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

Published at
NEW YORK UNIVERSITY LAW CENTER

VOL. 10, NO. 1

OCTOBER, 1962

Bulletin of The Copyright Society of the U. S. A.

EDITORIAL BOARD

WALTER J. DERENBERG, *Chairman*

RICHARD COLBY
EDWARD M. CRAMER
GEORGE E. FROST
HARRY G. HENN
ARTHUR S. KATZ
ROBERT J. KAUFMAN
BERNARD KORMAN

DR. STEPHEN P. LADAS
ALAN LATMAN
MELVILLE B. NIMMER
RICHARD H. ROEMER
STANLEY ROTHENBERG
CHARLES B. SETON
PAUL J. SHERMAN

JUDITH GRAD, *Associate Editor*
MARY T. HUNTER, *Assistant Editor*

The Copyright Society of the U. S. A.

OFFICERS

President
HARRY G. HENN
Vice-Presidents
LEONARD ZISSU
EDWARD A. SARGOY
Secretary
CHARLES B. SETON

Assistant Secretary
ALAN LATMAN
Treasurer
SIDNEY A. DIAMOND
Assistant Treasurer
EDWARD M. CRAMER

Executive Director
WALTER J. DERENBERG

BOARD OF TRUSTEES

PROFESSOR WALTER J. DERENBERG, New York University
JOSEPH S. DUBIN, Universal City, California
ROBERT V. EVANS, New York City
HERMAN FINKELSTEIN, New York City
GEORGE E. FROST, Chicago
PROFESSOR HARRY G. HENN, Cornell University
PROFESSOR BENJAMIN KAPLAN, Harvard University
IRWIN KARP, New York City
LEONARD KAUFMAN, New York City
SYDNEY M. KAYE, New York City
LEON KELLMAN, New York City
PROFESSOR JOHN M. KERNOCHAN, Columbia University
PROFESSOR ADRIAN A. KRAGEN, University of California
ISABELLE MARKS, New York City
JOSEPH A. McDONALD, Washington, D. C.
E. GABRIEL PERLE, New York City
JOHN R. PETERSON, Boston
CEDRIC W. PORTER, Boston
BARBARA A. RINGER, Washington, D. C.
BENJAMIN W. RUDD, Washington, D. C.
EDWARD A. SARGOY, New York City
JOHN SCHULMAN, New York City
PAUL SHERMAN, New York City
STUART SPRAGUE, New York City
SAMUEL W. TANNENBAUM, New York City
THEODORA S. ZAVIN, New York City
LEONARD ZISSU, New York City

Published at New York University Law Center
40 Washington Sq. South, New York 11, N. Y.

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

© 1962 by The Copyright Society of the U. S. A.

CONTENTS

Page

PART I. ARTICLES.

First Annual Report of the Committee to Investigate Problems Affecting Communication in Science and Education	1
L. B. HEILPRIN, <i>Foreword</i>	1
ROBERT W. HAMPTON, <i>Clearing House as Optimum Solution to Copyright Problems Affecting Communication of Educational and Scientific Information</i>	18
MIDDLETON, GEORGE, <i>Rights and Royalties of Foreign Authors and Composers in War Time</i>	26

PART II. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS.

1. United States of America and Territories	37
2. Foreign Nations	46

PART III. CONVENTIONS, TREATIES AND PROCLAMATIONS

PART IV. JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY.

A. Decisions of U.S. Courts.

1. Federal Court Decisions	49
2. State Court Decisions	59

PART V. BIBLIOGRAPHY.

A. Books and Treatises.

1. United States Publications	64
2. Foreign Publications	64

B. Law Review Articles.

1. United States	66

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 11, New York: Harry G. Henn, *President*; Leonard Zissu, Edward A. Sargoy, *Vice-Presidents*; Sidney A. Diamond, *Treasurer*; Charles B. Seton, *Secretary*; Edward M. Cramer, *Assistant Treasurer*; Alan Latman, *Assistant Secretary*; and Walter J. Derenberg, *Executive Director*.

Annual subscription: \$25.

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 11, N. Y.

Business correspondence regarding subscriptions, bills, etc., should be addressed to the distributor, Fred B. Rothman & Co., 57 Leuning Street, South Hackensack, N. J.

CITE: 10 BULL. CR. SOC. page no., Item (1962).

PART I.

ARTICLES

1. FIRST ANNUAL REPORT OF THE COMMITTEE TO INVESTIGATE PROBLEMS AFFECTING COMMUNICATION IN SCIENCE AND EDUCATION *

Editor's Note: Through the courtesy of the Register of Copyrights and Dr. Laurence B. Heilprin, of the Council on Library Resources, Inc., we publish here the first report of the CICIP, followed by a subcommittee report on an "Optimum Solution" by Robert W. Hampton, Esq., chairman of the subcommittee.

Dr. Heilprin writes: "We are indeed glad of the opportunity to place this problem before the copyright legal community. You will note that the point of view of copyright taken here is not primarily legal but scientific. In fact, the *raison d'être* of CICIP is scientific. It is hoped that [the problem] may be sufficiently novel to be of interest to your readers. The original recipients of this report are very few—perhaps a hundred participants in the conferences, who are deeply concerned with this unexpected aspect of copyright on the national flow of scientific and learned information."

FOREWORD

This report by the Study Group of the Committee to Investigate Copyright Problems Affecting Communication in Science and Education (CICIP) covers the year from the appointment of the Study Group (June 1959) to the time of writing (May 1960).

The report consists of three parts:

- I The Problem As We See It Now
- II Proposed Solutions to the Problem of Reproduction of Copyright Material for Nonprofit Scientific and Educational Use
- III The Optimum Solution?

* Report of May 10, 1960, reprinted with Addenda of December 13, 1961. The members of the CICIP Study Group as of May 1, 1960 were: Robert W. Hampton, Esq., Eastman Kodak Co.; Dr. Laurence B. Heilprin (Chairman), Council on Library Resources, Inc.; Mr. Charles A. Madison, Henry Holt & Co.; Mr. Daniel Melcher, R. R. Bowker & Co.; Mr. Eugene Power, University Microfilms; Mr. Thomas A. Schmid, Ass'n of American University Presses; Dr. Robert C. Snider, National Education Ass'n; Dr. I. Albert Warheit, International Business Machines Corp.; and Dr. Isaac D. Welt, Institute for the Advancement of Medical Communication; *ex officio*: Dr. Howard A. Meyerhoff (President, CICIP), Scientific Manpower Commission; Joseph A. McDonald, Esq. (past President of The Copyright Society of the U.S.A. and Vice President, CICIP), of the Washington Bar; and Mr. Gerald J. Sophar (Secretary, CICIP), of Jonker Business Machines Corp.

The three parts represent a continuous development and summary. They show the progress in thinking from just after the first CICP meeting, May 19, 1959, to just before the second meeting, May 18, 1960.

The year's work by the Study Group may be summarized as follows. During this period through fact-gathering, discussion and reflection the nature of the problem and proposed solutions became better defined. A point of view was developed as to what an adequate solution should contain (Part I). In the light of this viewpoint a set of specifications was drawn (Part I). The specifications enabled analysis of the proposed solutions (Part II), and (assuming the analysis valid) swept much of the ground clear (Table I, Part II; and Part III). For many of the proposed solutions were found to be lacking in essential features. There remained several solutions of high merit. These it was proposed to use in synthesizing an "optimum solution". A beginning has been made on it (Part III).

The chairman takes responsibility for the report because, although it has been reviewed by some members of the Study Group, there has not been time for a fourth Study Group meeting. The report is submitted in the hope that the members of CICP will contribute their criticism, suggestions and guidance as to the next steps. From the discussion on the report should emerge a plan for the second year of CICP.

The Study Group wishes to acknowledge the strong support given it by the officers of CICP: Dr. Howard A. Meyerhoff, President; Joseph A. McDonald, Esq., Vice President; and Mr. Gerald J. Sophar, Secretary. It also wishes to gratefully acknowledge support in many forms, ranging from professional advice to the supply of services and facilities: the Copyright Office through Mr. Abe A. Goldman, Chief of Research; the Department of Commerce, through Mr. Horace Hart, Director of Printing and Publishing Industries Division; the Joint Library Association, Special Library Association and Association of Research Libraries Committee on Copyright, through Mr. Edward G. Freehafer, Director, New York Public Library, and Prof. Julius Marke, Law Librarian, New York University; the Council on Library Resources, through Mr. Verner W. Clapp, President; the Microcard Corporation, through Mr. A. L. Baptie, Manager; the Eastman Kodak Company, through its Duplication Services and its Legal Department; the International Business Machines Corporation, through its Systems and Research Department under Dr. George W. Petrie.

Respectfully submitted by the CICP Study Group

L. B. HEILPRIN, *Chairman, Study Group*

Washington, D. C.
May 10, 1960

I. THE PROBLEM AS WE SEE IT NOW.

At the first CICP meeting, May 19, 1959, we were concerned with an effect of the operation of copyright law, which could scarcely have been predicted when the law was passed in 1909. In science and education communication takes place largely by journal article, book and audio-visual material (to all of which we shall simply refer as "published works" or "publications"). Because of this fact the most common method of dissemination, after primary publication, is to copy. Single copies are often needed by the scholar, research person or teacher. In increasingly many cases multiple copies are required. This is particularly true in the conducting of classes, in drafting scientific and scholarly reports, and in operation of information storage and dissemination systems now appearing on the scientific horizon. A large fraction, on the order of 50 per cent, of scientific and educational publication is copyrighted. For these publications it is necessary to obtain the copyright owner's consent before copying. This practice has not been strictly observed for single copies made for nonprofit, scientific or educational purposes. It has been well observed in the case of multiple copies. Success in multiple copying has been notoriously lacking. A certain fraction of the owners refuse or fail to respond to requests. These exceptions are important enough to nullify many scientific programs, especially large-scale programs requiring the gathering of many sources. Other projects which suffer are bibliographies and collections, the chief value of which lie in their completeness. In many cases, even when consent is finally given (with or without royalties), the time, effort and resources needed to secure the permission are prohibitively large. The user prefers not to copy rather than to risk suit for infringement. In effect the operation, not the intent, of the copyright law has often been to impede communication in science and in education. The direct connection between science and education and the national welfare renders the problem important to solve.

In the proceedings of last year's CICP meeting, and more fully in reference 1 of section-I, one of our main concerns was to disengage the purely legal aspects of this problem from non-legal economic and social aspects. This was accomplished by looking at copyright from a new point of view—considering it as a message. From the scientific viewpoint it can be seen that the economic value of messages in the arts and in the sciences differ. Protection for messages in the arts is effective under copyright law. For messages in the sciences, where value resides in the meaning rather than in the form of the message, copyright protection is poor. The law protects embodiments of ideas, not ideas. Nevertheless copyright is the only way in which scientific publishers can protect their intellectual property. Thus, the scientist or educator (we will use "scientist" for both) finds himself in con-

flict. The conflict is between himself in his professional role and in his role as publisher. Because of the lower economic value of his messages, the scientist has to undertake most of his own publishing. (The scientist is rarely interested in financial return from his contributions as an author, as he receives his income in other ways.) As a scientist he needs more freedom to copy, especially to make multiple copies. As a publisher he needs assurance of revenue for publication. Since it is a national principle to make enterprises "stand on their own feet", the revenue must arise from the publication. Hence, any reduction of circulation brought about by copying, without compensatory revenue, weakens scientific communication at the publishing source.

It is important to see that the conflict is not between publishers, on the one hand, and scientists on the other. It is an internal conflict, between the scientist-user, and the scientist-publisher or his agent who is supplying the scientist-user with publications. On the surface they are not struggling for the same things. The scientist-publisher struggles to retain his grip on revenue through copyright. The scientist-user struggles for freedom to create and teach. With his advancing copying techniques he is slowly breaking the grip of the publisher. Neither is the gainer, for both serve science.

If this analysis is correct then it is apparent that the new element in the problem, which takes it partly outside the immediate problem of copyright, is the support of scientific and educational publication. This is really at the bottom of the interference with scientific communication by copyright. It suggests that in any solution this must be an important element. The other equally important element is that the scientist must be in a position to obtain multiple copies when he needs them, at speeds consistent with those required in modern research and teaching.

At the 1959 CICIP meeting the dilemma was seen to be resolvable in two principal ways. The first was through some change in the law. Since this would involve congressional hearings and possibly a long time before a satisfactory solution could be worked out, and since there was present an element which seemed to lie outside of copyright, it was the general opinion that if possible some other solution should be sought. The second type of solution was to make some administrative change, operating under the law. The most promising type of administrative change was to supply an additional mechanism now lacking in the economics of our copyright system. It would be a mechanism whereby the copyright owner can grant licenses to copy his publications to some agency, provided the copying was performed for nonprofit, scientific or educational purposes. Other rights would be reserved. In return, the copier would pay royalties which would reach the copyright owner through the agency. This mechanism, a combined agent and clearing house, would eliminate delays, permit multiple copying and support scientific and educational publication.

During the year since the meeting the problem has been better defined. The basic situation remains the same, but a number of specifications have been set up which enable comparing the various proposed solutions on an objective basis. These specifications can be divided into those that are (1) necessary and (2) desirable. Their relative importance beyond this point has not been evaluated. One of the functions of the 1960 meeting will be, it is hoped, to consider whether all important specifications have been included. They are:

Necessary

1. The solution must provide copies promptly—that is within a time entirely suitable for the needs of the scientist, educator, scholar or student. This time may vary from a few minutes to a few hours or days. The delay interposed by requests for permission to copy should not be prohibitive, or in any way burdensome, as in the past.
2. The solution should provide revenues which support scientific and educational publication. This support need not be confined to compensation for loss of circulation, but could be a main source of income.
3. The solution should provide multiple copies. The expanding need for multiple copies in all fields of science and education cannot be met by a solution which provides only single copies.
4. The solution should remove the threat of infringement suit for copying for nonprofit scientific or educational purpose, where the suit is based only on economic loss of intellectual property. Suits for other purposes would not be affected.
5. The solution should not reduce the constitutional rights to their intellectual property vested in copyright owners.
6. All individuals or groups interested in the solution should participate in it beneficially.
7. The solution should not adversely affect the rights of foreign publishers and copyright owners entitled to protection under the Universal Copyright Convention (UCC) to which the U.S. is signatory.
8. The solution should require no legal or administrative measures which are highly impractical to carry out. For example, the solution should not require that the administrators of the Copyright Law, or any agency involved in the solution, distinguish between copyrighted scientific or educational works and other copyrighted works. To have to define and weigh the ideas in copyrighted works would be operationally unfeasible.

Desirable

9. The solution should not require a long time before it can be put into effect. For example, solutions which require congressional changes in the copyright law that may be controversial and may require extended hearings over several years before passage, are not as desirable as solutions free of this preliminary.
10. The solution should be practical to initiate. Setting it into operation should not require prohibitive effort.
11. The solution should be practical to administer.
12. The solution should be practical to alter. For example, any legal statute is less easily altered than a purely administrative measure, and to the extent that it is less flexible, is not as desirable.

Underlying every solution is the assumption that copying is for nonprofit scientific or educational purposes. Copying for profit would presumably be arranged for as in the past by private agreement between copier and copyright owner.¹

We are now in a position to survey the possible alternative solutions. These are given in Section II. At the end of that section they are compactly summarized in Table I, so that they can be compared. In this Table "1" signifies that the specification is substantially met, "0" that it is substantially unmet, "?" that there is some doubt as to the classification.

Further discussion of the results is given in Section III.

II. PROPOSED SOLUTIONS TO THE PROBLEM OF REPRODUCTION OF COPYRIGHT MATERIAL FOR NON-PROFIT SCIENTIFIC AND EDUCATIONAL USE

A. Solutions Based on a Change or Changes in the Law

1. *Do nothing*—"laissez faire", for fear of even more restrictions on copying if the law is changed and limits are accurately "spelled out".

Pro: There is some substance (for instance, the way in which the United Kingdom Copyright Act of 1956, Section 7 developed) to the fact that the law if rewritten may become more restrictive than ameliorative.

This alternative involves the least present effort.

Some satisfactory results are attainable at the present time under "laissez faire".

1. *Copyright as Communication*, L. B. Heilprin, June 1959.

Con: Does not face up to the main problem the solution of which is being attempted.

The situation is probably going to become worse than it is now.

Copyright infringement suit remains a threat.

2. *Extend the Principle of "Fair Use" to Statutory Law.* Fair use is recognized by the courts. It is tacitly assumed that the principle applies to nonprofit single copies of copyrighted works. This point has not been directly tested. The principle may not apply to copying of an entire work.

Pro: Statutory recognition of this principle would solve one problem—the right to make single copies—which now worries many who need to make copies for nonprofit purposes. It would relieve conscientious librarians as to the propriety of supplying single copies, and should enable scientists and educators to work more effectively at individual tasks.

Con: The concept of fair use probably could not go beyond single copies. Therefore, it would not solve the problem of large scale, multiple copying for research or educational undertakings. Examples of problems which would not be solved are the making of groups of reprints which cut across a large field or several fields, as well as all systems depending on multiple copying of the item stored.

Recognition of this principle does not solve the main economic reason for scientific copyrighting—need for support of scientific publications. No alternative royalty or revenue is provided the scientific publisher or author.

3. *Statutory Licensing of Scientific and Educational Copyrighted Works.* Statutory licensing is at present recognized in the recording of copyrighted music only. If a musical work is copyrighted it may not be reproduced without permission. But, if permission is given to anyone to make a recording, anyone else may make a recording upon payment of a fee set by law. Extension of this principle to copyrighted scientific and educational works could have two forms, a "strong" form and a "weak" form.

Weak: Copyrighted scientific or educational work cannot be reproduced without permission. But, if permission is given to

anyone to copy, anyone else may reproduce the work for scientific or educational purposes upon payment of a royalty, set by law, to the copyright owner.

Pro: Such a law would permit single and multiple copying.

It would provide royalties to publishers of scientific and educational publications.

Con: It is not practically feasible to distinguish what material is scientific or educational from other copyrighted material. This would require individual examination and possibly close study of each copyrighted work to determine whether it is scientific or not, educational or not. Also, the law would probably give rise to much litigation, and need for definitions which in many cases would be borderline and difficult.

The provision is against U.S. tradition in that it reduces constitutional rights to property. It deprives the owner of control over who may copy his work and in what form; and amounts to taking property now vested in the owner, by *eminent domain*.

Fixing the rate of remuneration in a manner satisfactory to all owners might be difficult.

Since the statute would fix the rate of remuneration, there might be created an inflexible situation hard to rectify later.

There might be some question whether the principle would be applicable to foreign publications entitled to protection in the U.S. under the UCC.

There would still be needed a mechanism for collecting the royalties and for distributing them. Without such a mechanism there would still be (a) discouragement from copying because of the time and effort required for payment, and of the need to be sure that permission had been given at least once, and (b) a tendency to disregard the payment of royalties not because of dishonesty but because of the time and effort needed for contacting the copyright owner.

Strong: If any scientific or educational work is copyrighted anyone may reproduce it for scientific or educational purposes upon payment of a royalty at a legally fixed rate to the copyright owner.

Pro: The same as for the "weak" form.

The strong form removes the need to determine that the right to copy has already been granted once.

There would be greater simplicity in carrying out projects which are based upon copying, since all material covered by U.S. copyrights in science and in education would be uniformly accessible for copying.

Con: The same as in the "weak" form.

The deprivation of property rights would be more absolute, since in the "weak" form the owner could still exercise some control if he denied everyone the right to copy.

4. *Enact a New Provision in the Coming Revision of the U.S. Copyright Law, Providing for the Needs of Science and Education. Specifically: permit unlimited multiple copying of copyrighted scientific or educational works, for nonprofit scientific or educational purposes.*

Pro: Such a provision would protect communication in science and education made *via* domestic copyrights.

The simplicity of the law would stimulate needed copying, and provide the most immediate measure for relieving the copyright problem of communication in science and education.

Since copying would be free as long as it was performed for nonprofit scientific or educational purposes, there would be no need for a mechanism for collection and distribution of royalties.

Con: Unless the law were to provide for unlimited free copying of *all* copyrighted works, provided only the purpose were nonprofit scientific or educational, there would be need to distinguish the nature of the material, in addition to the purpose for which copying was performed. This is the same objection as that to statutory licensing: it is not practical to distinguish between scientific and non-scientific, educational and non-educational copyrighted works.

If, on the other hand, the law were to permit free copying of *all* copyrighted works, providing the purpose were nonprofit, educational or scientific, this would weaken the purpose of the copyright law and reduce the incentive to copyright not only in the sciences, but in the arts. Even if a line could be drawn, e.g., between use for educational purposes (for instance, self-education) and use for purely recreational purposes, such a line could hardly be drawn without much litigation.

This provision would deny the publisher or owner any remuneration for this type of use. It would provide no support of scientific publications and would nullify the chief economic reason for copyright protection of scientific publications.

The effect might go further: free copying might so reduce the income of scientific and educational publishers as to diminish or eliminate their contributions to scientific and educational communication.

The same question raised under Statutory Licensing as to whether this could apply to foreign publications under UCC, arises here even more strongly.

This provision would probably meet legislative opposition because of the serious implications for hitherto protected intellectual properties.

Even if it were finally accepted, this solution would probably take a long time to consummate.

B. *Administrative Solutions*

1. *Voluntary Agreement Among Copiers and Copyright Holders, Like in the "Law Merchant", to Permit Single Copies for Non-profit Scientific or Educational Use.*

Pro: A voluntary agreement might be readily accepted by publishers and might become accepted on a world-wide basis. In fact, some agreements of this nature have been formed. Examples: the "Gentlemen's Agreement" of 1935 in the U.S.; and the "Fair Copying Declaration" in Great Britain.

Among ethical users such an agreement would probably be well observed.

An agreement is flexible enough for adjustment.

A voluntary, informal agreement would take less trouble to set up and less time, than would a more formal arrangement among leading copying institutions and publishers.

Con: Such an agreement might not include all publishers, so that copyright infringement suit remains a threat.

Does not solve the problem of large-scale multiple copying.

Does not contribute economically to the support of scientific or educational publications.

2. *Agreement on a Contract Basis, Between U.S. Publishing Industry and Groups of Users, to Permit a Limited Number of Multiple Copies, and Payment of Royalties (Modeled on German Contract).*

Pro: Permits multiple copying to signatories.

Pays royalties to publishers and authors.

Involves short term (Germany—3 years) for copyrights.

Annual settlement and paying in advance reduces accounting.

Con: Unless open to all, is not sufficiently inclusive of users. Should include all parties interested, e.g., individual scientists, educators, as well as all scientific and educational institutions.

Not sufficiently inclusive of publishers, and danger of copyright infringement suit remains.

3. *Nonprofit, Privately Operated Clearing House for Granting Paid Permissions to Copy Copyrighted Scientific or Educational Works for Nonprofit, Scientific or Educational Purposes, on a Large Scale; and for Administering a Paid Method of Similar Copying on a Small Scale.*

(a) *Statutory System.* (Everything that is copyrighted in designated classes is in the system.) This is the same as I 3 (Statutory Licensing) with added clearing house. *Pro* and *Con* are the same, except that this would provide a mechanism for collecting and distributing the royalties. Thus the system with statutory licensing and a voluntary clearing house would be an improvement over statutory licensing only.

(b) *Voluntary System.* (Copyright owners, mainly scientific and educational publishers, participate by mutual consent.)

Pro: Permits both large scale multiplication and small scale by all types of users, individuals, teams or institutions.

Supports scientific publication.

Retains private control over copying of copyrighted scientific and educational works for other than nonprofit purposes, e.g., control over non-ethical use.

Voluntary agreement on a scale of royalties has greater flexibility than a scale provided by law.

Permits publishers to make trial of system without irrevocable decision.

Foreign publishers could participate or not, as they elected, without affecting the UCC.

The entire operation would be conducted under existing or revised copyright laws and would require no special treatment of any copyright owner under U.S. law.

Con: A voluntary system would not guarantee participation by all publishers. The utility of the system would depend upon success in enlisting a large majority of publishers of scientific and educational works.

Getting voluntary participations from scientific and educational publishers would be a large operation.

Administering a clearing house would be a large operation.

4. *Ad Hoc Solutions for Publishers*

A number of arrangements could be worked out by the publishers themselves to supply promptly all copies ordered, in return for remuneration. Examples:

- (a) Publisher supplies photocopies and/or reprints on demand.
- (b) Publisher licenses duplication of his copyrighted works by:
 - (1) Libraries and commercial copiers.
 - (2) Subscribers.

Pro: All such arrangements operate under the law and require no change.

All have the flexibility of private enterprises.

Con: All such enterprises lack the generality of a national solution. Science and education are of national concern, and the Copyright Law is of national scope. Other things being equal, the most satisfactory solution is of the most general nature, with all interested groups participating.

If the publishers were to institute a separate, large scale private organization for collection of royalties and for dissemination of copies of copyrighted works, this would approach solution II 3, with the exception that it might not be nonprofit as to administration costs. Even if it were conducted as a nonprofit organization, however, because of the public interest in the relation of copyright to science and education it is probable that an institution conducted by publishers only would not solve the problem as well as one conducted under the sponsorship of all interested groups.

SOLUTIONS	NECESSARY								DESIRABLE				
	Provides Copies Promptly	Supports Scientific or Educational Publication	Provides Multiple Copies	Removes Threat of Infringement	Suit	Not Reduce Rights to Intellectual Property	All Interested Groups Benefit in Solution	Not Contrary UCC	Req. No Distinction Sci. & Ed. Works And other Copyrighted Works	Short Time Before Starting	Practical to Initiate	Practical to Administer	Practical to Alter
A Changes in the Law													
(1) Do Nothing	0	0	0	0	0	1	0	1	1	1	1	1	1
(2) Fair use—Statutory	1	0	0	1	1	1	1	1	1	0	1	1	0
(3) Statutory Licensing													
Weak	0	1	1	1	1	0	1	0?	0	0	0	0	0
Strong	1	1	1	1	1	0	1	0?	0	0	0	0	0
(4) Statutory Free Copying													
Science & Education	1	0	1	1	1	0	0	0	1	0	1	1	0
(a) All Copyrighted Works	1	0	1	1	1	0	0	0	0	0	1	0	0
(b) Science & Educ. only													
B Administrative Solutions													
(1) Voluntary Agreement	1	0	0	0	0	1	0	1	1	1	1	1	1
Single Copies													
(2) Contract Agreement	1	1	1	0?	1	1	0	1	1	1	1	1	1
Multiple Copies													
(3) Nonprofit Clearing House													
(a) Statutory	1	1	1	1	1	0	1	0	0	0	0	0?	0
(b) Voluntary	1	1	1	0?	1	1	1	1	1	1	1	1	1
(4) Ad Hoc. Solutions													
Publishers	1	1	1	0	1	1	0	1	1	1	1	1	1

Table I: Specification Analysis of Proposed Solutions

*1: Condition substantially met

0: Condition not substantially met

?: Doubtful

** All solutions: Copying is for nonprofit scientific or educational purposes.

III. THE OPTIMUM SOLUTION?

If the important specifications for a solution to the problem of copyright and scientific communication have been included, then we may draw certain conclusions from Table I. In the first place, there is no change in the copyright law which, without other measures, would remedy the situation. The closest approach is statutory recognition of "fair use". This measure would still leave two important problems unsolved: multiple copies, and support of scientific and educational publication. On the other hand, it may appear desirable to CICP to endorse statutory fair use. This should strengthen any other measures taken, without interfering with their effectiveness.

For an effective solution it appears that we must look to some administrative measure or measures. We can rule out voluntary agreement, as it fails to meet several of the principal specifications. Contract agreement and ad hoc publishers' solutions appear to have identical specification patterns. There is much to recommend them. The weakest points of both are that not all of the important publishers may join in the operation, and that consequently (1) there remains the threat of infringement suit, and (2) the solutions are open to the criticism that they are not truly general, as any solutions must be which underlie the welfare of science and of education. But, they do represent apparently workable solutions, and deserve further study.

We may rule out the nonprofit clearing house with statutory licensing for a number of reasons, most of which are the same as those for statutory licensing (I-3). This leaves the nonprofit clearing house with voluntary membership. As shown by the score, this solution has the highest number of specifications met, all except the removal of threat of infringement suit. As stated in Section II, the success of the agent-clearing house solution would depend on how many publishers (and possibly individual authors) of scientific and educational works join in it. If the majority were to join then many others would probably also join for purely economic reasons: they would have nothing to lose by so doing, and would have the opportunity to share in the royalties. In the same way, the larger the fraction of publishers and authors which participate, the smaller the threat of infringement suit. Thus the success of the clearing house solution resembles an "all or none" process. If the number of participants is above a certain threshold the entire process takes place. If the number of participants is below the threshold, the process does not take place. One of the estimates to be made is this threshold fraction of publishers in science and education, which would assure success with high probability.

The clearing house solution is one for which there are precedents, and which is within the capabilities of the data-processing industry. It is a bold, massive solution requiring both the large-scale techniques at which Americans

are adept, and the voluntary concerted action of private groups for which Americans are equally noted. An institution of the kind contemplated would have a special status, for it would support the constitutional principles of disclosure of intellectual works and protection of intellectual property, the creative efforts of scientists and teachers, and their communications.

The question arises: is this the optimum solution? Or is it possible to incorporate features which may be found elsewhere, including the other solutions discussed here, to produce a solution better than any yet proposed? In the belief that the latter might prove to be the case, your study group decided to carry on in parallel with the *analytic* work of the study group some *synthetic* work looking toward the earliest possible solution of the problem. If possible a draft was to be prepared in time to lay it before the CICP members at the 1960 meeting. Accordingly one of the study group members doubly qualified by knowledge of the problem and of the law was asked to initiate such a synthesis by heading a subcommittee to draft it. This was carried out. The draft follows immediately after the Addenda to this report.

ADDENDA

The following notes are added at the time of reprinting the above, to bring the CICP members up to date on major developments in our field of interest. Another brief review covering much the same ground is contained in Clapp, 55 *Law Library J.* 10-15, February 1962.

1. The Joint Libraries Committee on Fair Use in Photocopying Report on Single Copies has been issued. This committee, also called the Freehafer Committee, endorsed the principle "that it be library policy to fill an order for a single photocopy of any published work or any part thereof". The full text can be found in: 52 *Special Libraries* 251, No. 5, May-June, 1961. See comment following 2, below.

2. The U. S. Copyright Office has, in its Copyright Law Revision of July, 1961, proposed a revision to the Copyright Statute which specifically recognizes the doctrine of "fair use". It would permit "a library to make a single photocopy of material in its collections for use in research",—subject to certain restrictions. Specifically, the recommendation made is,

"The statute should permit a library, whose collections are available to the public without charge, to supply a single photocopy of copyrighted material in its collections to any applicant under the following conditions:

(a) A single photocopy of one article in any issue of a periodical, or of a reasonable part of any other publication, may be supplied when the applicant states in writing that he needs and will use such material solely for his own research.

(b) A single photocopy of an entire publication may be supplied when the applicant also states in writing, and the library is not otherwise informed, that a copy is not available from the publisher.

(c) Where the work bears a copyright notice, the library should be required to affix to the photocopy a warning that the material appears to be copyrighted".

The full text can be found in *Copyright Law Revision*, Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law, July 1961, printed for use of the House Committee on the Judiciary. See pp. v and 25-26. See also a brief article by J. Donovan, in *Publishers' Weekly*, October 9, 1961, pp. 24-27. *Special Libraries*, November 1961, contains several articles. One of them, *A Publisher Looks at Copyright*, by D. Dorward, comments favorably on the work of the CICIP.

Comment: It should be noted that this recommendation by the Copyright Office is more strict than that of the Freehafer Committee. The latter would permit copying complete works, without written statements by the applicant. There is at present a certain amount of debate as to whether the Freehafer Committee has been too courageous, and has actually subscribed to a greater invasion of proprietary rights than library interests require. From the point of view of CICIP's interest in solving a fundamental issue and jointly accomplishing two objectives, namely, to preserve both the essence of the Copyright Law and the freedom of communication in science and scholarship, it is felt that progress has been made but not enough. Neither recommendation attacks the central problem of multiple copying. The late Arthur Fisher once remarked to the undersigned that the single copy is *not* simply a special case of multiple copies. He felt very strongly on this matter, his basis being what he referred to as the time-honored, inalienable right of scholars to make their own copies of any work for purposes of research. The Copyright Office recommendation follows this concept. But the CICIP might ponder this: is there a great economic difference between the making of many single copies of a copyrighted work, over a length of time, and the making of a set of multiple copies, equal in number, in a like period of time? Is not the copyright owner equally deprived of compensation in each case? If the answer is "yes", then we must settle the multiple copy problem in order to reach a full and permanent solution.

3. The same Copyright Law Revision report recommends elimination of compulsory licensing for owners of copyrights on music. See the Revision Report, p. vi.

Comment: Since music is the only field to which compulsory licensing has been applied in the U.S. Copyright Statute, the recommendation removes an

important justification for consideration of compulsory licensing as an alternative to voluntary enrollment in a clearing house system. The arguments in the CACP Study Group 1960 annual report, and in the appended draft study, appear similar to or to overlap those advanced by the Copyright Office. To the extent that this recommendation is favorably received it would seem that the possibility of the compulsory licensing of multiple copies being incorporated in the Copyright Statute is remote. This would leave the field clear for voluntary enrollment in any projected Copyright Clearing House for scientific and educational works. It is in line with the feeling expressed by the majority of participants of the CACP conference, at the last discussion, notably by representatives of the publishers of scientific and educational works.

CLEARING HOUSE AS OPTIMUM SOLUTION TO COPYRIGHT PROBLEMS AFFECTING COMMUNICATION OF EDUCATIONAL AND SCIENTIFIC INFORMATION*

By ROBERT W. HAMPTON, *Chairman*

Dissemination of scientific, scholarly and educational information is increasingly taking place through copying. A large fraction of this information is copyrighted. Under the operation of the present copyright system it is often difficult to carry out this type of dissemination effectively, because obtaining permission to copy usually requires a prohibitively long time, and in many cases it is impossible even to identify the current copyright proprietor. In consequence, much communication which otherwise would take place is effectively blocked, or it is performed illegally. Not only is communication impeded but fees to copyright holders are reduced.

The Committee to Investigate Copyright Problems Affecting Communication of Educational and Scientific Information (CICP) has investigated a number of possible modifications of the copyright system, both as to its statutory make-up and as to the mechanics of its administration. Its findings have suggested that a clearing house may be an optimum solution. This paper explores various problems arising out of the clearing house approach. In view of the very great advantage which might accrue to our economy if these problems were overcome, it is stressed that the difficulties are presented not to discourage the clearing house approach, but to start some thinking about constructive, feasible solutions.

I. Basic Clearing House Operations

The proposed clearing house would be an organization that grants licenses to reproduce copyrighted works and collects and distributes royalties for the copies reproduced. The best form for administering such a clearing house seems to be as a private, non-profit corporation, which is federally chartered independently of any presently existing organization.

The clearing house corporation would be empowered to license and receive royalties with respect to enrolled works and to maintain an accounting

* Members of the Subcommittee to Draft the "Optimum Solution" were: Robert W. Hampton, Esq., Chairman; Joseph A. McDonald, Esq. and Dr. Laurence B. Heilprin. As part of CICP's effort to obtain informed opinion on the feasibility and desirability of such a project, it invites informed analytical comments. Comments should be addressed to Dr. Howard A. Meyerhoff, President, Committee to Investigate Copyright Problems Affecting Communication in Science and Education, 1507 M Street, N.W., Washington 5, D.C.

system, pay for its own operating costs out of gross royalties and distribute net funds to proprietors of enrolled works. The clearing house license might be limited to copying for certain specified uses only, such as education and science, leaving to the copyright proprietors the licensing of reproductions for other purposes.

II. *Enrollment of Works and/or Proprietors in the Clearing House System*

Copyrighted works or their proprietors could be enrolled with the clearing house either by statute or by voluntary agreement. Because a choice between these two methods of enrollment appears to be basic to the establishment of a clearing house, and because the two methods have quite different characteristics, a preferred form of each is outlined below.

A. *Statutory License*

Enrollment of works on an involuntary basis would require Congressional enactment of a statutory license provision, permitting reproduction of certain types of copyrighted works and unpublished manuscripts, for educational and scientific purposes, upon payment of a prescribed royalty or schedule of royalties (for example on the order of 2¢) for each reproduction of a page so protected. The page royalty might be varied according to the nature of the material involved and should be sufficiently high to give a fair return to proprietors after deduction of clearing house costs. Automatically, this would make the royalty high enough to discourage anyone from using a clearing house license for multiple copying of any entire work for sale; a direct license would be more economical for such purposes. However, the royalty should be low enough to encourage compliance with the copyright law in the many situations where unlawful copying could occur with little chance of detection.

In order to avoid extending the scope of a statutory license beyond that which is essential, the types of works to be affected by the statute should be identified quite carefully. The U.S. Copyright Office classified copyrighted works in a manner that may be of considerable help for this purpose. The desired subject matter might be selected by limiting the effect of the statute to works, other than models, in official Classes A, A-B, B, BB and I. These classes include all books, periodicals and scientific drawings.¹

-
1. At present it appears desirable to exclude photographs (Class J), although their inclusion would seem desirable if a statutory royalty schedule, which is meaningful as applied to photographs, could be established. The same considerations apply to lectures, sermons, and addresses prepared for oral delivery (Class C). It also seems desirable to exclude the classes that embrace works of art, prints and labels, maps, music, dramatic works and motion pictures. The situations in which these latter works are reproduced for scientific and educational purposes appear to be sufficiently limited

It would seem desirable to have a second statutory provision declaring that neither facsimile copying, nor distributing facsimile copies, of portions of works protected by statutory copyright would vitiate such copyright, even though the copied portion did not include the copyright notice appearing on the original, and bore no credit or acknowledgment.²

A third recommended statutory provision would declare that for scientific and educational purposes, making and distributing copies of those unpublished manuscripts that are available for public inspection, would not be deemed such publication as would vitiate common law copyright.³

A statutory license would have the obvious advantages of completeness, efficiency, convenience, and immunity from anti-trust charges. All pertinent domestic and foreign works would be included automatically, irrespective of identity of copyright ownership or renewal status. Copiers would not have to concern themselves with the enrolled or unenrolled status of a work and therefore would not be tempted to copy unlawfully in order to avoid the inconvenience of purchasing and referring to a catalog of enrolled works.

The primary disadvantages of basing enrollment on a statutory license include a natural distaste for any form of compulsory licensing, the considerable length of time probably involved in obtaining such legislation, the

and of such nature that currently available licensing procedures are substantially adequate and impose no undue hardship on either the proprietors or the copiers.

Even within the official class affected by a statutory license it may be desirable to exclude certain categories of works, such as atlases. Since the official classification of a copyrighted work does not appear in the work itself it would seem necessary to provide a clear statutory definition of both the enrolled classes of works and the categories excluded from such classes, for example, "all books, periodicals, . . . except atlases, photographs, . . .".

2. Under present practices of partial facsimile copying, where it occurs with permission of the statutory copyright proprietor, copyright theoretically may be vitiated unless the partial copy includes copyright notice.
3. Under present law, such distribution may vitiate common law copyright in the work and, by the absence of statutory notice, may prevent the proprietor from obtaining statutory copyright.

One alternative to the above statutory provision might have greater merit by solving not only the problem of clearing house licensing of unpublished works, but also the more general, long-standing problem of making such works available for all copying, irrespective of its purpose. This alternative would be an amendment to the present Copyright Statute, permitting registration of unpublished works in the classes now requiring publication. The amended statute could declare further that common law copyright would be lost by depositing any unpublished work, by or with permission of the proprietor of common law copyright therein, in such manner that it is available for public inspection. The only protection then allowed for works so deposited would be statutory copyright, which would be limited in its duration by the existing Constitutional requirement for such limitation.

problems of governmental regulation accompanying such legislation, the harmonizing of statutory license provisions with various international copyright conventions, and retroactive application of such a statutory license to existing works.

B. Voluntary Enrollment

A fully voluntary enrollment of works would avoid statutory compulsion and any opposition to the clearing house based solely on abhorrence of such compulsion. Also, it would minimize Government control over the clearing house and avoid any Congressional delays relating to the statutory license, although similar delays appear likely in defining a voluntary enrollment system that receives the nearly unanimous approval of the various affected interests, as would be required for adoption of any such system.

