether literary characters are protected by copyright, *see generally,* NIMMER, *supra* note 3, section 2.12; LATMAN, *supra* note 28, at 39-41; Stein, *supra* note 11, at 1161-4, and note his suggested contractual provisions if characters are a matter of contractual rights.

[112] Trademark considerations involving the Lanham Act, 15 U.S.C. 1051 et. seq., may also be involved when the preparer desires to use a popular cartoon character.

[113] Teasers and trailers are generally filmed advertisements, most frequently shown in theaters and containing bits of the promoted motion picture. *See generally,* Mayer, *supra* note 20, at 111-116; BLUEM, *supra* note 21, at 226-236.

[114] *See also,* Stein, *supra* note 11, at 1165, n. 103, on advertising promotion involving a synopsis of the derivative work story.

[115] *See,* NIMMER, *supra* note 3, section 2.08(G)(4).

[116] *See, e.g.,* Mayer, note 20, *supra*; and BLUEM, note 21, *supra*; Literary Purchase Agreement, *supra* note 14, section 20.

mination. Such a determination would be a judicially created exception to the literal prohibition in the Exception against the preparation of new derivative works after termination.[117] But a court could arguably consider that the close relation of such advertising to efficient utilization of the original derivative work outweighs the very meager use of the original derivative work in the new derivative advertising. Further, unlike the inclusion of segments from a radically edited original derivative work in a new collective work, such advertising would not be designed for profitable commercial exploitation itself and would not compete directly with a new derivative version of any significant part of the preexisting work.

But on the whole, the argument against permitting the creation of derivative work advertising, and the possibility of preparing promotion which could be nearly as efficient without creating new derivative works, should ultimately persuade a court that the statutory prohibition in the Exception should not be excepted on this issue. The derivative work advertising, by increasing the commercial success of the original derivative work, could indirectly decrease the value of recaptured rights to make a new derivative version, considering that prospective purchasers of those rights may not want to compete with an already successful version.[118] Such a possibility, *without the contrary weight of any clear legislative history* supporting the creation of derivative work advertising after termination, is probably enough by itself to conclude that there is no compellingly obvious and clear justification (which generally seems necessary) for ignoring the statutory language.[119] But additionally, the promotion of the derivative work utilization after termination could still be at least adequate by employing advertising which did not constitute a new derivative work. The advertising might use previously prepared advertising films or photos, jingles, or excerpts in their original form; the advertising could use previous photos of the actors similar to the permissible use of such portrayals discussed above with respect to merchandising; and the advertising might use new artistic renderings of general plot teasers such as a lovers' embrace or a car crash. And the available advertising could be used to promote new exhibition types; an advertising photo prepared

[117] *See generally*, notes 40 and 41, *supra*.

[118] *See generally*, note 51, *supra*. *Compare* the indirect effect of *copies*, not new derivative work versions, on recaptured derivative work rights, discussed in Part IV (A) of this article.

[119] *Compare* the different circumstances surrounding editing, discussed in Part IV (B) of this article with respect to the legislative history supporting the conclusion that exhibition of derivative works after termination, even if exhibition editing was required, was intended to be a major element in making the utilization right meaningful.

before termination for a motion picture, for example, could be copied and made into a cover for video cassettes after termination.

Another possible promotional use of excerpts from a previously prepared derivative work might be in a documentary detailing how the work, for example, a motion picture, was made. Such a documentary would probably contain a similar amount from the previous derivative version as would the advertising discussed above, but further, the material would be used in a new work which was itself intended for commercial exploitation and not solely for the promotion of the original derivative version. Thus any use of the original derivative version in a documentary not prepared under the fair use provisions of the Act should not be permitted after termination.

E. Utilization Of The Entire Derivative Work

Since a derivative work is a preexisting work in a recast, transformed, or adapted form, under the Exception the entire derivative work, including its original authorship and the copyrighted expression it employs from the preexisting work, may be utilized. This should be obvious regarding derivative works which involve original authorship that could be useless without the preexisting work the authorship is meant to modify, and which cannot be practically separated from the preexisting work, such as musical arrangements of underlying melodies, translations of underlying literary works, motion picture versions of underlying stories and characters, etc. But a derivative work wherein the original authorship can, in a literal if not practical sense, be separated from the underlying work to some degree, such as an annotated version of a preexisting literary work, is still, as a whole new creation, a derivative work, and should be permissibly utilized as such under the Exception.[120] Thus, an entire derivative work song could be utilized after termination, even though the derivative original authorship may have been new lyrics added to a preexisting melody, or vice-versa.[121]

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[120] *Id.; and see* Curtis 1972 Article, *supra* note 11 at 825, n. 131. If only the annotations could be used, the Exception would be meaningless for a derivative work type clearly enumerated in the broad statutory definition.

[121] *See*, Shemel, *supra* note 29, at 211 and generally at 141. Of course the preparer may also use only the original authorship he added to the preexisting work; thus for example he might take lyrics he added to a preexisting melody and set them to a new melody. It should be noted that many songs are created as a joint work of lyricists and composers. A song created subsequent to a grant of rights to prepare derivative works based upon the preexisting lyrics or music would be a derivative work, but not a joint work, if there was no intention, at the time of creation of the first work, that it be absorbed or combined into an integrated unit with the second work. *Id. See generally*

F. Compulsory License Derivative Works

The termination provisions apply to a transfer or license *executed by the author* or others designated in the Act,[122] so compulsory licenses to make derivative works such as the section 115 musical arrangements, which are *statutory* grants of rights that benefit the author through royalty payments, are not explicitly covered by the termination provisions.[123] Further, the original distribution of sound recordings of the musical work which "triggers" the right to obtain a section 115 compulsory license may continue under the Exception even though the first grant by the author which made that distribution possible may be terminated. But this termination does not affect the compulsory license provision. Once the compulsory license is granted as of right under the statute, it may

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Shemel, *supra* note 29, at 212-214; NIMMER, *supra* note 3, section 6. But some derivative works may also be joint works, such as a derivative work-joint work novel or sound recording or motion picture—all created by joint effort and based on preexisting works, and thus subject to the termination provisions and the Exception. *See also* note 127, *infra*. In any event, with respect to joint works it may that only one of the authors desires to terminate the grant. Section 304(C)(1), which covers the termination of grants subsisting in either a first or renewal term on January 1, 1978, states in part:

[122] Section 203 only refers to grants by the author, while section 304(c) refers to grants by the author and others designated in the second proviso of section 304(a).

[123] *Cf.*, Curtis 1977 Article, *supra* note 11, at 60, n. 124, which agrees with this assessment because the compulsory license is involuntary. *See also, id.*, at 38, on how the termination provisions do not cover transfers not executed by the author (or others designated in the Act). (It seems unjustifiably stretching the interpretation of "execute" to consider a compulsory license "impliedly" executed by the author merely because he executed the original "triggering" grant. The non-exclusive compulsory license is available to an indefinite number of licensees unlimited by the author, who have privileges not under the author's control, all mandated by the act and monitored by the Copyright Register's Office.)

But cf., Stein, *supra* note 11, at 1147, n. 29, who feels that it is arguable that since "license" is not defined in the Act, and since termination of an original triggering grant without termination of the compulsory licenses might not be very remunerative, an indirect right to terminate compulsory licenses may be inferred from the general policy of the termination provisions of allowing an author a second chance to exploit his work. But aside from the statutory language which makes the termination provisions applicable only to grants executed by the author, inferring a termination right to a grant conferred by law should be permitted only upon the clearest evidence of such Congressional intent (in this situation, nowhere to be found), and the absence of a reasonable influence to the contrary. One reasonable inference to the contrary is that the Congressional purpose underlying the termination provisions—to redress an author's poor bargaining position when he negotiated the original grant so that he may obtain rea-

continue in effect.[124] Thus, since compulsory licenses may not be terminated by an author who never executed them, and since the possible termination by that author of the original grant for distribution which triggered the right to create under the compulsory license does not terminate that license, derivative work arrangements prepared pursuant to such licenses may continue to be utilized after termination of the original grant; such arrangements, and compulsory license recordings, may even be *prepared* after termination of the original grant because the compulsory license right continues without termination.[125]

G. Performance Of Non-Tangible Derivative Works

Another very hard issue in this analysis is whether a derivative work play prepared before termination may be produced and performed after termination. The answer depends upon whether such a production is actually a derivative work itself; if it is, it may not be prepared after termination.

It is clear that non-tangible derivative works such as ballets, pantomimes, or improvised performances can be created, and that their unauthorized preparation may infringe the preexisting work's copyright.[126] The question is whether a non-tangible production and performance of a play is a derivative work involving original authorship separate and distinct from the underlying written play or other preex-

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sonable compensation the second time he tries to market the rights—is already achieved by the minimum statutory royalty payment for a compulsory licensee's use of the work. This minimum reasonably takes the place of any newly negotiated sales of rights by the author. Further, even if an original triggering grant is terminated, the original grantee can still make and distribute copies of the work. Thus, if in effect, the public distribution of recordings which under Congressional policy triggered the compulsory license before termination, continues after termination, it should logically continue to be a trigger for further compulsory licenses after termination. Stein correctly points out for example that "there is no indication that a lapse of a license by its own terms and under which the first recording was made would also result in a lapse of compulsory license right under present law." *Id.* (And indeed, this should not be inferred, either, without clear legislative history and a compelling and uncontradicted purpose.)

[124] Thus it seems that a record producer could not legally prepare a derivative work sound recording of a song under a terminated grant from the author, but could prepare such a sound recording under the compulsory license. But the royalty rate would be reasonably established as provided in the Act, and the producer still may not copyright the somewhat limited arrangements he might make of the preexisting work without the author's permission.

[125] But such arrangements still may not be copyrighted without the permission of the author of the underlying work.

[126] *See* the House Report, *supra* note 3, at 62.

isting work. For an analysis it may be appropriate to analogize to another type of derivative work—motion pictures.

If a screenplay is prepared (not under work-for-hire conditions) and then the rights to it are terminated under the Act, the filming and editing of the performances based upon the screenplay are two types of original authorship which are used to create distinct derivative works of the screenplay (as well as any preexisting works which the screenplay itself may be based upon) and may not be done after termination.[127] It seems appropriate to analogize the production and direction involved in preparing a performance of a play to the filming and editing of a motion picture; therefore the production and direction of a play's performance is a transformation of the underlying written play (or other preexisting work as well) through original authorship and is an impermissible preparation of a new derivative work after termination. That the production and direction involved in such preparation is non-tangible does not prevent such preparation from being the application of original authorship. Different styles of direction (akin to motion picture editing) could result in very distinctive derivative work performance versions.

Thus, the exhibition of a motion picture after termination is permitted because all of the derivative works (employing different types of original authorship) that the final version consists of—screenplay version, filmed version, edited version, etc., have been prepared before termination and are merely exhibited, not prepared, after termination. A play's performance also consists of several derivative works which employ original authorship, including a written script (which may be a derivative work) and the non-tangible directed and ultimately performed version. If these derivative versions were prepared before termination, performances based upon all of them without change might then more appropriately be considered akin to exhibition or "copies" of the derivative work and could continue after termination. But a revival (and certainly a "modernization") of a play may not be prepared after ter-

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[127] For purposes of the operation of the Exception, a motion picture is considered a derivative work with respect to every preexisting work incorporated in it. House Report, *supra* note 3, at 127; *cf.*, *id.*, at 120. *See generally*, the MPAA 1965 Statement, *supra* note 20, at 1018, which explains that the motion picture industry wanted this explicit understanding so as to assure continued use of a motion piture, after termination, without worry that the authors of preexisting works such as preexisting purchased music which might have been used in a motion picture could interfere with the use of the motion picture by trying to terminate and claim that the motion picture was not a derivative work with respect to such music. *Cf. also*, *id.*, at 1021-2.

mination because the new direction involved would make it an impermissible preparation of a new derivative work.[128]

H. Summary

An examination of permissible utilization of derivative works after statutory termination involves a delicate balancing of the statutory language, the complex Congressional purposes, the legislative history regarding certain uses of derivative works after termination, and the reasons for and probable consequences of these methods of utilization. An arguably different analysis might favor all utilization short of creating new derivative works which would directly compete with derivative works prospectively created under the recaptured derivative work rights. Such a view might permit after termination almost all exhibition editing of derivative works, derivative work advertising, revivals of derivative work plays, "best scenes" motion pictures, etc. But a more justifiable examination should seek to avoid contradicting the termination provisions and the literal language of the exception (which prohibits the preparation of new derivative works after termination) except where the legislative history obviously supports the utilization. The assessments of what the copyright law means and how it will develop on this subject are thus more reasonably and more soudly based, but unfortunately cannot be so certain as o deter all litigation. Therefore, with respect to the many close questions involving permissible utilization, derivative work preparers may prefer to simply arrange with the terminating party after the termination notice has been served for a new grant of utilization rights after termination, if possible.

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[128] A derivative work preparer who had already prepared a published derivative dramatic version of a preexisting work before termination could continue to publish and sell copies after termination. But even a non-directed public commercial "reading" of the play might not be permissible after termination since it might also constitute a non-tangible derivative work, especially if only parts of the play are read (that is, if the play is "edited" for the reading).

PART II

LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

1. United States of America and Territories

382. U.S. CONGRESS. HOUSE.

H.R. 8038. 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 on August 27, 1980; and referred to the Committee on Ways and Means. (96th Cong., 2d Sess.)

Under this legislation, the artistic creator would be entitled, subject to certain limitations, to a credit equaling 30% of the work's fair market value if the work is donated to a tax-exempt organization.

383. U.S. CONGRESS. HOUSE.

H.R. 8285. A bill to amend titles 18 and 17 of the United States Code to strengthen the laws against record, tape, and film piracy and counterfeiting, and for other purposes. Introduced by Mr. Drinan on October 2, 1980; and referred to the Committee on the Judiciary. (96th Cong., 2d Sess.)

To be cited as the "Piracy and Counterfeiting Amendments Act of 1980," this bill would amend title 18 of the United States Code by making whoever knowingly traffics in a counterfeit label affixed or designed to be affixed to a phonorecord, or a copy of a motion picture, or an audiovisual work, subject to a fine of not more than $250,000 or imprisonment for not more than five years, or both. Title 17, United States Code, Section 506(a) (relating to criminal offenses), would also be amended to make anyone involved in the reproduction or distribution, during any one hundred and eight-day period, of at least one thousand phonorecords, or copies infringing the copyright in one or more sound recordings, or the reproduction or distribution, during any one hundred and eighty-day period, of at least sixty-five copies infringing the copyright in one or more motion pictures or audio-

visual works or sound recordings, subject to a fine of not more than $250,000 or imprisonment for not more than two years, or both.

384. U.S. COPYRIGHT OFFICE.

37 CFR 201. Compulsory license for making and distributing phonorecords. Final regulations. *Federal Register*, vol. 45, no. 231 (Nov. 28, 1980), pp. 79038-79051.

Effective December 29, 1980, the Copyright Office is adopting final regulations to implement Sec. 115 of the Copyright Act (17 U.S.C. 115). The effect of the final regulations is to establish requirements under paragraphs (b) and (c) of Sec. 115 governing the content and service of notices and statements of account for obtaining a compulsory license to make and distribute phonorecords of nondramatic musical works. The main objective of the proceedings in this matter has been to determine the means for making the compulsory license a workable tool while, at the same time, assuring that copyright owners receive full and prompt payment for all phonorecords that are made and distributed under the license. These final regulations reflect conclusions reached by the Copyright Office on how best to achieve this objective.

385. U.S. COPYRIGHT OFFICE.

Manufacturing clause study. Announcement of the undertaking of a study and a request for comments. *Federal Register*, vol. 45, no. 209 (Oct. 27, 1980), pp. 71020-71021.

On or about July 1, 1981, the Copyright Office will issue final findings and recommendations in an economic impact study on the elimination of the manufacturing clause. This undertaking is in connection with the provisions of Section 601 of the 1976 Copyright Act, which establish July 1, 1982 as the phase-out date for the manufacturing requirement. To assure its having adequate and accurate information on which to base its reassessment of the phase out, Congress asked the Copyright Office to prepare this study. The Congressional Research Service has agreed to assist the Office by conducting a statistical evaluation of the economic impact of the elimination of the manufacturing clause. Mr. William Lofquist of the Bureau of Industrial Economics, Dept. of Commerce, will act as a consultant on the project. Interested parties are asked to comment as to issues and/or questions that should

be raised in preparing for the hearings and the design of the CRS survey. These comments should be received no later than November 14, 1980.

386. U.S. COPYRIGHT OFFICE.

Report of the Register of Copyrights on the effects of 17 U.S.C. 108 on the rights of creators and the needs of users of works reproduced by certain libraries and archives; public hearing. Notice of public hearing. *Federal Register*, vol. 45, no. 231 (Nov. 28, 1980), pp. 79202-79204.

In accordance with a congressional mandate, the Copyright Office is holding the fifth and final regional public hearing on the extent to which 17 U.S.C. 108 has achieved the intended balance between creators and users. This hearing is being held in New York City on January 28, 1981 and, if necessary, on January 29, 1981. Persons interested in testifying are asked to submit a written request to present testimony by January 19, 1981. The written statement and supplemental statement of testimony must be received by the Copyright Office no later than Jan. 21, 1981 and March 1, 1981, respectively. Witnesses are asked to discuss ways in which the 1976 Copyright Act has or has not affected their practices under Sec. 108 and to answer the questions that are specifically set out in the hearing announcement.

387. U.S. COPYRIGHT ROYALTY TRIBUNAL.

Declaration of controversy concerning distribution of 1979 jukebox royalty fees. *Federal Register*, vol. 45, no. 233 (Dec. 2, 1980), p. 79867.

Pursuant to 17 U.S.C. 116(c)(3), the Copyright Royalty Tribunal finds a controversy concerning the distribution of jukebox royalty fees deposited for 1979 performances and commences a proceeding to determine the distribution of such royalty fees.

388. U.S. COPYRIGHT ROYALTY TRIBUNAL.

National Association of Broadcasters application for stay pending appeal. *Federal Register*, vol. 45, no. 233 (Dec. 2, 1980), p. 79867.

The Order of the Copyright Royalty Tribunal of October 24, 1980 (45 FR 71641) concerning a stay of the distribution of cable

royalty fees in Docket No. 79-1 pending final determination of pending appeals is rescinded, effective immediately.

389. U.S. COPYRIGHT ROYALTY TRIBUNAL.

National Association of Broadcasters application for a stay pending appeal Docket No. 79-1. *Federal Register*, vol. 45, no. 211 (Oct. 29, 1980), p. 71641.

The distribution of copyright royalty fees for 1978 secondary transmissions by cable systems is stayed pending disposition of the National Assn. of Broadcasters' court appeal of the Copyright Royalty Tribunal's final determination in Docket No. 79-1.

390. U.S. COPYRIGHT ROYALTY TRIBUNAL.

Possible declaration of controversy concerning distribution of 1979 cable royalty fees. *Federal Register*, vol. 45, no. 211 (Oct. 29, 1980), p. 71641.

Claimants to royalty fees for 1979 secondary transmissions by cable systems are asked to submit any comments they have regarding possible controversy over the distribution of such fees to the Copyright Royalty Tribunal on or before November 15, 1980.

391. U.S. FEDERAL COMMUNICATIONS COMMISSION.

47 CFR 76. Cable television channel capacity and access channel requirements. Final rule (final order). *Federal Register*, vol. 45, no. 224 (Nov. 18, 1980), pp. 76178-76179.

The Federal Communications Commission issued an order deleting its rules requiring cable systems with 3500 or more subscribers to have twenty-channel and two-way capacity and to set aside certain channels for use by specified groups and by the public. Deletion of the rules is in accordance with a 1979 Supreme Court decision (*FCC v. Midwest Video Corp.*, 440 U.S. 689) which found that the regulations exceeded the Commission's authority. The order also discussed how certain remaining rules will be applied to programming distributed on cable television access channels.

392. U.S. FEDERAL COMMUNICATIONS COMMISSION.

47 C.F.R., Part 76. Cable television systems, termination proceeding involving carriage of specialty stations. Order terminating

proceeding in Docket 20553. *Federal Register*, vol. 45, no. 208 (Oct. 24, 1980), pp. 70468-70469.

On October 3, 1980, the Federal Communications Commission adopted an order terminating the proceedings (Docket 20553) regarding the possible future inclusion of ethnic and subscription television programming in the specialty station definition under its cable television distant signal carriage limitation rules. The Commission's decision in Dockets 20988 and 21284, 45 F.R. 60186 (1980), deleting the distant signal carriage limits, has rendered the proceedings moot.

PART IV

JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY

A. DECISIONS OF U.S. COURTS

1. Federal Court Decisions

393. UNIVERSAL CITY STUDIOS, INC. v. SONY CORPORATION OF AMERICA, 480 F. Supp. 429 (C.D. Cal. 1979) (appeal pending) [Ferguson, D. J.].

Steven A. Kroft and Rosenfeld, Meyer and Susman, Beverly Hills, for plaintiffs; Dean C. Dunleavy, Gibson, Dann and Crutcher, Marshall A. Rutter and Rutter and Ebert, Los Angeles, Rosenman, Colin, Freund, Lewis and Cohen, Joel W. Sternman, Ambrose Doskow and Frank Richard Rosiny, New York, for defendants.

Action for copyright infringement and unfair competition against users, manufacturers and sellers of Betamax video recorders for off-the-air recording of plaintiffs' motion pictures and television programs.

Plaintiffs produce and distribute films for television broadcast. Plaintiffs are compensated by television broadcasters, who are paid by advertisers when the films are broadcast. Television viewers receive the broadcasts free of charge. Defendants include corporations which manufacture, distribute and sell Betamax video recorders (the corporate defendants), and an individual who owns a Betamax and uses it to record televised material (the individual defendant). The recorded material was used only for personal and family entertainment viewing. Betamax advertising encouraged use of the Betamax to record off-the-air. However, the Betamax instruction booklet warned owners that unauthorized copying might violate the copyright laws.

Plaintiffs sought declaratory and injunctive relief based chiefly on the following legal contentions: (1) The use of the Betamax equipment by individuals to record copyrighted material

in their homes (home recording) is an act of infringement. (2) The corporate defendants were guilty of direct, contributory or vicarious infringement. (3) Defendants' infringement caused plaintiffs irreparable harm. The court rejected all of plaintiffs' contentions and rendered judgment for defendants.

The District Court first held that home recording was not an act of infringement under the 1909 or 1976 Copyright Acts. The court acknowledged that §1 of the 1909 Act and §106 of the 1976 Act grant broad protection to copyright proprietors, but held that neither statute prohibited home recording. The court relied on the legislative history of the 1971 Amendment to the 1909 Act creating limited rights in sound recordings. The House Report specifically stated that the Amendment was not intended to prohibit home sound recording, and also stated that owners of sound recording copyrights would enjoy rights equal to those of other copyright owners. The court deemed this history relevant to video-recording under both copyright acts.

The District Court held, in the alternative, that if home recording were otherwise prohibited by the 1909 and 1976 Acts, home recording is a fair use. The court relied on three of the four factors set forth at §107 of the 1976 Act. First, the court found that it was unclear if home recording would cause plaintiffs any harm. Second, the copied material is furnished to viewers free of charge. Third, the purpose of home recording is to permit a television viewer to watch programs at times convenient to him. In an attempt to be specific in its holding, the court emphasized two key distinguishing features in the factual setting of the case: "(1) Home use recording is done by individuals or families in the privacy of their own home for use in their home. (2) The material copied has been voluntarily sold by the authors for broadcast over public airwaves to private homes free of charge."

The court then turned to the issue of the liability of the corporate defendants. The court held that even if home recording were an act of infringement, the corporate defendants were neither direct nor contributory nor vicarious infringers. The corporate defendants would not be direct infringers because home use copying occurs in the Betamax user's home, and the corporate defendants play no role in the choice of material to be copied. Similarly, the corporate defendants would not be contributory infringers because (1) they played no role in the actual copying, (2) prior to the instant action, plaintiffs could not know whether home recording was an act of infringement, and (3) the sale of a device suitable for infringing and non-infringing uses does not

constitute an inducement to infringe. Finally, the corporate defendants would not be vicarious infringers because they neither controlled the activities of Betamax owners nor derived direct financial benefit from the copying.

Finally, the District Court held that plaintiffs failed to establish that home recording caused them irreparable harm. Plaintiffs' fears of irreparable harm were described as "speculative at best." The court acknowledged that irreparable harm to plaintiff is presumed in "ordinary" copyright cases; the court refused to adopt the presumption in the instant case because it was not ordinary. The court examined the uses to which the Betamax is put—"time-shifting" of broadcast material, creation of home video libraries, and removal of commercials from recorded programs—and concluded that any harm to plaintiffs would be speculative because viewers do not pay for access to plaintiffs' productions. The court concluded by stating that an injunction would not be appropriate in the instant case because an injunction against the sale of the Betamax machine would prohibit lawful as well as unlawful uses of the machine, and an injunction against infringing home recording would be impossible to enforce.

B. Decisions of Foreign Courts

1. Austria

394. Agreements-mechanical copyrights. Supreme Court 1980 4 Ob 397,79, January 15, 1980 (as yet unreported). *European Intellectual Property Review*, vol. 2 (August 1980), p. D-207.

The plaintiff, Austro-Mechana, is the Austrian mechanical copyright protection society. Four composers signed agreements transferring to the society all rights of mechanical reproduction and distribution in their existing and future works. The agreements provided they were to take effect when countersigned on behalf of Austro-Mechana. No countersignature ever took place but the agreements were acted upon, inasmuch as the composers were registered as members of the society and received accounts and royalties. The composers maintained, however, that Austro-Mechana owned no rights in their works because the agreements had not been brought into operation in the prescribed manner, that is by countersignature. It was held that the composers had

accepted accounts and payments from Austro-Mechana, and that constituted a binding acceptance.

395. Copyright—drawing of inn sign. Supreme Court 4 Ob 385/79, Dec. 11, 1979 (as yet unreported). *European Intellectual Property Review*, vol. 2 (June 1980), p. D-147.

The plaintiff was asked by the city council to produce a drawing of the defendant's inn sign for use in the city's tourist brochures. The defendant reproduced the drawing on his menu cards, leaflets, and in his advertising material. The plaintiff brought an action for infringement of his copyright, to restrain the defendant from using the drawing. The Supreme Court stated that a work must possess originality in order to be protected by copyright. The plaintiff's drawing showed the inn sign absolutely true to life, using standard graphic design techniques and was not copyrightable. The case was dismissed.

2. Denmark

396. DANISH AUTHOR'S ASSOCIATION AND OTHERS V. MINISTRY OF EDUCATION AND OTHERS. *European Intellectual Property Review*, vol. 2 (June 1980).

A brief look at the Inter-Nordic Commission's proposal to amend the Copyright Act in order to control widespread photocopying in schools. The agreement states that educational institutions are allowed to make one copy of a work per year (per class, per teacher) provided that the copying was confined to 20% of a given work and not more than twenty pages. It was agreed that the educational institutions would pay a fee per page copied and a lump sum for past use to a newly established body, *Copydan*, which would distribute the revenue among the copyright owners' organizations.

3. Ireland

397. CAVANDO LTD. V. ORRWEAR LTD. The Irish Times, May 21, 1980, p. 16. *European Intellectual Property Review*, vol. 2 (July 1980), p. D-180.

The plaintiffs manufactured and sold military jeans with a distinctively shaped curved pocket at the knee. They sought an interlocutory injunction to restrain the defendant from making or selling jeans with a similar pocket design. The plaintiffs alleged that their pocket design was unique to them, and that the manufacture and sale of trousers with similar pockets was an infringement of copyright. The court *held* that no injunction would be granted. The plaintiffs had not made out a *prima facie* case of either copyright infringement or passing off. *Note*: There is no equivalent in Ireland of the U.K.'s Design Copyright Act of 1968. The protection of designs in Ireland is governed by the Industrial and Commercial Property Act of 1927. The plaintiffs did not argue that their design was capable of protection as a work of artistic craftsmanship.

4. United Kingdom

398. POLYDOR LTD. V. HARLEQUIN RECORD SHOPS LTD., Court of Appeal, May 15, 1980 (as yet unreported). *European Intellectual Property Review*, vol. 2 (July 1980), p. D-185.

The second plaintiff owned the copyright in a recording made by the Bee Gees. The first plaintiff was the exclusive licensee in the U.K. of the copyright in that recording. The defendants acquired some records of the song which had been made by licensees of the second plaintiff in Portugal. They imported those records into the U.K. without the consent of either of the plaintiffs. The plaintiffs sought, and obtained from the Vice-Chancellor, an interlocutory injunction restraining such importation. The defendants appealed. The appeal was allowed. So far as English domestic law was concerned, the sale of records by the Portuguese licensees conferred ownership and possession on the defendants, but did not constitute a license from anyone to import those records into the U.K. In the United Kingdom the unauthorized importation of copyrighted recordings is an infringement.

PART V

BIBLIOGRAPHY

A. Law Review Articles

1. United States

399. Cohen, Jerry. Industrial articles' copyright. *Copyright Management*, vol. III, no. 10 (Oct. 1980), pp. 1-2.

This article discusses two copyright infringement cases in which the copyrightability of industrial utilitarian works was at issue. In the first case, *Kieselstein-Cord v. Accessories by Pearl, Inc.*, the District Court found that sculptured decorative belt buckles were not copyrightable. This decision was reversed on appeal. The second case, *Tomy Corporation v. Durham Industries*, involved the copyrightability of toys, some of which resembled Walt Disney cartoon characters. A summary judgment was granted against the defendants, and the judgment was affirmed on appeal. Though both cases were reviewed by the same appellate court, the decisions set countering trends with respect to "three dimensional works that are industrial or otherwise useful articles."

400. Developing countries' model statute. *Copyright Management*, vol. III, no. 10 (Oct. 1980), p. 3.

The World Intellectual Property Organization (WIPO) has published drafts of a model statute for regulating societies for authors. The drafts include alternatives for public institutions or private groups that are responsible for administering authors' rights. This article states that the WIPO statute goes beyond adaptation of developed-country models to those of developing countries, and, as a result, "establishes a more restrictive approach to cultural control." It concludes that the instrument takes a "monopoly/public utility" approach to protection and administration of authors' rights. Since developed countries have always

maintained that a non-monopolistic climate is more conducive to creativity, copyright interests in these countries are urged to recommend that WIPO give this theory strong consideration before issuing a final statute.

401. FISCHER, MARK A. Photography and the law of piracy. *Copyright Management*, vol. III, no. 10 (Oct. 1980), pp. 3-6.

Law and photography come together in many ways, among them copyright and the right to privacy. This article focuses on the right to privacy and the four categories of rights under the privacy concept. These categories, each of which is summarized in this article, are the right to control commercial appropriation of one's name or likeness, to be free from unreasonable intrusion upon one's physical seclusion, to prevent the disclosure of private facts, and to be free from publicity that would unreasonably place one in a false light. There is some discussion of the leading case in this area and reference to two books in which the topic of photography and its relation to law is the subject.

402. GOLDWAG, CELIA. Copyright infringement and the First Amendment. *Art & the Law*, vol. 5, no. 4 (1980), pp. 80-87.

The author states that "copyright protection results in a partial monopoly over expression, and to the extent it does, it conflicts with the first amendment interest in free speech." The article goes on to discuss those limitations on the copyright monopoly that ameliorate much of the potential conflict with the first amendment, a situation in which the Copyright Act may clash with the first amendment, and "whether the first amendment requires that a privilege to copyright infringement be established."

403. GOULD, THOMAS M. Copyright law: Impact on microcoputer software. *Memorandum of Law* (Aug. 14, 1980).

This memorandum is designed to show that the 1976 Copyright Act protects microcomputer software and thus prevents illegal copying from hindering the growth of the new technology. The memorandum states that "rights inherent in a copyright are in no way diminished because a copyrighted work is utilized in conjunction with computer-like systems . . . a school system, for example, may not purchase a cassette or diskette and simply reproduce unlimited copies to be disseminated around its various locations . . . any instructor guilty of making such unauthorized

copies may be prosecuted under the 1976 Act's punitive provisions."

404. GROFFMAN, ELLIOT. Divisibility of copyright: Its application and effect. *Santa Clara Law Review*, vol. 19, no. 1 (Winter 1979), pp. 171-194.

The 1976 Copyright Revision Act contains the first explicit statutory recognition in American law of the principle of divisible copyright, that is, the severance of the various ownership rights in a literary work. This comment criticizes the former doctrine of divisibility and discusses specific problem areas which should be alleviated by the recent change in law.

405. Michigan authorizes copyrights in state documents. *CCH Copyright Law Reports*, no. 27 (Sept. 30, 1980), p. 5.

H.B. 5449 has been enacted by the Michigan state legislature and signed into law by the governor on July 24, 1980, authorizing the state administrative board to seek copyright for literary, educational, artistic, or intellectual works authored by state employees or contractors. As the copyright owner, the state would control the production and sale of these works. The law is effective immediately. [Public Act 239, Laws 1980, July 24, 1980].

406. Notes: Blanket licensing: The clash between copyright protection and the Sherman Act. *The Notre Dame Lawyer*, vol. 55, no. 5 (June 1980), pp. 729-750.

The author states that blanket licensing has become the standard method by which writers and publishers of copyrighted works protect their exclusive public performance rights and believes it serves the performing rights industry well. The author then analyzes blanket licensing in conjunction with antitrust laws and cites the following cases as examples: *K-91 v. Gershwin Publishing Corp.* and *CBS v. ASCAP*.

407. PATTON, SUSAN HEDGES. Courting the artist with copyright-the 1976 Copyright Act. *Wayne Law Review*, vol. 24, no. 5 (Sept. 1978), pp. 1685-1704.

This article investigates art interests as property interests, requirements for copyright coverage, direct and indirect copyright benefits and the reasons why fine artists hesitate to use copyright.

408. Resale royalties: round three. *Copyright Management*, vol. III, no. 10 (Oct. 1980), pp. 7-8.

Both a U.S. District Court and the 9th Circuit Court of Appeals have upheld the validity of the California Resale Royalties Act. Art dealer, collector and speculation interests have been challenging the statute, which requires that each time a work of art is resold in California the original artist must receive a royalty. They are now taking their challenge to the Supreme Court. This article discusses the argument being raised in this final appeal and predicts that the high court will not only reject the challenge but that state and federal legislators will follow California's lead in implementing similar legislation.

409. ROSEN, PHILLIP L. Droit moral for musical compositions: Section 115 of the new Copyright Act. *Art & the Law*, vol. 5, no. 4 (1980), pp. 88-93.

A look at moral rights of the artist under the European and American systems, with special attention to section 115 of the U.S. Copyright Act. A section on protection and droit moral for musical compositions is provided along with an examination of cases, including *Gilliam v. American Broadcasting Companies, Inc.; Dutchess Music Corp. v. Stein*; and *Henry Holt and Co. v. Liggett*. The author enlarges on droit moral protection under "alternate state theories," and in his conclusion states that the U.S. is increasingly moving toward recognition of droit moral.

410. Supreme Court asked to review "right of publicity" decision. *BNA, Patent, Trademark & Copyright Journal*, no. 498 (Oct. 2, 1980), p. A12.

The Supreme Court is being asked to review a Sixth Circuit determination that a celebrity's right of publicity, "though exercised during his lifetime, does not survive his death." [*Factors Etc., Inc. v. Memphis Development Foundation*, No. 80-314, 8/27/80].

411. Supreme Court trims docket as new term gets under way. *BNA, Patent, Trademark & Copyright Journal*, no. 499 (Oct. 9, 1980), pp. A3, A4.

The Supreme Court began its 1980-81 terms on October 6th by denying several petitions for certiorari arising from intellectual property cases. One of these was *Hoehling v. Universal City Studios, Inc.*, No. 79-2029, wherein the petitioner argued that the Second

Circuit mistakenly limited the scope of copyright in historical accounts to "no more than the author's original expression of particular facts and theories."

412. Tape piracy/computer style (and pirate chasing). *Copyright Management*, vol. III, no. 10 (Oct. 1980), pp. 6-7.

This article discusses various approaches to circumventing the pirating of computer software, especially that created for home users and small user groups. An approach that is being considered by Softalk, a software trade publication, is an information hotline mechanism. The magazine would offer a reward for information leading to the arrest and conviction of anyone illegally copying "proprietary software." Other measures named include "firmware implementation of programs (a chip or a series of chips to be inserted into the computer rather than providing the same facility through a tape or disc software program)" and " 'write-protected' features of programs which slow down copying." The article suggests that the industry not look to criminal remedy approaches such as the information hotline because of the derivative nature of computer software. Instead, it recommends that software creators implement preventive measures like the two set out above and utilize the civil remedies provided under the copyright law.

413. TSENG, HENRY. What everyone should know about copyright. *Valparaiso University Law Review*, vol. 12, no. 1 (Fall 1977), pp. 1-24.

A look at the provisions of the new law and how the author believes these provisions should work in practice. Government publications, work for hire, reproduction by libraries and archives and the Copyright Royalty Tribunal are also discussed. The author traces the history of copyright and the various revision bills since 1924 and concludes that the most dominant trend has been the "utilization of compulsory licenses to balance the competing interest of creators and users of copyrighted works."

2. Foreign

1. In English

414. DUCHEMIN, WLADIMIR. Suggestions with a view to improving the protection of photographs within the European Community. *Revue Internationale du Droit d'Auteur*, no. 106 (Oct. 1980), pp. 25-117.

A lengthy look at photography in Europe, photography as a work of art, the right of reproduction, performance rights for photographers and lending rights as it relates to photography. The rights of the commissioned photographer versus the rights of the salaried photographer are analyzed with special emphasis on the commissioned portrait. The author delves into the use of photographs: private use, use in the interest of justice and public safety, and for the purposes of instruction or criticism or for scientific purposes. The author urges the European community to provide greater protection for photographers and their works within E.E.C., possibly through compulsory agreements and collective organizations.

415. MATTHYSSENS, JEAN. The moral right versus the counterfeiters of genius. *Revue Internationale du Droit d'Auteur*, no. 106 (Oct. 1980), pp. 3-23.

A discussion of moral rights of an author's work and the four periods in the life of a work. Matthyssens states that during the author's lifetime the function of the moral right is to protect the personality of the creator through his work. This is the first period. In the second period, in France, moral rights are transmitted to the heir of the deceased author. The heirs can refuse modifications that would be false to the very spirit of the work. In the third period of protection, the work falls into the public domain, but there are still heirs. In the fourth period (the author uses Victor Hugo's *Les Miserables* as an example), a work falls into the public domain, but the heirs are deceased. In this case, the protection of a classic work supposedly falls under the protection of the *Centre des Lettres*, but, in practice, this organization has ceased to take any interest in safeguarding the intellectual reputation of deceased authors.

416. Great Britain—News—artists' resale rights—EEC harmonization proposal. *European Intellectual Property Review*, vol. 2 (Sept. 1980), p. D-248.

A news item on artists' resale rights concerning the harmonization proposals within the EEC. The European Commission intends to issue a directive on the harmonization of the law in this area and the government is now examining the subject further in order to take an active part in discussions on any proposals which the Commission may make and in order to deal with it in the Green Paper on copyright reform which was being prepared.

417. South Africa—amendment to the Copyright Act of 1978. *European Intellectual Property Review* (Sept. 1980); D-265.

Two important features of the new amendment to South Africa's Copyright Act of 1978 include a change in the requirement that a literary, musical or artistic work shall not be eligible for copyright unless sufficient effort or skill has been expended on making the work to give it a new and original character. It is now a requirement that all works subject to copyright have to be original. Secondly, where a person commissions the taking of a photograph, the painting or drawing of a portrait, the making of a gravure, the making of a *cinematograph film* or sound recording, and pays for it, such a person shall be the owner of the copyright.

B. Articles Pertaining to Copyright from Magazines

1. United States

418. Alleged bootlegger charged with assault. *Record World*, vol. 37, no. 1736 (Nov. 1, 1980), p. 19.

Wilbur D. Hensley, an alleged T-shirt bootlegger, was charged with assaulting a federal officer. The assault occurred when the officer attempted to serve an order to confiscate the shirts Hensley was selling outside a Kenny Rogers concert in Cincinnati. The order was the result of an extensive investigation which uncovered a large T-shirt counterfeiting operation in Illinois last August. Hensley was also charged with assault and obstruction of official business under Cincinnati's misdemeanor laws.

419. A Lord's view on vidtaping off tube: sez permission needed. *Variety*, vol. 301, no. 2 (Nov. 12, 1980), p. 48.

During a House of Lords debate on copyright, minister of state Viscount Trenchard was asked to clarify whether home taping is illegal. His response was that the law requires anyone wishing to tape a copyrighted television program, even for private use, to obtain permission prior to making the videocassette because to do so without the authority of the copyright owner is a breach of copyright. One of the Lords commented that reports of widespread off-air recording indicated that the law is either unenforced or unenforceable. He proposed, therefore, that it be improved.

420. Aussie stiffens penalties against disk, film pirates. *Variety*, vol. 300, no. 10 (Oct. 8, 1980), p. 137.

Australia has amended its Copyright Act to increase penalties for film and record piracy. The maximum penalty for copyright infringement is now $A10,000 and/or six months in prison. Each count of reproduction of a phonorecord for commercial gain is punishable by a fine of $A150 and each violation of unlawfully copying a film, $A1,500. Under the old law, the unit penalty for these crimes was $A10 and the maximum was $A250 and/or two months in jail.

421. BESAS, PETER. Rampant piracy of videocassettes in Venezuela. *Daily Variety*, vol. 189, no. 24 (Oct. 9, 1980), p. 15.

Speaking at the International Videocommunications Market in Cannes, Antonio Camejo, a Venezuelan video dealer, reported that piracy is costing the video industry in his country approximately $20 million annually. He said that stores openly display and sell pirate videocassettes, many of which are recorded in the U.S. and Mexico, for about $20 each. The rest of his speech focused on Venezuela's VCR, color TV and video game markets.

422. BESAS, PETER. Video pirating in Venezuela boosts cassette player sales; factor the Miami connection. *Variety*, vol. 300, no. 11 (Oct. 15, 1980), p. 314.

Antonio Camejo, a video dealer based in Caracas, says that piracy is so common in his country that stores openly sell illicit cassettes. As in many other foreign countries, he says, major motion pictures are available on pirated videocassettes long before the film is exhibited in local theatres. Camejo discussed these and other matters concerning the Venezuelan video industry during

a public lecture at this year's Vidcom (International Videocommunications Conference).

423. BMI, ASCAP rap royalty exemption sought by N-P organizations. *Variety* (Aug. 27, 1980).

Performing rights organizations challenged the bill introduced by Senator Edward Zorinsky. The measure would exempt "non-profit veterans organizations and non-profit fraternal organizations" from paying copyright royalties for the performance of music. Testifying before the Subcommittee on Improvements in Judicial Machinery of the U.S. Senate's Committee on the Judiciary, BMI's Edward Cramer said that Congress had considered the issue when it enacted the present Copyright Act. As a result, it "specifically eliminated the copyright exemption given for non-profit performance of music under the original act of 1909 . . ." Hal David of ASCAP also expressed opposition to the proposal. He stated that he was ready to testify should the hearings be resumed.

424. BMI opposes change in copyright laws. *Daily Variety*, vol. 189, no. 42 (Nov. 4, 1980), p. 9.

Broadcast Music Inc. has gone on record opposing recommendations to amend the copyright law to exempt veteran groups and other fraternal organizations from paying musical performance fees. BMI president Edward Cramer, who expressed the organization's position in an in-house magazine, stated that "such organizations are already exempt from paying performance fees as long as the events being staged are free and utilize unpaid musicians and promoters." Cramer and some affiliated composers also voiced these sentiments in testimony at a Senate subcommittee hearing on the amendment proposal.

425. Bogus blues. *Time*, vol. 116, no. 21 (Nov. 24, 1980), p. 92.

In Mexico City an imposter Cartier boutique has been opened in the fashionable district of Zona Rosa. There are now fourteen fake "Cartier" boutiques owned by Fernando Pelletier in Mexico selling knock-off imitations of Cartier jewels and watches. Pelletier offered to sell his shops to the original Cartier firm for $4.5 million but Cartier officials sued instead. To date, the Paris firm has won 25 suits against Pelletier but still has lost over $4 million in profits. The article also includes accounts of other famous firms such as

Gucci, Omega, Celine, and Seiko whose profits have suffered because an international anti-counterfeiting code has not as yet been ratified, resulting in millions being lost due to unauthorized copying and marketing.

426. CELS, ROGER. MPEA working to secure cable fees in Europe. *The Hollywood Reporter*, vol. CCLXIV, no. 10 (Nov. 5, 1980), pp. 1, 13.

The Motion Picture Export Assn. (MPEA) has engaged a lobbyist to influence legislatures in European countries to enact laws requiring cable systems to pay copyright fees. MPEA, which is the overseas arm of the Motion Picture Assn. of America, wants the laws to allow it to negotiate the fees directly with European cable systems and to collect and distribute the proceeds to the program suppliers. According to an MPEA executive, there are several factors enhancing the effort's probability of success—(1) the cable industry is in its infancy in Europe; (2) the recent decision of a Belgian court that established cable liability for retransmission; (3) the absence of antitrust laws in Europe prohibiting the direct negotiation of cable copyright fees; and (4) the recognition of the Berne Convention, which offers wide-ranging copyright protection, by most European countries.

427. Clark Prods.' 'Murder' moves ahead despite plagiarism suit. *Daily Variety*, vol. 189, no. 52 (Nov. 19, 1980), p. 3.

Tommy Thompson, the author of "Blood & Money," and David Merrick, who owns the film and TV rights in the book, filed a plagiarism suit against Dick Clark Productions. The complaint charges that the script of defendant's four-hour made-for-TV film "Murder in Texas" contains substantial portions of description and dialogue that were taken directly from plaintiff's novel without permission. The book is based on the actual events surrounding the death of Joan Robinson Hill and her husband and the indictment of Joan's father for the husband's murder. Defendant argues that because all the passages in question were taken from factual sources, including trial transcripts and newspaper clippings, they are not subject to copyright protection.

428. Copyright cold war gaming. *LJ/SLJ Hotline*, vol. IX, no. 34 (Oct. 20, 1980), pp. 2-4.

The library photocopying hearing was one of the events that took place at the American Society for Information Sciences an-

nual conference in Anaheim, California. Two of the issues that were discussed during the hearing involve property rights and machine readable data. Database owners said that they were fearful about losing their property rights in an area where the law is unsettled. They were also concerned about what happens to a database operator or owner if a client's competitor gets access to data. Lawyers attending the sessions indicated that these and some of the other issues raised still have to be resolved. They predicted that the long process of litigation will have to settle most of them.

429. C'right suit vs. NBC miniseries 'Blood & Money.' *Variety*, vol. 300, no. 12 (Oct. 22, 1980), p. 70.

Dick Clark Productions is being sued by David Merrick. The suit seeks to prevent defendant from producing a miniseries for NBC-TV based on the book "Blood & Money" by Tommy Thompson. It charges that the script for the miniseries "was copied in whole or in large part" from Thompson's book. Merrick owns the film and TV rights in the novel and, at one time, also had planned to produce a similar miniseries for CBS-TV.

430. Court rules vs. pirate decoders. *The Hollywood Reporter*, vol. CCLXIV, no. 21 (Nov. 21, 1980), p. 1, 36.

The injunction that was sought by Stephen Robbins and S.C.R. Electronics against the enforcement of section 593e of the California Penal Code was denied. The section prohibits the manufacture and sale of subscription TV signal decoder devices. The plaintiffs sell decoder kits and were challenging the statute's validity on federal preemption grounds. In upholding the law, the court found that the state legislature was entitled to take steps against the manufacture and sale of the "pirate decoders" even though the federal government had exclusive authority over the broadcast media.

431. Court stays FCC deregulation of cable television. *Daily Variety*, vol. 189, no. 53 (Nov. 20, 1980), p. 1.

On November 28th, the U.S. Court of Appeals in New York stayed the Federal Communications Commission's order repealing its cable rules. The ruling was issued from the bench following oral arguments on the motion. The arguments on which the briefs will be based will not be heard until some time in January 1981.

432. Diskeries want royalty coin from Australian FM stations. *Daily Variety*, vol. 189, no. 25 (Oct. 10, 1980), p. 1.

Seven Australian record companies have petitioned the Copyright Tribunal to order FM stations to keep records of their playlists as broadcast. AM stations have had an agreement with the companies for ten years under which they contribute advertising time in lieu of cash. The FM stations want a similar agreement, but the Phonographic Performance Company of Australia, which represents the record companies, wants the stations to pay royalties for the right to broadcast copyrighted records.

433. FCC extends effective date of CATV rules. *Daily Variety*, vol. 189, no. 44 (Nov. 6, 1980), p. 14.

The Federal Communications Commission has changed the November 14 effective date of its order terminating the cable TV distant signal carriage and syndicated exclusivity rules. The date was changed to November 28 to accommodate the New York Federal Court of Appeals' November 18 hearing of oral argument on motions to stay the order.

434. FCC upholds start of new CATV rules. *Daily Variety*, vol. 189, no. 34 (Oct. 24, 1980), p. 7.

The National Assn. of Broadcasters and several broadcast companies asked the Federal Communications Commission to stay the November 14 effective date of its order abolishing the cable distant signal carriage and program exclusivity rules. The request, which was made pending court appeal of the order, was denied by a 4-3 vote. The Commission concluded that the benefits resulting from the order outweighed its potential harm.

435. FIELD, EUNICE POST. Federal regulatory drift favors cable, says ABC's Rule. *Hollywood Reporter*, vol. CCLXIII, no. 34 (Sept. 29, 1980), pp. 1, 10.

ABC president Elton Rule told advertisers at the Western Conference on Marketing and Media that new rules must be created to replace the cable rules that were recently abolished. He indicated that the government's removal of the rules undermines "competition in the program marketplace" and is a discriminatory move against free TV. He suggested that this disparity could be cured by the amendment of either the Copyright or Communi-

cations Act to require cable operators to obtain retransmission consent for the use of broadcast programs. Rule urged the advertisers to join with commercial broadcasters in lobbying Congress for legislative action in this direction.

436. Filipino pic assns. voice fears of $$ lost to vid piracy. *Variety*, vol. 300, no. 11 (Oct. 15, 1980), pp. 8, 302.

Film industry officials in Manila are fearful that they will go bankrupt unless their government is able to put a halt to video piracy. They say the problem is so rampant that not only are the pirates renting illicit cassettes at rates that are considerably lower than those offered by legitimate dealers, but they are openly selling them in supermarkets. The pirates even supply restaurants and hotels with illegal videocassettes of copyrighted motion pictures long before the legitimate product is available for screening at local theatres.

437. Florida counterfeiter given stiffest-ever sentence in RICO rap. *Record World*, vol. 37, no. 1739 (Nov. 22, 1980), p. 6.

Richard Turner, after pleading guilty to racketeering charges, was sentenced to a seven-year prison term by the U.S. District Court in Jacksonville, Florida. He was one of eighteen people indicted on charges ranging from racketeering to copyright infringement. The indictments were the result of multistate raids which netted an estimated $800,000 worth of allegedly illegally manufactured and distributed eight-track tapes and cassettes, various raw materials and duplicating and winding equipment. Eleven of those indicted pleaded guilty and are awaiting sentencing, and seven are awaiting trial. Reportedly, this is the severest penalty ever handed down for record counterfeiting.

438. GELMAN, MORRIE. Creative Caucus revise covers technology, c'right, accounting. *Variety*, vol. 300, no. 10 (Oct. 8, 1980), p. 132.

The Caucus for Producers, Writers & Directors recently revised its aims and objectives regarding the advent of new technology, copyright protection and financial accounting. With respect to copyright, the Caucus believes "that property rights in television programs should be given legal protection commensurate with the protection given to any other basic property rights." Its aim, therefore, will be to persuade Congress to amend the copyright law accordingly.

439. 'Grease' authors file N.Y. suit, claiming soundtrack royalty loss. *Variety*, vol. 301, no. 1 (Nov. 5, 1980), p. 83.

Jim Jacobs and Warren Casey are suing Allan Carr, the Stigwood Group, Paramount Pictures and others for approximately $40,000,000. Plaintiffs, who are the authors of the original theatrical version of "Grease," contend that they have been deprived of more than $8,000,000 in royalties due to defendants' issuance of statements that were "fraudulent and materially false and misleading in that they concealed domestic and foreign sales" of the soundtrack from the "Grease" motion picture. Defendants are also accused of including improper deductions and reductions in the statements. In addition to the damages, the complaint seeks to rescind the agreement granting defendants rights to produce the film and to produce soundtrack albums and singles in connection with the film.

440. HANSON, INGE. Diligent sleuthing nabs pirates; Swedish law tough on copiers and sellers beyond copyright. *Variety*, vol. 300, no. 10 (Oct. 8, 1980), pp. 49-72.

Piracy is one of the biggest problems facing the Swedish film industry. It is estimated that pirate videocassettes and audio disks make up an illegal market worth $4 million per year. Therefore, local prosecutors and Sweden's film industry are stepping up their antipiracy efforts. One of the measures being used by the government is stiffer penalties for offenders. In this vein, an audio record pirate recently was sentenced to four months in jail, marking the first time that a disk pirate was given a prison sentence in Europe. Measures being considered by film companies include the use of an anticopying signal or impulse on legal videocassettes; the installation of signal interference devices on videotape machines that are sold to home consumers; and the release of new films on videocassettes simultaneously with their being exhibited in theatres.

441. HARRIS, PAUL. Piracy: world-wide problem estimated to cost film industry. *Daily Variety*, vol. 189, no. 37 (Oct. 28, 1980), pp. 14, 79.

Video piracy is an international problem that is costing the motion picture industry millions of dollars annually. Mr. Harris takes an in-depth look at the problem in the U.S., Italy, the Near East and several other countries. He concludes that because the copyright laws of these countries predate the advent of video,

they are of little help against pirates. Therefore, he offers various alternative antipiracy measures.

442. HOLLAND, BILL. CRT schedules final hearings. *Record World*, vol. 37, no. 1737 (Nov. 8, 1980), pp. 3, 51.

November 17 and 19 have been set aside for the Copyright Royalty Tribunal's final mechanical royalty rate hearings. The Recording Industry Assn. of America, which originally contended that a rate increase at this time would be injurious to the industry, now has submitted a new proposal. The plan calls for interim rate hikes in 1982 and 1987 "if the average price of 'leading albums' from the trades' Top 200 list" go up. If an increase is warranted, it would be commensurate with the rate of increase in album costs. The National Music Publishers Assn. and the American Guild of Authors and Composers want a 6% mechanical rate. They attack the RIAA's interim rate plan as being untimely and they say it offers an "inadequate and unguaranteed boost." The Tribunal has until December 31 to issue its final decision in this matter.

443. HOLLAND, BILL. CRT to consider new RIAA proposal calling for copyright rate adjustment. *Record World*, vol. 37, no. 1736 (Nov. 1, 1980), pp. 3, 45.

The Recording Industry Assn. of America's most recent rate proposal was allowed into the record of the Copyright Royalty Tribunal's mechanical royalty rate proceedings. The proposal was strongly criticized by the National Music Publishers Assn. as being improperly introduced because the proceedings are nearing conclusion. This new plan calls for the retention of the 2.75 per-tune flat rate and interim adjustments based on the percentage jump in the average price of "leading albums" from the top 200 LPs in the three major music trade magazines.

444. HOLLAND, BILL. Music publishers react negatively to new RIAA royalty proposal. *Record World*, vol. 37, no. 1735 (Oct. 25, 1980), pp. 3, 49, 51.

The Recording Industry Assn. of America (RIAA) recently proposed that the Copyright Royalty Tribunal consider adjusting the mechanical royalty rate in two years and then again five years later if record prices continue to climb. Morris Abrams, representing the National Musical Publishers Assn., objected to the proposal. He said that the RIAA should have included it with its

original list of proposals instead of offering it during the period set aside for rebuttal arguments. Shortly after the proposal was made, Chairman Burg adjourned the hearing. The next day she said that "there was a question as to whether to allow it in" at this stage of the proceedings and that the Tribunal needed time "to sleep on it."

445. HUTCHINGS, MARY M. Copyright interpretation unreasonable. *American Libraries*, vol. 11, no. 9 (Oct. 1980), pp. 530-532.

A discussion of *Basic Books v. Gnomon* which was settled last March. Publishers have threatened more suits against commercial companies if immediate compliance with the terms of the *Gnomon* order are not forthcoming. The author states that many librarians read the settlement as "law" and unduly restrict copyright users, ignoring the fact that some forms of multiple copying may be fair use. The author states that some libraries have restricted access to their collections, prohibiting messengers or runners from using their resources for the purpose of photocopying an article for an employer. It is not clear that photocopying at unsupervised machines can or should be the responsibility of a commercial photocopying establishment.

446. Judge refuses to stop distribution of 'The Key to Rebecca.' *Publishers Weekly*, vol. 218, no. 21 (Nov. 21, 1980), p. 16.

Judge Mary Johnson Lowe of the U.S. District Court of Southern District of New York has ruled that Ken Follett's "The Key to Rebecca" would probably not be found to be substantially similar to a 1958 work by Leonard Mosley and has denied Mosley's motion to stop distribution of the current bestseller. Mosley had charged that "The Key to Rebecca" infringed the copyright of his book "The Cat and the Mice." The basic issue was whether "The Cat and the Mice" should be characterized as a historical novel, as its author had claimed, or whether it was a factual account of historical events, to which copyright protection does not extend. After examining the two books, the judge found insufficient evidence of substantial similarity to warrant a finding that Follett had "bodily appropriated the expression" of Mosley.

447. KOPP, GEORGE. Studios mull renting videocassette line. *Billboard* (Sept. 20, 1980), pp. 1, 54, 55.

The major film studios have found that there is a growing

market for prerecorded videocassette rentals. In trying to devise rental programs, however, they have run into several problems. One of these has to do with the distinction that is made in the Copyright Act between ownership of a copyright and ownership of the material object in which the work is embodied. This means that retailers can purchase prerecorded videotapes and legally rent them to their customers unless there are contractual agreements with suppliers to the contrary. Even with agreements, suppliers have found that enforcement is difficult. Therefore, the video industry is giving some consideration to lobbying for a change in the copyright laws.

448. L.A. man guilty of film piracy. *Daily Variety*, vol. 189, no. 52 (Nov. 19, 1980), p. 3.

Bruce Bright MacDonald pleaded guilty to two counts of film piracy. MacDonald, a sixty-year old professional pianist, admitted illegally duplicating "Snow White and the Seven Dwarfs" and "The Shootist." He could be sentenced for up to a year in fail and fined as much as $1000 on each count.

449. Mac Davis files c'right action over "I Believe.' *Variety*, vol. 300, no. 11 (Oct. 15, 1980), p. 316.

Songpainter Music and Screen Gems-EMI Music filed a copyright infringement suit against John Carney, Borden, Inc. and Ted Bates & Co. The complaint alleges that the defendants used substantial portions of Mac Davis' "I Believe in Music" in a Wyler's Lemonade commercial and on an ad disk. Plaintiffs are seeking at least $50,000 in damages for each violation, a preliminary injunction against further use of the material and the impounding of all material relating to the tune.

450. MAGARRELL, JACK. 'Exaggerated' warnings inhibit legal use of printed materials, Copyright Office told. *Chronicle of Higher Education*, vol. 21, no. 13 (Nov. 17, 1980), p. 23.

The Ad Hoc Committee on Copyright Law has complained to the Register of Copyrights about photocopying warnings that overstate copyright owners' rights. It pointed out that the fair use provisions of the law allows copyrighted works to be used for certain purposes without the proprietors' consent. Certain warnings are intentionally broad and phrased so as to discourage all uses of the work that are not specifically authorized by the copyright owner, including fair use. The group also complained

that the prescribed notice set out in the copyright law may be misleading because it implies that all of the contents of a work are copyrighted when, in fact, it may contain large amounts of public domain material. The Committee said that these efforts by copyright owners to enlarge their rights beyond what the law allows may constitute illegal restraint of trade. It was suggested that one thing the Copyright Office could do to stop these exaggerations of copyright owners' rights is to "refuse to register works in which the published statement exceeds the terms of the law."

451. Marshals act on Warners' cries of coyright foul. *The Hollywood Reporter*, vol. CCLXIV, no. 8 (Nov. 3, 1980), p. 4.

Warner Bros. has filed copyright infringement suits against the Williamsburgh Doll and Novelty Co. and others for the unauthorized manufacture and sale of stuffed dolls of Looney Tune cartoon characters. Hearings have been set for preliminary injunctions against defendants in Brooklyn, New York and Montgomery, Alabama in connection with the alleged infringements.