Under a voluntary system it is proposed that publishers enroll all works in which they can grant the necessary copyright licenses, making any desired exclusions by categories (for example, atlases) rather than by identifying individual works. Each enrolled publisher would enter into a written agreement with the clearing house, binding itself to such enrollment for a fixed period, for example, ten years, at a uniform royalty schedule, or at a flexible schedule that could be modified administratively according to specified rules.

The second and third legislative provisions recommended under Subsection II-A, above, would appear to have equal utility in a voluntary enrollment system. However, their enactment probably would not be necessary in order to begin operation of the clearing house on a voluntary enrollment basis.

Voluntary enrollment would have several disadvantages. For example, because there is no complete index of current proprietors of unexpired U.S. statutory copyright, it would be impossible to communicate with all such proprietors. Therefore, voluntary enrollment would be incomplete, which might adversely affect the prospective utility of automatic retrieval, translating, and other data processing systems now contemplated for libraries and copying services. Also, there would be a significant burden upon copiers to distinguish between enrolled and unenrolled works. Other disadvantages would include possible problems arising from U.S. commitments in international copyright conventions and treaties, renewal of copyright in enrolled works, fear of anti-trust charges in connection with enrollment by any group of commercial publishers, and increased administrative expenses relative to statutory licensing.

C. Modified Voluntary Enrollment

In view of the many difficult problems inherent in fully voluntary enrollment, tending to reduce enrollment and therefore the general utility of a

clearing house system, two principal modifications have been proposed, as follows:

1. A statutory enactment could empower the clearing house to notify all proprietors of statutory copyright at the addresses appearing in the index at the Copyright Office, and to enroll automatically all of the affected works whose proprietors do not specifically object. Future works in the affected categories would be excluded from enrollment only by so marking them, for example, along with the usual copyright notice. This modification is subject to many of the objections applicable to a full statutory license: it has an element of compulsion and would require that establishment of the clearing house await Congressional approval. In addition, it still would require the distribution of an index of enrolled (or unenrolled) works, which might be even more voluminous than for a fully voluntary system.

2. A statutory enactment might encourage voluntary enrollment by offering a reduced registration fee or other benefits. This modification would again depend on Congressional approval and would place a considerable additional burden on the Copyright Office. Even free registration (a saving of \$4 in the case of any work proposed to be affected by the clearing house) would hardly seem to be a significant inducement. In fact, it would be difficult to devise any practical system of benefits that actually would induce enrollment. The primary inducements still would be (1) a patriotic interest in improving lawful access to important information, (2) recovery of royalties now lost through unlawful copying and (3) added royalty income through increased copying and increased collection of royalties now lost.

III. *Central Accounting*

In a central accounting operation of the clearing house, royalty payments and various reports would be received from copying locations. Part of the money received as royalty payments would be used to pay administrative costs and the remainder distributed to proprietors of enrolled copyrighted works.⁴ Under a statutory license, distribution of royalties to domestic publishers would be simplest if based on ownership and addresses as shown in the records of the U.S. Copyright Office. Additional clearing house records would be needed for foreign proprietors, who would not be indexed in the U.S. Copyright Office merely by virtue of owning U.S. copyright under a convention.

4. It is anticipated that the bulk of the net funds distributed to proprietors would go to publishers, whether enrollment were voluntary or statutory. This of course would place an additional burden on each publisher to redistribute portions of such funds to authors in cases where royalty payments are required by author-publisher agreements.

The percentage distribution of net funds to the various proprietors of enrolled works could be based on a sampling technique, in order to eliminate the burden of manual or machine records as to each copying of a document. Each of a selected group of libraries, whose copying collectively represents a fair cross section of the national copying of enrolled works, could be provided with funds enabling it to send to the clearing house either (a) all original request slips for reproductions of enrolled works, or (b) copies, e.g., a microfilm record, of all such request slips. The clearing house accounting office could tally the information from these slips to calculate a prorata basis for distributing net funds. The group of libraries representing the sample could be changed periodically or randomly to prevent skewing of the sample through deliberate overpurchase of specific copies.

In view of the large anticipated number of copy-request slips that would have to be processed by the clearing house in a fair sampling system, it might be desirable to employ some form of automatic data processing equipment for prorating distribution of net funds, although such equipment could be used on a time-rental basis and need not be owned by the clearing house organization.

IV. Copier Accounting and Reporting

In conjunction with either a statutory license or a voluntary enrollment system, it would seem desirable that copiers be permitted to account for royalties by any of several prescribed means. In evaluating the various accounting means it is important to bear in mind two system requirements: (1) copier accounting and reporting must be characterized by a minimum of expense and the utmost simplicity and convenience, otherwise the clearing house system would be extensively opposed or ignored; and (2) all existing copying equipment should be usable under the proposed system.

In order to minimize accounting and reporting costs by copiers, a system of blanket licenses of varying scope could be provided, particularly for use by libraries and in other large-scale copying situations. Royalty payment for a blanket license could be based, conveniently, on the number of volumes in the library or on the total annual number of page copies of all kinds made in the library. If desirable, each licensed copy leaving the library or other copying station could be rubber-stamped or otherwise marked to identify it as a lawful copy.

An accounting system of higher precision and reasonable simplicity, which could be used economically in libraries and other locations in lieu of a blanket license, might employ a well known type of rubber stamp machine having a counting attachment. The stamped impression would identify a lawful copy and the machine count would indicate the number of royalty units payable to the clearing house since the last resetting of the counter.

Copying in libraries could include automatic accounting techniques used in conjunction with the copying equipment, but this probably would require some local coded identification of each copyrighted work.

The clearing house could furnish rolls or packets of adhesive-backed stamps, which could be made available through the clearing house or locally, for example through stationers, one stamp to be affixed to each lawful copy. Bulk-denomination stamps could be furnished to be affixed to multiple-page copies of documents, thereby minimizing the inconvenience of handling royalty stamps.

Certain manufacturers might wish to enter the field with stamp meters similar to the present postage meters. With such machines, the denomination of a single stamp would be determined by the number of pages in a unit of copy. Manufacturers also might wish to sell coin-operated or other forms of copying machines specifically adapted to copying, accounting and/or reporting under the system.

V. Clearing House Administrative Staff

It is proposed that the administrative staff of the clearing house have a single Managing Director who would report to a Board of Directors. The Board might be appointed by the President with approval of the Congress, or by the Congress, and include representatives of such organizations as the Copyright Office and the National Science Foundation, or the heads of organizations such as these might be designated by title to constitute members of the clearing house Board.

A house counsel and accounting manager would report to the Managing Director. If a statutory license were to become the basis for enrolling works in the system, it would seem unnecessary to provide any staff for promotional work, although some liaison with the Copyright Office and with the publishers and other proprietary groups would be necessary. If voluntary enrollment were to be used, some additional staff would be needed for corresponding with both domestic and foreign copyright proprietors, and in that case counsel's staff would have to be large enough to negotiate, draft and administer copyright license agreements with such proprietors.

VI. Original Financing of Clearing House

It is assumed from volume estimates that the clearing house, once in operation, not only would support itself but also would return to copyright proprietors significant additional royalties through increased copying, as well as through recovery of royalties that now are lost because of unlawful copying.

However, setting up the system would require funds, which might come from any of a number of sources, for example the following:

A. A loan subscribed by those elements of private industry that would receive commercial benefit from the system, principally:

1. Publishers
2. Manufacturers of copying equipment and/or media.

B. A Government loan to be repaid from future clearing house receipts.

C. A nonrepayable Government subsidy.

2. RIGHTS AND ROYALTIES OF FOREIGN AUTHORS AND COMPOSERS IN WAR TIME

By GEORGE MIDDLETON*

The President has approved legislation to amend the War Claims Act of World War II, largely divesting to former owners, subject to claims, certain enemy properties which had been taken over (vested) when war broke, by the Office of Alien Property (OAP) now in the Department of Justice.¹

Since the United States obtained no reparations under the Treaty of Peace, the net proceeds, to the extent of nearly \$230,000,000, derived from the administration of these properties during the Government's ownership, have been transferred to the War Claims Fund. This Fund has been used generally to satisfy claims of American prisoners of war, civilian internees and others who had suffered from their enemy captors. Further sums will also be transferred to this Fund to pay for additional claims against Germany.

Among the various categories of vested assets were copyrights. The story may now be revealed of the Government's unique and little publicized program—with its picturesque overtones of famous works and personalities—to administer the copyright interests and royalties of *enemy* authors and composers, who had pre-war contracts with American publishers. In addition, the similar pre-war interests of French and nationals of other occupied countries were also vested under technical "protective custody." Such properties were carefully safeguarded, and all royalties due on them were thus kept from falling, even indirectly, into enemy hands in Europe. These copyrights were all eligible for return under an existing Claims Procedure and many already have been returned with their values substantially increased. The return of enemy property, however, was prohibited by the Trading with the Enemy Act.² Under the new legislation, which goes into effect in ninety days from October 23, 1962, all copyrights will simply be divested; but royalties collected up to

* The author of this interesting first-hand account is the distinguished writer of many well-loved American plays, the translator of Brieux's "Accused", and similar works, and one of the founders and a past president of the Dramatists' Guild of the Authors' League of America. The author offered his services at the start of World War II to the Office of Alien Property, where, though not a lawyer, he acted for the next sixteen years as a "technical specialist" in the administration of vested copyrights. For his many contributions and innovations, the Department of Justice awarded him a "Sustained Superior Performance Award". The facts and figures employed in this article have all been taken, with permission, from official files.

1. Pub. L. 87-861, 87th Cong., Oct. 23, 1962. 76 Stat. 1139.

2. 62 Stat. 1246, 50 U.S.C. App., sec. 39.

that date will be retained by the Government. Complicated problems of extensive renewals and ultimate ownership will thus be avoided.

The necessary administrative problems were formidable. Initially, to some 1,800 American publishers or organizations known to have foreign literary or musical connections under copyrights, demands were sent for all current contracts. By vesting the foreign interest in these contracts the Government had stepped into the shoes of the former owner, proceeded to collect all royalties and took complete control though protecting the continuing contractual American interest.

Since the potential financial value of any copyright can never be pre-determined (in the face of additional royalty-bearing rights coming into existence) OAP never *sold* a single copyright—as was unfortunately done in World War I. Instead, a licensing apparatus was devised, for a limited period only, following customary trade practices. Many other enemy properties, not under pre-war contracts, were also vested and licensed profitably, both to the Government and the American nationals who desired to exploit the material.

LICENSES

When war broke, the need to obtain current results of foreign research was urgent. The OAP "assumed the responsibility of reproducing enemy-originating scientific publications." Operating under President Roosevelt's authority, an Advisory Committee of distinguished scientists and librarians obtained, through ultra-secret channels, 125 German journals, which were offered by subscription to 8,000 American firms. By 1945, 3,200 issues had been republished. As the printing costs were less than the gross subscription of \$311,293, the main objective of helping in the war effort was thus accomplished at no expense to the Government.

But this subscription effort did not include foreign copyrighted scientific books; 1,100 licenses were granted to republish those works which were vital to Army and Navy technicians engaged in war activities. Surreptitiously obtained by the Office of Strategic Services, these included sets and compilations, of which 759 were reproduced by photo-offset. On the usual trade royalties \$376,210 has been paid, in spite of numerous royalty-free copies allowed to offset manufacturing costs. All books were sold at less than the original German price. Beilstein's *Handbuch der Organischen Chemie*, a German classic in 57 volumes, was originally imported at \$2,000 a set. This had put it beyond the reach of many American laboratories. The republication price was at first \$400 a set and the royalties to date have been \$193,200.

In all, 1,800 licenses were granted on films, books, sheet music publication and other types of vested properties, yielding over \$1,300,000. Of this, \$500,230 has come from items found in 25,000,000 feet of captured enemy

films, which contain 4,500 individual titles. Among those which presented copyright problems of ownership or "remake" rights, were "*M*", *The Cabinet of Dr. Caligari*, *The Last Laugh* and *The Blue Angel*, that made Marlene Dietrich a star. Hundreds of German and Italian films were also licensed to exhibitors for "showings" at neighborhood theatres in their original language. On these, OAP retained 50% of the rental fees. "Stock shots" on such serials as *Victory at Sea*, *Crusade in the Pacific*, *20th Century* and the Churchill series, newsreels and "shorts" have been in constant and now increasing demand by commercial companies, colleges and study groups. On these the standard fee was \$2.50 a foot. As most film licenses have provided income from enemy property, further substantial revenue was credited to the War Claims Fund. Under the new legislation all film prints will be transferred to the Library of Congress, to be retained or disposed of at its discretion. Thus any film of historical or other value will be preserved.

PRE-WAR CONTRACTS

Some 634 pre-war contracts were reported and copyright interests vested. The accounting habits of each firm were not disturbed and their office forms were accepted. Royalty payments were scrupulously checked and followed up. Any exclusivity granted in a contract was recognized and no raiding of any rights by a business competitor was tolerated. In addition, no deviation from the contractual terms was allowed, except to enhance the Government's financial interest or the interest of those nationals sheltered under "protective custody." In the loose program followed by the Custodian in World War I, only 3,166 copyright interests were taken over and about \$250,000 collected. In World War II—so extended in duration and territory, plus a great expansion of new rights in music and films—several hundred thousand copyrights were vested. Nearly \$5,963,010 was received through September 30, 1962, from licenses and pre-war contracts.

Of the 300 books vested, only a few samples will indicate the scope and variety of the program. Oswald Spengler's famous classic, *The Decline of the West*, originally published by Knopf in 1924, had been active before and since vesting in 1943, and \$17,725 royalties were reported. OAP cooperated, also, in making possible a recent condensed edition. *Count Ciano's Diaries*, which brought \$36,332 royalties, had been artfully smuggled out of Italy into Switzerland by his widow, the daughter of Mussolini, who put the script under her garment, as she escaped into Switzerland. *Babar the Elephant*, a children's classic, earned \$26,402, while the late Isak Dinesen's celebrated African tales added up to the unusual \$33,558. There were also books by Gide, Bergson, Malraux, Romain Rolland, and plays by Giraudoux and Werfel, among others. Small sums only were often involved; but each account was

carefully kept and fitted into the administrative pattern. Some idea of the continuing interest in Marcel Proust is evidenced in the royalties on *The Remembrance of Things Past*. Of the \$33,000 paid for Gallimard, the French publisher, on his entire catalogue, \$13,000 was credited to Proust.

MUSIC

The sturdiest return of all, however, came from music and with it the most administrative copyright problems. From its various sources over \$4,000,000 was paid OAP; the composer's share is now a far cry from days when he lived on the crumbs of a patron's table. He then generally sold his composition outright to a publisher; but the ethical standards were low because neither could be supervised by the other. Both plagiarism and duplicate "out-right" sales took place. Even as late as 1859, Charles Gounod, of *Faust* fame, had turned over the French and foreign rights to his celebrated *Ave Maria*, based on Bach's *Prelude*, for 500 francs, as a photostat in OAP's files attests. But within this half-century the entire financial status of composers changed, beginning with the advent of "player piano" rolls. Until 1909, when the revised Copyright Law came into effect, no composer was paid for the uses of his composition. Due to the march of mechanical inventions, however, a single composition began to proliferate into specific separate fee-earning rights: sound films,³ perfected disks, radio broadcasting and television, plus "performance" and concert rights, each springing from an initial copyrighted sheet music publication. Even here the contractual relations between publisher and composer are now formalized.

Generally speaking, the complexities in monitoring the fees from each of these separate rights had best been handled through large groups or associations, often international in scope. To funnel the Government's share from such varied sources of musical income, which represented *only* the vested foreign national's interest, OAP did not disturb the workable structure of such commercial exploitation laboriously evolved over the years. One of the most effective of these was ASCAP, which has paid the Government \$1,150,832, mainly from broadcasting.

In 1914, when Victor Herbert strolled into Shanley's Broadway restaurant, he heard its orchestra playing the waltz hit from his own opera, *Sweethearts*. As this competed with the play itself at a nearby theatre, he brought an infringement suit. In using Herbert's music, without permission or fee, Shanley was following a well-established pilfering custom. It claimed this was not "a

3. As an instance, in another field, of how the income from stage production, beyond the usual royalties, has been increased by the invention of talking pictures, the powerful Dramatists Guild reported that on 600 picture sales (1926-1956) nearly \$43,000,000 was collected for distribution!

performance for profit," within the meaning of the 1909 Copyright Act, "since no admission was charged." In 1917, Justice Holmes wrote an opinion momentous to both native and foreign composers:

"If music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is profit and that is enough." ⁴

Before this copyright decision, no American composer had received a penny for the use of his music in any theatre, dance hall, café, circus tent, night club or cabaret. With radio's later arrival in 1922, every legal device was again employed to avoid paying for music. In 1941, Justice Brandeis handed down another epochal copyright decision: that broadcasting music through a radio, which distributed it in a hotel, was also a "public performance for profit" and constituted an infringement.⁵ This was climaxed by a series of similar decisions that *any* use of copyrighted music in films, on records or other mediums must be paid for.

In 1917, as a result of Holmes' decision, the non-profit association of "American composers, authors and publishers", was formed. They assigned to the organization, ASCAP, their "non-dramatic public performance rights", and it ultimately leased its entire repertoire for fees to be divided among its members. Blanket licenses have since been periodically negotiated with radio broadcasting chains, individual "stations," orchestras, theatres, wire services, etc. Millions have literally been snatched from the air.

This was of special concern to OAP because it had immediately vested twelve pre-war reciprocal agreements, which ASCAP had made with similar European societies in enemy and enemy-occupied countries. It had thus previously protected the revenue of its own American members abroad and, in return, reciprocally monitored and collected fees for the use of foreign compositions in the United States. On OAP's demand, ASCAP turned over all such sums due the foreign nationals with its usual certified breakdowns of *each* work and its original composer; \$629,266 alone was credited to the account of the French Société des Auteurs, Compositeurs et Éditeurs de Musique (SACEM), the granddaddy of all such protective groups.

INDIVIDUAL COMPOSITIONS

Since war conditions prevented contact with enemy-occupied France, its enormous musical repertoire, largely published under contract with American firms, had, like SACEM, been similarly vested. Among those world-famous

4. *Herbert v. Shanley Co.*, 242 U.S. 591, 595 (1917).

5. *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191 (1931).

individual compositions were Debussy's *Clair de Lune*, and *Bolero*, written for the ballerina Ida Rubenstein, by Ravel. The contracts between their publishers and Elkan-Vogel, the American agent, in each case, *required executive determination and will best illustrate the efficiency of OAP's "protective custody" policy*. Jobert had only granted the rights to exploit the sheet music sale of Debussy's masterpiece; all other rights had to be submitted to Paris for approval. As war no longer made this possible, when Paramount offered \$5,000 for its use as "background music" in the film, *Frenchman's Creek*, OAP itself immediately granted permission. The sheet music sales were thus greatly increased, resulting, from all extended rights, to over \$160,000 when it was returned. The popular *Bolero* was included in the Durand et Cie catalogue, but its contract had expired just before America entered the war. Knowing this, numerous competitors sought non-exclusive licenses from OAP to exploit it. As Durand, however, had renewed the original contract several times, OAP decided to continue Elkan-Vogel's exclusivity. The catalogue earned over \$100,000, after the deduction of the American agent's legitimate commission, the protection of which had likewise been within OAP's policy.

Among those composers who had become naturalized American citizens, Stravinsky, Schoenberg and Hindemith demanded and recovered their royalties which OAP had collected. Their early compositions had been included among the vested catalogues of leading European publishers. Some of these composers had been for years under contract with Associated Music Publishers, Inc. (AMP). As this important firm, owned by Broadcast Music, Inc. (BMI), controlled all exploitation rights, including radio, OAP obtained, during nearly 20 years, over \$820,000 on its German items alone.

Richard Strauss and Sibelius were still alive when the United States entered the war. Both wrote personal letters for the return of their accumulating royalties. Sibelius himself sent a long list of his works, "trusting it may be of use in making your decision." But Sibelius was a Finn. During early days his country was part of Russia, which afforded no copyright protection. Some of his compositions, however, had been published by a German firm which had owned the copyrights OAP vested. A very human problem rose as to *how* these works could legally be returned to the great composer.

This and similar cases led to OAP's most dynamic administrative decision. It had already been forced to consider the tragic lot of many destitute refugees who had escaped to this country. To meet the obvious injustice of retaining their needed royalties, as well as those of naturalized Americans, OAP relied on the "Equitable Servitude" doctrine. *This implicitly recognized that the author or composer still had a continuing "title interest" in the seized property, even though the legal copyright had previously been held by a German firm.*

Only with such "title interest" could one be eligible, under the then existing regulations, to file a claim for its return. Many thousands of royalties, augmented by OAP's administration, were thus ultimately given back to war victims. To Sibelius personally went a net of \$9,500, shortly before his death.

RICHARD STRAUSS AND OPERAS

An unpublished letter⁶ of biographical value, written by Richard Strauss two years before he died, will best present the complicated personal and copyright problems of nationality which the OAP faced.

"Lausanne, Le
Avenue, Ruchonnet 53
Telephone 3 1321
2nd February, 1949.

"Custodian of Enemy Property,
Washington, D. C.

"Dear Sir:

"I trust you will forgive this direct approach in a matter of vital importance to me which may receive your sympathetic consideration in view of the somewhat unusual circumstances.

"My name is certainly well known to you. And you may know that I am 85 years of age. The American rights in my works are vested in you and all my income from the numerous performances, mechanical reproductions and broadcasts is being seized by your office. All this is right and I recognize without complaint the justification. If I was able to earn my livelihood by other means such as conducting, I would do so and raise no questions about any income from my works. But I cannot conduct any more being too old and too ill. Therefore the income from my works is all that is left to me after having lost all my funds. And the major proportion of this income is seized by various Custodians in various countries. What I still can draw is not sufficient to keep my wife and myself and to meet the doctors' bills.

"The British Custodian very kindly released my income from Great Britain as from the 1st February 1948. Would it not be possible for you to entertain the idea of releasing my American income as from some appropriate date?

6. The manuscript letters from Strauss and Sibelius, among others, as well as photostats of numerous other documents, including many opera contracts, are deposited for study in the Music Division, Library of Congress.

"You may want to be satisfied that my attitude to the National Socialist Regime in Germany was not such as to justify a personally punitive quality of the seizure of my income. I beg you to spare an old man to go through the formalities of questionnaires which are not altogether applicable. I know that there is a certain amount of misrepresentation which ignores the fact that I was so prominent that what would have led to a prison or a concentration camp with others led only to a boycott with me. My family connections, the dedication of my works, my friendship with so many people all over the world should dispel any suspicion about my own attitude and convictions. I went, as you may know, through the formal denazification procedure and was cleared without a hearing. I helped many people in Germany to save their lives and property and never took part in any party matters. In fact, I am one of the very few who never belonged to the Nazi party in any form whatsoever.

"I do hope you will accept these assurances. In all modesty I may say that my works have given and are giving many happy hours to many American listeners. Could you consider then to allow me a modest participation by releasing the income from the American performances and so let me have what happiness a man of my age can still have? I would be most grateful if you could give this matter your kind attention and if you would grant under unusual circumstances this unusual request.

"I am,

Yours very truly,

Dr. Richard Strauss".

In spite of this moving appeal, the chain of title of his famous works led back to his German publishers, all rights in which had been automatically vested. Under existing law, which differs from British regulations, his property could not then be returned until his non-German citizenship—at time of vesting—could be established. In the meantime, though Strauss had originally sold outright all publication rights in *Der Rosenkavalier*, *Salome* and *Elektra*, their performing and other rights plus his Tone Poems and Songs have earned \$90,550!

Opera agreements in Europe, as with Strauss, were generally made between composer and music publisher, who in turn leased them separately to each opera house, at fees depending on its "status." Unlike stage royalties on a play, the fee was always a flat sum, since box-office receipts of operas are mainly affected by stars or conductors. For this reason, OAP had obtained photostats of all vested opera contracts, since they indicated the division of the respective share due on United States performances, when handled by

American agents. These were paid to OAP. SACEM's terms and conditions, generally controlling French operas, facilitated the administration of performances of *Thais*, *Mignon*, *Louise* and *Pelléas et Mélisande*, written and composed by Maeterlinck and Debussy, among others.

OAP's copies of David Belasco's contracts, however, indicate that he sold the "opera rights" in his plays, *Madame Butterfly* and *The Girl of the Golden West*, for \$1,250 each. But when Puccini wrote *Tosca*, founded on the Sardou play, *La Tosca*, Sarah Bernhardt's greatest success, the French author's estate obtained, through OAP, a share of performance fees, plus a percentage from both rental of scores and libretto sales, amounting to \$10,000. Until all the Italian property was returned, under treaty, the Ricordi catalogue, largely on Puccini royalties from *La Bohème*, *Tosca* and *Madame Butterfly*, had paid OAP \$320,000. This included fees even on arias (such as *Un Bel Di* and *Vissi d'Arte*), concert performances and films each of which OAP had licensed and on which it had collected a fee.

Though much pleasure, on a different level, has been given American audiences from the strains of European operettas, their administration faced a tangle of copyright ownerships, assignments, shifting royalty percentages on stage performances, with every possible accounting headache which such international works are heir to. However, they were all encouraged by OAP to sing out their famous melodies to considerable profit. *Blossom Time*, a hardy perennial back to World War I, paid on its annual tours over \$50,000; *The Merry Widow*, *The Waltz Dream* and *Die Fledermaus* (*Rosalinda*) added lesser amounts. *The Chocolate Soldier*, by Oscar Straus (based on Shaw's *Arms and the Man*), with its celebrated *My Hero Waltz*, brought nearly \$100,000.

As a footnote to popular songs, \$150,000 was also gathered from the sentimentally titled *I Kiss Your Hand, Madame*; *Speak to Me of Love*; *You Can't Be True, Dear* and *Jealousy*. To which is added the most famous German woman the war produced, *Lili Marlene*, on which some sixty licenses had been granted. Starting as the sentimental yearning of Hitler's soldier for the girl friend he left behind, its torrid tempo was turned by its publisher, Paul Lincke, the noted composer of *Glow Worm*, into a popular soldiers' marching song.

HITLER AND GOEBBELS

Shortly after Hitler's marching troops had failed to conquer Europe, there was found, in a rubbish heap, a carbon copy, on elegant paper, of Goebbels' Diary. Following a series of fantastic happenings, including extensive overseas investigations—much of which is still restricted—OAP claimed the common law copyright. After wide newspaper serialization, it became a Book-of-the-Month selection. With the consent of the Government, Louis

Lochner's English translation and commentary was published by Doubleday. The script as found, which had not been vested, now rests in the Hoover War Library, the gift of former President Hoover. Dr. Paul Joseph Goebbels, so linked in the Hitler venture, was a witness with Martin Bormann to Hitler's last "private will," written in the besieged Berlin bunker, and signed at 4 a.m., April 29, 1945. In this "authenticated" Will, a copy of which OAP obtained from the official court records in Munich, Hitler had dictated:

"Since in the years of my struggle I did not feel justified in assuming the responsibility of marriage, I have only now, before termination of my earthly career, decided to marry the girl who after long years of faithful friendship voluntarily came into this almost besieged city to share the same fate as myself. At my desire she will die with me as my wife. In death we shall find what my work in the service of my people robbed us of."

Like his master, Goebbels killed himself, two spectacular endings to the Nazi saga which concerned OAP, since royalties from each work will continue to be paid, already on the Diary \$81,796 and on *Mein Kampf* \$43,945.

In 1942, the English translation of Hitler's *Mein Kampf* was almost the first to be vested. Published by Houghton Mifflin ten years previously, the abridged version had rough legal going. Challenged by another publisher, who brought out and sold extensively a complete "unauthorized" version, it was claimed the basic copyright was invalidated since Hitler was a "stateless person." A protracted lawsuit followed until the Second Circuit finally sustained Houghton Mifflin's legal contention that copyright protected even a "stateless citizen."⁷ The Court's decision greatly helped OAP's administration of the property of refugees to this country, who themselves were later to be made "stateless" by Hitler.

The new 1962 law specifically forbids *Mein Kampf* to be divested, as well as the Diary of Goebbels, the Memoirs of Alfred Rosenberg, Otto Skorzeny and other Nazi leaders. Also to be retained are the 123,000 items in the extensive photographic history of the Nazi Party by Heinrich Hoffmann, its official photographer.

Among the great variety of contrasting documents OAP received may be added Paderewski's last Will. The great musician and former Premier of Poland died in 1941. He was buried, by President Roosevelt's direction, in Arlington National Cemetery—the second foreigner to be so honored. His amazing Will of twenty pages, written in his own hand, was not found until three years later. Its photostat became part of OAP's records since some of his

7. Houghton Mifflin Co. v. Stackpole Sons, Inc., 104 F.2d 306 (2d Cir.), cert. denied, 308 U.S. 597 (1939).

copyright interests had been vested.⁸ In its final few sentences he voiced his indignation at what was then happening to his beloved Poland:

"For the wrongs which I have suffered, and I have suffered many, I forgive in a Christian spirit. I cannot forgive those haughty and vile persons who, thinking only of their personal advantage and their own aggrandizement, led and are leading the Fatherland to perdition and the nation to degradation. God himself will not forgive them."

8. Royalties amounting to \$4,172, on Paderewski's vested copyright interest in his *Memoires* and famous *Minuet*, are being returned to the University of Cracow, Poland.

PART II.

**LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS**

1. UNITED STATES OF AMERICA AND TERRITORIES

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

Public Law 87-668, 87th Congress, H.J. Res. 627, September 19, 1962. Joint resolution extending the duration of copyright in certain cases. Washington, Govt. Print. Off. 1962. 1 p. (76 Stat. 555).

See Notice from the Register of Copyrights, 9 BULL. CR. SOC. 499, Item 386 (1962).

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

Public Law 87-773, 87th Congress, H.R. 11793, October 9, 1962. An Act to provide criminal penalties for trafficking in phonograph records bearing forged or counterfeit labels. Washington, Govt. Print. Off. 1962. 1 p. (76 Stat. 775).

The Act reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 113, title 18, United States Code, as amended, is further amended by adding at the end thereof the following new section:

"§2318. Transportation, sale, or receipt of phonograph records bearing forged or counterfeit labels

"Whoever knowingly and with fraudulent intent transports, causes to be transported, receives, sells, or offers for sale in interstate or foreign commerce any phonograph record, disk, wire, tape, film, or other article on which sounds are recorded, to which or upon which is stamped, pasted, or affixed any forged or counterfeited label, knowing the label to have been falsely made, forged, or counterfeited, shall be fined not more than \$1,000 or imprisoned not more than one year, or both."

SEC. 2. The chapter analysis of chapter 113, title 18, United States Code, is amended by adding at the end thereof the following:

"Sec. 2318. Transportation, sale, or receipt of phonograph records bearing forged or counterfeit labels."

Approved October 9, 1962.

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

Public Law 87-846, 87th Congress, H.R. 7283, October 22, 1962. An Act to amend the War Claims Act of 1948, as amended, to provide compensation for certain World War II losses. Washington, Govt. Print. Off. 1962. 2 pp. (76 Stat. 1107).

The Act reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * *

TITLE II

SEC. 201. That the Trading With the Enemy Act, as amended, is amended as follows:

* * * *

SEC. 206. At the end of the Act, as amended, add the following new section:

"SEC. 41. (a) * * * *

"(b) As used in this section the word 'copyrights' includes copyrights, claims of copyrights, rights to copyrights, and rights to copyright renewals.

"(c) All copyrights vested in the Alien Property Custodian or the Attorney General under the provisions of this Act subsequent to December 17, 1941, which have not been returned or otherwise disposed of under this Act, except copyrights vested by vesting orders 128 (7 F.R. 7578), 13111 (14 F.R. 1730), 14349 (15 F.R. 1575), 17366 (16 F.R. 2483), and 17952 (16 F.R. 6162) and copyrights vested with respect to the motion picture listed last in exhibit A of vesting order 11803, as amended (13 F.R. 5167, 15 F.R. 1626), are hereby divested as a matter of grace, effective the ninety-first day after the date of enactment of this section, and the persons entitled thereto shall on that day succeed to the rights, privileges, and obligations arising out of such copyrights, subject, however, to—

"(1) the rights of licensees under licenses issued by the Alien Property Custodian or the Attorney General in respect of such copyrights;

"(2) the rights of assignees under assignments by the Alien Property Custodian or the Attorney General of interests in such licenses; and

"(3) the right retained by the United States to reproduce, for its own use, or exhibit any divested copyrighted motion picture films.

The rights and interests remaining in the Attorney General under licenses issued by him or by the Alien Property Custodian in respect to copyrights divested hereunder are hereby transferred, effective the day of divestment, to the persons entitled to such copyrights: *Provided*, That all unpaid royalties or other income accrued in favor of the Attorney General under such licenses prior to the day of divestment shall be paid by the licensees to the Attorney General.

"(d) All rights or interests vested in the Alien Property Custodian or the Attorney General under the provisions of this Act subsequent to December 17, 1941, arising out of prevesting contracts entered into with respect to copyrights, except—

"(1) royalties or other income received by or accrued in favor of the Alien Property Custodian or the Attorney General under such contracts;

"(2) rights or interests which have been returned or otherwise disposed of under this Act; and

"(3) rights or interests vested by vesting orders 128 (7 F.R. 7578), 13111 (14 F.R. 1730), 14349 (15 F.R. 1575), and 17366 (16 F.R. 2483),

are hereby divested as a matter of grace, effective the ninety-first day after the date of enactment of this section, and the persons entitled to such rights or interests shall succeed thereto, subject to the right of the Attorney General to collect and receive all unpaid royalties or other income accrued in his favor under such prevesting contracts prior to the day of divestment.

"(e) Nothing in this section shall be construed to transfer to a person entitled to a copyright divested hereunder the right of the Attorney General to sue for the infringement of such copyright during the period between (1) the vesting thereof or the vesting of rights and interests in a contract entered into with respect thereto, and (2) the day of divestment. The right to sue for infringement shall remain in the Attorney General."

TITLE III

SEC. 301. If any provision of this Act, or the application thereof to any person or circumstances, shall be held invalid, the remainder of this Act, or the application of such provisions to other persons or circumstances, shall not be affected.

Approved October 22, 1962.

The Copyright Office has issued a circular entitled "Copyrights Divested under Recent Amendments to the Trading With the Enemy Act", in regard to Public Law 87-846, which reads in part as follows:

"No monetary return in the form of compensation or accumulated royalties is involved. This return is subject to the rights of licensees and assignees and to the right of the United States to exhibit or reproduce for its own use any divested copyrighted motion picture film. Licensees, however, are directed to pay to the Attorney General any unpaid royalties accrued to the day of divestment. Excepted from the return are some specific copyrights of a few high Nazi leaders.

"The divestment of these copyrights is automatic and it is not necessary for specific claims to be filed for their return, the law declaring simply that on the effective date, the persons entitled shall 'succeed to the rights, privileges and obligations arising out of such copyrights.' The divestment is not to be construed as including the right to bring an action for infringement occurring while the property was vested; this right remains in the Attorney General.

"All vested rights and interests arising out of pre-vesting contracts affecting copyrights are also returned under the same procedure, with the exception of contracts relating to most of the previously mentioned Nazi works. Royalties under such contracts accrued to or received by the Attorney General or his predecessor are excepted from the divestment, as are all rights or interest in such contracts which have been previously disposed of or returned.

"It should be noted that under this law the Copyright Office has not been delegated any function with respect to the divestment."

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

Public Law 87-861, 87th Congress, H.R. 9045, October 23, 1962. An Act to amend the Trading With the Enemy Act, as amended. Washington, Govt. Print. Off. 1962. 2 pp. (76 Stat. 1139).

This Act provides (a) for the transfer to the Library of Congress of title to all prints of motion pictures now in the custody of the Library, which prints were vested in or transferred to the Alien Property Custodian or the Attorney General pursuant to the Trading With the Enemy Act after December 17, 1941, except prints of motion pictures which are the subject of suits or claims under section 9(a) or section 32 of said Act. It also provides:

"(b) Subject to the right of selection by the Library of Congress, the authorization, direction, and exception contained in subsection (a) hereof shall apply with respect to such prints now in the custody of the Attorney General.

Prints not selected by the Library of Congress may be disposed of by the Attorney General in any manner he deems appropriate.

“(c) With respect to all prints concerning which title is transferred to the Library of Congress pursuant to subsections (a) and (b) hereof, the Library shall have complete discretion to retain such prints and to reproduce copies thereof, or to dispose of them in any manner it deems appropriate.”

Approved October 23, 1962.

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

Public Law 87-748, 87th Congress, October 5, 1962. 76 Stat. 744. Washington, Govt. Print. Off. 1962.

This recent amendment to the Judicial Code gives to the U. S. district courts “original jurisdiction of any action in the nature of mandamus” against a U. S. official or employee “to perform a duty owed to the plaintiff.” The same law also authorizes the institution of such action, *inter alia*, in the district where the plaintiff resides and provides that the summons and complaint may be delivered by certified mail to the U. S. officer or agency concerned.

Although the demand for this legislation originated with those who sought review in their local districts of various decisions relating to public lands, such as the granting of grazing rights and oil and gas leases, the scope of the new law in effect transfers the long standing jurisdiction of the U. S. District Court for the District of Columbia in all mandamus actions against federal officials to all other U. S. district courts. Such action alleviates the previously existing onerous burden of instituting the action in the District of Columbia court.

Although a primary concern of the Congress in enacting this legislation was to eliminate this burden upon citizens seeking relief against their government, the legislation also would seem to result in easing the congestion of the courts in Washington. Looking at the other side of the coin, the legislation conceivably could result in more expense to the taxpayer in that mandamus actions may increase in number, and when they involve such matters as agricultural allotment problems, communications law, patents and copyrights, and other highly specialized fields, it will become necessary for the government to send attorneys from Washington to assist the U. S. Attorneys in the field in the preparation and trial of such actions. Notwithstanding this possibility, the legislation would seem to deserve the plaudits and approbation of the bar.

GEORGE D. CARY

8. U. S. CONGRESS. HOUSE.

H.R. 12821. A bill to implement the Agreement on the Importation of Educational, Scientific, and Cultural Materials, opened for signature at Lake Success on November 22, 1950. Introduced by Mr. Mills, August 8, 1962, and referred to the Committee on Ways and Means. 11 p. (87th Cong., 2d sess.)

A bill to implement the so-called "Florence Agreement," and somewhat similar to H.R. 2537 introduced by Mr. Daniels during the first session of the 87th Congress. See 8 BULL. CR. SOC. 178, Item 134 (1961).

9. U. S. CONGRESS. HOUSE.

H.Res. 794. Resolution [to authorize an investigation into practices of Government copyrights, and for other purposes]. Submitted by Mr. Mathias, September 4, 1962, and referred to the Committee on Rules. 2 p. (87th Cong., 2d sess.)

A resolution which would authorize the House Committee on the Judiciary to conduct an "investigation and study of existing law and actual practice with respect to (1) the copywriting [sic] of material prepared by officers or employees of the United States, either in their capacity as such, or on matters directly related to their official duties, or as a result of the expenditure of Government funds and (2) the publication by private publishers, for profit or otherwise, of material originally prepared by or for the United States or any agency or instrumentality thereof and the extent to which the source of such material is properly credited."

10. U. S. CONGRESS. HOUSE.

H.Res. 829. Resolution [to authorize an investigation into practices of Government copyrights, and for other purposes]. Submitted by Mr. Cramer, October 5, 1962, and referred to the Committee on Rules. 2 p. (87th Cong., 2d sess.)

Identical with H.Res. 794. See Item 9, *supra*.

11. U. S. CONGRESS. HOUSE.

Paper curtain. Extension of remarks of Hon. John J. Rhodes of Arizona in the House of Representatives, Tuesday, July 31, 1962. *Congressional Record*, vol. 108, no. 149 (daily ed. Aug. 22, 1962), p. A6352.

Congressman Rhodes inserts into the appendix of the *Record* an editorial which appeared in the July 17, 1962 issue of the *Arizona*

Republic under the caption, "Paper Curtain." The editorial concerns the placing, by the Government, of "copyright restrictions on the contents of its publications and documents," with special reference to the advertisement appearing in the July 9, 1962 issue of the *New York Times* under the heading, "Legality of Governmental Copyrighting Challenged by Leading Editors and Scholars."

12. U. S. CONGRESS. HOUSE.

Revision of copyright law, long overdue, should aid the fine arts. *Congressional Record*, vol. 108, no. 157 (daily ed. Aug. 31, 1962), pp. 17227-17229.

Congressman McDowell includes, as part of his remarks on the subject of encouraging the fine arts, his statement given at hearings before the Senate Subcommittee on the Arts on August 31, 1962. In his statement the Congressman urges that S. 785 and S. 1250 be amended by the deletion of the Federal subsidy provisions and the substitution therefor of the *domaine d'état* provisions of his bill, H.R. 9906. See 9 BULL. CR. SOC. 247, Item 139 (1962).

13. U. S. CONGRESS. HOUSE.

Copyrighting of material prepared by officers and employees of the United States. [Revision and extension of remarks of Mr. Mathias] *Congressional Record*, vol. 108, no. 173 (daily ed. Sept. 25, 1962), pp. 19440-19441.

Congressman Mathias includes in his remarks the texts of H.Res. 794 which he introduced on September 4, 1962 (see Item 9 *supra*), and of three editorials which criticized the recent decision of the administration to permit the astronauts to sell stories of their personal experiences for their personal profit.

14. U. S. CONGRESS. HOUSE.

Government violates first amendment. Extension of remarks of Hon. Peter H. Dominick of Colorado in the House of Representatives, Thursday, July 26, 1962. *Congressional Record*, vol. 108, no. 128 (daily ed. July 26, 1962), p. A5779.

Congressman Dominick inserts into the appendix of the *Record* an article which appeared in a recent issue of the *Longmont, Colo., Daily*

Times-Call, under the caption, "Salmagundi; Government Violates First Amendment." The article comments critically on copyright restrictions placed by the Government on its publications.

15. U. S. CONGRESS. SENATE.

H.R. 11970. Amendment [D] intended to be proposed by Mr. Javits to the bill (H.R. 11970) to promote the general welfare, foreign policy, and security of the United States through international trade agreements and through adjustment assistance to domestic industry, agriculture, and labor, and for other purposes. . . . Referred to the Committee on Finance, August 7, 1962. 1 p. (87th Cong., 2d sess.)

This proposed amendment would specify "infringements of United States patents, copyrights, or registered trademarks, or tolerance of such infringements or of international cartels" as actions unjustifiably restricting U. S. commerce and as a cause for retaliatory action by the United States in the form of withdrawal of benefits of trade agreements concessions. Cf. 108 Cong. Rec. 14706 (daily ed. Aug. 7, 1962).

16. U. S. CONGRESS. SENATE. *Committee on the Judiciary*.

Criminal penalties for trafficking in phonograph records bearing counterfeit labels. Report to accompany H.R. 11793, submitted by Mr. Eastland, September 25, 1962. 9 p. (87th Cong., 2d Sess., S.Rept. No. 2154). See Item 4, *supra*.

A favorable report recommending Senate passage of the bill with amendments reducing the amount of the maximum fine from \$10,000 to \$1,000, and the maximum prison term from ten years to one year.

On September 27 the bill was passed by the Senate as amended, and on September 28 it was cleared for Presidential signature by House agreement to the Senate amendments.

17. U. S. CONGRESS. SENATE. *Committee on the Judiciary*.

Extending the duration of copyright protection in certain cases. Report to accompany H.J. Res. 627, submitted by Mr. McClellan, August 20, 1962. 6 p. (87th Cong., 2d sess., S. Rept. No. 1888). See Item 3, *supra*.

A favorable report recommending Senate passage of the joint resolution as amended and approved by the House on June 18th.

18. U. S. CONGRESS. SENATE.

The Government copyright racket. Congressional Record, vol. 108, no. 139 (daily ed. Aug. 9, 1962), pp. 15019-15021.

Remarks of Senator Proxmire on the floor of the Senate with respect to the copyrighting of Government publications with the insertion into the *Record* of the following: an article by Herbert Brucker, entitled "The Government copyright racket" (*Saturday Review*, Aug. 11, 1962); a letter to the Senator from Mr. Kaminstein, Register of Copyrights, dated June 1, 1962; an editorial entitled "Uncle Sam abuses copyright" (*Wausau, Wis., Record-Herald*, July 11, 1962); and an advertisement by Mr. Schnapper, editor of the Public Affairs Press, entitled "Liability of governmental copyrighting challenged by leading editors and scholars" (*New York Times*, July 9, 1962).

19. U. S. COPYRIGHT OFFICE.

Jeux. (*Interauteurs*, 226, no. 147, 2d quarter 1962.)

At head of title: Copyright Office—Library of Congress—Circulaire 17.

A French translation of Copyright Office Circular 17, Games. See 9 BULL. CR. SOC. 248, Item 142 (1962).

20. U. S. COPYRIGHT OFFICE.

Mention de copyright antdatée. (*Interauteurs*, 225, no. 147, 2d quarter 1962.)

At head of title: Copyright Office—The Library of Congress—Circulaire 3S.

A French translation of Copyright Office Circular 3S, Antedated notice.

21. U. S. COPYRIGHT OFFICE.

Copyright pour des publications sous forme de feuilles mobiles. (*Interauteurs*, 225-226, no. 147, 2d quarter 1962.)

At head of title: Copyright Office—The Library of Congress—Circulaire 16C.

A French translation of Copyright Office Circular 16C, Copyright for loose-leaf publications. See 9 BULL. CR. SOC. 316, Item 196 (1962).

22. U. S. COPYRIGHT OFFICE.

Copyright pour les imprimés ou étiquettes commerciales. (*Interauteurs*, 226-228, no. 147, 2d quarter 1962.)

At head of title: Copyright Office—Library of Congress—Circulaire 46.

A French translation of Copyright Office Circular 46, Copyright for Commercial prints and labels. See 9 BULL. CR. SOC. 316, Item 195 (1962).

23. U. S. COPYRIGHT OFFICE.

La Convention universelle sur le droit d'auteur. (*Interauteurs*, 224-225, no. 147, 2d quarter 1962.)

At head of title: Copyright Office—Library of Congress—Circulaire UCC 1.

A French translation of Copyright Office Circular UCC 1 [rev.] which explains briefly the application of the Universal Copyright Convention to United States works.

24. U. S. GENERAL SERVICES ADMINISTRATION.

Title 41—Public contracts. Chapter 5—General Services Administration. Part 5-54—Patents and copyrights. (27 *Federal Register* 7876-7877, no. 154, Aug. 9, 1962.)

A new part entitled "Patents and copyrights" has been added to title 41, chapter 5 of the Code of Federal Regulations prescribing policy and procedure for public contracts involving patents and copyrights. The new addition includes a general definition of a copyright and expresses the policy that copyrighted matter will not knowingly be incorporated in publications prepared by or for the Government except with the written consent of the copyright owner. There is also included a further expression of policy prescribing the conditions under which the Government shall be granted a royalty-free license with respect to copyrightable materials.

2. FOREIGN NATIONS

25. GHANA. *Laws, statutes, etc.*

Gesetz Nr. 85 über das Urheberrecht vom 8. November 1961. 64 *Blatt für Patent-, Muster- und Zeichenwesen*, 284-287, no. 9, Sept. 1962.)

A German translation of the new Copyright Law of Ghana.

26. GHANA. *Laws, statutes, etc.*

Loi sur le droit d'auteur du 8 novembre 1961, no. 85. (*Interauteurs*, 217-224, no. 147, 2d quarter 1962.)

A French translation of the new Copyright Law of Ghana.

27. GREAT BRITAIN. BOARD OF TRADE. *Departmental Committee on Industrial Designs.*

Report. London, H. M. Stationery Off., 1962. 143 p. Gt. Brit. Parliament. Papers by command, cmd. 1808.

The report and recommendations of a committee appointed on May 11, 1959 "to consider and report whether any, and if so what, changes are desirable in the law relating to the protection of industrial design." The Committee recommends, *inter alia*, that "a new system of protection for designs, to be known as Design Copyright, should be introduced in addition to the existing system, to be known as Design Monopoly."

28. RUSSIA (1923, U.S.S.R.). *Laws, statutes, etc.*

Loi de l'Union des Républiques Socialistes Soviétiques concernant l'approbation des principes de la législation sur le droit civil de l'Union des Républiques Socialistes Soviétiques et des législations des Républiques fédérées. (75 *Le Droit d'Auteur*, 190-191, no. 9, Sept. 1962.)

A French translation of the copyright sections of the *Principles of Civil Legislation of the USSR and the Union Republics* enacted by the Supreme Soviet on December 8, 1961. The *Principles* are discussed in 9 BULL. CR. SOC. 295, Item 187 (1962).

29. SWEDEN. *Laws, statutes, etc.*

Gesetz Nr. 729 über das Urheberrecht an Werken der Literatur und Kunst vom 30. Dezember 1960. (64 *Blatt für Patent-, Muster- und Zeichenwesen*, Urheberrechts-Teil, 247-252, no. 7/8, July-Aug. 1962.)

A German translation of the Swedish Law on copyright in works of literature and art of December 30, 1960.

30. SWEDEN. *Laws, statutes, etc.*

Gesetz Nr. 730 über das Recht an photographischen Bildern vom 30. Dezember 1962. (64 *Blatt für Patent-, Muster- und Zeichenwesen*, Urheberrechts-Teil, 252-254, no. 7/8, July-Aug. 1962.)

A German translation of the Swedish Law on copyright in photographic pictures.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

31. NEW ADHERENCE TO THE UNIVERSAL COPYRIGHT CONVENTION.

The Copyright Office has announced that it has learned, unofficially, that on October 23, 1962, Norway deposited with the Director-General of UNESCO its instrument of ratification of the Universal Copyright Convention and its annexed three Protocols.

Under Article IX, paragraph 2, of the Convention, the latter will come into force in respect of Norway three months after the deposit of its instrument of ratification, i.e., on January 23, 1963.

Norway is the 44th country to adhere to the Convention.

PART IV.

**JUDICIAL DEVELOPMENTS IN LITERARY
AND ARTISTIC PROPERTY**

A. DECISIONS OF U.S. COURTS

1. Federal Court Decisions

32. *Robauer v. Friedman*, 306 F. 2d 933, 134 U.S.P.Q. 561 (9th Cir., July 25, 1962) (Stephens, J.)

Appeal from judgment for plaintiff in action for damages for copyright infringement and to enjoin future infringement. Plaintiff claimed that he had acquired title to the renewal copyright in the 1924 film, "The Navigator", through a series of transactions as follows: The original copyright proprietor of the movie (which was produced by Buster Keaton Productions, Inc.) was the distributor, Metro-Goldwyn Pictures Corp. In 1937 Metro assigned to Loew's Incorporated "all right, title and interest of METRO in and to, any and all motion pictures . . . and all copyright thereof . . . recorded in the name of METRO as proprietor and/or owner . . . in the Office of the Register of Copyrights of the United States." In 1952 Loew's Incorporated renewed the copyright, and in 1960 (by which time its name had been changed to Metro-Goldwyn-Mayer Inc.) it assigned all its interest in "The Navigator", including the renewed copyright, to plaintiff. Defendant admitted that he had "duped" the film and had exhibited a duped copy in his theater, but challenged the validity of plaintiff's title to the copyright.

Held, affirmed.

Defendant challenged plaintiff's ownership of a valid copyright on three grounds.

I. It was held that defendant's contention that Metro-Goldwyn Pictures Corp. did not obtain a valid copyright in 1924 could not be sustained. The court said:

"The introduction into evidence of a copyright Certificate of Registration creates a prima facie case as to the facts stated therein. 17 U.S.C. §209; *Vance v. American Society of Composers, etc.*, 271 F. 2d 204 (8th Cir. 1959); *Wihtol v. Wells*, 231 F. 2d 550 (7th Cir. 1956); *National Institute, Inc., etc. v. Nutt*, 28 F. 2d 132 (D. Conn. 1928). The burden then shifts to the other party to go

forward with the evidence in order to overcome such prima facie case. There is nothing in the stipulated facts in the Pre-Trial Order which controverts the prima facie case made out by the introduction into evidence of the 1924 Certificate of Registration."

II. The defendant also claimed that the 1937 assignment from Metro to Loew's did not pass title to the renewal rights because renewals were not specifically mentioned in the assignment. The court held that in this case, an express reference to renewal rights was not required in order to find the necessary intent to convey them. The court stated:

"By requiring the express mention of renewal rights in . . . transfers (of copyright), thus avoiding an inadvertent or unintended transfer of such rights, the courts have found a means of carrying out the statutory policy of protecting the copyright interests of original authors and certain of their heirs. See 17 U.S.C. §24; *Edward B. Marks Music Corp. v. Charles K. Harris Music Pub. Co.*, 255 F. 2d 518 (2nd Cir. 1958) ; and *Rossiter v. Vogel*, 134 F. 2d 908 (2nd Cir. 1943). That policy and rule clearly have no application here, since none of the parties before the court are within the class of persons given special statutory consideration.

"Thus the scope of factual examination made to determine the intent of the parties to this assignment is not as limited as defendant contends. The language of the agreement in general, as well as the circumstances surrounding its execution may also serve to indicate the intent of the parties. And where there is evidence which shows an intention to transfer the renewal rights, the fact that they were not expressly mentioned in the assignment of the original copyright will not preclude their passing with the copyright. *Edward B. Marks Music Corp. v. Charles K. Harris Music Pub. Co.*, 255 F. 2d 518 (2nd Cir. 1958)."

The court found that the "all-inclusive language" of the assignment by Metro to Loew's of "*all right, title and interest . . . in and to, any and all motion pictures . . . and all copyright(s) thereof . . .*" showed an intent to convey the renewal as well as the original term, and that the course of action of the parties—Metro was dissolved and went out of existence shortly after making the assignment to Loew's—was inconsistent with an intention on the part of Metro to retain a right to renew, fifteen years later, the copyright in "*The Navigator*."

III. In addition, defendant attacked the validity of the copyright renewal by Loew's Incorporated in 1952 on the ground that at the time

of the renewal, Loew's falsely claimed to be a proprietor of a work made for hire. The court held, however, that while it was true that no employer-employee relationship subsisted between the renewal applicant and the actual creator of the work at the time of the renewal, this did not impair Loew's right to renew. The court said:

"Defendant has mistaken the requirements for renewal. The fact that the employer-employee relationship no longer exists at the time of renewal is immaterial. This is true because the author (employee) of a work made for hire obtains no interest in the copyrights or renewals relating to such work. All the rights pertaining to such work reside in the employer. 17 U.S.C. 24; *Shapiro, Bernstein & Co. v. Bryan*, 123 F. 2d 697 (2nd Cir. 1941); *Tobani v. Carl Fischer, Inc.*, 98 F. 2d 57 (2nd Cir. 1938), cert. denied, 305 U.S. 650 (1938); *Von Tilzer v. Jerry Vogel Music Co.*, 53 F. Supp. 191 (S.D.N.Y. 1943), aff'd. *Gumm v. Jerry Vogel Music Co.*, 158 F. 2d 516 (2nd Cir. 1946). And since the author has no interest in either the work, its copyright, or the renewal thereof, his state of employment at the time of renewal has no effect on the employer's rights to renew the copyright."

IV. Defendant's contention, raised for the first time on appeal, that the 1960 assignment to plaintiff had been altered to show a false date, was rejected on procedural grounds.

33. *Rico, Ltd. v. Hub Floral Mfg. Co.*, 206 F. Supp. 192, 134 U.S.P.Q. 70 (S.D.N.Y., June 18, 1962) (Ryan, J.)

Action to enjoin importing and selling plastic flowers and foliage which allegedly infringed plaintiff's copyrights. Plaintiff is a Hong Kong manufacturer of polyethylene artificial flowers, and the holder of U.S. copyright in sprays of boxwood and Chinese aster, registered as three-dimensional works of art. Defendant is a long-established importer of artificial flowers and shrubs. Plaintiff claims that the boxwood and Chinese aster sprays included in defendant's catalog infringe the copyright in its flowers, and obtained a restraining order which defendant now seeks to vacate.

Held, preliminary injunction denied; motion to vacate restraining order granted.

I. The court assumed, without deciding, that plaintiff's flowers were copyrightable, noting that "they appear to present some evidence of originality of form, contour, configuration and to be the product of artistic

skill and judgment. *Prestige Floral Societe Anonyme v. California Artificial Flower Co.*, D.C., 201 F. Supp. 287."

II. It was held that the similarities between the flowers was not so great as to establish copying, especially in the absence of any proof of access. The court said:

"There is no evidence and plaintiffs do not urge that defendant's articles are actual copies made from plaintiff's own molds; or from defendant's mold copied from plaintiff's molds. In fact, the evidence is to the contrary . . . The evidence is uncontradicted that defendant neither knew, nor saw, nor heard of plaintiff's copyright until it was sued herein. . . .

"The question then is whether the articles are so substantially similar to each other as to almost compel the conclusion that defendant's item is not the product of its own independent artistry, skill and judgment, but must rather be the result of a conscious copying and appropriation of plaintiff's design.

"We have carefully examined the plaintiff's flowers and box-wood and compared them side by side with defendant's accused items and we conclude that their overall appearance, resulting from variation of detail of leaf and flower design, placement, color and angle, is not so similar as to warrant a finding that plaintiffs would ultimately succeed in establishing that defendant copied their copyrighted articles. And this would be so to the casual observer who might normally overlook the disparity of detail which as we have pointed out appears to be substantial. *Peter Pan Fabrics Inc. v. Martin Weiner Corp.*, 2 Cir., 274 F. 2d 487. Naturally, there are essential basic similarities of form, size, composition and coloring since after all the copyrighted and accused products are copies of living flowers and leaves, but the similarities are not 'so numerous and substantial as to give rise to a strong inference of copying.' *Joshua Meier Co. v. Albany Novelty Mfg. Co.*, 236 F. 2d 144 (2d Cir., 1956); *Prestige Floral, Societe Anonyme v. Zunino-Altman, Inc.*, 203 F. Supp. 649 (1962 S.D.N.Y.); but see *Prestige Floral, Societe Anonyme v. California Artificial Flower Co.*, 201 F. Supp. 287 (1962 S.D.N.Y.)."

34. *United States v. American Society of Composers, Authors and Publishers*, 208 F. Supp. 896, 135 U.S.P.Q. 297 (S.D.N.Y., Sept. 14, 1962) (Ryan, J.)

Petition "for the determination of reasonable license fees" under the Amended Consent Judgment entered on March 14, 1950 in the antitrust

suit entitled *United States v. ASCAP*. Petitioners, who include more than 335 local television stations in the United States, asserted that neither a blanket license covering the entire ASCAP repertory for all locally originated shows (the type of license they have had for many years) nor a per program license, also available from ASCAP under the consent decree, are reasonable. They demanded instead a blanket license covering locally originated and produced programs only, with ASCAP being compelled to license at the source all network shows and all programs pre-recorded by persons other than the licensed station.

Held, petition denied, with petitioners given leave to apply for fixation of reasonable fees on a renewal of the type of license they now hold.

It was held that the court did not have the power, under the provisions of the consent judgment allowing for determination of reasonable fees, to compel ASCAP to grant "a radically different license from that under which petitioners have been operating for the past twelve years." The court said:

"The type of license sought is neither the blanket nor per program license described in the judgment. Petitioners would have a composite sort of license, containing a little bit of both, which would grant them the right to use any, some or all of the compositions of ASCAP's repertory on all their locally-originated broadcasts, while excluding from such license music performing rights for network programs and prerecorded material produced after February 28, 1962 by persons other than petitioners; as to these, petitioners would demand that the rights be secured, cleared and paid for at the source. . . .

"It is petitioners' position that the power to fix reasonable fees encompasses the power to fix a type of license which the court finds to be reasonable . . . and that consequently no amendment to the decree is necessary in order to grant the application. . . . And it is the ASCAP's position that, apart from the express prohibitions and restrictions as to the types of licenses it may not force on an applicant and the affirmative duty it has to offer upon request by an applicant a choice of the types of license enumerated in the judgment, it is free to negotiate with an applicant for a particular kind of license on particular terms, and that, therefore, the court lacks power to direct the issuance of the license sought, irrespective of its reasonableness. . . .

"We agree with the position taken by ASCAP, for the mere fact that a particular license requested may be more reasonable than that which has been given in the past, does not impose upon

ASCAP the duty to grant such license, nor does it give the court additional powers not contained in the judgment. . . .

"Petitioners urge that the type of license they seek would give greater effect to provisions of the Amended Judgment, which, they argue, is rendered ineffectual by the present type of broadcasting licenses. If this be so (and we make no finding either way), relief could only be had by a reappraisal of the Amended Judgment . . . on a petition filed for such relief by a party to the suit.

"Petitioners were not parties to the judgment; they have petitioned only as beneficiaries under it and they may not under cover of the protection from discrimination afforded them under its provisions indirectly effect an amendment to that judgment so as to wrest from ASCAP a type of license it is now under no judicial compulsion to grant."

35. *Creative Arts, Inc. v. Abady & Sultan, Inc.*, 134 U.S.P.Q. 388 (S.D. Fla., Feb. 13, 1962) (Dyer, J.)

Action for copyright infringement. Plaintiff is the holder of copyright in several religious works of art. Defendant Creative Arts Distributing Co. had been plaintiff's exclusive licensee to sell these works in a specified territory not including Florida. Three days after this license was terminated, the distributing company sold a quantity of these works to the other defendant, Abady & Sultan, in Florida. The latter continued to resell the works after being served with a summons in this action and right up to the time of trial. In addition, defendants had one of the works, "The Messiah," copied, and sold the copies.

Held, judgment for plaintiff.

The court held that defendants had infringed plaintiff's copyrights by copying the "Messiah" and selling the copies, and also by their unauthorized sales of the art objects manufactured by plaintiffs. The court stated that these sales were an infringement of plaintiff's copyright because they "constituted an interference with plaintiff's exclusive right to vend under its copyrights. 17 U.S.C. 1."

Plaintiff was awarded \$1500 in counsel fees in addition to \$1250 minimum statutory damages against the distributing company and \$1750 damages against Abady & Sultan.

36. *Cable Vision v. KUTV, Inc.*, 135 U.S.P.Q. 2 (D. Idaho, July 30, 1962) (Sweigert, J.)

In action for violation of antitrust laws, motion for preliminary injunction on counterclaim by defendant, The KLIX Corporation, for

unfair competition. This is "one of a series of cases brought to test the rights of so-called community antenna services to pick up the broadcasts of regularly licensed television stations for commercial distribution to their subscribers." (See *Intermountain Broadcasting & Television Corp. v. Idaho Microwave*, 196 F. Supp. 315, 130 U.S.P.Q. 127, 8 BULL. CR. SOC. 373, Item No. 368.) (D. Idaho, 1961)). KLIX, a Twin Falls, Idaho, television station, had made contractual arrangements with the three major networks pursuant to which it picks up the signals of three Salt Lake City network affiliates and rebroadcasts network programs to the Twin Falls television area. KLIX can broadcast only one such program at a time. Plaintiffs operate a community antenna in Twin Falls, picking up the same Salt Lake City television signals, and making all three available to its subscribers by means of microwave and cable transmission. KLIX charged in its counterclaim that it was losing advertising revenue because its anticipated audience, which could now watch the same network programs either on KLIX or, by means of the community antenna, on the Salt Lake City stations, was diminished by this duplication, and therefore local commercials reached fewer people.

Held, preliminary injunction granted.

I. That The KLIX Corporation has an exclusive contractual right to first call on network programs in Twin Falls was shown, the Court said, "by its existing contracts and by evidence of a generally recognized trade practice. . . . In the custom of the industry, the networks preclude themselves from licensing a simultaneous broadcast of their programs by any other station in that community."

II. It was held that state common law applied to counterclaimant's allegations of tortious interference with its exclusive contractual rights and unfair competition:

a) While the states would be barred, the Court said, by federal preemption of the communications field, from recognizing an exclusivity arrangement prohibited by federal statute or by regulations of the Federal Communications Commission, the arrangement here, limited to a single community, is "expressly permissible, valid and in conformance with present national policy." See FCC, Regulations, Sec. 3.568, Subsection B. The FCC prohibits exclusivity arrangements which give rights in larger geographical areas.

b) That community antennas are not subject to FCC regulation because they are not "broadcasters" under section 153(a) of the Federal Communications Act does not mean that they are also exempt from "ordinary common law responsibility to others—broadcasters or otherwise."

III. It was held that although no relief had been granted in the *Intermountain* case, an injunction against plaintiffs was proper in this case. The court noted that in the *Intermountain* case,

"(T)he question presented was whether a community antenna service in Twin Falls, Idaho, could, without the consent of three network affiliate stations in Salt Lake City, Utah, each of which had contractual rebroadcast arrangements with a local Twin Falls, Idaho, station, pick up the broadcasts of the Salt Lake City stations for distribution to its community antenna subscribers in Twin Falls.

"In those cases this Court held upon a motion for summary judgment that the pickup of the Salt Lake City broadcasts by the community antenna for such purpose did not, under the circumstances, amount to unfair competition with the Salt Lake City stations within the doctrine of *International News Service v. Associated Press*, 248 U.S. 215 (1918), and related cases. . . .

"In its previous opinion this Court expressly noted that no exclusive license rights were relied upon by the Salt Lake City stations in those cases, and, further, that the existence of possible exclusive license rights was not sufficiently documented in those cases to justify a determination on that ground by summary judgment."

Pointing out that the instant case is substantially different from the *Intermountain* case in that "the dispute here is not between Salt Lake City broadcasting stations and a Twin Falls, Idaho, community antenna service, as in the previous cases, but between KLIX, Twin Falls, the broadcaster, and the Twin Falls community antenna service," and in that in this case an exclusive contractual right was established, the court held that the community antenna was guilty both of interference with counterclaimant's contractual rights and of unfair competition. The court said:

"It has been generally held as a matter of common law under the doctrines of tortious interference with contractual rights, and under the doctrine of unfair competition as well, that one who contractually acquires, either expressly or impliedly by reference to a general industry wide custom, the exclusive right to the first call of entertainment programs, is entitled to protection of that valuable economic right, not only against the grantor, but also against acts of third persons which tortiously and unfairly prevent exploitation of the right or diminish its value. This is true without regard to and apart from any question of copyright ownership of particular program content. See, *Alcazon Amusement Co. v. Mudd & Cooley Amusement Co.*, 204 Ala. 509, 86 So. 209 (1920); *Montgomery Enterpriser*

v. Empire Theatre Co., 204 Ala. 566, 86 So. 880, 19 A.L.R. 987; Wells v. National Exhibitors Circuit, 149 Ga. 200 (1919); Peekskill Theatres v. Advance Theatrical Co., 206 App. Div. 138, 200 N.Y.S. 726 (1923); Meyer v. Washington Times Co., 76 F. 2d 988 (D.C. Cir. 1935).

"Also, as recognized by this Court in its previous opinion, the same result has been accomplished upon grounds of unfair competition in cases dealing with radio and television programs. Mutual Broadcasting System v. Muzak Corp., 177 Misc. 489, 30 N.Y.S. 2d 419, 51 USPQ 146 (1941); Twentieth Century Sporting Club v. Transradio Service, 165 Misc. 71, 300 N.Y.S. 159 (1937) . . .

"For the foregoing reasons the Court, finding that KLIX has acquired a contractual exclusive right to the first run of network and film programs in the community of Twin Falls with which plaintiffs, Cable Vision and Microwave, Inc. are tortiously interfering and with which they are unfairly competing to the detriment of KLIX and finding, further, that KLIX has no adequate remedy at law except through the issuance of a preliminary injunction herein, concludes and orders that such preliminary injunction should issue prohibiting defendants (sic) . . . from duplicating for community antenna subscribers in the community of Twin Falls, Idaho, any network or film program to which KLIX exercises a right of first run."

37. *Austin v. Steiner*, 207 F. Supp. 776, 134 U.S.P.Q. 561 (N.D. Ill., Aug. 27, 1962) (Will, J.)

Action for copyright infringement. Plaintiff is the composer of the melody of the two songs, "Gallion Stomp" and "Messin' Around" and the author of the words of "Messin' Around." Copyright in these songs was procured on June 28, 1928 in the name of the publisher, Chicago Music Publishing Co., Inc. Plaintiff and defendant, the latter as the publisher's assignee, each obtained registration of their applications for renewal of the two copyrights during the renewal year. Three years and three months after defendant secured its renewal registration, plaintiff commenced this suit, claiming that she alone was entitled to the renewal, and charging that the renewal by defendant was an infringement of her copyright.

Held, judgment for plaintiff.

It was held that plaintiff, and not defendant, was entitled to the renewal copyright, but that the mere act of applying for a renewal to which the applicant is not entitled is not an infringement.

I. The court found as a matter of fact, based on uncontested affidavits, that plaintiff was not an employee for hire, "but rather that she assigned to Chicago Music the right to be the copyright proprietor" and held that "(t)he necessary conclusion is that the plaintiff alone had the right to renew." The court said:

"Ordinarily, only the proprietor of an initial term copyright is entitled to renew. This includes a corporate proprietor of works written or composed by its employee in the course of his employment. However, only the composer or author may renew copyrights secured by a corporate proprietor as an assignee or licensee of the author or composer. Section 24 of Title 17 United States Code."

II. Plaintiff grounded her charge that defendant had infringed her copyright on the argument that filing for renewal constitutes a publication. The court held, however, that neither initial registration and deposit, nor renewal of a copyright, are such publication as will amount to an infringement. The court stated:

"Plaintiff cites two cases which hold that deposit with the copyright office of a copy or copies of a copyrighted work constitutes publication within the meaning of the statute. *Shilkret v. Musiccraft Records, Inc.*, 2 Cir. 1942, 131 F. 2d 929, cert. denied, 1943, 319 U.S. 742; *Marx v. United States*, 9 Cir. 1938, 96 F. 2d 204. . . .

"The opinions in the cited cases are, however, much narrower than plaintiff suggests. The *Shilkret* decision holds that the word 'published' as used in the proviso of Section 1(e) includes deposit of a copy of an unpublished work with the copyright office. This result extended statutory protection to unpublished works. The *Marx* case holds that the word 'published' as used in the first clause of Section 24 includes deposit of a copy of an unpublished work with the copyright office. This decision prevented the statutory copyright on unpublished works from having infinite duration. Neither holding is determinative of the present litigation.

"Section 10 establishes the means of perfecting a copyright on a published work and Section 13 sets forth the requirement of deposit of two copies as an incident thereto. *Davenport Quigley Expedition, Inc. v. Century Publications, Inc.*, D.C.S.D.N.Y. 1937, 18 F. Supp. 974, 977. Section 12 establishes the means of perfecting a copyright on an unpublished work and also recites the necessary depository requirements incidental to such copyright. *Heim v. Universal Pictures Co.*, 2 Cir. 1946, 154 F. 2d 480, 486. Plaintiff's

proposal, that deposit equals publication, would result in Section 12 being rendered nugatory because the deposit required by Section 12 would immediately cause the work to be published and thereby subjected to the additional depository requirements of Section 13. The Court is extremely reluctant to so interpret the statute as to determine that one section thereof is totally devoid of meaning.

"... Defendant is not alleged to have copied plaintiff's compositions. At most he is charged with having represented to the copyright office that he had the right to copy. He did not publish the compositions other than by his incorporation by reference (in the renewal application). This is not publication, and therefore this is not infringement."

III. It was held that even if the defendant's renewal registration could constitute an infringement, any action therefor would be barred by the statute of limitations, inasmuch as more than three years had passed between that filing and the commencement of the action and there had been no repeated or continuing infringement. The court said:

"If the mere holding of an invalid renewal certificate tolled the statute, plaintiff's cause of action would have an effective life of at least thirty-one years: the twenty-eight year duration of the renewal copyright plus the three year statutory period thereafter. The statute requires no such holding."

2. State Court Decisions

38. *Guide-Kalkhoff-Burr, Inc. v. Berinati Press, Inc.*, 134 U.S.P.Q. 85 (N.Y. Sup. Ct., June 22, 1962) (McGivern, J.)

Action for indemnity and for breach of contract. Defendant Edward Green, on behalf of a customer, placed an order with plaintiff for stock certificates with a special border design (all the parties are in the printing business). When plaintiff was unable to obtain certificate blanks with the specified border, Green arranged to have defendant Berinati Press purchase the design and print it on plaintiff's paper. Upon receiving the imprinted blanks from Berinati Press, plaintiff went ahead and completed the stock certificates in accordance with Green's order. When a claim of copyright infringement was made against plaintiff with respect to the border design, plaintiff settled the claim on advice of counsel to the effect that the claim was valid. He paid the copyright holder a sum of money, destroyed the outstanding forms with the special border, and repurchased from the copyright holder the special design

to reprint the certificates for Green's customer. He seeks to recover the damages thus sustained from the defendants. Defendant Green moved to dismiss the complaint.

Held, motion denied in part, granted in part.

I. It was held that plaintiff was entitled to maintain its first cause of action, which was based upon an implied agreement of indemnity, "it being contended that under the circumstances defendant Green is more culpable than the plaintiff." The court said:

"Plaintiff argues that it was requested by Green to do an illegal act, and that in consequence it sustained damage. The defendant argues that since copyright infringement is a tort and the plaintiff and defendant are co-tortfeasors, no action will lie. However, the plaintiff does not complain of infringement but, rather, of defendant's act in requesting of the plaintiff the use of material which infringed copyright of another. Upon the basis of this theory, plaintiff is entitled to maintain the first cause of action."

II. The plaintiff conceded that its second cause of action, for breach of contract, is asserted against defendant Berinati Press only and not against Green; this cause was, therefore, dismissed as against Green. The court held that the third cause of action, for breach of statutory warranty of title, also applied only to Berinati. This cause of action was also dismissed as against Green.

39. *Edgar Rice Burroughs, Inc. v. Metro-Goldwyn-Mayer, Inc.*, 23 Cal. Repr. 14, 135 U.S.P.Q. 40 (Cal. Dist. Ct. App., July 5, 1962) (Lillie, J.). For decision below, see 130 U.S.P.Q. 245, 8 BULL. CR. SOC. 376, Item 374 (1961).

Appeal from judgment dismissing second amended complaint in action for breach of contract. In a 1931 contract, plaintiff gave defendant the right to create an original story using the character, Tarzan, and to produce a motion picture based thereon. Defendant had the "right to . . . remake said first photoplay and also to produce additional photoplays based on said story" and agreed that all the films it made pursuant to this right were to be "based substantially upon the same story as that used by Metro in connection with said first photoplay" and that there would "be no material changes or material departures from the story used in connection with said first photoplay." Plaintiff alleged that a 1959 remake of the first photoplay under the same title, "Tarzan, the Ape Man," violated the above quoted agreement because the 1959 version was not based on substantially the same story as the original and con-

tained "material changes" and "material departures." After a dismissal on technical grounds, the plaintiff twice amended its complaint, and appeals here from a dismissal of its second amended complaint, which dismissal was based upon a failure to plead a sufficient cause of action.

Held, affirmed.

I. Defendant contended that the trial court had "enlarged the contractual rights of the parties by recognizing the right of MGM to 'update and modernize'." It was held, however, that the trial judge had properly interpreted the contract. The court reasoned that since the contract gave MGM "separate and distinct rights to *make* a photoplay based on the original story, to *reissue* the first photoplay, to *remake* the first photoplay and to *produce additional* photoplays based on the original story . . . for virtually an unlimited period of time in the future," the right to update and modernize the original story must be inherent in the contract, because the right of unlimited remakes would be valueless without it.

II. It was also held that the contract was clear and unambiguous and that it was, therefore, correct for the trial judge to interpret the words "material changes or material departures" as a matter of law, there being "no room" in an unambiguous contract "for an interpretation by way of proof of intent of the parties or custom or usage."

III. Plaintiff's contention that it was denied a trial on "whether the second photoplay is based substantially upon the same story as the first and whether it contains material changes or material departures" was rejected by the court, which agreed with the trial court that as a matter of law the 1959 version was based upon the original story as called for in the contract, and that no "material" changes were made.

The differences between the original story and the second photoplay which were found to exist were characterized by the court as "the updating, modernizing and adaptations" permitted by the court and were held not to be "material." The court said:

"Without question, the lower court possesses the power to view the two photoplays under section 426(3), Code of Civil Procedure, and has the right thereunder on demurrer to determine as a matter of law the issue of substantial similarity without a trial. (*Palmer v. M.G.M. Pictures*, 119 Cal. App. 2d 456; *Weitzenkorn v. Lesser*, 40 Cal. 2d 778.) In the case at bar the issue of substantial similarity consists of the questions whether the second photoplay is based substantially upon the same story as the first, and whether there existed in the second, material changes or material departures. This issue was framed by plaintiff's own specific allegations contained in its

second amended complaint (Para. VIII). The general demurrer thereto directly placed on the lower court the duty to consider all facts disclosed on the face of the pleading. And constituting part of these facts are the two photoplays which plaintiff had properly incorporated in the complaint. The controlling rule is set out in *Weitzenkorn v. Lesser*, *supra*, at page 791: 'Having both productions before it in accordance with section 426(3), the court may determine whether there is substantial similarity between them. If, as a matter of law, there is no such similarity, no question of fact is in issue and the demurrers to each count of the complaint were properly sustained. But if, from a comparison of the two productions, such similarity reasonably might be found, that issue, and also the question as to copying, should have been submitted to the jury for determination.' (Therein the contentions were reversed, plaintiff claiming a similarity existed.) This rule was followed in *Palmer v. M.G.M. Pictures*, 119 Cal. App. 2d 456, wherein the court rejected the contention appellant here makes, that the action of the lower court in determining the issue of similarity on demurrer deprived him of a trial on the issue, by holding that the only issue raised by the demurrer was the legal sufficiency of the complaint to state a cause of action for plagiarism. The court said: 'That is a question of law for the court, not of fact for the jury.' (p. 460.) And continued: 'In the present case, . . . the sole issue then remaining was that of similarity, a matter to be determined by direct comparison of the two productions.' As said in *Shipman v. R.K.O. Radio Pictures, Inc.*, 20 F. Supp. 249, 'the works themselves supersede and control any allegations and conclusions of fact about them or descriptions of them which may be contained in the complaint.' In *Kurlan v. Columbia Broadcasting System, Inc.*, 40 Cal. 2d 799, following *Weitzenkorn v. Lesser*, *supra*, the court said of the lower court's determination of similarity on demurrer under section 426(3): 'This in no way deprives a plaintiff of his right to a jury trial. If, from a comparison of the productions, a question of fact is shown to exist, the cause should be submitted to the jury.'"

Also of Interest:

40. *Arch Music Co. v. Gladys Music, Inc.*, N.Y.L.J., June 13, 1962, p. 14 (Sup. Ct., N.Y. Co.) (McGivern, J.)

In an action in which plaintiff contended that it sought a declaration of contract rights between the parties, the court held that the gravamen of the complaint was really a "question of copyright ownership

and interference the exclusive jurisdiction of which is in the United States District Court (Title 28, U.S. Code, sec. 1338; *Jewelers Mercantile Agency v. Jewelers Pub. Co.* 155 N.Y. 241, 247; *Young v. J. M. Hickerson, Inc.*, 9 Misc. 2d 932; *Wooster v. Crane & Co.* 147 F. 515)."

Held, motion to dismiss two causes of action granted, with leave to the plaintiff to amend its complaint.

41. *A. J. Sandy, Inc. v. Junior City, Inc.*, 232 N.Y.S. 2d 9 (Sup. Ct., July 16, 1962) (Markowitz, J.)

Action for infringement of common-law copyright in a dress, the name "Zip-Around" and certain advertising, for conversion of plaintiff's property in these items, and for unfair competition. Defendant moved to dismiss the complaint on the ground that these causes of action were insufficient in law.

Held, motion denied.

Citation Reported:

42. *Addison-Wesley Publishing Company, Inc. v. Brown, et al.*, 133 U.S.P.Q. 647 (E.D. N.Y. May 24, 1962), *digested* 9 BULL. CR. SOC. 492, Item 379 (1962), *now reported*, 207 F. Supp. 678.
-

PART V.

BIBLIOGRAPHY

A. BOOKS AND TREATISES

1. United States Publications

43. PAN AMERICAN UNION. *General Legal Division.*

Copyright protection in the Americas. 3d ed., rev. and enl. Washington, 1962. 175 p.