452. McMASTERS, THERESA. ABC's Goldenson blasts FCC for favoritism actions. *The Hollywood Reporter*, vol. CCLXIII, no. 27 (Sept. 18, 1980), pp. 1, 3.

Leonard Goldenson, chairman of ABC Inc., told the National Press Club that the Federal Communications Commission has reversed its policy with respect to cable and other pay-TV systems. He accused the government of now favoring as well as promoting these systems. Goldenson cited several recent FCC rulings in which he charged that cable restrictions were removed while network limitations were maintained. To offset this imbalance, Goldenson suggested a six-point plan calling for such actions as repeal of the Commission's multiple ownership rules; amendment of the Copyright or Communications Act to provide for retransmission consent; repeal of all rules restricting broadcast ownership of cable systems; and relaxation of rules restricting networks from offering a second network.

453. McMASTERS, THERESA. Copyright board sides with MPAA on cable TV program. *The Hollywood Reporter*, vol. CCLXIII, no. 31 (Sept. 24, 1980), pp. 1, 13.

The Copyright Royalty Tribunal has made its final determination with respect to dividing up the $14.7 million in cable

copyright fees. The formula devised by the Tribunal allocates 75% of the funds to program suppliers, 12% to sports claimants, 5.25% to public broadcasters, 4.5 to music performing rights societies, and 3.25% to broadcast claimants. ASCAP, BMI and SESAC were unable to agree on a formula for dividing up their share of the royalties. Therefore, the Tribunal also made a ruling on the proportions they will receive.

454. McMASTERS, THERESA. C'right Tribunal decrees 75% of cable lic. fees to suppliers. *The Hollywood Reporter*, vol. XXLXII, no. 41 (July 30, 1980), pp. 1, 26.

The National Assn. of Broadcasters was very disappointed about the Copyright Royalty Tribunal's decision to give program suppliers 75% of the $14.6 million in cable copyright fees. The broadcasters had sought 20% but were given only a 3.25% share. Joint sports claimants were given 12%; Public Broadcasting Service, 5%; music performing rights societies, 4.5%; and National Public Radio, 0.25%. NAB officials are trying to decide whether to accept or appeal the Tribunal's decision. Should they decide to appeal, the proposed distribution will be held up pending the outcome of the appeal.

455. McMASTERS, THERESA. High court won't hear 'Hindenburg' copyright case. *The Hollywood Reporter*, vol. CCLXIII, no. 40 (Oct. 7, 1980), p. 4.

The Supreme Court refused to review a Court of Appeals ruling in A. A. Hoehling's copyright infringement suit against Universal Studios and Michael Mooney, the author of the book "The Hindenburg." Hoehling wrote "Who Destroyed the Hindenburg," a 1962 book on the zeppelin Hindenburg. He contended that, in dismissing his suit, the lower court was stripping his historical work "of all protection of the copyright statutes." The appellate court had held that in works devoted to historical subjects "a second author may make significant use of prior work so long as he does not bodily appropriate the expression of another."

456. Miami man sentenced on piracy conviction. *Daily Variety*, vol. 189, no. 50 (Nov. 17, 1980), p. 6.

A $24,000 fine, a six-month jail term and two years' supervised probation were imposed on Ronald Wholsky for video pi-

racy. Wholsky, who operated the North Miami Beach Video Exchange, was convicted of eight counts of copyright infringement and conspiracy involving at least seven popular motion pictures.

457. MIDAS, SOPHIA. CBS study finds blank tape sales up, causing 20% annual industry sales drop. *Record World*, vol. 37, no. 1733 (Oct. 11, 1980), pp. 3, 46.

CBS Records released the results of an in-house study that shows that there are forty million blank tape buyers. Seventy-five percent of those buyers reported that the main reason they buy blank tapes is to make their own custom product. Other reasons cited included "cost, improved quality, saving record wear, gift-giving, taping as a hobby," and control to alter the sound to suit individual taste. The study also showed that four out of ten tape buyers record from their own collections; three out of ten borrow records to record from, and two out of ten record from radio, television and concerts. The study concluded that the increase in blank tape sales cost the music industry a sales loss of 20% or $700-800 million dollars.

458. Mitchell Bros. report porno c'right win. *Daily Variety*, vol. 188, no. 42 (Aug. 5, 1980), p. 3.

In a landmark decision, a federal court of appeals has ruled that a pornographic picture is entitled to copyright protection. The ruling was made in an action filed by Mitchell Bros. of San Francisco against Dallas theatre owner Kenneth Bora. Plaintiffs claimed that Bora had been exhibiting a pirated copy of their copyrighted porno film, "Behind the Green Door." The Mitchells were awarded damages, and the defendant will probably have to pay attorneys' fees.

459. MITGANG, HERBERT. Copyright suit filed against 'The Key to Rebecca' by Ken Follett. *The New York Times*, vol. CXXX, no. 44,733 (Oct. 11, 1980), p. 48.

Leonard Mosley has alleged in a suit filed in Manhattan federal court on October 9 that "The Key to Rebecca" by author Ken Follett was "largely copied" from his 1958 nonfiction book, "The Cat and the Mice." Also named as defendants are publisher William Morrow & Co., Book of the Month Club Inc., and Reader's Digest Condensed Books. U.S. District Court Judge Mary Johnson

Lowe has scheduled a hearing for October 31 on Mosley's request to enjoin the defendants from "publishing or marketing" the book.

460. MPAA's anti-piracy efforts result in two separate convictions, one sentencing. *Daily Variety*, vol. 189, no. 12 (Sept. 23, 1980), pp. 1, 13.

Due to the antipiracy efforts of the Motion Picture Assn. of America, Ralph E. Smith, Rubin Gottesman and Ronald Wholsky have been convicted in three copyright infringement cases. Smith was convicted of 36 counts of unauthorized videotaping of motion pictures off-the-air. Gottesman was found guilty of copyright infringement, racketeering and interstate transportation of stolen property charges. Wholsky was convicted on an eight-count indictment charging copyright infringement and conspiracy. Smith, the only one of the three to be sentenced so far, was fined a total of $100,000 and sentenced to four years in jail.

461. MULLERN, MATS. Primer on combating int'l video piracy. *Variety*, vol. 300, no. 9 (Oct. 1, 1980), p. 100.

This is an in-depth discussion of Sweden's pirate copying problem or "piratkopiering" as it is termed in that country. The types of unauthorized copying to which piratkopiering is most frequently applied are "film-to-tape transfer," off-air-videotaping and the duplication of prerecorded video material. These activities are explained and discussed in detail. Finally, Sweden's method of investigation and prosecution of copyright violations, as well as that of America and other countries, is summarized and compared.

462. NAB will make its last stand on cable atop Capitol Hill. *Broadcasting*, vol. 99, no. 6 (Aug. 11, 1980), pp. 38, 40.

The National Association of Broadcasters' executive committee has met to plan how best to combat recent blows dealt the industry by the Copyright Royalty Tribunal and the FCC. The NAB will seek legislation to establish what it regards as equitable marketplace regulation for the entire communications industry. Ken Schanzer, senior vice president of NAB, said he does not expect Congress to begin action this year. "But it is evident that there is movement on the Hill to look at the law," he said.

463. NARM critical of much-quoted RIAA bogus product estimates. *Daily Variety*, vol. 189, no. 21 (Oct. 6, 1980), pp. 1, 15.

During the National Assn. of "Recording" Merchandiser's rack jobber conference in San Diego, Charles Ruttenberg stated that the Recording Industry Assn. of America has been unable to substantiate its estimates of the prevalence of counterfeit product. He said that while there is clearly a counterfeit problem, no one knows the dimensions of the problem nor the extent, if any, to which organized crime is involved. Ruttenberg, who is NARM's legal counsel, advised the members to protect themselves from stocking bogus disks by establishing self-policing policies. Instituting such policies, he urged, would probably relieve them of any liability. He also gave them some tips for identifying counterfeit merchandise.

464. NCTA asks to intervene in suit vs. FCC ruling. *Daily Variety*, vol. 188, no. 54 (Aug. 21, 1980), p. 4.

The National Cable Television Assn. has filed a motion to intervene in Malrite Television's suit against the Federal Communications Commission. Plaintiff is challenging the agency's decision to eliminate its syndicated exclusivity and distant signal importation regulations.

465. NELSON, DALE. Dateline, Washington. *Wilson Library Bulletin* (Oct. 1980), pp. 124-125.

A discussion of the delicate balance between needs of photocopy users with the rights of authors and publishers. Unauthorized photocopying and the problems of students, professors and librarians were included in the discussion led by John H. Kyle of the University of Texas Press at a hearing in Houston this past March.

466. New York music report. *Show Business* (July 31, 1980), p. 1.

This article advises aspiring songwriters on how to attain success in the music industry. They are urged to procure copyright protection and to extensively promote their material. With respect to copyright protection, an explanation of PA and SR registrations, the effect of registering words without music, joint musical works, and public domain songs is provided.

467. NICELY, STEVE. Johnson Countain has potential gold mine in attic

full of movies. *The Kansas City Times*, Kansas City, Mo. (Sept. 2, 1980).

A listing of movies that have fallen into the public domain including "A Farewell To Arms" (1933) with Gary Cooper. Herbert Miller has set up a company to market the classics to cable systems and TV stations nationwide. The author discusses why so many films have fallen into the public domain and the future of these films.

468. NMPA to supply financial data requested by CRT. *Cash Box*, vol. XLII, no. 15 (Aug. 23, 1980), p. 8.

The National Music Publishers Assn. has engaged the New York accounting firm of Prager-Fenton to compile certain financial data requested by the Copyright Royalty Tribunal. The information may be relevant to the Tribunal's determination of the issues of mechanical royalty fees. The NMPA and the American Guild of Authors and Composers have asked that the royalty be set at 6% of the suggested retail price of an album or tape.

469. ON TV loses another round in fight against decoder kits. *Daily Variety*, vol. 180, no. 50 (Aug. 15, 1980), p. 1.

The U.S. District Court in Detroit has denied National Subscription Television's request for an injunction against Robert Moser and Philip Westbrook. The two had been selling $150 decoder kits that unscramble the firm's ON pay TV signals. In denying the injunction, the Court indicated that the Communications Act of 1934 does not provide for civil remedies in such cases. Since the ruling only applies to civil actions, the Justice Department is deciding whether to proceed with criminal charges against the two men. Meanwhile, the attorney for National Subscription TV said an appeal will be filed with the Sixth U.S. Circuit Court of Appeals in Cincinnati. It should be noted that this is the second time in less than a week that NST has been denied injunctive relief against those it calls "pay-TV pirates."

470. PEISCH, JEFFREY. AFM signs contract with cable show for broadcast rights. *Record World*, vol. 37, no. 1732 (Oct. 4, 1980), p. 23.

Bravo Associates has signed a three-year contract with the American Federation of Musicians to tape and broadcast symphonic, chamber, operatic, and dance performances. This is the first long-term agreement that the AFM has entered with a cable

company. In the past its contracts were for specific programs only. Bravo is a division of Cablevision.

471. PEISCH, JEFFREY. George Tucker perjury trial starts; RIAA's Schoenfeld unveiled as agent. *Record World*, vol. 37, no. 1729 (Sept. 13, 1980), pp. 3, 20.

The perjury trial of convicted tape counterfeiter George Tucker began in New York on September 2. Testifying before a grand jury in December 1979, Tucker denied having a business relationship with Norton Verner. The government contended that Tucker lied about his relationship with Verner, that the lies hampered its investigation of counterfeiting activities, impaired its investigative efforts in a related case against Sam Goody officials, and made it necessary for the Justice Department to abort its plans to prosecute Verner. Tucker's lawyer argued that the lies in no way obstructed the government's investigation and that the Justice Department could have indicted Verner. Verner, in the meantime has agreed to cooperate with the government in both the Tucker and Goody cases in exchange for immunity.

472. PEISCH, JEFFREY. Maine radio stations plead guilty to criminal copyright infringement. *Record World*, vol. 37, no. 1725 (Aug. 16, 1980), pp. 28, 42.

Three Maine radio stations, WPNO in Auburn and WSKW and WTOS-FM in Showhegan, have pleaded guilty to criminal copyright infringement charges. The stations failed to pay their ASCAP license fees but continued to broadcast ASCAP music even after being warned to stop. This resulted in ASCAP filing civil copyright infringement suits against the stations. When they refused to pay the settlement in the civil suits, ASCAP contacted the U.S. attorney, who agreed to prosecute. Now that the criminal fines have been paid, the owners of the three stations, all of which have been sold, have been charged once again by ASCAP with civil copyright infringement.

473. PEISCH, JEFFREY. RIAA wins reversal in Sam Goody trial. *Record World*, vol. 37, no. 1739 (Nov. 22, 1980), pp. 3, 79.

The Second Circuit Court of Appeals reversed a District Court's order requiring the Recording Industry Assn. of America (RIAA) to turn over certain documents to attorneys for Sam Goody Inc. Goody and two of its executives are being tried for

interstate trafficking of counterfeit tapes and have maintained their innocence. They claim that the requested reports, which contain information about record dealers throughout the country, will show that the Goody stores are not the only record stores that unknowingly buy counterfeit tapes. The Court of Appeals, in addition to reversing the District Court and overturning a contempt citation that was issued against the RIAA for refusing to turn over the documents, established guidelines that should be applied in determining which RIAA documents can and cannot be withheld from the Goody lawyers.

474. Personalities. *The Washington Post*, vol. 104, no. 84 (Feb. 27, 1981), pp. C2.

George Harrison, a former Beatle, has been ordered to pay $587,000 in damages for copyright infringement with his song "My Sweet Lord." Judge Richard Owen ruled that Harrison had "subconsciously" plagiarized the 1962 John Mack tune, "He's So Fine" in his song "My Sweet Lord."

475. Philippine govt. asks Singapore to quell pirate tape industry. *Variety*, vol. 301, no. 5 (Dec. 3, 1980), p. 93.

James Dy of the Asian Music Industry Assn. has reported that Filipino musical recordings are being illegally reproduced in Singapore and then exported back to the Philippines. These pirate exports are having a detrimental effect on the local music market. Therefore, the Philippine government sent a formal complaint to a high commission in Singapore regarding the illegal reproductions. Strong governmental antipiracy efforts had all but squelched piracy in Manila. As a result, many pirates moved from the Philippines to Singapore where there is no government prohibition against unauthorized recording. These pirates are believed to be responsible for much of the illegal product that is now coming into the country.

476. Piracy eating up tax revenues, sez Manila theatre org. *Daily Variety*, vol. 190, no. 19 (Jan. 5, 1981), p. 42.

The Bureau of Internal Revenue in the Philippines is looking into the effects of film piracy on its revenue collections. The investigation was prompted by complaints from local theatre associations. They claimed that piracy was not only hurting the Philippine motion picture industry but tax revenues generated

from the exhibition of foreign films as well. They also claimed that piracy was giving the country a bad reputation among foreign film producers.

477. Pirate-free bird keys Comsat bid for dbs success. *Variety,* vol.301, no. 8 (Dec. 24, 1980), p. 40.

The Satellite Television Corp. (STC) is planning to offer a direct broadcast satellite service. A company spokesman announced that STC will be using a highly sophisticated security system to protect its broadcast signal from being intercepted by unauthorized decoders. The system will utilize specialized electronic chips comprised of hundreds of components that contain circuits for a complex decoding scheme. It will also have an automatic periodic security check-up signal that will be transmitted by the satellite.

478. Plagiarism suit filed vs. MGM. *The Hollywood Reporter,* vol. CCLXIV, no. 29 (Dec. 4, 1980), p. 3.

MGM, Signet, Inc. and the New American Library are being sued for plagiarism. Ted Berkic, the plaintiff in the action, claims that he wrote a sceenplay entitled "Reincarnation, Inc." and that the defendants used his work without permission for books and the 1977 film "Coma." Plaintiff's work was reportedly registered with the Writers Guild of America in 1968 and again in 1980.

478a. Preyer advocates stiff fines, jail for signal pirate. *The Hollywood Reporter,* vol. CCLXIII, no. 13 (Aug. 29, 1980), p. 8.

Rep. Richardson Preyer (D-N.C.) introduced a bill in the House that would levy a fine of $100 a day, up to $1000, for unauthorized interception of pay TV signals. Fines of $250,000 and up to eighteen months in jail for first offenders or forty months for repeaters would be imposed against those making a profit from such interceptions. The measure also would restrict the use of small earth stations and converters.

479. Program suppliers reach agreement on how to divvy up cable c'right payments. *Daily Variety,* vol. 188, no. 51 (Aug. 18, 1980), p. 1.

The Copyright Royalty Tribunal will not have to decide how to divide program suppliers' share of the cable copyright royalties. The suppliers developed and approved a "formula based on time

weighted by fees generated from cable TV systems." Other claimant groups, however, have been unable to reach any agreement. In phase II of its distribution proceedings, the Tribunal will have to determine how much money individual claimants within each of these remaining claimant groups will receive.

480. Radio stations set to appeal new U.K. royalty rate. *Cash Box*, vol. XLII, no. 12 (Aug. 2, 1980), p. 35.

The Assn. of Independent Radio Contracts, a group of 21 commercial sound studios throughout the United Kingdom, is contemplating appeal of the Performing Right Tribunal's new royalty payment formula for on-air use of recorded music. The new formula, which will take effect Oct. 1, was devised subsequent to the radio stations' request for a reduction of the current rate from 7% of net annual revenue to approximately 1%. Under the proposed formula, radio stations will be required to pay 4% of the first 750,000 pounds ($1.8 million), six percent of the next 750,000 pounds, eight percent of the next 1.5 million pounds and 10% of all additional revenue.

481. RIAA activates its 'hitline alert' on pirated tapes. *Daily Variety*, vol. 188, no. 60 (Aug. 29, 1980), p. 1.

In the wake of the recent seizure of 20,000 illegal tapes in Kentucky, the Recording Industry Assn. of America has activated its piracy "Hitline Alert" system for the first time since it was adopted. The alert system provides complete descriptions of the seized product to members of the RIAA and the National Assn. of Recording Merchandisers.

482. ROBINSON, RUTH. Bootleg products costing industry $10-12 mil per yr. *The Hollywood Reporter*, vol. CCLXIV, no. 1 (Oct. 23, 1980), pp. 1, 6.

Gordon Bennett of the entertainment firm of Kragen & Co. says that entertainers lose an estimated $10-12 million in annual revenue from the manufacture and sale of bootlegged merchandise. Kragen and a tour merchandising company called Winterland were active in helping to close down two bootleg operations in Illinois. Bennett says that they have also come up with a blanket temporary restraining order which can be used against street vendors who sell unlicensed merchandise outside of concert halls. Another tactic being employed against bootleggers involves ex-

tensive mailings to alert artists whose likenesses are found on merchandise confiscated in raids.

483. ROBINSON, RUTH. FBI raids against music pirates step up; net $5 million. *The Hollywood Reporter*, vol. CCLXIV, no. 43 (Dec. 24, 1980), p. 4

In pre-holiday raids on counterfeit record and tape operations, law enforcement officials confiscated more than $5 million worth of illegal product and equipment. The raids, which took place in California, Texas, Oklahoma and Pennsylvania, netted English as well as Spanish-language records and tapes and expensive manufacturing machinery.

484. ROBINSON, RUTH. MIDEM delegates told top woes: pirating, home taping. *The Hollywood Reporter,* vol. CCLXV, no. 17 (Jan. 29, 1981), p. 26

In a report delivered at the fifteenth annual MIDEM, Ron N. White, President of the International Federation of Popular Music Publishers, said that counterfeiting and home taping remain the industry's main problems. The information contained in the report was gathered from music publishing associations in such countries as Austria, Germany, Italy, Finland, France, Japan, Holland and Spain. To help combat these problems, one of the countries recently enacted a tape software levy, another currently has a tax on tape hardware and is looking into a levy on blank tape, and several of the countries, including the U.S., are considering similar legislation.

485. 'Rocky Horror Show' wins copyright case. *Record World*, vol. 37, no. 1746 (Jan. 17, 1981), p. 37.

The author and publisher of "The Rocky Horror Show" were awarded $35,000 in damages in their copyright infringement suit against Herbert Plattner and others. The action was instituted by Richard O'Brien and Druidcrest Music, Ltd. after the defendants launched a publicity campaign to promote an unauthorized tour of the musical. In addition to damages, the defendants were ordered to pay more than $5,000 in attorney's fees and court costs and enjoined from performing "Rocky".

486. Royalty panel blocks distrib'n of 1978 cable-television coin. *Daily Variety*, vol. 189, no. 36 (Oct. 28, 1980), p. 6.

The Copyright Royalty Tribunal issued an order staying its decision regarding the 1978 cable TV royalty distributions. The order will be stayed pending a final determination of appeals initiated by the National Assn. of Broadcasters, various sports claimants and National Public Radio. The broadcasters are appealing the decision because they contend that they are entitled to more than the 3.25% distribution share that the Tribunal has allotted them. They justify their contention on the theory that stations should own the rights to their entire broadcast day, to sports games they telecast, and to syndicated shows under exclusive contract.

487. Satellite STV hits 'pay pirates' in Las Vegas with warning ads. *Variety*, vol. 300, no. 10 (Oct. 8, 1980), p. 116.

Satellite Subscription Television has begun a public ad campaign against the use of signal decoders. The ad, which is being run in newspapers, warns that such devices are illegal and reprints a notice that was issued by the Federal Communications Commission regarding the unauthorized interception of pay-television signals. The notice states, in part, "that any unauthorized use or reception of pay-television programming transmitted in the Multipoint Distribution Service (MDS) is a violation of the Communications Act and the rules and regulations of the Federal Communications Commission which could result in jail sentences and/or fines . . ."

488. SINDT, NANCY PIER. Newly revised copyright law protects artists beyond life. *National Jeweler* (August 16, 1980).

This article points out that many designers do not realize that under the new law a copyright is secured automatically when a work is created. The author discusses registration and its importance and the problem of storing designs in Washington with the Copyright Office.

489. So. African court hammers first nail into piracy coffin. *The Hollywood Reporter*, vol. CCLXIII, no. 20 (Sept. 9, 1980), p. 4.

In a landmark decision, the Supreme Court of South Africa has restrained Vic Donen from infringing the copyright of Time-Life titles licensed in South Africa. The suit was initiated by Highgold International, the Time-Life video licensee for the region. Donen unsuccessfully argued that "American copyright is not

valid in South Africa." Until now, the major distributors, reportedly, were unable and sometimes unwilling to protect their own copyrights.

490. South African high court hits homevid pic pirate. *Variety*, vol. 300, no. 12 (Oct. 22, 1980), p. 77.

The Supreme Court of South Africa handed down a landmark decision recently regarding video piracy. The order prohibits Vic Donen of Pik-A-Movie from infringing copyrights in the territory. Films involved in the case were "The President's Mistress" and "Seizure." It is believed that this legal precedent will make it easier to enforce similar cases in the future.

491. 'Star Wars' loses case to 'Galactica'. *The Hollywood Reporter*, vol. CCLXIII, no. 9 (Aug. 25, 1980), p. 1.

A federal district court granted Universal, MCA and ABC a summary judgment in a copyright infringement suit involving the "Battlestar Galactica" TV series. The suit was instituted by 20th Century-Fox, which maintained that the show's story line infringed that of "Star Wars."

492. Status report. *Book Production Industry* (July-Aug. 1980), p. 6.

By July 1, 1981, the Copyright Office must deliver to Congress a study on what effect the removal of the manufacturing clause of the copyright law might have on the domestic printing industry. There is much speculation about whether the Office will recommend elimination or retention of the clause, although it is believed that the latter is unlikely. Many major book manufacturers and suppliers, therefore, are conducting their own impact studies in the hope that they can persuade Congress to delay removal of the manufacturing clause for five to ten years.

493. Stiff fines for video pirates forecast by MPAA prez Valenti. *Daily Variety*, vol. 189, no. 63 (Dec. 5, 1980), pp. 1, 43.

Motion Picture Assn. of America president Jack Valenti told a luncheon gathering of the Federal Communications Bar Association that he hopes the next Congress will pass an anti-piracy bill that provides stiff fines for video piracy. He said that a bill had been introduced in that House last term, but it was opposed by lawmakers who were concerned that such legislation might have a "chilling effect on the development of new technology"

and shrink competition among manufacturers of pay-TV reception equipment. Another concern was that since STV, MDS and satellites use the public airwaves, the public should be allowed reasonable access to the services delivered by these enterprises. Valenti took issue with these arguments, however, and urged the group to support efforts to impose strong penalties for unauthorized use of pay-TV and pay-cable services.

494. Subscription TV assn. chief speaks out against pirates. *The Hollywood Reporter,* vol. CCLXV, no. 2 (Jan. 8, 1981), p. 8.

Subscription Television Assn. chairman Ron Brutoco pràised the Court of Appeals for overturning a lower court decision that upheld the legality of pay TV decoders. The appellate court ruled that the 1934 Communications Act prohibits the manufacture, sale or use of unauthorized decoder devices which have the capability to intercept the transmissions of subscription TV stations. Calling the decoder manufacturers pay TV pirates, Brutoco stated that all of "their efforts to justify their illegal undertakings now are revealed as a sham and a fraud on the public."

495. Supreme Court rules on royalties. *The Hollywood Reporter*, vol. CCLXIV, no. 18 (Nov. 18, 1980), p. 17.

The suit filed by an Los Angeles art dealer challenging the California Resale Royalties Act has been denied a hearing by the U.S. Supreme Court. The act provides a 5% royalty to artists whose works are resold for more than a $1,000 profit. The suit contended that the law was preempted by the 1976 Copyright Act.

496. Supreme Court wants another opinion in per-use case. *Broadcasting*, vol. 99, no. 19 (Nov. 10, 1980), pp. 86-88.

The Supreme Court has asked the Justice Department for advice in deciding whether to hear CBS's appeal in its eleven-year-old "per-use" music license case. The Supreme Court had ruled in an earlier opinion that blanket licenses were not a per se violation of the antitrust laws, but told the Court of Appeals to decide whether there was a violation under "the rule of reason." The Court of Appeals then ruled against CBS, affirming the District Court's dismissal of the suit. The Supreme Court set no deadline for the Justice Department to submit its views.

497. Thomas found not guilty in 'Wars' c'right case. *Daily Variety*, vol.

189, no. 45 (Nov. 7, 1980), p. 3.

Mark Thomas was found not guilty of criminal copyright infringement. The U.S. Attorney unsuccessfully tried to prove that Thomas, accused of selling an unauthorized videotape copy of "Star Wars," knew the film was not subject to a first legal sale.

498. 3 firms named in 'Hanta Yo' suit. *Daily Variety*, vol. 189, no. 52 (Nov. 19, 1980), p. 2.

A suit has been filed against Warner Bros., ABC Inc., Ruth Hill and others for unauthorized use of the book "Lahcotah," co-authored by the late Robert Hannum and defendant Hill. Plaintiffs, who are Hannum's heirs, claim that Hill and the deceased had an agreement to equally share all profits derived from any dramatic use of their work. Hill then wrote a novel entitled "Hanta Yo." Plaintiffs contend that the Hanta Yo novel and a television film of the same name are both based on the original joint work. They are, therefore, seeking damages in excess of $1 million in the Los Angeles Superior Court.

499. TILLEY, RAY E. ASCAP snafu shakes up operator. *Play Meter* (Aug. 1980), p. 21.

A copyright infringement suit brought by ASCAP against Gordon Runnberg has been dismissed. Runnberg, a jukebox operator in Moose Lake, Minn., said that the suit was the result of a mix-up which began when ASCAP discovered that one of his machines lacked a copyright license. The Society filed the action not knowing that the machine in question was probably merely a replacement for another jukebox which was licensed that was being serviced. Runnberg said that he has about 135 jukeboxes, and a check of the Copyright Office records showed that they were all licensed under his name and not that of his company, Gordy's Arrowhead Music, Inc. Since there was no record of a license being issued to the company, ASCAP assumed that it had not complied with the compulsory licensing provisions of the Copyright Act.

500. TILLEY, RAY E. Record industry against more fees on discs, but stands for bill on the jukebox. *Play Meter* (Sept. 1980).

Stanley Gortikov, president of the Recording Industry Association of America (RIAA), told the Copyright Royalty Tribunal, in testimony, that songwriters and music publishers have presented "no evidence at all" of their financial need for an in-

crease in mechanical royalties. The RIAA president said, "We feel that since the existing rate has only been in effect from January 1978, it is only gestating. The rate of 2 cents per tune existed for 70 years, during which time the songwriters flourished." The RIAA's position is that, if criteria set in the Copyright Act were adhered to by the rate-setting panel, change in the present mechanical royalty would be ruled out. RIAA spokesmen contend that the compulsory royalty figure should be set, as stated in the law, to 1) maximize the availability of creative works to the public; 2) afford a fair return to the copyright owners and fair income to users; 3) reflect the relative roles of the owner and the user in such areas as creative and technological contributions, capital investment, cost, risk, and the opening of new markets; and 4) minimize the disruptive impact on the structure and prevailing practices of the industries involved.

501. TROOST, F. WILLIAM. Copyright: BOCES versus Betamax. *Instructional Innovator* (Sept., 1980), pp. 34-36.

Mr. Troost discusses Encyclopedia Britannica Educational Corporation versus Board of Cooperative Educational Services (BOCES), a case pending in the district court in Buffalo, New York. This article draws primarily on the brief on fair use prepared for the trial by the Buffalo law firm of Ellis, Kustell, and Mullenhoff. BOCES is an agency that serves approximately 100 schools in western New York State. Its main function is the recording of television shows off-the-air for use in schools for face-to-face instruction upon request of individual teachers. As in the *Betamax* case, one of the primary arguments of the BOCES trial centers around economics. Another closely related issue involves public access. The author concludes that it is likely that the courts and legislature both need more information from user groups, especially regarding the degree of student access to a variety of television programming.

502. Tucker receives five-year sentence and $25,000 fine. *Record World*, vol. 37, no. 1733 (Oct. 11, 1980), pp. 3, 46.

Convicted counterfeiter George Tucker was sentenced to five years in jail and fined $25,000 for wire fraud, copyright infringement, perjury and obstruction of justice. After his conviction on the first two counts, Tucker agreed to aid authorities in their ongoing investigation of other counterfeiting activities. He then

lied to a grand jury that was hearing evidence on one such operation and, as a result, was convicted of the latter two charges.

503. U.K. record co.'s losing $530 mil from illegal taping. *The Hollywood Reporter*, vol. CCLXIII, no. 20 (Sept. 9, 1980), pp. 1, 4.

A British trade paper recently conducted a survey which showed that 95% of its readers admitted having taped music at home and 61% said that they would have purchased records if they had not had taping equipment. A British Photographic Industry official indicated that it is a common, but mistaken, belief that private taping for one's own use is not against the law. The 1956 Copyright Act prohibits all unauthorized taping, but this law is clearly unenforceable. So the record industry is seeking a government levy on blank tapes and cassettes. The official said that this survey underlines the loss of business the industry is experiencing and the need for the levy.

504. U.K. video association to discuss copyrights. *Record World*, vol. 37, no. 1724 (Aug. 9, 1980), p. 51.

The primary purpose of the newly formed British Phonographic Industry's Video Association is to look after the video interests of British record companies, but non-record company video producers who want the BPI to oversee their interests may join. The Association's first meeting will focus on negotiations concerning a blanket agreement for the use of existing programs for videograms and mechanical rates for video.

505. U.S. court forbids American sale of bootleg Joel items. *Variety*, vol. 300, no. 7 (Sept. 17, 1980), p. 72.

Billy Joel was granted an injunction against the sale of unauthorized T-shirts and other items bearing his name and/or likeness anywhere in the United States. The order also authorizes federal marshalls to seize and impound the illegal merchandise without obtaining additional court orders. Similar orders that are national in scope have been issued for merchandise of other celebrities.

506. Valenti calls for deregulation, new copyright act. *Broadcasting*, vol. 99, no. 22 (Dec. 1, 1980), pp. 108, 109.

Jack Valenti, president of the Motion Picture Association of America (MPAA), told a luncheon meeting of the Federal Com-

munications Bar Association of New York that Congress should "deregulate the basic cable industry from its legally sheltered false and artificial advantage outside the competitive marketplace." "Let the Congress declare to basic cable, pay cable, videocassettes, video-disks, network television and individual stations: 'If you are going to compete for the eye and ear of family viewers, then you will all compete equally, with no one of you having an unfair advantage.' " Valenti said this declaration, written into a revised Copyright Act, would make it clear that all profit-making enterprises must bargain openly and competitively for the programs they choose to offer their customers.

507. VALENTI, JACK. Pic biz fearful of cable capers; await GOP's team action. *Variety*, vol. 301, no. 11 (Jan. 14, 1981), pp. 1, 90.

Among the items on the Motion Picture Assn. of America's agenda for the coming year are copyright law revision, strengthening of antipiracy laws and expansion of international trade. The association also intends to continue its lobbying efforts against cable. To the traditional film and record piracy have been added "new-technology piracy" which is made possible through decoder devices and earth stations. Therefore, MPAA president Jack Valenti says renewed concentration will be directed towards solving this expanding problem.

508. VIDCOM hears legal questions at its seminars. *Billboard*, vol. 92, no. 42 (Oct. 18, 1980), p. 56.

Several legal issues pertaining to home video were explored at VIDCOM '80 in Cannes. They included: (1) an effort to define home and fair use video recording which ended in a stalemate over the meaning of the "family circle" within which recording could be tolerated; (2) a call for a levy on video hardware and software; (3) an attempt at drawing up guidelines for rights acquisitions; and (4) a discussion of video rentals.

509. WARNER, PETER. FCC action, court reversal aid ON's fight vs. 'pirates'. *The Hollywood Reporter*, vol. CCLXIII, no. 4 (Aug. 18, 1980), p. 3.

The federal appeals court in Michigan has overturned the lower court decision in the National Subscription TV Inc.'s suit against individuals who had been selling pay TV decoders. In overturning the decision, the appeals court also reinstated a temporary restraining order prohibiting the defendants from selling

the devices. Meanwhile, in a related matter, the Federal Communications Commission issued a statement that the Communications Act precludes the manufacture, sale, importation and use of over-the-air TV decoders without the FCC's authorization. NST operates ON TV in Detroit and the decoders allow non-subscribers to view the company's programming.

510. Webster cited as 'champion.' *Norman, Okla. Transcript* (July 25, 1980).

The pirating of his Blue-Back Speller by unscrupulous publishers led Noah Webster to devise and champion a federal copyright law. Congress enacted the Copyright Act in 1790, and an 1870 law made the Library of Congress responsible for the registration and custody of copyright deposits in the United States.

511. Where to get new plays produced. *The Writer* (August 1980), pp. 23-28.

A listing of the theaters that are accepting the works of new playwrights, and their locations. The article informs playwrights that their unpublished play scripts maybe registered before they are submitted to the theaters. The author suggests contacting the Copyright Office, Washington D.C. and requesting Form PA.

512. Woman sentenced in bogus disk matter. *Daily Variety*, vol. 189, no. 51 (Nov. 18, 1980), p. 15.

A Federal District Court in New York sentenced Velma Hydock to four months in prison and fined her $2,000 following her plea of guilty to one wire fraud and one mail fraud charge. She had been indicted on five counts of wire fraud and one of mail fraud as a result of the FBI's undercover investigation of record counterfeiting activities.

1. Australia

513. Copyright. *Bulletin of the Austrian Copyright Council Ltd.*, no. 34 (Aug. 29, 1980).

A study of copyright in designs and artistic works and a look at ownership, authorship, duration of copyright and exceptions to copyright protection. Section 75 of Australia's Copyright Act dealing with industrial designs is also discussed with additional study given to infringement of copyright, actions for infringement and remedies.

514. Copyright in designs and artistic works generally. *Bulletin of the Australian Copyright Council, Ltd.*, no. 34 (Aug. 29, 1980), pp. 1-14.

The *Bulletin* deals with copyright in artistic works and, in particular, with the provisions of Division 8 of Part III of the Copyright Act 1968. The *Bulletin* refers to the application of relevant parts of the Designs Act 1906-1968 and the Copyright Regulations. Topics also included are ownership of copyright, works by employees, rights, industrial designs, duration of copyright and registrable designs.

2. Great Britain

515. HERMAN, FRANK. China: The publishing connection. *The Bookseller* (Nov. 1, 1980), p. 1812.

A discussion of China's new copyright position. The author states that the country's non-adherence to a copyright convention has been its greatest barrier to collaboration with publishers from the West. This article provides an in-depth look at publishing in China today.

516. IPA to set up piracy watch network. *The Bookseller* (Oct. 25, 1980), p. 1719.

The International Committee of the International Publishers Association meeting in Frankfurt during the 32nd book fair has decided to set up a system to monitor piracy, using a network of national associations, as a first major international attempt to come to grips with the piracy problem. Other topics discussed at the meeting included international copyright distribution and new technology.

517. PA approaches Prime Minister and Commission president on Treaty threat to UK book trade. *The Bookseller* (Nov. 29, 1980), pp. 2119-2120.

A look at some problems in British publishing relating to the Treaty of Rome's insistence on the "free movement of goods within the British Community." The problems of licensing, manufacturing and publishing in Europe and the economic consequences to Europe's publishing industry are also discussed.

518. STM concern over copyright erosion. *The Bookseller* (Oct. 11, 1980), p. 1555.

The international group of scientific, technical and medical publishers had its meeting for 1980 at Frankfort. This was the group's twelfth meeting, and, in attendance for the first time, was a small group from the Republic of China. Two areas discussed included "document delivery" and the problems of photocopying.

3. USSR

519. VAAP: cultural exchanges. *Books and Art in the USSR* (Feb. 15, 1980), p. 23.

A look at the Soviet delegation that took part in the International Conference of States on the Double Taxation of Copyright Royalties in Madrid. The Conference worked out a multilateral Convention to relieve authors from double taxation and thus promote cultural exchange. This was precisely the position of the delegation of the USSR and of the majority of other countries participating in the Conference. The Conference was closed with the signing of a Final Act. The Convention is deposited with the General Secretary of the United Nations and will be open for signing until October 31, 1980.

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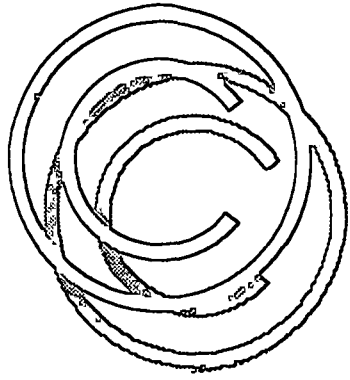

Published at

NEW YORK UNIVERSITY LAW CENTER

VOL. 28, No. 5 JUNE, 1981

Published at New York University Law Center, 40 Washington St. South, New York, N.Y. 10012. Printed and distributed by Fred B. Rothman & Co., 10368 West Centennial Road, Littleton, Colorado 80127.

ISSN 0010-8642

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THE BULLETIN of The Copyright Society of the U.S.A. is published 6 times a year by The Society at the Law Center of New York University, 40 Washington Square South, New York, New York 10012; Stanley Rothenberg, *President*; Richard Dannay and Alan J. Hartnick, *Vice Presidents*; Theodora Zavin, *Treasurer*; Jerold L. Couture, *Secretary*; Henry R. Kaufman, *Assistant Treasurer*; Raymond D. Weisbond, *Assistant Secretary*.

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CITE: 28 BULL. COPR. SOC'Y, page no., Item . . . (1981).

PART I

ARTICLES

520. EMERGING INTERNATIONAL COPYRIGHT LAWS ON OFF-THE-AIR HOME AND EDUCATIONAL VIDEO-RECORDING: AN ANALYSIS

By JEFFREY SCOTT GLOVER*

Introduction

> "Teledistribution, . . . and the use of video cassettes by individuals, could revolutionize the nature and the structure of the means of communication and give new dimensions to the freedom to diffuse and receive information and exchanges between peoples."[1]

The expanding utilization of video tape recording technology in private homes and educational establishments, to record television signals broadcast over the public airwaves, has given rise to legal controversy of international dimensions.[2] The interests of authors and film producers, broadcasters, and distributors, along with those of educational institutions, libraries, video-equipment manufacturers, and private users, have all become embroiled in a struggle over the control, and the intellectual benefits and economic profits derived therefrom, of material broadcast via television to the general public. For the most part, the law

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[1] WORLD COMMUNICATIONS, A 200-COUNTRY SURVEY OF PRESS, RADIO, TELEVISION, AND FILM. UNESCO Press (1975) at ix [hereinafter cited as WORLD COMMUNICATIONS].

[2] *See Legal Problems of Video Cassettes and A.V. Discs*, XI, 3 COPYRIGHT BULL. QUARTERLY REV. 5, 8 (1977, UNESCO), where an international working group on videorecording stated that the "most awkward problem is [sic] videograms' [video cassettes'] basic nature, i.e. a simple highly mobile carrier at the disposal of the public with no practical possibility of controlling their use—whether private-public, commercial, lawful or unlawful" [hereinafter cited as "working group"].

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of copyright[3] is the legal arena (on both the international and national levels) in which the conflicting interests of the present controversy will be resolved.

Unfortunately for those seeking knowledge of their legal rights in this matter, the copyright law of most nations, as is certainly the case on the international plane, is not clear.[4] This state of affairs is due largely to the fact that large-scale use of videorecorders is a rather recent development, having come into existence *after* most national and international copyright laws presently in force were enacted. What so complicates matters is the heretofore unheard-of ability of the general public to capture televised copyright protected material, broadcast into their homes, by the use of their videorecorders.[5] The reason that this new-found ability of the public poses such a difficult legal problem is that copying for private and educational purposes has been widely acknowledged as a traditional area exempted from copyright liability.[6]

The problem, simply put, is that copyright holders feel that their rights are being infringed by home and educational videorecording of their material, while most users believe that they are excluded from

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[3] The law of copyright developed around a definition of authorship that grew up basically after the invention of print technology—authorship as individual effort encased in an economic commodity: a book. With the invention of printing presses "[m]echanical multiples of the same text created a public—a reading public." M. MCLUHAN AND Q. FORE, THE MEDIUM IS THE MESSAGE. 122 (1967).

[4] *See* A. DIETZ, COPYRIGHT LAW IN THE EUROPEAN COMMUNITY: A COMPARATIVE INVESTIGATION OF NATIONAL COPYRIGHT LEGISLATION (1978). "Although the practice of mass use of sound recording devices . . . and the increasing importance of visual recording devices (video recorders) is approximately the same in all countries . . . the question whether this practice of the mass use or reproduction of protected works is permissible or not from the copyright point of view cannot be clearly answered on the basis of the law" at 118 [hereinafter cited as DIETZ].

[5] Typical capabilities of videorecorders are presented in this advertisement by RCA:

> "Viewers can tape any program off the air, replay it at their own convenience—and use the same cassette again and again for additional recording. They can record from one channel while viewing another. A built-in timer makes it possible to tape up to 4 hours automatically while everyone is asleep or away. There is even a black and white camera option that enables anyone to shoot a home grown television special."

Fortune, May 8, 1978 at 285.

[6] *See*, e.g. Sections 6, 7, and 41 of the British Copyright Act; Sections 46, 47, 53, and 54 of the Federal German Copyright Law; Article 41, para 2 of the French copyright Law. Compare Section 107 of the American Copyright Law. For the reflection of the above-mentioned Sections in international law *see* Part III "Limitations," *infra.*

liability due to the traditional leeway granted to educational and private copying. Copyright holders of televised films, such as the large motion picture studios, fear that the loss of control by the broadcaster over the times televised material can be viewed by the public, due to the use of videorecorders, will cause them serious economic harm and thus these copyright holders are determined to protect their markets.

The *basic* problem, however, goes deeper than the current economic protectionism which lies behind much of the present controversy. The videorecording problem has brought into sharp focus the very real tension built into the dual function of copyright law itself: that of promoting public access to information, while, at the same time, protecting the copyright holder's rights.

This inherent tension, found within all copyright legislation, is created by a somewhat delicate balancing of interests between, on the one hand, the author/producers, and on the other hand, the community/users. The continental European approach to copyright has been to divide authors' rights into economic and moral rights, based upon the theory that an author's copyright is a property right and an extension of his personality.[7] In the so-called Anglo-American doctrine, a copyright, as a method of economic protection, is granted to an author to encourage further creations—while his "moral" rights are protected *outside* the copyright scheme by application of defamation or unfair competition laws.[8]

With both the European and Anglo-American approaches, however, the basic requirement of uninhibited information dissemination, so vital to modern society, is a fundamental concern.[9] This concern is manifested by the various limitations and exemptions found in all copyright laws, and is clearly evident from the fact that copyright protection is always

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[7] COPYRIGHT AND DESIGNS LAW: REPORT OF THE COMMITTEE TO CONSIDER THE LAW ON COPYRIGHT AND DESIGNS [in England] CMND 6732 (1977) at 16 [hereinafter cited as Whitford Rpt.]. *See* J. Spirer, *In re Johannesburg Operatic and Dramatic Society v. Music Theatre International: Boycott of the South African Stage,* 20 ASCAP COPYRIGHT LAW SYMPOSIUM, 140, 143 n. 12 (1972).

[8] Whitford Rpt., *supra* note 7 at 17. *See also* working group, *supra* note 2 at 7, where it was pointed out that Anglo-Saxon law permitted the intellectual work and its fixation to constitute one protectible work, as against the Roman law concept, whereby an intangible work, to be protected, must be either a pre-existing work or a work specially made for incorporation in the support.

[9] E.g., "Meaningful democratic decision-making and the public's ability realistically to perceive and respond to the world require the widespread availability of information of general interest." Note, *The Rights of the Public and Press to Gather Information,* 87 HARV. L. REV. 1505 (1974). *See* DIETZ, *supra* note 4, at 137, where he states that copyright protection "of the individual is demarcated in relation to the requirements of the community".

of a *limited* duration.[10] Thus, under the copyright laws, an author's right to control and receive compensation for his work has always been tempered by the recognition that "private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."[11]

Ideas, expressed in literary, scientific, or even "entertainment" forms, know no national boundaries. New technology such as facsimile transmission, telecommunications, computerised data banks, photocopying, and electronic videorecording have helped produce a world where "what is written as news in New York is soon available, often in a matter of minutes, in many localities throughout the world. The same is true of books, music, plays, and other information subjects."[12] New technologies, such as videorecording, mean change, and change involves conflict while adjustments take place on the interface of the old and new technologies,[13] and on the national and international legal structures surrounding those technologies. This new array of communication technology has given a global reach not only to authors, but also to those who would appropriate their works.[14] Thus protection of author's rights on a world-

[10] DIETZ, *supra* note 4, at 161, explains that "[u]nlike ownership of physical objects, intellectual property-copyright cannot be passed on to any number of generations. The justification of this different treatment lies in the nature of the intellectual works themselves. While physical objects are generally used by only one person or a few persons, intellectual works tend to become common property . . . after a fair length of time."

[11] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) [hereinafter cited as *Aiken*]. DIETZ, *supra* note 4 at 137, states that copyright "has a somewhat strained relationship with the information needs of modern society and with the basic right of freedom of information." The Universal Copyright Convention, signed by European and Anglo-American States alike, declares in its opening paragraphs that an international copyright system of protection will "*encourage* the development of literature, the sciences, and the arts." Universal Copyright Convention, Paris Revision 1971, *printed in* COPYRIGHT LAWS AND TREATIES OF THE WORLD (1972 UNESCO) [hereinafter cited as CLTW] [emphasis added].

[12] A. Kiros, *Territoriality and International Copyright Infringement Actions*, 22 ASCAP COPYRIGHT LAW SYMPOSIUM 53 (1977) [hereinafter cited as Kiros].

[13] *See*, e.g. Gardner, *The Future Isn't What It Used To Be*, Publishers Weekly, Jan. 11, 1971, at 47.

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

[14] Often when the market for an author's work is on a global scale, the burden of enforcement, State by State, is too great to leave the author with an effective method of protecting his rights. *See* Kiros, *supra* note 12 at 54.

wide basis has likewise been evolving.

> "Perhaps it is no accident that the emergence of the international copyright concept coincided historically with the development of steamships, locomotives, and telegraphy. The widespread use of foreign works in the education, entertainment, and communications of a country not only has significant economic and political consequences, but it can also bring about radical change in that country's culture and society."[15]

The main multilateral conventions concerned with the international aspects of copyright protection are the Berne Union for the Protection of Literary and Artistic Works (Berne Convention) and the Universal Copyright Convention.[16] These conventions have initiated working groups and subcommittees to study the international legal aspects of new communications technology such as video-recording—just as most of the industrial nations (e.g. Great Britain, the United States, West Germany and Japan) have been investigating the problem on the national plane.

There occurs between the international and national discussions of videorecording much cross-fertilisatin of ideas and of possible solutions; for just as the international conventions developed through compromises between different national copyright concepts, so, now, the conventions influence new national copyright legislation.[17] Moreover, member nations of the international conventions may be limited in their develop-

[15] B. Ringer, *The Role of the United States in International Copyright—Past, Present, and Future*, 56 GEORGETOWN L.J., 1050 (1968). Ms. Ringer, later U.S. Register of Copyrights, explains that: "Copyright as a legal concept originated in the form of direct sovereign grants of monopolies during the Renaissance as a response to the needs created by the invention of movable type. During the Age of Reason, copyright in the form of national statutory protection developed as part of the growth of organised publishing industries. Similarly, international copyright appears to have been a response to the Industrial Revolution; the expanding technology in communications necessitated reciprocal protection of works between countries." *Id.* at 1051 *See* R. BOWKER, COPYRIGHT—ITS HISTORY AND ITS LAW 10-22 (1912), and R. DEWOLF, AN OUTLINE OF COPYRIGHT LAW 3-12 (1925).

[16] The Berne Union, first created in 1885, was revised in Berlin, 1908; Rome in 1928; Brussels in 1948; Stockholm in 1967; and lastly in Paris 1971. The Universal Copyright Convention was signed in Geneva 1952 in the hope of creating a bridge between Berne Union members and the Pan-American Convention countries (chiefly the United States) and was last revised also in Paris 1971.

[17] *See* DIETZ, *supra* note 4, at 139: "Often, indeed, the provisions of the RBC [Revised Berne Convention] have strongly influenced the national systems, this being particularly true of Luxembourg Copyright Law, lengthy sections of which . . . are an almost word-for-word copy of the international provisions."

ment of solutions to the videorecording problem by their international commitment to adhere to the articles of the conventions.[18] Thus the international conventions' committee reports interpreting the conventions' own articles can carry great weight in national debates on the solutions to the problems of home and educational videorecording.[19]

It is the purpose of this study to explore the legality of off-the-air non-commercial home and educational videorecording under the Berne and Universal Copyright Conventions and, as well, to shed some light upon the possible solutions. It is felt necessary, along with analysis of the international conventions, to examine relevant provisions of various States' domestic copyright legislation in order to gain a more complete understanding of the different approaches to, and the solutions of, the problems of home and educational videorecording.[20]

I. THE LEGAL STATUS OF "VIDEOGRAMS"

Video technology has created a new medium for artistic expression: viedo tape. Films and television programmes can now be produced originally in this medium. Before examining the problem of off-the-air videorecording it would be wise to understand the basic copyright status of video tapes in general, *remembering that this problem is distinct from, and*

[18] "We are . . . inevitably limited in recommending any change [of the 1956 British Copyright Act] by our international commitments and by the need to achieve, so far as may be possible, uniformity between the law of this country and in other countries." Whitford Rpt. *supra* note 7, at 6, 7.

[19] *See Subcommittee of the Intergovernmental Copyright Committee on Legal Problems Arising from the Use of Video-Cassettes and Audio-Visual Discs*, COPYRIGHT BULL. QUARTERLY REV. (UNESCO) Vol. XII No. 4, 4 at 6 (1978) [hereinafter cited as "Subcommittee"], where Professor Klaver, of the University of Amsterdam, acting as consultant to the Secretariats, stated that though the Subcommittee's work had "no binding or compulsory force" for national legislators, the work "could be a persuasive guide for them". *See also* Intergovernmental Copyright Commission Report Second Session (1977) [the Universal Copyright Convention Reports] at 22 para. 142, where the delegation of the United States stated that "the Klaver study and the conclusions of the working group were very important in establishing a legal framework for consideration of the problem [of public and educational videorecording]".

[20] The States examined have been picked from the western industrialised nations, for the problems of the "developing countries" are of a different nature. *See* the special provisions concerning "audio-visual fixations" for the benefit of developing countries adopted by the Universal Convention (Article V quater 3(b)) and the Berne Convention (Articles I, II, and IV of the Appendix) during the revisions at Paris 1971. *See also* A. Lazar, *Developing Countries and Authors' Rights*, 19 ASCAP COPYRIGHT LAW SYMPOSIUM at 1 (1971).

logically prior to, the problem of video copying off-the-air waves, to which the rest of this study will be devoted.

First a glance at terminology. The subcommittee of the Intergovernmental Copyright Committee on the legal problems arising from videorecording has adopted certain terms to be used internationally: "*Videogram:* both videodisc, video-cassette or other analogous material support for any sequence of images with or without sounds and the actual fixation of the sequence. *Videocopy:* reproduction of a pre-existing work [that is, the fixing of a work already produced in another medium, e.g. film, on video tape]. *Videographic work:* work specially made for fixing on a videogram."[21] Professor Klaver, in complete agreement with Japanese legal doctrine, has also proposed the term "video-program" to differentiate the video-support from the intellectual product, which may, or may not, be protected by copyright.[22] In this study all the above-mentioned terms and definitions will be used. In addition, the term "videorecording" will be used to indicate the process by which video-copies of televised visual and audio-visual programmes are made off-the-air.

As with all intellectual work which involves questions of copyright, the distinction between the intangible work or programme, and the material support on which it is fixed, must be clear, for the material supports for the programme, such as video-cassettes or video-discs, are not decisive to the legal status of the programme. What is very relevant to a determination of legal status, however, is the fact that the programme is of a visual or audio-visual nature, fixed upon a material object which allows the programme to be viewed, and reproduced, by means of a television receiver/viewer.[23]

In order to determine the basic legal status of all types of "videograms," given the general pre-existing copyright protection for cinematographic films and phonograms, the following issue must be determined: should videograms be regarded legally as cinematographic works, or merely as works analogous to cinematography or phonograms, or as works *sui generis* for which new copyright legislation, national and international, will be needed.[24]

The Assimilation Issue

The differences between videograms and cinematographic films

[21] Subcommittee, *supra* note 19 at 7, 11.

[22] F. Klaver, *The Legal Problems of Video-Cassettes and Audio-Visual Discs,* 23 BULL. COPY. SOC'Y 152, 155 (1975) [hereinafter cited as "Klaver"].

[23] *See supra* note 19.

[24] *Id.* at 11. *See* de Freitas, *Audio Visual Systems,* 18 BULL. COPY. SOC'Y 304 at 307 (1971); Whitford Rpt. *supra* note 7 at 224.

are, in the main, technical rather than conceptual. That is, both processes record a series of related images which, when viewed, impart an impression of motion. The differences lie in the fixation and projection processes only; photographic film and a projector are used with cinematography, while an audio-visual magnetic or electronic tape or disc and a television set are used with videograms.

Pre-packaged video-cassettes or discs have been thought, by some, to bear a closer relation to phonograms and audio-cassettes than to cinematography, as far as the "social function" of videograms is concerned.[25] Although a more traditional setting for viewing films has been the cinema rather than the home, viewing both projected and televised films in the home has been a commonplace event in most industrialized countries for many years.[26] It therefore follows that, as to the type of medium of expression used to present a work, videograms would seem to be used like cinematographic films by both the producer and the user.

National Viewpoints—Studies undertaken in Canada point towards videograms being assimilated into the traditional category of cinematography.[27] In Japan, however, information seems to indicate that two possibilities exist: (1) that the majority of videograms *would* be cinematographic works and (2) videograms might exist which are other than cinematographic works. What a videogram might be "other" than a cinematographic work is not known, and is really anybody's guess.[28] The French viewpoint on assimilation has been divided, while Sweden and Great Britain would seem likely to assimilate videograms into cinematographic works.[29]

In the United States' new copyright law, there exists a category of

[25] Klaver, *supra* note 21 at 157.

[26] *E.g.*, "The film shown in public cinemas has lost its place to television as the first medium of mass entertainment in most developed countries, but films are seen by very large audiences through television." WORLD COMMUNICATIONS, *supra* note 1 at ix.

[27] Intergovernmental Copyright Commission Report, first extraordinary session, 11 (1975).

[28] Klaver, *supra* note 21 at 156–7.

[29] *Id.* at 158, where Professor Klaver states that assimilation "would seem to be desirable under French doctrine". *See* Swedish Copyright Law Article I (as amended in 1973). The British Copyright Act of 1956 defines (Section 13) cinematograph film as "any sequence of visual images recorded on material of any description (whether translucent or not) so as to be capable, by the use of that material, (a) of being shown as a moving picture, or (b) of being recorded on other material (whether translucent or not), by the use of which it can be shown . . ." *See* Whitford Rpt. *supra* note 7 at 224 where this British Committee stated: "We take the view that the present definition [of cinematographic film] does already cover video recordings. . . ."

protected works entitled "audio-visual works" which are defined as "works that consist of a series of related images which intrinsically intend to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied".[30] Cinematographic works are then defined: "[m]otion pictures are audio-visual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any".[31] Thus, it appears obvious that, under the new United States copyright law, videograms would fit within the "motion picture" definition, and thus also come under the general category of "audio-visual works." Therefore, it would seem that the United States should clearly merge videograms into the cinematographic category.

In no State investigated was it discovered that videograms were held to be *sui generis* and could not, therefore, fit within an existing category of protected works. Moreover, it seems certain that the trend is clearly to define videograms as a type of cinematographic work. Further, the European Broadcasting Union (EBU) has stated that "videograms, including both cassettes and discs, were . . . cinematographic works in the classic sense of the term and were therefore subject to protection under the Berne and Universal Conventions"[32]; and it is to the international conventions that this inquiry will now turn.

The International Position—Neither the Berne Union for the Protection of Literary and Artistic Works, nor the Universal Copyright Convention (both of which were reviewed and revised in Paris 1971), make any mention of videograms *per se.* Nevertheless, the revised Berne text includes language which should be able to incorporate most of the advanced manifestations of modern technology in this area: Article 2, listing examples of protected works, includes "cinematographic works to which are assimilated works expressed by a process analogous to cinematography".[33] It is generally understood that "[c]ontracting states are free to interpret this expression as they see fit".[34] The Universal Copyright Convention, while listing cinematographic works as protected works in Article 1, fails to define the term, nor does it include the Berne clause mentioned above. This nebulous state of affairs certainly allows

[30] 17 U.S.C. Sections 101 et seq. at Sec. 101 (1976).
[31] *Id.*
[32] Intergovernmental Copyright Commission Report, first extraordinary session, 11 para. 72 (1975).
[33] CLTW, *supra* note 11, Berne Union Paris revision 1971, Article 2.
[34] Klaver, *supra* note 22, at 158. *See also* working group, *supra* note 2, at 7.

Member States freely to interpret the term "cinematography" as either assimilating videograms or not under the Universal Convention.[35]

Reflection upon both the national and international law leads to the conclusion that the new United States copyright law probably states the clearest conceptual framework in which new developments, such as videograms, can easily fit. By defining "motion pictures" as a subcategory, without any restraint as to mode of fixation and projection, videograms, under the rubric of motion pictures, can slip into berth, snug within the conceptual harbour of "audio-visual works." while the undefined categories of "cinematographic work" (of the Universal Convention) and a "process analogous to cinematography" (the Berne Convention) are, to be sure, somewhat vague, reasonable interpretation leads to the concludion that videograms will be assimilated into these two similar existing categories of copyright protected works, and, thus, will *not* require revision of the international conventions in order to protect copyright holders.[36]

Off-the-Air Videorecording—Videograms and cinematographic works have many similarities, as noted above. But copyright holders of films and other material broadcast over the airwaves have been dismayed at the fact that their material can metamorphose into a type of videogram without their consent. This is, of course, what occurs when a videorecorder is used to tape copyrighted programmes off-the-air. What then is the legal status of this new form taken by the copyrighted material, this "video-copy"? Has it become a new work? The answer is clearly no; the change in material form does not effect a change in legal substance.[37] Therefore, a copyright holder could still maintain certain rights in his material though it has been transferred onto the video medium by off-the-air videorecording. The possible rights of the copyright holder are analysed below.

II. THE EXCLUSIVE RIGHTS OF COPYRIGHT HOLDERS

> "For property, as Pufendorf observes, implies a right of excluding others from it."[38]

Both the Berne and Universal Copyright Conventions require copyright holders of Member States to be granted certain exclusive rights. These two conventions delimit the rights of copyright holders on the international plane and, as the Berne Convention is the more specific

[35] Klaver, *supra* note 22, at 159.
[36] *See e.g.*, Subcommittee, *supra* note 19, at 6.
[37] *Id.* at 11 B.1.
[38] Millar v. Taylor, 4 Burrow's Rpts. 2303, 2362 (1769), *reprinted in* 98 English Rpts. 202, 218 (1909).

of the two, it will be examined in somewhat more detail.