"This third edition summarizes the current copyright laws and regulations of each of the 21 American republics, and shows the status of treaties on the subject—inter-American agreements as well as the Universal Copyright Convention. The texts of these treaties are reproduced in Part IV."

44. GRZYBOWSKI, KAZIMIERZ. Copyright. (In *bis* Soviet legal institutions; doctrines and social functions. Ann Arbor, University of Michigan Press [1962], pp. 160-165.)

A section on the Soviet copyright law and its underlying principles.

2. Foreign Publications

45. INTERNATIONAL CONFEDERATION OF AUTHORS' AND COMPOSERS' SOCIETIES *Pan American Council.*

Mision en defensa de los derechos intelectuales en America. Buenos Aires, 1962. 81 p. At head of title: Consejo Panamericano de la Confederacion Internacional de Sociedades de Autores y Compositores.

Report of the Mouchet Mission for the promotion of author's rights in Latin America, organized by the Pan American Council of the International Confederation of Authors and Composers Societies; the publication was sponsored by the Ministry of Education of the Argentine Republic. (In Spanish.)

As a result of the Inter-American Meeting on Authors' Rights, held in Buenos Aires in July 1960 and the meeting of the Confederated Congress of the International Confederation of Authors and Composers Societies in Bürgenstock, Switzerland, in September 1960, the Pan American Council of the Confederation decided to organize a "Mission for the Promotion of Authors' Rights in Latin America". Dr. Carlos Mouchet,

Argentine lawyer, professor of law, and a specialist in municipal legal problems and authors' rights, was appointed as head of the Mission, which started February 15, 1961.

His work consisted of a tour which included the following Latin American cities: Asunción (Paraguay), Caracas (Venezuela), Bogotá (Colombia), Quito (Ecuador) and Lima (Perú). In each a full promotional program was carried out along the following lines:

1. Discussion panels, where intellectuals, university professors and Government officials participated. The points dealt with were regularly the ratification of the Geneva Universal Convention of 1952, seeking the support of the local Government to a Pan American meeting on authors' rights proposed to UNESCO on motion of the Argentine Government, introduction or reform of local legislation on authors' rights, organization or development of professional associations and promotion of specialized courses in law schools.
2. Permanent committees were set up in each capital to carry out the decisions and recommendations approved in the panel meetings.
3. Preliminary steps were taken to make surveys in each of the visited countries, on the following points: (a) existing legislation; (b) specialized courses; (c) professional associations; (d) official and private support to intellectual activities.

Along with the Mouchet Mission, the Pan American Council petitioned the Argentine Government to enter a motion at UNESCO calling for a Pan American conference on authors' rights to be tentatively held in the early months of 1963. The Argentine Government has so motioned at UNESCO and the Organization of American States. The intended agenda of that conference would include the adaptation of internal legislations to the Geneva and Pan American Conventions, administrative aspects of the enforcement of authors' rights and a study of authors' associations.

The Appendix to the Report includes Dr. Mouchet's curriculum vitae, some basic principles recommended for legislation on authors' rights and the organization of professional societies, the text of resolutions passed by the Inter-American authors' meeting in Buenos Aires, July 1960, and by the XXI Confederated Congress of the International Confederation. The second part of the Appendix includes records of the debates at the discussion panels, and editorials and newspaper articles with regard to the Mission.

Some facts mentioned in the report seem to deserve particular attention. For instance, it was found that Venezuela is party to no inter-

national or Pan American convention and that the Justice Ministry has just finished the draft of a bill on authors' rights which is about to be sent to the Congress. In Quito the Mission found that there were no authors' associations in the strict professional sense of the word. And finally in Peru the Congress has just passed a new Act on authors' rights which takes the place of the former Act of 1849.* In particular the report has a laudatory word for the professional associations in Paraguay and Colombia and for the organizational efforts of the Peruvian intellectuals.

Daniel C. Lecuona

46. HASE, ANDREAS VON. *Der Musikverlagsvertrag*. München, C. H. Beck, 1961. 77 p. (Urheberrechtliche Abhandlungen des Instituts für ausländisches und internationales Patent-, Urheber- und Markenrecht der Universität München, Heft 3.)

"The purpose of this work is to investigate the legal relations created by the publishing contract between the composer and the music publisher [in West Germany], and to show in what manner the publisher makes use of the rights assigned to him by the author."

B. LAW REVIEW ARTICLES

1. United States

47. ABLARD, CHARLES D. The Post Office and publishers' pursestrings: a study of the second-class mailing permit [by] Charles D. Ablard and Marion Edwyn Harrison. (30 *George Washington Law Review* 567-602, no. 4, Apr. 1962.)

A legislative and judicial history of the second-class mailing permit in the United States with an analysis of present Post Office practice and procedure. A section is devoted to decisions defining "periodical publications."

48. AMERICAN BAR ASSOCIATION. *Section of Patent, Trademark and Copyright Law*. 1962 committee reports to be presented at the annual meeting to be held August 3 to 9, 1962, San Francisco, Cal. Chicago, American Bar Center [1962] 214 p.

Among the reports are included those of the Copyright Division committees dealing with the following subjects: copyright law revision,

* See 9 BULL. CR. SOC. 160, Item 68 (1962).

international copyright relations and conventions, Copyright Office affairs, program for revision of the copyright law, program for protection of industrial designs, related rights, and authors. An appendix contains the text of a petition by the Section to the Council on Specialization requesting a recognition of copyright law as a legal specialty and a certification of attorneys in that specialty.

49. BURRUS, BERNIE R. The Soviet law of inventions and copyright. (30 *Fordham Law Review* 693-726, no. 4, April 1962.)

The history and current operation of Soviet laws relating to inventions and copyrights. The author concludes, *inter alia*, that "foreign authors publishing abroad have no legally protectible rights in the U.S.S.R.," and suggests probable reasons for the Soviet reluctance to recognize foreign rights.

50. CARY, GEORGE D. The common law and statutory background of the law of musical property. (15 *Vanderbilt Law Review* 397-417, no. 2, Mar. 1962.)

"After a discussion of the English and American history of musical copyright, the article examines the common law and statutory aspect of the subject, and concludes by discussing the international rules and conventions governing musical copyright."

51. COLINO, RICHARD R. Copyright protection abroad for United States cultural exports. (1962 *Duke Law Journal* 219-248, no. 2, Spring 1962.)

"This paper will review and examine the greatly advanced and simplified protection which became available only during the past few years, with the coming into effect of the Universal Copyright Convention in 1955. It will also indicate certain still pending problems requiring solution in the securing of protection abroad of the rights of United States 'cultural exporters.'"

52. CROUGHAN, RICHARD W. Copyright renewal by persons not mentioned in the renewal statute. (17 *Intramural Law Review* 218-227, no. 3, Mar. 1962.)

A note which examines the development and concepts of copyright law in order "to understand the logic of and justification for" the decision in *Gibran v. National Comm. of Gibran*, 255 F. 2d 121 (2d Cir.), *cert. denied*, 358 U.S. 828 (1958).

53. DERENBERG, WALTER J. Copyright law. New York, New York University School of Law, ©1962. pp. 555-570.

Reprinted from 1961 *Annual Survey of American Law*.

The 1961 annual survey of legislative and judicial copyright developments in the United States.

54. DERENBERG, WALTER J. Recent publications in the field of literary, artistic, and industrial property. (10 *American Journal of Comparative Law* 459-472, no. 4, Autumn 1961.)

A periodic review of the literature, domestic and foreign, published since the issuance of the previous review in the summer of 1960 (9 *Am. J. Comp. L.* 522).

55. DIAMOND, SIDNEY A. Copyright problems of the phonograph record industry. (15 *Vanderbilt Law Review* 419-436, no. 2, Mar. 1962.)

First published in 8 *BULL. CR. SOC.* 337, Item 349 (1961).

56. FIELDS, PETER A. What's in a stage name? (35 *Southern California Law Review* 149-160, no. 2, Winter 1962.)

An examination of various theories "upon which protection has been sought and sometimes obtained in suits to guard against, or to halt, defendant's appropriation for commercial purposes of a name which is, or has become, identified with the plaintiff."

57. GAYLOR, PETER J. Right to privacy as a collateral problem. (44 *Journal of the Patent Office Society* 351-354, no. 5, May 1962.)

A brief discussion of adjudications on the right of privacy offered in connection with the submission of advertisements "for copyright opinion."

58. GOLDBERG, MORTON DAVID. Promoting the progress of science and useful arts: a commentary on the Copyright Office Report on the General Revision of the United States Copyright Law. (47 *Cornell Law Quarterly* 549-629, no. 4, Summer 1962.)

"The present article attempts to summarize . . . [the Copyright Office] recommendations and their background; to suggest in some instances, alternative proposals; and to set forth certain principles for application in the consideration of copyright law revision."

59. GOLDSTEIN, RICHARD. The twilight zone: meandering in the area of performers' rights [by Richard Goldstein and Arthur Kessler]. (9 *U. C. L. A. Law Review* 819-861, no. 4, July 1962.)

An examination of the various theories presently utilized to protect the performer, followed by a brief evaluation of the "adequacy of existing law" and suggestions, where appropriate, for "methods of alleviating those problems which still persist."

60. MEGLEY, RICHARD B. Design and mechanical patents relating to the same subject matter. (44 *Journal of the Patent Office Society* 309-338, no. 5, May 1962.)

A discussion of the question as to the compatibility of the co-existence of design and mechanical patents on the same or similar subject matter and of the companion question as to the application of the doctrine of double patenting as a basis for declaring such coexistence repugnant to the established patent law.

61. MILLER, HOWARD W. Simulation of containers as related to unfair competition. (41 *Boston University Law Review* 538-546, no. 4, Fall 1961.)

"It is the purpose of this note to explore the limited, but often confused and misapplied, principles of law related to this area."

62. MOTT, KELSEY MARTIN. The standard of ornamentality in the United States design patent law. (48 *American Bar Association Journal* 548-552, no. 6, June, and 643-647, no. 7, July 1962.)

A two-part article which "discusses the characteristic 'ornamental,' in the patenting of any 'new, original, and ornamental design for an article of manufacture.'"

63. NETTERVILLE, VICTOR S. Copyright and tort aspects of parody, mimicry and humorous commentary. (35 *Southern California Law Review* 225-275, no. 3, Spring 1962.)

A study of cases involving public dissemination of "humor" as copyright infringement, libel, violation of right of privacy, unfair competition, or some other tort.

64. POTTER, STEPHEN B. Personal property—gifts—copyright—delivery of future profits. (11 *Catholic University of America Law Review* 115-117, no. 2, May 1962.)

A case note on *Speelman v. Pascal*, 10 N.Y. 2d 313, 178 N.E. 2d 723 (1961). See 9 BULL. CR. SOC. 262, Item 158 (1962).

65. SHARPE, ALBERT P., III. Copyrights and design patents—the common zone between. (11 *Cleveland-Marshall Law Review* 336-362, no. 2, May 1962.)

"The purpose of this paper is to explore briefly the influence which gave rise to [the confusion resulting from the overlapping of our present-day copyright and design laws], to discuss the present state of the law and its practical impact upon the practicing patent advocate, and finally to review and evaluate proposed legislation, past and present, in an effort to determine the possible course of future developments."

66. SILVERMAN, ARNOLD B. [A review of] Constraint by copyright by M. B. Schnapper . . . (23 *University of Pittsburgh Law Review* 1058-1059, no. 4, June 1962.)

The reviewer concludes that "although not a literary masterpiece, the book does serve as a persuasive appeal to the public to act soon to preserve our constitutional rights." See 8 BULL. CR. SOC. 194, Item 158 (1961).

67. WEHRINGER, CAMERON KINGSLEY. Copyrights, the artist, and filing delay. (44 *Journal of the Patent Office Society* 436-443, no. 7, July 1962.)

The author distinguishes between "mere" and "deliberate" delay in making a case for the prompt filing of copyright claims, with special reference to the artist and his painting as the subject of a copyright.

Copyright Society of the U.S.A.

c/o Fred B. Rothman & Co.

57 Lenning Street

South Hackensack, N. J.

Return Requested

Bulk Rate
U. S. POSTAGE
PAID
Hackensack, N. J.
Permit No. 2408

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

Published at
NEW YORK UNIVERSITY LAW CENTER

VOL. 10, NO. 2

DECEMBER, 1962

Bulletin of The Copyright Society of the U. S. A.

EDITORIAL BOARD

WALTER J. DERENBERG, *Chairman*

RICHARD COLBY
EDWARD M. CRAMER
GEORGE E. FROST
HARRY G. HENN
ARTHUR S. KATZ
ROBERT J. KAUFMAN
BERNARD KORMAN

DR. STEPHEN P. LADAS
ALAN LATMAN
MELVILLE B. NIMMER
RICHARD H. ROEMER
STANLEY ROTHENBERG
CHARLES B. SETON
PAUL J. SHERMAN

JUDITH GRAD, *Associate Editor*
MARY T. HUNTER, *Assistant Editor*

The Copyright Society of the U. S. A.

OFFICERS

President

HARRY G. HENN

Vice-Presidents

LEONARD ZISSU
EDWARD A. SARGOY

Secretary

CHARLES B. SETON

Assistant Secretary

ALAN LATMAN

Treasurer

SIDNEY A. DIAMOND

Assistant Treasurer

EDWARD M. CRAMER

Executive Director
WALTER J. DERENBERG

BOARD OF TRUSTEES

PROFESSOR WALTER J. DERENBERG, New York University
JOSEPH S. DUBIN, Universal City, California
ROBERT V. EVANS, New York City
HERMAN FINKELSTEIN, New York City
GEORGE E. FROST, Chicago
PROFESSOR HARRY G. HENN, Cornell University
PROFESSOR BENJAMIN KAPLAN, Harvard University
IRWIN KARP, New York City
LEONARD KAUFMAN, New York City
SYDNEY M. KAYE, New York City
LEON KELLMAN, New York City
PROFESSOR JOHN M. KERNOCHAN, Columbia University
PROFESSOR ADRIAN A. KRAGEN, University of California
ISABELLE MARKS, New York City
JOSEPH A. McDONALD, Washington, D. C.
E. GABRIEL PERLE, New York City
JOHN R. PETERSON, Boston
CEDRIC W. PORTER, Boston
BARBARA A. RINGER, Washington, D. C.
BENJAMIN W. RUDD, Washington, D. C.
EDWARD A. SARGOY, New York City
JOHN SCHULMAN, New York City
PAUL SHERMAN, New York City
STUART SPRAGUE, New York City
SAMUEL W. TANNENBAUM, New York City
THEODORA S. ZAVIN, New York City
LEONARD ZISSU, New York City

Published at New York University Law Center
40 Washington Sq. South, New York 11, N. Y.

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

© 1962 by The Copyright Society of the U. S. A.

CONTENTS

Page

PART I. ARTICLES.

BOGSCH, ARPAD, The First Decade of the Universal Copyright Convention	71
KAMINSTEIN, ABRAHAM, The General Revision Program	81
CELLER, EMANUEL, Copyright—New Frontiers	84
ULMER, EUGEN, The Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations, Part I	90

PART II. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS.

1. United States of America and Territories	102
2. Foreign Nations	102

PART III. CONVENTIONS, TREATIES AND PROCLAMATIONS

PART IV. JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY.

A. Decisions of U.S. Courts.	
1. Federal Court Decisions	105
B. Decisions of Foreign Courts.	
1. Great Britain	121

PART V. BIBLIOGRAPHY.

A. Books and Treatises.	
1. United States Publications	125
2. Foreign Publications	125
B. Law Review Articles.	
1. United States	126
2. Foreign	127

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 11, New York: Harry G. Henn, *President*; Leonard Zissu, Edward A. Sargoy, *Vice-Presidents*; Sidney A. Diamond, *Treasurer*; Charles B. Seton, *Secretary*; Edward M. Cramer, *Assistant Treasurer*; Alan Latman, *Assistant Secretary*; and Walter J. Derenberg, *Executive Director*.

Annual subscription: \$25.

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 11, N. Y.

Business correspondence regarding subscriptions, bills, etc., should be addressed to the distributor, Fred B. Rothman & Co., 57 Leuning Street, South Hackensack, N. J.

CITE: 10 BULL. CR. SOC. page no., Item (1962).

PART I.

ARTICLES

68. THE FIRST DECADE OF THE UNIVERSAL COPYRIGHT CONVENTION

By ARPAD BOGSCH*

The Universal Copyright Convention was signed approximately ten years ago, on September 6, 1952, at Geneva. The following lines are intended to survey briefly the geographical extension of the Convention and the general state of legislation in the countries party to it at the close of the first decennium. Furthermore, this article deals with the effects of two of the most important innovations of the Convention, namely, its provisions on copyright formalities and the protection of the right to translate.

Geographical Extension

As of January 23, 1963, the number of countries party to the Universal Copyright Convention will be 43.¹ Thirteen are American (Argentina, Brazil, Canada, Chile, Costa Rica, Cuba, Ecuador, Haiti, Mexico, Nicaragua, Panama, Paraguay, United States of America), 20 European (Andorra, Austria, Belgium, Czechoslovakia, Denmark, France, German Federal Republic, Holy See, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Monaco, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom), 7 are Asian (Cambodia, India, Israel, Japan, Laos, Lebanon, Pakistan), and 3 are African (Ghana, Liberia, Nigeria).

Although the adherences in America include the most populous of the American States (United States, Brazil, Argentina, Mexico), the total number of American adherences include only slightly more than half of all the American countries.

* Legal Advisor, U. S. Copyright Office. The views expressed in this article are the personal views of the author and not of the U. S. Copyright Office.

1. Or, if the Philippines is considered a party, then 44. The Philippines deposited its instrument of ratification but, before the three months required for its becoming effective, withdrew it. It is not quite clear what the legal effects of these acts are, in view of the fact that the Philippines did not denounce the Convention and denunciation is the only way provided for in the Convention for withdrawal.

In Europe, the coverage is pretty complete, with the exception of the communist countries of which only one (Czechoslovakia) is a party to the Convention. Other conspicuous absences are those of Finland, Greece and the Netherlands.

It had been said when the Universal Copyright Convention was signed that one of its aims is to be a "bridge" between Europe and America. This aim has been largely achieved since the majority of the American and European countries are party to it. But, of course, it will take approximately ten more adherences on each Continent before the "bridge" becomes complete.

From non-communist Asia, the most populous countries (India, Japan and Pakistan) are party to the Convention, but many are missing, including most of Southeast Asia and the Middle East. The most populous of the African countries, Nigeria, is a member, but some ninety percent of the African countries, including all the former French colonies are absent. Absent also are Australia and New Zealand, although most of the rest of the Commonwealth has ratified the Convention.

If one compares the cumulative effect of the Universal Copyright Convention and the Berne Union, and their overlap, the most striking is the case of the American countries. The Berne Union has only two members in the Western Hemisphere (Brazil and Canada); they are also party to the Universal Copyright Convention. But the Universal Copyright Convention has 11 more adherents in the Americas. On the other hand, all the European countries party to the Universal Copyright Convention, except Andorra, are also members of the Berne Union. However, the Berne Union has among its members not only Czechoslovakia but also all the other European "People's Democracies" (Bulgaria, Hungary, Poland, Rumania), except Albania, and also Yugoslavia. Furthermore, Finland, Greece and the Netherlands are also members of the Berne Union without being party to the Universal Copyright Convention.

Turning to other parts of the world, the Berne Union has more adherents than the Universal Copyright Convention. In Asia, five countries are party to both (India, Israel, Japan, Lebanon and Pakistan), two are party to the Universal Copyright Convention only (Cambodia, Laos), and five are members of the Berne Union only (Ceylon, Philippines,² Syria, Thailand, Turkey).

In Africa, there is no overlap. Three countries are party to the Universal Copyright Convention (Ghana, Liberia and Nigeria), whereas 10 are members of the Berne Union: Congo (Brazzaville), Dahomey, Gabon, Ivory Coast, Mali, Morocco, Niger, Senegal, Tunisia and South Africa.

Australia and New Zealand are members of the Berne Union only.

2. See note 1, *supra*, as to the Philippines.

All in all the total number of countries party to either or both systems is 68, which is slightly more than half of the sovereign countries of the world. Of these 68 countries, 26 are party to both, 25 are members of the Berne Union only, and 17 are party to the Universal Copyright Convention only.

Expressed in rough figures of population, the two systems cover, between themselves, some 1 billion 640 million people; the number of the inhabitants of countries members of the Berne Union only is 250 million; of countries party to the Universal Copyright Convention only is 320 million; and of countries party to both is 1 billion 70 million.

Naturally, the situation is far from being stationary and neither the Universal Copyright Convention nor the Berne Union has reached a point of saturation. This is evident for example from the figures of 1962: during that year, the Universal Copyright Convention gained seven, and the Berne Union eight, new adherences.

The State of Legislation in the Contracting Countries.

Under Article I of the Universal Copyright Convention each Contracting State is obligated to provide for adequate and effective protection of copyright. The Convention does not define the level of protection which must obtain to be "adequate and effective." It does, however, require that the protection endure at least 25 years and include writings, musical, dramatic, and cinematographic works, paintings, engravings, and sculpture. Furthermore, it provides that the right of translation must be protected during the entire term of copyright; albeit the right of exclusive authorization may, in certain cases and after a minimum of seven years, be replaced by a right to equitable remuneration. In other respects, the Convention offers no more definite criteria than a tacit and somewhat vague consensus of presently prevailing views on what is "effective" and "adequate."

There is little doubt that the protection afforded, at least on paper, is generally adequate in 19 of the 20 *European* adherents. The doubt relates to Andorra, which has no copyright legislation at all. We have been told that this does not necessarily mean absence of protection since a judge may, if a case comes before him, invoke French or Spanish law or apply principles of unwritten customary law. However, we know of no copyright cases in Andorra, so are not able to form any opinion on the matter.

As to the other 19 European countries, the past decade has seen the adoption of completely new copyright laws in six of them, namely, Czechoslovakia (1953), Denmark (1961), France (1957), Norway (1961), Sweden (1960), and the United Kingdom (1957). We know very little about the actual application of the new Czechoslovak law. The other five new statutes are certainly among the finest and most carefully drafted copyright laws in the world.

Among the older laws, I would put into the same category the laws of Austria (1936-1953), Germany (1901-1940), Ireland (1927-1958), Italy (1941-1946), Liechtenstein (1922-1959), Monaco (1948-1949), Portugal (1927), and Switzerland (1922-1955).

The copyright statutes of Belgium, Luxembourg and Spain, dating from the last century (1886, 1898, and 1879, respectively), are obviously antiquated. Although case law has filled some gaps, mostly resulting from modern methods of exploitation, both the statutes and the judicial decisions leave open many questions of interest today, and one often does not know exactly what to expect.

The situation of the copyright law in the Holy See is somewhat uncertain, whereas the law of Iceland, generally adequate, seems to contain an area of major uncertainty (regarding the right of translation) which is discussed later.

Turning now to the 13 contracting countries in the *Western Hemisphere*, we find two—Ecuador (1957-1958) and Mexico (1956)—which have adopted completely new copyright laws since the adoption of the Universal Copyright Convention.

The laws of the United States and Argentina, basically dating from 1909 and 1933, respectively, underwent important adjustments on account of adherence to the Universal Copyright Convention. The United States, by a law adopted in 1954, extended the application of the copyright statute to works coming under the Universal Copyright Convention, and made the necessary adjustment concerning formalities. These are discussed further below, as are the special provisions which Argentina adopted in 1957 when it instituted a system of compulsory translation licenses as permitted by the Universal Copyright Convention.

Most of the provisions of the Canadian Copyright Act date from 1921. Its latest amendment preceded, by more than ten years, Canada's adherence to the Universal Copyright Convention. The protection of works originating in Berne Copyright Union countries is written into the statute itself but other foreign works are protected only when the Canadian Government issues a "certificate" (very much like U. S. Presidential Proclamations issued under 17 USC § 9) in which it designates by name the country to which the benefits of the Act are thereby extended. (The United States is the only such country, since 1923.) As far as is known, no such certificate has thus far been issued in respect to countries on account of their being party to the Universal Copyright Convention. Pending the issuance of such certificates or the adoption of some other measures to the same effect, it is open to question whether works whose only claim for protection is the Universal Copyright Convention are protected in Canada.

The basic copyright laws of the other American contracting countries are too old to adequately take care of all the contemporary situations in which copyright is important: they date in Brazil from 1916, in Chile from 1925,

in Costa Rica from 1896, in Cuba from 1879, in Haiti from 1885, in Nicaragua from 1904, and in Panama from 1916. The law of Paraguay is an exception as it is only slightly more than ten years old, having been adopted in 1951. But in most of the others, as well as in the United States and Argentina, a general overhaul of the copyright laws could do much for improving and clarifying the legal situation.

In *Asia*, there is a recent, clear, and generally highly satisfactory copyright law in India which was adopted in 1957. Israel and Pakistan continue to apply what is essentially the 1911 United Kingdom Copyright Act, but in Israel rather substantial amendments were made by a law of 1953 which established the required harmony with the Universal Copyright Convention. In Pakistan, the legal situation is not entirely clear for reasons similar to those prevailing in Nigeria (and the two will be discussed together a little later).

It appears from letters addressed by the governments of Cambodia and Laos to UNESCO that these two countries follow more or less what was the French law of copyright prior to their becoming independent. This would mean the law that governed in France prior to the new French Act of 1957. That law, as is known, was primarily of judicial creation, with a few, brief, scattered statutory provisions. It is unclear whether Cambodia and Laos apply these statutory provisions or also the case law and just how much, if any, of each. Lebanon's basic law was adopted in 1924 and somewhat amended in 1926 and 1946. However, even with these amendments, it does not completely cover the field; some bringing up to date would be desirable.

Among the *African* adherents, Ghana has a new law, dated 1961. Although some of its provisions were not greeted with enthusiasm, it is, on the whole, one of the most clearly drafted and concise copyright laws, with a full grasp of all the questions to be tackled by a modern copyright statute. Liberia's copyright law, one of the shortest of the world, dates from 1911 but was revised in 1956. It is perhaps not entirely adequate for our times.

Nigeria, like Pakistan, applies the 1911 U. K. Copyright Act, subject only to minor amendments. Both of these countries present a rather serious problem and since it is the same problem, it will be simpler to discuss its application to both of them at the same time. In the British system, followed by Nigeria and Pakistan, the benefits of the copyright statute apply to foreign works only if Orders in Council so extend them and only to those foreign works which originate in the countries designated by name in such Orders. The U. K. Orders in Council extending the application of the 1911 U. K. Copyright Act to works originating in Berne Union countries applied and still apply in Pakistan and Nigeria since these Orders were issued prior to the dates on which Pakistan and Nigeria became independent. But the U. K. Orders in Council issued in relation to Universal Copyright Convention countries do not apply in Pakistan or Nigeria because the Orders do not so provide

and also, in the case of Pakistan, because they were promulgated after Pakistan became sovereign in its external relations. All this would not matter if Pakistan and Nigeria had issued Orders of their own to the same effect. But, as far as we know, they have not. Thus, in these two countries, the situation seems to be that, for lack of the Orders required by their copyright statutes, such statutes do not apply to works which Pakistan and Nigeria are supposed to protect under the Universal Copyright Convention. This conclusion is not based on any official communication of the governments of these two countries and may well be erroneous. It is merely based on the analysis of a system which, since it is similar to the British, is rather well known. Of course, even if my conclusion is correct, the situation is easily remediable: Pakistan and Nigeria need only issue Orders concerning works protected by the Universal Copyright Convention, as other followers of the British system (the United Kingdom, India and Israel) did when they adhered to the Universal Copyright Convention.

In conclusion, I think that there is quite a bit that could be done to modernize the copyright laws in many of the countries which are parties to the Universal Copyright Convention. This is true irrespective of the size of the country or the age of its independence. The United States and Germany, as it is well known, are very actively preparing a general revision of their copyright laws. The task is not an easy one and it is, in the newer and smaller countries, difficult also on account of the lack of specialized and expert advice on which the governments or legislators of such countries could draw. One of the most interesting and challenging tasks awaiting the international organizations dealing with copyright is to assist these emerging nations in the difficult enterprise of adopting copyright laws which would be consistent with their special needs, the requirements of modern media of diffusion, and their international obligations under the Berne Union or the Universal Copyright Convention.

Formalities

To most people in the Americas, it appears to be natural that the acquisition or maintaining of copyright requires the fulfillment of certain formalities, such as the placing of a "notice" on published copies of the work, or the deposit and registration of the work in a government office. The majority of Western Hemisphere countries have such formalities, Canada and Mexico being the major exceptions.

Outside the Western Hemisphere general obligatory formalities are practically unknown. It appears that the only country which does have them is the Philippines, whose Copyright Law is similar to that of the United States. Thus, in the vast majority of the countries of the world, copyright protection

is automatic; that is, it is obtained upon creation and continues without the need of fulfilling renewal formalities.

One of the most important results that the countries outside America expected from the Universal Copyright Convention was the possibility of obtaining protection for the works of their citizens in the United States without any formalities. The Convention did not give entire satisfaction to these countries but did satisfy them in respect to the most burdensome initial formalities since foreigners under the Convention may now avoid the requirements of various countries as to deposit, registration, and notarial certificates, as well as the requirement of manufacture of copies in the United States. The only thing they need to do in order to be able to avoid these formalities is to place the Convention notice in the published copies of the work.

In two respects the Universal Copyright Convention did not satisfy those who believe in automatic copyright protection: (1) any country may still require, as a condition of protecting published works, the use of the Convention notice in all published copies; (2) protection beyond the prescribed minimum term of 25 years may still be subjected to formalities, such as deposit and registration in a government office of the country in which a longer protection is available and desired.

The use of the Convention notice is now an accepted practice almost all over the world. It is truly astounding to see with what rapidity it has been adopted by most publishers. This, I think, proves that the requirement is not burdensome. The usefulness of the notice obviously transcends the technical field of the copyright law: it is useful also to librarians, book buyers, and readers, since the date in the notice is usually helpful in establishing the age of the work while the name in the notice gives a clue to the interests backing its publication.

Renewal formalities seem to exist only in two countries, the United States and the Philippines. The question has been frequently asked whether it is not going to be difficult to have the renewal recorded when the initial copyright claim has not been registered since, after the lapse of some 28 years, the data, documents, and perhaps even the copies of the work which might be needed to effectuate the renewal registration may be difficult to procure, and even may be missing. The Convention is still too young for this problem to arise under it, and it will be only in the early 1980s that the question will become a practical one. By that time, of course, the United States and the Philippines may have changed their laws, or may have simplified their renewal procedures, so as to eliminate such difficulties.

As of the present time and the near future, the significance of Article III is evident with respect to the initial formalities, that is, the fact that one can now secure protection in some ten American countries without registering and depositing the work in each of these ten countries. A further

major advantage exists for those who publish English books outside the United States in that they can now obtain protection in the United States without having to manufacture copies here. This, of course, is of primary interest to Canada and the United Kingdom. It is also of considerable significance to a great number of other countries since publishing in English is very common not only in India and Pakistan, but also in Europe and Japan, and to some extent in almost any country of the world.

The Right to Translate

The late Sir John Blake, who was the Rapporteur General of the diplomatic conference which adopted the Universal Copyright Convention, wrote in his report that "the discussion . . . on Article V dealing with translation rights revealed wide differences of opinion and it was apparent from the outset that this was one of the most difficult subjects before the Conference."

The system which evolved from these difficult discussions and which has been incorporated in the Universal Copyright Convention was an entirely novel one for its time.

Up until the Geneva Conference the only method of restricting the right of translation by international agreements was the method of shortening the term during which the right of translation was protected. The Berne Union allowed, and still allows, countries which make a reservation on this point to protect the right of translation for ten years only, provided no translation is made into the national language(s) of the country during the period of ten years.

The Universal Copyright Convention adopted a system in which translation can never become free before the work falls into the public domain, but in which translations may be made, under certain conditions, under a compulsory license granted by the Government.

Compulsory licensing is allowed only in the case of translation into the national language or languages of the licensing country, and only if no translation has been published in the language for which the compulsory license is requested during the seven years following the work's first publication. (There is also the rather special case where the translations are out of print, but we shall not refer to it here.) Thus, if a translation has been published during this period of seven years, the right of translation continues to be an exclusive right of authorization until the expiration of the copyright (usually 50 years *post mortem auctoris*) in respect to all those languages in which translations have been published during the seven years.

The system of granting compulsory licenses requires legislation in the countries which wish to adopt such a system. The need for such legislation is evident if one considers that the grant of licenses requires a certain ma-

chinery and personnel which must examine each individual application in order to assure that the safeguards and conditions of the grant, laid down in great detail in the Convention, are complied with. It was a matter of much speculation and great interest at the Geneva Conference and ever since just how much use of the compulsory licensing possibilities of the Universal Copyright Convention would be made by the contracting countries. As matters stand today, it would appear that less than ten percent—altogether four countries—have made use of it. But these four are large countries; their population represents something more than one-third of the population of all 43 contracting countries. They are Argentina, India, Japan and Mexico.

It is, doubtless, an agreeable surprise for the partisans of the exclusivity of the right of translation that out of eleven Latin American countries which have adhered to the Universal Copyright Convention only two have made use of the prerogative of introducing compulsory licenses in the field of translation.

As to India, the situation is rather curious because India grants a full (50 years *post mortem auctoris*) exclusive right of translation to all works originating in the Berne Union, and will apply compulsory licenses only in the case of works protected under the Universal Copyright Convention which do not have a Berne Union country as their country of origin. This means that simultaneous publication in a Berne Union country may continue to have a real practical significance as far as protection in India is concerned. For example, if the book of a U.S. author is first published in the United States but is also published, within 30 days from the first publication, in England, the right of translation in it can never be subjected to compulsory licensing in India; on the other hand if such "simultaneous" publication does not take place, the same work, in India, may become the subject of a compulsory translation license.

As to Japan, another country party to the Universal Copyright Convention and member of the Berne Union, the practical situation is almost the reverse. Japan is a reservatory country in the Berne Union. If a work of a U.S. citizen is first published in the United States and there is no simultaneous publication in a Berne member country, the right of translation into Japanese will be an exclusive right for seven years and, if no Japanese translation has been published in the meantime, it may be subjected to compulsory licensing thereafter. But if the same work is also published, within 30 days of its first (U.S.) publication, in England, the right of translation will completely cease in Japan after 10 years (unless a Japanese translation has been published in the meantime). Consequently, as far as protection in Japan is concerned, avoidance of a simultaneous publication in a Berne Union country would generally seem to be the more desirable course of action from the viewpoint of the U.S. author.

There are two more countries in which the question of the right of translation raises a special problem: Iceland and Panama.

It would seem that the domestic law of Iceland protects the right of translation for 10 years only, unless during these 10 years a translation has been published. (Whether this provision applies only to translation into Icelandic or into any language is not clear.) Now, what is particularly unclear is whether, in Iceland, this provision will also apply to works to be protected under the Universal Copyright Convention, or whether Iceland will regard Article V(1) of the Universal Copyright Convention as superseding this provision of its domestic law. If the Convention supersedes the law, then, of course, the right of translation will remain exclusive in Iceland for the whole duration of copyright (30 years *post mortem auctoris*). If the Convention does not supersede the law, then the Icelandic law does not comply with the requirements of the Convention.

Similar considerations apply in the case of Panama, where the domestic law provides that the works of a non-Panamanian author, printed in non-Spanish speaking countries, may be freely translated.

Of course, the operation, in actual practice, of the compulsory license system of Argentina, India, Japan and Mexico cannot yet be evaluated, since all of these countries adhered to the Universal Copyright Convention less than seven years ago. Consequently, there is no work old enough yet to be subjected to compulsory licensing. But in the course of the next few years some works will become eligible, and it will be interesting to observe the practical results when the governments of these countries will start applying the new procedure to concrete cases.

69. THE GENERAL REVISION PROGRAM

By ABRAHAM L. KAMINSTEIN*

I am grateful for this opportunity to talk to you about the general revision program. I am sure that many of you have been wondering just where we stand now and what we are planning to do in the months ahead. It has been more than a year since the Register's Report on General Revision was issued and, from external appearances at any rate, it might seem to some of you that little progress toward revision has been achieved in that time.

I can assure you that this is not the case at all. The past year has served an essential function in the drafting of revision legislation. It has allowed time for thorough examination, detailed analysis, and meaningful discussions of the proposals in the Report, and it has given us in the Copyright Office a chance to assess the strengths and weaknesses of these proposals in the light of specific comments and criticisms. I am not sure that the draft bill we are coming up with will get any further than previous revision bills, but I *am* sure that its chances are better because of this period of germination.

We have already entered the next phase of the revision program—the drafting of a bill for submission to Congress—and there are three main points that I want to make to you today about this phase. I will state them first, and then elaborate on them:

1. The Copyright Office is now actively engaged in drafting revision legislation.
2. The draft bill that we produce will not follow the Register's Report on all points; on some important issues we are departing entirely from the recommendations of the Report, and on others we are attempting to draft alternative language.
3. In the near future we will begin a series of meetings with the Revision Panel and others in an effort to resolve differences with respect to the substance and language of the draft bill, before it is submitted to Congress.

I'd like to say a few words about the job of drafting itself. I am keenly aware of the need to retain the momentum that has been built up by the Register's Report and the enactment of the bill extending renewal copyrights to the end of 1965. We now have a target date that demands steady and

* U.S. Register of Copyrights. Address before the Copyright Luncheon Circle, at the Overseas Press Club, New York City, on November 16, 1962.

rapid progress toward the reconciliation of different views and the introduction of a bill that we hope will secure general support. At the same time, I am conscious that the introduction of a poorly organized, badly written, ambiguous bill could do the revision program even more harm than delay. The task of drafting a coherent, consistent bill that is neither overcomplicated nor oversimplified is a formidable one, and is going to take some time.

I can assure you that we in the Copyright Office will make every effort to have a bill ready for introduction in 1963. This will be possible only with your cooperation and active assistance. In particular, I urge again that those who have not yet given us their views or comments do so as soon as possible.

I was aware, even before the Report was published, that some of its proposals would be controversial and that some changes would be called for in order to reach sufficient agreement to go forward with a bill. Our recommendations, which the Report characterized as tentative, were carefully considered and sincerely presented; they represented, as the Preface said, our best thinking at the time. There are many debatable questions involved, and we are now ready to change our earlier position on some of them. But there are also some which, even in the face of strong opposition from one side or the other, I remain prepared to fight for.

As even the most ardent partisans of a particular point of view will admit, there is more than one side to almost every issue in general revision. I feel sure that no one can expect to have his view prevail on every issue. We must concentrate on the accomplishment of a comprehensive, forward-looking revision of the copyright law as a whole, and not stubbornly cling to fixed positions. Our efforts can succeed only if we reduce to a minimum the disagreements that exist today, and this means that all sides must approach the various proposals in a spirit of compromise, seeking the very best bill for all concerned.

Let me give you some examples of the problems we are currently wrestling with in our drafting efforts. As you know, in the Report, we recommended the adoption of a concept of "public dissemination" which would supersede the present concept of publication for certain purposes. We had some concern about how this proposal would work out in practice, especially because it was complicated by technical obligations imposed by the Universal Copyright Convention, but felt that it deserved serious consideration. We are now convinced, on the basis of the arguments and comments received since publication of the Report, that this proposal would create new problems, at least in its original form.

Another issue that we felt was closely balanced was that of whether to retain the system of common law protection for works that have not been made available to the public, or whether to adopt a single federal copyright system. There are, obviously, difficult and important problems of policy and practice involved in the solution of this question. However, after weighing

the comments we have received, I believe there is merit in the proposal for adoption of a single federal copyright law.

A problem that has been much discussed is whether to base the copyright term on an event such as publication, as under the present law, or upon the life of the author, as under most foreign copyright statutes. As you know, the Report favors the first alternative, at the same time recommending that the term be lengthened to a maximum of 76 years. The reasons advanced in the Report in support of these proposals still seem cogent to me; and, if history is any guide, there will be supporters for this point of view when our draft bill reaches Congress for consideration.

On the other hand, no one could fail to be impressed by the single mindedness of the supporters of a life-plus system, by the force and vigor of their arguments, and by the preponderance of sentiment in favor of a life-plus term at the present time. I also believe that the almost universal acceptance of the life-plus term outside the United States is a powerful argument in its favor, especially in view of developments such as "Telstar," the increasing international exchange of intellectual materials, and our closer ties with the Berne Union. Consequently, at least one alternative version of our draft will adopt the life-plus basis for computing the term—in conjunction with a system of notice, deposit, and registration, which we consider essential.

Finally, I should like to offer reassurance to those who were afraid that the Copyright Office might simply proceed to draft a bill and have it introduced in Congress without further consultation or discussion. My own feeling is that this would be foolish and self-defeating, and that our drafting efforts can only benefit from a free give-and-take exchange, even though this may mean some delay. I should make it clear that, although on some issues we will be drafting alternative provisions for consideration and discussion, we intend to present a single, integrated bill to the Congress.

We hope, in the near future, to be able to print the transcript of all four of the meetings of the Panel of Consultants on General Revision held during the past year, together with the various comments and statements of position on the Report received from the Panel and others. I plan to reconvene the Panel, possibly enlarged by additional invited observers, for a new series of meetings beginning in January, to review and discuss both the substance and the language of our draft as it progresses. I would also welcome detailed proposals and assistance in reaching compromises from committees and subcommittees of the various bar associations, from any ad hoc groups that are now in existence or may be formed in the future, and from all organizations and individuals interested in general revision. I am genuinely hopeful that, if we can work together in a spirit of compromise and mutual purpose, we shall succeed where so many others have failed.

70. COPYRIGHT—NEW FRONTIERS*

By EMANUEL CELLER

Now that the American people have chosen their representatives and we are on the threshold of the 88th Congress, it seems peculiarly appropriate to review with the distinguished members of this Guild the strengths and weaknesses of the nation's copyright laws and the immediate prospects for their improvement as a protection for the authors and composers of music. What are the new frontiers in copyright?

Both as a private citizen and as Chairman of the House Committee on the Judiciary, I have long been interested in the musical arts—as a musician, a devotee of opera, a student, and a champion of the rights of all creators of American music, whether serious or popular. The jurisdiction of our Committee includes measures affecting copyrights, but it is not merely concerned with the technical aspects of copyright legislation. The Committee has the solemn duty of guarding the intellectual property of composers and authors, and of making sure that as our civilization grows more complex, American native talent will continue to be encouraged by receiving a just return from the commercial exploitation of its works.

For it must be recalled that the copyright law of the United States is founded on the constitutional provision (art. I, sec. 8) which empowers Congress

“ . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”

The Constitution thus envisages two purposes in providing for copyright. It wishes to foster the useful arts and it proposes to do so by rewarding authors for their contribution to society. Obviously these two purposes are closely related.

The last general revision of the copyright laws occurred in 1909. Tremendous changes in technology have taken place in the intervening half-century. These have fostered entire new industries and new methods for the reproduction and dissemination of literary and artistic works. In consequence the 1909 statute is no longer adequate in its application to present day conditions. Among the respects in which the copyright laws fail to achieve the constitutional objectives are a number of shortcomings which peculiarly affect song

* Remarks of the Honorable Mr. Celler, Chairman of the Committee on the Judiciary, U.S. House of Representatives, before the American Guild of Authors and Composers, on November 14, 1962.

writers and composers—notably the present inadequate term of copyright protection, the outmoded jukebox exemption, insufficient sanctions against the counterfeiting and piracy of phonograph records, the compulsory license for the recording of music, and the awkward and unsatisfactory provisions governing renewal and reversion of copyrights.

Past efforts to bring the copyright laws up to date have failed, largely, according to the Register of Copyrights, because of controversy among various private interest groups having a stake in the matter. In 1955, however, Congress provided funds for a comprehensive study by the Copyright Office as the groundwork for a general revision and in 1961, after much study, the Register issued a tentative Report containing detailed recommendations. These recommendations in large measure meet the proposals of your own group as to major matters, though varying in some areas and in particular details. Widespread discussions of the Register's Report were undertaken and are still in progress, with your organization taking a leading part. What is more, the Copyright Office has now turned its efforts to the drafting of a comprehensive bill which, in turn, will be the subject of extensive study by interested parties before it is submitted to Congress. It is hoped that, with the genuine cooperation of organizations interested in the project, such submission will take place during the forthcoming 88th Congress.

While waiting for the legislative proposals of the Register, the 87th Congress has not been idle in this field. With respect to the term of copyright, for example, Congress was called upon, as an emergency measure, to take steps to prevent the expiration of renewal terms of copyright during the period which still must elapse before the enactment of overall legislation. The present term of copyrights, as you know, is 28 years from first publication or registration, renewable during the 28th year by certain persons for a second period of 28 years. One criticism of existing law is that today the United States is the only important Western Power in which it is possible for a copyright to expire during the life of the author. The Register's 1961 Report recommends that the maximum term be increased from 56 years to 76 years. Under this recommendation the basic term would continue to run for 28 years, and would be renewable for a second term of 48 years. Although some groups, including your own, prefer a term of protection that would endure for the life of the author and for 50 years thereafter, as is the rule in many European countries, all interested parties appear to agree that the present term of copyright is unduly short. Meanwhile, existing renewal terms were continuing to expire and would be lost forever.

In this context, I introduced H.J.Res. 627, which extends the duration of copyright protection temporarily. As enacted, this measure continues until the end of 1965 the renewal terms of all copyrights subsisting on September 19, 1962, the date on which President Kennedy approved the measure. It thus

provides an interim suspension of copyright expirations pending the enactment of detailed overall copyright legislation. Originally this bill proposed to extend copyright terms until the end of 1967, but the subcommittee accepted the argument of the Register of Copyright that a temporary extension of that length might unduly impair the incentive of interested parties for achieving agreement on an overall revision.

Another significant achievement of the 87th Congress in this area was the enactment of legislation outlawing the vicious traffic in counterfeiting phonograph records. Hearings before the Copyright Subcommittee of the Committee on the Judiciary elicited testimony from representatives of phonograph record manufacturers, music publishers, and composers and performers of music to the effect that there exists a widespread practice of counterfeiting phonograph records, including labels, produced by reputable phonograph record manufacturers and selling them in interstate commerce in competition with the genuine articles. In 1960, alone, it was estimated, this practice drained more than \$20 million from the legitimate music industry. Typically, the counterfeiter takes hold of a legitimate phonograph record manufactured by a reputable concern and containing a popular song or arrangement. He makes copies of the recording and of the label as well. Then he palms off his counterfeit copies as the genuine products of the manufacturer whose label and recording he has appropriated.

Because the counterfeiter operates outside the law, paying no compensation to artists, no arrangers' fees, no copyright royalties, and no excise taxes, he is able to sell his illegitimate and often mechanically inferior records to jobbers and dealers at prices far below those charged by the legitimate manufacturers whose work has been forged.

The victims of this unconscionable practice are many. They include songwriters and publishers; record manufacturers, distributors, and dealers; recording artists and musicians; manufacturers of phonographs; and the U. S. Government. The songwriters, publishers, artists, and musicians are deprived of their royalties. The record industry is denied its legitimate profits. The Federal Government is robbed of its excise and other taxes. And the music-loving public, often as not, receives a mechanically imperfect product. This in turn injures the reputation of the artists and of the manufacturers of records and sound equipment, because the public naturally attributes the mechanical defects of the counterfeit record to the producers of the real thing.

The few State laws which attempt to deal with the problem impose relatively ineffective fines. Counterfeiters are happy to pay such fines, regarding them as in the nature of licenses.

Inasmuch as counterfeit records are being shipped in interstate commerce across State lines, I believed it essential to the proper administration of justice that Congress should enact a Federal criminal statute that would add the power

and weight of the Federal Government to State and county law enforcement agencies. Accordingly, I introduced and Congress enacted H.R. 11793, a bill that amends the Federal Criminal Code by declaring the traffic in counterfeit records to be a criminal act, subject to fine and imprisonment.

I believe that it is significant that both of these measures—the copyright extension bill and the counterfeit record bill—underwent amendment before they were enacted. I cannot emphasize too strongly the necessity for flexibility and compromise in the area of copyright legislation. In the copyright extension bill, as I have said, Congress accommodated the need of copyright owners to be saved from unnecessary extinction of their right to the equally urgent need of the Register to avoid a flagging of interest in a final agreement in overall revision. I believe the accommodation was a wise one.

Similarly, the counterfeit record bill underwent revision by the Senate, which sharply reduced the penalties provided by the House bill. This took place near the end of the session. Our House Committee was faced with the alternatives of accepting the Senate amendments and the greatly reduced penalties, or asking the Senate for a conference. In the second alternative, it is possible that we might have come out with a stronger deterrent; on the other hand, we might have come out with nothing at all. In this context Committee Staff consulted the principal proponents of the measure, representatives of phonograph record manufacturers. These persons wisely expressed their preference for a bird in the hand. I think this was much to their credit. The measure, as amended by the Senate, was enacted; trafficking in counterfeit records is now a Federal offense; and the investigative agencies of the Federal Government can be enlisted to stamp it out. A new deterrent has been placed on the books and, should the penalties prove inadequate, they can easily be revised upward.

There is one area, however, in which the spirit of compromise and accommodation has not yet borne fruit. I refer to my unceasing efforts to bring about the repeal of the anachronistic and outmoded jukebox exemption.

Through the years, Congress has amended the provisions of the copyright law to protect authors and composers in the commercial exploitation of their creative works by requiring users to pay reasonable fees to copyright owners for the sale or use of their property. Radio and television broadcasters, concert halls, movies, wired music—all these industries pay composers of copyrighted music for the right of commercial performance. The sole exception is the coin machine operator—the corporation that owns and leases coin machine phonographs to taverns and restaurants. To quote the Register of Copyrights, “Jukebox operators are the only users of music for profit who are not obliged to pay royalties, and there is no special reason for their exemption. The jukebox exemption should be repealed or at least replaced by a provision requiring jukebox operators to pay reasonable license fees for public performance of

music for profit." With this statement I agree. The use of copyrighted music on jukeboxes for profit without so much as a by-your-leave to the composers of such works is nothing less than legalized piracy.

In the 85th and 86th Congresses, I introduced bills to repeal the jukebox exemption. In June 1959, the Copyright Subcommittee of the House Committee on the Judiciary held extensive hearings on my bill H.R. 5931. Witness after witness testified to the injustice and inequity of the out of date copyright law which was enacted in 1909, 21 years before the modern machine phonograph made its appearance. Helen Sousa Abert, daughter of the late John Philip Sousa, told the Subcommittee: "A songwriter is entitled to compensation during the short term of his copyright from all sources which perform his work publicly for profit. The jukebox is certainly performing copyrighted music for profit."

The Subcommittee also heard from qualified witnesses that the jukebox industry is today a \$500 million industry—purchasing popular works at wholesale prices and selling renditions of the music at ten cents a play. Coin machine performances of recordings are clearly performances for profit; but under existing law the composer receives no royalties for them.

On the other hand, the coin machine operators make the plea that they cannot afford to pay such royalties, that they fear that outright repeal of the present exemption would leave them at the mercy of the copyright owners who might charge them unconscionable fees.

Thus, embraced in controversy, the antiquated 1909 jukebox exemption remains unchanged. But it should be changed, and Congress must act responsibly to find a path of justice in this matter.

In August 1958, a Subcommittee of the Senate Committee on the Judiciary reported favorably a bill to repeal the jukebox exemption. In the report on this measure there were several references to a possible compromise solution of the problem, offered by the National Beverage Association. This proposal envisaged the payment of between \$15 and \$25 per annum per coin operated machine, depending upon size. Even Mr. George Miller, President of the Music Operators of America, Inc., originally expressed interest in this proposal and the House Judiciary Committee staff attempted to schedule a conference for the purpose of discussing it. This conference, however, could not be arranged, the operators having apparently lost all interest in discussing a possible area of agreement.

In the 87th Congress I again introduced a bill to repeal the jukebox exemption, H.R. 70. Along with the Register of Copyrights, many public spirited citizens—authors, newspaper columnists, actors—have endorsed H.R. 70. The Department of State supports it. The American Bar Association, the American Patent Association support it. But because of the controversy that surrounds this matter, some members of Congress may feel that a blanket repeal of the exemption is not the best answer, because the coin machine

operators and the music copyright owners might not be able to agree on fair and equitable royalty in negotiations. Accordingly I introduced, as an alternative to H.R. 70, a new bill, H.R. 12450, which would not only provide for the payment of royalties by jukebox operators but would also establish trustees with an obligation to provide for the fair and orderly determination of the amount and the proper distribution of such royalties. Hearings were scheduled on these bills but had to be cancelled because of the unavailability of necessary witnesses.

In the new Congress I shall again introduce legislation for the purpose of eliminating this grossly unfair provision of existing law and I shall do everything in my power to see to it that this legislation is given a very high priority.

In appraising the reasons for the failure of Congress thus far to remedy this unconscionable situation, I believe that the members of your Guild—as well as all members and friends of the song writing profession—have an indispensable role to play. Because of the inability to foresee the development and popularity of the coin operated phonograph, the jukebox industry has been able to reap large profits from the exploitation of music and at the same time to deprive the song writers of their just share. The song writers must bring the justice of their position to the attention of the members of Congress, not only in the large urban centers, but also the less populated areas. I am confident that when the issue is thoroughly understood remedial action will inevitably follow.

I believe that all auguries are peculiarly favorable for substantial progress in copyright law reform. The Federal Administration has uniquely manifested its interest in cultural affairs, having for the first time appointed a Special Presidential Consultant on the Arts, the Honorable August Heckscher. The Congress will be increasingly alert and sympathetic to these problems, having worked with them, and it is your job to make us wholly conversant with your needs and problems. The Copyright Office is diligently tackling the challenging task of drafting legislation. Last, but not least, distinguished organizations like your own with specific stakes in copyright legislation are lending their expert assistance to the Register in attempting to accommodate competing interests and minimize conflicts among groups. It is hoped the new Congress will see the introduction of a general revision bill supported by the greatest possible consensus. In this work, no less than in the work of legislators, patience, statesmanship, recognition of the other fellow's needs, and an eye to the public interest are indispensable. From what I have seen of their work, I am happy to say that your own President, Burton Lane, your Counsel, Mr. Kellman, as well as the members of your Copyright Committee, admirably combine these qualities and seem uniquely fitted to represent the interests of your Guild in this vital area. I am confident also, that the public interest will be furthered by their continued efforts.

71. THE ROME CONVENTION FOR THE PROTECTION OF PERFORMERS, PRODUCERS OF PHONOGRAMS AND BROADCASTING ORGANIZATIONS¹

By EUGEN ULMER²

1. WORK OF THE CONFERENCE, PREVIOUS HISTORY AND OUTCOME

A. Generalities

1. The diplomatic conference which successfully concluded the work leading to an international agreement on neighboring rights was held, at the invitation of the Italian Government, from October 10 to 26, 1961, in Rome. The three major international organizations which had made the necessary preparations for the Convention by inviting committees of experts, consulting the governments concerned, producing working documents, etc.—viz, the Berne Union for the Protection of Literary and Artistic Works, UNESCO and the International Labor Organization—gave valuable assistance by supplying the conference secretariat and technical services to the delegations of the countries represented in Rome.

The deliberations of the conference, to which 42 countries had sent delegates, led, after a number of difficulties had been overcome, to the acceptance of the text of the Convention at the plenary meeting on October 25, 1961. On the evening of October 26, the solemn act of signing the Convention took place: there were altogether 18 countries (Argentina, Belgium, Brazil, Chile, Denmark, the German Federal Republic, France, Great Britain, the Holy See, India, Iceland, Italy, Yugoslavia, Cambodia, Mexico, Austria, Sweden and Spain) whose authorized representatives appended their signatures to the Convention.

2. The signing of the Convention is the final outcome of a long series of developments.³ Initial consultations concerning an international agreement

1. Authorized translation of an article which appeared in *Gewerblicher Rechtsschutz und Urheberrecht, Auslands- und Internationaler Teil*, 569-594, December 1961.

2. Professor of Law, University of Munich, Germany; Head of the Delegation of the Federal Republic of Germany to the Rome Conference.

3. For details of previous history see Baum's report in *GRUR Ausl.* 1953, 197 et seq., and the introductory chapter of my article, "The Protection of Performing Artists, Producers of Sound Recordings and Broadcasting Organizations; A Study in International and Comparative Law," published in 1957 by the U.S. Copyright Society Translation Service. The original (German) was published in the same year by the Institut für Urheber und Verlagsrecht of the Munich University.

on the rights of performing artists, producers of phonograms and broadcasting organizations had taken place at Samaden (Switzerland) in 1939 at a meeting of a committee of experts pursuant to an invitation of the International Institute for the Unification of Private Law. The outbreak of the Second World War brought the work to a standstill. Its resumption during the post-war period was encouraged by *vœux* expressed in 1948 at the Brussels Conference for the revision of the Berne Convention, advocating an international agreement for the protection of the three groups. Special emphasis was placed on the desire for an international agreement on the rights of performing artists, in substantiation of which the artistic nature of their performances was pointed out, and reference was made to the "*droits voisins du droit d'auteur*" (rights neighboring on copyright).

Subsequently, the Berne Union and the International Labor Organization (which had taken up the study of the question of protection for performing artists as early as 1926) called a meeting, in Rome in November, 1951, of a committee of experts consisting of five members of the Permanent Committee of the Berne Union, five representatives of the International Labor Organization, as well as representatives of the associations of interested groups. The result of the work of this committee was the 1951 Draft (Rome Draft), which at all events remained as an indication of the direction of future developments: the international agreement designed to protect performing artists, producers of phonograms, and broadcasting organizations was to be provided by one *single* treaty instrument and not, as had been planned at Samaden, by several such instruments.

The Rome Draft was submitted to the governments of the various countries with a view to obtaining their comments. The replies contained a number of valuable suggestions. In particular, the proposal embodied in the Draft to the effect that, in the event of records being used for the purpose of broadcasting or communication to the public, a claim to reasonable remuneration should be granted to the producers, prompted a large number of countries to suggest that the artists be given a share of the proceeds. Much attention was paid in this connection to the suggestion put forward by Mr. Lenoble, Inspector General of the French Broadcasting Organization,⁴ that while the right to a remuneration should be granted to the producers, they in turn should be obliged to allow the performers a share in the proceeds.

The experts who drew up the Rome Draft were exclusively Europeans. The United States Copyright Office was represented in Rome only by an observer. Subsequently, however, the United States manifested growing interest

4. Concerning this suggestion cf. G. Straschnov, "Protection internationale des droits voisins" ("International Protection of Neighboring Rights") (1958), p. 137 et seq.

in participating in an international agreement on neighboring rights. The framework provided by the Berne Union having thus become too narrow for the continuation of preparatory work, it was joined by UNESCO, whose Copyright Division had taken up the study of neighboring rights after the signing of the Universal Copyright Convention.

The intergovernmental organizations entrusted with the preparation of the Convention were henceforth the Berne Union and UNESCO, on the one hand, and the International Labor Organization on the other. As no agreement could be reached on the procedure to be followed, the ways of these organizations parted temporarily. The International Labor Organization convened a committee which met in Geneva in 1956. This Committee drew up a new draft (Geneva Draft), mainly through the efforts of experts appointed by the associations representing performing artists, the phonographic industry and broadcasting organizations. In 1957, the Berne Union and UNESCO convened a conference at Monaco, where the task of preparing the draft (Monaco Draft) was undertaken by experts appointed by the governments of twelve countries.

The Geneva and Monaco Drafts displayed a number of discrepancies. The Monaco Draft proposed straightforward and simple provisions which centered on the principle of national treatment. Minimum rights were only envisaged to a modest extent in the Monaco Draft; in particular, the question of remuneration for so-called secondary utilizations (use of commercial records for public performance) was to be left entirely to the discretion of the national legislatures of the various countries. The Geneva Draft was much more exhaustive. It contained detailed provisions which were the result of a compromise among the associations representing the three interested groups. With regard to secondary utilizations, the Geneva Draft incorporated the Lenoble proposal: reasonable remuneration was to be paid to the producers for the use of records for broadcasting and communication to the public, subject to the qualification that they (i.e., the producers) must allow the performing artists, by means of a direct arrangement between performers and producers, a share in the proceeds.

In view of the dissimilarity between the two Drafts, it was fortunate that it subsequently proved possible to bring about a resumption of co-operation between the Berne Union, UNESCO and the International Labor Organization, and to reach an agreement on the convening of a committee of experts to work out a single draft as a basis for the deliberations of the diplomatic conference. This committee met at The Hague in May 1960. Under the excellent guidance of Professor Bodenhausen (Netherlands), it was found possible to adjust the differences between the Geneva and Monaco Drafts and to produce a new draft (Hague Draft).⁵ Proceeding from the principle of national treatment, the

5. Concerning the Hague Draft cf. my report in GRUR Ausl. 1960, p. 605 et seq.

Hague Draft followed the lines of the Monaco Draft. In defining minimum rights, however, it also incorporated some elements of the Geneva Draft, thereby going further than the Monaco Draft. With regard to secondary utilizations, provision was made for an obligation to pay equitable remuneration. At the same time, it was to be left to the discretion of the contracting countries to decide whether the right to remuneration belonged to the performers, to the producers of phonograms, or to both jointly. The contracting countries were to have a right to declare in their instruments of ratification or accession that they abstained, wholly or partially, from granting the right to remuneration provided under the Convention in the event of commercial records being used for communication to the public.

3. The Hague Draft was the basis for the work of the Rome Conference, which accepted the main lines of its provisions: the Rome Convention takes as a basis the principle of national treatment and supplements it by provisions concerning the minimum rights of performers, producers of phonograms, and broadcasting organizations. Among the minimum rights, the most important one is the right to equitable remuneration in the event of commercial phonograms being used for the purpose of communication to the public. In accordance with the proposal contained in the Hague Draft, provision is made for a single equitable remuneration to be paid to the performers, to the producers of phonograms, or to both. The contracting countries retain, however, the possibility of excluding, wholly or partially, the application of the relevant provision by making an appropriate reservation; in the event of such exclusion, the principle of reciprocity applies.

Although the Rome Convention follows the main lines provided by the Hague Draft, it nevertheless incorporates a number of modifications or improvements concerning details, and, in particular, it contains refinements respecting the legal structure of the instrument. The cases in which the Convention applies are defined more clearly than in the Hague Draft, and without the use of the concept of "country of origin." As to the rights of producers of phonograms, the relevant criteria have been selected from new points of view. A number of questions which were still left open in the Hague Draft have, after careful study of the possibilities, been settled in an unequivocal manner. These included the question of what the position is to be in respect to reciprocity if the contracting countries should define the holders of the rights in different ways in connection with the payments for secondary utilizations. It was also possible to provide satisfactory solutions for the nonsubstantive questions, such as the requirements for the coming into force of the Convention; the questions pertaining to organization, including the appointment of an Intergovernmental Committee; and the question of the official languages.

B. *The resistance that was offered and overcome*

The successful outcome of the Rome Conference was not to be foreseen with any degree of certainty. On the contrary, we had gone to Rome with a certain amount of scepticism.⁶ True, the Hague Draft had been generally welcomed as a satisfactory compromise between conflicting interests. The majority of the governments consulted by the intergovernmental organizations had—subject to individual suggestions to amend certain provisions—declared or intimated that the Draft was a suitable basis for the conclusion of the Convention. During the last few months, however, there had been a stiffening of resistance to the principles underlying the Hague Draft. This resistance emanated, on the one hand, from authors' associations and, in particular, from the *Confédération internationale des sociétés d'auteurs et compositeurs* (CISAC) and the *Association littéraire et artistique internationale* (ALAI), and, on the other hand, from the European Broadcasting Union, which—like CISAC and ALAI—actively opposed the right to compensation provided for with respect to secondary uses.

1. The authors' associations had from the very outset followed the plans for an international agreement on neighboring rights with a certain amount of concern. It must be remembered that what is at stake is, after all, the recognition of new rights in a field where, on an international level, only authors' rights have hitherto been involved. At all events, they asked, in case an international agreement on neighboring rights should materialize, for a guarantee, based on the principle of the primacy of copyright, to the effect that the authors' interests would not be adversely affected.

With respect to the use of commercial records for public performance, the authors' associations noted with satisfaction that the Drafts did not grant a right of authorization to performers and producers of phonograms. This eliminated the danger of the authors—who have a right to royalties whenever records are broadcast—being "controlled" or "blocked" through the exercise of a right of authorization. But the authors' associations pointed out that even if only a right to remuneration is recognized, there is a danger, since the additional burden upon the user, whose ability to pay is limited, may result in a reduction of authors' royalties. This argument was not invoked in order to oppose any obligation for the payment of remuneration by broadcasting organizations, which already pay the producers for the broadcasting of records in most European countries. It was, however, invoked in connection with payments for other communications to the public (in restaurants, dance halls or

6. The German Delegation consisted, apart from the author of this report, who had been entrusted with the task of leading the Delegation, of Ministerialrat Sahmer of the Federal Ministry of Labor, and Regierungsdirektor Schneider of the Federal Ministry of Justice.

other public places). At a meeting of representatives of authors, held in 1956 at the invitation of the Director of the Bureau of the Berne Union, these were laid down in the so-called *principes interauteurs*.⁷

As the Rome Conference approached, however, the authors' associations decided to go beyond the position laid down in the *principes interauteurs*, and to launch a frontal assault on the proposed agreement on neighboring rights. The Legislative Committee of CISAC declared at its conference held in June 1961 at Tel Aviv that an international agreement on neighboring rights was unnecessary, since the protection of the legitimate interests of performers, producers of phonograms, and broadcasting organizations was already safeguarded by general legal principles and, in particular, by the possibility of concluding contractual arrangements.⁸ ALAI dealt with the Hague Draft at its congress at Florence in September 1961. After considering a report by Professor Henri Desbois, the meeting passed, by a majority vote, a resolution to the effect that the international agreement envisaged appeared to be uncalled for and useless; at any rate, in view of the existing differences between the views put forward, such an agreement was deemed to be premature at that time.⁹

At the Rome Conference it was the French Delegation, more than any other, which made the views of CISAC and ALAI its own. True, State Counsellor Puget expressed readiness, on behalf of France, to take part in the work of the conference, but emphasized that this participation was subject to the most far-reaching reservations and that, as a matter of principle, his Delegation took the view that the conclusion of a convention concerning neighboring rights was uncalled for, useless, and even dangerous, and that the safeguarding of the interest of performers, producers of phonograms, and broadcasting organizations could also be achieved without any special convention, by means of contractual arrangements. These arguments were supplemented by the ALAI observer, Professor Troller, who pointed out organizational considerations allegedly militating against regulation, in the same treaty instrument, of the rights, so different in nature, of performers, producers of phonograms, and broadcasting organizations.

2. The resistance emanating from the authors' associations was strengthened by the fact that the European Broadcasting Union also opposed any

7. The essential contents of the "*principes interauteurs*" are given in the report of the Director of the Berne Bureau in *Le Droit d'Auteur* 1956, p. 71 et seq. Cf. also the general report of the Special Committee appointed by ALAI, as published by Troller in "*L'artiste exécutant, le fabricant de phonogrammes, le radiodiffuseur*" (temporarily published as a special section of *Le Droit d'Auteur*), 1956, p. 93 et seq.

8. Cf. the report on the Tel Aviv meeting of the Legislative Committee of CISAC, published in *Le Droit d'Auteur* 1961, p. 211 et seq.

9. Cf. statement on the Florence Congress of ALAI in *Le Droit d'Auteur* 1961, p. 288 et seq.

obligation to pay remuneration for secondary uses, as provided in the Hague Draft.

For many years, the three interested groups—performers, producers of phonograms, and broadcasting organizations—had jointly advocated an international agreement on neighboring rights, and agreed among themselves on the main lines of such an agreement. An integral part of this understanding was the principle that in the event of records being used for broadcasting and communication to the public, equitable remuneration should be paid. The imposition of such an obligation to pay remuneration appeared to be acceptable to the broadcasting organizations, since they are already not only legally liable to pay such remuneration in Denmark, Germany, Great Britain, Italy, and Switzerland, but also make payments to producers of phonograms, on the strength of contractual arrangements with the phonographic industry, in countries where there is no such statutory obligation, e.g. in Belgium, France, the Netherlands, and Austria. What also carried weight with the broadcasting organizations were the facts that the performers—waiving their original demand to be granted a right of prohibition—contented themselves, at the international level, with the recognition of a right to remuneration, and that performers and producers of phonograms agreed to the payment of a single remuneration benefiting both groups. As to the legal form required to achieve this result, it was envisaged, in conformity with the suggestion made by Mr. Lenoble mentioned earlier, that while the right to remuneration was to accrue to the producers of phonograms, they should be obliged to allow the performers a share in the remuneration.

In conformity with the understanding between the three groups concerned, it was this plan which became the basis of the provisions worked out in Geneva. Even Dr. Straschnov, principal legal adviser of the European Broadcasting Union, advocated, after carefully weighing the pros and cons, a solution along the lines of the Lenoble proposal in his book on "*droits voisins*" published in 1958. At the same time, however, he urged that there should be left to the contracting countries a possibility of excluding, in whole or in part, the application of this principle by stipulating an appropriate reservation. It is at The Hague and subsequently accepted in Rome, whereby the right to Dr. Straschnov's credit that he pointed the way to the solution, first envisaged remuneration for secondary uses is, it is true, recognized in principle, but the possibility is left open to contracting countries of excluding, in whole or in part, the application of this principle by stipulating an appropriate reservation.

At the Rome Conference itself, however, Dr. Straschnov, who represented Monaco and whose views also carried weight with other delegations whose members were close to broadcasting organizations, did not remain true to his idea: the European Broadcasting Union had abandoned its previous point of view and was now opposing the Hague proposal. The reasons for this change

of attitude can only be a matter of conjecture. However, it is likely that this was to some extent prompted by the fact that the European Broadcasting Union had been successful in bringing about, in the Committee of Experts appointed by the Council of Europe for the exchange of television programs, the conclusion of a European Convention for the protection of television broadcasts. The European broadcasting organizations thereby attained, even before the conclusion of the Convention on Neighboring Rights, the safeguarding, on an international level, of the most important rights which were to be granted to them within the framework of the general Convention. In view of this anticipated satisfaction of its interests, the European Broadcasting Union no longer needed to have the same regard as previously for the interests of performers and producers of phonograms. It was concern at the prospect of this situation arising that prompted me, at the meeting of the Committee of the Council of Europe, to express doubts—notwithstanding recognition of the broadcasting organizations' legitimate interests in the sphere of neighboring rights—about the wisdom of anticipating the protection of these interests in a European Convention.¹⁰

3. These opposing forces had the same aim, namely, to cancel the obligation to pay remuneration for secondary uses and thus to do away with the provision of the Hague Draft which was the most important for the protection of the interests of performers and producers of phonograms. They were not successful, and this was due to the determination of the majority of the delegations to ensure effective protection for the interests of the three groups concerned—the performers, in particular—on an international level. The States whose Delegations constituted this majority included not only European countries such as the German Federal Republic, Great Britain, Ireland, and Austria, but also Australia, India, and Israel, the Latin American states, and, among the countries of the Eastern Bloc, Poland and Czechoslovakia. Even the Italian Delegation, which, under Mr. de Sanctis' influence, otherwise showed reserve in its attitude to the Convention, voted, on instructions received from its Government, in favor of the obligation to pay remuneration in the event of secondary uses. In adopting this attitude, the delegations of the above-mentioned countries realized that, by allowing the making of a reservation, appropriate regard was shown for those contracting countries which still had doubts about the introduction of an obligation to pay remuneration.

The arguments advanced by the representatives of the broadcasting organizations against the obligation to pay remuneration were not convincing, in view of the fact that these representatives had for many years agreed to

10. Cf. in this context my report on the work of the Committee of Experts appointed by the Council of Europe and the European Convention for the Protection of Television Broadcasts, in GRUR *Ausl.* 1960, 13 and 615 et seq.

incorporate this obligation in the Convention. As far as authors' interests are concerned, the protection of creators of intellectual works represents to us, no less than to other countries, an important and urgent concern. It should be mentioned in this context that the standard of copyright protection provided in the Ministerial Draft of a new German Copyright Law, published in 1959, is a particularly high one. This draft goes, in several respects, even beyond the limits of the protection which the new 1957 French Copyright Law confers upon authors of works of literature and art. The draft law would grant, for example, on the basis of a well-known decision of the Supreme Court of Germany, protection to authors in the event even of *private* sound or visual fixations of protected works, and would grant to authors a right to remuneration in the event of the commercial renting of copies of their works (books, musical scores, records, etc.). We do not refuse to recognize that some protection must also be granted to those who, in connection with the rendition of literary and artistic works, contribute something personal and original (*Leistung*). This applies particularly to performers. Against the so-called "pie theory" (the apprehension that authors might receive less in royalties if, in the event of record broadcasts or concerts, payments have to be made also to performers or producers of phonograms) must be set the experience of a number of countries, such as Great Britain and other countries of the British Commonwealth, Denmark and Italy, where such an obligation has been in force for some time. There may be temporary difficulties. In the long run, however, it is not to be assumed that the pie of the authors and music publishers will necessarily be smaller simply because performers and producers of phonograms are also given some dessert.

What was particularly regrettable in the categorical opposition of authors' associations to neighboring rights is that it led to a struggle against the protection of performers' interests. There is a close affinity between authors and performers in the creation and interpretation of spoken and musical works. As is well known, composers are frequently also conductors. Had the authors' cause been entrusted to the leaders of the profession, the performers' interests would probably have been properly understood. In fact, however, representation of authors' interests rests in the hands of the administrators of associations, music publishers, and their legal advisers, who act without any regard for the professional group of performers—a group professionally close to the authors—and who succeeded in persuading the associations, accustomed to listen to their advice, that the protection of neighboring rights represents a danger to the authors.

Lastly, as regards the doubts expressed by Mr. Troller from the point of view of formal consistency, I have repeatedly pointed out¹¹ that the rights

11. Cf. my article "The Legal Protection of Performing Artists, etc.," p. 10, as well as my *Urheber- und Verlagsrecht* (2nd ed.), p. 428 et seq.

of performers differ inherently from those of producers of phonograms and broadcasting organizations. In the case of performers' rights there is a mixture—in a way similar to copyright—of elements of moral and property rights. But in the case of the rights of producers of phonograms and broadcasting organizations, it is solely a matter of protecting property interests; as far as its juridical nature is concerned, this protection is close to the protection granted by the law of unfair competition. These differences in their legal nature do not, however, rule out regulation in the same convention, since there is a close relationship among the protected objects, phonograms and broadcasts being the media whereby the artists' performances are recorded or broadcast, and since there is a need for harmonizing the rights of the three groups concerned. It is a well-known fact that the Paris Convention, too, deals not only with patent and design law, but also with the law of unfair competition. Between the rights of performers and those of producers of phonograms and broadcasting organizations, there is no greater difference than that between, say, the protection of authors of designs and the protection of business enterprises against unfair competition.

4. A special word of recognition is due in this connection to the United States Delegation led by the new Register of Copyrights, Mr. Kaminstein, which greatly promoted the work of the Conference by its sagacious and temperate attitude.

It is generally known that special difficulties exist, owing to the relevant provision of the American Constitution and the prevailing practice in the United States, with regard to any agreement on neighboring rights. The Constitution limits the field of federal legislation to the protection of "writings." Even when, following recent decisions of American courts, this concept is interpreted more liberally so that not only written fixations but also other tangible fixations are considered to be "writings," it will still hardly be possible to include among "writings" the performances of performing artists which have not been recorded on phonograms or on films. To this must be added the peculiar situation arising from the fact that, in the United States, broadcasting is in the service of the advertising industry. Because of this advertising function, records are made available by the phonograph industry to broadcasting organizations free of charge or at preferential rates. There is no question of any payment for the broadcasting of records. The performers in the United States have set up, by trade-union methods, a system of protection from the disadvantages which may result from them due to the mechanization of music. The method underlying this protection, however, is different from the granting of a share to performers, as envisaged in Europe, Latin America, and other

countries, by payments which are made for using records for communications to the public.¹²

This situation had prompted the American Delegation to propose at The Hague that only a very low level of protection should, to begin with, be provided in the Convention on Neighboring Rights. However, in view of the resistance of the majority of the countries, the United States Delegation adopted a less extreme position at Rome. They wanted, first and foremost, effective protection of performers, and their proposals in this connection went considerably beyond the proposals of the Hague Draft. True, recognition of claims to remuneration in the event of records being used for the purpose of communication to the public is not under consideration by the United States.

The American Delegation, however, was content with the possibility of making an appropriate reservation, as already provided for in the Hague Draft. It was far from turning this question into one of principle, because it realized that in view of the situation in Europe, Latin America and elsewhere, the introduction of an obligation to pay remuneration is only reasonable.

C. The Organization of the Conference

1. At the opening session of the Conference, the leader of the Italian Delegation, Ambassador Talamo Atenolfi di Castelnuovo, was elected President. Elected as Vice-Presidents were the leaders of the Delegations of Argentina, the German Federal Republic, France, Ghana, Great Britain, Cambodia, the Netherlands, Sweden, Czechoslovakia, and Tunisia; as Rapporteur General, the Head of the United States Delegation, and as Chairman of the Credentials Committee, the Head of the Japanese Delegation. The above-mentioned Heads of Delegations constituted the "Bureau" (steering committee) of the Conference, which made suggestions concerning the division of the work of the Conference, the establishment of working groups, etc.

Furthermore, at the opening session, the rules of procedure for the Conference were accepted on the basis of a draft submitted by the inter-governmental organizations. They contained, *inter alia*, the important provision that a two-thirds majority was required in plenary meetings for the acceptance of individual articles and of the Convention as a whole.

2. In accordance with the rules of procedure, the President of the Conference was at the same time Chairman of the Main Commission.

To facilitate the progress of the work, it was arranged for the deliberations of the Main Commission to be preceded by deliberations of three working parties: Working Party No. 1 was concerned with "national treatment," the

12. Cf. in this connection my article "The Legal Protection of Performing Artists, etc.", p. 58 et seq.

definitions of the cases in which the Convention applies, and with the definition of certain concepts; Working Party No. 2 with minimum rights, as well as with the provisions on exceptions and reservations; and Working Party No. 3 with the formal provisions concerning ratification and accession, the coming into force, etc. The only subjects deliberated on immediately by the Main Commission were the articles concerning formalities and the relationship with copyright.

It was left to the delegations' election to enter their names for collaboration in the respective Working Parties on lists provided for that purpose. The practical result of this was that all delegations collaborated in Working Parties Nos. 1 and 2, while only some of them were represented in Working Party No. 3.

Professor Bodenhausen (Netherlands) was elected Chairman of Working Party No. 1, the author of this report was elected Chairman of Working Party No. 2, and Ambassador Petren (Sweden) was elected Chairman of Working Party No. 3.

3. Working Parties Nos. 1 and 3 met simultaneously. They completed their work on October 16. From October 17 to 23, it was the turn of Working Party No. 2.

The preparation of the text of the articles of the Convention by the Working Parties facilitated rapid passage through the Main Commission. This was followed by the meeting of the Drafting Committee, consisting of State Counsellor Puget (France), who acted as Chairman, and the delegates of Argentina, Belgium, Czechoslovakia, the German Federal Republic, Great Britain, Italy, Japan, Mexico, Spain, Sweden and the United States.

On October 25, the articles were submitted to the Plenary Meeting in the version decided upon by the Drafting Committee. Both the individual articles and the Convention as a whole were accepted, some unanimously and some by a majority of votes exceeding the required two-thirds. As a result, the work was completed in such good time that the signing of the Convention could take place—as scheduled—on October 26.

[Continuation will follow in the next issue.]

PART II.

LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS

I. UNITED STATES OF AMERICA AND TERRITORIES

72. UNITED STATES. *Laws, statutes, etc.*

Public Law 87-646, 87th Congress, H. R. 10432, September 7, 1962.
An Act to amend title 39, United States Code, to codify certain recent public laws relating to the postal service and to improve the Code.

The act reads:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That

SEC. 21. The first paragraph of section 8 of title 17, United States Code, as amended, is further amended to read as follows:

"No copyright shall subsist in the original text of any work which is in the public domain, or in any work which was published in this country or any foreign country prior to July 1, 1909, and has not been already copyrighted in the United States, or in any publication of the United States Government, or any reprint, in whole or in part, thereof, except that the Postmaster General may secure copyright on behalf of the United States in the whole or any part of the publications authorized by section 2506 of title 39."