Under the Berne Convention, the films and other copyright material which will be subject to home and educational videorecording are protected generally under Article 2 and specifically under Article 14 *bis* from *unauthorised*: "Reproduction, Distribution, Public Performance, Communication to the Public by Wire, Broadcasting or any other Communication to the Public or the Subtitling or Dubbing of Texts of the Work".[39] These rights are subject to certain limitations and exemptions within the Berne text and within the various national copyright laws of the Member States.[40] Therefore, no true understanding of the rights granted is possible without a discussion of the limitations upon those rights.

However, first things first. The likelihood of potential interference with the right of reproduction, and the right of public performance, by home and educational videorecording will be analysed.[41] Next, the possibility that any such interference found would in fact constitute a violation of these exclusive rights, and thus an infringement of copyright, will be examined in the light of the applicable limitations and exemptions.

The Rights of Reproduction and of Public Performance

The exclusive right of reproduction is the *sine qua non* of understanding the videorecording problem. This basic right is found in the Revised Berne text under Article 9(1): "Authors of Literary and Artistic Works Protected by this Convention Shall Have the Exclusive Right of Authorising the Reproduction of these Works in any Manner or Form."[42] Simply put, this statement means that no one may make a copy of a protected work without permission from the copyright holder. That such an advanced technique as videorecording would indeed be a re-

[39] *Reprinted in* COPINGER AND SKONE JAMES ON COPYRIGHT, 11th ed. at 726 (1971).

[40] *Compare,* Article 9(1) with 9(2) and Article 10(1) with 10(2). In both Articles' first paragraphs a certain right or rights must be granted, while in the second paragraphs of both Articles, schemes for national variations are expressly stated (within certain boundaries).

[41] Certain States grant copyrights to broadcasting organisations, e.g. Section 91 of the Australian Copyright Act and Sections 14, 40, and 41 of the British Copyright Act. As for home videorecording, the British Act of 1956 specially exempts from copyright liability the making of a copy of the broadcast film or other material if done for "private purposes." Educational videorecording *seems* to be controlled by Section 41 of the British Act; *see* Part III, "Limitations," *infra.*

[42] Oddly enough, "[i]t was not until Stockholm in 1967, that the Convention provided for the most elementary right of all, namely that of making copies of the work [Article 9]". Whitford Rpt. *supra* note 7 at 19.

production or copy falling under Article 9 is confirmed beyond any possible doubt by the language of Article 9(3): "Any Sound or Visual Recording Shall Be Considered as a Reproduction for the Purposes of this Convention."

The Universal Copyright Convention protects cinematographic works in general (Article I) by requiring that each contracting State "provide for the adequate and effective protection of the rights of authors and other copyright proprietors . . ."; and, specifically, in Article IV *bis*, where the rights of reproduction, public performance, and broadcasting are mentioned.[43] The actual scope of these rights depends upon each Member State's copyright legislation, so long as the domestic law fulfils the rather vague requirements of Article I.

That home and educational videorecording of copyrighted programmes off-the-air is *equivalent* to making an unauthorised copy or reproduction is beyond doubt, given the language of the abovementioned Articles of the Berne and Universal Copyright Conventions. What, however, is very much in doubt is whether this "equivalence" is, or should be, an infringement (i.e. a violation of the exclusive right of reproduction) given the traditional limitations and exemptions from copyright liability developed for private and educational use; for it is crucial to understand that " 'use' is not the same as 'infringement'; that use short of infringement is to be encouraged. . . ."[44] This approach will be explored in Section III of this article.

The *public performance* right basically gives the copyright holder control over any "public" performance, or in this case public viewing, of the protected work. As far as *home* videorecording is concerned, this right will probably not come into play in a copyright infringement action since the video-copy would not be actionable (under *this* particular right) unless the video-copy owner gave a "public" viewing of his copy. The definition of a private or home viewing as against a public performance, with regard to television transmissions, depends upon the domestic law of the Member States under both international copyright conventions. What is "public" is usually defined negatively, i.e. every situation that is *other* than what is considered "private" reception (e.g., in the family circle) is deemed public and thus can give rise to a copyright infringement action.[45]

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[43] *See* CLTW, *supra* note 11, Universal Copyright Convention 1971 revision.

[44] B. KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT, 57 (1967). *See also Aiken*, 422 U.S. at 155, where the U.S. Supreme Court stated, "if an unlicensed use of a copyrighted work does not conflict with an 'exclusive' right . . . it is no infringement of the holder's rights. No license is required by the Copyright Act, for example, to sing a copyrighted lyric in the shower."

[45] *See* Klaver, *supra* note 22 at 171.

While some Member States define the "family circle" or "restricted circle" rather narrowly,[46] other States define the terms more broadly, e.g., in the United States no violation of the public performance right would occur unless the video-copy owner allowed viewing by a substantial number of persons outside of the normal circle of a family and its social acquaintances.[47] The present author has earlier suggested: "An infringement action under the public performance right will likely be limited to videorecordings, privately or commercially produced, used in *public* settings such as hotels, restaurants, or bars, and is therefore of little concern to the specific problem of the private use of home videorecordings."[48]

The question whether videorecordings made and shown by educational establishments constitute a public performance is more complicated: is a video-copy, used in a teaching context, a "public" performance? Does the educational setting necessitate a special legal category between public and private, perhaps what Professor Klaver has termed as the "semi-private" area? Neither the Berne nor the Universal Convention appears to hold clear answers to these questions. While both conventions require prior authorisation by the copyright holder before a public performance of his work is allowed,[49] certain exceptions to this requirement are also given, e.g. for "the requirements of education and popularization".[50] However, the discussion of these exceptions to the public performance right, in the teaching context, properly falls within the area of "limitations on exclusive rights" and thus will be taken up again there.

III. STATUTORY LIMITATIONS ON COPYRIGHT

> "The scope of protection for each kind of property should depend on its nature and on the appropriate benefits and burdens caused by private ownership. The protection should be shaped to do the most good."[51]

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[46] Article 29 of the Swiss Bill and Article 12(2) of the Netherlands Copyright Law (recently amended). *See* CLTW, *supra* note 11.

[47] 17 U.S.C.A. Sec. 101 at 6 under "publicly" (1) (1977).

[48] *See* J. Glover, *Betamax and Copyright: The Home Videorecording Controversy*, I WHITTIER L. REV. 229, at 234 (1979) *reprinted in* ASCAP COPYRIGHT LAW SYMPOSIUM, 28 (1980) [hereinafter cited as Glover].

[49] *See* Berne Convention Articles 11, 14, 14 bis and the Universal Convention Article IV bis. CLTW *supra* note 11.

[50] Klaver, supra note 22, at 176.

[51] Z. Chafee Jr., *Reflections on the Law of Copyright: I*, 45 COL. L. REV. 503, 510 (1945).

A copyright holder's right to control the use of the protected work, while always of limited duration, is also restricted by traditional limitations "whereby the legal sphere of the individual is demarcated in relation to the requirements of the community, and which are conditioned by the requirements of intellectual life".[52]

The fundamental need for broad dissemination of information, as against the so-called "monopoly" rights of copyright holders, is manifested in modern times by the various statutory copyright limitations which have the effect of depriving the copyright holder of control over certain utilisations of the protected work. These limitations are found within the traditional areas of press reporting, teaching and science, private use, and certain public performances. Therefore, under the copyright laws, as a matter of public policy, certain uses of the protected work are placed beyond the control of the copyright holder. The traditional areas of limitation, found within national copyright laws, have been reflected in both the international copyright conventions, particularly in the Stockholm and Paris revisions. Thus, in certain cases, a copyrighted work may be used *without* prior permission by, or payment to, the holder of the copyright.

The specific limitations for reproduction for personal use and reproduction for educational utilisation, as applied to the issues of home and educational videorecording of televised broadcasts, will be the subject matter of this section. First, the present status of the private use limitation will be examined by analysis of the relevant copyright law sections of the two international conventions and four representative Member States.[53] Second, the limitations on exclusive rights involving educational use of off-the-air videorecordings will be analysed in a like manner.

A. Private Use of Video-Copies Recorded from Television Broadcasts: Limitations on the Right of Reproduction

1. Domestic Copyright Laws for Four Member States

The United Kingdom: Part I, Sections 6(1) and 9(1), of the Copyright Act of 1956, state that it is not an infringement of copyright in a literary, dramatic, or musical work (6(1)) or artistic work (9(1)) if the author is engaged in "fair dealing" for the purposes of research and private study.

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[52] DIETZ, *supra* note 4 at 137.

[53] The United Kingdom, the Netherlands, and the Federal Republic of Germany are members of both the Berne and Universal Copyright Conventions. The United States is a member of the Universal Convention only.

Fair dealing, which is termed "fair use" in the United States, traditionally stands for the proposition that some reasonable use (or reproduction) of a portion of a copyrighted work may occur *without* prior permission from, or payment to, the copyright holder.[54]

The fair dealing limitation, however, only applies to the "Part I" works of the British Copyright Act mentioned above (e.g. literary works) and does *not* apply to so-called "Part II" works, i.e. broadcasts, cinematograph films, and sound recordings. This separation of films and broadcasts, in Part II of the Act, from the aforementioned general categories of Part I works, has led to some confusion on the part of various commentators on the scope of the fair dealing exemption. Professor Dietz, for example, has stated that under Sections 6(1) and 9(1) of the Copyright Act, private tape recordings *would* be permissible within the framework of private study and research under the fair dealing concept.[55] It is important to note that this view is not correct. The fair dealing exceptions apply only to Part I works and do not cover other subject matters such as films and broadcasts.[56]

Although the fair dealing provisions do not apply to the situation of videorecording from television broadcasts, a statutory exemption from the *broadcaster's* copyright does apply. Section 14(4) of the Copyright Act lists the uses which are restricted by the copyright which exist in every television broadcast made by a broadcaster (either the British Broadcasting Corporation (BBC) or the Independent Television Authority (ITA)). Under Section 14(4)(a) the making of a cinematograph film, or copy, of a broadcast would be an infringement of the broadcaster's copyright if made "otherwise than for private purposes." Therefore it would seem that private home videorecording of "live-action"

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[54] *See, e.g.*, S. JAMES, COPINGER AND SKONE JAMES ON COPYRIGHT, para. 458 et seq., 11th edition (1971) [hereinafter cited as COPINGER]. The fair dealing exception of Section 6 of the British Copyright Act allows a student to make copies for himself for private study but whether this exception includes machine copying as distinct from the traditional hand-made copies remains an open question. *See* the Whitford, Rpt., *supra* note 7, at 55.

[55] DIETZ, *supra* note 4 at 118 para. 315. *See also* A. BOGSCH, THE LAW OF COPYRIGHT UNDER THE UNIVERSAL CONVENTION (1968) at 628, where the author's description of the United Kingdom's Copyright Act implies a fair dealing limitation to all Part II works due to his failure to identify and distinguish Part I works from Part II works. *See* Klaver, *supra* note 22 at 174 where she states that "In the case of sound or (audio-) visual recordings, copies may not be made, even for private purposes (Sections 12 and 13). The only exception allowed to this rule is in the case of reproduction for private purposes of a programme broadcast by radio or television."

[56] *See* the United Kingdom Copyright Act of 1956, Part I (6) and Part II. *See also* The Whitford Rpt., *supra* note 7 and 75 para. 296.

broadcasts and other programmes produced and broadcast by the BBC or ITA could fall within this "private purpose" exemption.

In the situation where the televised broadcast consists of a copyrighted motion picture licensed to the broadcaster by an independent copyright holder, a serious question is posed as to whether this "private purpose" exemption would apply. Under Section 13(5)(a) it would be an infringement of copyright to make an unauthorised copy of the protected film. However, does the home video-copy consist of a reproduction of the film or the broadcast? It is obvious that the physical film itself is *not* copied, only the broadcast has been copied—the broadcast, which, of course, has been beamed into private homes with the express consent of the copyright holder. Interestingly, Skone James, adding unknowing support to this viewpoint in the recent edition of his authoritative textbook on British copyright law, stated that the cinematograph work protected under Section 13 "is the physical thing . . .", rather than the material expressed within the film.[57] Therefore, it is possible that private home videorecording of copyright-protected films could fall within the "private purpose" exemption to the broadcaster's copyright because the film itself is not copied.[58]

On the other hand, it might well be that the fact of broadcasting the protected film simply means that two separate copyrights subsist in the broadcast film at the same time: the broadcast copyright, which is subject to the private purpose limitation, and the copyright in the film itself, which is not subject to such a limitation. But, naturally, as home videorecording has not yet been addressed directly in the United Kingdom's Copyright Act, and as it has not been clarified by litigation, the legality of such videoreproduction must remain in doubt. It is not presently possible, therefore, to state that under the Copyright Act of the United Kingdom, home videorecording is, or is not, included within that State's private use limitations.[59]

The Federal Republic of Germany: Article 53(1) of the German Copyright Statute of 1965 (as amended March 2, 1974) states expressly that it "shall

[57] *See* COPINGER, *supra* note 54 at para. 755, under meaning of "cinematograph film", where the author states: "The work protected, therefore, is the physical thing, rather than any dramatic or artistic matter embodied therein."

[58] Performers' rights (a so-called "neighboring right" to copyright) are protected in the United Kingdom by the "Dramatic and Musical Performers' Protection Act, 1958." In that Act a copy of a performance, including off-the-air reproduction, cannot be made without written consent of the performers *except* if made for "private and domestic use only" (para. 1). *See* Whitford Rpt., *supra* note 7 at 76.

[59] Although, if the views expressed in the Whitford Report (*supra* note 7 at 81 para. 319 et seq.) are followed, home videorecording would be termed a "non-commercial illegal" act in the United Kingdom.

be permissible to make single copies of a work for personal use." While codifying this personal use limitation within the copyright statute, the German legislature has also developed a new conceptual approach to the personal use limitation as applied to sound and visual tape reproductions.

Traditionally, the concept of a personal use exemption on a copyright holder's "exclusive" right of reproduction allowed a copy to be made without prior permission from, or payment to, the copyright holder. The German copyright statute, however, expresses the new idea that while the private user should be able to copy a protected work without seeking permission in advance from the copyright holder, such use of the protected work *does* require compensation to the holder of the copyright. Article 53(5) reads, in part, as follows:

> "If from the nature of the work it is to be expected that it will be reproduced for personal use by the fixation of broadcasts on visual or sound records, or by transferring from one visual or sound record to another, the author of the work shall have the right to demand from the manufacturer of equipment suitable for making such reproductions a remuneration for the opportunity provided to make such reproductions."

One of the more interesting features of Article 53(5) is that the compensation is paid directly by the *manufacturers* of sound and visual recording equipment rather than by the *user* of the protected material as traditionally required. It was apparently recognised by the German legislature that it would be prohibitively expensive for individual copyright holders to seek out and sue, under this new right to compensation, the thousands of individuals video- (and audio-) recording in their homes. Therefore, by being able to look to the manufacturers of the recording equipment, the copyright holders would have a small, easily identifiable group against whom they could seek to enforce this new statutory right. The copyright holders' claims, however, cannot be put forward individually, but must be brought through a collecting society so as not to expose manufacturers to a flood of individual compensation claims.[60]

Under Article 53(5), a working example of a legislatively created flat-fee compensation system, the private user pays a one-time tax or levy on the original price of his video-recorder which is collected by the manufacturer and then turned over to a collection society, which, in turn, redistributes the funds to the various copyright holders. This levy

[60] *See* DIETZ, *supra* note 4, at 119 and the Whitford Rpt., *supra* note 7, at 77.

is imposed only on audio and visual tape recorders which can be used for private recordings; office dictating machines and large professional machines for educational and commercial use are excluded from the system.[61] Because foreign copyright holders receive national treatment in Germany, they are "potential beneficiaries through their own collecting society, if any [e.g. the Performing Rights Society in the U.K.]."[62]

It is clear that home videorecording in Germany falls within a type of personal use limitation. It must, however, be carefully noted that personal non-commercial use of audio and visual copyright material is subject to a special tax. Furthermore, the tax is non-discriminatory, that is, videorecorder purchasers using the recorder in clearly noncopyright infringing ways are forced to pay a tax for the benefit of copyright holders.[63] This German legislation is quite important for it expressed for the first time, on either the national or international level, the somewhat paradoxical idea of a right to compensation *within* the notion of the private use limitation; it will be examined further in Section IV of this article.

The Netherlands: The Copyright Act of 1912 (as amended October 27, 1972) stated a broad private use exemption in Article 16(b) paragraph 1: "It shall not be deemed to be an infringement to reproduce [a work] in a limited number of copies for the sole purpose of the personal practice, study, or use of the person who makes the copies or orders the copies to be made exclusively for himself."

Article 16(b) conforms to the traditional concept of a private use exemption in that neither prior permission from, nor payment to, the copyright holder is required for private non-commercial reproduction and use. Interestingly, Article 16(b) broadens the traditional notion of private use by allowing reproduction to be done by third parties "on order." Article 16(b) paragraph 4, however, states that "reproduction made to order shall *not* apply to reproduction made by recording a work or a part thereof on an article intended for causing the work to be *heard or seen.*" [emphasis added] Article 16(b) paragraph 4 thus confirms that private audio and visual copies made by the individual for his own use is permitted (under 16(b) paragraph 1) but that the broadened "on order" clause does not include audio and visual reproductions.

In the Netherlands, therefore, under Article 16(b), home videore-

[61] Whitford Rpt., *supra* note 7 at 77.

[62] *Id.*, at para. 303.

[63] Clear non-copyright infringing uses include the viewing of pre-packaged tapes and the recording of either non-copyrighted works or copyrighted works for which recording consent, express or implied, is given (e.g., some educational broadcasters want recording to occur. *See* Glover, *supra* note 48 at n. 149).

cording of televised broadcasts would appear to be free of any restriction relating to the need for advance permission from, or payment to, the copyright holders of broadcast material.

The United States: In order to determine the present state of the private use limitation in the United States, and how it applies to home videorecording, both the general revision of the Copyright Law of October 19, 1976 (17 United States Code Annotated Section 101 et seq.) and the evolving case law must be examined.

There is no express mention of a general private use exemption in the copyright statute because of the existence of the "fair-use" limitation in which the concept of private use is incorporated.[64] The 1976 General Revision codified for the first time, in the four factors of Section 107, the rather vague—and non-exhaustive—pre-existing judicial standards of fair use:

> "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit education purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work."

The U.S. Congress recognised the need to keep the fair-use concept flexible and thus the concept must remain somewhat vague: "Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts."[65]

Universal City Studios, Inc. v. Sony Corp. of America[66] is the first case to have dealt specifically with the home videorecording issue, and thereby to have tested the limits of Section 107. In this case two of the major world copyright holders of televised motion pictures, Universal Studios and Walt Disney Productions (plaintiffs) sued Sony, the manu-

[64] Private use *is* specifically mentioned only in connection with the copyright exceptions for library and archive reproduction. *See* 17 U.S.C.A. Section 108.

[65] The House Comm. on the Judiciary, Copyright Law Revision, Rep. No. 94-1476, 94th Cong., 2nd Sess. (1976) at 65 [hereinafter cited as House Rpt.].

[66] Universal City Studios, Inc. and Walt Disney Productions v. Sony Corp. of America, F. Supp. (S.D. Cal., 1979) (appeal pending) [hereinafter cited as the "*Betamax* case"]. *See* Glover, *supra* note 48 at 251 for a discussion of maufacturers' liability in the U.S.

facturer of the "Betamax" videorecording machine. Universal's complaint asked that Sony be restrained from manufacturing and selling Betamax or Betamax tapes "for use by purchasers thereof to copy or otherwise infringe copyrighted motion pictures owned by plaintiffs."[67]

The plaintiffs' main contentions were that they would suffer great monetary damage if home videorecording of their broadcast copyrighted motion pictures were allowed to continue. Further, the plaintiffs alleged that Sony, as a manufacturer of videorecording equipment (the Betamax), was either a direct or contributory infringer or vicariously liable for the "infringements" by private home video-recording. The defendant (Sony) contended that home copying for home use was not an infringement and, even if it were, the defendant could not be held liable under any theory of infringement or vicarious liability.

The federal district court judge decided the case on the relation between Section 107 and the following fact situation: (1) Home use recording is done by individuals or families in the privacy of their own home for use in their homes. (2) The material copied has been voluntarily sold by the authors for broadcast over the public airwaves to private homes free of charge.

After three years of litigation, five weeks of trial, and, presumably, careful consideration of the extensive briefs by both sides of the case, the judge held that noncommercial home use of material broadcast over the public airwaves does *not* constitute copyright infringement. Such recording is a "fair use" under Section 107:

> "neither the Copyright Act of 1909 ("old Act") nor the revised Act of 1976 ("new Act") gave copyright holders monopoly power over an individual's off-the-air copying in his home for private, non-commercial use".[68]

The judge further held that even if such recording was an infringement the defendants could not be held liable under any theory of direct, contributory, or vicarious infringement.

The case seemed to centre on the fourth factor of Section 107, that is, on the issue of *economic harm* to the copyright holders. The judge found that by the end of 1978, after seven years of sales by other manufacturers of videorecorders, the plaintiffs had experienced no provable harm. "In addition to admitting that there has been no harm to date,

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[67] *Betamax* case, *supra* note 64, judgment at 50.

[68] *Id.* at 4. The court did not decide whether tape duplication, or copying from pay television, was prohibited, nor did the court rule on off-the-air recording by individuals or groups for use *outside* the home.

plaintiffs admit they cannot predict at what date or level of sales the expected harm will occur."[69]

Any possible future economic harm, the judge further held, could be compensated for satisfactorily by methods using the market mechanism. The entertainment industry has proved resilient to changes in market practices from other technological inventions, e.g. television itself and now cable television, and "while securing compensation to holders of copyrights was an essential purpose of the Act, freezing existing economic arrangements for doing so was not".[70] The judge went on to state that "the Betamax and other technological advances will undoubtedly change the industry and introduce new considerations into plaintiffs' marketing considerations. Copyright law, however, does not protect authors from change or new considerations in the marketing of their products."[71]

Home videorecording, therefore, has been declared a fair use of broadcast copyrighted programmes in the United States.[72] The traditional concept of a private use exemption not requiring either permission or payment has been followed. This decision in the *Betamax* case is a very important development in that the United States produces more programmes and films for broadcasting via television, and has more television receivers (98,600,000 estimated in use in 1972), than any other nation in the world.[73] Furthermore, it is the world's leading exporter of televised programming. It thus seems quite likely that this decision in the *Betamax* case could have great influence on the developing law in this area *outside* of the United States.

2. International Law

The Berne Convention: The concept of a full-blown private use exemption really made its first express appearance in the Stockholm revision in Article 9(2):

"It shall be a matter for legislation in the countries of the Union

[69] *Id.* at 86.

[70] *Id.* at 55, quoting the Supreme Court in Teleprompter Corp. v. C.B.S., Inc., 415 U.S. 394, 414 n. 15 (1974).

[71] *Id.*

[72] The case law on this topic could change if the plaintiffs in the *Betamax* case appeal successfully. But home videorecording could be declared *legal* as an exemption rather than a fair use by a higher court or if Congress passes new legislation. *See* Glover, *supra* note 48, at 245, The Case for a Home Recording Exception.

[73] *See* WORLD COMMUNICATIONS: A 200-COUNTRY SURVEY OF PRESS, RADIO, TELEVISION, AND FILM. UNESCO (1975) at 199.

> to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."[74]

The vagueness of the wording in Article 9(2) obviously allows for a wide range of domestic law interpretation.[75] For example, do the words "normal exploitation" mean just traditional marketing outlets for a copyright holder's works, or include new and developing markets such as videorecording? Do the words "not unreasonably prejudice the legitimate interests of the author" mean that a State may *reasonably* prejudice a copyright holder's interests and thus this last sentence of Article 9(2) is meant as a substantial modifier in order to understand the meaning of the term "normal exploitation"?

The questions offered above are not answered by a reading of the Berne text. As to the question of how private use is affected by Article 9(2), it was noted by the combined subcommittee on video-cassettes of the Berne and Universal Copyright Conventions that "the international Conventions did not contain any provisions which expressly forbade private use as such, and that it could be deduced that such use was tolerated."[76] Therefore it seems likely, given the existence of a private use limitation in most member countries of the Convention, that home videorecording, which, as has been discovered above, falls within the private use limitation in Germany, the United States, and the Netherlands, is *not* an infringement of copyrighted works, but is a permitted "special case" under the Berne Convention's Article 9(2).

The Universal Copyright Convention: This Convention, like the Berne Convention, states no express limitation, for private use, on a copyright holder's right of reproduction. However, reasonable interpretation of Articles I and IV *bis* (2) leads to the conclusion that an exception for private use can be validly made in the domestic copyright laws of the Member States.

Article I requires every "Contracting State . . . to provide for the adequate and effective protection of the rights of authors and other

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[74] While the older Brussels revision contained limitations for the press (Art. 9) and educational or scientific uses (Art. 10), the only general private use limitation appeared to be for short quotations from newspapers and periodicals (Art. 10(1)).

[75] *See* Klaver, *supra* note 21 at 168, who states that Article 9(2)'s wording "allows national legislation considerable freedom of action".

[76] Subcommittee, *supra* note 19 at 8 para. 29. But the Subcommittee felt that copyright holders did suffer a loss. *See* Section C of this article, *infra*.

copyright proprietors. . . ." As Bogsch has rightly noted, "the word "effective" does not seem to add much to 'adequate' since an ineffective protection could hardly be considered adequate".[77] The Report of the 1952 Conference which adopted the Convention stated that the *rights* to be protected should be those "recognised in civilized countries" and include at least the rights of reproduction, adaptation, and public performance.[78] As to the "adequacy" of the protection, while this language is general, if not vague, it must be assumed that generally *some* right of control or of compensation would be needed to meet the "adequate and effective" requirement of Article I.

At the Paris revision of 1971 some attempt was made to clarify the rights, and exceptions to a copyright proprietor's rights, under the Convention. In Article IV *bis* (1) the broadcasting right was included, along with the rights mentioned above, in the Convention text. Article IV *bis* (2) now contains important language regarding copyright limitations: "However, any Contracting State may, by its domestic legislation, make exceptions that do not conflict with the spirit and provisions of this Convention. . . ." That a private use exception is permissible is the only logical conclusion which can reasonably be drawn from this language because the major "civilized" States which developed the Universal Convention did, at the time of its creation, and still do, maintain private use exceptions within their domestic copyright laws.[79] Thus, reasonable interpretation of this clause can only lead to the conclusion that an exception for home videorecording, if declared a valid private use, can be made in the domestic legislation of the Member States of the Universal Copyright Convention.

Private Use—Conclusion: Under the Berne and Universal Copyright Conventions (Articles 9(2) and IV *bis* (2) respectively) a contracting State may provide for private use exemptions from copyright liability without violating the Articles of either multilateral Convention. It would appear that either a traditional private use limitation, i.e., requiring no prior authorisation nor payment for private non-commercial use, or a system whereby prior consent is not needed but compensation is required, e.g., West Germany, would be equally acceptable under the letter and spirit of the international Conventions.

As for home videorecording, it is up to each contracting State to determine if this activity should be placed under the rubric of a private

[77] BOGSCH, *supra* note 55 at 5.

[78] *Id.* at 5, 6.

[79] *E.g.* the United States, United Kingdom, and the Federal Republic of Germany. *See* BOGSCH, *supra* note 55 under domestic law sections; and Klaver, *supra* note 21, at 169.

use exemption. It has been discovered above that, while the United Kingdom is as yet undecided, the Federal Republic of Germany, the Netherlands, and the United States have placed home videorecording within a private use category. A serious question remains, however, as to whether a Member State *should* require payment to copyright holders for the unauthorised use of their televised copyrighted material by home videorecording. This issue will be analysed in Section IV of this article.

B. Educational Use Limitations on the Exclusive Rights of Copyright Holders

1. Domestic Copyright Laws: A Survey

The United Kingdom: While certain exceptions to the exclusive rights of copyright holders for the benefit of primary and secondary schools exist in Section 41 of the Copyright Act of 1956, no exception appears for the specific use of videorecorded broadcasts.

As with the home videorecording problem, commentators on British educational exceptions have been confused by the distinction between the Copyright Act's so-called Part I and Part II works, e.g., both Professor Dietz and Professor Klaver would apply Section 41 to the educational recording problem.[80] However, the exceptions for education found within Section 41, like the fair dealing provisions of Sections 6 and 9, are restricted to Part I literary, dramatic, musical, or artistic works only. Audio-visual programmes, like televised films, are Part II works and as such do *not* fall within the possible Section 41 exceptions for educational use.[81]

The BBC has apparently negotiated certain special licences for educational off-the-air recording of specific educational programmes.[82] The British Council for Educational Technology, however, has stated that negotiating such licences under the present law is "exceptionally difficult," due to the complexity of the situation, and has urged new legislation in this area including an extension of the fair dealing pro-

[80] *See* DIETZ, *supra* note 4 at 143, where he states that, under Section 41, the videorecording of televised broadcasts for educational purposes remains an open question of law; and *see* Klaver, *supra* note 21 at 174–5, where she suggests that the language *of* Section 41 seems to preclude any educational videorecording exception.

[81] Whitford Rpt. *supra* note 7 at 75–76.

[82] *Id.* at 76. These licences "allow schools and colleges and certain other educational establishments to make recordings, for instructional purposes only, under closely defined conditions, the most important of which specify where and by whom the recordings may be made and for how long they may be retained (in no case longer than three years)."

visions to "all categories of materials," i.e. Part II works.[83]

The "Whitford Report" on British Copyright and Designs Law has also made recommendations for new legislation to deal with the problem of educational off-the-air videorecording; these suggestions will be examined *infra* in the discussion of flat-fee levies and blanket licensing. At the moment, however, unauthorised videorecording, even though for noncommercial educational purposes, would appear to be an infringement of the copyright holder's rights under Section 13(5)(a) and (b) of the Copyright Act of the United Kingdom.[84]

The Federal Republic of Germany: In Article 47(1) of the German Copyright Statute, schools and institutions for teacher training and advanced training are given permission to make visual and/or sound recordings of school broadcasts for use in teaching. This appears to be a rather broad exception from copyright liability due, in part, to "schools" being defined as including residential educational institutions.[85] What remains unclear is the breadth of the definition of a "school broadcast." While there is some indication that a school broadcast means any televised broadcast of educational interest,[86] it may be that only programmes specifically directed to a school audience are included in Article 47, which would of course greatly limit the use of this exception.

The copyright holder's rights are taken into consideration in paragraph (2) of Article 47 which allows unauthorised "free" use of a protected work only for the current school year, after which some compensation (how much, and by what method, are questions left open by Article 47) must be paid to the copyright holder *if* the recording is to be kept. Article 47(2) reads:

> "The visual or sound records may be used only for instructional purposes. They must be destroyed not later than the end of the then current school year, unless an equitable remuneration has been paid to the author."

Thus it is clear that in Germany educational videorecording of at

[83] *Id.* at 80.

[84] That is unless educational use is held to fall within the "private purposes" exception to the Section 14 broadcaster's right; but this possibility seems slight—*see* text at notes 53–56, *supra*. Section 13(5) reads: "The acts restricted by the copyright in a cinematograph film are—(a) making a copy of the film; (b) causing the film . . . to be seen in public . . . [and/or] to be heard in public. . . ."

[85] *See* DIETZ, *supra* note 4 at 143, "residential educational establishments may make sound or video recordings of school broadcasts for use in teaching."

[86] *See, e.g.*, Klaver, *supra* note 21 at 174, 175 and DIETZ, supra note 4 at 143.

least certain types of televised material is recognised as falling under a statutory limitation on the copyright holder's rights. Prior authorisation is never required under Article 47, while compensation is required *only* if the video-copy is to be kept longer than the current school year.

The Netherlands: There is no special provision in the Dutch Copyright Law to deal with educational off-the-air videorecording. Article 14 states that "the reproduction of a . . . work shall be understood to mean also the recording of all or part of the work on an article intended for causing a work to be seen or heard." It appears that even though a private use exemption to Article 14 exists under Article 16(b) (as discussed under "Private Use"), educational videorecording nevertheless would seem to be an infringement of Article 14 as the 16(b) exemption applies only to "personal" study.

Although it is possible that "personal" study could be broadened by the Dutch courts to include a limited educational exception, this approach is highly unlikely given the recent amendment on reprographic reproduction to the Netherlands Copyright Act. This amendment, entitled the "Decree Concerning the Reproduction of Copyrighted Works," was enacted in response to the problem of commercial and educational photocopying of copyrighted written materials.[87] A blanket licensing system requiring compensation (in exchange for not requiring prior authorisation) for photocopies made *beyond* the Article 16(b) personal use exemption was made effective as of January 1975. The rates of payment are 0.10 florins per page, of beyond Article 16(b) exempted material, for higher educational establishments and libraries, and a rate of 0.25 florins per page for schools.[88]

The trend in the Netherlands as to educational exceptions to copyright would, therefore, given the response to the analogous problem of photocopying, appear to be toward a blanket licensing approach rather than an expanded personal use exemption to solve the problem of educational off-the-air videorecording.

The United States: The present status of educational off-the-air videorecording remains unclear in the United States. The *Betamax* decision was limited specifically to declaring only home videorecording to be a fair use, the problem of educational videorecording not being addressed in that case.[89]

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[87] CLTW *supra* note 11 at Netherlands: ITEM 1A; a study in the Netherlands indicates that, of the works photocopied in educational establishments, about 25% are copyrighted.

[88] *Id. Cf.* Whitford Rpt. *supra* note 7 at 60 where it is stated that a "special rate of 0.025 Guilders is laid down for schools."

[89] *Betamax* case, *supra* note 66 at 4 and *supra* note 68.

The general revision law of 1976 codified three important limitations to a copyright holder's exclusive rights which are applicable to educational reproductions in general: (1) fair use (Section 107), (2) the library and archive exceptions (Section 108), and (3) the exemption for certain performances and displays (Section 110). Of especial interest to analysis of the legality of educational videorecording are the sections on fair use and performances.

The four factors of Section 107 (given *supra*) were created largely with educational uses in mind. Guidelines were also developed which set minimum standards to be followed for educational *photocopying* of books and periodicals; the maximum limit of fair use was left open to be determined on a case-by-case basis.[90] As for videorecording, the House of Representatives' Committee on the Judiciary (the official report on the general revision law) wrote,

> "the problem of off-the-air taping for nonprofit classroom use of copyrighted audiovisual works incorporated in radio and television broadcasts has proved to be difficult to resolve . . . the fair use doctrine has some limited application in this area. . . ."[91]

There is presently a lawsuit in the United States which is in the process of litigating the specific issue of the possible scope of Section 107's applicability to off-the-air educational videorecording. In *Encyclopaedia Britannica Educational Corp. v. Crooks*[92], a Federal District Court has granted a preliminary injunction to the plaintiffs, producers of educational audiovisual works, against the defendants, local government officials who would tape the plaintiffs' works off-the-air, make copies of them, and distribute these copies to the schools. In granting this preliminary relief the court held that the fair use defence did not overcome the plaintiffs' showing of a *prima facie* case of infringement at this stage of the proceedings. The court stated that:

"This case does not involve an isolated instance of a teacher

[90] *See* 17 USCA 107 at 113, "Agreement on Guidelines for Classroom Copying in not-for-profit Educational Institutions: Books and Periodicals."

[91] H.R. 94–1496, 94th Cong., Sess., 71 (1976). At the urging of the pertinent House Judiciary Subcommittee, a wide range of interested parties was brought together for a discussion of the issue in July, 1977 at Airlie House in Virginia. Thereafter, a working group was assembled under the aegis of the Subcommittee in an attempt to develop voluntary guidelines. *See* Hearings on Off Air Taping for Educational Use before Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the Committee on the Judiciary, House of Representatives, 96 Cong., 1st Sess. (March 2, 1979) (Serial No. 6).

[92] 447 F. Supp. 243 (W.D.N.Y. 1978).

> copying copyrighted material for classroom use but concerns a highly organized and systematic program for reproducing videotapes on a massive scale . . . [the defendants] make as many as ten thousand tapes per year. For the last twelve years, these tapes have been distributed throughout Erie County to over one hundred separate schools. Considering all of these factors, I find that the plaintiffs have established a *prima facie* case entitling them to preliminary relief."[93]

Until the court has reached a final decision in this case the scope of Section 107 as applied to educational videorecording must remain uncertain. Nevertheless, the court in granting preliminary relief to the plaintiffs seemed to indicate, in the quote above, that an isolated instance of a teacher copying copyrighted material for classroom use would stand on different ground from this massive programme of systematic reproduction. Thus, spontaneous videorecording by a teacher, of protected material to be used in current learning activity, *could* seemingly fall within the fair use concept of Section 107.

The conclusion that some type of educational off-the-air videorecording is likely to be exempted from copyright liability under Section 107 is strengthened by reference to Section 110, the exemption for certain performances and displays. Under this section, the right of public performance is not infringed by the projection or viewing of a legally made copy of a protected work by a teacher to his or her pupils.[94] The Official Report, commenting on Section 110, has stated that this "exemption would extend to the use of devices for amplifying or reproducing sound and for projecting visual images."[95] Therefore, if a videocopy was made by a teacher legally, i.e., under Section 107, the viewing of this copy by his or her pupils would not constitute an infringement of the public performance right.

The reasoning above, however, is only conjecture; the actual status of educational off-the-air videorecording under the copyright law of the

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[93] *Id.* at 252.

[94] 17 USCA Sec. 110, p. 142. This Section reads, at para. (1):

> "performance or display of a work by instructors or pupils in the course of face to face teaching activities of a non-profit educational institution, in a classroom or similar place devoted to instruction, is not an infringement of copyright, unless, in the case of a motion picture or other audiovisual work, the performance, or display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe that it was not lawfully made."

The Official Report (17 USCA Sec. 110 at 145) states that "face to face teaching" does not require the teacher and students to see each other—they must only be in the "same general place".

[95] *Id.* at 145.

United States is still an open question.

2. The International Conventions

The Berne Convention: Under Article 10(2) of the Convention it is quite clear that reasonable exceptions to the right of reproduction for educational videorecording are permitted to the Member States. Article 10(2) reads as follows:

> "It shall be a matter for legislation in the countries of the Union, and for special agreements existing between them, to permit the utilisation, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, *broadcasts, or sound or visual recordings for teaching,* provided such utilisation is compatible with fair practice [emphasis added]."

Under the general, and undefined, notion of "fair practice" a contracting State seemingly should be able to withdraw the need for prior authorisation, or require compensation for certain utilisations of an otherwise exempted use of a copyrighted work, or not. What is important to recognise is that the Berne Convention does *not* make either condition mandatory; it only requires a reasonable approach to the creation of educational exceptions.

Although a right of public performance is given as an exclusive right in Article 11 it is clear that the teaching exception under Article 10(2) must either modify the "exclusiveness" of the right given in Article 11, or else place the teaching situation outside the definition of "public" performance. Thus, neither the right of reproduction nor the public performance right will be infringed by reasonable domestic legislation granting educational exceptions to these rights under Article 10(2) of the Berne Convention.

The Universal Copyright Convention: No express mention of a general educational exception exists within the text of the Universal Convention.[96] Both the rights of reproduction and public performance are "basic rights" to be protected under Article IV *bis* (1). Nevertheless, under paragraph (2) of Article IV *bis*, contracting States are expressly permitted to "make exceptions that do not conflict with the spirit and provisions of this Convention." All that is required is that a "reasonable degree" of protection still remain for each right to which an exception has been made.[97] Therefore, as with the Berne Convention, the development, or

[96] However, an educational exception directly concerning "audio-visual fixations" for the benefit of developing countries *only* was adopted at the Paris 1971 revision—*see* note 20, *supra.*

[97] CLTW, note 11, *supra,* at Universal Copyright Convention: Item B-1, page 3 under Article IV bis (2).

retention, of reasonable exceptions for non-commercial educational uses, which would include off-the-air videorecordings, would not appear to violate the provisions of the Universal Copyright Convention.

Educational Use—Conclusion: As was seen in the copyright laws of the four representative Member States, each State has taken a different approach to the problem of off-the-air videorecording by educational establishments. Nevertheless, in developing solutions to the problem of educational videorecording, as long as a State retains some reasonable balance between a copyright holder's exclusive rights and the limitations placed on those rights for the good of the community, a State will not be in violation of either multilateral copyright Convention.

Now that some understanding of the present state of the law, on both the international and national planes, has been gained, this inquiry will turn to an examination of the proposed international solutions to the problems of home and educational off-the-air videorecording.

IV. THE POSSIBLE SOLUTIONS: A CRITICIAL ANALYSIS

A. The International Subcommittee Recommendations

In Paris, in the autumn of 1978, the Subcommittee of the Intergovernmental Copyright Committee of the Universal Copyright Convention and the Subcommittee of the Executive Committee of the International Union for the Protection of Literary and Artistic Works (Berne Convention) on the Legal Problems Arising from the Use of Video-Cassettes and Audio-Visual Discs (hereinafter "Subcommittee") met jointly in order to seek solutions which could be offered to the Member States of the Conventions.[98]

The delegates attending this meeting[99] were given for their study

[98] Subcommittee, supra note 19 at 4.

[99] The States and Organizations represented at the Paris meeting are listed below:

"Eight States Members of the Subcommittee of the Executive Committee of the Berne Union (Belgium, Canada, Hungary, Italy, Mexico, Morocco, Switzerland, Tunisia) and eleven States Members of the Subcommittee of the Intergovernmental Copyright Committee of the Universal Copyright Convention (Brazil, France, Israel, Italy, Japan, Mexico, Netherlands, Senegal, Tunisia, United Kingdom, United States of America) were represented at the meetings. Seven States party to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention) (Colombia, Czechoslovakia, Denmark, Ecuador, Luxembourg, Norway, Sweden) were represented.

the Report of the 1977 Geneva Working Group,[100] the comments on this report submitted by various States and concerned organisations and an analysis of the report and the comments by Professor Klaver, together with a list of questions for discussion developed by the professor as consultant to the Secretariats. The Subcommittee, during the general debate, confirmed the conclusions of the 1977 Working Group, which were that off-the-air videorecording:

> "(i) did not call for a revision of the Berne Convention or the Universal Copyright Convention, since the provisions contained in these multilateral Conventions left national legislators enough scope to legislate on the subject in the light of the socio-economic context of their own countries; (ii) did not necessitate the preparation of a new international instrument . . . ; (iii) required, however, the establishment of a typology of specific situations, with their legal implications, and a list of considerations which could serve as a basis for solutions that would make it possible to alleviate the consequences of the development of new techniques in the audio-visual field."[101]

The Subcommittee "forcefully stressed" the urgency of the need to find solutions to the problems of private and educational off-the-air videorecording "in light of the considerable harm already suffered" by copyright holders due to the practice of videorecording.[102] It is unfortunate that the evidence of this supposed harm was *not* included in the Subcommittee's report, if indeed any evidence existed beyond the ge-

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Two intergovernmental organisations (International Labour Office (ILO), Arab Educational, Cultural and Scientific Organisation (ALECSO) and thirteen international non-governmental organisations (European Broadcasting Union (EBU), International Bureau of the Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM), International Confederation of Professional and Intellectual Workers (CITI), International Confederation of Societies of Authors and Composers (CISAC), International Federation of Actors (FIA), International Federation of Film Producers' Associations (FIAPF), International Federation of Musicians (FIM), International Federation of Producers of Phonograms and Videograms (IFPI), International Literary and Artistic Association (ALAI), International Music Council (IMC), International Writers Guild (IWG), Internationale Gesellschaft für Urheberrecht (INTERGU)) were represented by observers. Professor Franca Klaver, of the University of Amsterdam, also attended the meeting as a consultant to the Secretariats."

[100] Working group, *supra* note 2.

[101] Subcommittee, *supra* note 19 at 6.

[102] *Id.*

neralised opinions of certain delegates.[103] Nevertheless, the Subcommittee went on to point out that not only would copyright holders be harmed by this new dissemination technique but the phonographic industry, the cinematographic industry, and television organisations would all be adversely affected by videorecording.

The forecasts of the Subcommittee were

> "regarded as alarming, in particular because markets might suffer or even disappear through a decrease in sales and the difficulty of amortizing products, which were bound to result from the gradual replacement of other dissemination processes by cassettes and audio-visual discs . . . endless multiplication of recording capacity might jeopardize the legitimate income of the creators . . . and consequently intellectual creation itself."[104]

The above quotation starkly illuminates the Subcommittee's basic perspective on off-the-air videorecording: a rather xenophobic reaction to possible marketing shifts which could disturb the *status quo* of the communications industry. It should be kept in mind that the copyright laws were created to protect the legitimate interests of the creators of intellectual works, and thereby to encourage further creations to society's benefit. However, the copyright laws were not created to *freeze* the existing economic arrangements for securing compensation to the holders of copyrights. Testimony given during the *Betamax* trial revealed that off-the-air videorecording may require adjustments in marketing strategy, but it did not establish even a likelihood of harm; nor did the testimony invoke concern that denial of "monopoly" power over home use recording would significantly dissuade authors and producers from creating audio-visual material for television:

> "[P]eople that [sic] have constantly forecast the doom of a particular industry in the entertainment industry have historically been

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[103] Subcommittee, *supra* note 19, at 6. It is interesting to note that besides the delegates from the Member States, seven States party to the Rome Convention (for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations) were represented; further, the representatives of thirteen international non-governmental organisations were present, none of whom apparently represented the views of educators or private users. It seems unlikely that any formal proof of harm was presented, for if such real proof of harm did exist surely Universal Studios or Walt Disney would have discovered it during the three years of litigation in the United States (where no proof of harm was discovered in the *Betamax* case).

[104] Subcommittee, *supra* note 19 at 6.

> wrong. . . . They forecast the doom of radio stations when television developed on the horizon. Radio stations are more profitable today than they have ever been."[105]

The Subcommittee, however, approached private and educational use with the *assumption* that real economic harm was being incurred by copyright holders and that this "harm" would get worse as videorecording became increasingly widespread. While the view was expressed that certain videorecordings might not be considered as conflicting with a "normal exploitation" of a copyrighted work (Article 9(2) of the Berne Convention), such as non-commercial videorecordings made in the home, "the Subcommittee considered that the owners of the rights did in every case suffer a loss which, if it could not be avoided, should at least be mitigated".[106]

The Subcommittee's reasoning led them to conclude that what the situation required was a flat-fee tax, such as the West German system, on both videorecording equipment and blank tapes, coupled, possibly, with compulsory blanket-licences for educational uses, all on a massive global scale.[107] The Subcommittee

> "emphasized that this charge was not to be considered as a tax or para-fiscal levy, but as compensation due to the owners of exclusive rights to off-set their inability to exercise such rights".[108]

It is clear, however, as analysis of both international Conventions has shown, that home and educational videorecording can fall within established exceptions to the exclusive rights of copyright holders and thus there exists no legal obligation for compensation under either multinational copyright Convention.[109]

But the fact remains that this influential international Subcommittee has recommended that a world-wide compensation system be developed

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[105] *Betamax* case, *supra* note 66 at 97. Testimony of Mr. Lewis Wasserman, Chairman of MCA, one of the top U.S. firms in the entertainment industry.

[106] Subcommittee. *supra* note 19 at 8.

[107] *Id.* at 12, 13. The Subcommittee left open a full recommendation for compulsory licences for educational use allowing for the play of exceptions such as fair use in this area, while not in the private use area.

[108] *Id.* at 8.

[109] If the Subcommittee's view of this matter were held to be the correct interpretation of the law under the international copyright conventions, both the United States and the Netherlands would presently be in violation of their international commitments as both States allow private use exemptions without providing for compensation to copyright holders.

by the Member States of both copyright Conventions. Therefore, this proposal must be examined.

Legislatively Created "Flat-Fee" Compensation Systems: Private Use

While the Subcommittee had not yet researched even the complexities of the West German system, let alone the many difficulties inherent in the development of a global system, before it proposed the development of such a compensation system,[110] the inner workings of a flat-fee system must, nevertheless, be understood *before* it is possible to determine its viability as a solution to the problem of off-the-air videorecording. There are four basic variables to be examined when analysing a compensation system such as the one recommended by the Subcommittee: the feasibility of enforcement, tax rate determination, collection procedures, and the distribution system.

Enforcement: The strongest factor in favour of a flat-fee system, for States which rule that private videorecording is an infringing activity, is its defusing of the massive enforcement problem. That is, *if* private videorecording were declared an infringement of copyright in a particular State, the enforcement of that ruling would probably be a nearly impossible task for the effort and expense necessary to locate and sue the thousands of individuals videorecording in their homes would be prohibitive.[111]

Under the flat-fee system, however, the copyright holders of televised material would give to the public a "blanket" licence to make videorecordings off-the-air, for private use, in exchange for the surcharge on the videorecording equipment. Thus the "infringing" activity would become, in effect, "licenced" activity and the need to police non-commercial home videorecording would vanish. The enforcement of this flat-fee collection and distribution system—i.e., the institution of lawsuits,

[110] The Subcommittee, *after* recommending this world-wide compensation system based upon the German system, called upon UNESCO and the World Intellectual Property Organisation (WIPO) to "collect all possible information on the way in which the system established by the abovementioned law of the Federal Republic of Germany was currently being applied. . . ." (*See* Subcommittee, *supra* note 19 at 9.) It would seem that this research should have been done *before* any proposal was developed, let alone recommended, but the Subcommittee apparently felt otherwise.

[111] *See* Glover, *supra* note 48 at 256 and n. 162, quoting the U.S. Register of Copyrights, who stated

> "I have spoken at a couple of seminars on video cassettes lately and this question is usually asked, 'What about home recorders?' The answer I have given and will give again is that this is something you cannot control. You simply cannot control it."

if necessary, and the negotiations with the manufacturers—would then be handled by the same private or governmental, or mixed private/governmental, agency which would handle the collection and distribution process.

Tax Rate Determination: The surcharge or levy could be set by the State, subject to revision if necessary, or agreed upon through negotiation between the collecting agency and the manufacturers. Perhaps the most equitable and workable method would be for the State to set a ceiling on the percentage of the manufacturer's total yearly sales which the claims for compensation could not exceed.[112] The manufacturers and the collection agency could then negotiate the surcharge rate within the bounds set by the State in its copyright statute or promulgated thereunder. In this manner an equitable charge might be developed which would not be unfairly burdensome on the manufacturers.[113]

Collection: Under this proposed "flat-fee" type system,[114] payment would be made not on the basis of copyright "infringing" recordings actually made, but by a levy or surcharge on the sale of every videorecorder. Collection of the surcharge, placed upon the original purchase price of the recording equipment, from the manufacturers,[115] could be accomplished by a private, mixed private and governmental, or governmental collection agency.

Distribution: The most serious problem inherent within a flat-fee compensation system is the inaccuracy involved in distributing the revenue collected.[116] Therefore, the key to a reasonably accurate flat-fee distri-

[112] *See* the F.R.G. Copyright Statute, Article 53(5), CLTW, *supra* note 11 under Germany (Federal Republic of). By dealing with lump sum amounts, rather than a per-machine levy rate, some of the difficulties of sales estimation are removed from the negotiations, while the statutory claim ceiling could keep the negotiations within reasonable bounds.

[113] It would be quite unfair to overburden the manufacturers since their machines are used for many non-infringing purposes (e.g., the playing of copyright licenced pre-packaged video-tapes) and are not responsible for any true infringing activity done by the user.

[114] A "per use" system, the only other approach to a compensation scheme, would not be possible as a viable alternative to a flat-fee system to deal with *home* videorecording. A per use collection system would require the public to record each copy made and then collect payment for each recording—clearly an impossible enforcement-collection task.

[115] In practice, under the German system, the surcharge is not collected on a per machine basis but as a negotiated lump-sum payment based on total yearly sales—*see* Whitford Rpt., *supra* note 7 at 77.

[116] *See Project, New Technology and the Law of Copyright: Reprography and Computers*, 15 UCLA L. REV. 939 at 973 (1968) [hereinafter cited as Project].

bution system would be a sophisticated sampling technique; for in order to determine what percentage of the total revenues collected a particular copyright holder would be entitled to receive, a general approximation of the amount of recording done by the public of his televised work must be made. Thus the "fairness" of the distribution, based upon a flat-fee system, depends upon constant monitoring of the recording public, or a representative cross section thereof, in order to determine approximately the number of times a particular copyright holder's broadcast works are likely to be videorecorded.

Sampling systems would have to be developed world-wide in order for the Subcommittee's compensation system to even approach some level of accurate distribution. Just to have an approximate idea of which televised programmes are recorded, without attempting to count playbacks, a sampling system, possibly similar to the one developed by the A.C. Nielson Co. in the United States, would have to be organised in each contracting State of the International Conventions.

In the United States, the A.C. Nielson Co. places electronic monitors into 1,170 private homes which then feed TV channel selection data to computers; an additional 100,000 families are asked to fill out diaries each week regarding their TV watching—the diary and monitor results are supposedly very consistent with one another.[117] It thus seems possible, if not very probable, that sophisticated sampling techniques could be developed in each State which would give a rough idea which programmes were copied and would then provide the framework for a reasonably fair distribution of the collected revenues.

Blank Tape Tax: The Subcommittee also recommended that a surcharge placed on the material supports (blank videotapes), along with the levy on the videorecorder itself, would provide the best compensation for the "prejudice" caused by private videorecording.[118] While Austria has passed legislation on a blank tape levy,[119] both the West German Parliament and the British Whitford Committee have rejected such a proposal:[120]

> "The possibility of imposing a levy on blank tape, either as an alternative to or as an addition to a levy on equipment, was con-

[117] Elsner, *Keeping Track: A.C. Nielsen Co. Does More than Rate TV Shows*, Wall St. J., Aug. 2, 1976 at 1, col. 1. The Nielsen meter service only credits recording, not playback of video-copies, but the Nielsen diary activity does tabulate the playbacks.

[118] Subcommitte, *supra* note 19 at 9 and 12.

[119] Copyright Amendment Law, 1980. (No. 321 of July 2, 1980).

[120] Whitford Rpt., *supra* note 7 at 77.

sidered by a number of bodies and almost universally rejected as being unsatisfactory."[121]

In theory a surcharge on the sale of blank tape would reflect more accurately actual off-the-air reproduction, although still without any differentiation between copyright protected material and unprotected or exempted broadcasts. A surcharge on the material supports *alone* would probably fail to generate sufficient revenue due to the relatively small value of the tapes and the fact that blank video-tapes can be erased and re-used. To surcharge both the videorecording equipment *and* the material supports would entail a much larger and more complex operation, adding more difficulties to a system already complicated enough.

It would thus seem that a flat-fee collection and distribution system could be developed, at least as far as a State by State levy on the recording equipment is concerned. But just to show that the development of such a system is feasible does not show that it is desirable. It is indeed difficult to believe that the *need* for declaring private videorecording an infringement of copyright is sufficiently great to warrant the considerable costs and complexities that would be involved.[122] Therefore, after another look at the West German system, we will turn to the question of whether there is sufficient need for off-the-air videorecording to be declared an infringement of copyright.

The West German System—Private Videorecording

As mentioned before, under Article 53(5) of the German Copyright Act of 1965, *private* videorecording is controlled by a flat-fee compensation system, which is the model system for the Subcommittee's recommendations. In the German system the tax rate is determined through negotiations between the collecting society and the manufacturers with a statutory ceiling placed at five per cent of the manufacturer's total yearly sales. Collection is handled by a joint collecting society, Zentralshelle für Privat Überspielungerecht (ZPÜ), formed by three preexisting

[121] *Id.* at 78.

[122] The costs of developing and running the needed sampling system added to the continuing administrative costs of the compensation system will demand a large percentage of the revenues collected. For example, ASCAP (a music clearinghouse for licensing broadcast music in the U.S.A) expended 9 million dollars *just for collection costs* in 1967, to collect domestic revenues of 49 million dollars. *See* Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programmes*, 84 HARV. L. REV 281 at 332 (1970). The West German levy system, on both audio and video recorders, collected only DM 13 million in 1973 of which, besides copyright holders, authors, performing artists, and producers share in the revenue. Whitford Rpt., *supra* note 7 at 77.

collection societies representing composers, lyric writers, performers, and producers, among others.[123] At least one of the collection societies takes its share of the collected levy revenue and adds this money to its income from its other sources to be distributed by its usual method.[124]

Controversial copyright legislation, such as this West German system, is difficult to enact and the problems inherent in such regulation are many and complex. First, the use of a flat-fee system destroys any attempted application of the fair-use doctrine by placing a mandatory tax on the purchase of the machine rather than on the use to which the machine is put. Second, machine purchasers using the videorecorder in clearly non-infringing ways would be forced to pay a tax for the benefit of the copyright holders.[125] Third, the German collection society has had difficulties in obtaining accurate data on the manufacturers' turnover of recording machines and the copyright holders have complained that their return from the levy is too low.)[126] Fourth, there are the substantial difficulties engendered by the flat-fee collection system due to the inherent problems involved in a fair distribution of the monies collected.

Therefore, surely before adopting the Subcommittee's views, a substantial showing should be made that this difficult and expensive flat-fee system is in fact needed to protect the holders of copyrights in broadcasted programmes.

B. The Assumptions vs. the Reality: A Pragmatic Approach to the Economic Impact of Private Videorecording

"This is really a battle of money, not principle."[127]

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[123] Whitford Rpt. *supra* note 7 at 77.

[124] *Id.*

[125] *E.g.*, the playing of pre-packaged video-tapes and homemade video movies, plus the off-the-air recording of non-separately copyrighted broadcasts or copyright works for which recording consent is given. As to the latter point, some educational broadcasters, for instance, *want* recording to occur. Interview with D.C. Dunlevy, Counsel for Sony in the *Betamax* case, in Los Angeles, June 22, 1978.

[126] *See* DIETZ, *supra* note 4 at 120. Dietz states that

> "A certain weakness of this arrangement [the German system] is the fact that the legislator has not laid down a precise percentage for this compensation but has only specified that the total of the compensation claims of all parties entitled thereto (including, in addition to the authors, the performing artists, the producers of phonograms and of films) must not exceed 5% of the manufacturer's sales proceeds."

Id. at 119. *See* note 122, *supra.*

[127] Project, *supra* note 112 at 961. *See also* DIETZ, *supra* note 4 at 138, who states, "the ultimate question here, too, is the author's financial participation in the exploitation of his work."

From the economic viewpoint, the relevant question becomes whether, and to what extent, home videorecordings cause financial harm to the copyright holders of those recorded programmes. In this matter it is useful to examine the typical arguments of copyright holders. Home videorecording of copyrighted programmes, they argue, will have a great adverse economic effect on the entertainment industry as a whole and on copyright holders in particular. As more and more of the public record their favourite shows, it will become increasingly difficult to persuade broadcasters to pay to rebroadcast or to get advertisers, for commercial TV, to pay for repeat showings to a shrinking market. Moreover, with the development of the various types of pre-recorded pre-packaged video-tape cassettes for home use,[128] the copyright holders' market will be reduced in direct relation to the amount of recording done of those programmes by home recorders.

Holders of copyrights in televised material, taking the broad view of the problem, fear an adverse economic ripple effect on the whole entertainment industry if home videorecording is allowed to grow.[129] The unique residual-rights payment structure of the commercial television industry is intimately connected with the repeat showing of movies and television programmes.[130] Therefore, should the number of re-runs of a programme be significantly reduced or should there be a reduction in the number of programmes produced, the income of the actors, producers, and others involved may also be drastically affected, thereby forcing many to leave the field altogether and causing a creative slump in the industry.[131] Frequently a very popular motion picture's production of revenue, through continued repeat showings, will allow a studio to produce other programmes of questionable economic return. Thus, the protection of revenues earned by a popular film also protects the continued development of non-cost effective creative or controversial films.[132]

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[128] *See* Newsweek, April 3, 1978 at 85, which stated that there were already over 1,000 pre-recorded tapes on the market.

[129] Subcommittee, *supra* note 19 at 6.

[130] *See* Gilbert, *"Residual Rights" Established by Collective Bargaining in Television and Radio,* 23 LAW AND CONTEMP. PROB. 102, 103 (1958). Under this concept of "residual rights" each time a movie, for example, is broadcast via television, the performers in that movie (if required by contract) receive certain "residual" fees.

[131] *See generally,* Memorandum Opinion in the Matter of Network Television Broadcasting, 25 Federal Communications Commission 2d. 318 at 330 (1970 U.S.A.), where the Commission stated that independent television producers "must look to subsequent syndication of the series to make them whole and provide a profit."