73. UNITED STATES. *Laws, statutes, etc.*

Loi publique 87-668, 87^e Congrès, H.J.Res. 627, étendant la durée de protection du droit d'auteur dans certain cas (19 septembre 1962). (75 *Le Droit d'Auteur* 263, no. 11, Nov. 1962.)

A French translation of the U. S. copyright extension act, Public Law 87-668. See 10 BULL. CR. SOC. 37, Item 3 (1962).

2. FOREIGN NATIONS

74. DENMARK. *Laws, statutes, etc.*

Act on rights in photographic pictures, 1961; Act No. 157, of May 31st, 1961. (75 *Le Droit d'Auteur* [English inset] 142-143, no. 10, Oct. 1962.)

The official English translation.

75. IRELAND (*Erie*) *Laws, statutes, etc. (Bills)*

An bille coipchirt, 1962. Copyright bill, 1962. Dublin, Stationery Off., 1962. 61 p.

"No. 30 of 1962."

A bill to replace existing legislation, introduced by the Minister for Industry and Commerce, and ordered to be printed by *Dáil Éireann* on July 19, 1962. The bill comprises 57 sections, arranged in 7 parts, plus two schedules embodying transitional provisions and enactments repealed. The bill appears to be modeled upon the British Copyright Act, and retains much of the latter's complex structure.

76. MEXICO.

Accord fixant le tarif relatif au paiement des droits d'exécution publique de la musique au moyen d'appareils phono-électromécaniques, du 17 juillet 1962. (75 *Le Droit d'Auteur* 214-215, no. 10, Oct. 1962.)

An agreement, under the provisions of Art. 95 of the Mexican copyright statute, between the author societies and jukebox operators associations fixing royalties for public performance of musical compositions by means of jukeboxes.

77. NEW ZEALAND. *Laws, statutes, etc. (Bills)*

A bill entitled An Act to consolidate and amend the law relating to copyright. As reported from the Statutes Revision Committee, House of Representatives. Wellington, R. E. Owen, Govt. Printer, 1962. 85 p. (no. 63-2.)

The bill calls for a complete revision of the New Zealand copyright law. The recommendations of the Copyright Committee which appeared in its *Report* of May 29, 1959, have been adopted except for the term which will remain at life plus fifty years. Important modifications have been made in the design picture. For a summary of the committee report, see 7 BULL. CR. SOC. 63, Item 80 (1959).

78. NORWAY. *Laws, statutes, etc.*

Act relating to property rights to literary, scientific or artistic works; Act no. 2 of May 12th, 1961. (75 *Le Droit d'Auteur* [English inset] 106-112, no. 8, Aug. 1962.)

The official translation.

79. PERU. *Laws, statutes, etc.*

Decreto Supremo no. 61. Reglamento de la Ley de Derechos de Autor, no. 13714. *El Peruano*, Oct. 26, 1962, pp. 1-2.

A decree implementing the Peruvian copyright law of 1961.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

80. Committee of Experts concerning Extension of Copyright Protection, *Rome, 1962*. Report by Professor Henri Desbois, General Rapporteur. (75 *Le Droit d'Auteur* [English inset] 113-115, no. 8, Aug. 1962.)

The report of a meeting of a Committee of Experts held in Rome, May 14-16, 1962, whose task was "on the one hand to specify the conditions in which an extension of the general term of protection might be introduced in relations between Unionist [i.e., Berne] countries wishing to move in this direction, and on the other hand to establish methods by which a standardisation could be obtained for exceptional measures granted due to the effect of war in certain countries." The meeting was held in implementation of a resolution adopted by the Permanent Committee of the Berne Union at its tenth session, Madrid, September 25-30, 1961. Appears in French in the main section of the same issue of *Le Droit d'Auteur*.

81. Diplomatic Conference on Neighboring Rights, *Rome, 1961*. Internationales Abkommen über den Schutz der ausübenden Künstler, der Hersteller von Tonträgern und der Sendeunternehmen vom 26. Oktober 1961. *Gewerblicher Rechtsschutz und Urheberrecht*, Auslands- und Internationaler Teil 501-504, no. 10 (Oct. 1962).

A German translation of the text of the Rome Convention on Neighboring Rights prepared with the collaboration of the representatives of West Germany, Austria and Switzerland.

82. Diplomatic Conference on Neighboring Rights, *Rome, 1961*. Internationales Abkommen über den Schutz der ausübenden Künstler, der Hersteller von Tonträgern und der Sendeunternehmen, geschlossen in Rom am 26. Oktober, 1961. (37 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 73-104, no. 1/2, June 1, 1962.)

The text of the Rome Convention in German, French and English.

83. Diplomatic Conference on Neighboring Rights, *Rome, 1961*. Report of Abraham L. Kaminstein, Rapporteur-Général. (75 *Le Droit d'Auteur* [English inset] 157-172, no. 10bis, Oct. 1962.)

Also appears in French and Spanish in the main section of the same issue of *Le Droit d'Auteur*.

PART IV.

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

84. *United States v. Loew's, Inc., et al.*, 371 U.S. 38, 135 U.S.P.Q. 201 (U.S., Nov. 5, 1962) (Goldberg, J.). *For decision below see* 189 F. Supp. 373, 131 U.S.P.Q. 348, 9 BULL. CR. SOC. 264, Item No. 160.

Appeal to the United States Supreme Court from judgment for the United States in civil antitrust actions against six major distributors of pre-1948 copyrighted motion picture feature films for television exhibition. The distributors had been "block-booking" their films, offering the films in packages which included some desirable and some inferior films, thus compelling stations who wished to purchase certain of the films to buy some additional films which they did not want. No conspiracy was alleged, but the government charged that the block-booking itself was a violation of Section 1 of the Sherman Act.

Held, modified.

I. The court defined the issue here as the "recurring question of whether specific tying arrangements violate § 1 of the Sherman Act" and went on to state that:

"The standard of illegality is that the seller must have 'sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product * * *.' *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 6. Market dominance—some power to control price and to exclude competition—is by no means the only test of whether the seller has the requisite economic power. Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.

"The requisite economic power is presumed when the product is patented or copyrighted, *International Salt Co. v. United States*, 332 U.S. 392, 75 USPQ 184; *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 77 USPQ 243."

II. Defendants contended that the attribution of the necessary uniqueness to copyrighted feature films in *United States v. Paramount Pictures, Inc.*, supra, did not apply in the different context of television. They argued that in television, films are "reasonably interchangeable" with other types of program material and with other feature films, and therefore, for purposes of determining whether their block-booking was an illegal tying sale, they are not "unique." The court held, however, that the reasoning in the *Paramount Pictures* case fully applies to the case at bar. The court said:

"Appellants cannot escape the applicability of *Paramount Pictures*. A copyrighted feature film does not lose its legal or economic uniqueness because it is shown on a television rather than a movie screen.

"The district judge found that each copyrighted film block booked by appellants for television use 'was in itself a unique product'; that feature films 'varied in theme, in artistic performance, in stars, in audience appeal, etc.' and were not fungible; and that since each defendant by reason of its copyright had a 'monopolistic' position as to each tying product, 'sufficient economic power' to impose an appreciable restraint on free competition in the tied product was present, as demanded by the Northern Pacific Decision. 189 F. Supp. at 381, 131 USPQ at 352-353. We agree. These findings of the district judge, supported by the record, confirm the presumption of uniqueness resulting from the existence of the copyright itself.

"Moreover, there can be no question in this case of the adverse effects on free competition resulting from appellants' illegal block booking contracts. Television stations forced by appellants to take unwanted films were denied access to films marketed by other distributors who, in turn, were foreclosed from selling the stations. Nor can there be any question as to the substantiality of the commerce involved. The 25 contracts found to have been illegally block booked involved payments to appellants ranging from \$60,800 in the case of Screen Gems to over \$2,500,000 in the case of Associated Artists. A substantial portion of the licensing fees represented the cost of the inferior films which the stations were required to accept. These anti-competitive consequences are an apt illustration of the reasons underlying our recognition that the mere presence of competing substitutes for the tying products, here taking the form of other programming material as well as other feature films, is insufficient to destroy the legal, and indeed the economic, distinctiveness of the copyrighted product. *Standard Oil Co. of California v. United*

States, 337 U.S. 293, 307; *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594; 611 and n. 30. By the same token, the distinctiveness of the copyrighted tied product is not inconsistent with the fact of competition, in the form of other programming material and other films, which is suppressed by the tying arrangements.

"It is therefore clear that the tying arrangements here both by their 'inherent nature' and by their 'effect' injuriously restrained trade. *United States v. American Tobacco Co.*, 221 U.S. 106, 179. Accommodation between the statutorily dispensed monopoly in the combination of contents in the patented or copyrighted product and the statutory principles of free competition demands that extension of the patent or copyright monopoly by the use of tying agreements be strictly confined. There may be rare circumstances in which the doctrine we have enunciated under § 1 of the Sherman Act prohibiting tying arrangements by involving patented or copyrighted tying products is unapplicable. However, we find it difficult to conceive of such a case, and the present case is clearly not one.

"The principles underlying our *Paramount Pictures* decision have general application to tying arrangements involving copyrighted products, and govern here."

III. Appellant C & C Super. Corp. contended that it was forced to sell films by means of block-booking because of the contractual arrangements under which it had secured its financing. The court held, however, that C & C's business situation did not justify otherwise illegal activity. The court said:

"(T)he thrust of the antitrust laws cannot be avoided merely by claiming that the otherwise illegal conduct is compelled by contractual obligations. Were it otherwise, the antitrust laws could be nullified. . . . Hence, tying arrangements, once found to exist in a context of sufficient economic power are illegal 'without elaborate inquiry as to * * * the business excuse for their use,' *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5."

IV. The district court judgment enjoined the defendants from conditioning the purchase or license of one motion picture on the purchase or license of any other film or on the purchase or license of the same film for additional television stations, and from fixing the relative prices of individual pictures and packages in such a way that the pricing "has the effect of conditioning the sale or license of such film upon the sale or license of one or more other films." The government made three requests for modification of the judgments, as follows:

a) The government asked that the defendants be required to price the films individually and offer them on a picture-by-picture basis at the outset, rather than being permitted to offer a package first and give individual prices only upon subsequent request. This request was granted, the court calling it "a necessary addition to the decrees."

b) It was also asked that the judgments prohibit differences in price between a film when sold individually and when sold as part of a package, not justified by cost. This request, too, was granted. The court said:

"The final judgments as entered only prohibit a price differential between a film offered individually and as part of a package which 'has the effect of conditioning the sale or license of one or more other films.' The Government contends that this provision appearing by itself is too vague and will lead to unnecessary litigation. Differentials unjustified by cost savings may already be prohibited . . . Nevertheless, the addition of a specific provision to prevent such differentials will prevent uncertainty in the operation of the decree The Government, however, seeks to make distribution costs the only saving which can legitimately be the basis of a discount. We would not so limit the relevant cost justifications the modification should be worded in terms of allowing all legitimate cost justifications."

c) In addition, the United States asked that the judgment proscribe "temporary" refusals by a distributor to deal on less than a block basis while he is negotiating with a competing television station for a package sale. This request was granted in modified form. The court said:

"The Government's third request is, like the first, designed to prevent distributors from subjecting prospective purchasers to a 'run-around' on the purchase of individual films. No doubt temporary refusal to sell in broken lots to one customer while negotiating to sell the entire block to another is a proper business practice, viewed in vacuo, but we think that if permitted here it may tend to force some stations into buying pre-set packages to forestall a competitor's getting the entire group. In recognition of this the Government seeks a blanket prohibition against all temporary refusals to deal. We agree in the main, except that the modification proposed by the Government fails to give full recognition to that part of this Court's holding in Paramount Pictures which said,

'We do not suggest that films may not be sold in blocks or groups, when there is no requirement, express or implied,

for the purchase of more than one film. All we hold to be illegal is a refusal to license one or more copyrights unless another copyright is accepted.' 334 U.S., at 159, 77 USPQ at 253.

We therefore grant the Government's request, but modify it only to the limited degree necessary to permit a seller briefly to defer licensing or selling to a customer pending the expeditious conclusion of bona fide negotiations already being conducted with a competing station on a proposal wherein the distributor has simultaneously offered to license or sell films either individually or in a package."

The judgments were vacated and the case remanded.

(Justices Harlan and Stewart wrote a partial dissent on the ground that the Court should not exercise revisory power with regard to the specific terms of antitrust relief, "except in instances where things have manifestly gone awry".)

85. *Dan Kasoff, Inc. v. Novelty Jewelry Co.*, 309 F. 2d 745, 135 U.S.P.Q. 234 (2d Cir., Nov. 2, 1962) (per curiam).

Appeal from judgment for plaintiff in action for copyright infringement.

Held, affirmed.

I. It was held that plaintiff's jewelry was sufficiently original to be copyrighted. The court said:

"Although it might be thought that the invocation of the power of government to protect designs against infringement implied some merit other than a faint trace of 'originality,' it is now settled beyond question that practically anything novel can be copyrighted. *Mazer v. Stein*, 347 U.S. 201, 100 USPQ 325 (1954); *Rushton v. Vitale*, 218 F. 2d 434, 104 USPQ 158 (2d Cir. 1955). 'No matter how poor artistically the "author's" addition, it is enough if it be his own.' *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F. 2d 99, 103 USPQ 153, 157 (2d Cir. 1951).

"There can be no doubt that the copyright in plaintiff's garish trinket was valid and that defendants infringed by copying plaintiff's product."

II. Defendants' contention that plaintiff's copyright notice was insufficient was rejected by the court. The court said:

"Even if, as defendants urge, the copyright notice might not be sufficient for some purposes, because it used the word 'Florenza,'

plaintiff's trademark, rather than plaintiff's name, the defendants, as willful infringers wholly aware of the existence of the copyright, are in no position to assert the insufficiency of the notice. See *National Comics Publications, Inc. v. Fawcett Publications, Inc.*, 191 F. 2d 594, 90 USPQ 274 (2d Cir. 1951)."

86. *Day-Brite Lighting, Inc. v. Sta-Brite Fluorescent Mfg. Co.*, 308 F. 2d 377, 135 U.S.P.Q. 49 (5th Cir., Sept. 18, 1962) (Rives, J.)

Action by manufacturer of lighting fixtures for infringement of a design patent and infringement of copyrights in catalogue pages, for trademark infringement and for unfair competition. The trial court held that "the heart of the original action was destroyed" when a motion to strike the patent counts was allowed, and it proceeded to enter judgment dismissing all the other claims as well. From this judgment for defendant, plaintiff appeals.

Held, reversed and remanded.

I. It was held that the elimination of the patent counts did not justify dismissal of the other causes of action. The court said:

"We are unable to agree with the district court that the heart of this action resided in the patent counts. Instead, we think that each claim must be considered on its own merits."

II. a) Defendant contended that plaintiff's certificate of copyright registration of its "Sheet 6 of Section 50 of Day-Brite Catalogue" was not "evidence" that the catalogue sheet defendant had copied was "the work on file in the Copyright Office." The court held, however, that the certificate was "at least prima facie evidence" and quite sufficient as proof, inasmuch as no evidence to the contrary was introduced.

b) Defendant also urged that plaintiff's copyright in this catalogue sheet was invalid because it was registered in Class K, covering "Prints and pictorial illustrations including prints or labels used for articles of merchandise" whereas it was not a print or label "used" for articles of merchandise, but was "published" in connection with the sale or advertisement of merchandise. The court held that it was not necessary to "inquire whether the classification was correct" because an erroneous classification does not impair copyright protection or invalidate a registration. Copyright Law, Section 5.

c) Defendant's contention that plaintiff's catalogue sheet was not sufficiently original to be susceptible of copyright protection was rejected by the court. The court said:

"Most copyrights of advertisements would be invalidated if anything more than a very low degree of originality were required. In response to commercial reality, it is now settled that extremely little originality is essential for the copyright of an advertisement. *Bleistein v. Donaldson Lithographing Co.*, 1903, 188 U.S. 239, 250-252, *Ansehl v. Puritan Pharmaceutical Co.*, 8 Cir., 1932, 61 F. 2d 131, 136; *Gordon v. Weir*, E.D. Mich., 1953, 111 F. Supp. 117, 123, *aff'd per curiam*, 6 Cir., 1954, 216 F. 2d 508 (an advertisement of a dot-counting contest). . . . Clearly, plaintiff's catalogue sheet had sufficient originality to be copyrightable."

d) The court held that the copyright notice on the front side of the catalogue sheet was sufficient to protect the reverse side as well. The court said:

"It appears to us that the notice requirements of the Copyright Act, 17 U.S.C.A. §10 and §19, do not necessitate as to one familiar with the front side on which the notice of copyright appears that another notice be on the reverse side of the sheet. See *Coventry Ware, Inc. v. Reliance Picture Frame Co.*, 2 Cir., 1961, 288 F. 2d 193."

III. It was held that the trial court was not clearly erroneous in finding that a second catalogue page had not been copied by defendant, and that infringement of plaintiff's trademarks "Cleartex," "Lumatex" and "Paralouver" had not been sufficiently shown.

IV. The court held that although defendant had used "Sta-Brite" in its corporate name for years without objection from plaintiff, defendant's subsequent use of "Sta-Brite" in large and fancy type and apart from its corporate name might well be an infringement of plaintiff's trademark and trade name "Day-Brite" and that a new trial should be had on this issue.

87. *Stevens v. Continental Can Co.*, 308 F. 2d 100, 135 U.S.P.Q. 111 (6th Cir., Sept. 28, 1962) (O'Sullivan, J.).

Appeal from judgment for plaintiff in action for alleged appropriation and use on paper plates and cups of plaintiff's decorative scheme, which consisted of log marks on a wood grain background.*

Held, reversed.

* Log marks, identifying marks placed on logs by their owners, look exactly like cattle brands.

The court held that although it might be true that plaintiff had disclosed her idea for a design for paper plates and cups in such circumstances that an expectation of payment if the design were used was implied, no recovery could be had because the design was neither new nor original, was publicly known, and had already been used by others on similar merchandise. The court said:

"It is difficult to find a precise category in which to fit plaintiff's asserted right to recover here. We may assume, for the purpose of this discussion, that until plaintiff talked to defendant's representative, no one had, as yet, manufactured picnic *plates and cups* with cattle brands or log marks placed on a simulated wood grain background. As shown by plaintiff's own proofs, however, there was nothing new in using a wood grain background on picnic plates and cups. Likewise, there was nothing new in putting cattle brands on a wood grain background as a decoration on cartons containing merchandise other than cups and plates. As noted previously, the use of cattle brands as the decorative motif on crackerjack boxes, popcorn boxes and other sales devices was very old and had been thoroughly exploited. . . .

"In general, it may be said that property rights may exist in copyrighted material (such as literary and musical compositions), architectural designs, mechanical or scientific inventions, advertising slogans, original paintings and works of art. *Liggett & Meyer Tobacco Co. v. Meyer*, 101 Ind. App. 420, 194 N.E. 206 (1925); *Aronson v. Baker*, 43 N.J.Eq. 365, 12 A. 177 (1888); *Kurfiss v. Cowherd*, 233 Mo. App. 397, 121 S.W. 2d 282 (1938); *Booth v. Stuts Motor Car Co.*, 56 F. 2d 962 (C.A. 7, 1932); *Bristol v. Equitable Life Assur. Soc.*, (1892) 132 N.Y. 264, 30 N.E. 506 . . . We find no case, however, where anything as simple as combining into a decorative scheme for picnic cups and plates, a wood grain background (already in use and well known) with cattle brands (long in use as a decoration on packages for merchandising) was held to be an original artistic scheme, work of art or a work of such novelty as to vest in its author a common law or statutory copyright. . . . Assuming, however, that such a decorative design creates a property right, it will not be accorded protection against use by others if it is not original with the person asserting the right to such protection or if such design is already in use and within public knowledge. *Mitchell Novelty Co. v. United Mfg. Co.*, 199 F. 2d 462, 465 (C.A. 7 1952), *De Filippis v. Chrysler Corp.*, 53 F. Supp. 977, 980 (S.D.N.Y. 1944), affirmed 159 F. 2d 478 (C. A. 2,

1947) . . . Ordinarily, the law will not imply a promise to pay one who voluntarily confers a benefit on another Where, however, the benefit conferred was because of a voluntary disclosure made in confidence with the expectation of payment therefor, the law will . . . imply a contract or promise to pay . . . But, in order for a recovery to be obtained for such a disclosure, the matter communicated must possess the quality of novelty in the legal sense."

88. *Welles v. Columbia Broadcasting System, Inc.*, 308 F. 2d 810, 135 U.S.P.Q. 116 (9th Cir., Oct. 3, 1962) (Tavares, J.)

Appeal from judgment for defendant in action for infringement of common law copyright and for unfair competition. Defendants broadcast a documentary television drama entitled "The Night America Trembled" which portrayed the panic precipitated by the famous 1938 Mercury Theater radio version of H. G. Wells's "The War of the Worlds." Orson Welles, who was the "owner" and producer of Mercury Theater, and who had conceived the idea of adapting the Wells novel, alleged that he owns the literary property in the radio script and that the television broadcast, without his permission, was an infringement.

Held, affirmed.

I. The defendants argued that the permission of Howard Koch, who had written the radio script in 1938, was all they needed to use the script in their television show, and this permission they had. The court held that the finding by the trial court that Koch was not an employee for hire and that he was the owner of the literary property in the radio script was well supported by the evidence.

II. The conclusion of the lower court that "the fact that said script embodies plaintiff's general conception . . . entitles him to no relief against defendants for their use of said script" was held by the court to be correct. The court said:

"Conclusion of Law No. 1 correctly states the rule that ideas per se are not copyrightable, but that the words or means of embodiment or expression of those ideas are."

III. The court stated further that the conclusion of the trial court that Welles was not entitled to relief on the basis of his charge that the television show amounted to unfair competition was also correct. The court said:

"Conclusion of Law No. 3 to the effect that the use of the script by CBS in the television show entitled appellant to no relief on the ground of unfair competition is also sound for (a) appellant

did not own the rights in the script; and (b) the television show was not a direct reproduction of the actual radio show, i.e., it was neither a transcript nor a photographic reproduction of the same performance, but was an entirely different performance with different actors, and much new matter. If the television show had been a re-run, let us say, of a movie taken of the Welles performance of the radio show, or a duplication of it, or if the same tapes or portions thereof used to record the radio show, or direct transcriptions thereof, had been in the television show, possibly a case of unfair competition, other elements being assumed to exist, might have been made out. However, none of these elements was proved. The same script was used, but the *rights in the script*, as above stated, as the lower court properly held, *did not belong to Welles*. Hence Welles could have no valid objection to the use of this script in putting on another entirely different performance, with entirely different actors. Of course, the unexpected results of panic created by the performance of the radio show were newsworthy events, which any person would be entitled to reproduce and to which Welles could have no exclusive right of reproduction in any event."

89. *Brennan v. Paramount Pictures Corp.*, 209 F. Supp. 150, 135 U.S.P.Q. 356 (S.D.N.Y., Sept. 20, 1962) (Dawson, J.)

Action for copyright infringement. Plaintiff is the author of a short story entitled "Slime" which he sold to *Weird Tales* magazine in 1952. The story was published in a 1953 issue carrying notice of copyright in the name of the magazine. Short Stories, Inc., owner of *Weird Tales*, later went bankrupt, and the trustee in bankruptcy assigned its copyrights to one Marvin Isaacs. In 1958 Paramount registered for copyright the motion picture, "The Blob." Leaving the issue of whether "The Blob" infringes the copyright in "Slime" for trial, the defendant moved for summary judgment on the ground that plaintiff had no standing to sue for its infringement.

Held, motion denied.

Plaintiff relied on equitable ownership of the copyright as author of the story, claiming that while nominal ownership had been in *Weird Tales*, he actually retained all rights except first North American serial rights when he sold the story to the magazine in 1952. Although it conceded the existence of a doctrine of equitable ownership of copyright, defendant contended that (1) plaintiff had not "come forth with creditable evidence in support" of his claim to equitable ownership, and (2) that all equitable rights had been cut off by the transfer by the trustee in bankruptcy.

I. It was held that the failure to state sufficient facts in the complaint to show an alleged equitable ownership was not a ground for summary judgment. The court said:

" . . . [D]efendant relies upon *Hoffman v. Santly-Joy, Inc.*, 51 F. Supp. 778 (S.D.N.Y. 1943) where the court dismissed the complaint of the party who asserted an equitable ownership of a copyright. The court there states that the plaintiff must do more than assert the legal conclusion that he is the equitable owner; facts supporting that conclusion must be pleaded with particularity. The decision of the court gave plaintiff leave to file an amended complaint curing the defects that the court noted. Assuming, arguendo, that the complaint in the instant case suffers from the same defect, the dismissal of a complaint with leave to amend is not analogous to the granting of summary judgment on the merits. The former requires a redrafting of the complaint; the latter, subject to appeal, is a final determination. . . .

"Defendant has been unable to call attention to any case in which a motion for summary judgment was granted because the plaintiff did not sufficiently allege facts incident to its equitable ownership of a copyright. Plaintiff should be granted the opportunity to come forward with his proof in support of this contention."

II. The court held that Paramount, which had not secured the permission of the record copyright holder to make its film, was not in a position to assert "a possible defense belonging to the present holder of the copyright that this person purchased for value, in good faith and without notice." The court said:

"It may be that all of the assignees from Weir took with knowledge of plaintiff's alleged reservation of interest. If so, plaintiff could at any time make a motion picture based upon his short story without securing the permission of anyone. It would be anomalous to suggest that Paramount, which did not secure the permission of the present holder of the copyright, is in a position to assert a right which may be greater than and superior to the record owner of that copyright."

The court further held that the "fact that the first transfer was accomplished by the Trustee in Bankruptcy does not necessarily change the result" because while a bankruptcy court has the power to sell property free of all liens, this power is discretionary, and it was not shown here that such power had been exercised, no record of the bankruptcy proceedings having been submitted.

90. *Cresci v. Music Publishers Holding Corp.*, 210 F. Supp. 253, 135 U.S.P.Q. 189 (S.D.N.Y., Oct. 23, 1962) (Bryan, J.)

Action for judgment declaring void the assignments of renewal rights in 65 songs made by plaintiffs as children of the late Mort Dixon, a composer and lyric writer. Dixon had made a contract with defendant wherein he assigned his renewal rights and agreed to cause his wife and two daughters to assign their expectancies. Both daughters executed such assignments, and now claim they did so as a consequence of fraud and overreaching practiced upon them by their father with the connivance of defendants to deprive them of their rights without compensation. Defendants moved to dismiss for lack of jurisdiction over the subject matter.

Held, motion granted.

I. The court held that the federal court is without jurisdiction to determine questions of ownership of copyright which depend upon common law or equitable principles, since such questions do not arise under the copyright laws. The court said:

"No claim is made in the amended complaint that the copyrights involved, original or renewed, are invalid or that they have been infringed. The basic claim is that the assignments by plaintiffs of their renewal rights in the copyrights of their father's compositions were procured by the fraud of their father and through his breach of a confidential relationship with them and that the defendants participated in these acts. . . . The resolution of such questions depends on principles of common law and equity governing fraud and overreaching and plaintiffs' rights are dependent upon such principles. The fact that fraud has been committed with respect to a patent or a copyright does not confer federal jurisdiction. *Wells v. Universal Pictures Co.*, 166 F. 2d 690 (2 Cir. 1948); *Eckert v. Braun*, 155 F. 2d 517 (7 Cir. 1946)

"Here the copyrights and the renewals in them are only incidentally involved in the claim of fraud and the plaintiff's rights are not dependent in any way upon the federal statute. Plainly such a claim standing alone does not present a case arising under the copyright laws within the purview of § 1338(a) over which this court has jurisdiction. See *Danks v. Gordon*, 272 Fed. 821 (2 Cir. 1921) and cases above cited.

"Jurisdiction is not conferred on this court merely because ownership of the renewed copyrights or of the renewal rights assigned is in issue. There are cases which recognize the standing of an equitable

owner of a copyright to sue for *infringement*. See *Harrington v. Mure*, 186 F. Supp. 655, 657 (S.D.N.Y. 1960) and cases cited at 186 F. Supp. 686. But as Judge Palmieri pointed out there, a federal court has no original jurisdiction to hear and decide a claim of title to a copyright. Such incidental power as it has to do so must depend upon its power to adjudicate an infringement claim where, in a case of that nature, as a preliminary matter, the federal court may permit the plaintiff to establish the facts as to his ownership interest on which his right to sue for infringement depends.

"Where, as here, however, a claim of infringement is absent, the federal courts are without jurisdiction to determine questions of title dependent on general common law or equitable principles, and plaintiffs, in the absence of diversity, must look to the appropriate state courts to decide such issues."

II. Plaintiffs contended that federal jurisdiction existed because their claims involved questions of public policy under sections 24 and 28 of the Copyright Law. The court held, however, that no such public policy questions were implicit in plaintiff's allegations. The court said:

"The difficulty with plaintiffs' position is that the claims which they allege do not involve any questions of public policy arising under §§ 24 and 28 or any other provisions of the copyright law, or, indeed, of any federal law. . . .

"I do not find in either of these sections any expression of federal public policy governing the subject matter of this action or applicable to the operative facts alleged in the amended complaint. Section 24 merely provides the circumstances under which the renewal rights to an original copyright may be exercised and the persons who are entitled to exercise them

"It is plain that it was the intention of Congress in enacting (section 24) to provide that the renewal rights of a copyrighted work would inure to the benefit of the author if living at the time when application for renewal could be made, and, if not, to his widow or children or the other persons designated in the statute in the appropriate order of succession. *Miller Music v. Daniels*, 362 U.S. at 376. But this is not to say that Congress laid down or attempted to lay down any policies governing the circumstances under which the expectancies of any of those who might be entitled to renewal rights should be assigned or under which the assignment of such rights could be obtained. These are matters quite beyond the scope of the statute.

"It is settled that the author may assign his expectant interest in renewal rights. *Fred Fischer Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943). The widow has a like capacity to assign her expectancy. See *Miller Music Corp. v. Charles H. Daniels, Inc.*, *supra*, at p. 378; *M. Witmark & Sons v. Fred Fischer Music Co.*, 125 F. 2d 949, 953 (2 Cir. 1942), *aff'd sub nom* *Fred Fischer Music Co. v. M. Witmark & Sons*, *supra*; *Selwyn & Co. v. Veiller*, 43 F. Supp. 491, 494 (S.D.N.Y. 1942). The rights of adult children of an author to assign their renewal expectancies do not differ from those of the author himself or of his widow who succeeds to the right of renewal only as a member of a class which includes the children. *Cf. De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956). There is no basis for plaintiffs' contention here that there are restrictions upon a child's capacity to assign her expectant interest in the original copyrights of her father, be she so minded, or that she is not a proprietor entitled to assign under § 28. The statute does not so provide nor does it express any policy imposing such restrictions."

III. Plaintiffs also argued that this was an action arising under the copyright laws on the ground that there was an issue as to whether the assignments of renewal rights they executed were without consideration or for an inadequate consideration. The court held that while such a question could be decided in the federal court in, for example, a suit for infringement, it would not itself confer jurisdiction. The court said:

"... (*Rossiter v. Vogel*, 134 F. 2d 908 (2 Cir. 1943), 148 F. 2d 292 (1945)) is quite distinguishable from the case at bar. There suit was brought by an assignee of the author's renewal rights in a copyright against another assignee of the renewal rights Both (assignments) had been recorded under §§ 30 and 31 of the Copyright Act The basic question presented involved a construction of these recording sections of the Act which controlled the respective rights of the competing assignees.

"Once that question had been decided in plaintiff's favor the court went on to consider whether defendant had established defenses of lack of equity which would justify a court of equity in refusing to enforce plaintiff's assignment or to grant the aid necessary to make his assignment ultimately effective. Thus the court's power to determine whether there was 'such coercion of circumstances that enforcement [of plaintiff's assignment] would be unconscionable' (*Fischer v. Witmark*, *supra*, at p. 657) was incidental to its power

to adjudicate a case which plainly arose under the copyright laws of the United States and that issue could be determined by the federal court in order to ascertain whether in fact the plaintiff was entitled to recover on his basic claim. . . . In the case at bar, however, . . . plaintiffs, having assigned their rights by instruments of assignment which they concededly executed, are seeking to set aside such assignments on the ground of fraud and overreaching upon general principles of common law and equity. Their rights are in no way dependent on a construction or interpretation of the copyright laws and their action does not arise thereunder."

IV. Defendant contended that because, as to 11 of his songs, Dixon had died after renewal applications had been filed but before the renewal term actually began, there was a question under the Copyright Law whether Dixon's assignee had a right to these renewals. The court considered that this issue was too remote and contingent, even if valid, to support jurisdiction. The court said:

"Plaintiffs claim that this question has never been decided and was left open both by *Miller Music Corp. v. Charles N. Daniels, Inc.*, *supra*, where the author died before the commencement of the twenty-eighth or renewal year, and by *Fred Fischer Music Co. v. M. Witmark & Sons*, *supra*, where the author was alive at the commencement of the twenty-ninth year when the renewal term commenced.

"The point is of very doubtful merit in the light of the language of § 28. (See also *Rose v. Bourne, Inc.*, 176 F. Supp. 605, 610 (S.D.N.Y. 1959), *aff'd* 279 F. 2d 79, 80 (2 Cir. 1960).) But apart from this there is no such issue presently in this action and there cannot be unless and until plaintiffs succeed in setting aside the assignments on general common law or equitable grounds. Plaintiffs' contention that these grounds which are the whole basis of their action should be held to be pendent to a remote claim which might eventually arise under the copyright laws if plaintiffs were successful in their suit would result in the tail wagging the dog. *Cf. Hurn v. Oursler*, 289 U.S. 238 (1933)."

91. *H. M. Kolbe Co., Inc. v. Armigus Textile Co. Inc.*, 135 U.S.P.Q. 188 (S.D.N.Y., Aug. 17, 1962) (Murphy, J.) For decisions on preliminary injunction see 126 U.S.P.Q. 11 (S.D.N.Y. 1960), *affirmed* 279 F. 2d 555, 126 U.S.P.Q. 1 (2d Cir. 1960); see 7 BULL. CR. SOC. 292, Item 389.

Action for infringement of copyright in a fabric design. As part of its settlement with a dress manufacturer, originally a defendant in this suit, who had purchased infringing fabric, plaintiff permitted it to retain and use some of the fabric it had purchased. The action was continued against the manufacturer of the infringing fabric.

Held, judgment for plaintiff.

Defendant contended that by permitting a dress manufacturer to use the defendant's infringing fabric, which contained no copyright notice, plaintiff had permitted publication without notice and therefore had forfeited its copyrights. The court held, however, that no such publication had occurred. The court said:

"The material Bea Rite was permitted to use, that it was not required to surrender for destruction, was 'in the cut stage or made up in dresses' and so, though not entirely clear, it does seem to us that any copyright notice would have already been severed from the fabric, i.e., the selvage where the notice was affixed by plaintiff and held to be sufficient notice in this case would have been cut off already. It would certainly appear to be a vain act if it were necessary that plaintiff require Bea Rite to sew on a strip of selvage again with notice of copyright and then permit it to be again cut off. As we opined above, the notice could not otherwise be affixed or incorporated into the design itself without adversely affecting its market value."

92. *Shapiro Bernstein & Co. v. H.L. Green Co.*, 135 U.S.P.Q. 181 (S.D.N.Y., July 30, 1962) (Murphy, J.)

Defendant Jalen Amusement Co. had records manufactured embodying a number of copyrighted songs without the consent of the copyright owners and without complying with compulsory license provisions. These records were "close copies of hit-type authorized records of major record manufacturers," and were sold in the H. L. Green stores by defendant Jalen, who operated the record departments in the stores as a concession.

Held, judgment for plaintiffs against defendant Jalen Amusement Co., complaint dismissed as to H.L. Green Co.

The court held that defendant H.L. Green Co. had sold none of the infringing records, since a sale by a concessionaire is not a sale by the owner of the store in which the concession is located. H.L. Green Co. was paid a percentage of Jalen's profits, but the court considered these payments to be in the nature of rent for the use of space in the stores.

ALSO OF INTEREST:

93. *Osborn v. Boeing Airplane Co.*, 309 F. 2d 99, 135 U.S.P.Q. 145 (9th Cir., Oct. 11, 1962) (Browning, J.)

Appeal from summary judgment for defendant in action for payment for a suggestion submitted to employer and used by it.

Held, reversed.

It was held that although a form used for a company "Suggestion System" provided that the company had sole discretion as to who was to be paid for offered suggestions and how much, it could not properly be held as a matter of law that the company had reserved the right to appropriate valuable ideas without making any payment at all.

94. *King Bros. Productions, Inc. v. RKO Teleradio Pictures, Inc.*, 208 F. Supp. 271, 135 U.S.P.Q. 183 (S.D.N.Y., July 30, 1962) (Bryan, J.)

Defendant, which had been distributing plaintiff's pictures pursuant to contract, discontinued doing so and plaintiff sued for damages. Defendant counterclaimed with respect to one of the films, "The Brave One," alleging that the script was its property and that plaintiff had converted it to its own use. Plaintiff moved for summary judgment on the counterclaim.

Held, motion denied.

It was held that the counterclaim, which challenged plaintiff's title to the literary property upon which its motion picture was based, was sufficiently related to the claim for contractual damages with respect to distribution of the motion picture to be a compulsory counterclaim under federal rules of procedure.

95. *Affirmed per curiam*

Dan Kasoff, Inc. v. Gresco Jewelry Co., 135 U.S.P.Q. 209 (2d Cir., Oct. 25, 1962), affirming 204 F.Supp. 694, 133 U.S.P.Q. 438 (S.D. N.Y. 1962) (Bonsal, J.), reported at 9 BULL. CR. SOC. 404, Item 267 (1962).

B. DECISIONS OF FOREIGN COURTS

1. Great Britain

96. *Campbell Connelly & Company Ltd. v. Noble* (Ch., November 13, 1962) (Wilberforce, J.) (Not yet reported)

In a 1934 agreement, Ray Noble assigned to plaintiff music publishers "the full copyright for all countries in the musical composition

entitled 'The Very Thought of You' . . . in all Countries for the period of copyright as far as it is assignable by law, together with all rights therein which he now has or may hereafter become entitled to whether now or hereafter known" United States copyright was obtained later that year, when the song was published. In 1959, Noble assigned the renewal term in the United States copyright to M. Witmark & Sons. Plaintiffs claim that they are entitled to the renewal because renewal rights, although not specifically mentioned therein, were conveyed to them by virtue of the original 1934 contract.

Held, judgment for plaintiffs.

The court held that as a matter of English contract law, the right to renew the American copyright was conveyed by the broad language of the 1934 assignment.

I. The court referred to American law in order to determine whether the "disputed subject matter . . . the creation of the law of the United States of America . . . is assignable at all, and if so, in what conditions it is assignable" and held that American law is that the renewal copyright is capable of assignment and that "it may be made the subject of a contract to assign it, entered into at the same time as the original copyright is assigned, which will be effective when the renewal copyright has been secured." *Fred Fischer Music Co., Inc. v. M. Witmark & Sons*, 318 U.S. 643 (1943).