[132] These arguments may strike the reader as similar to arguments advanced by

If taken at face value this general argument against home video-recording might be persuasive, for it has "indeed a captivating sound; it strikes the passions with a winning address."[133] However, the question which must be asked is whether these fears of economic injury *to copyright holders* have a substantial basis in probability and fact or whether they are based upon the unfounded conjecture of possibly biased parties.

Economic Relationships

Commercial television, such as the IBA in Britain (ITV until 1973) or the commercial channels in Europe and the United States, is financed through complex economic inter-relationships between the broadcasters, copyright holders, advertisers, and the viewing public:

> "Unlike propagators of other copyrighted material, such as those who sell books, perform live dramatic productions, or project motion pictures to live audiences, holders of copyrights for television programs or their licensees are not paid directly by those who ultimately enjoy the publication of the material—that is, the television viewers—but by advertisers who use the drawing power of the copyrighted material to promote their goods and services. Such advertisers typically pay the broadcasters a fee for each transmission of an advertisement based on an estimate of the expected number and characteristics of the viewers who will watch the program. While, as members of the general public, the viewers indirectly pay for the privilege of viewing copyrighted material through increased prices for the goods and services of the advertisers, they are not involved in a direct economic relationship with the copyright holders or their licensees."[134]

It is, therefore, the ability of the copyright protected material,

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the copyright holders of books and periodicals against machine photocopying. Photocopying, or as the field is called "reprography," poses a difficult problem for copyright law and has been under international study since at least 1961. Two excellent, though opposing, viewpoints on the copyright problems of reprography can be found in Breyer, *supra* note 122, and in the Whitford Report, *supra* note 7 at 54.

[133] As Judge Yates said in 1769. He went on to say "but it will be found as fallacious as the rest, and equally begs the very question in dispute." Millar v. Taylor, 4 Burrow's Rpts. 2303 at 2359 (1769). Judge Yates was speaking against the copyright holder's arguments for the existence of a common law copyright of perpetual duration in the famous British case.

[134] This quote is from the United States Supreme Court's discussion of the television industry in Teleprompter Corp. v. C.B.S., Inc., 415 U.S. 394, 411 (1974).

through mass audience appeal, to attract advertising to the broadcaster that gives the material its basic economic value. In the United States, for instance, the advertisers' market, i.e., the television viewing public, formed one vast consumer pool of at least 36 million viewers per day in 1977.[135] Obviously, an individual videorecording at home would have at most a *de minimis* adverse economic effect on such a considerable market. Thus, only by guessing at the aggregated effect of a possible large *future* class of home video-copiers could any substantial economic impact even be hypothesised.[136]

As for non-commercial television, Britain's BBC (a non-profit public corporation since 1927), for example, is financed by government grants derived from television licences fixed by Parliament, and cannot accept commercial advertisements.[137] There is also direct government encouragement of the film industry such as annual grants and levies on cinema admissions to help off-set film production costs.[138] With such government involvement in the television and film industry, added to the fact that the British public already pay an annual "levy" for a licence to view the BBC, adverse economic impact from home videorecording would seem even less likely.

Nevertheless, copyright holders predict a wide range of harmful effects from the various uses of off-the-air videorecording. They believe that harm will develop from each of the following specific uses of the videorecorder:

1. *"Time-shifting,"* recording off-the-air while not viewing the programme, then watching the programme and keeping it for a short period of time and finally erasing it.

2. *"Librarying,"* recording off the air and keeping the recorded programme for future viewing.

3. *"Avoiding commercials,"* either by using the pause button function so as not to record the commercials while recording the programme, or by "fast-forwarding" past the commercials when playing the recording back.

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[135] Forbes, Sept. 15, 1977 at 59.

[136] How long it will take before market penetration affects the structure of the television industry is unknown. Given the high cost of the videorecorder, around 800 U.S. dollars, excluding tapes which cost around fifteen to twenty dollars, and the deepening world recession, it seems likely that, at best, it will be quite some time before such a large class develops. At the moment videorecorder sales have not nearly reached a ten per cent market penetration even in the United States. *See* Chew, *Innovations in Video—Nightmare for Networks,* Advertising Age, May 30, 1977 at 3.

[137] World Communications, *supra* note 1 at 462.

[138] *Id.* at 462–466.

Some of these allegedly harmful effects will be immediate, others delayed, but all are based upon the assumption that the public will own and use a very large number of videorecorders.[139]

Surveys of Use

During the summer of 1978 two extensive surveys were made of home videorecording practice in the United States for use during the litigation of the *Betamax* case. Field Research Corporation (Field Research) conducted a survey for the plaintiffs (Universal Studios and Walt Disney) by interviewing over the telephone 805 adults who identified themselves as the family member "most familiar with the use of the videorecorder." Crossley Surveys Inc. (Crossley) conducted the defendants' (Sony's) survey by telephone interviews with 998 individuals who identified themselves as the family member "who uses the videorecorder the most frequently." Some of the findings of these surveys are reprinted below as they help illuminate the discussion of the possible economic effects predicted for the specific uses of home videorecording which will follow.[140]

The Field Research survey

> "found that the average number of cassettes owned by the interviewees was 31.76. 63.9% of these interviewees had less than five cassettes with movies on them and 81.1% had less than five cassettes with television programmes on them."

Crossley's interviewees "reported an average of 25.21 cassettes with material recorded off-the-air."

Time-shifting: Field Research found that "75.4% of the VTR [videotape recorder] owners use their machines to record for time-shifting purposes half or most of the time." Crossley discovered that "96% of the Betamax owners had used the machine to record programmes they otherwise would have missed."

Librarying: When Field Research "asked interviewees how many cassettes were in their library, 55.8% said there were 10 or fewer." Crossley's survey showed that "of the total programmes viewed by interviewees in the past month, 70.4% had been viewed only that one time and for 57.9%, there were no plans for further viewing."

Eliminating commercials: Field Research discovered that "58.3% of the owners eliminate commercials from the recording either 'sometimes',

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[139] *Betamax* case, *supra* note 66 at 86.

[140] *Id.* All following survey quotations are taken from the *Betamax* case opinion at pages 18–20.

'rarely', or 'never'; 56.1% use the fast-forward to pass commercials either 'sometimes', 'rarely', or 'never'." Crossley's survey found that

> "82.4% of the recording done by Betamax owners in the past month was done while they were gone or viewing another channel (and therefore could not use the pause button to eliminate the commercials). 17.6% of the recording was done while viewing, with the pause button being used 8.1% of the time."

While viewing playbacks in the past month, defendants' interviewees "fast-forwarded" through commercials in 24.6% of them.

Crossley's survey also discovered that "81.9% of the interviewees watched the same amount or more of regular television as they did before owning a Betamax. 82.2% reported their frequency of movie-going was unaffected by Betamax."[141]

These surveys do of course only reveal the viewing patterns of the present relatively small group of people using home videorecorders. However, these surveys furnish the basis for an inference that if home videorecording expands significantly in the future, the general viewing and recording habits of this group may remain close to the patterns indicated by the present surveys. Nevertheless, should future changes occur in the viewing patterns of the public, due to home videorecording, further State protection of the copyright holders' interests will be unnecessary as explained in the analysis below on specific uses and marketing shifts.

Analysis of the Specific Uses

Time-Shifting: There are two basic situations in which the public can take advantage of the time-shifting capabilities of the videorecorder: first, they can record a programme while watching a different programme on another channel;[142] second, they can record a programme they otherwise would have missed if they are not at home during the broadcast. It is clear that what time-shifting really does is allow increased individual control over televised audio-visual experiences, and, conversely, decrease the broadcasters' iron-fist control over the viewing habits of the general public.

That this loss of control *by the broadcaster* over the viewing patterns

[141] *Id.* at 18–20.

[142] Under the concept of "counter-programming" different television channels broadcast popular films and programmes during the same time-period as other channels broadcast different high interest programmes—thus the networks force a viewing choice, unless a videorecorder is used.

of the videorecorder-owning public will cause economic harm to the copyright holder is difficult to accept. The assumption is that the watching of video-tapes will decrease "broadcast" television viewing and thus upset the audience drawing power of the broadcast programme to the copyright holder's detriment.[143] There is no factual basis for this assumption. The Crossley survey, for example, did not indicate any change in the broadcast television viewing patterns of the owners of videorecorders. It is reasonable to assume, however, that a videorecorder owner might watch his video-copies when there is nothing on broadcast television he wishes to see.

The copyright holders and their licencees fear that the market for programme "re-runs" on *commercial television* will be adversely affected by time-shifting.[144] The assumption is that with each recording of a televised programme more viewers would refuse to see that particular programme if it is later re-broadcast; the larger this "original" audience is, the fewer viewers a later broadcast will attract. But, paradoxically, the re-run marketing practices of the industry are based on quite the opposite proposition: "Today, the larger the audience for the original telecast, the higher the price the [copyright holders] can demand from the broadcasters for re-run rights."[145] So it would seem that if videorecording becomes very widespread, and can be accounted for in the rating surveys,[146] this increase in total audience size would actually *help* the copyright holder to earn higher fees from the broadcaster.

As to the possible economic impact on a post-television broadcast re-release of a copyrighted film, there is no evidence to show that home videorecording would cause a lowering of the licence fee (already affected due to the film's prior TV broadcast) between the copyright holder and the cinema distributor. Given all these points it is thus understandable why the court ruled in the *Betamax* case that:

> "Harm from time-shifting is speculative and, at best, minimal . . . it is not implausible that benefits could also accrue to plaintiffs [co-

[143] With commercial television, the lower the audience size the less advertisers pay to the broadcaster, who, in turn, pays less to the copyright holder for the right to broadcast the programme. *See* B. OWEN, J. BEEBE, AND W. MANNING, TELEVISION ECONOMICS 4 (1974).

[144] *See, e.g.*, The Daily Variety, Mar. 10, 1978 at 1, 33 (the newspaper of the entertainment industry in the United States).

[145] *Betamax* case, *supra* note 66 at 90. The court went on to say: "There is no survey within the knowledge of this court to show that the rerun audience is comprised of persons who have not seen the program." *Id.*

[146] *See* note 117, *supra*. A.C. Nielsen has stated that only if home videorecording reaches at least ten per cent penetration of the television market will the surveys be significantly affected. *See* Chew, *supra* note 136 at 3.

pyright holders], broadcasters, and advertisers, as the Betamax makes it possible for more persons to view their broadcasts."[147]

Librarying: Here the assumption is that videorecorder owners will build large video-libraries and thus, as in the time-shifting argument, not watch re-runs of the film on television or in the cinema. But it is unlikely that a significantly large number of videorecorder owners will be able to afford to create an extensive film library (with blank tapes costing approximately 20 U.S. dollars each), added to the fact that neither the Field Research nor the Crossley survey indicates that much librarying is in fact occurring. Furthermore, if, which is unlikely, the post-televised cinema re-release audience attendance is significantly lowered by future large-scale home video-recording, the copyright holders' fee situation should be balanced by the increased audience, and thus increased fee-rates, for the original televised broadcast.[148] These factors, along with the fact that copyright holders have pre-packaged professionally produced video-tapes for sale to compete with the less sophisticated home-made copies, do not indicate that the copyright holder is in any real economic danger from this possible librarying practice.

Avoiding Commercials: This fear is based upon the notion that should enough videorecorder owners edit-out the televised commercials (using the pause control while present at the recording or "fast-forwarding" past them while viewing) advertisers will pay less to the broadcaster who will in turn pay less to the copyright holder. The argument against this use of the videorecorder naturally applies only to commercial television; broadcasts free of advertisements, such as Britain's BBC or the pay TV channels in the United States, would be unaffected by this practice.

The Crossley survey discovered that 92% of the interviewees recorded their programmes with the commercials intact—and only 25% of these individuals later "fast-forwarded" past these advertisements.[149] Not only is this editing activity slight, but it seems reasonable to assume

[147] *Betamax* case, *supra* note 66 at 92. During the trial the plaintiffs (the copyright holders) admitted that time-shifting in itself would result in "not a great deal of harm." *Id.*

[148] The cinema experience is qualitatively different from that of television viewing—as anyone who has seen "Star Wars" on both the "big screen" and a television set can fully appreciate. Nevertheless, *television* has stolen a lot of the cinemas' audience over the last 25 years (*see* Glover, *supra* note 48 at 244). It is important to remember, however, that the copyright laws were *not* created to protect the development or the decline of any particular outlet for a copyright holder's works. While the decline of the traditional cinema theatre has hurt cinema owners, the development of television has been a boon to copyright holders.

[149] *Betamax* case, *supra* note 66 at 94.

that those who do take the time and effort to edit-out commercials are likely not to watch these advertisements during normal television viewing.[150] But really, the question as to who actually *watches* these televised advertisements, while, to be sure, a question of considerable importance to the advertiser, is not a question to be asked of the copyright law.

Marketing Shifts

Because the home video-copy owner does not make multiple copies or distribute them,[151] the potential economic harm to the copyright holder from the uses examined above is minimal at best, occurring, if at all, during the initial change in marketing practices which might be needed if a large future class of video-copiers does indeed develop. Of course, in all likelihood, by the time such a class does develop, the copyright holders should be well protected by new contract agreements with the producers and broadcasters[152] and by their own exploitation of this new class. As the legal adviser for Britain's Performing Rights Society stated, when commenting on the fears expressed by copyright holders over off-the-air home videorecording:

> "a great deal of what has been said, is, I believe, misleading and somewhat hysterical. . . . Of course there are a number of practical problems but most of these, I believe, fall into the area of contract law and business negotiation rather than the field of copyright per se."[153]

Home videorecording may, however, eventually affect the shape of the communications industry as the growth of commercial television has. In the United States, for example, since 1948 commercial television has had a major effect on re-shaping the film industry: "RKO went out of business entirely, Paramount, Warner Bros., United Artists, and Universal were taken over by conglomerates. Others survived by diversifying

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[150] To argue that home videorecording will harm copyright holders due to the possibility of editing out commercials is to argue (absurdly) that television remote control units should be taxed or banned because they allow an individual to turn the sound or picture off during the commercials without leaving his chair.

[151] The making *for sale* of video-copies is, and should of course remain, illegal under the copyright laws. This activity is in direct competition with the copyright holder for the economic fruits of the protected work and is an infringement of copyright whether the video-copies are made in the home or in a clandestine recording studio.

[152] *See* D. deFreitas, *Audio Visual Systems,* 18 BULL. COPY. SOC'Y 304 at 310 (1971).

[153] *See* D. deFreitas, *Authors' Societies vis-a-vis New Techniques,* 20 BULL. COPY. SOC'Y 149 (1972).

into other businesses."[154] Television substantially affected the American publishing business as well:

> "Television also lured advertising away from the great mass-circulation magazines, in time killing *Colliers,* and *Saturday Evening Post, Look,* and finally *Life.* In contrast, magazines aimed at special audiences have flourished."[155]

The holders of copyrights of that past period (as today) had to change their marketing strategies as the possible delivery systems for their works also changed and evolved. In *Teleprompter Corp. v. CBS, Inc.*[156] the United States Supreme Court correctly explained that

> "These shifts in current business and commercial relationships, while of significance with respect to the organisation and growth of the communications industry, simply cannot be controlled by means of litigation based upon copyright legislation."[157]

Conclusion: The International Subcommittee's decision that home videorecording would be an infringement of the copyright holder's rights under the International Copyright Conventions, and its conclusion that a massive world-wide compensation system is therefore needed, is clearly an overreaction to the situation. A large class of home videorecorders has yet to develop and therefore a true picture of its impact must lie in the speculative future. But, while shadowy fears of economic injury beckon us to create a Frankenstein's monster in the shape of a global compensation system, calm reflection, based upon the empirical data presently available, quiets these fears.

Our examination has revealed that home videorecording of televised copyrighted material does not equal economic injury to the copyright holder nor is this practice in violation of either of the two multinational Copyright Conventions. Thus, a global compensation system is simply not needed.

C. Educational Videorecording of Televised Broadcasts

> "It is wise in any state, to encourage letters, and the painful researches of learned men."[158]

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[154] Forbes, Sept. 15, 1977 at 59.
[155] *Id.*
[156] *See Teleprompter, supra* note 134 at 414.
[157] *Id.*
[158] Millar v. Taylor (1769), *supra* note 38 at 2335.

New methods of teaching have developed alongside the evolving reproduction technology. Methods founded on "resource-based learning," the successor to the traditional text-book approach, require the availability of a great variety of material, such as articles from current magazines and professional journals to modern short stories or news reports.[159] The access to such material has been made relatively simple due to the rapid advance of photocopying technology. Further, the development of video-tapes and closed circuit television, for example, has expanded the educator's ability to expose students to much more information and many more learning experiences than had previously been possible.[160]

The ease of reproduction which the new reproduction technology permits has been a Faustian boon to educators. Teachers both have the wish and now possess the ability to reproduce the materials they feel they need; however, at the same time, under the copyright laws, they risk legal action being taken against them for possible infringements of copyright. Copyright holders, on the other hand, fear, and not unreasonably, that the possibility of unlimited off-the-air videorecording by educational establishments, given the considerable size of the educational market, could destroy their profits.

States have had considerable difficulties in formulating new copyright statutes, needed to cope with the growing array of reproduction techniques, which would protect the legitimate interests of copyright holders without unduly hampering the free flow of information, ideas, and artistic achievements so vital to today's educational needs.[161] With the traditional educational exceptions from copyright liability as justification for their position, educators generally have lobbied for the right to reproduce any materials they believe would encourage the intellectual maturity of their students. Although most copyright laws require prior authorisation before a teacher can reproduce a copyrighted work, the act of seeking prior permission is "looked upon as excessively cumbersome and time-consuming . . . the result generally is that either the material is copied illegally or the student is deprived of its use."[162] The

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[159] *See* Whitford Rpt., *supra* note 7 at 79.

[160] A. MacLean, *Education and Copyright Law: An Analysis of the Amended Copyright Revision Bill and Proposals for Statutory Licensing and a Clearinghouse System,* 20 ASCAP COPYRIGHT L. SYMPOSIUM 1 at 2 (1972) [hereinafter cited as Education and Copyright].

[161] *See, e.g.,* Education and Copyright, *supra* note 160 at 22. *See,* Section IIIB Educational Use Limitations, *supra.*

[162] Whitford Rpt. *supra* note 7 at 80. *See* Education and Copyright, *supra* note 160, where the author states, "This factor alone is responsible for many violations of the law which the most creative teachers seem willing to commit."

educators, therefore, have urged a broadening of the traditional exceptions for education while the copyright holders and their licensees have lobbied for greater enforcement of the copyright laws and/or the development of some type of compensation system.

The International Subcommittee's Views

The Subcommittee, wisely, was more cautious in its recommendations relating to the educational use of videorecordings than in relation to the private use problem. The Subcommittee endorsed the view of the 1977 Geneva Working Group that the educational situation with regard to off-the-air videorecording "varied to such an extent from one country to another that it was not possible to formulate any set of uniform guiding principles for the utilisation of videograms for teaching purposes".[163] The Subcommittee did recommend, however, that States strictly delimit educational uses in order to identify clearly the types of recording activity that would involve an exclusive right "or on the contrary do not involve the exercise of these rights (fair-use), or for which a system of compulsory licences might be introduced possibly accompanied by provision for fair remuneration".[164]

States should note, the Subcommittee went on, the special preferential system granted to the developing countries by the 1971 revisions to the Berne and Universal Copyright Conventions; and further, that during the Paris revisions the definitions of the terms "school and university" were framed broadly, including, besides formal education on all levels, "a wide range of organised education activities intended for participation at any age level and devoted to the study of any subject."[165] Thus the Subcommittee indicated that a wide range of possible approaches to the educational use of off-the-air videorecordings was indeed possible under both multilateral copyright Conventions, including either full or limited exemptions, compensation systems, or, on the other hand, even full liability.

The only caveat entered by the Subcommittee on the possible approaches was that the exceptions should not "have an *adverse effect* either on creative activity or on the normal use of videograms."[166] It therefore seems likely that some form of limited exemption, with or without a type of compensation system, is the most feasible approach for the developed

[163] Subcommittee, *supra* note 19 at 10.
[164] *Id.* at 12.
[165] *Id.* at 10 and 12. The special provisions concerning developing countries are found under Article V *quater* 3(b) of the Universal Convention and under Articles I, II, and IV of the Appendix to the Berne Convention.
[166] *Id.* at 10 [emphasis added].

nations; a full liability approach would probably prove unenforceable, while a full exemption, given the large size of the educational market combined with a broad definition of what is educational use, would quite possibly have a significant adverse effect on the copyright holder's sales in this area.

The Whitford Committee Approach

In Britain, the Whitford Report of 1977 recommended that the British Copyright Act of 1956 be amended so as to adopt a blanket licence scheme to meet the needs of both educational establishments and the copyright holders of televised material.[167] The scheme would work in the following manner. *First,* educational institutions would pay an annual licence fee *on top* of an initial levy on the sale of the videorecorder. This licence would be a so-called "blanket" licence, i.e. one that allowed reproduction of any televised work of a copyright holder included in the system *without* the need for prior authorisation. *Second,* a statutory tribunal would collect the fees and distribute this revenue to a collecting society which would, *third,* in turn, distribute the collected funds to the various copyright holders.[168]

The tribunal would act as a clearinghouse for the revenues between the educational establishments and the collecting society; it would have to

> "sell licenses, monitor unlicensed copiers to detect violations, bring infringement actions where piracy is found, make random samples to determine the relative frequency with which works are copied, and distribute the collected income. . . ."[169]

It is difficult to believe that the administrative costs of such a system would not be high indeed. Each school or university might have to keep track of, and report, what recording they were engaged in. The tribunal would have all the various costs attendant on running the complex functions of the compensation system, and, finally, the administrative costs of the copyright holders' collecting society itself would take a last bite of the collected revenues.

Given the inherent costs of the system itself, and tight educational budgets, it would seem unlikely that substantial revenues would be produced.[170] But the fact that the income would not be large does not prove

[167] Whitford Rpt. *supra* note 7 at 82.
[168] *Id.*
[169] *See* Breyer, *supra* note 122 at 332.
[170] *See, e.g.,* text at n. 108, *supra,* for discussion of the workings and probable costs of a compensation system.

that these blanket licence fees would not be harmful. It is very possible that a licence fee high enough to provide adequate revenues would at the same time discourage the growth of educational videorecording, thus depriving students and society at large of the varied benefits of this new teaching aid.[171] Furthermore, to grant a statutory tribunal the authority to set licence fees and supervise the clearinghouse price-scales is asking for continuous disputes over the "fairness" of both the complex workings of the system and the licence fee rates.[172]

The Whitford Committee apparently felt that its novel "incentive" plan would smooth out complaints of unfairness by putting pressure on the copyright holders to join together and offer reasonable licence rates to the educational establishments. The Committee recommended that if, after three years of the adoption of its suggestions, a copyright holders' collecting society had not been formed and had not presented a "suitable blanket licence" (in both works available and fee demands), the "right" to compensation as against educational off-the-air video-recording would lapse, i.e., become unenforceable.[173]

Rather than put pressure on copyright holders to enter into a compensation plan of dubious value (under the threat of a full educational videorecording exemption to copyright liability if the copyright holders do not comply)[174] the Whitford Committee could have approached the situation in a more flexible manner, that is, by way of a limited exemption possibility.

The Case for a Limited Exemption Approach

"When the genius of the nation took a more liberal turn, and

[171] Increased information dissemination which aids both specialised research and general education cannot help but to "spill over" technological and cultural benefits to the general society.

[172] *See* Breyer, *supra* note 122, at 334, where the author states that

> "To ask an administrative agency or a court to regulate or to supervise clearinghouse prices invites complex and nearly irresolvable disputes over what price is 'fair'. One is, in essence, asking a court to guess what price would be reached by bargaining were the market relatively free."

Id. at n. 217.

[173] *See* Whitford Rpt. *supra* note 7 at 82, where the committee refers to its recommendation for reprography; at p. 71, stating that if a collecting society is not formed, a free-for-all should occur. "By a free-for-all we mean the right to make copies free of payment . . . either for one's own use or for supply to one's pupils. . . ."

[174] Although the Whitford Committee based its recommendation on a notion of blanket licensing based upon "voluntary" development of a copyright holders' collecting society for televised works, the "incentive" plan clearly would create a compulsory system, the alternative being unlimited videorecording.

> learning had gained an establishment among us, it was then for the office of the Legislature, to make such provisions for its encouragement, as to them should seem proper."[175]

Education is the method by which modern societies systematically attempt to develop the potentialities of young and old alike for the advancement of all *e pluribus unum*. Any educational videorecording exception to copyright liability, while attentive to the public need, must protect fundamental moral and legal rights of the creators of intellectual works. Therefore, what is needed by the developed nations is a system whereby a society can glean the educational benefits of increased information dissemination without depriving copyright holders of their legitimate income or involving the parties concerned in a costly and administrative nightmare.

A limited exemption for educational videorecording is here proposed. In general, educational establishments would have "free" use of their video-copies for a limited time after which a fair compensation would be paid to the copyright holder if the video-copy were to be kept.[176] Specifically, educational exceptions should be limited to non-profit systematic instructional activities in schools and universities; this would create a clear distinction as to who might claim the exemption and thus enforcement would be simplified. The video-copies would be required to have the proper copyright notice, and the educational establishments would remain under a duty not to allow any substantial distortion of the fundamental nature of the televised material in order to protect the moral rights of the creator.

Concern has been expressed by copyright holders and their licensees over the development of audio-visual (A-V) production and distribution centres which can serve entire educational districts.[177] Nevertheless, the education exemption should *not* be limited only to the spontaneous recordings by individual teachers but should allow A-V centres to develop. Some educational districts will not be able to afford to produce good quality video-copies, which can be time-consuming and requires expensive equipment. Central A-V distribution centres would allow these poor

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[175] Millar v. Taylor, *supra* note 38 at 2387.

[176] The general concept of such a limited exemption can be found in the West German Copyright Act under Article 47. *See* Part III (B)1, Educational Use Limitations, the Federal Republic of Germany, of this article, *supra*.

[177] *See* Subcommittee, *supra* note 19 at 9; *and see* Whitford Rpt. *supra* note 7 at 79 where broadcasting authorities feared the development of a "cottage industry" in the business of making and supplying video-tapes. *See, e.g.*, the *Encyclopaedia Britannica Educational Corp. v. Crooks* case, *supra* note 92 and following text.

educational districts to gain the benefits from videorecording that they otherwise could not afford. Although an A-V centre's activities would be organised and carried on systematically on a wide scale, copyright holders would not suffer any adverse economic effects because they would be protected under the required "per use" compensation system discussed below.

At the end of a limited period of time, say either one or two school years, the educational owner of the video-copy would be required to choose between erasing the tape or paying an equitable remuneration to the copyright holder. This time period of a year or so should be long enough for the educators to decide if the video-copy is worth keeping, i.e., long enough for its usefulness to be tested in the teaching situation. If the video-copy is to be retained longer than the statutory period, a rental or purchase price would then have to be paid. The price to be paid would be comparatively easy to compute; it would be that of the same or similar type of video-cassette or film then available on the market. If, for instance, a copyright holder televised his programme *and* had a film or video-cassette of the same programme available for purchase, the post-exemption period video-copy price would be fixed at the pre-existing market rate of the original product. By this approach the difficulties of the blanket licence fee system would be avoided and the user would pay only for the video-copies actually kept beyond the exemption period, and, thus, the monies later received by the copyright holder would reflect the *actual* use of his material.

A copyright tribunal would still be needed. But under this limited exemption approach, administrative costs would be kept down since the functions of this statutory tribunal would be minimised. For example, the tribunal would not have to involve itself in developing fair blanket licence price-scales or in the difficulties of extensive sampling procedures and flat-fee distributions.

The per use compensation system would work in the following manner. First, the educational establishments, including the A-V centres, would be required to report annually or semiannually any video-copies to be kept beyond the statutory period of exemption.[178] Second, the report would be sent in to the copyright tribunal, which would fix the rate owed as discussed above and bill the school or district. Third, the inherent difficulties of the flat-fee distribution system are avoided because the fees are based on a "per use" system and these funds would

[178] The costs of this record keeping and reporting should not be a burden on the schools since it would just involve a simple date check and then, following a decision as to whether the video-copy were to be kept, sending a form to the copyright tribunal.

be sent directly to the copyright holder, or representative collecting society, by the tribunal. Fourth, enforcement by the tribunal would probably be limited to investigation of abuse such as non-payment and/or spot checks of school videorecording records if this were felt to be necessary.

The benefits of this limited exemption system would be many and fairly balanced between educational needs and the copyright holder's rights. Educators would have the right to decide what televised material to record, who would do the recording, and how long the video-copy would be kept,[179] while the copyright holder-creator would at all times retain his moral rights *and* would receive fair compensation for the use of his broadcast programmes after the exemption period had lapsed. Further, the foreign copyright holders of broadcast material would be easy to include in each State's per use distribution of the collected fees.

Thus, by the creation of limited educational exemptions, combined with per use compensation systems, the developed nations can meet both their national and international copyright commitments without the development of blanket licence procedures and troublesome flat-fee collection and distribution systems.[180]

V. CONCLUSION

> "We must take care to guard against two extremes equally prejudicial; the one, that men of ability who have employed their time for the service of the community may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded."[181]

The introduction and growing use of new reproduction technology, such as off-the-air videorecording, can be viewed as indications of the continuing need of mankind to expand its ability to communicate. The development of ever more sophisticated media for communication is creating an increasing breadth and depth of information dissemination, which, in turn, stimulates new intellectual explorations. The world's copyright laws provide the legal foundation for the inducement and cir-

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[179] The right of public performance would still be held by the copyright holder. It would be up to each State to decide how broad or narrow this right should remain relating to the educational use exemption, e.g., should the parents of the students be allowed to be present at a performance of a video-copy?

[180] *See* note 165, *supra*, and following text.

[181] Sayre v. Moore, 102 Eng. Rep. 139, 1 East 361 (K.B. 1785).

culation of intellectual creations, thereby influencing, in some subtle manner, the evolution of our society.

"If, as the familiar aphorism has it, copyright is the metaphysics of the law, then international copyright must be its cosmology."[182] International copyright principles, as manifested by the Berne and Universal Copyright Conventions, are reflections of State copyright concepts which but mirror the dynamic tensions which exist between the information needs of society and the rights of individuals. Great care is needed, therefore, when seeking to adjust the copyright laws to meet the shifting economic realities of the present communications explosion. It is hoped that careful consideration of the copyright issues involved in the use of home and educational off-the-air videorecordings, as set forth in this study, will help illuminate the often complex legal problems arising from the use of this new reproduction technology.

APPENDIX

PROPOSED LEGISLATION

Limitations on the Exclusive Rights of Copyright Holders: Exempted Uses

(1) *Reproduction for Private Use*—It is not an infringement of copyright to make a single copy of a broadcast work for non-commercial private use by the recording of such works on audio or audio-visual records or tapes.

(2) *Reproduction for Educational Purposes*—It is not an infringement of copyright to make copies incorporating audio or audio-visual material of broadcast works for use in teaching activity by non-profit educational establishments *so long as* the use of such a copy does not exceed a period of one calendar year from its creation.

If the copy is to be kept longer than one calendar year fair compensation for this use as fixed by the Copyright Tribunal must be paid to the copyright holder.

A detailed explanation of the provisions of this proposed legislation would not be fruitful because it would be merely a repetition of the concepts discussed within this study. The reader should, however, refer to that part of the study to which these provisions relate.

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[182] *See* Ringer, note 15, *supra*, at 1050.

PART II

LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

1. United States of America and Territories

521. U.S. CONGRESS. HOUSE.

H.R. 20. A bill to amend the copyright law, title 17 of the United States Code, to provide for protection of ornamental designs of useful articles. Introduced by Mr. Railsback on January 5, 1981, and referred to the Committee on the Judiciary. (97th Cong., 1st Sess.)

To be cited as the Design Protection Act of 1980, this bill would amend the Copyright Act to provide for the protection of original ornamental designs of useful articles, except designs that are: (1) not original; (2) staple or commonplace; (3) determined solely by a utilitarian function; or (4) composed of three-dimensional features of shape and surface in wearing apparel. The bill stipulates that protection for a design shall be available for subject matter usually excluded if the design is a substantial revision, adaptation or rearrangement of such subject matter. It sets the term of protection at five years, which may be renewed for an additional five years upon proper application. It requires the design to be marked with a design notice when it is made public and specifies the criteria for determination of infringement of a protected design. The bill provides for the transfer of ownership rights of designs subject to protection. It prescribes penalties for fraudulent registration, false marking and false representation of any design. The act would take effect one year after the date of enactment. Note: This bill is identical to H.R. 2706 introduced by Mr. Railsback in the 96th Congress.

522. U.S. CONGRESS. HOUSE.

H.R. 2007. A bill to amend title 17 of United States Code to exempt nonprofit veterans' organizations and nonprofit fraternal organizations from the requirement that certain performance roy-

alties be paid to copyright holders. Introduced by Mr. Young on February 23, 1981, and referred to the Committee on the Judiciary. (97th Cong., 1st Sess.)

This bill would amend section 110 of title 17 United States Code by adding a new paragraph (1) making the performance of a musical work in the course of the activities of a nonprofit veterans' organization or a nonprofit fraternal organization, exempt from certain performance royalties.

523. U.S. CONGRESS. HOUSE.

H.R. 2108. A bill to amend title 17 of the United States Code to provide that certain performances and displays of profitmaking educational institutions and nonprofit veterans' and fraternal organizations are not infringements on the exclusive rights of copyright owners. Introduced by Mr. Donnelly on February 25, 1981, and referred to the Committee on the Judiciary. (97th Cong., 1st Sess.)

This bill would amend section 110 of title 17, United States Code by adding a new paragraph (10) making the "performance of a nondramatic literary or musical work by a nonprofit veterans' or fraternal organization, without any purpose of direct or indirect commercial advantage, if the proceeds, after deducting the reasonable cost of producing the performance, are used exclusively for education, religious, or charitable purposes and not for private financial gain," a non-infringement on the exclusive rights of the copyright owner.

524. U.S. CONGRESS. SENATE.

S. 3175. A bill to amend the Internal Revenue Code to increase the amount that an artist may deduct when he contributes an artistic composition to charity. Introduced on September 30, 1980 by Mr. Moynihan, and referred to the Committee of Finance. (96th Cong., 2d Sess.)

To be cited as "The Cultural Heritage Preservation and Access Act of 1980," this bill would allow individuals who donate literary, musical, or artistic compositions to charity, to deduct an increased percentage of the work's fair market value in accordance with a sliding scale ranging from 30% to 93% depending upon one's income.

525. U.S. COPYRIGHT OFFICE.

37 CFR 201. General provisions; import statements. Final regulations. *Federal Register,* vol. 46, no. 32 (Feb. 18, 1981), pp. 12701-12705.

The Copyright Office issues its final regulation regarding the issuance of import statements. It implements Section 601(b)(2) of the Copyright Act of 1976, which permits copyrighted works not manufactured in the United States or Canada to be imported into the U.S. Among the provisions included in the final regulation are those governing the issuance of import statements for works registered before, on or after January 1, 1978, for foreign reprint editions of works protected under the former copyright law, for works under or eligible for ad interim copyright on December 31, 1977, and in cases of dispute between the Customs Service and a copyright owner.

526. U.S. COPYRIGHT OFFICE.

Manufacturing clause study; hearing. Notice of public hearing. *Federal Register,* vol. 45, no. 243 (Dec. 16, 1980), p. 82768-82769.

Congress asked the Copyright Office to prepare a study on the possible economic impact of the elimination of the manufacturing clause from the copyright law on July 1, 1982. In connection with this study, the Office is conducting a hearing on January 13, 1981 to solicit information from copyright owners, publishers, printers, and other informed persons on issues relevant to the phaseout. Anyone wishing to testify is asked to submit a written request to present testimony to the Copyright Office by January 5, 1981. January 9, 1981 is the deadline for submitting written statements, and witnesses are asked to include in their comments information relevant to the specific questions that are set out in the hearing announcement.

527. U.S. COPYRIGHT ROYALTY TRIBUNAL.

37 CFR 306. 1980 Adjustment of the royalty rate for coin-operated phonorecord players. Final rule. *Federal Register,* vol. 46, no. 2 (Jan. 5, 1981), pp. 884-891.

The Copyright Royalty Tribunal gives public notice that effective January 1, 1982 the royalty rate for the public performance

of nondramatic musical works by coin-operated phonorecord players will be increased. The rule establishing the rate adjustment provides that commencing on January 1, 1982 the annual compulsory license fee will be $25 and, beginning on January 1, 1984, $50. It also provides that a cost of living adjustment will be published by the Tribunal on August 1, 1986. This adjustment, which will be determined by the Consumer Price Index covering the period February 1, 1981 to August 1, 1986, will take effect January 1, 1987.

528. U.S. COPYRIGHT ROYALTY TRIBUNAL.

37 CFR 307. Adjustment of royalty payable under compulsory license for making and distributing phonorecords; rates and adjustment of rates. Final rule. *Federal Register,* vol. 46, no. 2 (Jan. 5, 1981), pp. 891-892.

The Copyright Royalty Tribunal gives public notice that it has amended its rules to include a provision for the adjustment of the royalty rate for making and distributing phonorecords embodying nondramatic musical works. The amendment provides that the rate for phonorecords made and distributed on or after July 1, 1981 will be four cents or 3/4 of one cent per minute of playing time or fraction thereof. Also included are provisions concerning future adjustments.

529. U.S. COPYRIGHT ROYALTY TRIBUNAL.

37 CFR 307. Adjustment of royalty payable under compulsory license for making and distributing phonorecords; rates and adjustment of rates. Final rule findings. *Federal Register,* vol. 46, no. 22 (Feb. 3, 1981), pp. 10466–10487.

Pursuant to 17 U.S.C. 803(b), the Copyright Royalty Tribunal issues detailed findings with respect to its decision to adopt the rule increasing the royalty rate for making and distributing phonorecords embodying nondramatic musical works. The rule increases the rate from 2 3/4 cents to 4 cents per song and provides for possible subsequent rate adjustments until the Tribunal convenes the next rate adjustment proceeding in 1987.

530. U.S. COPYRIGHT ROYALTY TRIBUNAL.

37 CFR 308. 1980 Adjustment of the royalty rate for cable

systems. Final rule. *Federal Register,* vol. 46, no. 2 (Jan. 5, 1981), pp. 892–897.

The Copyright Royalty Tribunal gives notice that effective February 4, 1981 it is amending its rules to include a provision for royalty rate adjustments for secondary transmissions by cable systems. The new rule provides that commencing with the first semi-annual accounting period of 1981 and for each subsequent semi-annual accounting period the cable royalty rates will be increased by 20.75% (rounded off to 21%) and the gross receipts limitations increased by 33.81% rounded off to the nearest one hundred dollars.

531. U.S. COPYRIGHT ROYALTY TRIBUNAL.

Jukebox royalty distribution proceeding. Notice. *Federal Register,* vol. 46, no. 22 (Feb. 3, 1981), p. 10522.

In connection with its September 12, 1979 (44 FR 53099) declaration of a controversy regarding distribution of the 1979 jukebox royalty fees, the Copyright Royalty Tribunal notifies claimants that it will be accepting proposals for the structure and procedures of the distribution proceedings until February 13, 1981. Reply comments will be accepted through February 27, 1981. A conference will be held on March 10, 1981 to discuss the proposals.

532. U.S. COPYRIGHT ROYALTY TRIBUNAL.

Partial distribution of 1978 cable royalty fund. *Federal Register,* vol. 46, no. 35 (Feb. 23, 1981), p. 13544.

All claimants to the 1978 cable royalty fund or their authorized representatives are directed to submit to the Copyright Royalty Tribunal not later than March 6, 1981 proposed scope and terms of a final order of the Tribunal providing for partial distribution of the 1978 cable royalty fees.

533. U.S. FEDERAL COMMUNICATIONS COMMISSION.

47 CFR 76. Amendment of Part 76 of the commission's rules to add frequency channeling requirements and restrictions and to require monitoring for leakage from cable television systems. Final rule. *Federal Register,* vol. 46, no. 33 (Feb. 19, 1981), pp. 12975–12976.

In 1977, the Federal Communications Commission adopted rules that would assure that cable television systems operating on frequency bands 108–136 MHz and 225–400 MHz would not interfere with the safety or life services of air navigation and aeronautical and marine emergency radio, which also utilize these frequencies. Sec. 76.610(d) of the adopted rules was intended to accomplish this by requiring that cable systems interested in using the frequencies notify the Commission of their intention at least sixty days prior to commencing such use. It has now been determined that for the rule to be effective and to achieve its intended purpose it must provide not only that the systems notify the Commission but that they obtain authorization prior to commencing operation. Therefore, effective immediately upon publication, Sec. 76.610(b) is amended to require that cable television systems intending to use a frequency or frequencies in the frequency bands 108–136MGz and 225–400 MGz shall not commence operation without prior Commission authorization. Because of the need to protect the public health and safety, the new rule is being adopted without prior notice and comment pursuant to Section 553(b)(B) of the Administrative Procedure Act.

534. U.S. FEDERAL COMMUNICATIONS COMMISSION,

47 CFR 76. Cable television systems; and postponement of divestiture requirements of Section 76.501 relative to prohibited cross-ownerships in existence on or before July 1, 1970; order extending time for filing reply comments. Proposed rule; extension of reply comment period. *Federal Register,* vol. 46, no. 31 (Feb. 17, 1981), pp. 12525–12526.

The reply comment period in the matter of the proposed rule requiring divestiture of all existing cross-ownerships between television broadcast stations and cable television systems located within the Station's Grade B contour is extended to February 23, 1981. The deadline for receiving comments in this proceeding had been January 8, 1981. Because a number of comments were filed after that date, the Commission was asked to extend the deadline for reply comments to February 23, 1980 in order for interested parties to have sufficient time to prepare responses. Having considered the matter carefully, the Chief of the Cable Television Bureau, under authority delegated by Sec. 0.288 of the Commission's rules, grants the request.

535. U.S. FEDERAL COMMUNICATIONS COMMISSION.

47 CFR 76. Television broadcasting; television broadcasting; cable television; addition to Huntsville-Decatur, Alabama, market. Denial of proposed rule. *Federal Register,* vol. 46, no. 13 (Jan. 21, 1981), pp. 6025–6028.

The Federal Communications Commission has denied Television Muscle Shoals, Inc.'s proposed revision of the Commission's list of the top 100 television markets utilized in the cable television rules. Under the proposal, Florence, Alabama would have been added to the hyphenated market now designated as Huntsville-Decatur, Alabama (#96). The Commission found that Florence "is not part of the Huntsville-Decatur viewing market; that there is no public need to include Florence in the market; and that the burden would be too great on Huntsville and Decatur cable systems to require them to carry the Florence station under the mandatory signal carriage rules."

PART IV

JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY

A. DECISIONS OF U.S. COURTS

1. Federal Court Decisions

536. RUSS BERRIE & CO. v. JERRY ELSNER CO., 482 F. Supp. 980 (S.D.N.Y. Jan. 7, 1980) [Haight, D.J.].

Sheldon Palmer and Peter L. Berger, New York, New York, and Henry R. Lerner and Lewisohn, Niner and Lerner, New York, New York, of counsel, for plaintiff; Harold James and James and Franklin, P.C., New York, New York, for defendants.

Motion for preliminary injunction in an action for copyright infringement with respect to plaintiff's stuffed toys and defendant's cross-motion for summary judgment on plaintiff's copyright claims. Motion for preliminary judgment on plaintiff's trademark infringement claim granted; cross-motion for summary judgment granted. *Held*:(1) A copyright in a derivative work is infringed only if the elements added to the pre-existing work are copied. (2) A plaintiff may not prove copying by proof of substantial similarity alone if the works in question are commonplace. (3) The failure to disclose in a copyright registration application that a work is a derivative work renders the registration invalid, precludes enforcement of the copyright, and constitutes unclean hands.

Plaintiff owns the copyrights in three stuffed toys it sells to retail stores: a stuffed gorilla called "Gonga", a stuffed Santa Claus, and a teddy bear in a Santa Claus costume. Gonga was a modified version of "Gori-Gori", a stuffed gorilla in the public domain manufactured by a Japanese firm. Plaintiff's copyright registration application for Gonga did not disclose that it was a derivative work. Defendant sold stuffed animals similar to plaintiff's to retail stores. It obtained its stuffed gorilla from a Taiwanese manufacturer which had manufactured plaintiff's Gonga

for a time. The gorilla was presented to defendant as a copy of the public domain Gori-Gori. Defendant sold its gorilla under the name "Congo" in wholesale sale. The name was not used in retail sale.

Plaintiff began the instant action for infringement of its copyrights and its trademark "Gonga," and moved for a preliminary injunction. Plaintiff admitted it could neither prove that defendant had copied its stuffed toys by direct evidence nor prove that defendant had access to them prior to defendant's production of its stuffed animals. However, plaintiff argued that the striking similarity between the respective sets of works was sufficient proof of copying. In moving for summary judgment on plaintiff's copyright claims, defendant challenged the validity of plaintiff's registration of the Gonga copyright because plaintiff did not disclose that Gonga was a derivative work. Defendant denied that plaintiff's and defendant's works were sufficiently similar to warrant an inference of copying. Defendant also argued that plaintiff had failed to demonstrate that it would suffer irreparable harm if no injunction were issued because plaintiff's losses and defendant's profits could be definitely ascertained.

The District Court denied plaintiff's motion for a preliminary injunction on its copyright claims and granted defendant's cross-motion for partial summary judgment.

The court accepted the certificates of registration for plaintiff's bear toy and Santa Claus toy copyrights as valid. Therefore, the certificates were *prima facie* proof of the validity of the copyrights and proof of plaintiff's compliance with the statutory requirement of registration of a copyright prior to beginning a lawsuit to enforce it. The court did not accept the certificate of registration of the Gonga copyright as valid because plaintiff failed to disclose on its registration application that Gonga was a derivative work based on Gori-Gori. Plaintiff's president claimed that, when the application was filled out, he believed the Gonga design *was* original because of the changes made in the Gori-Gori design. Thus, he claimed, the omission was made in good faith. The court was not persuaded by Mr. Berrie's affidavit and concluded that plaintiff had consciously withheld material information from the Copyright Office. The court found the omission to be all the more serious because plaintiff made only minor changes in the Gori-Gori design and the Copyright Office was deprived of the opportunity to render an informed decision on the copyrightability of Gonga. Thus, with respect to Gonga, plaintiff failed to comply with the statutory requirement that a copyright registration be

secured before an infringement action is begun. The court also held that filing a false copyright registration constitutes unclean hands and a basis for denying plaintiff's motion for a preliminary injunction.

The District Court agreed with plaintiff that both parties' bear toys and Santa Claus toys were similar. However, the court did not find defendant guilty of infringement because the toys only shared characteristics common to all toy bears and Santas. Thus, the toys were not substantially similar, and, *a fortiori,* were not strikingly similar.

The District Court would not have granted plaintiff an injunction even if it had demonstrated probable success at trial because it failed to prove irreparable harm. Plaintiff's evidence of irreparable harm consisted only of generalized statements regarding profit and loss of goodwill. Moreover, defendant's sales of the allegedly infringing toys would provide a precise measure of plaintiff's damages and defendant's profits.

The court granted plaintiff's motion for a preliminary injunction on its unfair competition claim, holding that "Congo" was confusingly similar to "Gonga." Defendant argued that no injunction should be issued because "Congo" was used only in wholesale sale. The court held that plaintiff was entitled to protection from confusion at the wholesale level as well as the retail level.

537. ASSOCIATION OF AMERICAN MEDICAL COLLEGES v. CAREY, 482 F. Supp. 1358 (N.D.N.Y. Jan. 22, 1980) [McCurn, D.J.].

DeGraff, Foy, Conway, Holt-Harris and Mealey, Albany, New York, and Fulbright and Jaworski, Washington, D.C., Carroll J. Mealey, Albany, New York, and Carl W. Vogt and Joyce E. Reback, Washington, D.C., of counsel, for plaintiff; Robert Abrams, Attorney General of the State of New York, Stanley Fishman and Maurice K. Peaslee, of counsel, for all defendants except three.

Action by administrator of Medical College Admissions Test (MCAT) for declaratory and injunctive relief to declare illegal, and enjoin the enforcement of, sections 341 and 342 of the New York Education Law. On motion for preliminary injunction, *held,* plaintiff's claim that state law requiring disclosure of MCAT questions, answers and studies of test results to the public and to state agencies raises serious questions of law going to the merits of the action and a preliminary injunction is warranted.

Plaintiff develops and administers the Medical College Admissions Test (MCAT). As the sponsor of the MCAT, plaintiff prepares confidential studies of the performance of students of selected universities and of subjects' performance on certain questions. Sections 341 and 342 of the New York Education Law, part of Article 7-A, "the Testing Law," require disclosure of MCAT questions, answers and studies as follows: MCAT questions and answers must be supplied to test subjects and the Commissioner of Education after test results are released. The test studies must be supplied to the Commissioner. Materials filed with the Commissioner become subject to public disclosure under the state Freedom of Information Act.

Plaintiff is of the view that the disclosure provisions of the Testing Law would prevent the successful administration of the MCAT. Disclosure of questions and answers would prevent the re-use of questions, prevent the use of recurring scored questions to compare tests from year to year, and prevent the preparation of confidential studies. Prior to commencing the instant action, plaintiff announced it would cease administering the MCAT in New York.

Plaintiff's central claim in this action was that enforcement of sections 341 and 342 would infringe its copyrights in the MCAT and its MCAT studies. Plaintiff argued that, as the copyright owner, it was entitled to control the reproduction and distribution of the MCAT and the studies, but sections 341 and 342 would require plaintiff to make and distribute copies against its will. Plaintiff also asserted constitutional challenges to the Testing Law.

The District Court granted plaintiff a preliminary injunction prohibiting enforcement of sections 341 and 342. The court disposed of defendant's jurisdictional defenses and held that plaintiff had made the necessary showing for a preliminary injunction: proof of irreparable harm if no injunction were issued; the raising of serious questions of law going to the merits of the action; and the tipping of the balance of hardship decidedly in plaintiff's favor.

The court's "serious question" analysis focused on the issue of fair use. Defendants argued that the fair use defense was applicable for three reasons. First, the Testing Law was enacted in the public interest to make testing agencies accountable to test subjects. Second, enforcement of the Testing Law would have no commercial motive. Third, the copies required by the Testing Law would not be used in competition with plaintiff. Plaintiff argued that defendants were not entitled to the protection of the

fair use defense because the fair use doctrine does not apply to works intentionally restricted from public distribution; enforcement of the Testing Law would require copying and distribution of entire works; and distribution of MCAT questions and answers would prevent the MCAT from being compared from year to year, thereby destroying its value as an admissions test. The court found merit in the arguments of both sides. However, the court declined to issue a final determination of defendant's fair use defense until the facts were more fully developed, because a decision on fair use depends on close factual analysis. The court did find plaintiff's objections to defendants' claim of fair use to be sufficiently cogent to raise questions of law of sufficient merit to support the issuance of a preliminary injunction.

The court also found merit in plaintiff's argument that section 301 of the Copyright Act pre-empted the Testing Law and in plaintiff's constitutional challenges to the Testing Law.

538. JOHN H. HARLAND CO. v. CLARKE CHECKS, INC., 207 U.S.P.Q. 664 (N.D. Ga. March 25, 1980) [Tidwell, D.J.].

Action for copyright infringement, trademark infringement and other unfair competition torts. On motion by defendant for partial summary judgment on copyright infringement claims and unfair competition claims, *held,* plaintiff's desk checkbook with an extra stub feature is not copyrightable because it is a blank form that does not convey information.

Plaintiff manufactures and markets Memory Stub checkbooks. The Memory Stub checkbook is a desk checkbook with a special feature: Each check has an extra perforated stub between the check and the usual stub bound into the checkbook. The purpose of this feature is to permit the user to remove a check from the book and record the transaction when the check is spent. The Memory Stub checkbook was introduced in 1976. In 1977, the Copyright Office issued registrations for plaintiff's Memory Stub products. In 1979, defendant began marketing its Entry Stub products. Entry Stub products contain an extra stub feature identical to the Memory Stub feature. When defendant rejected plaintiff's demand to stop distributing Entry Stub products, plaintiff commenced the instant action. Defendant moved for summary judgment on plaintiff's copyright claim on the grounds that plaintiff's Memory Stub products were not copyrightable, or, if they were copyrightable, defendant's Entry Stub products were not infringing as a matter of law. Defendant's motion was granted.

The District Court based its decision that plaintiff's Memory Stub feature was not copyrightable on the seminal case of *Baker v. Selden,* 101 U.S. 99 (1879). In *Baker,* the Supreme Court held that blank forms designed for use in connection with Selden's bookkeeping system were not copyrightable because the forms did not convey information, but were intended to record information. Furthermore, the Court reasoned, granting copyright protection to Selden's forms would grant him a monopoly on his bookkeeping system, while such protection may only be secured by patenting the system. The District Court found that plaintiff's Memory Stub products fell squarely within the rule of *Baker v. Selden* and were therefore not protected by copyright.

Plaintiff sought to bring its Primary Stub line outside of the rule of *Baker v. Selden* by arguing that the *placement* of the extra stub, rather than the extra stub idea itself, *was* protected by copyright. The court rejected this contention. Quoting *Morrissey v. Procter & Gamble Co.,* 379 F.2d 675 (1st Cir. 1967), the District Court held that when uncopyrightable subject matter is so limited that it may only be expressed in a few forms of expression, one cannot monopolize the subject matter by copyrighting all of the possible forms of expression.

The District Court distinguished the instant case from cases cited by plaintiff in which the forms were held to be copyrightable on the ground that the forms in those cases were so detailed they did convey information. The Court specifically disagreed with *Harcourt, Brace & World v. Graphic Controls Corp.,* 329 F. Supp. 517 (S.D.N.Y. 1971) which held that blank computer scored answer sheets were copyrightable.

The court denied defendant's motion to dismiss claims for unfair competition and deceptive practices under state law and federal law (presumably §43 (a) of the Lanham Act). The elements of confusion or deception of the public found necessary under state law were not required in copyright infringement actions. Since the state causes of action thus "involve more than the mere acts of copying and selling an article, they are not 'equivalent to' copyright claims preempted under 17 U.S.C. § 301." Plaintiff's "federal unfair competition claims were held preserved under 17 U.S.C. § 301 (d) which excluded from the preemptive sweep of that section rights and remedies under any other federal statute.

The court also denied plaintiff's cross-motion for summary judgment.

B. Decisions of Foreign Courts

1. United Kingdom

539. JAMES ARNOLD AND CO. LTD. V. MIAFERN LTD. & OTHERS, High Court (Feb. 6, 1980) (as yet unreported). *European Intellectual Property Review,* vol. 2 (Aug. 1980), p. D-216.

The World Black and African Festival of Arts and Culture took place in Nigeria. An agency that was part of that festival was issued a franchise to sell souvenirs. Souvenirs included scarves in which negatives were produced from the artwork. Plaintiffs agreed to produce scarves for the franchise by use of the following: The negatives were printed into plates, the surfaces of which were then treated with acid, leaving the design in relief. Bakelite molds were produced from the plates and from the molds, rubber stereos were made. The pliable moulds were fitted into rollers. From the rollers transfer papers were produced which transferred the design to the scarves. The plaintiffs argued that the rubber stereos were engravings within the Copyright Act of 1956, and that they owned the copyright in those engravings and that the defendants had infringed that copyright by copying the design. The defendants, accused of infringement, argued, *inter alia,* that the rubber stereos were not engravings within the meaning of the Act. It was *held* that the defendants had infringed the plaintiffs' copyright and the rubber stereos were engravings within the meaning of the Copyright Act. The court construed Section 3 of the 1956 Copyright Act to provide that an engraving could mean the actual engraved plate from which the copies were taken. It was also argued that for an object to be an engraving it had to be made by an engraving or cutting process. The court did not feel so constrained and drew attention to modern production processes including a molding process. Finally, the court held that plaintiffs, who had commissioned others to perform certain steps in the manufacturing process, were nevertheless the owners of copyright.

PART V

BIBLIOGRAPHY

A. BOOKS, TREATISES AND CASSETTES

1. United States Publications

540. MCFARLANE, GAVIN. Copyright: The development and exercise of the performing right. John Offord Publications, Eastbourne, East Sussex, England (1980) 205 p.

If copyright is a "bundle of rights," then, in the field of music, the performing right is the key element in that bundle. License fees from musical performing rights comprise the largest single source of income for most songwriters and music publishers.

The ubiquity of nondramatic public performances of music in modern society has led to development of new licensing practices. Organizations have been formed to license and enforce those rights collectively: they are the performing right societies, ASCAP, BMI and SESAC in the United States. And the needs of bulk users of music have resulted in the blanket license of performing rights, recently upheld by the Supreme Court against antitrust attack in *BMI v. CBS*, 441 U.S. 1 (1979).

The performing right—in drama as well as in music—was not recognized in early copyright laws. It was, in essence, a nineteenth century development which reached fruition in this century. And it originated, as many concepts dealing with protection of artistic cretion did, in France.

The story of the development of the performing right in the United States has been amply detailed, mostly in legal periodicals. Now, in his fascinating and eminently readable work, Gavin McFarlane tells the story of the performing right in England. It is an interesting story, made even more interesting by the parallels to the American experience.

Dr. McFarlane finds seminal traces of a dramatic performing right in pre-nineteenth century England, but no legal recognition of the right until Bulwer Lyttons' Act of 1833. The testimony before the Parliamentary Committee which led to that law's en-

actment is illuminating. Even then, the familiar reply of copyright users to creators who ask for payment for their property was heard: Don't ask us for money, we'll make you famous instead. Dr. McFarlane tells the story of Douglas Jerrold, a playwright:

> Jerrold applied to Covent Garden for some remuneration for a work of his which was being played there without his authority. He received a letter in reply expressing more than surprise at his request, and saying that its performance at Covent Garden had done Jerrold a great deal of good. "I have not yet discovered that," commented Jerrold acidly. "The reputation I acquired did not give me sufficient influence to get a piece brought out next season at Covent Garden."

And, as Dr. McFarlane continues the story in light of the legislative, legal, and practical developments which occurred, other parallels abound. For example, Dr. McFarlane has uncovered a little-known organization which evidently flourished in Victorian England, the Dramatic Authors Society. Its similarities to the modern musical performing rights society are striking:

Membership was open to any author whose works were performed in a theater of standing—as ASCAP membership is open to any songwriter whose works are performed by an ASCAP licensee or in media licensed by ASCAP.

- The Society collected a fixed sum for the entire season from theaters, for the privilege of performing any of the Society's plays—as ASCAP's blanket license allows the music user, for an annual fee, to perform any, some or all of its members' works.

- The Society distributed the fees it collected to its members based on the actual performances of plays, determined by checking playbills—as ASCAP distributes royalties based on a scientific survey of actual musical performances.

- Licensing was accomplished through agents in the field and members' rights were enforced through lawsuits on their behalf—as ASCAP licenses users and protects its members' rights today.

Of course, no discussion of the performing right in England would be complete without reference to the British musical performing right society, PRS. Dr. McFarlane describes PRS' founding, its court battles on behalf of its members, and its present-day operations.

Dr. McFarlane's work is an admirable and detailed study. It should be in the library of all who practice in the field of music—and all who are interested in copyright.

By I. FRED KOENIGSBERG

2. Foreign Publications

1. In English

541. BOGUSLAVSKY, M.M. Copyright in international relations. Australian Copyright Council, Ltd.(Oct. 20, 1980).

Professor Boguslavsky's book analyzes the multi-lateral copyright conventions and discusses the problems and philosophies relating to the international legal protection of intellectual property. This work also gives practical details of the USSR's laws and insight into its socialistic approach to copyright.

2. In German

542. DESSEMONTET, FRANCOIS. Schadensersatz fuer Verletzung geistigen Eigentums nach schweizerischem und franzoesischem Recht. (Indemnification for violation of intellectual property in Swiss and French law.) *GRUR International* (May 1980), pp. 272–282.

Prof. Dessemontet presents a broad review of the Swiss legal system, doctrine and judicial decisions with regard to the indemnification for violations in the fields of patent, trademark, copyright, patterns and models law. The injured holder of a copyright must in practice prove his actual damages or can claim a customary compensation but has no right to demand the remittance of the illegally obtained gain. French law and practice are annotated. For future Swiss legislation, the author submits a number of proposals.

543. GOTZEN, FRANK. Angleichung des Rechts der ausuebenden Kuenstler im Rahmen der Europaeischen Gemeinschaft. (Harmonization of the rights of the performing artist in the framework of the European Community.) *GRUR International* (Aug./Sept. 1980), pp. 471–490.

This is an in-depth comparative study of the pertinent laws in certain European countries. Six members of the European Community—the German Federal Republic, Great Britain, Ireland, Italy, Luxembourg and Denmark—have legal provisions for the protection of the rights of the performing artist. Three other

countries—France, Belgium and the Netherlands—failed so far to promulgate specific provisions in this field although the courts are granting a degree of protection. The author makes a plea for the harmonization of the laws in the countries of the European Community and submits a draft of a uniform text for the protection of performing artists.

544. KRASSER, RUDOLF. Schadensersatz fuer Verletzungen von gewerblichen Schutzrechten und Urheberrechtennach deutschem Recht. (Indemnification for violations of industrial property rights and copyrights in German law.) *Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil* (GRUR International) (May 1980), pp. 259–272.

Prof. Krasser first outlines the basic provisions regarding the monetary recovery for violations. Damages are awarded for intentional or negligent violations of the protected rights. Under a special provision inserted into the Copyright Law of 1965, the injured party can demand instead of damages the remittance of the gain obtained by the violator. Whether or not there is culpability on his part, he is exposed to a claim for unjust enrichment. According to a long line of decisions by the German Supreme Court, the injured holder of an industrial property right or copyright has a triple remedy: he can demand either damages concretely calculated pursuant to civil law rules comprising the lost gain, or payment of a sum corresponding to a license fee based on the extension and duration of the illegal use, or the remittance of the gain obtained by the illegal use of the protected right. The author provides an in-depth review of the case law and the doctrine, discusses the advantages as well as the disadvantages of the triple choice of remedies and gives in conclusion a critical analysis of the Supreme Court decisions.

545. PAGENBERG, JOCHEN. Die amerikanische Schadensersatzpraxis im gewerblichen Rechtsschutz und Urheberrecht. (The American practice of awarding damages in matters of industrial property protection and copyright.) *GRUR International* (May 1980), pp. 286–298.

The author, J.D., LL.M. (Harvard), member of the Munich Bar, devotes the greater part of his article to the monetary remedies practice in U.S. patent law and draws conclusions therefrom for a possible legislative reform in European countries. As to copyright, the frequently criticized old U.S. law is mentioned and

the provisions of Secs. 504(b) and (c) of the 1976 Act are analyzed.

546. SCHOENHERR, FRITZ *and* KUCSKO, GUIDO. Schadensersatz im gewerblichen Rechtsschutz und Urheberrecht Oesterreichs. (Indemnification under Austria's laws for the protection of industrial property and copyright.) *GRUR International* (May 1980), pp. 282–286.

The statutory provisions of the patent, trademark and copyright laws are reproduced and analyzed in the light of judicial decisions. The holder of an illegally used copyright can demand an equitable compensation even in the absence of any culpability. If the violation has been committed intentionally or negligently, the injured author can claim also the lost gain and, in the case of violation of a performance right, twice the equitable compensation, unless greater damages are proved. In certain cases, the culpable violator has to pay the illegally obtained gain. The "equitable compensation" is essentially a claim based on unjust enrichment. On the other hand, even in cases of slight negligence, the violator has to pay also for the "nonmaterial damage" suffered by the injured author if this is justified by the special circumstances of the case.

547. STROEMHOLM, STIG. Die Fruehstufen des nordischen Urheber- und Verlagsrechts. (The early developments of the Nordic copyright and publishing law.) *GRUR International* (April 1980), pp. 216–219.

Prof. Stroemholm traces the history of Nordic legislative efforts in copyright and publishing law back to the Danish Ordinance of January 7, 1741 and the Danish laws of 1857 and 1864, the Swedish Ordinances and laws of 1752, 1810, 1841, 1855, 1867, 1877 and 1897, the Norwegian laws of 1876 and 1877 as well as the Finnish legislation of 1829, 1865 and 1880. During the subsequent period ending in 1914, Denmark promulgated three important laws (in 1902, 1904 and 1912), and Sweden, the amending laws of 1897 and 1904, while in Norway on July 4, 1893 a new law had been enacted which—with some amendments—remained in effect until 1930. All Nordic countries have adhered to the Berne Union.

B. Law Review Articles

1. United States

548. Advertising copyright. *Copyright Management,* vol. III, no. 11 (Nov. 1980), p. 6.

This article focuses on *Excel Promotions v. Babylon Beacon, Inc.* Plaintiff publishes a weekly newspaper and, through vendors, makes up ad mats for advertisers under purchase orders. Excel prints the mat but they are signed by the advertisers. The case raised two questions: (1) who owns the copyright in an advertisement published in a newspaper—the advertiser or the publisher; and (2) what is their implied agreement in the absence of a contract? The court ruled that "the advertiser is the real employer of the vendor, not the paper. The lack of copyright notices in the ads threw the ads into the public domain." Nevertheless the court ruled as though a valid copyright existed, to find the advertiser's title superior to the paper's.

549. Copy wars. *Copyright Management,* vol. III, no. 12 (Dec. 1980), p. 3.

The October 27, 1980 issue of Forbes Magazine carried an article in which it was estimated that the publishing industry lost $100,000,000 in revenue to illegal photocopying. Newsletter and software publishers said that illegal copies of their product far outsold the legitimate copies. One publisher reported that he even tried printing his newsletter on "Xerox-proof paper," but found that the Xerox machine was not the only one unable to read the paper—people were having trouble as well.

550. Hartnick, Alan J. The network blanket license triumphant: The fourth round of the ASCAP-BMI-CBS litigation. *Communications and the Law,* vol. 2, no. 4 (Fall 1980), pp. 49–54.

A comment on the *ASCAP-BMI v. CBS* decision. The Supreme Court has ruled that blanket licensing is not a *per se* violation of the Sherman Act, and remanded the case to the Second Circuit for further action, including an assessment of the blanket license under the rule of reason.

551. Hipsh, Harlene J. The Betamax case and the breakdown of the traditional concept of fair use. *Communications and the Law,* vol. 2,

no. 4 (Fall 1980), pp. 39–48.

The author gives an overview of the Betamax case, and illustrates certain forces which are often brought to bear on the judicial process when it functions to incorporate changed conditions into an existing legal framework. Legal precedent for deciding the case by analogy might be said to exist but when read literally, the "precedents" are found to be inadequate to the task. Conditions have arisen which were not foreseen when the prior rulings were articulated. It is the author's contention that the resolution of the Betamax case was dictated primarily by practical concerns and a deep-seated reluctance on the part of the judiciary to stand in the way of technological experimentation rather than by directly applicable legal precendent derived from cases and statutes.

552. JACOBSON, JEFFREY E. Fair use: Considerations in written works. *Communications and the Law,* vol. 2, no. 4 (Fall 1980), pp. 17–38.

In this essay, the author examines how the fair use doctrine affects the written word, paying particular attention to the fair use of previously existing writings by later authors. Although the emphasis is on nonfiction, biographies, research, and other scholarly works, Mr. Jacobson also gives consideration to other collateral issues. He concludes that the current codification of "fair use" in section 107 is inadequate to give proper guidance to the contemporary writer, and that regulations should be adopted with explicit criteria by the Copyright Office.

553. LIEB, CHARLES H. Interactions and tensions between primary and secondary scientific publications. *Communications and the Law,* vol. 2, no. 4 (Fall 1980), pp. 55–59.

A discussion of the interactions and the tension that often exist between primary and secondary publishing in the field of science, and the not always easy-to-apply principles of law that establish the copyright rights of the respective parties. Mr. Lieb suggests that the Copyright Clearance Center be broadened to accommodate the clearance and payment of publisher-prescribed fees for secondary publication of tables of contents and abstracts first published in primary journals. He suggests further that the copyright law be amended to permit the secondary publication, without permission, of tables of contents and abstracts appearing in scientific journals which have not been entered in the CCC or

a similar system, with the secondary publisher to be liable for the "copy value" of the material copied, but not for statutory costs or statutory damages or attorney's fees which otherwise might be recoverable in an infringement suit.

554. MCFARLANE, GAVIN. The public lending right—a comparison of national approaches. *Copyright,* vol. 16, no. 11 (Nov. 1980), pp. 335–339.

The author discusses the United Kingdom's Public Lending Rights Act passed in 1979. Since a number of foreign countries already have some form of public lending right, he examines how these rights were developed, and how they are being applied. Mr. McFarlane concludes that the time is not far distant where considerable advantage might be derived from calling a diplomatic convention to at least explore the possibility of introducing laws governing public lending, either by means of a new international convention or by adding public lending rights to an existing convention.

555. NIEDZIELSKA, MARIE. The intellectual property aspects of folklore protection. *Copyright,* vol. 16, no. 11 (Nov. 1980), pp. 339–346.

Some of the problems outlined in this article include the exact definition of folklore and the area within the arts that folklore encompasses. The differences between folklore and folk art are explored with a special look at the folklore laws in Europe and Africa. The author emphasizes that folklore takes on specific forms within each national culture and differs from other forms of practical expression by reason of its age, its harmonization within the community's way of living, and its absorption into the community to such an extent that it becomes a common cultural heritage and the names of the creators are forgotten.

556. Snoopy and impolitic/unfair use. *Copyright Management,* vol. III, no. 11 (Nov. 1980), p. 6.

United Feature Syndicate settled its copyright infringement suit against Armand D'Amato. Defendant, who is brother to the New York Senate victor Alphonse D'Amato, had campaign buttons made that bore an image of the cartoon character Snoopy. Under the terms of the settlement, plaintiff was paid $6,500 and defendant agreed to discontinue using the buttons.

557. WINCOR, RICHARD. Henry the ninth. *Communications and the Law,* vol. 2, no. 4 (Fall 1980), pp. 61–66.

This is an article designed to illustrate, by use of the case system tinged with fantasy, how literary material may be protected, developed, and marketed until it grows from "duchy to empire."

558. YEDELL, ERIC. Copyright protection for live sports broadcasts: new statutory weapons with constitutional problems. *Federal Communications Law Journal,* vol. 31, no. 2 (Spring 1979), pp. 277–302.

This article investigates the new copyright act, including the problems of broadcasting live sports events and recording the events simultaneously. The case of *U.S. v. National Football League* is discussed along with the problems of fixation, registration and some constitutional considerations.

2. Foreign

1. In English

559. Copyright News—*European Intellectual Property Review,* vol. 2, (Nov. 1980), p. D-324.

The Australian Copyright Amendment Act of 1980 introduces a new regulatory system for photocopying and substantially increases the penalties for record piracy and other copyright offences. It became law on the 19th of September, 1980. The Act, as finally passed, is similar to the Bill introduced in the Australian Parliament in 1979 with, however, a substantial number of amendments. An article discussing these amendments will appear in the December 1980 issue of *EIPR.*

560. CISAC—Congress—Nov. 1980—Dakar—International News. *EIPR,* vol. 3. no. 1 (Jan. 1981), p. D-20.

A discussion of copyright and the needs of developing countries. One of the main topics was mass media and copyright, another was the benefits and easy access to the public through new technology versus the problems of control by authors and creators.

The suggestion for balance offered by Prof. G. Koumantis of Athens focuses on voluntary arrangements by collective organizations rather than "statutorily imposed systems of compulsory licensing."

561. KINDERMAN, MANFRED. Computer software and copyright conventions. *EIPR,* vol. 3, no. 1 (Jan. 1981), pp. 6–12.

This article deals with the question of national laws on copyright applying equally to the Berne Copyright Convention and the Universal Copyright Convention, both of which provide for mutual copyright protection among their member states. The author analyzes computer software, electronic data processing and copying, the Berne Convention and the UCC and their provisions and formalities for computer software protection.

562. LE STANC, CHRISTIAN. Trade secrets law—the protection of know-how in France. *EIPR,* vol. 3, no. 1 (Jan. 1981), pp. 13–16.

Within this article on trade secrets is a section on literary and artistic copyright. From the Paris Court of Appeals come the *De Laire v. Rochas* case which considers whether a perfume formula can be considered a work of art.

563. Piracy—IFPI—Council Meeting and General Meeting—Delhi, India. *European Intellectual Property Review,* Nov. 1980, p. D-321.

The main topic discussed was the piracy of records. It was reported that in the South East Asia region a major achievement had taken place. As a result of a vigorous anti-piracy campaign one record company in Thailand had reported a tenfold increase in sales of local repertoire. Singapore, however, continued to be the main problem area in the region. In the Mediterranean and Middle East region, IFPI had concentrated its resources in three countries: Greece, Egypt and Kuwait. New laws in Greece and Egypt may deter piracy in those countries.

564. WHALE, R.F. Author's rights—the need for separate recognition in the copyright arena. *EIPR,* vol. 3, no. 1 (Jan. 1981).

The article provides a look at copyright and the private interest of authors and those of the general public and the controversy surrounding Britain's Copyright Act of 1956 in balancing these interests. The author states that UK legislation does not make any distinction between authors' rights and neighboring

rights but protects them all under copyright—although performers are also protected under the Performers Protection Act. R.F. Whale states that authors are placed in a subordinate role and he suggests several solutions to this problem.

C. Articles Pertaining to Copyright from Magazines

1. United States

565. AFD, ITC settle Peppard Lawsuit. *The Hollywood Reporter,* vol. CCLXIV, no. 41 (Dec. 22, 1980), p. 18.

The copyright infringement and unfair competition suit against Associated Film Distribution and Independent Television Corp. has been settled for an undisclosed amount. Actor George Peppard and composer Bill Conti, the plaintiffs in the action, alleged that the defendants had unlawfully used music from the film "Five Days From Home" in connection with the advertising and promotion for "Firepower," a 1979 motion picture. Under the terms of the settlement, the defendants agreed to refrain from further use of the music.

566. Amusement climate changing; British are too easy on pirates. *Variety,* vol. 301, no. 11 (Jan. 14, 1981), p. 141.

In a report that Ken Maidment made to the British Film Producers Assn., it was stated that existing laws in the United Kingdom are inadequate to deal with unauthorized copying of film. He said that the British government, in response to industry requests for updating the law, might enact new legislation in 1982. Maidment predicts that the main issue in approaching a legislative solution to the film piracy problem will be whether to make domestic copying legal and compensate copyright owners by a blank tape and hardware tax or to outlaw it because proprietors will find it almost impossible to defend their copyrights and to differentiate between legal and illegal copying.

567. Arcomano, Nicholas. The copyright law and dance. *The New York Times,* vol. CXXX, no. 44,825 (Jan. 11, 1981), pp. D8, D16.

This article provides a brief history of dance and copyright and a look at the 1892 lawsuit involving the celebrated dancer Loie Fuller. After analyzing the progression of copyright protection through the early 1900's, the author discusses the rights

granted under the new law, including the right of reproduction, the right to prepare derivative works, the right to distribute copies, and the right to display a copy of the dance by means of a film or slide or television image.

568. Arrangers' role defined vis-a-vis composers' orgs. *Variety,* vol. 301, no. 6 (Dec. 10, 1980), p. 100.

The American Society of Music Arrangers (ASMA) adopted a resolution reaffirming its role as protector of arranger/orchestrator interests only. Reportedly, ASMA's ongoing efforts to convince the Copyright Royalty Tribunal to establish a separate mechanical royalty for arrangers has caused some concern on the part of composer organizations. They fear that ASMA is trying to "cut in" on their mechanical royalties. The resolution is aimed at clarifying the jurisdictional lines between composer organizations and ASMA and allaying composers' fears about the Society's efforts having an adverse impact on their rights.

569. ASCAP and BMI win rounds in license cases. *Daily Variety,* vol. 190, no. 48 (Feb. 13, 1981), pp. 1, 42.

In separate copyright infringement actions, The Gap retail clothing chain and the U.S. Shoe Corp., et al, were enjoined from further in-store performance of ASCAP and BMI licensed music. In the case against U.S. Shoe Corp., the court awarded BMI damages of $2,000 on each of seven counts plus more than $40,000 for costs. ASCAP, the plaintiff in the case against The Gap, has not submitted a claim for damages as yet, but could receive as much as $10,000 for each of six causes of action plus legal costs.

570. ASCAP awarded copyright damages. *The Hollywood Reporter,* vol. CCLXIV, no. 30 (Dec. 5, 1980), p. 47.

A judgment was entered against Joseph M. Futia and Delta D&I Corp. in a copyright infringement suit filed by ASCAP on behalf of some of its members. The suit charged that the defendants, who are the owners of the Coliseum Colonie summer theatre in Latham, N.Y., performed ASCAP songs without permission on October 20 and 28, 1978 and May 11, 1979. ASCAP was awarded $9,750 in damages and $7,250 in attorneys' fees.

571. BMI wins awards against promoter. *The Hollywood Reporter,* vol. CCLXV, no. 7 (Jan. 15, 1981), p. 42.

A U.S. District Court in Los Angeles awarded BMI $20,000, attorneys' fees and court costs in its copyright infringement suit against Lewis Grey and his concert promoting company. The defendant refused to enter into a BMI license agreement but continued to use thirteen of the organization's copyrighted songs in concerts presented in California and Denver.

572. Canadian disk sales squeeze, off 25% in first half; piracy, limp c'right law seen culprits. *Variety,* vol. 301, no. 4 (Nov. 26, 1980), p. 83.

Canadian Recording Industry Assn. president Brian Roberts says that Canadian retail record sales were down 20–25% for the first six months of this year. He attributes the drop to record and tape counterfeiting and home taping. A recent home taping study shows: (1) that 54% of the tapers who responded to a poll had taped music either from the radio or a record in the prior twelve months; (2) that for tapers in the 16–29 age group, the figure exceeded 66%; (3) that over 38% were taping more than a year earlier, and (4) that 32% were buying fewer albums since they purchased a tape recorder. Counterfeiting and bootlegging, Roberts says, has grown to alarming proportions. He feels that this is due to Canada's 1924 copyright act, which is out of date and does not impose strong penalties. Therefore, the music industry is encouraging the use of either fraud or conspiracy charges which, as criminal violations, carry stiffer penalties.

573. CASTILLO, ANGEL. New shield for data programs. *The New York Times,* vol. CXXX, no. 44,787 (Dec. 4, 1980), pp. D1, D3.

This article discusses the Computer Software Copyright Act of 1980, H.R. 6933. The legislation is aimed at protecting the rights of individuals and corporations engaged in the development, sale and leasing of computer programs. The individual program instructions, in machine or symbolic language, will be protected from unauthorized copying, but not the algorithms on which a program is based, as such formulas are considered "ideas" not covered by the copyright law.

574. Changes due in Brit. copyright to protect homevideo business. *Variety,* vol. 301, no. 11 (Jan. 14, 1981), p. 201.

The United Kingdom reportedly is in the process of issuing a green paper, which is a preliminary discussion document, pro-

posing audio and video performance and production residuals. The paper is expected to suggest that a measure be written into the copyright law. The government committee that was established to examine the country's 1956 Copyright Act published a report in which it expressed support for a levy on recording equipment. The Mechanical Copyright Protection Society, which represents music publisher interests, indicated that it favors a blank software tax. Whatever proposal the green paper contains, it is hoped that performers and manufacturers will be adequately protected from audio and video piracy.

575. Chi court aborts religious music use c'right test. *Daily Variety,* vol. 190, no. 25 (Jan. 13, 1981), pp. 1, 46.

The United States District Court in Chicago dismissed F.E.L. Publications' copyright infringement suit. The suit sought $180,000 in copyright royalties from the Catholic Archdiocese in Chicago. Plaintiff, a Los Angeles religious music publisher, alleged that the defendant reneged on a music license agreement. In the 29-page order dismissing the suit, the court stated that it took issue with at least two of the license's provisions. The first required that the Archdiocese purchase all 1400 songs in the F.E.L. library, and the second required that the church pay for the "rights to music for non-profit religious worship."

576. COHN, LAWRENCE. Character not in public domain: 'Hopalong Cassidy' c'right case dismissed. *Daily Variety*, vol. 190, no. 40 (Feb. 3, 1981), p. 6.

Filmvideo Releasing Corp.'s suit seeking permission to license 23 Hopalong Cassidy films was dismissed by U.S. District Court Judge Henry F. Werker. Filmvideo contended that the pictures and 26 Hopalong Cassidy books were in the public domain. The defendants, who included the administrator of the estate of Clarence E. Mulford and others, counterclaimed charging copyright infringement. In dismissing Filmvideo's complaint, Judge Werker concluded that although the copyrights in the Cassidy films had expired, the books were still protected because the estate of Clarence E. Mulford, the creator of the Hopalong Cassidy stories, had renewed the copyrights. The films, being based on various characters and stories created by Mulford, "infringe the books' copyrights." A companion suit, *Filmvideo Releasing Corp. v. William Boyd Enterprises,* was also decided by Judge Werker. Judgment was entered for defendant in that action.

577. CONTI, LUIGI. Tougher outlook in Italy for until now happy music pirates. *Variety,* vol. 301, no. 11 (Jan. 14, 1981), p. 139.

This article focuses on piracy and the new direction that groups are taking internationally to deal with this phenomenon. Special attention is given to Italy's piracy problem, its consistency, legal and economic consequences and remedies. In the area of remedies, the Italian Society of Authors and Editors (SIAE) and other organizations lobbied for and were able to convince the Italian government to approve draft legislation making all types of piracy—sound recordings, motion picture and televised images—a criminal offence carrying stiff fines and penalties. The SIAE was also instrumental in several piracy investigations and intends to continue pushing for strict enforcement, especially in the area of phonographic product.

578. Convicted film pirate sentenced to prison term. *Daily Variety,* vol. 189, no. 54 (Nov. 21, 1980), p. 27.

A federal court jury in Miami found Rubin Gottesman guilty of copyright infringement, interstate transportation of stolen property charges and violation of the Racketeer Influenced & Corrupt Organization Act (RICO). The charges stemmed from the FBI's Valentines Day sting operation in which fifty persons were arrested in connection with an illegal motion picture ring. Gottesman was sentenced to eighteen months in prison and his $250,000 home was forfeited to the government, an action allowed under the RICO Act.

579. Copyright case vs. Keaches shifted to superior court. *Daily Variety,* vol. 190, no. 8 (Dec. 17, 1980), p. 6.

The copyright infringement suit filed by Christopher Allport and Bump Heeter against James and Stacy Keach was recently dismissed by a federal district court in Los Angeles. Plaintiffs claimed that they co-authored the screenplay for the film "The Longriders" with James Keach. The court "ruled that in cases of joint copyright ownership, jurisdiction lies with the state." The action is now pending in the Los Angeles Superior Court on grounds of breach of written agreement.

580. C'right Tribunal orders c-of-l increase in cable TV royalties. *Daily Variety,* 190, no. 5 (Dec. 12, 1980), pp. 1, 37.

The Copyright Royalty Tribunal ordered a cost of living in-

crease for cable royalties. The order means that fees set by the 1976 Copyright Act will be upped from 17 to 20% on Jan. 1, 1981. There will be no further adjustments, however, until the cable fees are revised again in 1985. This increase, like the increase in the compulsory license fee for jukeboxes, was adopted by a vote of 3-2.

581. Counterfeit raids in Milwaukee net $2 mil. in lps, equipment. *Variety,* vol. 301, no. 10 (Jan. 7, 1981), p. 55.

An update on antipiracy activities in Milwaukee. Raids on four area locations by local FBI agents netted approximately $2,000,000 worth of pirated LPs, audio and video cassettes, eight-track tapes and record and tape manufacturing paraphernalia. A New York federal court denied convicted Milwaukee pirate David Heilman's motion to "dissolve a grand jury" that was instrumental in getting a $6,740,728 judgment against him and his company, E-C Tape. The motion also sought disclosure of all minutes and transcripts of the grand jury contempt citations against the record companies involved, and a temporary restraining order prohibiting the release of any documents that had been submitted to the grand jury.

582. Court of appeals expedites hearings on Betamax suit. *The Hollywood Reporter,* vol. CCLXIV, no. 41 (Dec. 22, 1980), pp. 1, 17.

In November of 1980, the Court of Appeals for the Ninth Circuit granted Universal City Studio's motion for an expedited hearing of its appeal in the Betamax case. The hearing is now set for February 6, 1981 and a decision is expected shortly thereafter. The main issues being considered by the appellate body are whether off-the-air recording of copyrighted motion pictures on Betamax videotape recorders violates the copyright law and, if it does, whether the Sony Corp., which manufactures the machines, and its retailers are liable for such violations. The District Court held that off-air recording at home for one's private use is not in violation of the copyright law, and Universal and its co-plaintiff, Walt Disney Prods., appealed to the Ninth Circuit.

583. Delay in revising copyright act attributed to political priorities. *Variety,* vol. 301, no. 4 (Nov. 26, 1980), p. 84.

Though revision of Canada's antequated 1921 Copyright Act has been under study for approximately two and a half years,

revision still may be far off. The Canadian music industry has been lobbying for an increase in the mechanical royalty rate, which is currently two cents per "side," for new synchronization rates and for stronger infringement protection. The government is more concerned with the problems of inflation and high energy costs right now, however.

584. Different folks, different spokes; who has 'Bicycle Thief' rights? *Variety,* vol. 301, no. 9 (Dec. 31, 1980), p. 6.

Vittorio de Sica's film "Ladri di Biciclette" (Bicycle Thief) is the subject of a copyright infringement suit and counterclaim. The action, which was filed by International Film Exchange Ltd. (IFEX), names Corinth Films, Richard Feiner & Co. and others. Plaintiff claims that it acquired distribution rights and was assigned the copyright in the motion picture in 1976 by the General Film Co. Ltd. The defendants deny the infringement counts and counterclaim, asserting that defendant Feiner obtained the exclusive rights to exploit and the copyright in the film from Produzioni De Sica S.R.L. in 1967.

585. Disney home video sues to protect its rental program. *The Hollywood Reporter,* vol. CCLXIV, no. 41 (Dec. 22, 1980), p. 4.

In separate lawsuits, Walt Disney Telecommunications and the Non-Theatrical Co. charged the Video Station in Richmond, Va. and Home Video Specialties in Riverside, Calif. with copyright and trademark infringement and with misrepresenting themselves as authorized Disney home video rental dealers. Both complaints seek injunctive relief, damages and attorneys' fees. According to company sources, the suits are intended to "demonstrate Disney's commitment to support its rental program . . . not only with merchandising and advertising but also with whatever legal action is necessary to protect" and enforce its rights and those of the hundreds of dealers with whom the company has rental agreements.

586. Doobie Brothers sue Pickwick. *Record World,* vol. 37, no. 1743 (Dec. 20, 1980), p. #9.

The Doobie Bros. singing group has sued Pickwick International and Paul Curcio for unfair competition and copyright and trademark infringement. According to the complaint, the Doobies recorded audition tapes at Curcio's Pacific Record Studio

approximately ten years ago. These tapes have remained in Curcio's possession and, allegedly, were the subject of an agreement between Curcio and Pickwick under which the material was recorded onto an album and sold under the title "Introducing the Doobie Brothers."

587. Dun-Bradstreet wins $3,850,000 in a suit over its copyrights. *The Wall Street Journal,* vol. CXCVI, no. 118 (Dec. 16, 1980), p. 21.

A federal district court jury has awarded Dun & Bradstreet, Inc. $3,850,000 on its counterclaim of a copyright infringement suit against National Business Lists, Inc. of Chicago. National Business Lists originally sued Dun & Bradstreet for $22,500,000 charging violation of antitrust laws in the credit information business. The same jury rejected the claims and Dun & Bradstreet filed a counterclaim charging National Business Lists was using credit information copyrighted by Dun & Bradstreet to compile its business lists. The jury concluded that over the past five years, National Business Lists made $3,850,000 from the copyrighted lists.

588. End to '76 copyright act conflict sought. *Daily Variety,* vol. 190, no. 7 (Dec. 16, 1980), p. 6.

The Harry Fox Agency has asked the District Court for the Southern District of N.Y. to settle a dispute between Mills Music Inc. and the heirs of Ted Snyder, one of the co-authors of the song "Who's Sorry Now." Mills owned the copyright in the work through a grant until January 3, 1980 when Snyder's widow and son reclaimed their rights under the termination provisions of the Copyright Act. Since the termination date, Fox has collected more than $4,000 in mechanical royalties for the song. Almost $1400 of the royalties, which is the Snyder interest, has been claimed by both Mills and the heirs. Fox says that an interpretation of derivative work is needed to resolve the dispute because the termination provisions do not identify a sound recording as a derivative work, although it is so defined elsewhere in the Act. Fox has also asked the court to restrain Mills and the Snyders from filing an action against it for the disputed funds.

589. FBI agents seize 900 pic prints. *Daily Variety,* vol. 190, no. 11 (Dec. 22, 1980), p. 3.

FBI agents in New York recently raided two locations in the

Rochester area seizing around 900 unauthorized film prints and videotape duplicating equipment. The cites of the seizures were Bob Hyatt's Stereo Center and Hyatt's home. No arrests have been made, but the evidence gathered in the raids and during the seven to eight-month investigation preceding the raids will be presented to a federal grand jury in the near future.

590. Fed judge denies Merrick's petition vs. Clark NBC vidpic. *Daily Variety,* vol. 190, no. 14 (Dec. 26, 1980), p. 2.

A U.S. District Court in New York has refused to grant a preliminary injunction against Dick Clark Prods.' telefilm "Murder in Texas." The script of the production is based on an autobiography by Ann Kurth entitled "Prescription: Murder," which deals with the events and people involved in a well-known Houston murder case. David Merrick sought the injunction on the claim that Clark's script infringed the copyright in "Blood & Money," a book also based on the events surrounding the Houston case. In denying the injunction, the District Court ruled that in almost every instant where the defendant's script was alleged to have infringed the plaintiff's work, the similarity was limited to reported facts, which are not subject to copyright. The court did not dismiss Merrick's complaint but indicated that it is unlikely that he will succeed at trial.

591. FLINT, MICHAEL. Video confabs galore in '80 deal in rights. *Variety,* vol. 302, no. 1 (Feb. 4, 1981), pp. 97, 124.

This article discusses two meetings that were held in London recently—"Video Clearances"—and "Video Rights '80." The first conference attracted union representatives, collection society officials as well as film, video and videogram industry executives. It focused on the problems of clearing copyright in music, records, films, books, plays, etc. for homevideo production. The cost of music and mechanical royalties were also matters of concern to those attending this meeting. Topics discussed at the "Video Rights" conference included video piracy, blank cassette levy and various approaches to the homevideo problem under copyright law throughout Europe.

592. Florida appeals court deems royalties legit stolen property. *Record World,* vol. 37, no. 1741 (Dec. 6, 1980), p. 8.

The conviction of tape pirate Robert Crown was affirmed by the District Court of Appeals for the First District of Florida.

Crown, who was prosecuted under a Florida larceny law, was found guilty of "dealing in stolen property rights." The stolen property in this case was considered by the court to be "the intangible rights between an artist and his record company, specifically royalty rights." It is predicted that this decision will aid in the future prosecution of tape and record counterfeiters and pirates whose activities do not properly fall under federal copyright laws.

593. GEVER, MARTHA. Photographs as private property—a Marxist analysis. *Afterimage*, vol. 8, no. 6 (Jan. 1981), pp. 8–9.

A look at a new book *"Ownership of the Image: Elements for a Marxist Theory of Law"*, with special attention given to a section entitled "The Juridical Production of the Real". Problems of law, capitalist production and juridical idealogy are discussed, including the legal areas of copyright, the right of privacy and artists' moral rights. The pros and cons of French copyright particularly as it pertains to the rights of photographers are also analyzed.

594. Group attacks copyright statements in recent books. *Publishers Weekly*, vol. 218, no. 23 (Dec. 5, 1980), pp. 8, 9.

An ad hoc committee, formed of library and educational groups, said the copyright statements appearing in the front of many books are having a "chilling effect" on persons who are specifically allowed by the "fair use" section of the copyright law to photocopy parts of books. The committee also said that teachers, historians, scholars or librarians out in the field are intimidated by this kind of language. Typical of the copyright statements is: "All rights reserved. No part of this book may be reproduced in any form by photostat, microfilm, xerography, including information storage and retrieval systems, without permission in writing from the publisher, except by a reviewer who may quote brief passages in a review." The group has been trying to get the Copyright Office to take action on the complaint by refusing to register works that include copyright statements that allegedly exceed the scope of the law. However, the Register of Copyrights replied that the Copyright Office has no "authority to act" in the matter because the statements in the books have nothing to do with actually registering the work for copyright. In a meeting on November 20, the ad hoc committee decided to continue pressing its fight with the Copyright Office rather than seeking redress through its other option, the Federal Trade Commission. Mr.

Steinhilber, the group's leader, said that the committee could argue that the statements constitute a "restraint of trade."

595. HARRINGTON, RICHARD. The battle royal over record royalties. *The Washington Post,* vol. 103, no. 326 (Oct. 26, 1980), pp. L1, L7.

Mr. Harrington discusses the controversy between the Copyright Royalty Tribunal (CRT) and various music associations concerning the 2 3/4 cent mechanical royalty payment for each song on every record sold. Three groups involved in the dispute are: the Recording Industry Association of America (RIAA), which is opposed to any change in the existing system; the National Music Publishers Association, which wants the payment changed from its historic flat rate to six percent of list price; and songwriters, represented by the American Guild of Authors and Composers and the Nashville Songwriters Association, who want eight percent. In addition, the RIAA has questioned the CRT's statutory authority to change the royalty formula from a fixed rate to a percentage-based rate. Congress mandated the CRT to make a decision on the royalty matter by January 1, 1981, and also to balance the income requirements of copyright owners with the financial health of copyright users, i.e., record companies.

596. HARRIS, PAUL. C'right Tribunal says mechanical rate justified. *Daily Variety*, vol. 190, no. 42 (Feb. 5, 1981), pp. 1, 14.

The Copyright Royalty Tribunal's written decision regarding the mechanical royalty rate increase stated that the evidence gathered during the rate proceedings showed that the 2 3/4 cent rate did not afford copyright owners a "fair return for their creative work," and that an increase was warranted. The evidence also showed that not only had inflation eroded the royalty rate but that the "aggregate royalties actually paid to copyright" owners during the period from about 1963 to 1974 had declined while record sales had increased considerably.

597. HARRIS, PAUL. License fee hikes bummer for juke ops, boon for music biz. *Daily Variety,* vol. 190, no. 5 (Dec. 12, 1980), pp. 1, 37.

By a 3-2 vote, the Copyright Royalty Tribunal increased the annual compulsory license fee for jukeboxes from $8 per machine to $25. In two years, the fee will automatically be increased to $50. The Tribunal indicated that the 1987 and subsequent fee adjustments will be linked to the consumer price index. AS-

CAP/SESAC had sought a $70 fee and BMI, a $30 fee. The American Music Operators Assn. had argued for maintenance of the current fee, contending that any major increases of the royalty would be disastrous to many of its member companies.

598. HARRIS, PAUL. New royalty rate hard on piano roll firms. *Daily Variety,* vol. 190, no. 21 (Jan. 7, 1981), pp. 22, 26.

Piano roll manufacturers are unhappy about the Copyright Royalty Tribunal's decision to increase the mechanical royalty rate. Piano rolls are considered sound recordings. Thus their manufacturers are expected to pay the same rate that their counterparts in the recording industry pay. The manufacturers complain that in making its decision the Tribunal did not consider the fact that unlike the recording industry, the piano roll industry is not a multi-million dollar business. Since their industry is smaller than the recording industry in size as well as sales volume, the manufacturers feel that they should not be expected to pay the same rate. Letters have been sent to Congress and the Tribunal expressing the industry's views and requesting a restructuring of the royalty formula.

599. HENNESSEY, MIKE. Nordic record industry girds to cope with challenges of the eighties. *Billboard,* vol. 92, no. 42 (Oct. 18, 1980), pp. S-1, S-4 thru S-6.

In 1979, the Nordic recording industry was generally at a standstill. Album sales were static and cassette sales were substantially down. The cassette market was the only segment of the industry that showed an increase in sales. This overall state of decline was attributed to home taping and several other things. One solution being considered by the Nordic countries, which include Denmark, Finalnd, Norway and Sweden, is a levy on blank tape. Their efforts toward imposing levies have been hampered, however, by their inability to devise a scheme for dividing the royalty once it is collected.

600. HOLLAND, BILL. Copyright Office sets license regulations. *Record World,* vol. 37, no. 1742 (Dec. 13, 1980), pp. 3, 54.

The Copyright Office recently published its final regulations for establishing a compulsory license for making and distributing phonorecords of non-dramatic musical works. These regulations, which supersede the interim regulations adopted December 29,

1977, take effect December 29, 1980. They prescribe the "requirements governing the content and service of certain notices and statements of account to be filed by persons exercising" the compulsory license. In adopting the final regulations, the Office decided to: (1) discard the tracking requirement for record shipments; (2) use a "first-out-first-in" accounting convention, audited by a CPA in accordance with generally accepted accounting principles (GAAP); and (3) reduce the "point in time" cut-off for holding reserves from twelve to nine months. Along with these determinations, the Office published its conclusions with respect to certain unsettled issues and made changes in the formula for computing royalties.

601. HOLLAND, BILL. Copyright Tribunal appeal to be heard in Washington. *Record World,* vol. 37, no. 1751 (Feb. 21, 1981), pp. 3, 42.

The Recording Industry Assn. of America's appeal of the Copyright Royalty Tribunal's decision increasing the mechanical royalty rate will be heard by the Court of Appeals for the District of Columbia. The RIAA filed one appeal on December 19, 1980 shortly after the Tribunal made its decision and another on February 3, 1981 after the decision appeared in the Federal Register. The court ruled that the latter appeal was valid in that it was the first filed after the decision's publication in the Register. The National Music Publishers Assn. and the American Guild of Authors and Composers also appealed the Tribunal's action. Their appeals, which were filed in New York on December 19th, were dismissed as premature.

602. HOLLAND, BILL. RIAA, NMPA move to appeal CRT ruling. *Record World,* vol. 37, no. 1745 (Jan. 10, 1981), pp. 3, 34.

The National Music Publishers Assn. has appealed the Copyright Royalty Tribunal's decision increasing the mechanical royalty rate to four cents per song. One of the issues raised in the appeal, which was filed with the Second Circuit Court of Appeals in New York, concerns the new rate's July 1, 1981 effective date. The NMPA wants an earlier effective date. It is expected that this action will be consolidated with that filed by the Recording Industry Assn. of America.

603. Indict married pair. *Variety,* vol. 301, no. 4 (Nov. 26, 1980), p. 40.

A federal grand jury in St. Paul has indicted Curtis and Car-

olyn Acree for three counts of illegally distributing copyrighted films. The couple is charged with illegally videotaping and selling copies of "Star Trek" and "The Empire Strikes Back".

604. KARLEN, PETER H. Art law—copyright and licenses. *Artweek* (Nov. 1980).

A definition of a licensor, the rights which he can grant, and the way these rights may be exercised are topics discussed in this article. The author emphasizes the need for a written contract and some of the pitfalls of an exclusive license to an author's work.

605. KARLEN, PETER H. Art law, copyright transfer. *Artweek* (Oct. 18, 1980).

The author discusses transfer of copyright for the visual artist and defines "a work made for hire." Peter Karlen suggests that anyone who acquires a copyright from another should record the change of ownership with the Copyright Office. He also states that when a copyright is inherited or donated, it is subject to inheritance, estate and gift taxes.

606. KARLEN, PETER H. Copyright: subject matter. *Artweek* (Oct. 4, 1980).

A discussion of section 102(b) of the Copyright Act of 1976 for the beginning artist. The author states that an "idea" cannot be protected by copyright. He emphasizes that the work must be in a tangible form before it can be protected. Games and recipes are given as examples of the "idea-expression" dichotomy. The author instructs his readers that a board game may only be partially protected by copyright—the sculptural game pieces or perhaps the game instructions. The same is true for a recipe where only the arrangement of the words can be protected by copyright as a literary work.

607. KELLER, J.R. KEITH. Video software biz sprouts in Denmark; pirates active. *Daily Variety*, vol. 190, no. 33 (Jan. 23, 1981), p. 84.

Bent Fabricius-Bjerre has entered Denmark's video film market, which until recently was solely run by pirates. Fabricius-Bjerre, who is the distributor for Warner Brothers films and records in Denmark, teamed up with Andre Poulsen, a video film dealer, to open up Metronome Video. Denmark has several companies that rent video films and recorders, but Metronome is the

country's first legitimate video sales firm. In addition to Metronome, the partnership has begun setting up sales/rental programs in at least forty local theaters, a move which will probably considerably cut into the illegal video market.

608. KOCH, WILLIAM H. Helping the copyright law work. *Physics Today* (Nov. 1980), p. 9.

An article questioning whether the new copyright law accomplishes the constitutional purpose "to promote the progress of science and useful arts." A discussion of Sections 405, 107 and 108, fair use and the reproduction by archives is provided along with a look at the problems of librarians in complying with the intent of the new copyright law primarily because of their restricted library budgets.

609. KOPP, GEORGE. Video music: legal gray areas still darken horizon. *Billboard* (Nov. 22, 1980), pp. VM-14, VM-22.

Because the home video industry is still in its infancy, it faces many legal problems that fall into a gray area which the lawmakers and the courts have not yet defined. Currently most of these problems can be categorized as arising in the course of program acquisition or arising after program sale. Somewhere in between these two categories is perhaps the industry's most serious problem–piracy. The 1976 Copyright Act and the Betamax case will eventually offer some guidance in this area, but they are both subject to change. Other unsettled legal issues facing the video industry include video rentals by retailers and the question of whether music used on videocassettes is subject to synchronization rights or to mechanical rights.

610. KUPFERMAN, THEODORE R. Seventy-five years of 'showbiz' law. *Variety*, vol. 301, no. 11 (Jan. 14, 1981), pp. 20, 124.

In this in-depth article on communications and entertainment law, Judge Kupferman discusses several landmark cases including copyright infringement suits involving perforated music rolls and off-air taping by Betamax machines. Some attention is also given to the right of privacy, defamation, the 1909 and 1976 Copyright Acts, international copyright conventions, satellite transmissions and contract rights.

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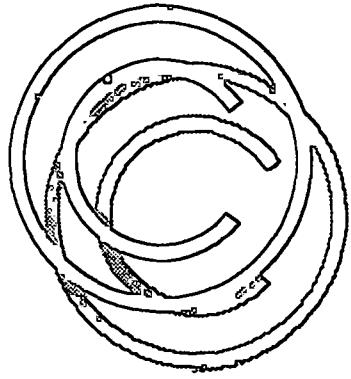

Published at
NEW YORK UNIVERSITY LAW CENTER

VOL. 28, No. 6 AUGUST, 1981

Published at New York University Law Center, 40 Washington St. South, New York, N.Y. 10012. Printed and distributed by Fred B. Rothman & Co., 10368 West Centennial Road, Littleton, Colorado 80127.

ISSN 0010-8642

BULLETIN

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The membership dues set forth above generally reflect an increase approved by the Board of Trustees at its Annual Meeting on June 14, 1981.

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THE BULLETIN of The Copyright Society of the U.S.A. is published 6 times a year by The Society at the Law Center of New York University, 40 Washington Square South, New York, New York 10012; Stanley Rothenberg, *President;* Richard Dannay and Alan J. Hartnick, *Vice Presidents;* Theodora Zavin, *Treasurer;* Jerold L. Couture, *Secretary;* Henry R. Kaufman, *Assistant Treasurer;* Raymond D. Weisbond, *Assistant Secretary.*
All communications concerning the contents of THE BULLETIN should be addressed to the Chairman of the Editorial Board at the Law Center of New York University, 40 Washington Sq. So., New York, N.Y. 10012.

Business correspondence regarding subscriptions, bills, etc., should be addressed to the distributor, Fred B. Rothman & Co., 10368 West Centennial Road, Littleton, Co. 80123.

CITE: 28 BULL. COPR. SOC'Y., page no., Item . . . (1981).

PART I

ARTICLES

611. United Kingdom Green Paper. Reform of the Law Relating to Copyright, Designs, and Performers' Protection

Introduction

1. The purpose of this document is to invite public comment on proposals made for the revision of the law relating to copyright, industrial designs and performers' protection.

2. Copyright exists to protect the products of intellectual endeavour. Originally concerned with preventing the unauthorised copying of printed books, copyright law has developed so as to protect other works and subject matters and to extend the activities which can be controlled by copyright owners. The range of material presently capable of attracting copyright is truly remarkable. A work of great literature, a translation, a football coupon, a screen play; a symphony, a pop song; a painting, a drawing, a sculpture, a building, an exhaust pipe for a motor car; a photograph; a film; an audio or video recording; a broadcast. Copyright law covers these and many more of the diverse results of intellectual effort. And the rights which are conferred are also extensive. Without the agreement of the copyright owner and apart from some limited exceptions, there can, for instance, be no copying of his work, no public performance of his work, no recording, no filming, and no broadcasting.

3. Copyright plays a significant role in commercial life and has a considerable impact in areas such as education where there is also a public interest. Not only does it serve to protect the individual against plagiarism and ensure reward for his intellectual efforts. It provides the legal framework which permits the commercial exploitation of copyright material on which depends the livelihood of the multitude of firms and organisations who, with the agreement of the creators, disseminate their material for public consumption. The record or film maker and the broadcaster are themselves creators of copyright matter; they are also users of copyright works and other material which form a vital ingredient of their own productions. The educationalist may himself be a creator, but he is also a considerable user of the copyright material provided by others in his efforts to advance the knowledge and learning of his pupils.

4. It is small wonder therefore that copyright law has grown into the intricate and comprehensive code now expressed in the Copyright Act 1956.[1] Obviously this code cannot be fixed for all time and consideration has to be given to its evolution in response to changing economic conditions, social requirements and technical developments.

5. A thorough review of copyright law was carried out by the Whitford Committee[2] which reported in 1977. This included the law relating to industrial designs and also that relating to the protection of performers. The Committee made several recommendations for change and the Government is prepared to accept many of these. However, on a number of important matters, the Committee was not unanimous in its view and consultations carried out by the Government subsequent to publication of the report have also shown that it has had a mixed reception. There have also been changes in the

economic situation of the country since the report was published and these have particularly affected the significance of copyright in the industrial field. In these circumstances the Government considers it right to formulate its own views and to present them in this document for further public debate.

6. Copyright and the protection afforded to performers are not simply national affairs. For long they have been subjects of international agreements. In fact the United Kingdom is party to the Berne Convention for the Protection of Literary and Artistic Works,[3] the Universal Copyright Convention,[4] the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations[5] and the Convention for the Protection of Producers of Phonograms against unauthorised Duplication of their Phonograms.[6] In the television field, the United Kingdom belongs to the Council of Europe Agreement concerning Programme Exchanges by means of Television Films of 1958[7] and the Agreement on the Protection of Television Broadcasts of 1960.[8] To complete the picture, mention must also be made of the Convention relating to the Distribution of Programme-Carrying Signals transmitted by Satellite[9] and the Vienna Agreement for the Protection of Type Faces and their International Deposit[10] to neither of which the United Kingdom yet belongs. Many of these agreements have potentially world-wide membership; they provide a climate in which rights can be properly exercised and yield enormous benefit to British interests in securing protection for them in foreign lands. The Government intends to ratify the Satellites Convention and the Vienna Agreement and to accede to the latest Act of the Berne Convention which it signed in 1971.

7. So far as the international arena is concerned, it is also appropriate to refer to the moves which are afoot in the European Economic Community. In 1977, the Commission published *Community Action in the Cultural Sector*.[11] This is a Commission Communication to the Council which demonstrates that the Commission is considering some harmonisation of copyright laws in the Community over and above that already provided by the International Conventions to which all the Member States of the Community are parties. As a start to this, the Commission has begun work aimed at harmonising laws on the term of copyright and on 'Droit de Suite'. In addition, the Commission has instructed experts to prepare studies of various aspects of copyright law. Of these, the Commission has published *Copyright Law in the European Community* by A Dietz,[12] *Performers' Rights in the European Economic Community* by F Gotzen,[13] *Protection of the Works of Artistic Craftsmen* by W Duchemin,[14] *Performing Rights Contracts* by F Gotzen[15] and *Piracy of Phonograms* by Gillian Davies.[16] As a member of the European Economic Community, the United Kingdom will of course play an active part in discussions on any proposals which the Commission may make. It is very early days yet and it is not possible to foresee what the Commission may propose. But it is as well to bear in mind that if any Community initiative in the copyright area yields results acceptable to the United Kingdom it may have an impact on the content of new legislation. Conversely, the Government hopes this document and the comment on it will play their part in shaping the views of the Community.

8. The following chapters of this document broadly cover all the subjects dealt with by the Whitford Committee. Many matters covered by the Copyright Act are not in need of change. These were not discussed in the report of the Whitford Committee and are not referred to in this document. So far as these matters are concerned, the Government has no present intention of making any changes of substance. When it comes to drafting new legislation the Government will take account of remarks by the Whitford Committee which reflect on the wording of the Copyright Act 1956 and, as pleaded by the Committee, will attempt to structure the provisions so as to put the law 'on a plain and uniform basis', so far as this is possible.

9. The Government hopes that there will be a lively public debate on the issues spelt out in this document. Comments will be welcome and should in the first instance be addressed to the Industrial Property and Copyright Department, Department of Trade, 25 Southampton Buildings, London, WC2A 1AY.

REFERENCES

[1]4 and 5 Eliz. 2 c. 74.

[2]*Copyright and Designs Law* (Report of the Committee to consider the law on copyright and designs chaired by the Honourable Mr Justice Whitford Cmnd. 6732)—referred to throughout this document as 'Whitford'.

[3]Misc. No. 23 (1972), Cmnd. 5002 contains the latest, that is Paris (1971), Act of this Convention which is referred to in this document as the Berne Convention. The United Kingdom is party to the Brussels (1948) Act—Treaty Series No. 4 (1958), Cmnd. 361—for provisions of substance and to the Stockholm (1967) Act—Treaty Series No. 53 (1970) Cmnd. 4412—for Berne Union administration purposes.

[4]Treaty Series No. 9 (1975), Cmnd. 5844.

[5]Treaty Series No. 38 (1964), Cmnd. 2425 referred to in this document as the Rome Convention.

[6]Treaty Series No. 41 (1973), Cmnd. 5275.

[7]Treaty Series No. 88 (1961), Cmnd. 1509.

[8]Treaty Series No. 87 (1961), Cmnd. 1508; Treaty Series No. 69 (1965), Cmnd. 2744; Treaty Series No. 47 (1975), Cmnd. 5954. These respectively contain the text of the Agreement, a Protocol and an additional Protocol to the Agreement.

[9]Published by the World Intellectual Property Organisation, Geneva and referred to in this document as the Satellites Convention.

[10]Misc. No. 27 (1974), Cmnd. 5754 referred to in this document as the Vienna Agreement.

[11]*Bulletin of the European Communities Supplement* 6/77.

[12]Published by Sijthoff and Noordhoff 1978.

[13]Published by the Commission 1977.

[14]Published by the Commission 1976.

[15]Published by the Commission 1980.

[16]Published by the Commission 1980.

CHAPTER 1

Industrial Designs

1. Intellectual property covers patents, copyright and designs. Patents are concerned with the protection of inventions and they confer monopolies which protect not only a particular article which incorporates an invention but also all the other forms which the invention might take; in other words, the idea is protected.

2. Copyright protects artistic works against copying; no monopoly is conferred. Infringement exists only if the work is copied.

3. Industrial designs deal with an uneasy territory concerned with articles produced in quantity which are lacking in inventiveness of a kind such as to attract patent protection but which have an appearance which plays a part in the choice of an article. This may be because the object as a whole has an aesthetically pleasing shape or, where the shape is not in itself pleasing, carries some aspect of embellishment, say in the form of a flower. If there is novelty in features of shape which are not 'dictated solely by the function which the article to be made in that shape has to perform', monopoly protection for 15 years may be obtained by registration under the Registered Designs Act 1949.[1] It may be noted that a registered design confers a monopoly, that is, its features are protected not only as applied to the particular article depicted in the application but also as applied to other articles of the same kind.

4. It is clear that there has always been the possibility of overlap between the protection conferred by registered design and that conferred by copyright, as both forms of protection may cover the appearance of the same article. The 1956 Act avoided duality of protection by providing that as soon as a registrable design was applied industrially or a design was registered, the copyright immediately became ineffective in the field of the design. This avoided a second problem, namely that where a copyright work was applied to a mass-produced article, the article itself would in effect be protected for the copyright term of life plus 50 years; this, for industrial articles of commerce, was thought to be far too long.

5. It followed, therefore, that the aesthetic aspects of mass-produced articles could find protection only under the Registered Designs Act. This of course is quite independent of whether the copyright work had an existence separate from the article, for example, a painting applied to a tin tray.

6. Apart from the change brought about by the Design Copyright Act 1968[2] (which postponed the loss of copyright for 15 years from first marketing goods to which a copyright work had been applied), two cases had a marked effect on the practical meaning of this provision. One was *Dorling v Honnor* [1964] RPC 160 and the other was *Amp v Utilux* [1972] RPC 103.

These two cases had the result that a very large number of mechanical components which had previously been thought to be registrable under the Registered Designs Act were shown not to be, and that unregistrable designs may have copyright protection for life plus 50 years.

7. This effect would not have mattered a great deal were it not for the fact that the 1956 Act protects three-dimensional copies of two-dimensional works, and drawings are regarded as works. Hence, copyright protection automatically existed whenever an article started life as a drawing and the drawing was recognisable in the article. The total result, therefore, was that large numbers of machine parts incapable of being protected under the Registered Designs Act, and rightly so, since they lack visual appeal, were protected for an even longer term under the Copyright Act, through fortuitously having started life as a drawing.

8. The outcome of all this has the widest of implications. Almost any article of commerce which can be guaranteed to have no visual appeal, and hence to be excluded from protection under the Registered Designs Act, is very likely protected under the 1956 Act if somewhere or other (in any of the countries of the Berne or Universal Copyright Conventions) an original drawing exists. Examples include exhaust pipes and gear wheels and, indeed, motor car spares in general where appearance is immaterial.

9. The overall position is that in the United Kingdom designs may be protected under one or more of the following:

(1) Under the registered designs system in their own right provided that there are features of shape or configuration not dictated solely by function.

(2) Under the copyright system as copies of an original drawing.

(3) Under the copyright system in their own right as works of artistic craftsmanship.

10. There are two questions which must be answered:

(1) Which designs should be protected?

(2) By what legal mechanism?

11. By far the most controversial aspect of the first question is whether purely functional designs should be protected. There was substantial agreement in Whitford that where an article has an aesthetic aspect, it should be protected by one means or another against copying, but a majority of Whitford thought that the functional article should also be protected against copying because a very great deal of effort or investment might have gone into its making, notwithstanding the lack of aesthetic interest. The design of a cylinder head is a typical example. The Government is inclined to accept the view of the minority which is that the purely functional should not be protected against copying; indeed, unless it attracts patent protection as being inventive it should not be protected at all. There are various reasons for this.

12. As a country we have set our face against petty patents. We have considered that there ought to be a substantial level of inventiveness before articles are protected from the point of view of their function and it is consistent with this view that we exclude from patent protection articles which show no inventiveness at all. More important than this, however, and perhaps under-estimated by Whitford, is the effect of protecting the functional and non-inventive on the development and competitiveness of British industry. We have noted, and some of the comments on Whitford that we have received stress, that except for patent and similar protection, the purely functional is unprotected in most other countries. It follows from this that British spare parts manufacturers are at a disadvantage compared with foreign competitors. The Government does not consider that placing British industry in this disadvantageous position is in the national interest.

13. More broadly, however, the Government does not believe that industrial progress will be helped if almost any industrial product is protected against copying. The Government thinks that if an industrial society is to be active and competitive, there must be a substantial common pool of experience from which all can freely take. The spectacle of all functional elements being protected carries with it a threat of stagnation of industrial development or at best of a substantial waste of time and money in changing perfectly satisfactory designs for no other reason than to avoid legal consequences.

14. Given that the purely functional should not be protected other than by patents, the problem still remains as to what features an article should have in order to attract protection in its own right. It would be difficult to distinguish between aesthetic and other elements of an article and the Government therefore proposes that the general appearance of an article should be protected in so far as it is not dictated by the function that the article may have to perform. This is the copyright approach rather than the registered design approach of considering individual features and it is right that such articles should get protection by way of copyright legislation. The result of this proposal would be an expansion of the existing provision of section 3(1)(*c*) from works of artistic craftsmanship to works whose appearance is not solely dictated by the function they have to perform. Such works would generally attract the normal copyright term applicable to artistic works. However, where they are applied industrially, there seems no justification for such a long term and, as mentioned earlier, designs which are applied industrially are protected by copyright for only 15 years from first marketing. The Government proposes to extend the copyright term in these cases to 25 years from first marketing. This will remove an obstacle to United Kingdom ratification of the latest Act (Paris 1971) of the Berne Convention.

15. At the moment, functional articles are attracting protection under copyright as three-dimensional copies of drawings. If the purely functional is to be excluded while at the same time retaining protection for the drawing, the present situation whereby any article acquires protection merely because it is recognisably a copy of a drawing itself in copyright, must cease. The Government proposes therefore that unless the article itself would attract

protection under the definition given above, it will not itself be protected against copying in either two or three dimensions, even though it is recognisably a copy of the drawing. Moreover, an article which is a direct copy of the drawing will not infringe the copyright in the drawing unless the article could claim protection in its own right. Cases where it is necessary to determine whether an article is in fact a copy of a drawing, will become fewer under this system. Nevertheless, the Government proposes to adopt the Whitford recommendation that the non-expert test of section 9(8) of the 1956 Act should be repealed. The test is difficult to apply and leads to uncertainty and seems in any event to have been overtaken to some extent by the Court of Appeal's judgment in *Solar Thompson Engineering Company Limited v Barton* [1977] RPC 537 which assumes that the non-expert has a sectioned object in his hands for the purpose of comparison with a sectional drawing.

16. The system proposed above will exclude the purely functional from any protection save patents, but will protect appearance under copyright law. In connection with the latter, the Government has given close consideration to the suggestions made to Whitford for reducing the uncertainty for other manufacturers which is consequent upon copyright protection. Like Whitford, the Government does not believe that it would be justified in requiring a deposit of the design. This would destroy the advantage of automatic protection, add to the burden and to costs and create practical difficulties for a number of trades. To ensure adequate notice of the claim to protection, Whitford recommended that damages should not be recoverable in respect of infringement committed before specific notice of the copyright claim or unless notice has been given by way of marking on the article or on its packaging or accompanying literature. The Government does not feel able to accept this proposal since it does not appear to be consistent with United Kingdom's international obligations. Article 5(2) of the Berne Convention provides that 'the enjoyment and the exercise of rights [claimed by virtue of the Convention] shall not be subject to any formality'. It is also true that although strong representations on this subject were made to the Johnston Committee,[3] they were not repeated to Whitford and it appears that some of the fears expressed to Johnston may have been allayed.

17. Finally, there is the question of whether or not the Registered Designs Act should be repealed, as suggested by Whitford. Whitford argued that since all that is needed is protection against copying, there was no longer any case for the registered design system if, as proposed above, protection against copying is given by the Copyright Act. The Government recognises the strength of the argument. However, in spite of the attempts in the 1956 Act to equate copyright and registered design protection, they do not cover exactly the same field. It is felt therefore that far more debate is necessary before such an important step as doing away with the registered design system is taken, in particular on the practical effect of protecting features of shape and configuration as opposed to overall appearance. It is on this aspect and on whether or not it meets a practical need for British industry that the future of the registered design system depends. Nevertheless, there are certain additional factors which cannot be ignored.

18. That there is a clear demand for such protection is shown by the number of applications received by the Designs Registry of the Patent Office. The statistics given in Appendix B of Whitford and the figures available since publication of the report show that the application rate is still significant. Indeed, the statistics for 1978 to 1980 (each year recording over 5,000 applications) indicate a certain resurgence of interest. Apart from this, it is considered that it is not unlikely that, as the European Economic Community develops, a unified Community approach will be sought and that this will be along the lines of a registration system. In this respect, it is perhaps significant that the recent Benelux law provides for registration as well as protection under copyright. It is also worth noting that the design monopoly system enables British nationals to claim Convention priority under the terms of the Paris Convention for the Protection of Industrial Property.[4] Also, protection for designs in some dependent and former dependent territories is only possible in respect of designs which have been registered in the United Kingdom. Unless and until such territories amended their laws, British-owned (and other) designs could well be at risk there.

19. Nevertheless, the question of whether the design system meets a different need from the copyright system is a basic one. The Government hopes that there will be a lively debate on this subject and, on its conclusion, the fate of the registered designs system will depend.

REFERENCES

[1]12, 13 and 14 Geo. 6 c. 88.
[2]Eliz. 2 1968 c. 68.
[3]*Report of the Departmental Committee on Industrial Designs* (Cmnd. 1808).
[4]Treaty Series No. 61 (1970), Cmnd. 4431.