II. Although the testimony of American experts had been offered on the question of how renewal copyrights may be assigned as well as on the question of assignability of renewals under American law, the court held that Noble's 1934 agreement with plaintiffs was "a purely English contract and must plainly be interpreted according to English law." The court said:

"There have been a number of decisions in American courts on the nature of the expressions which it is necessary to use in order effectively to assign the renewal copyright. I do not propose to refer to these except as establishing what seems to me to be indisputable—that the renewal copyright is separate and distinct from the original copyright. It seems to me that decisions as to the construction and effect of United States contracts are not helpful or indeed admissible guides to me in interpreting this English contract. Nearer to the point, and not without interest, are two English decisions given at a time when English law created two separate copyright periods. The first is the case of *Carnan v. Bowles*, decided in 1785 and reported in 2 Brown's Chancery Cases at page 80. 'In

1771' (says the report) 'Captain Paterson, having prepared a book of roads, sold all his interest in the copyright of it to the plaintiff. . . . ' Then, citing from the argument, reference is made to the 11th section of the Act of 8 Anne. . . . 'it is provided that, after the expiration of the term of fourteen years, the sole right of printing, or disposing of the copies of books, shall *return* to the authors thereof; if they are then living, for a further term of fourteen years, but the question is, whether the conveyance of the author's property in the copy did not convey to the plaintiff his right to that contingent return. The words of the grant are, *all his right*, which must convey the contingent interest in the second term of fourteen years, as well as the absolute interest in the first fourteen'. . . . Lord Chancellor Thurlow, in dealing with this point, said this: 'With respect to the first point, it strikes me that the contingent interest must pass by the word *interest* in the grant. He conveys *all his interest in the copyright*: the assignment must have been made upon the idea of a perpetuity; and it is probable not a syllable was said or thought of, respecting the contingent right. They merely followed the old precedents of such conveyances. It must, I think, be considered as conveying his whole right. If he had meant to convey his first term only, he should have said so'.

"The second case is the case of *Rundell v. Murray*, decided in 1821 and reported in Jacob's Reports at page 311. . . . Lord Chancellor Eldon said this with reference to the relevant point: 'I conceive that an author will not be taken to have assigned his contingent right in case of his surviving the fourteen years, unless the assignment is so expressed as to purport to pass it'.

"Although these were decisions upon a statute which can fairly be regarded as the parent or at least the ancestor of the present United States Title 17, it would be wrong to regard them as binding authorities as to the manner in which the modern United States renewal copyrights are to be assigned; but in Lord Eldon's words, which I have just cited, I find considerable support for the approach which independently I should be inclined to make to this contract, which is to ask this question: Given the separate proprietary character of the renewal copyright, is this clause so expressed as to pass it?"

III. The defendant contended that the original contract, which made no specific reference to the renewal copyright, was not intended to convey it, but the court held that such specific reference, while it might be a requirement in an assignment directed toward the United States copy-

right in particular, was not necessary in a broad general assignment of world rights, although American copyright was necessarily included. The court said:

" . . . it appears to me that . . . (defendant's arguments) might have great force if this was a contract dealing specifically with the United States copyright. In such a contract one might expect specific attention to be directed to the renewal copyright and to the mechanism for securing it. But they lose all validity, to my mind, once it is appreciated that this clause is a clause of world-wide application. If it is specifically directed towards the copyright law of any one country, that country is the United Kingdom, and indeed the words 'the period of copyright so far as it is assignable by law' seem to be related to the proviso to section 5(2) of the Copyright Act, 1911. As regards other countries, one would expect nothing more than words of a general character and of sufficient width to bring in any right in the nature of copyright, however different from English copyright that might be.

"I recognise, of course, that it is reasonable to assume that the parties to this contract had *inter alia* United States copyright in mind. Not only is the United States copyright of great and obvious value on account of the superficial similarity of the two languages, but we know that the plaintiffs at this time had a United States associate company which was actively concerned with their rights in America. But giving full weight to this, it is in my view quite natural that clause 1 should still have been expressed in a general form"

PART V.

BIBLIOGRAPHY

A. BOOKS AND TREATISES

1. United States Publications

97. ERNST, MORRIS L. Privacy: the right to be let alone, by Morris L. Ernst and Alan U. Schwartz. New York, Macmillan, 1962. 238 p. (Milestones of law series.)

This first volume of a series designed for laymen traces the development of the right of privacy through case law.

2. Foreign Publications

98. ELSTER, ALEXANDER NIKOLAUS. Gewerblicher Rechtsschutz und Urheberrecht. Begründet von Alexander Elster. 3., erw. und völlig umgearb. Aufl. von Kurt Bussmann, Rolf Pietzcker [und] Heinz Kleine. Mit Abdruck der Gesetzestexte, der internationalen Verträge und der amtlichen Entwürfe. Berlin, W. de Gruyter, 1962. 791 p. (Lehrbücher und Grundrisse der Rechtswissenschaft, 8. Bd.)

A systematic treatise on West German industrial property and copyright laws, designed as a textbook for students and a compendium for legal as well as technical specialists. The Appendix contains texts of pertinent laws, international agreements and official draft laws.

99. HUGUET, ANDRÉ. L'ordre public et les contrats d'exploitation du droit d'auteur; études sur la loi du 11 mars 1957. Préf. de Rene Savatier. Paris, Librairie Générale de Droit et de Jurisprudence, 1962. 231 p. (Bibliothèque de droit privé, t. 30.)

A study of the regulation, under the French copyright statute of 1957, of contractual relationships between authors and those who exploit their works.

100. United Nations Educational, Scientific and Cultural Organization. Repertorio universal de legislación y convenios sobre derecho de autor (RUDA). Suplemento de 1961. Paris, Organización de las Naciones Unidas para la Educación, la Ciencia y la Cultura [and] Aguilar, Madrid. 1962. 215 p.

The first supplement to the Spanish version of the *Copyright Laws and Treaties of the World*, bringing the contents up to January 1, 1961. See 8 BULL. CR. SOC. 195, Item 160 (1961).

101. WHITE, THOMAS A. BLANCO. Patents for inventions and the registration of industrial designs. 3d ed. London, Stevens, 1962. 640 p.

A new edition of a British textbook on patent and design laws with a special section on industrial designs in relation to copyright under the U. K. Copyright Act of 1956.

B. LAW REVIEW ARTICLES

1. United States

102. KRAY, DOROTHY J. Use of summary procedure in copyright actions. (35 *Southern California Law Review* 408-423, no. 4, Summer 1962.)

This essay, which was awarded first prize in the ASCAP Nathan Burkan Memorial Competition at the University of Southern California in 1962, reviews copyright decisions involving the use of summary procedure. The conclusion is made that such "procedure to eliminate unnecessary trials by advance determinations should be resorted to only when it is clear as a matter of law that there are no reasonable doubts regarding factual issues. It should be denied in plagiarism actions unless general observation of the works submitted with the pleadings would reveal a patent absence of similarities to the lay observer."

103. MOTT, KELSEY MARTIN. Authors' tax problems; a summary of the provisions of the Internal Revenue Code. (22 *Federal Bar Journal* 148-158, no. 2, Spring 1962.)

This study is concerned with a question "whether the author's tax burden is fair or not, considering the nature of his creative profession, and with especial reference to the startling difference in the treatment of authors vis-à-vis inventors."

104. PINKSTAFF, R. STEVEN. Copyright notice requirements for foreign works published abroad. (6 *The Patent, Trademark, and Copyright Journal of Research and Education* 278-288, no. 2, Summer 1962.)

"This paper is concerned with the applicability of the notice requirement to works of foreign authors published abroad and is not

directed to the relative merits of the notice requirement per se." The author, a senior in George Washington University Law School, was recipient of the Patent Office Student Award for the paper which was submitted in partial fulfillment of the requirements for the seminar and lecture series for the year 1962.

105. SMITH, JUDITH A. The misuse defense in copyright actions. (37 *New York University Law Review* 916-932, no. 5, Nov. 1962.)

This paper, which received first prize in the 1962 Nathan Burkan Memorial Competition at New York University School of Law, explores "patent-copyright distinctions affecting the antitrust violation as a misuse defense, and the role of the misuse doctrine in copyright and contract actions."

106. WALKER, LAURENCE N. Publication and the copyright law revision. (50 *California Law Review* 672-695, no. 4, Oct. 1962.)

This comment, which has been entered in the Nathan Burkan Memorial Competition, purposes "to examine the problems relating to *publication* in the law of copyright and to evaluate the Copyright Office's proposed solutions [as published in the Register's general revision report] in light of both the present law and the suggestions made in the [general revision] studies."

107. ZELNICK, ALLAN. The relationship of copyright and antitrust statutes; views inspired by "Copyright and Antitrust." (7 *Antitrust Bulletin* 331-340, no. 2, Mar.-Apr. 1962.)

A review article on Joseph Taubman's *Copyright and Antitrust* (New York, 1960). See 8 BULL. CR. SOC. 270, Item 231 (1961).

2. Foreign

1. In Dutch

108. KLAVER, F. M. TH. De uitvoerende kunstenaars en de Conventie van Rome over de "droits voisins." (*Nederlands Juristenblad* 425-457, no. 20, May 19, 1962.)

An analysis of the rights of the performing artist under the Rome Convention on Neighboring Rights.

2. In English

109. BARKER, RONALD E. The fair use of copyright literary works; report presented to the 16th Congress of the International Publishers Association, by Ronald E. Barker and Robert H. Code Holland. Union Internationale des Éditeurs. 16. Congrès, Barcelone, 6-12 mai 1962. *Rapports*, pp. 92-110.

A comparative survey of fair use legislation confined exclusively to books, followed by conclusions and recommendations with the object of providing a "first step towards a universal treatment (either by legislation or by trade practice) should that appear desirable."

110. BOGSCH, ARPAD. Copyright situation in South Asia. Reprinted from 4 *UNESCO Information Bulletin on Reading Materials*, no. 1, Apr. 1962. 2 p.

An article on a mission to Burma, Ceylon, India and Pakistan by the author as visiting UNESCO expert in copyright law under the Reading Materials Project. The article deals with the state of copyright legislation, revision of copyright laws, international conventions, and the problem of how to provide for the need of the reading public with respect to foreign books.

111. CIAMPI, ANTONIO. Authors' copyright and related rights. (4 *Italian Books and Periodicals* 1639-1646, no. 11, Nov. 1961.)

A discussion of "the connection between authors' copyright and related rights," with a broad outline of the Rome Neighboring Rights Convention.

112. Copyright provisions in deeds. (106 *Solicitors' Journal* 319-321, no. 16, Apr. 20, 1962.) *Signed*: W. A. G.

A brief discussion of copyright ownership, in Great Britain, of commissioned works, with special reference to architectural works and plans, and photographs and paintings, offered as an aid to the solicitor in advising a client as to copyright provisions for inclusion in contracts for services.

113. LASSEN, BENGT. The public lending right; report presented to the 16th Congress of the International Publishers Association. Union Internationale des Éditeurs. 16. Congrès, Barcelone, 6-12 mai 1962. *Rapports*, pp. 143-165.

The report is divided into the following four principal parts: (1) A discussion of the general problems and principles; (2) A summing-up of the answers to a questionnaire sent to member organizations of the International Publishers Association; (3) An account of the system employed in Scandinavia for compensation to authors for the lending of their works through public libraries, including what has been decided but not yet carried out in Finland; (4) An account of the main contents of the new Swedish Copyright Act of December 30, 1960, with special reference to provisions relating to the question of the public lending right. Summaries of the report in French and German are included.

114. NAMUROIS, ALBERT. The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Diplomatic Conference, 10th to 26th October 1961). (*EBU Review*, no. 72B (Mar. 1962), pp. 42-43; no. 73B (May 1962), pp. 29-37.)

A discussion of the general structure of the Convention and its underlying principles, followed by a detailed examination of the protection which it accords.

115. Protection of skill: copyright in design? (204 *The Economist* 682, no. 6209, Aug. 25, 1962.)

An article on the recent report of the Departmental Committee on Industrial Designs of the British Board of Trade.

116. SAVIGNAC, F. WILLARD. The Canadian Copyright Appeal Board. (*EBU Review* 31-38, no. 74B, July 1962.)

A history and brief description of the past and present activities of the Board, the function of which is "to regulate and govern an annual tariff of fees between the user of copyrighted dramatico-musical and musical works and the societies or associations claiming to exercise control over and to collect fees, charges or royalties in respect of performance of their works in Canada."

117. SECRETAN, JACQUES. Structural evolution of the International Union for the Protection of Intellectual Property. (75 *Le Droit d'Auteur* [English inset] 122-131, no. 9, Sept. 1962.)

Translated from the French original which appeared in 75 *Le Droit d'Auteur* 131-140, no. 6 (June 1962). See Item 140, *infra*.

118. United Nations Educational, Scientific and Cultural Organization. *Secretariat*. Books for the developing countries; a report to the 16th Congress of the International Publishers Association. Union Internationale des Éditeurs. 16. Congrès, Barcelone, 6-12 mai 1962. *Rapports*, pp. 215-232.

A report on the problem of meeting the growing book needs of Asia and Africa, including a discussion of the difficulties encountered by the Asian and African publisher in securing and paying for copyright and translation rights, with suggestions for future action. Includes summaries in French and German.

119. ZINI LAMBERTI, CARLO. The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations. (*E.B.U. Review*, no. 75B (Sept. 1962), pp. 68-72; no. 76B (Nov. 1962), pp. 49-54.)

Contents: 1. The historical background of the problem. 2. The Rome Convention: principles and policy; scope of the instrument; relationship with copyright. 3. Protection given by the Convention: national treatment; eligibility criteria; definitions; formalities; term of protection. 4. The minimum standard of protection under the Convention: (a) performers; (b) producers of phonograms; (c) secondary uses of phonograms; (d) broadcasting organisations; (e) provisions common to the three types of performances and properties protected. 5. Final clauses. 6. Conclusions.

A summary of the main features of the Rome Convention on Neighboring Rights.

3. In English and French

120. LIGI, FRANCO. The protection of the individuality of the author in the integrity of his work. (75 *Le Droit d'Auteur* [English inset] 131-137, no. 9, Sept. 1962.)

A translation from the Italian original which was published in 32 *Il Diritto di Autore* 477-493, no. 4 (Oct.-Dec. 1961). See 9 BULL. CR. SOC. 425, Item 324 (1962). A French translation appears in the main section of the same issue of *Le Droit d'Auteur*.

121. STRASCHNOV, GEORGES. The Ghanaian Copyright Act. (75 *Le Droit d'Auteur* [English inset] 93-98, no. 7, July 1962.)

An analysis of the new law in which the reasons for Ghana's objections to membership in the Berne Union as reflected by the Act are examined "with an eye to their possible implications for the forthcoming Revision Conference in Stockholm." Also appears in French in the main section of the same issue of *Le Droit d'Auteur*.

122. VAUGHAN, DENIS. The recognition of the authentic text by the use of alternative type characters in the printing of literary and artistic works. (75 *Le Droit d'Auteur* [English inset] 179-184, no. 11, Nov. 1962.)

A case is made for the protection of the integrity of an author's work, with particular reference to music. Suggestions are offered to enact "a new preventive legislation, designed to eliminate the necessity of the frequent use of the *droit moral*, and to increase the responsibility accepted by the copyright societies [i.e., authors' societies] in various countries." Also appears in French in the main section of the same issue of *Le Droit d'Auteur*.

4. In English, French and Spanish

123. Intergovernmental Copyright Committee. Rules of procedure (revised). (15 *UNESCO Copyright Bulletin* 37-43, 91-97, 145-151, no. 1, 1962.)

The revised text of the Rules incorporating the amendments adopted by the Committee at its second, third and sixth sessions (Washington, 1957; Geneva, 1958; and Madrid, 1961).

124. PLAISANT, ROBERT. L'exploitation du droit d'auteur et les conflits de lois. (*Revue Internationale du Droit d'Auteur* 62-109, no. 35, Apr. 1962.)

A study, in French, English and Spanish, in parallel columns on the exploitation of copyrights and conflict of laws in France.

125. ROUSSELET, MARCEL. Le droit moral de l'auteur; communication faite à l'Académie des Sciences Morales et Politiques le 26 février 1962. (*Revue Internationale du Droit d'Auteur* 2-41, no. 35, Apr. 1962.)

A survey, in French, English and Spanish in parallel columns, of the evolution of the moral rights doctrine in France from case law beginning with the landmark *Rosa Bonheur* case of 1865 to legislative regulation under the copyright statute of 1957.

126. SCHULMAN, JOHN. The report on copyright law revision in the United States. (*Revue Internationale du Droit d'Auteur* 42-61, no. 35, Apr. 1962.)

An outline, in English, French and Spanish in parallel columns, of the Register's Report on the General Revision of the Copyright Law. The author cautions that the enactment of the law should not be expected too soon but expresses the conviction "that a new statute will ultimately result from the commendable efforts of the Register of Copyrights and those who have labored diligently with him."

127. Société des auteurs, compositeurs et éditeurs de musique, *Paris*. Guide du droit d'auteur, Paris, 1962. 28 p.

A popular, illustrated booklet, explaining, in the form of questions and answers, the essential provisions of the French copyright law, with special emphasis on public performance of copyrighted works.

128. Summaries of articles published in "Le Droit d'Auteur." (15 *UNESCO Copyright Bulletin* 49-57, 103-111, 157-165, 15, no. 1, 1962.)

Contents: New Swedish laws, by Torwald Hesser. Certain questions concerning the future revision of the Berne Convention, by Torwald Hesser. Letter from Denmark, by Torben Lund. Letter from Hungary, by Robert Palagyi. Publication of musical works in printed form, by Denis Vaughan.

129. United Nations Educational, Scientific and Cultural Organization. *Secretariat*. Photoduplication of copyrighted material by or for the libraries, documentation centres, and scientific institutions; preliminary report. (15 *UNESCO Copyright Bulletin* 45-47, 99-101, 153-155, no. 1, 1962.)

The report concludes with a proposal that a study be made by UNESCO on the problems of photoduplication in order to try to find means of solving them.

5. In French

130. Conference Diplomatique de Rome: La Convention sur les droits voisins. (*Bulletin [du] Bureau International de l'Édition Mécanique* 33-36, no. 8, Aug. 1962.)

A brief critical comment on the Rome Convention on Neighboring Rights, dealing with the following aspects: (1) content of the rights;

(2) short-comings; (3) difficulties in application; (4) position of authors.

131. DELFOSSE, GUY. La protection en Belgique des dessins et modèles appartenant à des étrangers. (52 *Revue de Droit Intellectuel, l'Ingénieur-Conseil* 121-155, no. 7, July 1962.)

A survey of developments regarding the protection of designs and utility models afforded in Belgium to foreign nationals under domestic laws and international conventions.

132. DITTRICH, ROBERT. Lettre d'Autriche. (75 *Le Droit d'Auteur* 201-210, no. 9, Sept. 1962.)

A survey of Austrian case law in the field of copyright and related matters since July 1, 1936.

133. ELBIR, ISMAIL KEMAL. Lettre de Turquie. (75 *Le Droit d'Auteur* 103-109, no. 5, May 1962.)

An account of the author's efforts, made in behalf and under the direction of the French author society "SACEM," which led to the enactment of the Turkish Copyright Law of 1951. An outline of the leading provisions of that law is included.

134. États-Unis: le Rapport du Copyright Office et la licence obligatoire. (*Bulletin [du] Bureau International de l'Édition Mécanique* 38-44, no. 8, Aug. 1962.)

A brief, favorable note on the Register's Report, with particular reference to some of the recommendations, and a French translation of the section dealing with compulsory licensing.

135. International Confederation of Authors' and Composers' Societies, 22d Congress, Rome, 1962. Confédération internationale des Sociétés d'auteurs et compositeurs (CISAC). Réunion de la Commission de législation, Rome, 14 et 15 juin 1962. XXIIe Congrès, Rome, 18-23 juin 1962 [Activités]. (75 *Le Droit d'Auteur* 177-188, no. 8, Aug. 1962.)

A summary of the agenda of the 22d Congress of CISAC, held in Rome, June 18-23, 1962, the list of vœux and resolutions adopted, and a report on the activities of the Legislative Committee of the CISAC by its president, Mr. Valerio de Sanctis. The vœux and resolutions were on the following subjects: prolongation of the term of copyright protection, revision of the Berne Convention, international protection of

cinematographic works, sound recording and copyright, the new West German draft copyright law, defense of copyright in socialist countries, the copyright situation in newly independent countries, and honoring of agreements made within the framework of the Berne Union.

136. International Publishers Association. *Permanent Bureau*. Rapport présenté au XVI^e Congrès de l'Union Internationale des Éditeurs par Hans Conzett, secrétaire général. Union Internationale des Éditeurs. 16. Congrès, Barcelone, 6-12 mai 1962. *Rapports*, pp. 19-64.

A report on the activities and development of the Association from 1958 to the end of 1961, the major part of which is devoted to summaries of the answers to questionnaires sent to member countries as a follow-up to resolutions adopted at the three previous congresses. The resolutions dealt, *inter alia*, with the following subjects: photocopying and microcopying; the Universal Copyright Convention; and the current status of the copyright laws of the member countries.

137. KAUFMANN, GUY. Nouvelles du Pérou: la loi péruvienne sur le droit d'auteur du 1^{er} Septembre 1961. (*Revue Internationale du Droit d'Auteur* 110-114, no. 35, Apr. 1962.)

A brief summary of the Peruvian copyright law of September 1, 1961.

138. LYON-CAEN, GÉRARD. Nouvelles observations au sujet de la protection internationale des oeuvres cinématographiques. (*75 Le Droit d'Auteur* 153-156, no. 7, July 1962.)

A comment on the report of the Berne Union—IGCC Study Group on the International Protection of Cinematographic Works (Geneva-Madrid, 1961), with particular emphasis on the problems connected with distinctions between television and theatrical films. See 9 BULL. CR. SOC. 319, Item 203 (1962).

139. SANCTIS, VALERIO DE. Lettre d'Italie. (*75 Le Droit d'Auteur* 270-276, no. 11, Nov. 1962.)

A survey of recent legislative, judicial and international developments in Italy in the field of copyright and related subjects.

140. SECRETAN, JACQUES. L'évolution structurelle des Unions internationales pour la protection de la propriété industrielle. (*75 Le Droit d'Auteur* 131-140, no. 6, June 1962.)

The director of the United International Bureaux for the Protection of Industrial, Literary and Artistic Property surveys the structural evolution of the United Bureaux, past, present, and future.

141. TROLLER, ALOIS. Lettre de Suisse. (75 *Le Droit d'Auteur* 171-173, no. 8, Aug. 1962.)

A survey of recent Swiss case law in the field of copyright and neighboring rights, preceded by a brief note on present legislative projects.

142. VAUNOIS, LOUIS. Lettre de France. (75 *Le Droit d'Auteur* 140-144, no. 6, June 1962; 162-166, no. 7, July 1962.)

A two-part survey of recent judicial developments in the field of copyright and related subjects in France, the first part of which deals principally with cases involving alleged violations of the moral right of an author.

143. ZAKÁR, JÁNOS. Les droits moraux des auteurs. (*Interauteurs* 171-178, no. 147, 2d quarter 1962.)

A study of the development, modification, and completion on several points by Hungarian jurisprudence, of the regulation of the moral rights of authors "in conformity with the fundamental social changes occurring in the country since 1945."

6. In German

144. ADAM, KLAUS. Der Film in der deutschen Urheberrechtsreform; zur jetzigen Regierungsvorlage. (6 *Film und Recht* 2-13, no. 2, Feb. 15, 1962.)

A critical analysis of those provisions of the West German draft copyright laws which are concerned with the copyright protection of motion pictures.

145. Arbeitskreis der deutschen Schallplattenindustrie. Stellungnahme zur Tonbandfrage. (*GEMA Nachrichten* 17-19, no. 54, June 1962.)

An opinion of a working group of the West German phonograph record industry favoring a provision in a new copyright law for the payment of copyright royalties by private owners of tape recorders.

146. BERGSTRÖM, SVANTE. Die neue schwedische Gesetzgebung über das Urheberrecht. (*Gewerblicher Rechtsschutz und Urheberrecht*, Auslands- und Internationaler Teil 364-381, no. 7/8, July/Aug. 1962.)

A German version of a two-part article which appeared in *E.B.U. Review*, no. 68B (July 1961) under the title "The new Swedish copyright legislation." See 9 BULL. CR. SOC. 182, Item 91a (1961).

147. Der Bundesrat zu den Regierungsentwürfen der Urheberrechtsreform. Jetzt hat die Bundesregierung das Wort; ein zusammenfassender Bericht. (6 *Film und Recht* 14-17, no. 2, Feb. 15, 1962.)

A brief summary of the West German Bundesrat's position on the official draft copyright laws.

148. DITTRICH, ROBERT. Das Rom-Abkommen über die verwandten Schutzrechte. (11 *Österreichische Blätter für Gewerblichen Rechtsschutz und Urheberrecht* 21-29, no. 2, Mar.-Apr. 1962.)

A brief report of the Rome conference on neighboring rights, followed by a commentary on the text of the Convention, by a member of the Austrian delegation.

149. GEMA, Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte. Stellungnahme der GEMA zur beabsichtigten Urheberrechtsreform. (*GEMA Nachrichten* 4-9, no. 54, June 1962.)

The official position of the West German performing rights society, GEMA, on provisions of the Federal Government draft copyright laws dealing with duration, cultural tax, compulsory and ex-lege licenses, copyright protection of a melody, musical quotations, exceptions to an exclusive performing right, and private tape recordings.

150. GEORGI, ARTHUR. Charakter, Bedeutung und Auswirkung des "domaine public payant." *Union Internationale des Éditeurs*. 16. Congrès, Barcelone, 6-12 mai 1962. *Rapports*, pp. 67-91.

This report purposes "to reveal the legal, political and practical aspects of domain public payant, to explain the changes of the present-day situation as compared to 1954 at the time of the Zurich Congress and the paper presented by J. Rodolphe-Rousseau, and the resolution passed in Zurich, again to call attention to the nonsensical attempt at justifying, in terms of copyright legislation, domaine public payant, and to point at its consequences also as a tax." Includes summaries in French and English.

151. Gesamtverband der Tonträger-Hersteller, e. V., Köln. Denkschrift zur Regelung der Tonbandfrage durch das neue Urheberrechtsgesetz. (*GEMA Nachrichten* 15-17, no. 54, June 1962.)

A memorandum of the West German Association of Phonogram Manufacturers to government authorities requesting the reinstatement of Section 54, paragraph 3 of the previous draft copyright law in the current Government draft from which this provision had been deleted. Section 54, paragraph 3 provided for payment of copyright royalties by private owners of tape recorders.

152. GOLDMAN, ABE A. Vorarbeiten und Empfehlungen zur Urheberrechtsreform in den USA. (*Gewerblicher Rechtsschutz und Urheberrecht, Auslands- und Internationaler Teil* 234-237, no. 5, May 1962.)

Translation of a summary, by the General Counsel of the U. S. Copyright Office, of the recommendations of the Register's Report on the General Revision of the U. S. Copyright Law, followed by a list of the copyright law revision studies.

153. HAEGER, SIEGRIED. Der Einbruch von Nutzungsrechten in die Privatsphäre. (37 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 45-72, no. 1/2, June 1, 1962.)

An interpretation of section 15, paragraph 2, of the [West] German Law concerning Copyright in Literary and Artistic Works, as amended up to December 13, 1934, in its application to royalties for tape recording for private use, with the author's conclusion that a right to compensation for such recording is neither legally justified nor can it be determined and enforced.

154. HENNINGS, HELMUT DIETER. Warum Streit mit der GEMA? (*GEMA Nachrichten* 8-10, no. 55, Aug. 1962.)

A justification of demands by GEMA for the payment of royalties by private owners of tape-recorders.

155. HIRSCH, ERNST E. Die Werkherrschaft. (36 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 19-54, no. 1/2/3/4, Feb. 1, 1962.)

An exposition of Hirsch's thesis that the term "author's right" is incorrect because the totality of rights and privileges belonging to an author is neither a single subjective right nor a sum of such rights, but rather a "legal position" from which the various rights, known as

"author's rights," arise. According to Professor Hirsch, the copyright is a "dominion over the work" (a suzerainty, *Werkberrschaft*), a concept which was expounded by Hirsch in an earlier work published in Turkey in 1942. The present article is a reprint of an essay published in *Annales de l'Université d'Ankara*, vol. 2, pp. 275 ff (1948).

156. HUBMANN, HEINRICH. Die Zuständigkeit des Bundes für die Urheber-nachfolgevergütung. (36 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 396-407, no. 7/8, May 1, 1962.)

A criticism of the Bundesrat's position that the Federal Government is not competent, under the Constitution, to enact the *droit de suite* provisions of the official West German draft copyright laws.

157. KNAP, KAREL. Neue Grundsätze des Urheberrechtsschutzes in der Sowjet-Union. (37 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 290-300, no. 5/6, Sept. 1, 1962.)

A summary of the basic principles of the new Soviet copyright law enacted by the Supreme Soviet on December 8, 1961, as part 4 of the Principles of Civil Legislation of the Union of SSR and the Union Republics.

158. KRAUSE-ABLASS, GÜNTER B. Zitate aus Aufführungen, Tonaufnahmen, Filmen und Sendungen in Film und Rundfunk. (64 *Gewerblicher Rechtsschutz und Urheberrecht* 231-240, no. 5, May 1962.)

A study on the freedom of quotation, in motion pictures and broadcasts in West Germany, from works performed, recorded on tape, filmed and broadcast.

159. LEINVEBER, GERHARD. Urheberrechtsreform und Verleger; ein juristischer Nachwort zur Konstanzer Tagung 1962. (64 *Gewerblicher Rechtsschutz und Urheberrecht* 344-347, no. 7, July 1962.)

A lawyer's comment on the annual meeting of the West German Book Trade Association and eight publishers organizations held at Constance in April 1962, at which the publishers' position on the Federal Government draft copyright laws was discussed.

160. LÖFFLER. Urheberrechtsschutz zwischen der Bundesrepublik und der UdSSR, von Rechtsanwälten Dres. Löffler und Wenzel. (18 *Börsenblatt für den Deutschen Buchhandel*, Frankfurter Ausg. 217-219, no. 14, Feb. 16, 1962.)

A discussion of the copyright relations between the Federal Republic of Germany and the Soviet Union, with the conclusion that, "in essence, works by Soviet authors are as little protected in the Federal Republic as are works by German authors in the Soviet Union."

161. LÖFFLER, MARTIN. Der Streit um die private Tonbandaufnahme. (*GEMA Nachrichten* 10-15, no. 54, June 1962.)

A case is made for payment of copyright royalties by private owners of tape recorders in West Germany.

162. MENTHA, BÉNIGNE. Türkisches Urheberrecht und Berner Übereinkunft. (36 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 55-60, no. 1/2/3/4, Feb. 1, 1962.)

A brief appreciation of Professor Ernst E. Hirsch as the principal drafter of the present Turkish Copyright Law, responsible for its basic concept of the author's "dominion over the work," and leading proponent of Turkey's adherence to Berne.

163. MÖHRING, PHILIPP. Der Regierungsentwurf eines Gesetzes über Verwertungsgesellschaften auf dem Gebiet des Urheberrechts (Verwertungsgesellschaftengesetz). (36 *Archiv für Urheber-, Film-, Funk- und Theaterrecht*, 407-427, no. 7/8, May 1, 1962.)

An examination of the need for legislation on performing rights societies in West Germany, and a critical analysis of the adequacy of the provisions of the official draft law relating thereto.

164. MÜLLER-MEININGEN, ERNST, JR. Das "geistige Eigentum"—Gedanken zur Reform des Urheberrechts. (*GEMA Nachrichten* 3-8, no. 55, Aug. 1962.)

A brief comment on the latest West German draft copyright laws, with criticism of the provision which would permit the making of recordings for private use.

165. PETER, WILHELM. Das allgemeine Persönlichkeitsrecht und das "droit moral" des Urhebers und des Leistungschutzberechtigten in den Beziehungen zum Film. (36 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 257-356, no. 5/6, Mar. 1, 1962.)

A study, from the Austrian and West German points of view, of the relationship between the moral right and the general right of per-

sonality in the sphere of copyright and neighboring rights, in which an attempt is made to determine the extent of freedom of contract in motion picture agreements.

166. POHLMANN, HANSJÖRG. Zur Überwindung der "Eigentums"-Vorstellungen im Urheberrecht; aktuelle Fragen zur Revision der bisherigen Geschichtsbeurteilung. (36 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 61-100, no. 1/2/3/4, Feb. 1, 1962.)

In his new contribution to the study of the origins of the German concept of copyright, Pohlmann holds that the early German copyright was closer to the present notion of authors' rights than the 18th century legal theory of intellectual property, because, instead of emphasizing merely the patrimonial side of the copyright, it contained elements of both personal and property rights of the author. At the end of the article appears an additional list of 16th and 17th century royal privileges, the first part of which was published in 33 *UFITA* 196-204, no. 3/4 (Feb. 1, 1961). See 8 *BULL. CR. SOC.* 327, Item 330 (1961).

167. ROEBER, GEORG. Der Film und die Probleme des künstlerischen Leistungsschutzes. (36 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 127-175, no. 1/2/3/4, Feb. 1, 1962.)

An analysis of the extent of legal protection granted to performing artists in the West German motion picture industry under the present statutory and case law, with some conclusions and suggestions for the forthcoming copyright law reform.

168. ROEBER, GEORG. [Ernst E. Hirsch] Zur Einführung und zum Geleit. (36 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 5-18, no. 1/2/3/4, Feb. 1, 1962.)

A eulogy of Ernst E. Hirsch, professor of law at the Free University in Berlin, with a survey of his principal accomplishments in the field of copyright and patent law.

169. SCHIEFLER, KURT. Der Regierungsentwurf des Urheberrechtsgesetzes unter besonderer Berücksichtigung der Änderungen gegenüber dem Ministerialentwurf des Urheberrechtsgesetzes. (64 *Gewerblicher Rechtsschutz und Urheberrecht* 338-344, no. 7, July 1962.)

The text of a lecture delivered on May 3, 1962, in Hamburg, dealing with the present state of deliberations concerning the West German Government draft copyright laws, with special emphasis on the

differences from the earlier draft laws which were prepared by the Federal Ministry of Justice.

170. SCHNORR VON CAROLSFELD, LUDWIG. Zum internationalen Urheberrecht ausserhalb der Konventionen. (37 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 281-290, nos. 5/6, Sept. 1, 1962.)

A discussion of the applicability of national copyright laws to foreign countries outside the sphere of international conventions, written in form of a review article on the new editions of two West German standard legal works, Raape's *Internationales Privatrecht*, 5., neubearb. Aufl., 1961, and Kegel's *Das internationale Privatrecht im Einführungsgesetz zum BGB*, 9. Aufl., 1961.

171. STREULI, ADOLF. Internationales Abkommen über den Schutz der ausübenden Künstler, der Hersteller von Tonträgern und der Sendeunternehmen. (1 *Schweizerische Mitteilungen über Gewerblichen Rechtsschutz und Urheberrecht* 50-69, no. 1, May 1962.)

The author's comments on the Rome Convention on Neighboring Rights in form of answers to a questionnaire which had been distributed by the Swiss Federal Office for Intellectual Property (Eidgenössisches Amt für Geistiges Eigentum) to various interested persons and groups in Switzerland.

172. ULMER, EUGEN. Von der Entwicklung des internationalen Urheberrechtes unter besonderer Berücksichtigung des Film- und Fernseherrechtes. (36 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 385-396, no. 7/8, May 1, 1962.)

A reprint of a lecture, delivered at a meeting of the Institute for Motion Picture Law in Munich on April 12, 1961, containing a brief survey of developments in the field of international copyright with special reference to motion picture and television law.

173. WERHAHN, JÜRGEN W. Persönlichkeitsrecht und Zeitgeschichte; ein Beitrag zur Lehre vom Recht am eigenen Bild. (37 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 22-44, no. 1/2, June 1, 1962.)

A discussion of one specific aspect of the general right of personality, namely, the right to one's own picture, under the provisions of sections 22-23 of the [West] German Act on Copyright in Works of Art and Photography, as amended up to May 12, 1940.

174. ZINI LAMBERTI, CARLO. Das Internationale Abkommen von Rom über den Schutz der ausübenden Künstler, der Hersteller von Tonträgern und der Sendeunternehmen. (37 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 257-281, no. 5/6, Sept. 1, 1962.)

A summary of the leading principles of the Rome Convention on Neighboring Rights.

7. In Italian

175. ARIENZO, ALFREDO. Nozione e tutela giuridica della parodia. (11 *Rassegna di Diritto Cinematografico, Teatrale e della Radiotelevisione* 8-9, no. 1, Jan.-Feb. 1962.)

A brief discussion, from the point of view of the Italian copyright law, of the nature and legal protection of parody.

176. PROTETTI, ETTORE. Possesso e tutela possessoria dei diritti di utilizzazione economica del diritto d'autore. (11 *Rassegna di Diritto Cinematografico Teatrale e della Radiotelevisione* 36-37, no. 2, Mar.-Apr. 1962.)

An examination, in the light of general rules and theory of Italian civil law, of the questions whether the rights of economic utilization of the author are rights susceptible to possession and whether the possession is subject to protection.

8. In Swedish

177. KARNELL, GUNNAR. 1961 års förslag till ändringar av U. S. Copyright Act; referat och synpunkter. (31 *NIR* 59-68, nos. 1-2, 1962.)

A Swedish critique of the Register's *Report on the General Revision of the U. S. Copyright Law*.

178. DESIGN LAWS AND TREATIES OF THE WORLD

The third installment of this loose-leaf collection of laws, regulations, treaties and conventions concerning the protection of designs and works of applied art, edited by Arpad Bogisch, has recently been published. Among the countries covered for the first time are Ceylon, Czechoslovakia, Ireland, Malaya, Norway, Philippines, Portugal, Rhodesia and Nyasaland, Spain and Venezuela.

The basic collection is now complete and covers all the countries concerning which sufficient information is available. It runs into some 500 pages and is delivered with two binders.

The publishers are A. W. Sythoff, Leyden, Holland and Bureau of National Affairs, Washington, D. C., in agreement with UNESCO,

The collection will be kept up to date by yearly supplements. Paris, and BIRPI, Geneva.

Copyright Society of the U.S.A.
c/o Fred B. Rothman & Co.
57 Leuning Street
South Hackensack, N. J.

Return Requested

Bulk Rate U. S. POSTAGE PAID Hackensack, N. J. Permit No. 2408

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

Published at
NEW YORK UNIVERSITY LAW CENTER

VOL. 10, NO. 3

FEBRUARY, 1963

Bulletin of The Copyright Society of the U. S. A.

EDITORIAL BOARD

WALTER J. DERENBERG, *Chairman*

RICHARD COLBY
EDWARD M. CRAMER
GEORGE E. FROST
HARRY G. HENN
ARTHUR S. KATZ
ROBERT J. KAUFMAN
BERNARD KORMAN

DR. STEPHEN P. LADAS
ALAN LATMAN
MELVILLE B. NIMMER
RICHARD H. ROEMER
STANLEY ROTHENBERG
CHARLES B. SETON
PAUL J. SHERMAN

JUDITH GRAD, *Associate Editor*
MARY T. HUNTER, *Assistant Editor*

The Copyright Society of the U. S. A.

OFFICERS

President

HARRY G. HENN

Vice-Presidents

LEONARD ZISSU
EDWARD A. SARGOY

Secretary

CHARLES B. SETON

Assistant Secretary

ALAN LATMAN

Treasurer

SIDNEY A. DIAMOND

Assistant Treasurer

EDWARD M. CRAMER

Executive Director
WALTER J. DERENBERG

BOARD OF TRUSTEES

JOSEPH S. DUBIN, Universal City, California
CARLETON ELDRIDGE, New York City
ROBERT V. EVANS, New York City
HERMAN FINKELSTEIN, New York City
GEORGE E. FROST, Chicago
PROFESSOR HARRY G. HENN, Cornell University
PROFESSOR BENJAMIN KAPLAN, Harvard University
IRWIN KARP, New York City
LEONARD KAUFMAN, New York City
SYDNEY M. KAYE, New York City
LEON KELLMAN, New York City
PROFESSOR JOHN M. KERNOCHAN, Columbia University
PROFESSOR ADRIAN A. KRAGEN, University of California
ISABELLE MARKS, New York City
E. GABRIEL PERLE, New York City
JOHN R. PETERSON, Boston
CEDRIC W. PORTER, Boston
BARBARA A. RINGER, Washington, D. C.
BENJAMIN W. RUDD, Washington, D. C.
EDWARD A. SARGOY, New York City
JOHN SCHULMAN, New York City
PAUL SHERMAN, New York City
STUART SPRAGUE, New York City
SAMUEL W. TANNENBAUM, New York City
THEODORA S. ZAVIN, New York City
LEONARD ZISSU, New York City

Published at New York University Law Center
40 Washington Sq. South, New York 11, N. Y.

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

© 1963 by The Copyright Society of the U. S. A.