CHAPTER 2

Reprography

1. One of the fundamental elements of copyright is the right of an author to control the reproduction of his work and rightly so, since authorship is a national asset which must continue to be fostered. At the same time, however, there are a number of activities which under the 1956 Act and, indeed, under the laws of most other copyright countries are allowed to proceed without the author's permission and without payment to him. These activities are termed 'fair dealing' in section 6 of the 1956 Act and although the expression is not defined in the Act, it is generally recognised that for dealing to be fair it should not compete with the author's work as, for example, by diminishing its sales.

2. There are various reasons behind the fair dealing exceptions. In some cases it would be inequitable for the user to have to pay; criticism or review or reporting current events in, for example, newspapers are obvious examples of this. In other cases, the needs of students and research workers are considered to be paramount so they are not called on to seek authority for what they wish to do; hence fair dealing for purposes of 'research or private study'.

3. Another exception is under section 7 of the 1956 Act which allows certain non-profit making libraries to supply, under specified conditions, single copies of an article from a periodical or a reasonable extract from a book.

4. The idea of fair dealing is widely accepted in copyright countries and, indeed, is recognised by the Society of Authors and the Publishers Association who, in a joint statement, have specified acceptable amounts of copying which may be carried out without seeking permission from the copyright owner. However, the widespread use of modern photocopying equipment has altered the picture. The common understanding is that there is a great deal of copying of copyright works in private and public organisations and in schools and libraries of which undoubtedly a significant proportion would be acceptable as fair dealing but a great deal more of which constitutes an abuse of the exceptions, in particular in the taking of multiple copies of the same work. However, no statistical evidence has been produced to establish the extent of illicit private copying and its effect on sales of copyright works. This underlines the difficulty of policing acts which take place in private.

5. Confronted with this problem, Whitford recommended that the 1956 Act should be amended to encourage the introduction of blanket licensing in the field of reprography, by which was meant a scheme whereby a group of copyright owners forgo their rights to take individual action, collection of royalties instead being carried out at one or more standard rates by a central collecting society which is also responsible for distributing revenue among the individual copyright owners. Whitford recommended that there should be a flexible system of blanket licensing to cater for all user requirements for

facsimile copies. However, no copying should be allowed which would conflict with the copyright owner's normal modes of exploitation, for example the distribution of copies to the public. Nevertheless, Whitford considered that blanket licensing could be undermined by use of the exceptions provided for in sections 6 and 7, and therefore recommended that as and when licensing schemes came into existence, the latitude given by section 7 (the library exceptions) should not apply and section 6 should not allow facsimile copies to be made for research or private study.

6. The Government has considerable doubts about narrowing the scope of section 6 in this way. First, as indicated above, it is believed that the section 6 exception is reasonable, and one that should not therefore be disturbed. The amendment of the section to prevent the making of facsimile copies for research or private study is likely to be widely ignored where the student has control over the photocopier himself. Moreover, where the student needs to copy part of a work for manifestly fair dealing purposes, it would be wrong to prevent him using a fascimile copier which is after all nothing more than a tool of modern technology.

7. As to the library exceptions under section 7, the problem is more complex. If Whitford's proposal is taken up, the users of a designated library would have to pay more for all the copies the library made for them, including those which the student might have made for himself under the fair dealing provision. Since the intention of the Government is to preserve the right of the individual student to make copies within the limit of fair dealing, it seems that the right of the library which, after all, is the repository of most of those works which the student requires, must also be retained.

8. Nevertheless, the Government is prepared to consider some tightening of the provisions of sections 6 and 7 with a view to controlling their abuse. The intention of the library exceptions was to afford certain libraries the opportunity of assisting individual students who need to have single copies. They were never intended to allow systematic copying of the same material. Accordingly, the Government is prepared to consider limiting the exceptions of section 7 so as to make it quite clear that they exclude the related production of multiple copies of the same material. Furthermore, the Government intends to follow Whitford's recommendation and limit the 'research and private study' exceptions of sections 6 and 7. The effect of the proposed limitation will be to ensure that these exceptions are not used for the purposes of research carried out for the business ends of a commercial organisation.

9. Whitford contended that the retention of section 7 would reduce the incentive of libraries to take licences under blanket licensing schemes. This is undeniable in so far as it relates to designated libraries which are content to give a service by preparing a single photocopy of an article or book extract to an individual who needs it for research or private study. However, it would seem that retention of section 7 would not have such a result in the case of other libraries or even in the case of designated libraries which are desirous of doing more for their customers than the law presently allows. In any event,

there would appear to be many other user areas, eg industry and professional interests, where sections 6 (as proposed to be amended) and 7 have no relevance and where no change in the legal framework is necessary to deal with copying by means of blanket licensing. If copyright owners consider it desirable, it is already open for them under the existing law to band together and establish licensing schemes and negotiate with the different groups of users.

10. Finally, it should be mentioned that it is not unlikely that any blanket licensing scheme that may be worked out by users, or organisations representing them, and licensing bodies set up by copyright owners, will at some stage give rise to some disagreement as to the rates of payment or other terms and conditions. The Government therefore accepts Whitford's proposal that a Copyright Tribunal should be established with jurisdiction in respect of such disputes. This is dealt with further in Chapter 15.

CHAPTER 3

Recording

Audio recording

1. The private copying of a sound recording on to a blank tape or cassette, whether this is done for example by taping a disc or by taping a radio broadcast of a recording, requires the permission of the owner of copyright in the work, eg song, on the record and also the permission of the owner of the separate copyright in the recording itself. These rights are clear; Whitford remarked however that the use of tape recording equipment, particularly in the home, is resulting in their widespread infringement. Further, Whitford considered that the practical problems of policing acts of infringement which take place in private render it impossible for copyright owners to exercise their rights.

2. Whitford took note of a 1975 survey which showed that 45 per cent of homes have access to a recording facility and that 20 per cent of persons over the age of 16 have used such equipment to record from commercial records or tapes. They concluded that whilst all statistics should be viewed with a good deal of caution, it is clear that there is a considerable amount of unauthorised recording going on. If a record is copied on to blank tape, a sale of the record may be lost. Such copying has financial attractions as blank cassettes cost much less than LP's and pre-recorded cassettes.

3. Whitford did not examine the effect of unauthorised recording on the wellbeing of the copyright owners whose rights are infringed other than to make the following remark in connection with the suggestion that fair dealing should be extended to permit some free recording;

> 'Complete freedom for individuals and education establishments to record for nothing from any source would not only weaken the record industry but also harm the interests of composers, writers, publishers, performers and others who are dependent on that industry, to the ultimate detriment of the whole community.'

4. It seems clear that the traditional solution of granting an exclusive right to the record maker and leaving it to him to ensure that those who infringe are brought to book is not a satisfactory method of coping with activities that take place in private. It may of course be argued that such activities should be regarded as beyond the reasonable bounds of copyright law and that copyright owners should be content with exercising their rights within the commercial sphere. This may not be easy to accept but, unless alternative schemes which compensate the rights owners without imposing unacceptable burdens on the individual are possible, it may be that the industry will have to reconcile itself to a situation where its revenue comes mainly from broadcasting and other public performances (such as discos) of its recordings.

5. The ideal solution would be the payment of a fee in respect of each individual recording made, the fee to go to the owner(s) of the individual

copyright. This is, of course, entirely impractical. A somewhat more feasible solution, therefore, would be for those who wish to make private copies to do so in return for payment of a blanket licence fee. The drawback to this, however, is that copyright owners would have no effective means of policing those who do not take out licences. Indeed, the Mechanical Copyright Protection Society operated such a scheme for many years but very few licences were taken out and the scheme has now been discontinued.

6. Another attempt by the record industry to resolve the problem of the taping of records relates to the development of a spoiler system. In recent years, the record industry has sponsored research aimed at finding a technological solution to the problem in the form of a spoiler system which would produce an inaudible signal when the record is played which would react with tape recorder circuits to spoil a tape recording of the record by superimposing unwanted noise. Their research has apparently been unsuccessful so far. Nevertheless, if a technically successful system were found, the Government would seriously consider supporting this solution to the problem by introducing legislation to make illegal any anti-spoiler devices which might subsequently be developed.

7. A further solution which has received a great deal of publicity is to impose a levy on tape recording equipment and/or blank tape in return for the freedom to make recordings in single copies for private use. A levy system based on recording equipment is provided in the Federal German Copyright Act 1965. The levy is collected by a collecting society which represents record makers, composers, lyric writers and performers. Whitford recommended the introduction of a similar system in the United Kingdom and, in the belief that a levy on blank tape would probably not be worth the trouble of collecting, considered that it too should fall on recording equipment alone. In Germany the amount of the levy is specified as a maximum of 5 per cent of the manufacturer's sales proceeds. It is understood that this yields only about £4 million a year and that the introduction of a further levy on blank tape is currently under discussion.

8. Since Whitford was published, further numerical information has become available. This information falls into two categories, namely facts, such as actual record sales in the UK, and statistical analyses in which possible sales of records lost to private taping are assessed.

9. Within the first category the following figures are relevant.

TABLE I **Annual trade deliveries of LP's (including pre-recorded cassettes and 8-track cartridges)**

	million units
1972	67.4
1973	96.5
1974	109.7
1975	111.8
1976	102
1977	101.3
1978	107.2
1979	98

(*Source:* British Phonographic Industry Limited).

TABLE II **Access to a recording facility**
The proportion of the adult population (15 years of age or over) with access to a tape recorder.

	per cent
1973	30
1975	45
1977	52
1979	56

(*Source:* Report by the British Market Research Bureau Limited prepared on behalf of the British Phonographic Industry Limited and the Mechanical Copyright Protection Society).

TABLE III **Sales of blank cassettes**

	million
1973	15.0
1974	18.5
1975	27.0
1976	36.0
1977	34.1
1978	33.0

(*Source:* The Economist Intelligence Unit Limited).

10. A survey carried out at the request of the British Phonographic Industry and the Mechanical Copyright Protection Society and based on statistics available in 1977 concluded that 25 million LP's was a 'reasonable conservative estimate of the sales lost to the pre-recorded music industry through unauthorised in-home taping' in 1977 alone.

11. From the 1979 *Year Book of the British Phonographic Industry Limited* the cost breakdown of a full price pop LP is as follows:

	£
Value added tax	0.61
Dealer margin	1.40
Distribution and dealer discounts	0.54
Artist royalty	0.43
Copyright royalty	0.26
Sleeve (box and liner)	0.18
Manufacturing costs	0.38
Recording costs (other than artist royalty)	0.14
Advertising, marketing and promotion	0.42
Contribution to record company profit and overheads	0.33
	£4.69

12. If a sale is lost, the following costs are saved: about 20p of the distribution costs together with the sleeve and manufacturing costs, dealer margin and VAT. This is a total saving of £2.77 which leaves a loss to the rights owners and artists of £1.92. Taking this figure as £2 and multiplying by estimated lost sales of 25 million units (see paragraph 10) gives a sum of £50 million to be retrieved. Assuming that this were all to fall on blank cassettes, assuming sales of 35 million blank cassettes per year and assuming that the same levy is applied to all cassettes irrespective of their running time, then the levy per cassette would be about £1.40. Such a levy would more than double the cost of a medium grade C90. Alternatively, some or all of a levy could fall on equipment. If it is assumed, as suggested by the above-mentioned survey,

that about 3 million recorders are sold per year, £50 million could be realised by say a £10 average levy on each machine, together with 60p on each blank cassette. It could also be realised by a levy of around £17 on recording equipment alone.

13. Although such evidence as there is suggests that private recording does result in lost sales to the record industry, factors other than private copying could well have had their effects. In this connection, mention may be made of varying VAT rates, varying levels of disposable incomes and the varying popularity of music recorded in given years. It is evident that the sales lost as a direct consequence of private copying cannot be precisely quantified.

14. Whatever the merits of the arguments of the record industry and the owners of copyright works that, because of private copying, they are not receiving a proper return, it must be faced that the increase in prices resulting from the imposition of a levy would fall on very many consumers and runs counter to Government policies aimed at controlling inflation in this country. More than this, it has to be realised that, because of this country's obligations under international copyright conventions, part of the amount raised by any levy would inevitably go abroad. The copyrights in many of the works embodied in recordings available in retail outlets in this country belong to foreign owners and the record industry has indicated that some 15-20 per cent of any levy would go to these owners and also to foreign performers, and it is evident that there would be little in the way of compensatory inflow. In addition, a major proportion of the record firms operating in the United Kingdom are foreign-owned; 65 per cent of LP sales in 1979 were by foreign-owned companies. These companies would also benefit from the levy in that they have a copyright in the recordings they produce. Consequently, it is not easy to ignore the fact that, through these companies, some additional unquantifiable proportion of the levy paid by British consumers could also be channelled into foreign countries with little prospect of significant reciprocal inflows from abroad.

15. If the view is taken that compensation by way of a levy should be payable in respect of lost sales, one problem is to decide on whom the legal obligation to pay the levy should fall. The only effective solution would seem to be, as Whitford suggests, to require payment by manufacturers and importers. It may be argued of course that the blank tape industry and/or recording equipment industry should not be penalised by imposing a levy on their products to alleviate the difficulties of the record industry and other copyright owners. But it can equally be argued that the industries mentioned are those which actually make possible the mass utilisation of records and, in any case, they will doubtless pass on the amounts payable to the user by way of a higher purchase price.

16. This in turn will inevitably attract representations from various sectors of the community who consider that they have special grounds for being exempted from paying the higher prices. These might well comprise those concerned with education and social welfare, for example organisations of

and for disabled people, especially the blind, those who use tape recorders merely for the purpose of playing commercial pre-recorded cassettes, not to mention those who only record non-copyright material. If a levy is imposed, it follows that an element of rough justice will have to be accepted unless, as seems unlikely, some rebate scheme can be worked out which can be operated at small cost and which will enable genuine claimants to be distinguished from the rest.

17. Another problem is to determine the extent of any compensation. If there is to be a levy, it would seem sensible to base it on sales proceeds, since they provide some measure of the extent of private recording. Since the lost record sales cannot be precisely quantified, the percentage of the proceeds of sales of recording equipment to be paid by way of a levy would inevitably have to be some arbitrary amount. If it is decided to impose a levy on blank tape also, again the amount would have to be expressed as an arbitrary percentage. It is, however, not possible to indicate here the sort of percentage figures that would have to be imposed. This is a matter that the Government would wish to consider carefully with the industries concerned and representatives of the consumers.

18. There is also no easy answer to the question as to whether the levy should fall on recording equipment alone, as Whitford suggested, or whether it should be imposed on both the equipment and blank tape or on blank tape alone. It is arguable that the levy should not fall on recording equipment alone. Since a tape recording facility is already available to a majority of the population, it would be inequitable to burden new purchasers with an amount aimed at compensating for the freedom to copy for private purposes which would be available to all. In any case, it would appear that a levy on blank tape would be a fairer measure of the extent of private recording. On the other hand, it is possible to foresee serious difficulties with a blank tape levy. To give a degree of compensation, this would need to be a high percentage of the sales price (*cf* paragraph 12). In any case, tapes are re-usable and it can be envisaged that some unscrupulous dealers could circumvent the levy by selling tapes having trivia recorded on them. Alternatively, a tape levy could be avoided by the consumer purchasing them direct by mail order from abroad.

19. Finally, it is necessary to refer to another problem. If a levy is introduced it will almost certainly need to be administered by a statutory body. The administration will inevitably be complex: on the collection side it will doubtless be necessary to make provision for exemptions or rebates and on the distribution side it will be necessary to decide how the proceeds should be apportioned between the different categories of rights owners and, within those categories, to individual companies and other recipients. Unless the levy is set at an unacceptably high rate, it is possible, therefore, that the net compensation available for distribution might well be minimal.

Video recording

20. It is a breach of the copyright in literary, dramatic, musical and artistic works and also in cinematograph films and sound recordings to reproduce them in the form of videotape without the consent of the owner of copyright.

Most television programmes are pre-recorded and therefore come within the definition of cinematograph film in the 1956 Act, and many live broadcasts in any case contain a copyright literary etc work. As with private sound recording, the enforcement of copyright in the case of video-taping within the privacy of people's homes is, in practice, impossible. Whitford in fact did not distinguish video recording from sound recording and therefore recommended that a levy should also be applied to video recording equipment.

21. Video copying is a relatively new problem but the evidence so far available suggests that it may not be analogous to audio copying. In particular, it is not clear that recording for private purposes detrimentally affects any commercial interests. Normal practice is to use the recorder for 'time-shift' purposes, ie the user records a programme which is broadcast at a time when he is unable to watch it. The programme is subsequently watched at a time convenient to the user and the tape is then re-used to record other programmes. It does not seem to be the custom for users to create libraries of programmes they have taped: perhaps they do not want to dedicate expensive tapes to programmes of films that they will only wish to see rarely if at all.

22. No doubt recording practice is determined by the machines on the market. Those recorders which are currently available can do no more than record television broadcasts and play back recordings on television. They do not therefore represent a threat to the producers of pre-recorded video-cassettes as they cannot copy these products (except when they are broadcast). There will also be no threat to the owners of rights in video-discs when these come on the market as the machines for playing these will have no recording capacity. It may be that the future will bring much cheaper tapes and inexpensive machines which will enable the copying, in the home, of commercial pre-recorded tapes and video-discs (for example, video analogues of the music centre which provides facilities for taping audio-discs). For the present however the Government is not convinced that video recording for private purposes harms the interests of broadcasters, producers of programmes, film producers or any other rights owners involved in video productions.

Conclusion

23. This chapter has sought to expose all the arguments and to indicate the relevant figures. In the light of these, the Government has still not received convincing evidence that the introduction of a levy on audio or video equipment or blank tape would provide an acceptable solution to the problems or potential problems described: at the end of the day it may have to be accepted that there is in fact no acceptable solution. The Government would, however, welcome a public debate before reaching any final conclusions on the matter.

CHAPTER 4

Statutory Recording Licence

1. Section 8 of the 1956 Act provides a statutory licence system in respect of musical works. Once records of a musical work or 'a similar adaptation of the work' have been made in or imported into the United Kingdom for the purpose of retail sale with the agreement of the owner of the copyright in the work, the copyright owner loses his exclusive right to authorise the manufacture of other records of the work. Provided prior notice is given to the copyright owner and the statutory royalty paid, anyone is then free to make his own original recording of the work and sell copies in the United Kingdom.

2. This statutory licence system has been in existence since 1911 and the evidence furnished to Whitford by record manufacturers, writers, composers and music publishers, indicates broad agreement that the system works to the benefit of all concerned.

3. This situation suggests that, apart perhaps from some changes in detail, the statutory licensing system of section 8 should be preserved, as indeed Whitford recommended. The Government, however, is not entirely convinced of the need for this system under present day conditions. It was introduced in 1911 when the British record industry was of course in its infancy. Since then the position has changed dramatically and it seems difficult to accept that, in this single area of copyright, it is now really necessary to provide a derogation from the exclusive rights of composers and music publishers. As the Government views the situation, it is probable that the recording of music would be better left to the operation of the competitive forces in the market, as is the case in all other areas of copyright. On this point, the Government would welcome further public comment before coming to a final conclusion.

4. In this connection, it should be noted that no such licence is possible under the Berne Convention for video recordings and it seems anomalous that sound recordings should be singled out for special treatment. Mention must also be made of another factor which has crept into the argument. This derives from United Kingdom membership of the European Economic Community. In the other Community countries, even those which have statutory licensing systems for the recording of music, the royalty which is payable for second and subsequent recordings is subject to negotiation rather than being fixed by statute as in the United Kingdom. In the Community countries, other than the United Kingdom and Ireland, the recording of music is controlled by a standard agreement entered into by BIEM (Bureau Internationale des Sociétés Gérant les Droits d'Enregistrement et de Reproduction Mécanique; an association of societies and other organisations which administer on behalf of composers and music publishers the exclusive rights conferred on them by national laws) and IFPI (International Federation of Producers of Phonograms and Videograms, which represents the record companies in the countries in which BIEM societies exist). This agreement regu-

lates the terms under which record companies in each of the countries can acquire recording rights from, and pay royalties to, the respective national societies which belong to BIEM. Local variations of the standard agreement are negotiable to meet the special conditions prevailing in the different countries covered, but generally it seems that the royalty obtainable in the other countries is somewhat higher than in the United Kingdom. Because of this, the practice has developed for the national societies in Community countries to claim the difference between the going rate in the country into which records made in the United Kingdom are imported and the royalty already paid by the record manufacturer under section 8. However, in a recent judgment the European Court of Justice has ruled that this practice is contrary to Community law relating to the free flow of goods. The Government would welcome public comment on the implications of this judgment to the question of whether the section 8 provision should be retained.

5. The rest of this chapter is concerned with detailed changes which were considered by Whitford. These will now be discussed on the assumption that the statutory licence system is maintained.

6. Recognising that market conditions may change, the system provides for review of the statutory royalty rate by means of a public inquiry, initiated by the Department of Trade. To date there have only been two such enquiries. The first in 1928 resulted in an increase of the royalty from 5 per cent to 6¼ per cent of the retail price of a record and this is the rate now specified in the 1956 Act (which also includes a minimum royalty of 0.313p—the decimal equivalent of three farthings in old currency). The second inquiry took place as recently as 1977, after Whitford reported, at the request of music copyright owners who considered that the rate of 6¼ per cent was too low. The Inquiry (Cmnd. 6903), conducted in accordance with the Copyright Royalty (Records of Musical Works) (Inquiries Procedure) Regulations 1974,[1] was held by Mr H E Francis QC who recommended that no change be made in the royalty rate or in the amount of the minimum royalty. From the first approach for a change in the rate to the publication of the report, over four years elapsed. The hearing of the parties itself lasted 29 days during which over 20 witnesses were called and both sides were represented by leading Counsel.

7. In the light of evidence concerning problems associated with calculating the royalty and suggesting that the present machinery for reviewing the rate was cumbersome, Whitford recommended that in future these matters should be brought within the jurisdiction of the Performing Right Tribunal with suitably widened powers. Since the Government accepts that there should be a Tribunal with wide-reaching responsibilities in the copyright field, it is obviously convenient and sensible that this Tribunal should also have control over the statutory recording licence machinery. The Government therefore endorses, as did those organisations who commented on it, the Whitford recommendation that the Tribunal should be empowered to review the royalty to be paid under the statutory recording licence.

8. As suggested by Whitford, the Government also proposes that the Tribunal should be empowered to make recommendations as regards the basis on which the royalty should be calculated. These recommendations would then be considered by the Government having regard to the public economic interest before an order is made fixing the rate and the method of calculating it. Pending the establishment of the new Tribunal and any recommendation it may make following references to it by the interests involved, the Government proposes that the new Copyright Act will maintain the present royalty rate.

9. During the course of examination of the current statutory licence provisions, Whitford became aware of an apparent anomaly which could result in copyright owners being entitled to no royalty in the case where a record manufacturer had availed himself of the provision and subsequently—possibly as part of a promotion campaign—distributed the records for nothing. This would be unfair to copyright owners and the Government therefore accepts the Whitford recommendation that the royalty should be payable, under the terms of the statutory licence, on all records which are issued to the public, whether by retail sale or otherwise.

10. Section 8 only permits the manufacture of records in the UK. The importation of records under the statutory licence is not permitted. Bearing in mind that the record industry is international in character and that artists are not always available for making recordings in the United Kingdom, Whitford considered that importation of sound recordings in the form of matrices or tapes solely in order that records may be manufactured in the United Kingdom for retail sale should be allowed. The Government proposes to accept this suggestion.

11. In the case of musical works which are associated with lyrics, the Government accepts the Whitford view that section 8 should only permit records to be made where the music and words are used in association. In the event of the section 8 provision being retained the new legislation will be so drafted as to make this position plain.

12. Whitford took the view that section 8 of the 1956 Act referred only to audio, as opposed to audio-video, recordings. With increasing sales of video recording and transcription machines, and with the advent of videodisc players and audio-video equipment which has hi-fi audio quality, there will clearly be a market for the audio-video analogue of the sound recording. Some musical works may well start their recorded life in audio-visual form; it can therefore be argued that manufacturers should be able to avail themselves of statutory recording licence facilities in respect of such works so as to re-record them in audio or audio-video form. Alternatively, they may wish to make audio-video recordings of works which are only available as audio recordings. To allow of these possibilities some extension of the licence facilities would have to be made. An audio-video recording is equated to a cinematographic work and, in view of the United Kingdom's obligations under Article 14 of the Berne Convention, it would not be permissible to extend section 8 so that

audio-visual recordings of an audio-visual work may be produced under a statutory licence. However, if convincing evidence is produced to the effect that some extension of section 8 into this field would be of overall benefit, the Government would be prepared to consider extending the licence facilities so as to permit the audio-video re-recording of a work previously audio recorded, or to permit the audio re-recording of a work previously audio-video recorded.

REFERENCE

[1]SI 1974/2190.

CHAPTER 5

Performing Rights

1. It is in general an infringement of copyright in a literary, dramatic or musical work to perform it in public (section 2 of the 1956 Act); to cause a sound recording to be heard in public (section 12); to cause a cinematograph film to be seen and/or heard in public (section 13); and to cause a television broadcast to be seen and/or heard in public by a paying audience (section 14).

2. Some of these restricted acts are subject to exceptions. So far as concerns sound recordings, section 12(7) of the Act provides that copyright in the recording (as distinct from that in works recorded) is not infringed where the record is played:

(a) at premises where persons reside or sleep as part of the amenities provided exclusively or mainly for the residents or inmates therein, unless a special charge is made for admission to the parts of the premises where the recording is to be heard; or

(b) as part of the activities of, or for the benefit of, a club, society or other organisation which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare, subject to the proviso that the exception does not apply if a charge is made for admission to the place where the recording is to be heard, and any of the proceeds of the charge are applied otherwise than for the purposes of the organisation;

and section 40(1) provides that causing a sound recording to be heard in public is not an infringing act where the public performance occurs through the reception of BBC or IBA sound or television broadcasts.

3. As regards section 12(7), the Government agrees with Whitford that there is no justification for exempting commercial enterprises, such as hotels and holiday camps, from their copyright obligations and is disposed to delete section 12(7)*(a)*.

4. As regards section 40(1), a majority of Whitford thought that a person who causes sound recordings to be heard in public by the use of a radio or television receiver should be required to pay in the same way as he is required to pay for performing the music itself, and accordingly recommended that section 40(1) should be deleted.

5. Removal of the section 40(1) exception would have a two-fold effect. It would extend the record manufacturer's public performance right in his sound recordings to include performances occurring through the reception of a BBC or IBA sound or television broadcast. It would also give a corresponding right to the broadcasters themselves in so far as their broadcasts are pre-recorded, as of course many of them are. (It is worth mentioning here that, subsequent to the Committee's report, the IBA has indicated that it does

not want a public performance right in its broadcasts.) The consequence of deletion of section 40(1) would be that the owner of premises at which, for example, broadcasts were used to provide background music, would need separate licences from the broadcasting organisations and Phonographic Performance Ltd (which collects on behalf of the record manufacturers), in addition to his Government broadcast receiving licence and the licence he already needs from the Performing Right Society Ltd (which collects on behalf of the composers). Section 40(1) was introduced into the 1956 Act specifically in order to remove the need to obtain such a variety of licences, and the Government is inclined to the view that it should remain.

6. Section 14 of the 1956 Act gives protection to broadcasts as such. However, section 14(4)*(c)* withholds protection where the public performance of a television broadcast is not to a paying audience. This is of importance for inns, hotels and cafes and the Government agrees with Whitford that the limitation to paying audiences should be preserved. As permitted by the European Agreement on the Protection of Television Broadcasts, the Government has entered a reservation to this effect and does not propose to withdraw it.

7. Section 48(6) makes the occupier of the premises where the public performance takes place responsible for causing the work or recording to be heard in public. However, commercial enterprises exist which provide equipment, records and tapes etc for the express purpose of giving public performances; eg, the suppliers of juke-boxes and background music systems. Although these enterprises do not themselves carry out public performances, Whitford suggested that a supplier should be liable as a contributory infringer. It appears from Whitford that the supplier should be so liable in all cases. The Government has doubts about this; it would thrust on the supplier the responsibility to ensure that the occupier not only possesses the necessary licences for public performance but that he will renew such licences. It would seem that the only way in which the supplier could be certain of his position would be for him to obtain a licence from the copyright owners enabling him to authorise others to cause works and recordings to be heard in public. It is understood that in the past such licences have been granted to suppliers, but the practice has been discontinued. In these circumstances, it hardly seems fair that the supplier should be liable in all cases. The Government would welcome public comment on this matter, but it tends to the view that a supplier should only be held liable if he knew that the occupier intended to use the equipment in infringement of copyright.

8. As a result of anti-trust legislation, cinema owners in the USA are no longer required to pay public performance fees on music incorporated in the sound tracks of films. In consequence the Performing Right Society has established an arrangement whereby its members vest their synchronisation rights (ie, the right to incorporate music in the sound tracks of films) in the Society, which then only allows film producers to use the music if they agree to pay the appropriate licence fees in respect of the exhibition of the film in the USA. Whitford considered that there should be some control over the Society's

activities in this respect and recommended that the jurisdiction of the Performing Right Tribunal should be extended to cover licences in respect of the reproduction as well as the performing right. The Government agrees with this view.

CHAPTER 6

Performers' Rights

1. The Performers' Protection Acts 1958 to 1972[1] make certain unauthorised acts connected with performances criminal offences punishable by fines and/or imprisonment. The offences relate to the unauthorised recording or filming of live performances, the public performance of such recordings or films and the unauthorised broadcast or diffusion of a live performance and are confined to performances of literary, dramatic, musical or artistic works. Whitford considered it inequitable to exclude variety artistes such as jugglers, acrobats etc who do not normally perform copyright works. The Government agrees and proposes that new legislation should give protection to such artistes.

2. 'Knowledge' is of the essence of an offence under the Performers' Protection Acts. It has been held to apply not only to the making of, for example, a record, but also to the fact that such making was without the written authorisation of the performer. Whitford recommended that the requirement to prove knowledge under the Acts should be removed, but that a defence of innocence should be provided if the alleged offender can establish that he believed, and had reasonable grounds for believing, that the consent of the performers had been obtained.

3. As will be seen, Whitford made a similar recommendation in respect of sections 5, 16 and 21 of the Copyright Act. The view of the Government is that it would be inadvisable to shift the burden of proof in this way. The basis of the criminal law is that the prosecution must prove its case beyond reasonable doubt and the Government does not think it would be right to make an exception in the field of performers' rights and copyright. It realises the difficulties of stamping out the illicit recording and subsequent commercial exploitation of performances by performing artistes and will certainly give close consideration to stiffening the penalties laid down when legislation is brought forward. In addition the Government considers that *written* consent of performers should not be dispensed with. Bearing in mind the wide variety of circumstances, it accepts the view, which has been strongly expressed by performers, that there is a clear need for agreements affecting them to be in writing.

4. The question was canvassed before Whitford as to whether performers should be given civil as well as criminal remedies. Since then the Court of Appeal has decided in *Island Records Ltd v Corkindale* [1978] FSR 505 that the terms of the Performers' Protection Acts, which explicitly refer only to criminal sanctions, did not disbar performers from obtaining an 'Anton Piller' order (see Chapter 14). Even so, the judgments in this case were based on different grounds and it is arguable that the jurisdiction of the courts to grant civil remedies to performers rests on somewhat insecure foundations. In these

circumstances, the Government intends to make it clear in new legislation that civil remedies are to be available.

REFERENCES

[1]Dramatic and Musical Performers' Protection Act, 1958 6 and 7 Eliz. 2 c. 44; Performers' Protection Act, 1963 c. 53; Performers' Protection Act, 1972 c. 32.

CHAPTER 7

Broadcasting and Diffusion

Broadcasting

1. Television and radio are major users and creators of copyright works, and the 1956 Act therefore deals with the subject of broadcasting comprehensively. In principle, the authors of literary, dramatic, musical and artistic works, as well as the makers of sound recordings and cinematograph films, are protected against the unauthorised broadcasting of their works. At the same time, there may be copyright in the broadcasts themselves. This copyright is mainly designed to prevent the unauthorised 'secondary use' of copyright material for gain (for example, one of the restricted acts is to cause a broadcast to be seen or heard by a paying audience); it also protects the exploitation for gain of broadcasts of non-copyright material such as sporting events.

2. Whitford did not recommend any changes in the main provisions relating to broadcasting; and in fact the Government does not consider any such changes necessary. There are however two subjects which need consideration.

3. The first subject is the European Agreement of 1960 on the Protection of Television Broadcasts with which are associated the Protocols of 1965 and 1974. The Agreement provides for the protection in Member States of other States' television broadcasts against re-broadcasting, wire diffusion, public performance and recording. It is therefore of particular importance to the UK in view of the widespread popularity of British broadcasts on the continent of Europe. The Agreement allows four exceptions to its protection, all of them the subjects of UK reservations.

4. The first allows the UK to withhold protection against wire diffusion and is discussed below in paragraph 20.

5. The second allows the UK to withhold protection where the public performance of a broadcast is not to a paying audience, eg in inns and hotels. As mentioned in Chapter 5, the Government, like Whitford, sees no reason to withdraw this particular reservation.

6. The third reservation is from the requirement to protect against taking still photographs from the television screen. Whitford considered this to be a minor irritant to broadcasters and recommended withdrawal of the reservation; the Government proposes to adopt this recommendation.

7. Finally, although the Agreement protects broadcasting organisations either *(a)* constituted in the territory and under the laws of another Contracting State, or *(b)* transmitting from such territory, the UK has made use of a reservation which requires both criteria to be met in order to comply with section 32(1)*(e)* of the 1956 Act. The Government proposes to follow Whitford's recommendation and amend the law so as to avoid having to make the

reservation. The UK will then also be in a position to withdraw the notification requiring both criteria which was made in relation to the Rome Convention. Amendment of the law in this respect will also remove an obstacle to UK accession to the Satellites Convention.

8. The second subject which needs to be considered under the heading of broadcasting is the relationship of copyright to satellite transmissions. There are two kinds of satellite, namely, point-to-point satellites and direct broadcasting satellites. The former are the kind covered by the Satellites Convention 1974, the purpose of which is to protect programme-carrying signals which go to or pass through satellites but are not intended for direct reception by the general public. The protection required is against transmission to the general public by somebody for whom the signal was not intended, and fortuitously this protection is provided by the Wireless Telegraphy Act 1949[1] which makes the unauthorised reception of transmissions to and from such satellites an offence: they are not protected as broadcasts by the 1956 Act as they are not intended for direct reception by the general public. The Government will give consideration to whether protection of such transmissions should also be provided in copyright legislation.

9. Two other questions remain in connection with accession to the Satellites Convention. Although the Convention requires the protection of satellite transmissions against wire diffusion, a reservation is permitted to those States (such as the UK) which denied such protection on 21 May 1974, the date of the Convention. However, such a reservation should be unnecessary given the course proposed below in paragraph 20.

10. The other matter concerns the 'originating organisation' referred to in Article 1(vi) of the Convention. 'Originating organisation' is there defined as the person or legal entity that decides what programme the emitted signals will carry. On the face of it, it excludes the IBA, which of course owns rights in broadcasts, because decisions on programmes are left to the programme contractors in the UK. However, the Conference on the Convention felt that, in this situation, the originating organisation would be the IBA rather than the contractor since it possesses the ultimate power of decision. There should therefore be no difficulties in this connection.

11. In direct satellite broadcasting, programmes transmitted to a geostationary satellite are re-transmitted for direct reception by individual aerial or by community aerial for cable distribution. Broadcasting by means of such a satellite seems to be the same in principle, if not in degree, as broadcasting by means of a terrestrial transmitter. The legal protection afforded to the owners of copyright in material which is broadcast as well as the protection given to the broadcasters themselves should therefore also apply to direct broadcasting satellite (DBS) programmes.

12. Direct broadcasting by satellite involves two 'legs'. The first leg involves the transmission of programmes to the satellite. These transmissions as such are not intended for direct reception by the general public and do not

constitute broadcasting. The second leg involves transmitting the programmes from the satellite at a frequency and power suitable for direct reception by individuals either on their own receiving equipment or by community receiving equipment and cable distribution. The second leg constitutes broadcasting.

13. The first leg transmissions are similar in kind to point-to-point satellite transmissions (see paragraph 8 above) and are protected fortuitously under the Wireless Telegraphy Act 1949. The consideration which the Government will be giving to the question of copyright protection for the latter will encompass also the question of protecting the former. The effect of protection for the first leg transmissions would be to give authors of literary, dramatic, musical and artistic works and the makers of sound recordings and films, control over the input of their works to a satellite. However, as they already have control over the second leg transmissions (ie for broadcasting) of their works, it may be that control over the first leg is unnecessary. In relation to the second leg, the fact that it is broadcast means that broadcasters will have the right to prevent others from recording the broadcasts (other than for private purposes), showing them to a paying audience or re-broadcasting them. If the broadcast includes a copyright work the owner himself already has the basic rights to prevent recording of his work, its performance in public and its re-broadcasting without his authority.

14. Broadcasts from direct broadcasting satellites will frequently be the subject of cable distribution. Given the assimilation of DBS within broadcasting in general, and the proposals in the next section of this chapter dealing with the diffusion of broadcasts, no provision needs to be made specifically in relation to the diffusion of DBS broadcasts.

Diffusion

15. The proportion of United Kingdom viewers who receive their television programmes by cable is now relatively small compared with some other countries. New technological developments such as the direct broadcasting satellite could well change this however.

16. Cable diffusion covers a wide range of services in which signals are provided from a single aerial to a number of television sets in different locations. It offers good picture quality in so-called shadow areas and avoids the need of a forest of individual aerials. The service may be restricted to a single block of flats or it may cover an entire district. Although the smaller installations are often no more than community aerials providing subscribers with programmes intended by the broadcasters for local reception, larger networks may offer an 'out of area' programme (provided it can be received off-air by the cable operator) and some have experimentally transmitted their own locally originated programmes.

17. The operator of each diffusion service requires a licence from the Home Office under the Wireless Telegraphy Act. These licences incorporate technical conditions as to standards of performance and specify which trans-

missions by the BBC and IBA the operator is permitted to diffuse. In addition a licence is required from the Post Office under the Corporation's telecommunications monopoly conferred by the Post Office Act 1969. The relevant restrictions on what a licensee may distribute may be summarised as follows:

(a) he may distribute only sound programmes from authorised broadcasting stations wherever situated (ie within or outside the UK); and

(b) he may distribute only television programmes from authorised UK (ie BBC or IBA) stations or, with the Home Secretary's consent (which, however has never been given) from authorised broadcasting stations wherever situated.

There are various other restrictions concerning the precedence which the cable operator must accord to particular services, depending on the number of radio/television channels which his network can provide; and any service he distributes must be distributed in its entirety and at the times at which it is broadcast. It is not, therefore, open to the cable operator in distributing a service to tinker with it in any way, for example by inserting his own advertisements.

18. The present legal position is that although authors and film-makers have the general right to control the diffusion of their works and films, they are assumed by section 40(3) of the 1956 Act to have freely licensed the diffusion of BBC and IBA broadcasts which include their material. The reason for the exception is that as the BBC and IBA pay the copyright owners on the basis of the whole potential audience for their transmissions, it would be inequitable to allow an additional payment of copyright royalties in respect of what is essentially the same communication to the public. As the BBC and IBA and record producers presently have no right to control the diffusion of their works, cable operators may diffuse any copyright material free of all royalties, other than in respect of programmes they themselves originate and programmes originated by foreign broadcasting organisations.

19. When drafting the new Act, the Government will pay close attention to the suggestion that, instead of using the words 'causing the work to be transmitted to subscribers to a diffusion service' reference should be made to the communication to the public by wire, as in the Berne Convention. This will be amplified as necessary to include other substances, such as optical fibres, which are capable of relaying wireless telegraphy. As to the substance of the matter, the Government accepts Whitford's recommendation that a right to control diffusion should also be provided for the broadcasting organisation and for the makers of sound recordings. As to exceptions to the right to control diffusion, Whitford recommended that the exception provided by section 40(3) of the 1956 Act should continue and that a similar exception should also apply to the proposed broadcasters' rights but only in so far as the cable communication is of the whole broadcast, is simultaneous with the original broadcast and is only within an area in which the broadcast is normally receivable or intended to be receivable directly off air. The Government agrees with these recommendations (with the section 40(3) exception also applying to sound recordings): the proposed right of control (as modified

by the proposed exception in the case of BBC and IBA services) enabling broadcasting organisations to ensure simultaneous diffusion without modification, would be of little practical significance given that the cable operator's licence already imposes such conditions. In the case of out of area diffusions, however, the cable operator would additionally require permission from the broadcasting organisation.

20. Under the present law, there is no exception to the right of authors and other contributors to control the diffusion in this country of works broadcast by foreign broadcasting organisations. However, under section 28 of the Copyright Act, the Performing Right Tribunal is empowered to limit the claims of the copyright owners to cover only the additional audience (over and above that paid for by the foreign broadcaster) reached by means of the diffusion service. As suggested by Whitford, the right to restrict the diffusion of their broadcasts will be given to foreign broadcasting organisations. The United Kingdom will therefore be in a position to withdraw its reservation from protection of diffusion of foreign broadcasts which it was previously obliged to make in relation to the European Agreement on the Protection of Television Broadcasts. Section 28 will be preserved, but the exception from the right which is referred to in the preceding paragraph will only apply to BBC and IBA broadcasts as it is assumed that rights owners have already been paid in respect of the whole audience (including that reached by diffusion) for BBC and IBA broadcasts whereas the diffusion of foreign broadcasts could reach a new audience for which no remuneration has been paid.

21. Under the proviso to section 48(3) of the 1956 Act, the diffusion of broadcast or other programmes as an incidental service in hotels, flats or other premises where persons reside or sleep is allowed without restriction. Whitford considered two factors. First, the free diffusion of BBC and IBA programmes is already allowed. Second, if the diffusion is of other works, and is of a scale and in conditions which could justifiably rank as public, then royalties should be paid. They therefore recommended abolition of the proviso and with this the Government agrees.

22. The Government accepts Whitford's recommendation that diffusion companies should enjoy a copyright in programmes that they themselves originate, just as broadcasters do in their own broadcasts. Following the restricted acts in section 14(4) of the 1956 Act, such diffusions would be protected against recording, both visually and aurally, showing to a paying audience, and broadcasting or rediffusing. Moreover, the exceptions provided by section 40(1) and (2) will be extended so as to apply in the case of programmes originated by diffusion companies. Following Whitford's view that diffusion operators' rights should be kept in line with those of broadcasters, the Government also agrees that section 6(9) of the 1956 Act (which extends the broadcasters' right to make certain ephemeral recordings to diffusion operators) should be retained.

23. Finally there is the question of educational closed circuit television systems. The Government agrees with Whitford that such systems do not fall

within the existing definition of a diffusion service. Although, as previously stated, the Government intends to reconsider this definition, it takes the view, as Whitford did, that schools should enjoy the exceptions afforded by section 41(3) and (5) in relation to the diffusion of copyright works to school audiences.

REFERENCE

[1]12 and 13 Geo. 6 c. 54.

CHAPTER 8

Computers

1. At the time when the 1956 Act was drafted computers were in their infancy and the question of their interaction with copyright did not arise. Since then, of course, revolutionary developments have taken place in computer science, and there are now few aspects of life not affected in some way by computers. In this situation it is inevitable that computers are having increasing impact upon the subject of copyright, both in the way in which they affect conventional copyright works, for example through storage and processing of data, and as regards the protection afforded to computer software, and in particular to computer programs.

2. It may be questioned whether copyright is the right vehicle for the protection of programs. However, as Whitford remarked, it is probable that programs are already protected under the 1956 Act and the Government accepts that there is much to be said for dealing with programs under copyright law, since the essential need is for protection against copying. To remove any uncertainty that may exist it is proposed to make explicit in new legislation that computer programs attract protection under the same conditions as literary works. In these circumstances considerations such as term and ownership, and, indeed, the basic question of whether a program possesses sufficient originality to attract copyright protection, will apply to programs in the same way as to other copyright works.

3. While programs may sometimes be expressed in conventional written form they are generally recorded in a less accessible manner such as on magnetic tape or disc or even as a pattern of electrical charges within the surface of a microcircuit chip. Indeed, although in the early days of computers programs were no doubt composed on sheets of paper, as both the programs themselves and the machines they control have become more complex and sophisticated this is no longer the case, and a modern program may well never be seen in human-readable form. Similarly, when works other than programs are stored in a computer memory they are generally held in these less accessible forms. The Government considers that this should not diminish the protection afforded either to programs or to other computer-stored works, and therefore proposes that copyright protection should extend to works fixed in any form from which they can be reproduced. This accords with the recommendation of the Advisory Council for Applied Research and Development (ACARD) in its recent report on information technology.[1]

4. The acts presently restricted by copyright in a literary work which are most relevant to programs are reproducing the work in any material form, making or reproducing an adaptation of the work and, perhaps less significantly, publishing the work or an adaptation of it. Computer programs conventionally undergo various transformations; for example, translation from human-readable 'source code' to machine-readable digital 'object code' and *vice versa*, or from one source code to another. Such alternative expres-

sions of the original program will clearly lie within the term 'adaptation' and as such will fall within the scope of the copyright in the program, and similar considerations will, of course, apply to any adaptations of other literary, dramatic or musical works made during computer processing. The Government considers that the act of loading a program, or indeed any literary, dramatic, musical or artistic work, into a computer should be a restricted act, and proposes to amend the definition of reproduction in order to make this clear. One effect of this measure will be to clarify the position as to the protection of copyright works of all types stored in a database.

5. Whitford was undecided as to the extent to which the owner of copyright in a program should have the right to control use of the program, the majority of the Committee recommending that such a right should exist as part of the copyright. It is the Government's view, however, that it is sufficient for the copyright owner to have control of the initial loading of his program into the computer. If the creator of an original program wishes to retain control over the use of his program beyond that inherent in his control over the reproduction involved in the initial loading into the computer, or to obtain recompense for such use, he has the possibility of achieving this through appropriate licensing terms.

6. The question of the computer use of copyright material does, however, arise in relation to works extracted from computer storage and either displayed on a visual display unit (VDU) or printed out as a hard copy. It is arguable that in so far as the reading of a work displayed on a VDU is equivalent to the reading of a book in a library, the act of displaying the work is analogous to merely opening the book to the appropriate page and should not be regarded as the making of a copy. This is probably the position under present law. According to this argument, if the owner of copyright in the stored work wishes to be compensated for the mere display of his work he can take this into account in negotiating the terms under which he grants permission for the initial copying of the work into the computer store. On the other hand, the unauthorised taking of a hard copy printout of a work stored in a computer may apparently constitute an infringement of the copyright in the stored work, just as the taking of a photocopy of a book in a library may do so (subject to the appropriate exceptions). The logic of the preceding argument could, however, perhaps even be pursued to the conclusion that the copyright owner has no need of a right to prevent the taking of a printout of his stored work, since the fact that such printout will occur could also be taken fully into account in the initial negotiation. If the work is stored for use in a system, such as Ceefax, Oracle or Prestel, further considerations arise, since broadcasting and diffusion are amongst the acts restricted by the copyright in a literary, dramatic or musical work. In reality, however, the copyright owner's right to control broadcasting and diffusion would probably simply constitute a further factor in the initial negotiation determining the terms under which he agreed to allow his work to be used in the system. The Government at this stage invites public comment on the issues involved, and in particular on the question of whether any changes are needed in existing law to deal specifically with VDUs and printout.

7. Whitford considered the question of who should be regarded as the author of a work produced with the aid of a computer. Working from the approach that a computer was to be looked upon as a mere tool, Whitford concluded that both the person who devised the program and the person who originated the data should jointly be regarded as authors of the new work. In the course of subsequent consultations it has been suggested that a more appropriate analogy would be to regard the *programmed* computer, rather than the computer alone, as a tool. If this approach is adopted it is logical to conclude that the author of the new work is neither of the two parties proposed by Whitford, but is instead a third person; namely the one responsible for running the data through the programmed computer in order to create the new work. (It must, of course, be recognised that in practice a single individual may constitute two or more of these three persons.) Following this latter approach, initial copyright in the new work should therefore also lie with this person, subject to agreement to the contrary or to over-riding ownership considerations arising from the author's status as an employee or a commissioned worker. The general proviso that copyright only subsists in a work if sufficient skill and labour have been expended in its creation for it to be regarded as original will of course apply to works created with the aid of a computer. The question of ownership of copyright in computer output, in common with other areas of interaction between copyright and computers, raises new issues and the Government looks forward to a constructive public debate on the subject.

REFERENCE

[1]*Information Technology*; HMSO, September 1980.

CHAPTER 9

Type Faces

1. Work and skill go into the design of original sets of lettering or 'type faces'. It is anomalous that whereas individual letters may qualify for protection under the existing copyright law or may be registered under the Registered Designs Act 1949,[1] a set of lettering is not only not registrable as a set under the Registered Designs Act but probably does not qualify for copyright protection.

2. The Johnston Committee[2] recommended that provision be made for sets of lettering to be protected by ordinary copyright law and made proposals as to the form these provisions should take. The effect would be that the copyright in an original set of lettering would be infringed by unauthorised reproduction, for example, in the form of metal type or in the form of printed text.

3. In 1973 the Vienna Agreement was signed. Contracting States to this Agreement (which is not yet in force) are obliged to grant national treatment and may protect by one or more of (i) their industrial designs law, (ii) a special deposit provision, or (iii) their copyright law. The United Kingdom has signed this agreement and has indicated its intention to protect type faces by provisions in copyright law. Under the agreement, the minimum term of protection is 15 years, although seven of the eleven signatory States signed a Protocol which requires a minimum period of 25 years.

4. Whitford accepted the recommendation of the Johnston Committee and in addition recommended that the United Kingdom should ratify the Vienna Agreement and that the term of protection should be 25 years. Comments on Whitford indicate general agreement with these recommendations which the Government therefore proposes to accept.

REFERENCES

[1]12, 13 and 14 Geo. 6 c. 88.

[2]*Report of the Departmental Committee on Industrial Designs* (Cmnd. 1808).

CHAPTER 10

Ownership

Literary, dramatic, musical and artistic works

1. Under section 4 of the Copyright Act 1956, the author of a literary, dramatic, musical or artistic work is in general the first owner of the copyright in it. However, there are three exceptions to this principle, each of which is subject, in any particular case, to an agreement excluding its operation. These exceptions are:

(a) copyright in a work created by an author in the course of his employment by the proprietor of a newspaper, magazine or periodical, is split; the proprietor is entitled to copyright so far as it relates to publication in his newspaper, magazine or periodical and the author retains copyright for all other purposes (section 4(2));

(b) in the case of all other works created in the course of the author's employment, the employer is entitled to the copyright (section 4(4)); and

(c) where a photograph, a painting or drawing of a portrait or an engraving is commissioned the commissioner is entitled to copyright provided he pays or agrees to pay for the work (section 4(3)).

2. It is natural that copyright should vest in the author of the work, unless he has entered into some agreement to the contrary. Views differ, however, as to who should own the copyright in cases where the author is in the employment of another person who is paying him to produce copyright works and in cases where the author is commissioned to produce a particular work. There are many who argue that even in these cases the copyright should remain with the author. Others would give greater weight to the interests of employers and commissioners and vest the copyright in them.

3. The exceptions provided by the 1956 Act operate in situations where no agreement has been reached by the parties involved. Undoubtedly such situations arise and, with a view to avoiding or reducing the uncertainty that may be caused in such circumstances, Whitford suggested that the statutory exceptions should be maintained, though in modified form.

4. In the case of a work produced by an employee in the course of his employment, Whitford recommended that copyright should vest in the employer, but, if the work is exploited (by the employer or someone else with his permission) in a way that was not within the contemplation of the employer and employee at the time of making the work, the employee should have a statutory right to an award from his employer which, if not agreed, should be settled by a Tribunal. This provision, which will be subject to any agreement to the contrary, would replace the exceptions described at *(a)* and *(b)* above.

5. On the subject of commissioned works, Whitford was divided in its views. The majority recommended that, subject to any agreement to the

contrary, the copyright in all commissioned works should belong to the author (or his employer) subject to two important qualifications: (i) the person commissioning the work should have an exclusive licence for all purposes which could reasonably be said to have been within the contemplation of the parties at the moment of commissioning, and (ii) the commissioner should have the power to restrain any exploitation for other purposes against which he could reasonably take objection. The minority of Whitford considered that where a work is commissioned and the only purpose of the commission is the creation of the copyright work then, subject to any agreement to the contrary, the copyright should vest in the commissioner, but the author should have the right to an award from the commissioner if the commissioner exploits the work in a way which could not reasonably have been anticipated at the time when the work was made.

6. These proposals have been the subject of much comment. Views are split between those who favour the idea that employers and commissioners should own the copyright and those who are totally opposed to any limitation of authors' rights. Nevertheless, there is a clear consensus of opinion that considerable practical difficulties would arise in determining what was within the contemplation of the parties at the time a work was made by an author who is employed or commissioned. It also seems to be generally felt that determining what a commissioner might reasonably object to would be a source of trouble.

7. The Government recognises the force of these criticisms. If the object of providing statutory exceptions is to remove uncertainty left by failure of the parties to define their rights by contract, it is certainly not easy to see that this will be fulfilled by reference to what was possibly within their minds at the time. In this connection, it is to be remembered that a dispute may arise many years later and one or both of the parties may by that time be dead.

8. The Government shares the Whitford view that there should be statutory exceptions to cater for the cases where the parties have reached no agreement. To leave copyright with the author would in some cases, eg commissioned photographs or portraits, be contrary to common understanding of the position and, in other cases, be very likely to cause disputes as to the precise extent of the interests of the two parties and create serious practical difficulties.

9. As to the exceptions themselves, there is much to be said for the view that they should remain as they are in the 1956 Act, subject perhaps to some clarification of wording. Certainly it does not appear from Whitford that the present law has created much difficulty in practice. The trouble, it seems, stems mainly from matters of principle on which there is clearly no consensus.

10. Whitford appears to have felt that the statutory exceptions should be modified with a view to establishing a fairer balance consistent with modern day conditions. The Government agrees with this and, in view of the criticism which the Whitford proposals have met, would welcome public comment on the following suggestions.

11. The first of these concerns photographs, portraits and engravings. In the case of a photograph or engraving, the negative or plate generally remains with the photographer or engraver who, if copyright vested in him, would be able readily to produce copies. This is not the case for a portrait but, in all these instances, considerations of personal privacy are often involved. It would be intolerable, for example, if a photographer commissioned to take photographs of a private family nature had the right to reproduce them for any other purpose, perhaps to advertise a product or for use in unwelcome publicity. For this reason, it is suggested that section 4(3) of the 1956 Act should be maintained.

12. Secondly, it is suggested that, in the case of other commissioned works, copyright should also vest in the commissioner. However, where a work is commissioned for a specific purpose, the creator should have the right to prevent its use for other purposes. This is in fact the suggestion made by the Gregory Committee.[1] It provides a simple rule which recognises the right of the person who pays for the work to be created and also avoids hardship for the author or artist who creates the work.

13. Thirdly, there is the case where a work is made in the course of employment by another person. As to this, it is suggested that copyright should vest in the employer for the purposes of his business, but the author should have the right to restrain the use of his work for any other purpose. It will be noted that this suggestion would take away from employers some of the right presently given to them by section 4(4) and is really an extension of the special situation provided for employed journalists by section 4(2) of the 1956 Act. It recognises the fact that in many areas these days a copyright work, whether it be literary or artistic, may well have value in different fields, and the Government believes that there is fairly general acceptance of the view that an employer is entitled to expect that copyright in a work produced by his employee as part of the daily activity for which he is paid should belong to him, at any rate for use in his business.

Sound recordings and cinematograph films

14. Whitford recommended no change in the existing ownership provisions relating to sound recordings and cinematograph films, save in respect of joint ownership. The Committee recommended that joint makers of sound recordings and cinematograph films should be provided for as joint authors of works are at present. The Government proposes to adopt this recommendation.

Broadcasts

15. The Government proposes to follow the recommendation of no change made by Whitford.

Still photographs

16. Section 48(1) of the 1956 Act defines the 'author' of a photograph as the person who, at the time when the photograph was taken, is the owner of the material on which it is taken. The Government proposes to accept the

recommendation of Whitford that the new Act should define the author of a photograph as the person responsible for the composition of that photograph.

Crown copyright

17. Whitford recommended that the existing Crown copyright provisions in section 39 of the Copyright Act should be brought to an end, mainly on the grounds that they were too wide and that there seemed little reason why the Crown should be treated differently from other large organisations. Whitford did recognise, however, that it may be desirable to safeguard the right of the Crown to publish, for example, evidence given to committees and commissions and the findings of such bodies.

18. The Government has carefully considered the views of Whitford. Crown copyright provisions have been operated for nearly seventy years. In practice there has been little criticism of their operation and, in view of the fact that their removal would necessitate the employment of additional staff to keep track of all the authors concerned in the production of Government publications and add to public expenditure with no discernible public benefit, it is proposed to retain them. However, the Government accepts the Whitford view that section 39(2) is too widely drawn in that it gives the Crown the copyright in works first published by or under the direction or control of the Crown or a Government department, apparently even to the extinguishment of the rights of any person who claims copyright in the unpublished work. It seems desirable in these circumstances to replace this provision with a specific right in the new Act which will meet the Crown's need to publish material such as evidence given to committees and commissions and the findings of such bodies.

REFERENCE

[1]*Report of the Copyright Committee* (Cmnd. 8662).

CHAPTER 11

Reversionary Interests

1. Under the Copyright Act 1911[1] the right of an author to assign or license his copyright for the full term of his life plus 50 years was restricted by a proviso to section 5(2). Except for 'collective works', the proviso ensured that 25 years after the death of the author, copyright reverted to his personal representatives as part of his estate. Whatever the reasons for this proviso may have been, the restriction on an author's capacity to assign or license his copyright was omitted from the 1956 Act, except in respect of an agreement made before 1 July 1957.

2. It appears that in recent years some importance has been attached to the reversionary rights in these old agreements and this is now causing problems to music publishers in particular. Various possibilities for rectifying this situation were canvassed before Whitford and a further suggestion has been made to the Government since. But all these would in some way affect existing arrangements and the Government agrees with Whitford that whatever is done should not compulsorily remove expectation of rights to come.

3. As Whitford points out, difficulties arising in respect of pre-1956 Act agreements would be eased if the authors who were parties to them, or their personal representatives, were able to make a new agreement now. This would enable their present publishers to enter into negotiations with them in respect of the reversionary period. However, there is some doubt as to whether, in cases where the author is still alive, this is allowable in view of the wording of the existing law. It is the Government's intention that new legislation should remove this doubt.

REFERENCE
[1] 1 and 2 Geo. 5 c. 46.

CHAPTER 12

Term

1. The 1956 Act provides a number of different terms of copyright protection. The 'normal' term, equal to the life of the author plus 50 years after the end of the year in which he dies, applies to published literary, dramatic, musical and artistic works (other than photographs which are protected for 50 years from publication, and industrially applied designs which are protected for 15 years from first marketing of the articles to which the design is applied). It also applies to unpublished artistic works other than photographs and engravings.

2. An indefinite term of protection applies to unpublished literary dramatic and musical works and also to unpublished photographs and engravings. Sound recordings and cinematograph films are also protected indefinitely while they remain unpublished or, in the case of films registrable under the Films Act 1960,[1] until registration.

3. If a literary, dramatic or musical work which is unpublished at the author's death is subsequently published, performed in public, offered to the public in the form of records or broadcast, copyright protection ends 50 years from the end of the calendar year in which the first of those events takes place. A similar term applies to engravings which are published after the author's death. A 50-year term also applies to published sound recordings, cinematograph films which are published or registered under the Films Act 1960, and to television and sound broadcasts.

4. It is proposed to continue the shorter term of protection, namely 25 years, which applies to published editions of works, ie 'typographical arrangements'.

The normal term of copyright

5. The term of life plus 50 years is a compromise between on the one hand the economic interests of authors and their direct descendants and on the other hand the public interest in widespread and unfettered dissemination of works. Whitford heard from authors and publishers that the term should be increased but found that the case had not been made out. No new arguments emerge from comments on the report to persuade the Government to deviate from Whitford's recommendation that the normal term of copyright be unchanged.

6. Nevertheless, the Government is aware of moves within the European Community to harmonise the terms of protection given by the ten Member States. The countries of the Community provide as follows:

(a) United Kingdom, Ireland, Netherlands, Luxembourg, Denmark, Greece—life plus 50 years;

(b) Belgium, France, Italy—life plus 50 years plus one or more extensions for periods of war;

(c) Federal Republic of Germany—life plus 70 years.

7. Problems may arise when a work has become public property in one country but not in another country, eg in the period between 50 and 70 years after the author's death. There can then be a clash between, on the one hand, provisions in the EEC Treaty concerning free circulation of goods and, on the other hand, national copyright laws. This difficulty can be resolved by reliance on Article 36 of the EEC Treaty which preserves national rights as long as they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States. There may still however be practical difficulties arising from the existence of different terms of protection. The Government would therefore view any moves towards harmonisation in a constructive light. In the meantime, it notes that least change would be required overall if a term of life plus 50 years were adopted throughout the Community: only one state would need to change its law and three others would need to phase out periods of extension.

The indefinite term of copyright

8. Whitford was opposed to perpetual copyright and recommended that all literary, dramatic, musical and artistic works should be protected for life plus 50 years. The Government accepts this recommendation which has the effect of liberating material of possible importance from perpetual protection. In the case of anonymous and pseudonymous works, the Government proposes to follow the provisions of Article 7(3) of the Paris Act of the Berne Convention. Such works will therefore be protected for 50 years after they have been lawfully made available to the public. This term will however be subject to the provision that protection will expire when it is reasonable to presume that the author has been dead for 50 years.

Cinematograph films and sound recordings

9. The Government agrees with Whitford's recommendation that the term of protection for films should be brought into line with the Paris Act of the Berne Convention. This requires a term of 50 years from first making available to the public (with consent) which includes sale, public lending or public showing (including broadcasting or wire diffusion); if none of these events happens within 50 years from making the film, copyright ceases. The 1956 Act also protects for 50 years but the term runs from the date of registration or publication. As that date may precede first public showing, a shorter term of protection may be given than the Convention demands. The Government also accepts the recommendation that the term for sound recordings should be the same as for cinematograph films.

Copyrights of universities and colleges

10. The Government accepts Whitford's recommendation that section 46(1) of the 1956 Act which preserves to certain universities and colleges those perpetual copyrights covered by the Copyright Act of 1775[2] should be

repealed. It is believed that society should, as a matter of principle, have unrestricted use of all works after a stipulated period of protection.

REFERENCES

[1]8 and 9 Eliz. 2 c. 57.

[2]15 Geo. 3 c. 53.

CHAPTER 13

Exceptions to the Right of Reproduction

Introduction

1. The basic right conferred by copyright laws on those who produce copyright material is the right to prevent the reproduction of such material without consent. This right is essential to enable copyright owners to control piracy in the market place. However, the public interest demands that not every unauthorised reproduction of copyright material should constitute an infringement of copyright and, for this reason, several limited exceptions are included in the 1956 Act in favour of users.

2. These exceptions are of obvious importance in that they seek to establish a proper balance between the legitimate interests of copyright owners and the legitimate desires of users of copyright material. Their aim is to avoid copyright acting as an impediment to the use of copyright material for certain defined purposes, while ensuring the economic interests of copyright owners are not thereby damaged. Not unexpectedly, this matter of exceptions was the subject of many representations to Whitford. The call from those who use copyright material was generally for more latitude to be given to them. Not surprisingly, copyright owners take a quite different view.

Fair dealing

3. Section 6 of the 1956 Act allows 'fair dealing' with literary, dramatic and musical works for the purposes of (i) research or private study, (ii) criticism or review (provided there is an acknowledgment) and (iii) reporting of current events in newspapers, magazines, periodicals (an acknowledgment must be given), broadcasts and films. Section 9 allows 'fair dealing' with artistic works for purpose (i) and (ii), but not for purpose (iii). As regards sound recordings and cinematograph films, the 1956 Act contains no fair dealing provisions; on the other hand, the reproduction of a broadcast without consent is permitted for private use.

4. Recognising that the 'fair dealing' exceptions were somewhat uncertain in scope and that it was difficult in principle to defend the limitation of the freedom to comment and to criticise to particular forms and media, Whitford recommended a general exception in respect of fair dealing with all works and subject matters which does not conflict with normal exploitation of the work or subject matter and does not unreasonably prejudice the legitimate interests of copyright owners. Consultations following Whitford indicate that this recommendation has received a mixed reception. In particular, the suggestion is unwelcome to some organisations representing copyright owners, particularly since it is feared that its adoption would enlarge the freedom available to users.

5. 'Fair dealing' is of course an imprecise expression; whether or not a particular 'dealing' is 'fair' depends on the circumstances. Inevitably this leads to difficulty since it is unlikely that a user and a copyright owner will have a

common view as to what is 'fair'. It would appear that the same difficulty would arise if the Whitford formula—'does not unreasonably prejudice the economic interests of the author'—were used. Moreover, the formula implies a shift of emphasis from purpose to effect and would seem to have the consequence that the defence of 'fair dealing' is extended to new purposes.

6. The Government is appreciative of the Whitford desire to simplify the law where possible. However, for the reasons indicated above, it does not feel that there is a convincing case for amending sections 6 and 9 along the lines suggested and, in view of the difficulties already experienced by copyright owners in protecting their rights, the Government does not feel it would be justified in making an amendment which might result in further encroachments into the basic copyright. It proposes therefore to retain the substance of sections 6(1)–(3) and 9(1) and (2), though, as mentioned in Chapter 2, it is proposed to follow another Whitford suggestion, to restrict the scope of the term 'research or private study' so as to exclude research carried out for the business ends of a commercial organisation. Moreover, the Government is not disposed to amend Part II of the 1956 Act so as to provide for 'fair dealing' in respect of records and films.

Judicial proceedings

7. Section 6(4) provides that copyright is not infringed if a literary, dramatic or musical work is reproduced 'for the purposes of a judicial proceeding'. Section 9(7) provides for the same exception in respect of artistic works, and sections 13(6) and 14(9) extend it to cinematograph films and broadcasts respectively. There is no such exception as regards sound recordings and the Government proposes to accept the recommendation of Whitford that there should be. In addition, the Government proposes that the copyright in the typographical arrangement of a published edition which is given by section 15 shall not be infringed by reproduction 'for the purpose of a judicial proceeding, or for the purposes of a report of a judicial proceeding'. For the purposes of this exception, it is proposed to follow the Whitford recommendation that all copies produced shall be clearly marked 'for use only in connection with (the proceedings in question)'.

8. Whitford recommended an exception for the purposes of 'statutory administrative enquiries' and considered that this would enable plans in planning applications to be copied in reasonable quantities for use by those with a definite interest. From time to time representations have been made in favour of facilitating the copying of such plans by third parties who have a legitimate interest in planning applications. The Government considers that the ready availability of copies of plans would be valuable to effective public participation in planning. There are however other considerations which have a bearing on the issue, principally, the extent to which the interest of copyright owners could be adversely affected with resulting financial loss. The Government is considering whether there are practical ways of achieving the aims of Whitford's recommendation, through either copyright or planning legislation.

Ephemeral recordings

9. Section 6(7) provides that where a person is authorised to broadcast a literary, dramatic or musical work, but not expressly to record the work in sound or on film, that person may nevertheless make a recording for the purpose only of broadcasting and provided that the recording is destroyed within 28 days of the first broadcast. Whitford felt that this provision should reflect realities by making it clear that any organisation concerned with the preparation of an authorised broadcast should be permitted to make such a recording, subject to the same proviso. The Government proposes to accept this suggestion. On the other hand, the Government considers that if Whitford's proposal that the recording need not be destroyed were accepted the recording would no longer be 'ephemeral' and this would go beyond the latitude allowed to national laws by Article 11 *bis* (3) of the Berne Convention. The Government is therefore disposed to maintain the 28 days rule.

Public records

10. Section 42 of the 1956 Act, as amended by the Public Records Act 1958,[1] provides that, where a copyright work is comprised in a 'public record' as defined, the copyright in the work is not infringed when a copy is made or supplied to any person by a duly appointed officer. This exception is necessary for the achievement of the purpose of the Public Record Office and the Government proposes to extend it so that it applies not only to copyright works but also to all copyright public records whatever form they take. Records which are not classed as 'public records' will not be brought within the exception.

Documents for export

11. In exercising its powers to control the export of goods, the Department of Trade may stipulate that specific items of British literary or historic interest may only be exported if copies are made for deposit in appropriate archives. The particular items are documents, manuscripts and archives, more than 50 years old and irrespective of value, and photographic positives and negatives more than 60 years old and having a declared value of £200 or more. An exporter who is unable to trace or otherwise obtain permission to copy from the owners of any copyright subsisting in a work he wishes to export is thus faced with the alternatives of infringing copyright or of failing to obtain the necessary export licence. To avoid this problem, it is proposed to create a new special exception from the copyright in literary, dramatic, musical and artistic works whereby the necessary copy may be made for this limited purpose.

REFERENCE

[1]6 and 7 Eliz. 2 c. 51.

CHAPTER 14

Remedies and Related Matters

1. Part III of the 1956 Act provides both civil and criminal remedies for copyright infringement. The civil remedies are available to the copyright owner or his assignee or, under section 19, to an exclusive licensee subject to certain limitations.

2. Section 17 provides that the civil remedies for copyright infringement shall include those normally available to owners of proprietary rights. In the past few years the courts have developed the practice of granting 'Anton Piller' orders* as a further safeguard for the interests of the owners of copyright and similar rights, and these have found particular application in relation to the difficult problem of piracy, especially of records, cassettes and films. The scope of these orders has, however, recently been curtailed by a House of Lords judgment (*Rank Film Distributors Ltd and others v Video Information Centre and others* (as yet unreported)) allowing defendants to invoke the privilege against self-incrimination. The Government is at present considering whether legislative amendment is required to restore the effectiveness of Anton Piller orders, but this is an issue of broader application than copyright.

3. Damages are a normal remedy in the event of infringement and are based on the loss occasioned to the copyright owner by reason of infringement. However, penal damages may be awarded under section 17(3) for flagrant infringement and, in the case of a person dealing in infringing copies, conversion damages may be obtained under section 18(1). Conversion damages are based on the value of the infringing copies without regard to the cost of producing them. They may well exceed the damages obtainable for infringement and be out of all proportion to the loss suffered by the copyright owner. Such damages are not obtainable in respect of other intellectual property rights and the Government proposes to accept the Whitford view, which appears to be widely supported, that this particular remedy should be abolished. An effective deterrent is of course necessary and the Government believes that the power of the courts to award penal damages should be strengthened. Accordingly, it proposes to adopt the recommendation that section 17(3) should be amended so that the discretion of the court to award penal damages in appropriate cases is unfettered.

4. Section 17(4) presently bars the courts from granting an injunction or other order in an action for infringement of copyright in respect of a building. As Whitford states, there seems to be no particular reason for this derogation from the general power of the courts to make appropriate orders. In this matter also the Government considers that the courts can be relied upon to

*Anton Piller orders, named after *Anton Piller KG v Manufacturing Processes Ltd* [1976] RPC 719, are orders granted on *ex parte* application which empower a plaintiff to enter a defendant's premises for the purposes of inspection or removal of documents and articles alleged to contain evidence of, for example, copyright infringement.

exercise their discretion wisely and proposes therefore to delete section 17(4).

5. Delivery up is another civil remedy available to copyright owners under sections 17 and 18 of the Act. It is intended that this remedy should remain in the discretion of the court and, in drafting new legislation, close attention will be given to the definition of the material the delivery up of which may be ordered. In this connection, the suggestion has been made that reproduction equipment of any kind should be subject to delivery up. On this, the present view of the Government is the same as that of Whitford that this would go too far where the equipment (which may for example consist of a printing machine) is not specifically adapted for the purpose of producing infringing copies and can be used for many other entirely legitimate purposes.

6. As regards the definition of 'infringing copy' in section 18(3)*(a)*, it seems anomalous to exclude reproduction in the form of a cinematograph film. There seems to be no reason to place the infringer who makes a film in a better position than one who makes a record or a printed copy and it is considered that this exception should be removed.

7. Finally, in connection with section 18, it is observed that the reference to 'detention' appears to allow claims based on the old common law action of detinue which was in general abolished by the Torts (Interference with Goods) Act 1977.[1] There seems to be no particular reason for perpetuating this action in the copyright field and it is accordingly proposed to delete the reference to 'detention'.

8. Whitford suggested the introduction of a remedy against a person who makes groundless threats of copyright infringement. Such a remedy has been available in the field of patents for many years. The suggestion seems to be that such an action should not be available to, for example, a person who makes an alleged infringing copy but should be open to a customer who is selling the copies and is being coerced by the copyright owner. In the context of such an example a provision on the lines recommended may be practicable and of some use, at any rate in the case of copyright in a design in the industrial field. However, bearing in mind the different acts protected by copyright and the fact that the protected acts also vary with the subject matter, it is not clear how a feasible distinction can properly be drawn between the so-called 'primary' and 'secondary' infringers, referred to by Whitford, as a general proposition applicable to all fields of copyright. Apart from this, the Government is not entirely convinced of the need to introduce into copyright law a remedy available in the different area of patents where the scope and validity of monopoly rights are in question. It intends to give further thought to this matter and would welcome public comment.

9. Proof of title in a copyright action is often very difficult and costly to establish. For this reason, section 20(1) of the 1956 Act contains presumptions to the effect that copyright exists and is owned by the plaintiff. These presumptions only apply if the defendant does not put the questions in issue,

and it is invariably the case that in practice defendants do require proof of title. If there is any doubt, the defendant is naturally fully justified in challenging the plaintiff on these basic questions. However, the result in many cases is an untoward delay in the proceedings and the expenditure of time, money and effort which in the event is completely wasted. Accordingly, Whitford suggested that section 20(1) should be modified as follows. In interlocutory proceedings, the presumptions shall apply unless the defendant can show that the facts presumed are untrue, provided that the court is satisfied that the defendant will be adequately protected by the plaintiff's undertaking for damages. In the action proper, if the matter has been unreasonably put in issue, then that should be taken into account in any award of costs. The Government is concerned to facilitate quicker and cheaper procedures. It considers that the Whitford recommendations should help in this direction without unfairly weakening the position of defendants, and it proposes to adopt them.

10. As noted by Whitford, the Paris text of the Berne Convention provides that the maker of a film shall be the person whose name appears on it, unless the contrary is proved. This presumption will be incorporated in new legislation and so remove an obstacle to UK ratification of the latest Act of the Convention.

11. Section 21 of the 1956 Act concerns criminal remedies in respect of which Whitford made the following recommendations with a view to making the sanctions more effective. Firstly, it was suggested that possession of an infringing copy should be an offence if it is in the course of trade. Secondly, the obligation on the prosecution to prove that the accused knew that he was dealing with an infringing copy should be abolished; instead the onus should be shifted to the accused who should be entitled to an acquittal if he can show that he did not know and had no reasonable grounds for suspecting that the acts complained of were acts done in relation to infringing copies. Thirdly, the scale of penalties should be increased.

12. The Government accepts the first and third of these recommendations without any reservation. (It may be noted here that it is also intended that 'possession in the course of trade' should be an infringing act covered by sections 5 and 16.) However, it has serious doubts about the recommendation to shift the onus of proof on to the accused. The general requirement of the criminal law in this country is that the prosecution must prove the guilt of the accused beyond reasonable doubt. The Government appreciates the desire of those, particularly in the record and film industries, who seek stronger sanctions in their fight against pirates and those who deal in their goods. However, to create in the copyright field an exception from the normal rule would, it is thought, be going too far in that the law would then lean too heavily on the vast majority of honest traders. It has to be remembered that at any one time there is a huge amount of material which is in copyright and it would be unreasonable to expect an honest trader, who may well deal in many different products, to prove that he did not know that a particular product was made in infringement of copyright. As stated, the Government accepts the need for stiffer penalties against those who knowingly deal with infringing products and hopes that this will provide an effective deterrent.

13. As suggested by Whitford, it is also intended that the public performance of records and films (other than by the use of a radio or television receiver) should be brought within the scope of section 21(5). The further suggestion that persons procuring the commission of an offence of the kind referred to in section 21 should be similarly liable is considered to be covered by the existing general law. Particularly in view of section 8 of the Accessories and Abettors Act 1861[2] and section 35 of the Magistrates' Courts Act 1952,[3] now consolidated in section 44 of the Magistrates' Courts Act 1980,[4] a special provision in the Copyright Act does not appear necessary. Finally, in connection with section 21, the Government would welcome public comment on the suggestion to introduce a defence of due diligence on the lines of section 111(4) of the Patents Act 1977.[5] This would, for example, give protection to an employer in respect of the sale by one of his employees of an article which the employer knew to be an infringing copy, but which he had for his own private use and in relation to which he had given instructions that it should not be sold.

14. Section 22 of the 1956 Act provides for the prohibition of imports of unauthorised printed copies of literary, dramatic or musical works if the copyright owner has given notice to the Commissioners of Customs and Excise. It is very difficult to control piracy once unauthorised imported copies are dispersed throughout the country and, in view of the increasing international traffic in pirate records and films, the Government is prepared to accept the desirability of widening section 22 so as to include records and films also. However, in view of the serious practical difficulties in detecting and identifying pirated material at importation, it would be necessary, before an import prohibition could be enforced, for advance notice to be given to Customs specifying exact details as to time and place of the expected importation. The details involved will be a matter for Regulations made under the new Act.

REFERENCES
[1]1977 c. 32.
[2]24 and 25, Vict. c. 94.
[3]15 and 16 Geo. 6 and 1 Eliz. 2 c. 55.
[4]1980 c. 43.
[5]1977 c. 37.

CHAPTER 15

Copyright Tribunal

1. The Performing Right Tribunal was set up under the 1956 Act for the purpose of controlling possible abuses by persons or organisations in the exercise of certain of the rights conferred on them by the statute. It has jurisdiction over the issue of licences for the public performance, broadcasting or diffusion by wire of literary, dramatic or musical works where the copyright owners exercise their rights collectively through a licensing body. It also has jurisdiction in respect of licences for public performance and broadcasting of sound recordings and for the public performance of television broadcasts; in these cases, the jurisdiction exists even where the rights are exercised on an individual basis.

2. Whitford recommended that the Tribunal should be given a much wider jurisdiction enabling it to settle disputes which arise as a result of the operations of any collecting society that issues blanket licences as a main part of those activities. The jurisdiction as so extended would cover in particular any blanket licensing schemes which may be established for reprographic copying and the licence which a film producer requires from the Performing Right Society in order to reproduce a musical work on a film soundtrack, as well as any scheme which covers the recording of the works of several authors or composers. It is believed that, subject to the comments in paragraph 8 below, it is in the public interest to confer this extended jurisdiction on the Tribunal and to rename it the 'Copyright Tribunal'. However, events since Whitford reported have highlighted difficulties a standing tribunal of this sort faces when dealing with cases where large sums of money are at stake. Unless such problems can be overcome, serious consideration will have to be given to some alternative form of settling disputes. However, the following paragraphs assume that the Tribunal would be retained much in its present form; revision of its procedure is considered in paragraph 8.

3. If the statutory licensing system provided for the recording of musical works is retained, the Government intends, as suggested by Whitford, to confer on the Tribunal the power to review the statutory royalty and the basis on which it is calculated. So far as this is concerned, the role of the Tribunal would, however, simply be one of advising the Government since it is believed that the rate should be fixed by the Government with the approval of Parliament, thus enabling the public economic interest to be taken into account.

4. Whitford also recommended that the Tribunal should be empowered, on such terms as to reserving payment or otherwise as it thinks fit, to give clearance in advance for reproduction, publication, performance, broadcasting or other *prima facie* infringing acts in cases where the Tribunal is satisfied that:

(a) the copyright owner cannot be traced, and

(b) it is reasonable in all the circumstances.

The Government appreciates that the difficulties involved in tracing a copyright owner may sometimes create a problem. In such cases, there is a clear choice to be made between not using the particular work or taking the risk of being sued for infringement. The proposal of Whitford would in effect give a Tribunal the power to legalise use of the work by substituting its consent for that of the untraced copyright owner. The Government does not think it would be right to extinguish or reduce the rights conferred on copyright owners in this way. The Tribunal would be in the position of being empowered to grant a compulsory licence and this does not appear to be consistent with the United Kingdom's international obligations.

5. The Government agrees with Whitford that there should be no change in the present basis underlying the work of the Tribunal. In settling disputes referred to it under its extended jurisdiction, the Tribunal must decide what is reasonable in all the circumstances.

6. Whitford recognised that the extended jurisdiction of the Tribunal would be likely to increase its workload. This will undoubtedly add to the difficulties of manning the Tribunal. To alleviate this and to spread the load among the members, it is considered that the Tribunal should in future be composed of a larger panel of persons than is the case now, the members who are needed for any particular case being drawn from this panel as seems appropriate.

7. The cost of running the Tribunal will inevitably increase, but Whitford has suggested that official fees should be kept as low as possible. The running costs of the Tribunal seriously concern the Government. The fee for bringing a case before the Tribunal is presently set at £6, the intention from the beginning of the Tribunal's life being to avoid discouragement of the 'small man' who felt aggrieved. In the 23 years of the Tribunal's life, 37 cases have been referred to it. Of these, three are still pending, eight were withdrawn and four were settled without a hearing; until the most recent case, there were 15 hearings covering 22 different references, the average length of a hearing being nearly five days. The hearing on the most recent case, however, occupied no fewer than 80 days before the Tribunal. Often considerable amounts of money in the way of licence fees are at stake and, presumably for this reason, it is the rule rather than the exception that each of the parties retain Counsel. Usually the referor is a trade association and, as is only to be expected in view of their responsibility for operating licence schemes, the other party is normally the Performing Right Society or Phonographic Performance Limited. In only one case has the 'small man' been involved. It is clear that the extension of jurisdiction could bring before the Tribunal many other organisations and newly created licensing bodies. Since the total running cost of the Tribunal is now some £350 per day, an amount which has to be borne by the general taxpayer, the Government considers that there is no longer any justification for low fees, and feels that a more realistic amount should be charged in the future.

8. Nevertheless, the cost of the Tribunal is not the only factor; even with an enlarged panel there will be the severest difficulties in finding suitable

persons to constitute the Tribunal in long cases. Nor is the Government convinced that the interest of the public, who after all pay ultimately, is served by the expenditure of very large sums of money by the parties in the prosecution of the cases. If, therefore, the trend is to such cases, and particularly bearing in mind the enlarged jurisdiction of the Tribunal, it is for consideration whether the present procedures of the Tribunal can be speeded up without, of course, doing injustice to the parties. In particular, the Government would welcome public comment on the suggestion that evidence should mainly be by way of affidavit and that the Tribunal should decide on the basis of the documents submitted to it, a hearing being called only when the Tribunal considers this to be necessary for the purpose of eliciting answers to those matters which in its opinion are vital to its decision.

CHAPTER 16

Droit de Suite

1. Paintings and sculptures are frequently resold at prices many times those originally paid to the artist. This is regarded in some countries as inequitable and has led to the institution of schemes whereby the artist and his heirs have the right, during the normal copyright term, to part of the proceeds of each resale—commonly known as 'droit de suite'.

2. Although Article 14 *ter* of the Paris Act of the Berne Convention incorporates an optional provision concerning droit de suite, only 17 of the 71 Member countries provide for it. The 17 includes, however, six European Community countries: Belgium, Denmark, France, Germany, Italy and Luxembourg. The provision is not included in UK legislation.

3. Whitford was not persuaded by the arguments advanced by organisations representing British artists and did not recommend that droit de suite should be introduced here. Whitford did not consider the concept to be necessarily fair or logical and felt that the practical problems associated with the administration of such a scheme outweighed any advantage that might be achieved.

4. In its communication 'Community Action in the Cultural Sector',[1] the Commission of the European Communities has recommended to the Council of Ministers the introduction of a Directive on the basis of Article 100 of the EEC Treaty to ensure the harmonisation of the laws on droit de suite in force in several Community countries and the general application of these rights throughout the Community. It has been suggested that disparities between provisions in Member States lead to socially unacceptable inequality between artists and to distortion of trade (the argument being that sales are attracted to those countries such as the UK where the right—in effect a levy on sales—does not exist).

5. The Commission has announced its intention to make proposals for a Directive on droit de suite which would ensure the payment to creative artists in the plastic arts (or their heirs) of a percentage of the capital gain realised on successive sales of their works. This will provide an opportunity to re-examine the subject in greater detail. For the present, however, the arguments in support of droit de suite are not considered sufficiently logical, equitable or compelling to warrant its introduction.

REFERENCE

[1] *Bulletin of the European Communities Supplement*, June 1977.

CHAPTER 17

Libraries of Legal Deposit

1. Under section 15 of the Copyright Act 1911,[1] left unrepealed by the 1956 Act, there is a legal requirement that the publisher of every book published in the United Kingdom shall deposit a copy with the British Library and, on written demand, with five other libraries. For the purposes of this requirement the word 'book' includes, for example, newspapers, magazines, pamphlets, sheet music, maps and plans. Different paper qualities are specified as between the British Library and the other deposit libraries, and certain limited editions are exempt from the deposit requirement with one of the other libraries, namely the National Library of Wales.

2. Whitford recommended that consideration should be given to the question of relieving publishers of the financial burden of legal deposit. The Government is sympathetic to the reasoning behind this proposal, but it should be recognised that the publishers' expenditure on deposit copies is already allowable under normal tax rules as a deduction in computing profits for tax purposes and it is not considered that any additional allowance is justified.

3. The Government, having considered whether there should be any change in the numbers or locations of the deposit libraries, and in particular whether, as proposed by Whitford, the John Rylands University Library of Manchester should be accepted as an additional deposit library, has concluded that the existing libraries sufficiently meet the needs of scholarship.

4. The National Library of Wales is distinguished from the other deposit libraries in that it cannot in general claim a copy of any edition of which no more than 300 copies are produced. For larger editions of up to 600 copies there are price-related restrictions upon the National Library of Wales' right to claim copies, and it also has no claim in relation to imported limited editions not exceeding 100 copies.[2] The National Library of Wales was added to the list of deposit libraries by the 1911 Act very shortly after its foundation. Since then, however, it has developed into a major reference library of substantial reputation and the reasons for its initial lack of privilege relative to the other deposit libraries in relation to limited editions no longer apply. The Government will therefore follow the Whitford recommendation that these limitations upon the rights of the National Library of Wales should be removed in order that all the deposit libraries may be placed on the same footing. An additional effect of this measure is that it will enable a single London collecting station to be used for all the deposit libraries other than the British Library, with consequential administrative savings.

5. Whitford recommended that consideration should be given to extending the obligation to deposit 'books', as defined by the 1911 Act, to new works published in microform. The logic of this is recognised where microform publication is used as a substitute for conventional publication. The full practical and financial implications of such an extension are, how-

ever, by no means clear and the Government would therefore welcome further public debate of the issues involved.

6. Whitford recognised that the question of the creation of comprehensive national archives of films and published visual and sound recordings was not strictly within its terms of reference, but expressed the opinion that the desirability and feasibility of such archives should be investigated by a committee qualified to assess these questions. The Government sees considerable obstacles to the creation of such comprehensive archives at the present time, not only because the technical problems of storing this material are still to be fully solved, but also because the bodies now operating in this area would need considerably more accommodation and staff to undertake the increased work that would result. The case for comprehensive national archives of sound and visual recordings has yet to be made and a far fuller demonstration of the need for them is required before the Government could consider their establishment and the resulting additional burden on public funds.

7. As suggested by Whitford the Government will consider the appropriate level for the financial penalties for non-compliance with the legal deposit obligation as part of its general review of the penal provisions of copyright and performers' rights legislation.

REFERENCES

[1]1 and 2 Geo. 5 c. 46.

[2]The National Library of Wales (Delivery of Books) Regulations SR & O 1924/400; The National Library of Wales (Delivery of Books) (Amendment) Regulations SI 1956/78.

CHAPTER 18

Miscellaneous

Moral rights

1. Article 6 *bis* of the Berne Convention requires Member countries to grant to authors:

(i) the right to claim authorship of the work (sometimes called the right of 'paternity');

(ii) the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work which would be prejudicial to the author's honour or reputation (sometimes called the right of 'integrity').

These rights, which are generally known as the moral rights of authors, are required to be independent of the usual economic rights and to remain with the author even after he has transferred his economic rights.

2. The difference between the Paris text of Article 6 *bis* and the previous text of Brussels, which the United Kingdom ratified, is that the later text provides that some at least of the moral rights must be protected for the full term of copyright, namely, the life of the author plus 50 years. For that reason, amendment of the 1956 Act is necessary if the United Kingdom is to ratify the Paris Act of the Berne Convention, as indeed the Government proposes.

3. The present position in the United Kingdom is that moral rights are provided to some extent by section 43 of the 1956 Act and to some extent by the common law in the form of the laws of contract, passing off and defamation. Whitford cast some doubt on whether the law has ever been fully satisfactory to meet the obligations even of the earlier text of the Berne Convention. Whether these doubts are justified or not, the Government considers that the occasion of a new Copyright Act presents a good opportunity to clarify the position and to bring all the provisions necessary to meet the Paris Act together in a single statute.

4. The Government therefore proposes to make provision in the new Act for moral rights as follows.

5. Firstly, as to the right of paternity, the author will be given the right to claim authorship of the work. Although Whitford saw difficulties in interpreting the right to claim authorship as a right to insist that every copy bears the author's name, it seems from the wording of the Convention that what is intended to be included is the positive right to claim authorship which the author may exercise as he wishes. Normally this will be by placing his name on the copies. A related right is currently provided in the 1956 Act by section 43. This section provides, *inter alia*, a bar against passing-off a work as that of a particular author by putting his name to another person's work in such a way as to imply that he is the author. Although the further retention of this

provision was questioned by Whitford, there is evidence that it provides a useful remedy where the plaintiff is not a professional writer and could not therefore recover damages for loss of goodwill in a passing-off action.

6. Secondly, as to the right of integrity, Article 6*bis* of the Berne Convention permits some latitude since it requires a right to object only in cases where actions in relation to an author's work (such as modifications of it) 'would be prejudicial to his honour or reputation'. Whitford was attracted by the philosophy adopted in the Netherlands Copyright Act and suggested that 'reasonable' modifications of a work should be allowed. The Government agrees that exceptions of this kind should be made and considers that it would be in accordance with the Berne Convention to do so. It therefore intends to provide that no change shall be made in any literary, dramatic, musical, artistic or cinematographic work without the author's consent, with the exception however of changes to which the author could not in good faith refuse consent.

7. Thirdly, the rights will be exercisable only by the author or, after the author's death, his personal representative. Any contravention of the rights will be actionable as a breach of statutory duty. The rights will not be assignable. The author will however be able to waive his moral rights and such waiver will be binding on his successors in title.

8. Fourthly, the moral rights will have the same duration as the economic rights.

Choreographic works

9. The Paris Act of the Berne Convention makes protection conditional on 'being fixed in some material form'. Although section 49(4) of the 1956 Act corresponds with this requirement, section 48(1) limits protection to choreographic works 'if reduced to writing in the form in which the work or entertainment is to be presented'. The Government proposes to remove this limitation from section 48(1).

Architecture

10. The law will be revised so as to protect a work of architecture erected in a Convention country by a non-Convention national. Such protection is required by Article 4 of the Paris Act of the Berne Convention.

Folklore

11. Article 15(4) of the Berne Convention (introduced at the Stockholm 1967 Revision and confirmed by the Paris Revision) requires Member States to recognise an authority designated in another Member State to enforce rights in unpublished works believed to come from that country but of which the author is unknown. Such works, being anonymous, need to be protected for only 50 years from being made available to the public (Article 7(3)) and this corresponds to the term of protection now prescribed in the Second Schedule of the 1956 Act. The Government recognises the deep interest shown by the developing countries in their folklore and therefore intends to

make provision so as to enable designated authorities of other Member States of the Berne Union to sue in the United Kingdom for infringement of copyright in such unpublished works. At the same time, the names and addresses of such designated authorities will be published from time to time in this country.

Territorial limits

12. The present copyright law does not apply on the Continental Shelf or on British registered ships or aircraft when outside territorial limits. There seems to be no particular reason why acts which, if done within the territory of the United Kingdom, would be infringements of copyright, should not equally be regarded as infringements when done on an oil rig in the UK sector of the Continental Shelf. The Government therefore proposes in new legislation to bring copyright law into line with that on patents (*cf* section 132(4) of the Patents Act 1977). As regards the use of copyright on ships or aircraft when outside territorial limits, the problem is that there is no international regulation on this matter and the Government is not therefore inclined to impose liability on British registered ships and aircraft which would involve payments to foreign copyright owners when the owners of other ships and aircraft incur no liability to British copyright owners.

Copyright in patent drawings

13. It is common for patent applications to include drawings depicting embodiments of the invention. Apart from these drawings, it is also frequently the case that other drawings exist which also relate to the invention. When the invention has been developed, the final product may well be a recognisable copy of the drawings in the patent specification or in the other drawings. In these circumstances, a third party who manufactures the product at a time when the patent has expired, lapsed or been revoked may find that he is nevertheless infringing copyright. It follows that copyright may have the effect of resurrecting the patent monopoly even though the invention should be in the public domain.

14. Since copyright in patent specifications vests in the Crown, this problem would be unlikely to arise in practice in so far as copyright in the product is derived from the specification drawings. As for the other drawings, it would appear that, if the copyright owner is also the person who took out the patent, there would be an implied license to produce the product without infringing the copyright; this was the view expressed by Mr Justice Whitford in *Catnic Components Ltd v Hill and Smith Ltd* [1978] FSR 405. However, it is difficult to argue that the same result would apply where the copyright and the patent are in different hands.

15. As Whitford remarked, this is not a satisfactory position. However, if, as the Government is suggesting, it is enacted that an article should only be protected by copyright in so far as the features of its appearance are not dictated by the function it may have to perform, it is considered that the problem will be significantly reduced. This may be enough. Nevertheless, the Government is prepared to consider the introduction into the new Act of a provision to the effect that the manufacturer of a product, the copyright in which is derived from drawings associated with the invention of a published patent application or patent, shall, when the application has been withdrawn or the patent has expired, lapsed or been revoked, be treated as if he were the holder of a licence granted by the copyright owner.

PART II

LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

1. United States of America and Territories

612. U.S. CONGRESS. HOUSE.

H.R. 2908. 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. Frank on March 30, 1981; and referred to the Committee on the Judiciary (97th Cong., 1st Sess.).

To be cited as the "Visual Artists Moral Rights Amendment of 1981," this bill would amend Sec. 113 of P.L. 94-553 by adding at the end thereof a new subsection: "(d) Independently of the author's copyright in a pictorial, graphic, or sculptural work, the author or the author's legal representative shall have the right, during the life of the author and fifty years after the author's death, to claim authorship of such work and to object to any distortion, mutilation, or other alteration thereof, and to enforce any other limitation recorded in the Copyright Office that would prevent prejudice to the author's honor or reputation."

613. U.S. CONGRESS. HOUSE.

H.R. 3392. A bill to amend title 17 of the United States Code to authorize certain nonprofit use of copyrighted works. Introduced by Mr. Young on May 1, 1981; and referred to the Committee on the Judiciary (97th Cong., 1st Sess.).

The current copyright law exempts organizations from paying royalty fees when they are nonprofit educational institutions using copyrighted works in a classroom or similar place devoted to instruction, such as a place of worship or other religious assembly. This bill would amend the language so that nonprofit religious organizations could use copyrighted works under any circumstances in the exercise of religion, provided those activities are not for commercial advantage.

614. U.S. CONGRESS. HOUSE.

H.R. 3408. A bill to amend title 17 of the United States Code to exempt nonprofit veterans' organizations and nonprofit fraternal organizations from the requirement that certain performance royalties be paid to copyright holders. Introduced by Mr. Johnston on May 4, 1981; and referred to the Committee on the Judiciary (97th Cong., 1st Sess.).

This bill would amend section 110 of title 17 U.S.C. by adding a new paragraph 10 making the performance of a musical work in the course of activities of a nonprofit veterans' organization or a nonprofit fraternal organization exempt from performance royalties. (Identical to H.R. 5466 introduced by Mr. Harsha in the 96th Congress, 1st Session.)

615. U.S. CONGRESS. HOUSE.

H.R. 3560. A bill to amend the copyright law respecting the limitations on exclusive rights to secondary transmissions, and for other purposes. Introduced by Mr. Kastenmeier on May 12, 1981; and referred to the Committee on the Judiciary. (97th Cong., 1st Sess.).

This bill would make compulsory licenses available for a limited number of distant signals and grant the CRT the power to establish syndicated exclusivity rules in addition to authorizing the CRT to establish "just and reasonable" royalty rates for use of the compulsory license. Sports teams would be granted full copyright protection with respect to cable retransmission of games within a radius of fifty miles of the stadium, and a portion of the royalty pool would be distributed to radio program producers. This bill would also raise the copyright exemption limit liability to 5,000 subscriber systems, grant the CRT subpeona power, and eliminate a provision of the present law which appears to require an automatic stay in distribution of royalties upon judicial appeal.

616. U.S. CONGRESS. SENATE.

S. 601. A bill to amend the Communications Act of 1934 to establish licensing procedures, renewal procedures, and licensing terms for television broadcast stations. Introduced by Mr. Goldwater on March 3, 1981; and referred to the Committee on Commerce, Science and Transportation (97th Cong., 1st Sess.).

This legislation would do three things. First, it would extend the term for TV licenses from three to five years. Second, the bill

would permit the Commission to use a lottery or random selection to choose among applicants for new television licenses. Third, this bill would change the process of dealing with renewal television licenses so that an incumbent desiring renewal of his certificate would apply first, rather than having all persons desirous of a license apply at once. Should the incumbent successfully demonstrate that he has substantially met the needs and problems of his service area, has not committed any serious violations of the Communications Act and remains of good character, the Federal Communications Commission would renew the license.

617. U.S. CONGRESS. SENATE.

S. 603. A bill to amend title 17 of the United States Code to exempt nonprofit veterans' organizations and nonprofit fraternal organizations from the requirement that certain performance royalties be paid to copyright holdiers. Introduced by Mr. Zorinsky on March 3, 1981; and referred to the Committee on the Judiciary (97th Cong., 1st Sess.).

This bill would amend section 110 of title 17 of the United States Code by adding a new section (10) making the "performance of a nondramatic literary or musical work in the course of a social function which is organized and promoted by a nonprofit veterans' organization or a nonprofit fraternal organization to which the general public is not invited, if the proceeds from such performance, after deducting the reasonable costs of producing the performance, are used exclusively for charitable purposes and not for financial gain," exempt from certain performance royalties. [Identical to S. 2082 introduced by Mr. Zorinsky in the 96th Congress.]

618. U.S. CONGRESS. SENATE.

S. 691. A bill to amend titles 18 and 17 of the United States Code to strengthen the laws against record, tape and film piracy and counterfeiting, and for other purposes. Introduced by Mr. Thurmond on March 12, 1981; and referred to the Committee on the Judiciary (97th Cong., 1st Sess.).

This bill would amend 18 U.S.C. 2318 to make it a five-year felony (with $250,000 fine) to knowingly transfer for profit or possess with intent to so transfer, a counterfeit label that is affixed to a phonorecord or a copy of a motion picture or an audiovisual work. A new section 2319 to title 18 would be added to incorporate by reference the criminal infringement of a copyright offense

defined in 17 U.S.C. 506(a) and to establish more appropriate penalties. A copyright offense involving at least 1,000 phonorecords or at least 65 films within any 180-day period, or a repeat offender, would be punishable by a fine of $250,000, or imprisonment for five years, or both. A copyright offense involving 101 to 999 phonorecords or eight to 64 films would carry a penalty of $250,000 fine, or imprisonment for two years, or both. Any other violation of the section would be a one-year misdemeanor with a fine of $250,000.

619. U.S. CONGRESS. SENATE.

S. 851. A bill to amend the Internal Revenue Code to increase the amount that an artist may deduct when he contributes an artistic composition to charity. Introduced by Mr. Moynihan on April 1, 1981; and referred to the Committee on Finance (97th Cong., 1st Sess.).

S. 852. A bill to amend the Internal Revenue Code to provide a tax credit for certain contributions of literary, musical or artistic compositions. Introduced by Mr. Moynihan on April 1, 1981; and referred to the Committee on Finance (97th Cong., 1st Sess.).

S. 851 and S. 852 are similar in content as well as scope. To be cited as the "Pen and Ink Act of 1981" these bills would provide a tax credit for certain contributions of literary, musical, or artistic compositions to charity. Both bills would apply to contributions of "literary, musical, or artistic compositions" to section 501(c)(3) organizations or to government agencies. The artist would be required to obtain a statement in writing from the donee that says that the artwork has artistic significance and that it will be used by the donee in connection with its exempt function. The bills contain four tables showing the amount of credit the artist is allowed based on each artist's tax bracket. Neither bill would change the rules for politicians who make gifts of their official papers. Politicians do not get a tax deduction for such contributions.

620. U.S. COPYRIGHT ROYALTY TRIBUNAL.

37 CFR 303. Regulations for copyright owner access to phonorecord players (jukeboxes) and certain establishments. Proposed rule. *Federal Register*, vol. 46, no. 65 (April 6, 1981), pp. 20566-67.

The Copyright Royalty Tribunal proposes to amend its rule

requiring the filing of jukebox location lists. The requirement was adopted for the purpose of allowing prospective claimants to compulsory license fees from the public performance of copyrighted musical works by coin-operated phonorecord players to have access to establishments where the machines were located. The Amusement and Music Operators Association, which has always opposed the location lists, recently moved for reconsideration of the requirement. On that motion, the Tribunal is soliciting comments on its deletion and is asking that such comments be submitted on or before May 15, 1981 and reply comments by May 26, 1981.

621. U.S. COPYRIGHT ROYALTY TRIBUNAL.

Cable royalty distribution proceeding. Notice. *Federal Register*, vol. 46, no. 65 (April 6, 1981), p. 20586.

With respect to the controversy regarding the distribution of the 1979 cable royalties, the Copyright Royalty Tribunal will meet with claimants on April 15, 1981 to discuss the structure and conduct of the distribution proceedings. The meeting will be held at 10:00 a.m. in Room 414, 2100 K Street, N.W.

622. U.S. COPYRIGHT ROYALTY TRIBUNAL.

Commencement of obligation to pay adjusted royalty fees. *Federal Register*, vol. 46, no. 54 (March 20, 1981), pp. 17825-17826.

The Copyright Royalty Tribunal commences a proceeding regarding copyright owners' Petition for Declaratory Relief in the matter of the royalty adjustment for compulsory licenses for secondary transmissions by cable systems. The Petition asks that if the Tribunal's adjustment of cable royalties is sustained on judicial review that (1) cable systems be obligated for payment of the adjusted royalty fees as of January 1, 1981, and (2) interest on the adjusted royalty fees be calculated from the first semiannual deposit date in 1981 through the date of actual payment by a cable system. The National Cable Television Association submitted a filing in opposition to the copyright owners' request, but, because at issue are questions of general application to all Tribunal royalty adjustment proceedings, interested parties are being given the opportunity to comment on questions raised in the Petition as well as on the subject of any retroactive application of royalty rate adjustments, generally. These comments must be submitted to the Tribunal no later than April 15, 1981.

623. U.S. COPYRIGHT ROYALTY TRIBUNAL.

Commencement of obligation to pay adjusted royalty fees; extension of time to file comments. *Federal Register*, vol. 46, no. 71 (April 14, 1981), p. 21799.

The Copyright Royalty Tribunal extends the comment period for commencement of obligation to pay adjusted royalty fees. Interested parties may now submit comments until April 24, 1981 and reply comments until May 8, 1981.

624. U.S. COPYRIGHT ROYALTY TRIBUNAL.

Determination of a controversy by the Copyright Royalty Tribunal in respect to the distribution of cable royalty fees. Notice. *Federal Register*, vol. 46, no. 38 (Feb. 26, 1981), pp. 14153-14154.

The Copyright Royalty Tribunal announces the commencement of distribution proceedings for the cable royalty fees deposited with the Copyright Office during the period January 1 through December 31, 1979 and declares that a controversy exists regarding the distribution of these royalties. Claimants or their duly authorized representatives are directed to submit proposals on the structure and procedures of the proceedings to the Tribunal no later than March 13, 1981, and reply comments no later than March 20, 1981. Legal briefs questioning copyright ownership as it affects a royalty claim should be submitted by March 23, 1981, and reply briefs no later than March 30, 1981.

625. U.S. COPYRIGHT ROYALTY TRIBUNAL.

Jukebox royalty distribution proceeding. Notice. *Federal Register*, vol. 46, no. 49 (March 13, 1981), p. 16707.

The public is notified that beginning April 21, 1981, the Copyright Royalty Tribunal will conduct an evidentiary hearing in the matter of the 1979 jukebox royalty distributions. The hearing will continue on such subsequent days as the Tribunal deems necessary. Interested parties are instructed to submit prehearing statements or memoranda, witness lists along with a summary of each witness' testimony, and copies of documentary evidence on or before April 13, 1981. It is noted that as a result of a prehearing conference that was held on March 10, the Tribunal determined that BMI, ASCAP, SESAC and the Italian Book Corporation are all proper claimants in the proceeding.

626. U.S. COPYRIGHT ROYALTY TRIBUNAL.

1978 cable royalty fees, not subject to appeal; order granting limited stay with conditions of order directing distribution. *Federal Register*, vol. 46, no. 74 (April 17, 1981), pp. 22420-21.

Pursuant to 17 U.S.C. 809, the Copyright Royalty Tribunal ruled that 50% of the 1978 cable royalty fund would be distributed effective April 16, 1981. On April 13, 1981, the National Association of Broadcasters petitioned the Tribunal to delay the partial distribution for two weeks, allowing it to pursue a court stay of the distribution under rules that provide time for other parties to file responses and replies. Because the benefits to affected parties outweigh the possible harm, the Tribunal grants an administrative stay through April 30, 1981, subject to two conditions: (1) that the NAB file its motion for stay under Rule 6(a) of the Rules of the District of Columbia Circuit and Rule 27(a) of the Federal Rules of Appellate Procedure; and (2) that such motion is filed on or before April 17, 1981.

627. U.S. COPYRIGHT ROYALTY TRIBUNAL.

1979 cable royalty distribution proceeding. Notice. *Federal Register*, vol. 46, no. 84 (May 1, 1981), pp. 24619-20.

The Copyright Royalty Tribunal gives public notice that hearings in the matter of the 1979 cable royalty distributions will commence on July 7, 1981 and continue on such subsequent days as are necessary. These proceedings will be conducted in two parts. Phase I will be to determine the percentages, if any, to be allotted each category of claimant; Phase II will be to resolve possible disputes among members of each of these groups. Parties wishing to participate in Phase I must notify the Tribunal of their intentions on or before May 15, 1981, and must submit all prehearing filings by June 15, 1981. Phase I participants will be given the opportunity to submit rebuttal evidence at a date and time yet to be determined by the Tribunal.

628. U.S. COPYRIGHT ROYALTY TRIBUNAL.

Order directing distribution of 1978 cable royalty fees, not subject to appeal. *Federal Register*, vol. 46, no. 70 (April 13, 1981), pp. 21637-38.

The Copyright Royalty Tribunal has decided to distribute a

portion of the 1978 cable royalty collections. The decision was reached after a review of appeal briefs and recommendations for partial distribution submitted by claimants indicated that at least 50% of the royalties in question were not subject to the dispute currently under appeal. A partial royalty distribution scheme has been adopted, therefore, under which syndicators will be allocated 37.5%; sports claimants, 6%; public broadcasting, 2.62%; music performing rights societies, 2.25%; and broadcasters, 1.63%.

629. OREGON.

S.B. 729. A bill for an act relating to design rights.

This bill would give an employee the right to copyright or patent any design he created during his employment. If the employee elected not to exercise that right, his employer would have the first right to accept or refuse assignment or transfer of the copyright or patent. If the employer refuses, the employee would retain all rights to the design. [*See* paragraph 20,109 CCH COPR. L. RPTR.]

630. OREGON.

S.B. 730. A bill for an act relating to reproduction of works of fine art.

This bill would reserve to artists works of the fine art the reproduction rights despite a sale or other transfer of the original work. It would also reserve to authors of other works of art, including motion pictures and photographs, the title to the physical work after the author transferred any right to performance or reproduction to another. [*See* paragraph 20,110 CCH COPR. L. RPTR.]

2. Foreign Nations

631. CANADA. *Laws, statutes, etc.*

Miscellaneous Statute Law Amendment Act of 1981. *News Release Communique*, NR-81-4, Ottawa, March 31, 1981.

The Canadian Copyright Act has been amended to remove a barrier to the production of "talking books"—audio recordings of literary or dramatic works—for persons unable to read print due to physical handicap. The amendment adds a subsection of section 19 of the Copyright Act to exempt from the compulsory

licensing provisions under this section of the Act contrivances "intended primarily for and distributed to persons unable to read print." Under section 19(1) of the Canadian Copyright Act, once the copyright owner of either a musical, literary or dramatic work grants permission to have such a work recorded, it can be recorded subsequently by any party without infringement of copyright, providing notice is given and a stipulated royalty is paid to the copyright owner.

PART IV

JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY

A. DECISIONS OF U.S. COURTS

1. Federal Court Decisions

632. FACTORS ETC., INC. v. PRO ARTS, INC., 496 F. Supp. 1090 (S.D.N.Y. July 29, 1980) [Tenney, D.J.].

Golenbock & Barell, New York, N.Y. and Ervin, Cohen & Jessup, Beverly Hills, Cal., Michael C. Silberberg and Donald F. Schneider, New York, N.Y., and Arthur Fields and Daniel Lidman, Beverly Hills, Cal., of counsel, for plaintiffs; Schulman, Berlin and Davis, New York, N.Y., William J. Davis and Charlotte A. W. Pfahl, New York, N.Y., of counsel, for defendants.

Action by assignee and licensee of Elvis Presley's right of publicity for infringement of that right. Motion for summary judgment for a permanent injunction and an order directing that further proceedings be held to determine damages. Motion granted. *Held, inter alia*, that state laws protecting the right of publicity are not preempted by federal copyright law.

Two days after Presley's death, plaintiff Factors Etc., Inc. acquired the exclusive license to exploit Elvis Presley's name and likeness from plaintiff Boxcar Enterprises, Inc., Presley's assignee. On August 19, 1977, the next day, defendant Pro Arts, Inc. published in poster form a photograph of Presley purchased from the Atlanta *Constitution*, and filed a copyright registration application for the poster.

Factors began the instant action to enjoin defendants from manufacturing and selling the poster and for damages. Plaintiffs' motion for a preliminary injunction had been granted and defendants appealed. The court of appeals for the Second Circuit affirmed the judgment below, holding that Elvis Presley enjoyed a right of publicity under New York law, that this right survived Presley's death, and that defendants' poster did not enjoy First

Amendment protection as a celebration of a newsworthy event.

On remand, plaintiff brought the instant motion for summary judgment. In granting the motion, the court noted that section 301 of the Copyright Act of 1976, the preemption provision, was, by its own terms, not applicable to the instant action because it was commenced before January 1, 1978. The court's analysis of prior law was that state protection of the right of publicity is preempted by federal law only if Congress intended that any such protection be granted by federal law, or that the right of publicity be left unprotected. The District Court looked to section 301 as an indication of Congressional intent. The court also quoted Professor Nimmer's statement that section 301 was a codification of prior law.

The court first described the legislative history of section 301. As enacted, section 301 provides that as of January 1, 1978 all legal or equitable rights equivalent to the exclusive rights of copyright are governed by federal law exclusively, but that state laws regulating violations of rights which are *not* equivalent to copyright rights are not affected. The original draft of section 301 included a list of non-equivalent rights. The right of privacy was among those non-equivalent rights. According to the court, the right of publicity is part of the right of privacy. The original bill was amended to add rights against misappropriation to the list of non-preempted rights. Congressional reaction to concerns expressed by the Justice Department over the inclusion of misappropriation led to the deletion of the entire list of non-equivalent rights. The court adopted the view of commentators that the state protection of rights listed in the original draft was not preempted.

The court then analyzed the right of publicity to determine if it is equivalent to any of the exclusive rights protected by copyright, using a test devised by Professor Nimmer: A right is not equivalent to copyright rights if a cause of action for its infringement includes an element other than reproduction, distribution, display or performance by defendant. The court concluded that the right of publicity is not equivalent to copyright rights because a cause of action for infringement of the right of publicity includes additional elements, namely, the exploitation of the name or likeness of the celebrity in question during his lifetime.

PART V

BIBLIOGRAPHY

A. Articles from Law Reviews and Copyright Periodicals

1. United States

633. Compagnie Generale and Cine Vog Films, 62/79, Court of Justice of the European Communities (March 18, 1980). *Entertainment Law Reporter*, Jan. 15, 1981, vol. 2, no. 16, pp. 2-6.

A court case concerning a Belgian film distribution company, Cine Vog Films, and their exclusive right to show the film "Le Boucher" ("The Butcher") in Belgium, both in the theater and by television broadcast. When the film was rebroadcast in Germany, three Belgian cable television companies picked up the program at their reception sites in Belgium and transmitted the film by cable to their subscribers in Belgium. The Court of the First Instance decided that the three Belgian cable T.V. companies infringed on Cine Vog Film's copyright and they were ordered to pay damages. The case was appealed. The European Court of Justice ruled that the Common Market Treaty does not bar a copyright infringement action as defendants had claimed.

634. Nimms, Malcolm L., Jr. Reversion and derivative works under the copyright acts of 1909 and 1976. *New York Law School Review*, vol. XXV, no. 3 (1980), pp. 595-639.

An analysis of the two major revisions of the U.S. copyright laws of 1909 and 1976 and the legislative history of section 203. A history of the renewal concept is provided along with a discussion of *Rohauer v. Killiam Shows, Inc.*, a case involving motion picture rights to a 1925 novel entitled "The Sons of the Sheik."

635. Samuels, Edward B. Copyright and new communications. *New York Law School Law Review*, vol. XXV, no. 4 (1980), pp. 905-925.

This is a look at cable television, subscription television, multipoint distribution service, direct broadcasting satellites and the "copyright problems that may affect or be affected by the FCC policies in regulating these technologies." There is also a discussion of copyright protection of T.V. programs in general and copyright problems on the international level.

636. SCHILIT, LISA. A look at the Copyright Revision Act through the eyes of the art collector. *Art and the Law*, vol. VI:2 (1981), pp. 31-35.

This article by Lisa Schilit, which won First Prize in the 1980 Nathan Burkan Memorial competition at Columbia Law School, takes a look at the Copyright Revision Act through the eyes of the art collector. This article analyzes the scope of copyright protection available to the visual artist and the respective rights of the artist and the collector in a unique work of art. It also looks at the changes in the copyright law through the collector's eyes and discusses transfer of rights from the artists to the collector, publication of a unique art work, and the problems involved.

637. SHAPIRO, JACQUELINE. Toward a constitutional theory of expression: the copyright clause, the first amendment and the protection of individual creativity. *University of Miami Law Review*, vol. 34, no. 4 (1981), pp. 1043-1075.

This article is concerned with copyright and the First Amendment and the constitutional approach to free expression. It also compares the results achieved under the copyright clause through congressional policy and judicial case law. Fair use, compulsory licensing and moral rights are analyzed and the balance that the copyright law tries to meet between individual and public interests is also discussed.

638. VERALDI, LORNA. Cable television's compulsory license; an idea whose time has passed. *New York Law School Law Review*, vol. xxv, no. 4 (1980), pp. 925-952.

A look at the *CBS, Inc. v. Teleprompter Corp.* case, and the concept of "distant signal carriage" and the shaping of cable's compulsory license and cable developments from 1976-1979.

2. Foreign

1. In English

639. A program of assistance by CISAC for the promotion of copyright in developing countries. *Interauteurs*, no. 191 (1980), pp. 49-52.

The program for the promotion of copyright in developing countries includes a formula for agreement with Unesco and WIPO which seeks "to establish a common program of action based on a common budget for the organization of Authors Societies in countries where they do not yet exist." The areas of the world that need particular attention include: Africa, Latin America, South-East Asia and the Middle East. Some points of consideration also include understanding and acceptance of the copyright system by the developing country and by the authors themselves.

640. HAZAN, V. The convention for the avoidance of double taxation on copyright royalties. *Interauteurs*, vol. 191 (1980), pp. 101-102.

A report on the Diplomatic Conference in Madrid in which delegations from the Western World took a stand against the Convention. The author states that most delegations were "composed of fiscal people" who showed little concern for the subject matter. However, a draft of the work was completed and three states signed—Cameroon, The Holy See, and Israel.

641. KOUMANTOS, GEORGES. Challenges and promises of the mass media for copyright. *Interauteurs*, no. 191 (1980), pp. 64-70.

Mass media in this article refers to the press, phonographic records, cinematographic film, tape and cassettes and radio and television broadcasts and the problems of copyright protection for individual creators in these areas. The author points out that new techniques in multiple reproductions make it more difficult than ever to enforce copyright laws and that the mass media has vast economic power to put pressure on state organizations to protect those who diffuse works rather than the authors of those works.

642. NICOLAJ, ALDO. Authors and copyright. *Interauteurs*, no. 191 (1980), pp. 86-88.

An essay on the problems of remuneration for authors when their plays are televised to the general public. The author states

that the more successful a work is the broader the audience is through mass media and the less control both financially and artistically the author has. He also provides a condensation of CISAC's and EBU's declaration concerning direct broadcasting via satellite.

2. In French, English and Spanish

643. CHAVES, ANTONIO. The current status of copyright in Brazil. *Revue Internationale du Droit d'Auteur*, no. 197 (Jan. 1981), pp. 69-125.

This is an announcement of the reform of the internal regulations of the National Copyright Council and the convening in Buenos Aires of the first seminar on copyright. A listing of the activities of the Inter-American Copyright Institute (IIDA) is provided, along with a discussion of copyright and the right to personal privacy.

644. JANVIER, ELISABETH. Did you say authors? The situation of literary translators in France. *Revue Internationale du Droit d'Auteur*, no. 107 (Jan. 1981), pp. 2-22.

In this discussion of translators and their rights as authors, Ms. Janvier defines a translation as an action and its result, a cause and an effect as well as the act of translating and the object translated. She explains that in France the translator as author, his transfer rights and his royalty payments and contract rights are very ambiguous. She urges, therefore, that special status and protection be given to translators.

B. ARTICLES PERTAINING TO COPYRIGHT FROM MAGAZINES

1. United States

645. ABC loses bid for injunction vs. 'Rae' pilot. *Daily Variety*, vol. 191, no. 11 (Mar. 20, 1981), p. 1.

The Los Angeles Superior Court denied ABC-TV's motion to restrain 20th Century-Fox and NBC-TV from proceeding with plans for a "Norma Rae" television pilot. The network filed suit against Fox and NBC claiming that pursuant to the contract under which ABC purchased certain rights to "Norma Rae" it had been given the right of first refusal regarding a TV project based on the film. Plaintiff also moved for a preliminary injunction, but the court will act on that filing later.

646. ABC sues 20th, NBC over rights to 'Norma Rae.' *Daily Variety*, vol. 191, no. 10 (Mar. 19, 1981), p. 14.

ABC-TV has filed a suit against 20th Century-Fox and NBC in Los Angeles Superior Court. At issue is the television rights to the film "Norma Rae." Apparently, 20th Century-Fox sold to and filmed for NBC a pilot based on the motion picture not realizing that ABC had been given the right of first negotiation. The suit claims that a contract granting ABC the rights to the film for five years contains a clause which states that Fox will not only notify ABC in writing of any TV plans regarding the film but that it will negotiate with the station for 21 days before offering the rights to anyone else. It seeks, therefore, to restrain the defendants from proceeding with their TV pilot until after ABC has had a chance to exercise its rights under this clause.

647. 'Al Capone-style' prosecutions urged in vidtape pirate fight. *Daily Variety*, vol. 190, no. 53 (Feb. 23, 1981), pp. 29, 31.

Speaking at a copyright symposium, Helen Ganz of 20th-Century Fox World Wide Copyright Security focused on the piracy problem. She indicated that the problem has grown to such proportions that drastic legal measures are needed to contain it. She suggested the employment of "Al Capone-style" prosecutions, stiffer penalties, tighter security and consumer education. David Leibowitz, another speaker at the symposium, spoke on copyright laws as they relate to the cable industry. In addressing the issue of cable royalties, Leibowitz said that he did not know of any legislative proposals calling for a cable royalty increase, but indicated that Congress might call for oversight hearings on the matter.

648. ANDREWS, RON. With PRS help, Kenya taking control of local royalty payments. *Billboard*, vol. 93, no. 12 (Mar. 28, 1981), p. 56.

Royalty negotiations for Kenyan artists have led to a merger of the Performing Right Society (PRS) and the Musicians Performing Rights Society of Kenya (MPRSK). The two societies agreed to jointly open an office in Nairobi that will be funded by PRS in London and administered by a local executive. Local royalty collection and distribution will be the province of the MPRSK. It is hoped that this affiliation will attract international recognition, meet the needs of Kenyan interests and be one of the first effective, locally operated performance rights organizations in Africa.

649. ATV Music halts unauthorized use of 'All you need is love.' *Record World*, vol. 37, no. 1759 (Apr. 18, 1981), p. 18.

A federal court in Seattle has issued a permanent injunction against AA Sales, Inc. and others for copyright and trademark infringement. The injunction prohibits AA Sales from distributing and selling posters or any other products bearing the phrase "All you need is love." The suit was filed by Maclen Music, Inc. and ATV Music Group, the U.S. representatives for most of the music written by John Lennon and Paul McCartney.

650. Australian anti-piracy drives heat up; draw praise from distributors. *Variety*, vol. 302, no. 6 (Mar. 11, 1981), pp. 39-40.

Australia's federal police have initiated a strong antipiracy campaign aimed at stopping the manufacture of illegal videocassettes of popular motion pictures. It is hoped that this stepped-up effort by authorities in conjunction with the country's copyright law will reduce Australia's pirate population. The law was revised recently to impose strict penalties for copyright infringement.

651. BERGER, PETER L. Copyrights and the jewelry industry. American *Jewelry Manufacturer* (Feb. 1981), p. 12.

A discussion of the new copyright law as it pertains to the jewelry industry, including proper notice and publication. This article also mentions why a copyright registration application may be denied.

652. BERMAN, LEN. Publisher's viewpoint. *Printing Views* (Jan. 1981).

A discussion of photocopying and book publishing and a mention of the fact that "printed works of U.S. authors and pub-

lishers need not be printed and bound in the U.S. to receive U.S. copyright protection." Included in the article is a brief discussion of the manufacturing provisions.

653. BESAS, PETER. Latin America on verge of homevideo explosion. *Daily Variety*, vol. 191, no. 16 (Mar. 27, 1981), pp. 46, 50, 52.

This is an in-depth report on Latin America's homevideo market. Mr. Besas indicates that most of the data used in this report were gathered from unofficial sources in that virtually all video activities in the area are illegal. The report indicates that local shops and department stores not only deal in the sale and rental of pirated videocassettes but in the sale of smuggled video records (VCR) as well. Pirates control the Latin American video market, but authorities seemingly are not concerned because they say that the market is very small—only an affluent few have or can afford video. Others feel, however, that though the country's market is currently small it has the potential to grow as large as Europe's. They say that as the market grows, so will piracy. They urge, therefore, the adoption of antipiracy measures now while video is still in its infancy and before the piracy problem becomes insurmountable.

654. Bid to increase cable c'right payments gains ground in D.C. *Daily Variety*, vol. 191, no. 22 (Apr. 6, 1981), p. 12.

A "discussion draft" of a bill to amend the cable provisions of the Copyright Act is being considered by a House Judiciary subcommittee. The changes proposed in the bill included retention of the Federal Communications Commission's distant signal exclusivity rules, establishment of syndicated exclusivity regulations by the Copyright Royalty Tribunal and a mandate for CRT cable rate-setting authority.

655. Bootleg lps seized in Connecticut raid. *Record World*, vol. 37, no. 1756 (Mar. 28, 1981), p. 6.

In a raid on a location in Old Saybrook, Connecticut, FBI agents confiscated approximately $500,000 worth of bootleg LP's, master tapes, mastering equipment and other record manufacturing paraphernalia. One man, Keith Taruski, was arrested at the site of the raid and charged with interstate transportation of stolen property.

656. Carmen sues CAM in dispute over royalties; wants out of contract. *Variety*, vol. 302, no. 10 (Apr. 8, 1981), p. 62.

Singer-songwriter Eric Carmen filed a $20 million breach of contract suit against Victor Benedetto, CAM-USA and CAM-Prods. The complaint charges that the defendants repeatedly failed to "properly account and report" plaintiff's recording and publishing royalties, improperly diverted royalty income due the plaintiff and "short-changed" him of certain song-writing royalties. In addition to damages, plaintiff seeks rescission of the contract and reassignment of his copyrights.

657. CATV rule to stand, INTV told. *Daily Vareity*, vol. 190, no. 60 (Mar. 4, 1981), p. 8.

The Association of Independent Television (INTV) stations asked Federal Communications Commission's (FCC) general counsel Marjorie Reed to seek a remand of the decision abolishing two of the Commission's cable rules. The INTV premised its request on new financial data which it said show "the increased unprofitability of many independent TV stations" and which it felt might influence the Commission's thinking. Affirming the Commission's position on the cable issue, Ms. Reed denied INTV's request.

658. Copyright action begins to stir on Congress. *Broadcasting*, vol. 100, no. 13 (March 30, 1981), p. 23.

The House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, plans to hold hearings on copyright issues in mid-May according to Chairman Robert Kastenmeier. The hearings will cover a wide range of issues, including "the role of the tribunal and its jurisdiction, piracy, performance royalties and how competition between cable and satellite carriers has changed." The Judiciary Committee has scheduled hearings on April 29 to examine compulsory licensing for cable, and on May 13, performance royalties.

659. C'right indictment names 3 L.A. men. *Daily Variety*, vol. 191, no. 2 (Mar. 9, 1981), p. 8.

Karl Dassoff, Anthony Finocchiaro and Robert Reiss have been indicted by a federal grand jury on four counts of copyright infringement and one count of conspiracy to infringe. The men,

who were doing business as Video Etc. in Los Angeles, allegedly were illegally duplicating motion pictures on cassettes. One of the men, Karl Dassoff, already has one copyright infringement conviction. A second conviction could mean "two years in prison and a $50,000 fine for him."

660. Copyright proposal gets yea from NAB, nay from NCTA. *Broadcasting*, vol. 100, no. 4 (Apr. 6, 1981), pp. 39.

Rep. Robert Kastenmeier (D.-Wis.) is currently drafting legislation that would limit compulsory licensing to signals allowed to be transmitted under the distant signal rules eliminated by the FCC in July 1980, as well as increase the powers of the Copyright Royalty Tribunal by allowing it to create its own rules governing syndicated exclusivity, and increase its ratemaking ability. In response to the draft bill, Thomas Wheeler, president of NCTA, said: "The bill as presently drafted represents a major victory for broadcasters and Hollywood. It appears as though the bill's drafters have bought the rhetoric which the FCC's three-year economic inquiry totally discredited. I cannot see how the 18 million cable subscribers will tolerate the draft bill's enactment once they understand its implications in terms of higher costs and reduced services." However, Kenneth Schanzer, senior vice president of NAB, said the bill is "an excellent beginning, but there are areas we feel need to be addressed."

661. Copyright suit against Ann Corio is dismissed. *Variety*, vol. 302, no. 4 (Feb. 25, 1981), p. 101.

Songwriter Richard Tinory's copyright infringement suit against Ann Corio and Michael Iannuci has been dismissed. Plaintiff contended that the defendants' use of one of his songs in a show entitled "This was Burlesque" constituted a live performance, the right to which is subject to licensing by the copyright owner. The court disagreed with plaintiff's argument and dismissed the suit on the grounds that Tinory had "given away the rights to the song when he signed an agreement with Broadcast Music Inc." Therefore, the defendant was under no obligation to pay him royalties. Tinory indicated that he will appeal the decision.

662. Court order bars Police bootlegs. *Record World*, vol. 37, no. 1756 (Mar. 28, 1981), p. 9.

A federal court in Los Angeles has issued a blanket permanent injunction against the unauthorized manufacture or distribution of merchandise bearing the name or likeness of the rock group "The Police." The order authorizes federal marshals as well as state and local police to seize and impound any and all infringing product. Reportedly, this order covers any "concert venue where pirated merchandise may be sold" thus obviating the need to obtain separate injunctions in each jurisdiction.

663. CRIA instrumental in anti-piracy raids. *Variety*, vol. 302, no. 7 (Mar. 18, 1981), p. 299.

Six Toronto locations were simultaneously raided in what was the culmination of a five-week piracy investigation by the Canadian Record Industry Assn., CBS Records Canada and local police authorities. Confiscated in the raids were more than 12,000 albums and record manufacturing paraphernalia, all valued at about $1,000,000.

664. CUNNIFF, AL. House of Bryant files infringement claim on Frizzell/West hit. *Record World*, vol. 37, no. 1760 (Apr. 25, 1981), p. 8.

According to House of Bryant Publications' attorney, a written notice has been given to all parties connected with the single "You're the Reason God Made Oklahoma." The notice says that the song infringes House of Bryant's copyright in the tune "Rocky Top" and warns that legal action will be taken if such infringement does not cease. Similar action taken by House of Bryant some years ago with respect to an allegedly infringing Merle Haggard release ended in a friendly out-of-court settlement.

665. CUNNIFF, AL. RIAA's Gortikov talks tough at music publishing luncheon. *Record World*, vol. 37, no. 1755 (Mar. 21, 1981), p. 18.

The president of the Recording Industry Assn. of America, Stanley Gortikov, addressed an educational luncheon meeting sponsored by the National Academy of Recording Arts and Sciences. During his speech he lambasted the Copyright Royalty Tribunal's decision increasing the mechanical royalty rate and speculated about the decision's effect on album prices, record sales and the length of songs on future LPs. He also spoke out against the annual cost-of-living adjustments that were provided for in the decision and against music publishers for not putting

more financial backing behind the industry's antipiracy efforts. He closed his speech with a pro-performance right pitch.

666. Eight defendants convicted in Fla. pirate record trial. *Variety*, vol. 302, no. 6 (Mar. 11, 1981), p. 215.

Eight people indicted for offences ranging from racketeering and interstate transportation of stolen property to wire fraud and copyright infringement were all found guilty by a Jacksonville, Florida jury. The indictments were the result of a 1979 pirate investigation and raids by FBI officials in four states.

667. End of the road for CBS and its 'per use' fight. *Broadcasting*, vol. 100, no. 10 (March 9, 1981), p. 130.

The Supreme Court has voted 8-0 to deny review of the eleven-year old case involving ASCAP, BMI and CBS over 'per use' music licenses. In 1979 the Supreme Court ruled, on appeal, that the licences are not a per se violation but sent the case back to the Appeals Court to determine whether there was violation under "the rule of reason." A year later an Appeals Court panel held that the blanket licenses, as they relate to networks, do not violate antitrust laws. That was the ruling the Supreme Court refused to review.

668. FBI seizes videotapes, hardware in Ill. raid. *Daily Variety*, vol. 191, no. 37 (Apr. 27, 1981), p. 2.

Hundreds of videotapes and approximately $20,000 worth of electronic hardware were confiscated in an FBI raid on the home of Andy Iglar in Hanover Park, Illinois. Television sets, videorecorders and other video manufacturing paraphernalia were also seized in the raid.

669. Fed. judge nixes cable pirate sale. *Variety*, vol. 302, no. 2 (Feb. 11, 1981), p. 40.

A U.S. District Court in New York granted Home Box Office a temporary restraining order against Advance Consumer Technology and Movie Antenna, Inc. The order prohibits the companies from selling microwave antennas and down converters that were advertised as having the capability to intercept the HBO signal. HBO filed the action because the cable systems that it serves in New York receive their picture via microwave, and the devices were believed to be aimed at those systems.

670. Feds nail couple as video pirates. *Variety*, vol. 302, no. 8 (Mar. 23, 1981), p. 124.

FBI agents raided the home of Curtis and Carolyn Acree in Fidley, Minnesota, confiscating approximately 300 videotaped versions of several motion pictures. As a result of the confiscations, the couple pleaded guilty to a misdemeanor charge of illegally making and distributing videocassettes. The guilty plea was in exchange for having two other copyright charges dropped.

671. GOLD, RICHARD. RIAA hands over documents in Goody case; Gortikov to testify. *Variety*, vol. 302, no. 2 (Feb. 11, 1981), pp. 115, 120.

As ordered by U.S. District Court Judge Thomas Platt, the Recording Industry Assn. of America has submitted all original copies of the investigative reports and file materials that were subpoenaed by the defense in the Sam Goody counterfeiting case. In addition to ordering the RIAA to supply the documents, Judge Platt instructed the organization's Jules Yarnell to explain some "redactions made by the RIAA" in the subpoenaed documents and to reveal the names of stores and operatives involved in several of the RIAA counterfeiting investigations. Yarnell refused the court's instruction in the hope that the RIAA would be cited for contempt. Instead of a contempt citation, Judge Platt fined Yarnell and attorney Ray Kulcsar $1000 a day under a non-appealable court rule that regulates the courtroom conduct of attorneys.

672. HAPP, GREGORY. Who owns the artwork? *Screen Printing* (Feb. 1981).

A look at the T-shirt business and the problems of copyright. The author explains the process of reproducing art work on T-shirts and the legal concept of a work made for hire, transfer of ownership and written contracts.

673. HARRIS, PAUL. No need for c'right Tribunal: CRT chairman says current royalty fixing is 'unfair'; CATV would reap benefits. *Daily Variety*, vol. 190, no. 61 (Mar. 5, 1981), pp. 1, 22.

Copyright Royalty Tribunal chairman Clarence James, Jr. told a House judiciary subcommittee that he feels that the compulsory licensing system would work more smoothly if the Tribunal were eliminated. James also recommended that the

compulsory license for cable television be abolished; that the compulsory licensing rate for making and distributing records and tapes be changed to possibly a retail-price based rate; that the rate for jukeboxes be changed to one based on marketplace value with annual adjustments tied to the consumer price index; and that public broadcasting pay a revenue-based performance royalty. He indicated that the government's intervention in the compulsory licensing system has caused many problems, not the least of which is the continued denial of royalties to copyright owners as a result of appeals of every proceeding held by the Tribunal.

674. HARWOOD, JIM. Appeals court upholds penalty in feature film copyright case. *Daily Variety*, vol. 190, no. 56 (Feb. 26, 1981), pp. 1, 29.

The Court of Appeals for the Ninth Circuit has upheld the contempt citation and $40,000 fine entered against Thomas W. Dunnahoo for violating a 1972 consent judgment in a copyright infringement action against him. The judgment enjoined Dunnahoo from distributing a number of films copyrighted by Columbia, Universal, MGM, 20th Century-Fox, American International Pictures and several other motion picture studios. The Appeals Court rejected the arguments put forth by Dunnahoo that the films were in the public domain because they were not promptly registered and deposited with the Copyright Office after publication with copyright notice.

675. HOLLAND, BILL. CRT orders distribution of withheld cable TV royalties. *Record World*, vol. 37, no. 1761 (May 2, 1981), p. 67.

The Copyright Royalty Tribunal has ordered that $7,367,000 of the 1978 cable royalties be distributed. The order was issued subsequent to a determination that "no party will be awarded less than 50% of the amount the Tribunal originally allocated in its final decision." The partial distribution will be divided as follows: program syndicators, 37.5%; sports claimants, 6%; public broadcasters, 2.62%; music performing rights societies, 2.25%; and television broadcasters, 1.63%.

677. HOLLAND, BILL. NMPA asks court to set back date for royalty rate increase. *Record World*, vol. 37, no. 1760 (Apr. 25, 1981), pp. 3, 31.

An intervenor was filed in the American Guild of Authors

and Composers/Nashville Songwriters' Assn. International's appeal of the Copyright Royalty Tribunal decision increasing the mechanical royalty rate. The interposing brief, which was filed by the National Music Publisher's Assn., argues for affirmation of the rate increase but strongly opposes its July 1 effective date. The NMPA wants the date set back to February 1, 1981.

678. Home tapers catch up to 'real' pirates in German hv mkt. *Variety*, vol. 302, no. 9 (Apr. 1, 1981), p. 46.

Home taping and the sale of unauthorized videocassettes of motion pictures are taking a toll on Germany's video industry. The quality of pirated videocassettes selling for $50 to $60 is indistinguishable from that of the more expensive cassettes released by film companies. Videocassettes of major motion pictures can be acquired for as little as the price of blank tape. These two factors are causing an increasing number of German consumers to obtain cassettes via home taping or commercial pirating and many feel that there is almost nothing that can be done about this growing problem.

679. Homevideo: Swiss assn. vs. video pirates. *Variety*, vol. 302, no. 3 (Feb. 18, 1981), p. 58.

Various factions of Switzerland's video industry have united to form the Swiss Videogram Assn. The new group represents video program, videocassette and video disk producers, technicians and distributors. The Assn. was formed to combat piracy, to protect the rights of creators and producers of video programs, and to help establish a legal basis for video in Switzerland.

680. House of Lords ruling blow for U.K. piracy fight. *Daily Variety*, vol. 191, no. 26 (Apr. 10, 1981), p. 1.

In a landmark decision, the House of Lords upheld a lower court ruling "that retailers can't be compelled to incriminate themselves by revealing the sources of their bootleg supplies." It is almost certain that Britain's 1956 Copyright Act will be amended as a result of the decision. In fact, it is rumored that the government has already started working on proposed changes.

681. If sexplicity 'pirated,' declare FBI takes next to no action. *Variety*, vol. 302, no. 10 (Apr. 8, 1981), pp. 5, 26.

Under the Freedom of Information Act (FOIA), the Adult

Film Assn. of America is attempting to gain access to documents which it claims will show that FBI and U.S. Postal officials have been violating the civil rights of individuals engaged in the pornography trade. The Association also claims that some of the requested documents will prove that the Justice Department actively pursued copyright offenders of works produced by the major film studios, while it willfully failed to prosecute adult film pirates. These FOIA requests and some forty others were recently discussed at the AFAA's thirteenth annual convention.

682. IFPI takes hard line on home taping. *Record World*, vol. 37, no. 1755 (Mar. 21, 1980), p. 41.

IFPI has prepared a report which indicates that governments may be contravening the Berne Convention as well as reproduction rights by allowing home taping without proper compensation to copyright owners. Therefore, it suggests that renumeration be required via a royalty payment "equal that on commercial prerecorded copies of the works, calculated as a percentage of the returns based on average mechanical payments, which is worked out on sale price of product."

683. Import statement. *Copyright Management*, vol. IV, no. 3 (Mar. 1981), pp. 2-3.

This article discusses the Copyright Office's final regulation concerning import statements. It addresses such matters as the issuance of the statements for works registered under the old copyright law and the 1976 law, the fee for such issuances and the Office's treatment of duplicate registrations.

684. Is skating news? Judge sez WFSB can't scoop ABC. *Variety*, vol. 302, no. 6 (Mar. 11, 1981), pp. 45, 202.

WFSB-TV, a CBS affiliate in Hartford, was unsuccessful in two separate attempts to persuade a federal court to sanction its taping and broadcast of portions of the 1981 World Figure Skating Championships on the news. The competition's organizers had prohibited any TV coverage because the exclusive right to televise the event had been licensed to ABC Sports. In the first action, the court ruled that WFSB "had no constitutional right to special access to the event and that the restrictions were not arbitrary." The judge in the second action ruled that the skating competition was "entertainment and as such was not subject to

the same free press access as a political event." He indicated that because skating is a "visual sport," it could be diminished by TV news coverage. A WFSB official said the judge's decision will be appealed.

685. JD probe zeros in on ASCAP, BMI TV pacts. *Daily Variety*, vol. 191, no. 33 (Apr. 21, 1981), p. 11.

Leslie Arries has learned that the Justice Department is investigating ASCAP's and BMI's music licensing systems. Arries, who is the chairman of the All Music Licensing Committee, said that his organization is preparing its own case against the societies' licensing practices and will cooperate fully with the Justice Department probe.

686. KAUFMAN, DAVE. District attorney alleges 21 cameramen stole and sold film from studios. *Daily Variety*, vol. 190, no. 49 (Feb. 17, 1981), pp. 1, 15.

The FBI is investigating some 21 cameramen believed to be involved in the theft of film from motion picture studios. The investigation began with the Los Angeles District Attorney Office's inquiry into the activities of one cameraman, Peter Santoro, who was suspected of supplying Studio Film & Tape, Inc. (SFT) with approximately $300,000 worth of film that he allegedly had stolen from Universal Studios. Evidence uncovered during the Santoro probe implicated other cameramen who purportedly were also supplying SFT with stolen film. At that point the FBI joined the investigation because of possible copyright violations by the cameramen.

687. Keon: wrong to call Canadian copyright 'politically delayed.' *Variety*, vol. 302, no. 2 (Feb. 11, 1981), pp. 119, 120.

In a letter to the editor, Jim Keon, a research economist, corrects certain "inaccuracies and misconceptions" which he says appeared in an article on Canadian that was published in the November 26th issue of *Variety*. Contrary to what was reported, Keon says that the responsibility for copyright law revision rests with Canada's Department of Consumer and Corporate Affairs and that the political priorities of certain administrations have not delayed revision of the Canadian copyright act. With respect to revision, Keon says that steady progress has been underway since 1971. Reports have been published, planning groups formed to

make legislative recommendations, a Working Paper on the revision prepared, and a Committee appointed to solicit the views of interested parties in the public as well as the private sector. He says that it is the need to resolve many complex and diverse copyright issues that has delayed the revision process, not political priorities.

688. KNOLL, STEVE. Valenti lists home vid woes—MPAA prez calls on ITDA to help in fight against industry's growing problems. *Daily Variety*, vol. 191, no. 10 (Mar. 19, 1981), pp. 1, 23.

Jack Valenti asked the International Tape-Disk Assn. to help him solve the problems that are plaguing the home video industry. Among the problems he cited were unauthorized rentals and unauthorized exports. With respect to rentals, he said that retailers are using the first-sale doctrine as a basis for renting material they purchase. Calling the unauthorized exports problem the "purchase and export syndrome," Valenti indicated that alarming numbers of videocassettes and disks marketed in one country are being purchased, exported and offered for resale in others. He warned that unless these and other problems facing the industry are resolved the "envisioned financial glories of the home video market" will not be realized.

689. Legal briefs. *The Hollywood Reporter*, vol. CCLXVI, no. 7 (Mar. 27, 1981), p. 34.

This article discusses the legal battle being waged by pay TV services against the manufacturers/sellers of subscription TV decoder kits. The services say "that their broadcasts are for the exclusive use of their paid subscribers and not for the general public." Sec. 605 of the Communications Act prohibits the unauthorized interception of broadcasts not for the use of the general public, and it is this section that the pay TV services argue is being violated by those in the decoder business. There have been at least three court actions filed against sellers of unauthorized decoders, but because the rulings have been conflicting, the legal status of the devices is still unsettled. Complicating the issue is a public notice issued by the Federal Communications Commission which warns that decoders must be approved and anyone using an unapproved decoder could be subject to fines and other penalties. Further complicating the situation is a recently passed California statute prohibiting the making and sale of unauthor-

ized decoders and conflicting rulings in two court actions brought under the statute.

690. Libel insurance for authors. *Authors Guild Bulletin* (Sept.-Oct. 1980), pp. 7-8.

Authors are now obtaining individual insurance policies against liability for libel and invasion of privacy because of increasing suits. The Author's Guild includes in this article lists of coverage for the author by Media/Professional Insurance, Inc., one of the few companies providing protection for authors.

691. MATHEWS, SALLY A. What every teacher needs to know about copyright protection. *Voc Ed* (Nov./Dec. 1980), pp. 57-58.

This article discusses areas of copyright law that affect educators. It advises teachers and school administrators to familiarize themselves with the law. It then provides information on what can and cannot be copyrighted and attempts to explain the legal protection afforded by the 1976 Act. Also included is a brief discussion of fair use, works for hire and collective works.

692. MCA, CBS, RCA settle Colony suit. *Record World*, vol. 37, no. 1759 (Apr. 18, 1981), p. 14.

A copyright infringement suit against Colony Record and Radio Center in New York has ended in a settlement. Under the settlement, Colony consented to a permanent injunction and agreed to pay an undisclosed amount in damages, court costs and attorneys' fees. Defendant also agreed to provide MCA, CBS, and RCA Records, the plaintiffs in the case, with information regarding other persons who allegedly are involved in the unauthorized duplication of plaintiffs' copyrighted music. The suit against Colony was the result of an undercover investigation in which store employees duplicated songs from albums and singles at the request of Recording Industry Assn. of America agents.

693. MCMASTERS, THERESA. MPAA appeal to reinstate cable rates adjustment. *The Hollywood Reporter*, vol. CCLXV, no. 14 (Jan. 26, 1981), p. 3.

The National Cable TV Assn.'s appeal of the Copyright Royalty Tribunal's decision increasing the compulsory royalty rate for cable systems has prompted program suppliers also to appeal the

ruling. Motion Picture Assn. of America President Jack Valenti said that program suppliers were willing to accept the Tribunal's 'compromise' decision to increase the rate by 21% and had hoped that the cablers were willing to do likewise. The "NCTA's appeal," he said, "demonstrates that attempts to increase the rates, or even maintain them at their real constant dollar level will be delayed and frustrated by protracted litigation." In addition to announcing the programmers' decision to appeal, Valenti also called for an end to the compulsory license for cable.

694. MGM files $20 mil suit over foreign rights to old films. *Daily Variety*, vol. 191, no. 28 (Apr. 14, 1981), p. 2.

Arthur Cohn and his company are being sued by Metro-Goldwyn-Mayer Co. for fraud and deceit. The complaint alleges that, unknown to plaintiff, Cohn hired John Spires, MGM's foreign rights advisor, during negotiations for the sale of foreign rights to certain MGM films. As a result of those negotiations and on the advice of Spires, the studio sold the rights in question under contract dated March 1979 to the defendant for $1,800,000, a price which MGM now considers to be too low. Plaintiff is asking for damages of $20,000,000 and for rescission of the contract.

695. MIDAS, SOPHIA. CBS updates results of blank tapes study. *Record World*, vol. 37, no. 1472 (Dec. 13, 1980), p. 19.

CBS Records has updated its October 1980 blank tape study. The earlier study showed that blank tape sales were "on the rise and causing an industry loss of $700 to $800 million in music industry sales." It also indicated that the number of consumers who purchase blank tapes and tape equipment continues to rise each year, that people are taping more than before, and that one half of blank tape buyers use tapes away from home. The new findings show that the majority of blank tapers fall into the 26-40 age group and that 80% of the people who tape also buy a great deal of prerecorded records and tapes.

696. MORRIS, GAY. When artists use photographs: is it fair use, legitimate transformation or rip off? *Artnews*, vol. 80, no. 1 (Jan. 1981), pp. 102-106.

A look at moral rights as it pertains to photography. The author discusses artists who use the work of photographers in their collages including Robert Rauchenberg's work, *Pull*, incorporating Mario Beebe's photo, Andy Warhol's use of Patricia Caul-

field's everglade flowers photograph as well as Larry Rivers' use of Arnold Newman's photograph of Picasso. All were unauthorized. Mr. Morris believes the answer to limiting unauthorized use of photographers' pictures lies in increasing public awareness of the copyright laws and an increased respect for the work of photographers.

697. Mosley drops Follett suit over 'Key to Rebecca'. *The New York Times*, vol. CXXX, no. 44, 829 (Jan. 15, 1981), p. C22.

Leonard Mosley has withdrawn his copyright suit against Ken Follett, author of the novel "The Key to Rebecca". In the lawsuit, filed in Federal District Court in Manhattan, Mosley had contended that material in "The Cat and the Mouse", an earlier work by him, had been used in Follett's novel. The withdrawal follows a decision denying injunctive relief to Mosley because he had failed to establish the probable success of his claim.

698. MPAA joins suit to block FCC lift of cable TV regs. *Variety*, vol. 301, no. 5 (Dec. 3, 1980), p. 53.

The Motion Picture Assn. of America filed a statement in the United States Court of Appeals in New York supporting reversal of the Federal Communications Commission's removal of its cable distant signal and syndication exclusivity rules. The Association stated that deregulation of cable could diminish the quantity as well as the quality of the programming that is available to TV viewers. It contended that the potential harm to the mass TV audiences outweighs deregulation's benefits to the limited world of cable viewers. The appeal of the Commission's order abolishing the rules is being sought by several broadcast organizations. In addition to the MPAA, the Screen Actors' Guild and the American Federation of Television and Radio Artists also filed statements that argued against the deregulation move.

699. Music publishers pick 'Rose' song of yr., but publishing rights remain in dispute. *Daily Variety*, vol. 191, no. 4 (Mar. 11, 1981), p. 22.

A publisher trophy was not awarded for the song chosen to be the National Music Publishers' Assn.'s song of the year, "The Rose". Normally in such cases, trophies are awarded to both the work's composer and publisher, but because of a dispute over the ownership of the publishing rights, only Amanda McBroom, who

wrote the tune, received a trophy. Reportedly, Fox Fanfare Music, which has been credited as being the publisher of "The Rose", is being sued by someone claiming prior ownership of the song.

700. NAB makes move to rep stations at c'right seshes. *Daily Variety*, vol. 191, no. 30 (Apr. 16, 1981), p. 11.

At a convention in Las Vegas, David Pollinger urged stations to let the National Association of Broadcasters (NAB) represent them in future cable copyright royalty proceedings before the Copyright Royalty Tribunal (CRT). The stations were told that the cost of such representation would not be borne out-of-pocket because an NAB ad hoc committee has devised a plan by which expenses will come out of the royalty collections themselves. Pollinger indicated that the reason he is advocating NAB representation is that, as a group, broadcasters probably would be allotted a greater percentage of the royalty distributions than they were individually granted in the 1978 proceedings.

701. Nail Sydney pirate; oz fuzz to swoop more; stiffer fines. *Variety*, vol. 301, no. 9 (Dec. 31, 1980), p. 27.

John Ian Randall was found guilty of video piracy by the St. James Court of Petty Sessions in Sydney, Australia. Randall's conviction carried a $300 fine and he was ordered to turn over to authorities 1216 illegal videocassettes. The Australian Federal Police obtained information on Randall's involvement in a five-member video piracy ring from Scotland Yard. That information showed that Randall and another person had been the suppliers of illegal tapes that were seized by British police during the arrest of one Martin Alper.

702. New c'right law question seen in tape showings for bar patrons. *Daily Variety*, vol. 190, no. 8 (Dec. 17, 1980), p. 6.

In a copyright infringement suit brought by ABC, a U.S. District Court in Boston has enjoined Carl Miranda from showing videotapes of ten hours of "General Hospital" reruns at his disco in Quincy, Mass. The court ruled that Miranda had not obtained adequate permission from ABC-TV to publicly exhibit the tapes.

703. Northern sues Crystal. *Variety*, vol. 302, no. 1 (Feb. 4, 1981), p. 165.

Crystal Pictures has been accused of the unauthorized use of

280 Beatles songs. The charge was made in a suit filed by Northern Songs, the publisher of most of the Beatles' tunes. The complaint alleges that the defendants exhibited, without a license, a film and/or videotape of a program featuring the works. Plaintiff seeks an injunction against further showings, at least $250 for each infringement, an injunction against exhibition during the court action, impoundment of the material, punitive damages and court costs.

704. Ohio police seize tapes and equipment. *Record World*, vol. 37, no. 1757 (Apr. 4, 1980), p. 8.

Police answering a domestic disturbance call in Willoughby Hills, Ohio stumbled upon and seized more than $2 million worth of cassette and 8-track tape manufacturing equipment. The material confiscated included cassette duplicators, a recording system and recorder/player, a synthesizer, blank labels, blank cassettes as well as finished 8-track and cassette tapes.

705. 'Pagano' stage production cancelled after protest by film-TV rights owner. *Daily Variety*, vol. 190, no. 25 (Jan. 13, 1981), p. 26.

Threat of legal action has forced the Delaware Theatre Co. to halt its stage production of "Pagano," the story about the Catholic priest who was accused of being the "Gentleman Bandit." Highgate Pictures owns the exclusive television and literary rights to the story. The contract conveying these rights also provides that Highgate has the right to restrict all "other representational rights to the story" until eighteen months after the screenplay is delivered to CBS or the film is televised. Highgate's attorneys say that the DTC stage play would be in violation of the contract.

706. PARRY, JOHN. British go slow on tape piracy. *Copyright Management*, vol. IV, no. 3 (Mar. 1981), pp. 1-2.

The British Phonographic Assn. brought suit against a record store for encouraging piracy. The complaint averred that the defendant, by its sale of blank tapes and rental of sound recordings, was aiding and abetting unauthorized copying. The court rejected plaintiff's claims and dismissed the action, pointing out that the defendant not only had displayed notices in its stores warning about the danger of contravening the piracy act but also had placed the warnings on the sleeves of the records it rented and sold.

707. Patent granted on new process designed to curb pay-TV piracy. *Daily Variety*, vol. 191, no. 10 (Mar. 19, 1981), p. 4.

Jones International Ltd., a Denver-based firm, has been granted the patents on a new electronic process called variable velocity scanning (V.V.S.). The company claims that V.V.S. can scramble over-the-air signals, thus eliminating pay-TV piracy. Reportedly, it can also reduce the band of conventional television signals from six megahertz to one megahertz, increasing the total number of television transmission signals. The first V.V.S. units are expected to be marketed within the year.

708. PEISCH, JEFFREY. Goody Inc. and Samuel Stolon found guilty of counterfeit charges; appeal is expected. *Record World*, vol. 37, no. 1759 (Apr. 18, 1981), pp. 3, 86.

The jury in the counterfeit trial against Sam Goody, Inc. has found the company guilty of two counts of interstate transportation and three counts of copyright infringement. Goody vice president Samuel Stolon was convicted of one interstate transportation and one copyright infringement count. The defense attorneys are expected to ask the court to set aside the verdict for insufficient evidence.

709. PEISCH, JEFFREY. Indictment against Levy dropped; jury weighs Goody Inc., Stolon charges. *Record World*, vol. 37, no. 1758 (Apr. 11, 1981), pp. 3, 34.

The judge in the Sam Goody case dismissed the RICO (racketeering influenced corrupt organization) charge against the company, all charges against its president, George Levy, and some of the charges against its vice president, Samuel Stolon, before sending the case to the jury. Stolon still faces one racketeering, three interstate transportation of stolen property and six copyright infringement counts. The copyright infringement charges involve several songs, one of which is "Saturday Night Fever". It is noteworthy to mention that because of some irregularity in the tune's copyright certification, the court instructed the jury to exclude all evidence pertaining to the work if it "found that there was a movie copyright before an LP copyright."

710. PEISCH, JEFFREY. Judge postpones filing of motion for Goody reversal. *Record World*, vol. 37, no. 1761 (May 2, 1981), pp. 3, 66.

The defense attorneys and the prosecutor in the Goody tape counterfeiting trial jointly petitioned the court for a two-week postponement of the deadline for filing of the motion to reverse the guilty verdict against Sam Goody Inc. and Samuel Stolon. The court granted their request, giving defense until May 8 to file a memorandum for reversal and the government until May 22 to respond. The defendants were convicted by a jury for knowingly buying counterfeit cassettes and transporting them to another state. If the convictions are left undisturbed, Stolon faces up to eleven years in jail and a $35,000 fine and the corporation, a $95,000 fine.

711. PEISCH, JEFFREY. RIAA's Yarnell 'encouraged' by results of anti-piracy crackdown. *Record World*, vol. 37, no. 1752 (Feb. 28, 1981), p. 13.

A report was issued by the Recording Industry Assn. of America which shows that federal and local law enforcement authorities made substantial progress in their antipiracy efforts during 1980. Though encouraged by the antipiracy accomplishments, summarized in the report, the RIAA's Jules Yarnell said that what is needed now is the imposition of stronger penalties by the courts.

712. Pirate booty may have paid for 500G in cds at N.C. bank, FBI says. *Variety*, vol. 302, no. 11 (Apr. 15, 1981), p. 75.

An FBI agent filed an affidavit in federal court which indicates that $500,000 worth of certificates of deposits confiscated from the United Citizens Bank in Winston-Salem, North Carolina may have been purchased with funds from an illegal tape manufacturing operation. The certificates were allegedly deposited by Benny M. Church, the owner of a trucking concern who has been under investigation for copyright violations in connection with the manufacture and sale of pirated tapes.

713. PRO Canada asks for royalty boost from film houses. *Variety*, vol. 302, no. 5 (Mar. 4, 1981), p. 91.

Canada's Copyright Appeal Board has been asked to approve a proposal calling for film houses to pay a royalty fee of one-tenth of 1% of total yearly box office receipts. Currently, the formula is based on theater seating capacity and amounts to approximately $20,000 annually. The proposed formula, if approved, would increase the royalty to $300,000.

714. PRO's new mechanical rights division to collect royalties from overseas. *Variety*, vol. 301, no. 4 (Nov. 26, 1980), p. 83.

Effective January 1, 1981, the Performing Rights Organization of Canada will have a new division to look after member interests in foreign countries. The division will collect mechanicals and royalties for public performance rights. This service was previously unavailable to Canadian composers.

715. Publicity and privacy—an analysis of the right of publicity. *Art & the Law*, vol. VI, issue 2 (1981), pp. 39-43.

This article examines the present status of the right of publicity, speculates as to its future development, its limitations and its effect on artists. A history of the right of privacy is provided. Several cases are examined, including *Lahr v. Adell Chemical Co.; Matschenbach v. R. J. Reynolds Tobacco Co.; Uhlaender v. Henricksen; Lugosi v. Universal Pictures; Ali v. Playgirl* and *Factors, Etc. Inc. v. Pro Arts, Inc.*

716. Publishers, printers in manufacturing clause battle. *Publishers Weekly*, vol. 219, no. 5 (Jan. 30, 1981), pp. 18, 22, 24.

Publishers and printers are urging the federal government to retain a requirement that U.S. copyrighted books be printed in the United States or Canada to be afforded copyright protection. The "manufacturing clause" contained in the 1976 Copyright Act states that certain nondramatic literary materials in the English language must be manufactured in either the United States or Canada if they are to enjoy the protection of the U.S. copyright law. That clause is scheduled to expire on July 1, 1982. The clause applies generally only to works by American citizens or foreigners residing in the United States. Without retaining the clause, publishers and printers worry that Hong Kong, Singapore, the Philippines and South Korea are likely places for much of the printing and binding because labor is cheap in those nations, thus hurting the American market.

717. ROBINSON, RUTH. Series on Chaplin subject of suit. *The Hollywood Reporter*, Vol. CCLXVI, no. 14 (Apr. 7, 1981), p. 4.

Dean B. Kaner has filed a copyright infringement suit against NBC and Marble Arch. The complaint claims that defendants' planned Charlie Chaplin miniseries duplicates a work written by

plaintiff entitled "The Little Tramp". Plaintiff seeks to enjoin the defendants from proceeding with the production.

718. ROBINSON, RUTH. Supreme Court hits sour note for nets music. *The Hollywood Reporter*, vol. CCLXV, no. 39 (Mar. 3, 1981), pp. 1, 4.

The Supreme Court has denied CBS' request for review of a Court of Appeals ruling upholding the legality of the system by which ASCAP and BMI license copyright music. CBS, which has been litigating the case for about twelve years, charged that the organizations' blanket license system constituted illegal price fixing, in restraint of trade and in violation of the antitrust laws. Under the system, broadcasters are allowed to use all of the music in the ASCAP and BMI repertories for a set fee. CBS argued that the organizations should offer per use licenses, but ASCAP's and BMI's position was that the copyright owners could be contracted with directly in such instances.

719. ROBINSON, RUTH. Writer files $2 mil suit over 'Hero'. *The Hollywood Reporter*, vol. CCLXVI, no. 14 (Apr. 7, 1981), p. 17.

Barry E. Taff has filed a copyright infringement action against Steven J. Cannell and others. Plaintiff alleges that defendants' "The Greatest American Hero" television series is based on his copyrighted work, "Mocha Man". The suit asks that profits from "Hero" be placed in a constructive trust and that all infringing copies be confiscated or destroyed. It also seeks punitive damages of $2 million.

720. SAMPSON, JIM. German cops raid vid pirates' nets: 300 masters seized. *Billboard*, vol. 93, no. 12 (Mar. 28, 1981), p. 58.

In raids on five locations in the state of North Rhein-Westphalia, West Germany police confiscated master copies of approximately 300 motion pictures and arrested eight people. Most of the seized films were in the German language. Therefore, authorities believe that only local film distributors were being supplied from the cities.

721. SAMPSON, JIM. New German copyright proposal causes discussion. *Record World*, vol. 37, no. 1742 (Dec. 13, 1980), pp. 8, 58.

The German legislature has been conducting hearings on the Justice Ministry's draft omnibus copyright law revision bill. New

cassette technology has rendered the current copyright law, which contains a tape hardware royalty, obsolete. The local music industry feels that the royalty, 5% of the wholesale cost of the recording section of a unit, is no longer adequate and that what is needed is a blank tape levy. The Justice Ministry, however, decided against the tape tax, and, instead, proposed an increase in the current hardware royalty rate. Reportedly, strong anti-tape tax lobbying on the part of tape manufacturers had a lot to do with the Ministry's decision. The legislature will be accepting comments on the draft until December 31, 1980, and will be holding further hearings in March of 1981.

722. SANTAMARIA, MASSIMO FERRARA. Present legal tangles & some future quirks of global form playoff; role of cable, dubs. *Variety*, vol. 301, no. 11 (Jan. 14, 1981), p. 138.

This article discusses foreign cases involving copyrighted motion pictures. It focuses on legal problems arising from film exhibition agreements, unauthorized transmissions by cable systems and motion picture distribution contracts. The case concerning film exhibition is noteworthy in that it was brought by a Paris theater owner against the French subsidiaries of the major American global film companies, for refusing to sell goods offered to the public. Such refusal is a crime under the French Penal Code. The author of this article is an international legal authority, and he discusses his role in the suit.

723. See cable foes pushing Congress for c'right mods. *Variety*, vol. 302, no. 5 (Mar. 4, 1981), pp. 2, 100.

Bruce A. Lehman of the House Subcommittee on Courts and Civil Liberties told a U.C.L.A. Communications Law Symposium that program producers, commercial networks, independent broadcasters and sports leagues are banding together to lobby for retransmission consent via an amendment to the Copyright Act. He said that this coalition of anti-cable interests wants to redefine cable's copyright liability. Lehman noted, however, that cable forces are determined to resist any "additional copyright liability."

724. Shootout over rights to 'Hopalong Cassidy'. *Broadcasting*, vol. 100, no. 7 (Feb. 16, 1981), p. 68.

The U.S. District Court for the Southern District of New York has issued an injunction barring Filmvideo Releasing Corp.

from licensing any of the 23 "Hopalong Cassidy" motion pictures for viewing on television or cassettes. Judge Werker ruled that each of the 23 motion pictures infringed upon the copyrights in the books and enjoined Filmvideo from "using or licensing any of the 23 motion pictures from viewing in general or homeviewing via cassettes."

725. 600 pirated prints seized at Dortmund. *Variety*, vol. 302, no. 12 (Apr. 22, 1981), p. 32.

West German authorities have uncovered an illegal film organization headquartered in Dortmund. The operation, which was comprised of theater owners as well as video sales and rental establishments, was exchanging pirated copies of some 300 motion pictures, making videocassettes of the films and distributing them throughout the country.

726. SOBEL, LIONEL. 'Key to Rebecca' lawsuit may unlock copyright controversy. *The Hollywood Reporter*, vol. CCLXV, no. 13 (Jan. 23, 1981), p. 56.

This article discusses three copyright infringement suits—*Mosley v. Follett, Hoehling v. Universal Studios* and *Miller v. Universal Studios*. The main issue in each of the actions is the copyrightability of works based on factual or historical information. The defendant in the first case was accused of using material from a book based on the true adventures of a spy. The plaintiff in the second suit alleged that the defendants' movie and novel infringed the copyright in his non-fiction book about the Hindenburg tragedy. The third action involved the ABC docudrama "The Longest Night." The complaint alleged that the movie infringed factual information that appeared in the book entitled "83 Hours to Dawn."

727. SOBEL, LIONEL. Legal briefs. *The Hollywood Reporter*, vol. CCLXVI, no. 25 (Mar. 20, 1981), p. 40.

In David Merrick and Thomas Thompson's copyright infringement action against Dick Clark Productions, the court entered a judgment for defendant. Plaintiffs had alleged that the defendant's telefilm, "Murder in Texas", infringed the copyright in "Blood and Money", a book authored by Thompson and to which Merrick owns the motion picture rights. The court said that the book is a factual historical account of events surrounding the

death of Joan Hill and the trial of her millionaire father for the murder of Joan's husband. Historical facts are not copyrightable, and since almost all of the 124 instances of infringement alleged in the complaint involve either facts or quotations, the plaintiffs' claims were rejected.

728. SOBEL, LIONEL. Legal briefs. *The Hollywood Reporter*, vol. CCLXVI, no. 27 (Apr. 24, 1981), p. 18.

David Ladd told the Los Angeles Copyright Society that the Copyright Office will recommend that Congress abolish the compulsory license for cable systems. Ladd, who is the Register of Copyrights, said that the license is no longer needed because the cable industry has grown considerably since the 1976 Copyright Act was passed, when the thinking was that cable systems could not afford to pay negotiated license fees. Currently, the industry is not only able to buy programming it wants at marketplace prices but has enough financial clout to produce its own. Ladd also told the group that on the issue of unauthorized retransmission of TV broadcast signals by satellite, his Office will take the position that such transmissions are in violation of the copyright law.

729. Songwriter royalties to rise. *The New York Times*, vol. CXXX, no. 44,806 (Dec. 23, 1980), p. D11.

The Copyright Royalty Tribunal has increased the ceiling on the royalty that record and tape companies must pay songwriters and music publishers to four cents a song from 2¾ cents, for each copy of the song made. The increase is scheduled to take effect July 1981. However, the Recording Industry Association of America (RIAA) said the ruling would cost its members millions of dollars and has filed an appeal in the United States Court of Appeals. The new four-cent rate (or three-quarters of a cent a minute, if the sum is greater) represents an upper limit, and record companies can negotiate a lower rate.

730. SPAHR, WOLFGANG. Court bans some imports; c'right prevails over trade law. *Billboard*, vol. 93, no. 12 (Mar. 28, 1981), p. 58.

In a copyright case (*Deutsche Grammophon v. Mikulski Import Co.*) involving imported sound recordings from Israel, a German federal court ruled that the copyright law prohibits such importations when the same product is also produced domestically. The defendant in the suit argued that records and prerecorded tapes

from non-EEC territories are exempt from the copyright law when free trade agreements exist between the outside territories and EEC countries. The court rejected this argument, however, and held that "free trade agreements were simply to abolish customs barriers between the EEC countries, or those signed to free trade agreements, not to set aside the copyright laws of the individual countries."

731. Springsteen, CBS win bootleg suit. *Record World*, vol. 37, no. 1744 (Dec. 27, 1980), p. 12.

CBS, Inc. and Bruce Springsteen were awarded a total of $2,268,000 in damages and attorneys' fees by a district court in California. The award was granted as a result of the conviction of Andrea Waters and Jim Washburn on 43 counts of copyright infringement, unfair competition and unauthorized use of Springsteen's name and likeness. Because Waters' copyright violations were deemed to be willful, the court awarded Springsteen $50,000 per infringement and enjoined Waters from further bootlegging copies of Springsteen's performances. CBS was awarded nominal damages of $1500.

732. Stonehill sues U.S. Customs over manufacturing clause. *Publishers Weekly*, vol. 219, no. 11 (Mar. 13, 1981), p. 12.

Last year the U.S. Customs Service refused admittance into this country of a shipment of the foreign edition of a book entitled "World Guide to Nude Beaches and Recreation" on the grounds that it did not meet the manufacturing requirement of the Copyright Act. As a result, the book's publisher, Stonehill Communications, Inc., filed suit challenging Customs' interpretation of the manufacturing clause. It provides that except under certain conditions only 2,000 copies of a copyrighted work consisting proponderantly of nondramatic literary material that is in the English language and that is not manufactured in the U.S. or Canada may be imported into or distributed in this country. Stonehill contends that "consisting preponderantly of nondramatic literary material that is in the English language" should be construed narrowly and in accordance with its common meaning and apply only in cases where the measured area of a work's English-language text exceeds the area of photographs it contains. The company maintains that this interpretation would render the clause inapplicable in this instance because the total square inches of

photos in the "World Guide" exceeds the total square inches of text by 32%. Subsequent to the filing of the suit, a stipulated agreement was worked out whereby Stonehill agreed to obliterate the copyright notice on all copies and to place in escrow an executed abandonment of the copyright in the text in return for Customs' consenting to the importation of a shipment of 8,000 books into the U.S. If the suit is decided in favor of the government, the abandonment will be filed in the Copyright Office, thus placing the text in the public domain. If Stonehill wins, the abandonment will be voided and the company may proceed with registration of its claim to copyright in the text as it apparently has done in the book's photographs.

733. Superman sues ABC. *Variety*, vol. 302, no. 7 (Mar. 18, 1981), p. 271.

A suit has been filed against ABC charging copyright infringement, unfair competition and misappropriation with respect to its new television series "The Greatest American Hero". Plaintiffs in the suit, Warner Bros. Inc., Film Export A.G. and D.C. Comics Inc., allege that the program infringes the rights in their "Superman" character.

734. Supreme Court again denies CBS petition on license ruling. *Variety*, vol. 302, no. 10 (Apr. 8, 1981), p. 70.

After the Supreme Court refused to review a lower court judgment upholding the blanket licensing systems of performing rights organizations (March 2), CBS filed an amended petition (March 6). That second filing was also denied and now the federal court in New York will supervise settlement negotiations between the parties.

735. TANNENBAUM, JEFFREY A. Copyright on trade secrets may not add to protection, some legal experts argue. *The Wall Street Journal*, vol. CXCVI, no. 126 (Dec. 29, 1980), p. 26.

Computer, engineering and chemical concerns are taking the extra step of copyrighting secret product manuals and other materials with standard copyright notices. The reasoning is that even if a competitor got the secret document, he could not legally reproduce or distribute it. Also, companies say, if a prosecution of a competitor under the secrecy laws failed, the plaintiff could try again under the copyright laws. The author discusses some of

the legal ramifications of keeping secrets secret, including an overview of the case involving Arthur Young & Co. and Bryce & Co. A consulting group, Bryce & Co., made a presentation to Young and to AFM Inc., a Young client. Later, Young completed a standards manual for the data-processing operations at AMF's Harley-Davidson unit; Bryce accused Young of stealing its ideas. A jury delivered a verdict for Bryce, which received a $10,000 judgment.

736. TERRY, KEN. French tackle home taping; law promised to stem tide. *Daily Variety*, vol. 190, no. 34 (Jan. 26, 1981), p. 6.

The French minister of culture and communications has reported that a special Commission has determined that home taping poses a threat to the rights of copyright owners. The Commission has until the end of March to recommend a solution, and it is pretty certain that either a tape or hardware tax will be proposed. It is not known whether the Commission will recommend the amount of tax to be imposed or whether the recipients of the levy will be restricted to French artists.

737. Three labels accuse Colony outlet of piracy. *Variety*, vol. 302, no. 7 (Mar. 18, 1981), p. 298.

Three record companies, CBS, RCA and MCA, have brought a copyright infringement action against Colony Records in New York. The suit charges that defendant's employees illegally duplicated albums and singles on cassettes and sold them to customers. RCA and MCA are asking for specific damages and confiscation of infringing materials as well as equipment used to make the cassettes. CBS is seeking punitive damages.

738. TILLEY, RAY E. Feds to get tough on unlicensed jukeboxes. *Play Meter* (Nov. 15, 1980), p. 58.

This article discusses the problem of unlicensed jukeboxes and some of the steps being taken to alleviate the situation. In 1981, a computer will be used by the licensing division of the Copyright Office to pair operators licensed in 1980 with those licensed in 1981, to produce a printout of possible non-licensed machines that are in operation. It is estimated that only a third of the 400,000 to 500,000 jukeboxes are licensed as required by the copyright law. Action against non-licensed machines is presently a matter for the performing rights societies.

739. TUSHER, WILL. Assault on storefront exhibs: film security office blurb blitz aimed at illegal use of videocassette films. *Daily Variety*, vol. 191, no. 13 (Mar. 24, 1981), pp. 1, 34.

The unauthorized exhibition of cassettes of motion pictures by hotels, restaurants, bars and even peep show establishments is becoming so widespread that the Film Security Office (FSO) of the Motion Picture Assn. of America is planning an advertising campaign to combat the problem. The ads, which will be placed in the near future, will warn of criminal and civil penalties for violation of the copyright law. This tactic was effectively employed once before and the FSO is optimistic that it will be successful again.

740. TUSHER, WILL. Par jumps on the bandwagon against illicit videocassette use. *Variety*, vol. 302, no. 3 (Feb. 18, 1981), p. 58.

In a move to stop unauthorized commercial use of videocassettes, Paramount Pictures and other studios have asked film exhibitors to report any commercial establishments showing product on cassettes. Apparently, it was in response to this request that an exhibitor recently disclosed that some public libraries in California were circulating feature cassettes on a one-day loan basis. Exhibitors at the ShoWest '81 convention indicated that their willingness to help the motion picture industry in this endeavor stems from the fact that the unauthorized use of videocassettes is their major source of competition.

741. U.K. planning changes in its copyright laws. *Daily Variety*, vol. 191, no. 23 (Apr. 7, 1981), p. 1.

Homevideo technology has prompted the British government to consider amending its copyright law. Among the changes being contemplated is a provision exempting home taping on the premise that "such technical violations under present law are impossible to control." Reportedly, the industry will be given an opportunity to comment on the proposed amendment some time this summer.

742. U.K. school fined for copying sheet music. *Variety*, vol. 302, no. 4 (Feb. 25, 1981), p. 93.

The London High Court found a private school guilty of copyright infringement in connection with its photocopying songs from a book of Christmas carols. The school was ordered to pay

approximately $9,600 in damages to Novello & Co. and the Music Publishers Assn., the plaintiffs in the action.

743. Universal suing British ad firm re Frankenstein. *Daily Variety*, vol. 190, no. 61 (Mar. 5, 1981), p. 4.

Universal Studios is in the process of bringing a copyright infringement suit against the U.K. advertising agency Collett, Dickenson, Pearce (CDP) over the Frankenstein monster. Universal charges that CDP used a character in one of its ad campaigns that "too closely" resembles the Boris Karloff monster that is featured in four of its copyrighted motion pictures. CDP says that it will argue that the Frankenstein monster character is now in the public domain.

744. VERSTAPPEN, WIM. Dutch film biz vexed as cable feeds pirate fare, unpunished. *Variety*, vol. 302, no. 5 (Mar. 4, 1981), p. 37.

Amsterdam's cable television company, KTA, is being sued for copyright infringement by local film distributors and exhibitors. KTA is being accused of picking up the signals of not only the two official Dutch channels, but some French, German and English channels as well. Indications are that the distributors and exhibitors are unlikely to prevail in their suit since the court in previous cases of this nature has upheld the contention that electronic signals are not copyrightable.

745. VERSTAPPEN, WIM. Dutch TV pirates airing features on nationwide basis. *Daily Variety*, vol. 191, no. 3 (Mar. 10, 1981), p. 12.

For some time, Amsterdam's cable system has been the source of films for TV pirates. Now the pirates have begun to bootleg films from systems throughout the Netherlands, which has caused considerable concern among members of the local film trade. Authorities apparently know that the pirates bootleg their films by beaming short-distance signals at a cable system's master antenna but have been unable to determine the signal's origination point. As a stop-gap measure, therefore, one of the country's cable firms agreed to discontinue its operation during Dutch television's off-air hours. Film exhibitors and distributors asked Amsterdam's cable company to implement a similar shutdown procedure but were refused. Copyright infringement actions aimed at forcing the company to comply with the request have failed.

746. WARNER, PETER. P-N's Chaseman gives fiery warning on video future. *The Hollywood Reporter*, vol. CCLXV, no. 16 (Jan. 28, 1981), pp. 1, 4.

Post-Newsweek Stations president Joel Chaseman accused the Federal Communications Commission and other federal regulatory agencies of adopting a "laissez-faire" attitude about major communications issues. New technology is bringing about the convergence of the communications, entertainment and data processing industries. Chaseman said that it is the responsibility of these agencies to establish national goals, priorities and plans for addressing the numerous public policy and legal questions being raised by these developments, as well as by the revised copyright and piracy laws. He indicated that deregulation allows the marketplace to decide these important issues, a move which he said jeopardizes "the future audience reach and economic health" of the mass communications medium.

747. WCI picks 3 to pay disk piracy tipsters. *Daily Variety*, vol. 191, no. 1 (Mar. 6, 1981), p. 51.

Roberta Flack, Jules Yarnell and David Oppenheim have been chosen to make determinations regarding the amounts to be awarded informants for information leading to the conviction of record pirates and counterfeiters. The awards will come out of a $100,000 fund that was established by Warner Communications Inc. last year. Warner reports the tips it receives to the Recording Industry Assn. of America, which screens and forwards them to the FBI.

748. WEISSMAN, BARRY LEIGH. Who owns the copyright? *Daily Variety*, vol. 190, no. 10 (Dec. 19, 1980), p. 10.

This article discusses copyright ownership, with special attention to Sec. 201(b) of the 1976 Copyright Act—Works Made for Hire—and its effect on the ownership of motion pictures or other audiovisual works. When the author of such works is a salaried employee of a studio, his or her rights automatically shift to the employer; but when the writer/creator is commissioned, certain steps must be taken before copyright ownership is transferred to the studio. Mr. Weissman says that this places the commissioned writer in an advantageous bargaining position when

negotiating a contract for the transfer of copyrights. He indicates that once an agreement is reached, it is important that the studios protect themselves by adhering to "all" of the statutory prescriptions for transferring copyright ownership because the new law is somewhat unclear in this area.

749. WGN files suit, sez cabler strips its teletext signal. *Variety*, vol. 302, no. 9 (Apr. 1, 1981), pp. 52, 60.

WGN-TV in Chicago has brought a copyright suit against United Video Inc. The complaint alleges that the defendant has violated the Copyright Act by its deletion of a teletext portion of the signal that it picks up from WGN and distributes to a cable system. Under the Act, passive carriers such as the defendant are exempt from paying copyright fees as long as they do not exercise any direct or indirect control over the content of the programming they distribute. Plaintiff, reportedly, has documentation to substantiate its claim that the defendant is, in fact, exercising some control since the signal emerges from WGN with the teletext portion included yet it is being received by an Albuquerque cabler without it.

750. Theodora Zavin named copyright consultant. *Record World*, vol. 37, no. 1758 (Apr. 11, 1981), p. 34.

For one year, Theodora Zavin will serve as a member of the Copyright Office Advisory Committee. Ms. Zavin, along with the other members of the Committee, will advise the Register of Copyrights on such matters as the U.S. copyright law, international copyright and the management and services of the Copyright Office.

751. ZITO, TOM. Kin charged with copying O'Keeffe. *The Washington Post*, vol. 104, no. 144 (Apr. 28, 1981), pp. 1, A17.

James Stieglitz, a relative of American artist Georgia O'Keeffe, has been arrested and charged with violating copyright laws in connections with reproduction of O'Keeffe works. O'Keeffe says she has neither authorized nor signed the works, which are apparently photographic reproductions of her painting. Stieglitz is under investigation by the FBI for allegedly making available for sale fraudulent lithographs supposedly signed by the artist.

2. Foreign

1. England

752. BBC pays damages in copyright case. *The Bookseller*, no. 3920 (Feb. 7, 1981), p. 419.

The BBC has agreed to pay $54,000 and legal fees to eight authors who claimed their copyright had been infringed by the BBC publication of a work called "The Explorers" based on a 1975 television series which the authors had written. Five of the authors had attempted to negotiate with the BBC for over a year and for three years the BBC had denied infringement. Last March BBC reversed its stand.

753. High Court injunction against copying. *The Bookseller*, no. 3920 (Feb. 7, 1981), p. 420.

The Music Publishers Association has begun a court action against the Oakham School in Leicestershire for copying music without permission. The Bookseller considers this a test case as illegal copying of works is widespread in schools but this is the first time that "attempts have been made to expose it through the courts."

754. *Letter to the editor*—unauthorized copying in the schools. *The Bookseller*, no. 3919 (Jan. 31, 1981), p. 347.

A letter about the growing problem of copying-offset litho printing presses that are being used by some schools. The Swedish and Danish licensing bureaus have tried to combat this problem by offering compensation to publishers for unauthorized school copying.

755. MENZINGER, KLAUS. Copyright and photocopying: revision debates in the Federal Republic of Germany. *IFLA Journal*, vol. 6, no. 4 (1980), pp. 368-369.

An article on the controversy of photocopying including the demands and arguments of the publishers and the response of the German Library Association. The publishers want to limit the

freedom of reproduction and want compensation for every photocopy of a copyrighted work. The German Library Association in turn states that these changes would be very damaging for science and the freedom of information.

756. Piracy—the other cheek or a left hook? *The Bookseller*, no. 3918 (Jan. 24, 1981), p. 231.

A discussion of world-wide piracy in both books and records and cassettes. Book piracy is estimated to be in the $500 million category and record piracy at $850 million a year. The author discusses the problems of developing countries, especially India, and urges civil action for damages done to publishers and stronger provision for seizure of pirates' stock and equipment.

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