CONTENTS

	PAGE
Joseph A. McDonald. <i>In Memoriam</i>	145
 PART I. ARTICLES.	
BERAN, MARTIN J., Refusal to Register—A Roadblock to Copyright Owners	147
ULMER, EUGEN, The Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations, Part II	165
 PART II. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS.	
1. United States of America and Territories	179
2. Foreign Nations	184
 PART III. CONVENTIONS, TREATIES AND PROCLAMATIONS	
 PART IV. JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY.	
A. Decisions of U.S. Courts.	
1. Federal Court Decisions	187
2. State Court Decisions	193
 PART V. BIBLIOGRAPHY.	
A. Books and Treatises.	
1. United States Publications	198
2. Foreign Publications	199
B. Law Review Articles.	
1. United States	200
2. Foreign	201
C. Articles Pertaining to Copyright from Trade Magazines.	
1. United States	203
2. England	206
 NEWS BRIEFS	
	206

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 11, New York: Harry G. Henn, *President*; Leonard Zissu, Edward A. Sargoy, *Vice-Presidents*; Sidney A. Diamond, *Treasurer*; Charles B. Seton, *Secretary*; Edward M. Cramer, *Assistant Treasurer*; Alan Latman, *Assistant Secretary*; and Walter J. Derenberg, *Executive Director*.

Annual subscription: \$25.

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 11, N. Y.

Business correspondence regarding subscriptions, bills, etc., should be addressed to the distributor, Fred B. Rothman & Co., 57 Leuning Street, South Hackensack, N. J.

CITE: 10 BULL. CR. SOC. page no., Item (1963).



Joseph A. McDonald
June 8, 1903–February 1, 1963

Joseph A. McDonald

Joseph Albert McDonald, a Charter Trustee and second President of our Society (1955-1957), died in Washington, D. C., on Friday, February 1, 1963.

Born on June 8, 1903 in New York City, Joe was graduated from Webb Institute of Naval Architecture in 1924 (Diploma in Naval Architecture and Marine Engineering), from Fordham University School of Law in 1928 (LL.B.), and from New York University School of Law in 1929 (LL.M.).

His first three years at the New York Bar were with the New York City admiralty firm of Hunt, Hill & Betts. Thereafter, for thirty years, he pioneered in the legal problems raised by the two then successively emerging media—radio and television. He served the National Broadcasting Company, as Assistant General Counsel, for thirteen years, divided between New York City and Chicago, where he served as Central Division Attorney and was admitted in 1939 to the Illinois Bar; then for six years as the General Attorney, Assistant to the President, Secretary, and Vice President of the American Broadcasting Company; later as the Treasurer of the National Broadcasting Company; and since 1958, when he was admitted to the District of Columbia Bar, as a member of the Washington, D. C. firm of Smith, Hennessey & McDonald, and, when Mr. Smith entered government service, its successor firm of Hennessey & McDonald.

Continuing to represent copyright causes in private practice, Joe was counsel to Admiral Rickover in the celebrated case involving the copyrightability of the Admiral's speeches, which Joe argued before the United States Supreme Court last year.

Joe, along with Samuel W. Tannenbaum, the first President of the Society, was a co-founder of the highly successful Copyright Luncheon Circle. He served with distinction as Chairman of the Copyright Division of the Section of Patent, Trademark and Copyright Law of the American Bar Association (1959-1960), as well as chairman of various copyright committees of that Section and of the Section of International and Comparative Law. In 1951-1954, he was chairman of the Committee on Copyright of the Association of the Bar of the City of New York.

He was a member of the Panel of Consultants on General Revision of the United States Copyright Law, composed of twenty-nine copyright specialists appointed by the Librarian of Congress, and of the UNESCO Panel on International Copyright. He was also a member of the Committee on Communications of the New York County Lawyers Association, the Federal Bar Association of New York, New Jersey, and Connecticut, the Society of Naval

Architects and Marine Engineers, the United States Power Squadron, and Gamma Eta Gamma.

He lectured on copyright at symposia of the American Bar Association and of the Federal Bar Association of New York, New Jersey, and Connecticut, at the Practising Law Institute, and at Columbia, Cornell, New York University, and Yale Law Schools.

His writings constitute a significant contribution to copyright law. They include: "Non-Infringing Uses", 9 *Bull. Cr. Soc.* 466 (1962); "Technological Advances and Copyright", 8 *Bull. Cr. Soc.* 3 (1960); "Lawyers and Broadcasting" in 2 *Stud. Law. J.* 7 (Oct. 1956); "Introduction: Analysis of the Convention" in *Universal Copyright Convention Analyzed* (1955); "The Law of Broadcasting" in 7 *Copyright Problems Analyzed* (1951); "Radio Defamation" (with I. L. Grimshaw), 9 *Air L. Rev.* 328 (1938).

Notwithstanding the fact that Joe served for seven years as a director of Broadcast Music, Inc., he was appointed as impartial chairman by ASCAP—a tribute to Joe's innate sense of fairness. He was in constant demand to serve on various industry committees. He also chaired the Broadcast Advisory Committee of the United States Information Agency.

One of the most public-spirited citizens of the communities in which he lived, Joe served as President of the Pelham Men's Club, counsel and member of the Board of Governors of the Pelham Country Club, and Vice-President of Hutchinson River Council, Boy Scouts of America. He also was a Trustee of his alma mater, Webb Institute of Naval Architecture.

Joe McDonald has aptly been called a "gentle gentleman". In controversy, he was often the balance-wheel, whose suggestions were always so fair, reasonable, impartial, and honest as to compel acceptance and to overcome seemingly unbreakable deadlocks. Yet, throughout, his standards remained uncompromisingly high. Typically, as one of his friends observed, at a meeting or social gathering, Joe would light up a cigar and put everyone at ease with a humorous story or lively quip. He will be missed, of course, on the big committees and important cases, but more so by the multitude whom he could always find time to counsel on their little problems.

Joe is survived by his wife, Mrs. Louise Cruger Muth McDonald, three children, his mother, a sister, and a brother. To all of them, but specially to Louise, who was so often at Joe's side at copyright functions and shared his legion of friendships in copyright circles, our Society extends its sincere condolences.

HARRY G. HENN
President

PART I.

ARTICLES

179. REFUSAL TO REGISTER—A ROADBLOCK TO COPYRIGHT OWNERS

By MARTIN J. BERAN*

The basis of all copyright legislation in this country is, of course, Article I, Section 8 of the U. S. Constitution which grants to Congress the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

Section 10 of the Copyright Act of 1909¹ specifically provides that "any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title" It is well settled that statutory copyright is created upon compliance with this section, namely upon publication of the work with the prescribed copyright notice—nothing more is required.

Yet, if the copyright proprietor does nothing more than publish his work with the prescribed notice, it is equally well settled that he will not be able to maintain an action for infringement of his statutory copyright. This follows from the fact that Section 13 of the statute² states in part that "no action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with."

Thus, it is clear that publication with notice, together with compliance with the statutory requirements of deposit of copies and registration of the work are conditions precedent for the bringing of an action under the copyright statute. But the statute does not spell out what constitutes "compliance" with the statute, or whether the compliance is to be by both the copyright claimant and the copyright office, or merely by the copyright claimant.

* Member of the New York Bar; Associate of the firm of Blum, Moscovitz, Friedman, Blum & Kaplan, New York City.

1. 17 U.S.C. Section 10.

2. 17 U.S.C. Section 13.

It is because of this ambiguity that a copyright claimant, unsuccessful in obtaining a certificate of registration from the Copyright Office may find himself unable to restrain a wrongful use or misappropriation of the copyrighted work at a time when irreparable damage is being done to the work of the copyright owner.

It is the purpose of this paper to explore the problem of Copyright Office refusal to register a work, and the maintenance of an action for infringement without such registration certificate, and to suggest a possible means for dealing with this problem.

Assuming that the Copyright Office refuses to issue a certificate of registration for a work, and assuming further that the work sought to be protected is being copied by another, what recourse is available to the injured party?

In the early case of *White-Smith Music Pub. Co. v. Goff*,³ complainant, a music publisher who was *not* the author of the work, brought an action for infringement of a copyrighted musical composition during its renewal period. The complainant had complied with the provisions of the statute with respect to filing the application for renewal of the copyright, but registration had been refused on grounds that complainant was not the author of the work, or one designated by statute to apply for the renewal in lieu of the author.

In affirming the decree of the lower court in favor of the defendants, the First Circuit Court of Appeals held that the complainant, not being the author of the work or other statutory person vested with renewal rights in the work, could not maintain an action for infringement of a copyright after the original term had expired. However, with respect to the question as to whether the refusal of the Register of Copyrights to register the work was a bar to maintaining a suit for copyright infringement, the Court stated at p. 247:

"[The complainant] offered registration under the statute, and although registration was refused, yet it fully complied with the requirements of law, and is entitled to maintain this suit if it had any statutory right to the extension."

As the Court held that complainant did not have any right to the extension, or renewal copyright, the above statement must be regarded as dicta. However, the above-quoted statement, coupled with the fact that the Court looked to the merits of the issue, rather than deciding the case merely upon the failure of complainant to register the work, indicated that in the eyes of the Court the failure to obtain a certificate of registration from the Copy-

3. 187 F. 247 (1st Cir., 1911).

right Office was not, per se, a bar to maintaining an action for infringement of the copyright, where there was compliance by the applicant with the registration provisions of the statute.

A year after the decision in the *White-Smith Music* case, a New York lower court had occasion to consider this question in *New York Times Co. v. Star Co.*⁴ on an application to punish the defendant for contempt for violation of an injunction. Complainant's bill in equity had charged the defendant with copyright infringement of a published work. The bill, which was verified on March 8, subsequent to the publication by complainant of its copyrighted work, stated that complainant "is about to file two complete copies of the best edition when published". Shortly thereafter, an order to show cause, containing a restraining order, was signed and served upon the defendant. Subsequent thereto, on March 9, two copies of the copyrighted work were filed in the Office of the Register of Copyrights.

The Court held that a valid copyright had been secured by publication of the work, but that the injunction against the defendant was a nullity because it was served prior to the depositing of two copies of the copyrighted work in the Copyright Office by the complainant.

On the question of whether an action could be maintained where there has been compliance with the statutory filing requirements by the applicant, the Court stated as follows at the conclusion of its opinion:

"At the time the person entitled to copyright publishes his work with the notice required, presumably he has copies of it in his possession and could at once deposit in the mail the two copies required, addressed as the statute prescribes. That act on his part would seem to be a compliance with Section 12,⁵ sufficient to entitle him to maintain his action or proceeding. But, until he does this, the prohibition of that section is imperative."

Thus, by way of dicta, the Court deemed it compliance with the registration requirements of the statute for purposes of suit once the copies of the work are in the mail addressed to the Copyright Office, and appeared to indicate that it would have so held if such had been the case.

This issue again arose in *Lumiere v. Pathe Exchange, Inc.*,⁶ wherein plaintiff brought an action for copyright infringement of a published work. At the time the action was brought, plaintiff was the owner of copyright regis-

4. 195 F. 110 (S.D.N.Y., 1912).

5. This is now Section 13 of the Act, see note 2, *supra*.

6. 275 F. 428 (2nd Cir., 1921).

tration certificates only for an unpublished work, although two copies of the published work had been deposited in the Copyright Office.

The Court held that the action could not be maintained because "deposit of copies and registration is each a condition precedent of the right to maintain an action for infringement." Nevertheless, it acknowledged the right of plaintiff to maintain an action after obtaining a certificate of registration from the Copyright Office, which action plaintiff had, in fact, begun, and accordingly approved of the District Court dismissing the bill without prejudice.

Thus, the Court of Appeals for the Second Circuit, without referring to the statements made in the *White-Smith Music* and *New York Times* cases, indicated that an action for infringement of a published work could not be maintained where no certificate of copyright registration for the published work has issued from the Copyright Office, even though the requisite number of copies of the work have been deposited with the Register of Copyrights.⁷

This decision was followed by a lower court in *Rosedale v. News Syndicate Co., Inc.*⁸ wherein a motion was made to dismiss a complaint seeking an injunction and damages for infringement of a work of art. A certificate of copyright registration had been obtained for an unpublished work. Plaintiff had deposited two copies of the work with the Copyright Office, and the Court acknowledged that plaintiff apparently attempted to comply with the statutory filing provisions for a published work. However, the failure of plaintiff to obtain a certificate for a published work from the Copyright Office resulted in a dismissal of the complaint, without prejudice, as in the *Lumiere* case.⁹

It is in this setting that we come to the case of *Vacheron & Constantin-LeCoultre Watches, Inc. v. Benrus Watch Company, Inc.*¹⁰ This was an action alleging copyright infringement, design patent infringement and unfair competition in connection with plaintiff's artistically designed wrist watch. With respect to the question of copyright infringement, the District Court held that the claim of copyright was invalid because the subject matter of the suit was not a work of art within the contemplation of the copyright act. The plaintiff had applied for but had been refused registration of its work by the Copyright Office on two occasions on grounds that it was not a copyrightable work of art. Though the Court looked to the merits of the question of copyrightability, it specifically stated that its decision rendered unnecessary a de-

7. As will hereinafter be pointed out, *infra*, note 13, there is some confusion as to what the Second Circuit actually held in the *Lumiere* case.

8. 39 F. Supp. 357 (S.D.N.Y., 1941).

9. See also *Algonquin Music, Inc. v. Mills Music, Inc.*, 93 F. Supp. 268 (S.D.N.Y., 1950).

10. 155 F. Supp. 932 (S.D.N.Y., 1957).

termination of whether plaintiff had the right to sue for infringement of a validly copyrighted work which had been refused registration.

On appeal, the Second Circuit discussed the problem at great length. The majority opinion, written by Judge Hand, assumed *arguendo* that plaintiff's work was copyrightable, but held specifically that Section 13 of the statute forbids any action for infringement of the copyright when the Register of Copyrights has refused, as he did on two occasions, to accept the work as copyrightable and issue a certificate of registration.

The Court distinguished the *White-Smith Music* case¹¹ as dicta, and therefore did "not deem it an authoritative precedent."

Although the opinion referred to its earlier *Lumiere* decision¹² it did not regard that as controlling, the *Vacheron* Court stating that the *Lumiere* Court had affirmed "a judgment dismissing an action for infringement, though without prejudice, because the copyright owner, the plaintiff, had deposited with the Register only one, instead of two, copies as the statute required," and that "the point was not raised or decided whether, had the plaintiff deposited two copies and the Register refused to issue any certificate under Section 209 of Title 17, the action would have succeeded." The Court thereupon determined that "this decision also did not pass upon the issue here at bar."¹³

After further discussion in support of its position, the Court concluded as follows:

"We find confirmation of our conclusion in the text of the last sentence of Section 13, for it denies the right to sue for infringement 'until

11. *Supra*, note 3.

12. *Supra*, note 6.

13. Judge Clark's dissent in the *Vacheron* case took an entirely different view of the holding in the *Lumiere* case, stating that "the Court actually held that plaintiff had failed to take the proper steps; he had failed to file a proper registration *after* publication, and his first registration to claim copyright in an unpublished work did not carry over after publication". However, Judge Clark agreed with the majority that the *Lumiere* case was not pertinent to the issue herein. Yet, a reading of the *Lumiere* decision suggests that two copies of the work were, in fact, filed after publication, but that the certificate of registration for the published work had not issued prior to suit, plaintiff relying upon certificates of registration previously obtained for unpublished works. Under such circumstances, it would appear that the majority in the *Vacheron* case could have relied upon *Lumiere* for the proposition that suit cannot be maintained where no certificate of registration for a claim to copyright in the particular work has been obtained. In any case, the majority reached this conclusion without the *Lumiere* decision, so that the question as to what the Second Circuit previously held in the *Lumiere* case would appear to be academic.

the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with', and that imports more than mere 'deposit of copies'. Since the owner must submit an application and pay the required fees in order to make a deposit, 17 U.S.C., Section 202.3(b) (1952 ed. Supplement V) we can think of no other added condition for 'registration' but acceptance by the Register. We therefore affirm the judgment on the first count because the plaintiff did not succeed in 'registering' his wrist watch as a 'work of art' under Section 5(g)."

Thus, in no uncertain terms, the Second Circuit made it clear that a bona fide attempt to register a work with the Copyright Office is not sufficient, and that an action for statutory copyright infringement cannot be maintained without first having obtained a certificate of registration of a claim to copyright from the Register of Copyrights.

In a vigorous dissenting opinion Chief Judge Clark pointed out, first of all, that the decision of the Register of Copyrights in refusing registration was "purely a ruling of law which was erroneous and beyond the authority of the official making it." He expressed doubt that the ministerial grant of a certificate of copyright registration is a condition precedent to a suit for copyright infringement, and indicated that the plaintiff having complied with the requirements put upon it, the only remaining question was whether it must assume the risk of waiting until the Register has performed his statutory duties.

He also took issue with a statement of the majority suggesting that the existence of a mandamus action against the Register of Copyrights necessarily precludes a right of action for infringement where registration has been refused.

Judge Clark then pointed to "the distinction at times overlooked between copyrights and patents and between the respective duties and authorities of the Register of Copyrights and the Commissioner of Patents." He stated further:

"A patent is a governmental *grant*, made by the Commissioner after careful examination and in the exercise of important quasi-judicial functions, 35 U.S.C., Section 131-135, with intramural appeal, 35 U.S.C., Section 134, and ultimate appeal to the courts, 35 U.S.C., Sections 141-146, all as strictly provided by law.³ (³ The powers and duties of the Commissioner of Patents as to trademarks are similar. 15 U.S.C., Sections 1062-1072, 1091-1094.) But beginning with the way in which copyright is obtained, the entire scheme of the Copyright Act is altogether different. Section 10 of 17 U.S.C. sets the tone by providing that copyright of a work is secured 'by publication thereof with the notice of copyright required by this title.' That is all a defendant ever has to know to be on

notice of plaintiff's right. After copyright has been thus secured, the applicant is directed to deposit two copies in the Copyright Office, together with a claim of copyright, 17 U.S.C., Section 13; this claim is made on an appropriate form, with statutory registration fee, 37 CFR, Section 202.3; the Register makes appropriate entry in his book, 17 U.S.C., Section 208; and the person recorded as the claimant is entitled to a certificate of registration, 17 U.S.C., Section 209. Note that 17 U.S.C., Section 13 says nothing about the necessity for purposes of suit of this certificate, so fully described in purpose and effect in Section 209. The whole implication throughout is that the Register must carry out the provisions of the law and has no judicial or discretionary functions such as has the Commissioner of Patents."

Judge Clark indicated that the district court should afford plaintiff interim relief by continuing the injunction, until plaintiff could "seek mandamus against the Register in the District of Columbia" and "could persuade the Register to comply with the law", thereby permitting plaintiff to file a supplemental complaint annexing a copy of the certificate of copyright registration. However, he concluded that even this was unnecessary because *White-Smith Music Pub. Co. v. Goff*, supra, in which adjudication was made on the merits once the right to sue was settled, provides a square holding—and not dicta—that compliance by the applicant with the filing provisions of the statute entitles it to maintain an action for copyright infringement, irrespective of refusal by the Register of Copyrights to issue a certificate of registration.

While this writer is sympathetic to the views expressed by Judge Clark with respect to the plight of the copyright owner who cannot maintain an action for copyright infringement because the Copyright Office has refused registration of his work, it is submitted that Judge Clark, in his dissent, confused two different issues, applying a cause-and-effect relationship between the two, where, in fact, it does not exist.

The first issue is whether the Register of Copyrights has the authority to refuse registration of a work as consisting of non-copyrightable subject matter, or because the applicant does not belong to a class entitled to copyright protection. Assuming an affirmative answer upon this issue, the next question is whether or not the unsuccessful registrant can maintain an action for infringement of his copyright for which registration by the Copyright Office was refused. It does not necessarily follow that if the Register of Copyrights has the discretion and authority to refuse registration of a work on the grounds above-stated, a suit for infringement of the copyright cannot be maintained in the absence of obtaining such a certificate of copyright registration. If it did so follow, then the *Vacheron* case might never, and need

never have been decided, for it is submitted that, irrespective of the statements of Judge Clark to the contrary, it is well settled that the Register of Copyrights *does* have authority to refuse registration of a work where it is deemed not subject to copyright or where the applicant is believed not entitled to obtain a copyright for the work, although his action is subject to court review. In this connection, reference is made to the Copyright Act itself. Section 4 of the Act¹⁴ states:

"The works for which copyright may be secured under this title shall include all the writings of an author."

Section 9 of the Act¹⁵ provides for copyright in the author or proprietor of the work.

Section 10 of the Act¹⁶ states, in part:

"Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title"; (emphasis added).

Section 11 of the Act¹⁷ states:

"Such person may obtain a registration of his claim to copyright by complying with the provisions of this title, including the deposit of copies, and upon such compliance, the Register of Copyrights shall issue to him the certificates provided for in Section 209 of this title."

It is clear from the foregoing that not every person is entitled to copyright, that not every notice of copyright creates a valid copyright, and that in not all works may copyright be secured under the Act. As Section 201 of the statute¹⁸ provides, in part, that "the Register of Copyrights . . . shall, under the direction and supervision of the Librarian of Congress, perform all the duties relating to the registration of copyrights," it follows therefrom that in performing these duties, the Register of Copyrights must determine whether the work sought to be protected is properly entitled to a certificate of registration, i.e., whether there has been compliance "with the provisions of this title."

Separate and apart from any statutory basis for the proposition that the Register of Copyrights has authority or discretion to reject works within the

14. 17 U.S.C., Section 4.

15. 17 U.S.C., Section 9.

16. 17 U.S.C., Section 10.

17. 17 U.S.C., Section 11.

18. 17 U.S.C., Section 201.

limited scope of his duties relating to the registration of claims to copyright, it must be accepted as an accomplished fact, for this authority has, in fact, frequently been exercised by the Register of Copyrights and has been upheld by the courts.

In *Bouve v. Twentieth Century-Fox Film Corporation*,¹⁹ the Register of Copyrights took an appeal from a judgment of the District Court in a mandamus action to compel the Register of Copyrights to issue a certificate of registration. The issue to be determined was whether a collection of contributions to periodicals was a single "book" and therefore registrable for a single fee. Although there was no issue as to the copyrightability of the subject matter, the Register had refused to issue a certificate except upon payment of a separate fee for each contribution. In affirming the lower court, the Court of Appeals held that the Register erroneously refused registration as a book for a single fee, and ordered the registration of the work on that basis. In rendering this decision, which was directed to the correctness of the ruling by the Register—and not to his authority to make such a ruling—the Court noted at p. 53 that "it seems obvious that, unless the Register has some power to control deposits for copyright it may soon become necessary to build a new library annex", and that "[i]t seems obvious, also, that the Act establishes a wide range of selection within which discretion must be exercised by the Register in determining what he has no power to accept."

Likewise, in *Brown Instrument Co. v. Warner*,²⁰ appellant had brought a mandamus action against the Register of Copyrights who had refused to issue a copyright certificate for certain calibrated charts used to record such variables as temperature and pressure in conjunction with an apparatus manufactured by appellant. The Court affirmed the District Court which had held that appellant "failed to establish that its charts are 'writings of an author' or 'drawings' within the meaning of the Constitution and the copyright statute, or that said charts convey or are capable of conveying the thought of an author," and that the charts were therefore not copyrightable. Thus, the authority of the Register of Copyrights therein to refuse registration was not only taken for granted, but his decision was reviewed by two courts and was concurred in.

One of the more recent cases reaffirming the authority of the Register of Copyrights to refuse registration of a work was *Bailie v. Fisher*,²¹ wherein appellants sought a declaration that their picture-record device was a work of art, and an order requiring the Register of Copyrights to register the device

19. 74 App. D. C. 271, 122 F.2d 51 (D. C. Cir., 1941).

20. 161 F.2d 910 (D. C. Cir., 1947).

21. 258 F.2d 425 (D. C. Cir., 1958).

as such. The Register of Copyrights had refused registration on grounds that the device was not a work of art and was not subject matter of copyright. In affirming the District Court which had granted summary judgment in favor of the Register, the Court stated, in part, as follows:

" . . . [T]he Register may properly refuse to accept for deposit and registration 'objects not entitled to protection under the law' It seems obvious; also, that the Act establishes a wide range of selection within which discretion must be exercised by the Register in determining what he has no power to accept. . . . *Bouve v. Twentieth Century-Fox Film Corp.*, 1941, 74 App. D. C. 271, 273, 122 F.2d 51, 53. The Register's discretion is not uncontrolled, but is subject to judicial review and correction. *Ibid.*"

Likewise a recent opinion of the Attorney General of the United States²² acknowledges that the Register of Copyrights may properly refuse to accept for deposit and registration objects not entitled to copyright protection under the law.

Perhaps the best and most succinct recent statement of the law with respect to this was that made by Caruthers Berger in a study entitled "Authority of The Register of Copyrights to Reject Applications for Registration",²³ as follows:

" the authority of the Register of Copyrights is ministerial in registering the claims of persons entitled to copyright, though in executing this ministerial function he must apply, and hence construe, the law governing the question of whether the applicant for registration is entitled to copyright."

It should be noted that the Copyright Law Revision Report²⁴ confirms the view that the "Register of Copyrights has for many years exercised the authority to refuse registration when he finds that the article deposited is not copyrightable, or that the requirements for securing copyright or for registration have not been fulfilled." The report then proceeds to document this statement:

"A recent survey shows, in round figures, that out of 250,000 applications received in a year, 6,000 or 2.4 per cent were rejected. Of

22. 41 Ops. Att. Gen. No. 73, 121 U.S.P.Q. 329 (December 18, 1958, Released May 8, 1959).

23. Copyright Law Revision Study 18, March, 1959, p. 97.

24. Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law, House Committee Print, 87th Congress, 1st Session, p. 75.

the rejections, 40 per cent were for articles considered not copyrightable, 35 per cent for articles not bearing the required notice, 17 per cent for unpublished material of classes not eligible for registration, and the remaining 8 per cent for miscellaneous reasons."

It is clear from all of the foregoing that the authority of the Register of Copyrights to refuse registration of works for non-copyrightability, for failure to affix the proper statutory notice of copyright, or for failure of the applicant to qualify as one entitled to statutory copyright protection is well established. Thus, it is believed that the statements by Judge Clark to the contrary in his dissent in the *Vacheron* case were not only unnecessary to his ultimate conclusion that relief should be afforded the plaintiff therein, but are not supported by the weight of authority.

Furthermore, it is believed that the Register of Copyrights should continue to exercise his discretion—erroneous though it may be in particular instances—in determining whether the work for which registration is sought is subject to copyright protection, or whether the party seeking registration is of the statutory class of persons entitled thereto, in addition to determining whether there has been compliance by the applicant with the statutory filing requirements. Otherwise, the value of a certificate of registration issued by the Copyright Office would itself be de minimus, for anyone would be able to obtain a certificate from the Register of Copyrights upon paying the prescribed fee, filing an application, and depositing two copies of the work, irrespective of an obvious defect mitigating against the acquisition of a valid copyright in the work by the applicant thereof.

It is accordingly submitted that any realistic inquiry into the plight of the copyright owner whose work has been refused registration by the Copyright Office must recognize that the Register of Copyrights does and should exercise some discretion in executing the duties of his office, i.e., in performing all the duties relating to the registration of copyrights.

However, does it necessarily follow that Section 13 of the Copyright Act forbids any action for infringement of the copyright when the Register of Copyrights has refused to register the work? I submit not.

It will be recalled that Section 13²⁵ of the Copyright Act states in part:

"No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with."

25. 17 U.S.C., Section 13, note 2, *supra*.

It should be noted that the above sentence appears as the final sentence in Section 13 which discusses in detail the requirement of the deposit of copies *by the applicant* after copyright has been secured by publication with the statutory notice. The whole import of Section 13 is directed toward what the *applicant* must do and not toward the obligations of the Register of Copyrights. Indeed, the duties of the Register are discussed in a different part of Title 17, namely Chapter 3, entitled "Copyright Office", Sections 201 through 216. It is clear, therefore, that the reference to compliance with "deposit of copies and registration" appearing in the last sentence of 17 U.S.C. 13 refers to compliance by the *applicant* and not by the Register of Copyrights. Since the applicant cannot issue his own certificate of copyright registration, it follows that the compliance referred to by the statute is compliance by the applicant with the deposit of copies, the filing of a duly executed application for registration of a claim to copyright, and the tendering of the statutory filing fee.²⁶ When the applicant has done this, he has complied with "the provisions of this title with respect to the deposit of copies and registration", and should be entitled to maintain his action for infringement of his copyrighted work, irrespective of whether the Register of Copyrights acting within the scope of his authority sees fit to validate the application and render it *prima facie* evidence of the facts stated therein by issuing a certificate of registration. The statement of the First Circuit Court of Appeals in the *White-Smith Music* case, just two years after the enactment of the present statute is believed to be further support for the above position, although that statement is concededly *dicta*. Likewise, as pointed out by Judge Clark in his dissent in the *Vacheron* case, the liberal interpretation given to the last sentence of Section 13 by the United States Supreme Court in *Washington Pub. Co. v. Pearson*,²⁷ also tends to this direction. The Court therein had held that the right to sue under the Act for infringement is not lost by a mere delay in filing for registration of the work, the copyright inuring from first publication with the proper copyright notice appearing thereon, with the duty not to infringe being unaffected by the failure to obtain a registration for the work.

It is therefore submitted that where the applicant for registration of a claim to copyright has complied with the procedural filing requirements of

26. This compliance has itself been liberally construed by the Copyright Office and the Courts. See *United States v. Backer*, 134 F.2d 533 (2nd Cir., 1943) wherein the Court of Appeals affirmed a District Court decision which held valid a certificate of copyright registration issued for a published work subsequent to publication of the work with the copyright notice, and subsequent to the deposit of copies with the Copyright Office, but based upon an application filed with the Copyright Office prior to publication of the work.

27. 306 U.S. 30, 59 S. Ct. 397, 83 L. Ed. 470 (U.S., 1939).

the statute, he is entitled to maintain his action for copyright infringement irrespective of any Copyright Office refusal to issue a certificate of registration, and irrespective of the fact that this plaintiff will not be afforded a presumption that the facts stated in his application for registration are true.

SUGGESTED REMEDIES

Notwithstanding the views hereinabove expressed, it must be recognized that the statute is ambiguous on the question of maintaining an action where registration has been refused, that one of the most respected courts in the country has interpreted the statute as forbidding the maintenance of an action for copyright infringement where the plaintiff has been unable to obtain a certificate of registration from the Copyright Office, and, further, that the only recourse to date against a Copyright Office refusal to register a work has been through a mandamus action against the Register of Copyrights. Therefore, if there is to be a final and definitive resolution of this problem, corrective legislation is needed. Such legislation, it is believed, should specifically provide for speedy and just relief to the applicant whose work has been refused registration by the Copyright Office, but at the same time, it should codify the well-established principle that the Register of Copyrights has the discretion and authority within the scope of his duties to determine whether a certificate of registration should issue with respect to a particular work, and to refuse to issue said certificate if in his good judgment a particular claim is deemed ineligible for registration.

In a Letter To The Librarian of Congress dated September 17, 1938 from Clement L. Bouve,²⁸ the then Register of Copyrights, an analogy was drawn between the basis for determining patentability of an invention by the Commissioner of Patents, and the basis for determining copyrightability by the Register of Copyrights. The Commissioner of Patents, it was stated, makes his determination upon a finding as to whether the invention claimed belongs to the class of articles entitled to patent protection, whether the invention is correctly described and claimed, whether the invention is new, and whether the necessary formalities have been complied with. If the applicant feels aggrieved, he can appeal from the Patent Office determination to the United States Court of Customs and Patent Appeals, or he can bring an action against the Commissioner of Patents in the U. S. District Court for the District of Columbia.²⁹ Either court will pass upon the merits of the case, although the

28. Letter To The Librarian of Congress Concerning Certain Aspects of The Copyright Act of March 4, 1909 In Their Relation To the Public Interest and Existing Problems of Copyright Office Administration, p. 66.

29. The same procedure is applicable with respect to trademarks. See Trademark Rules of Practice of the U. S. Patent Office, Rule 2.145.

appeal to the Court of Customs and Patent Appeals is based solely upon the record of the case, whereas the action in the District Court contemplates that additional evidence will be introduced into the record.

With respect to the Register of Copyrights, his conclusion as to whether to issue a registration of a claim to copyright is based upon a determination as to whether the applicant belongs to a class entitled to obtain copyright, whether the work sought to be protected is copyrightable, and whether the statutory formalities have been complied with. His decision is based upon an examination of copies of the work deposited, the information contained in the application, and such correspondence as may accompany the application. However, unlike the applicant for a patent, if the Register of Copyrights refuses registration of the work, the only recourse available to the applicant for registration under existing procedure is a mandamus action against the Register of Copyrights which is directed more to determining whether the Register acted arbitrarily and abused his discretion, than to the actual merits of the case.

Bouve, therefore, recommended, first of all, that there should be statutory provision made for hearings in the Copyright Office, which, at the present time are granted only as a matter of fairness to disappointed applicants and in the interest of good administration. More important, however, he urged judicial review of decisions of the Copyright Office refusing registration on substantive grounds by broadening the jurisdiction of either the Court of Customs and Patent Appeals or of the District Court for the District of Columbia.

While it is believed that the suggestions of Bouve represent a step in the right direction in that they would place the applicant for a copyright registration in a position analogous to the applicant for a patent, it should be pointed out that as a general rule, the determination of copyrightability of a work is ordinarily easier and requires less of a complex technical background than that required in a determination of whether a patent should issue in a particular case. Furthermore, the length of time necessary to prosecute an appeal through the Court of Customs and Patent Appeals or to institute an action *de novo* in the District Court for the District of Columbia may well render this remedy of little more assistance than a mandamus action to the copyright owner whose work is being infringed and who needs speedy and immediate relief, particularly in the case of certain copyrightable classes of works which have their value and are in demand only on a seasonal or temporary basis. Indeed, the dissent of Judge Clark in the *Vacheron* case indicated that there should be some form of interim relief against the infringer while the mandamus action is being litigated. Therefore, while there is merit to providing review from the decision of the Register of Copyrights refusing registration, on a basis analogous to that granted the applicant for a patent—

as well as to an applicant for registration of a trademark under the Lanham Act—this does not appear to be a completely satisfactory answer to the problem for copyright owners.

In a well-written article by Caruthers Berger,³⁰ it is suggested that the validity of the rejected claim should be tried in an infringement action, with the requirement that the Register of Copyrights be notified of the action so that he may present to the Court the basis for his refusal of registration. This would have the effect of giving the Register the opportunity to present his views to the court and, at the same time, if the claim is held valid, the applicant could obtain relief against the infringer.

This view was adopted by the Copyright Law Revision Report³¹ wherein the majority opinion in the *Vacheron* case was criticized, the Report stating, in part:

"Where a claimant has deposited the required copies, application, and fee, and registration has been refused, we believe he should be entitled to maintain a suit against an infringer. The validity of the claim would be determined in that suit. But the Register should be notified of the suit and given the opportunity to advise the court of the reasons for refusing registration."

It is pointed out, however, that while the above views deal with the problem of obtaining speedy relief for a copyright claimant of a work refused by the Copyright Office, which latter work is being infringed, they make no reference to the unsuccessful copyright claimant whose work is not presently being infringed, it apparently being "understood" that such an applicant is relegated to the age-old remedy of bringing a mandamus action against the Register of Copyrights to determine whether he has been arbitrary in refusing to issue the certificate. In such an action, the court might well look only to the question of abuse of administrative discretion or power, and not to the merits of the case. Thus, the proposed remedy would place the unsuccessful copyright applicant in a better position if his work is being infringed than if it is not being copied, for if there is an infringement, he could have the matter decided on the merits of his claim by bringing suit against the infringer and joining the Register of Copyrights as a party. Furthermore, since it is well settled that the Register of Copyrights *does* have discretion and authority to refuse registration for works which are not deemed to be protected by a valid copyright, the remedy of mandamus—which implies that only a mere ministerial act involving no discretion is involved—should be superseded once and

30. *Supra*, note 23, p. 98.

31. *Supra*, note 24, p. 75.

for all by a remedy directed to both the infringed as well as the non-infringed work which has been refused registration by the Copyright Office.

With this in mind, the following suggested procedure is herewith submitted:

The Statute should specifically state that the Register of Copyrights is authorized, subject to court review, to refuse registration for any claim which he finds invalid, but that he must register any claim which appears to be valid, when the procedural requirements of the statute have been complied with.

Where an application for registration of a claim to copyright has been refused registration, the applicant should have the choice of proceeding by way of one of three mutually exclusive alternatives.

The applicant for copyright registration should be permitted to pursue the same remedies available to the applicant for registration of a trademark or for the issuance of a patent. Thus, upon broadening the jurisdiction of the United States Courts of Customs and Patent Appeals, the applicant should be permitted to appeal to this tribunal from an adverse ruling of the Copyright Office. As an alternative, if the applicant so desires, he should be permitted to commence a civil action in the District Court for the District of Columbia asking the Court to adjudicate the validity of his claim to copyright. This would conform with the procedure in patent and trademark cases. Such a civil action would differ from a mandamus action, for the applicant would not merely be asking the Court to hold that the Register has abused his discretion in refusing registration, and thereupon request the Court to order the registration of the work, but rather, this civil action would be a trial de novo, in which additional evidence could be introduced to show that the work sought to be protected has acquired a valid copyright and is entitled to be registered by the Copyright Office. A decision in such a proceeding would constitute an adjudication as to the validity of the copyright.

However, let us assume that the work which has been rejected by the Copyright Office is being infringed, and that the unsuccessful copyright applicant desires more immediate relief than that afforded by an appeal to the Court of Customs and Patent Appeals or by a civil action de novo against the Register of Copyrights in the Federal District Court.

Under such circumstances, upon request of the applicant, the Register of Copyrights should be required to issue a *Certificate of Administrative Compliance* to the applicant whose work has been refused a certificate of copyright registration. The *Certificate of Administrative Compliance* would state that the Register of Copyrights has examined the application, and that the applicant has complied with all of the administrative requirements necessary to

obtain a certificate of copyright registration, namely, the filing of a duly executed application, the depositing of the requisite number of copies of the work, and the payment of the filing fee. The *Certificate of Administrative Compliance* would also state that a certificate of registration of a claim to copyright cannot be issued by the Copyright Office, setting forth the reasons why the Register of Copyrights has refused to register the work. This certificate would thus serve as the basis of an action against the infringing party. The certificate would be deemed prima facie evidence of the facts stated therein, namely, that the owner thereof has fully complied with the registration requirements of the statute, but that the work has been held not to have acquired a valid copyright inuring to the applicant and that registration has accordingly been refused by the Register of Copyrights. Thus the applicant would go into court with a presumption that he has complied with the procedural requirements of the statute, thereby permitting him to maintain his action under the Copyright Act, but also with a presumption that his claim to copyright is not valid. The applicant would then be permitted to introduce evidence rebutting this latter presumption and proving that he has a valid copyright, and, at the same time, showing that his copyright has been infringed by the defendant. If the court finds for the plaintiff, it can grant the injunctive and monetary relief requested against the defendant, and, at the same time, order the Register of Copyrights to issue a certificate of registration to the successful plaintiff, nunc pro tunc.

Under this procedure, it would not be necessary to join the Register of Copyrights as a party to the suit, although he could be brought in upon the court's own motion, or with court approval upon the request of either party. Nevertheless, notice of the filing of the suit should be given to the Register of Copyrights as above suggested.

The foregoing discussion assumes that there has, in fact, been compliance by the applicant with the administrative and procedural requirements of the Act with respect to filing for registration of a claim to copyright. Obviously, if there is an issue as to whether such compliance has been made, no *Certificate of Administrative Compliance* could or should be given the copyright owner. In such a case—and it is believed that such situations would be relatively rare—the applicant should be relegated to an appeal to the Court of Customs and Patent Appeals, on this limited question of whether there has been compliance with the requisite procedural requirements, namely, the filing of a duly executed application for registration of a claim to copyright, the depositing of the requisite number of copies of the work, and the payment of the statutory filing fee.

It is respectfully urged that the above suggestions be given serious consideration in the revision of that portion of the Copyright Act relating to the

relief to be afforded a copyright owner whose work has been rejected by the Copyright Office, for it is of the utmost importance that the remedy decided upon be one which will protect the infringed as well as the non-infringed work, but likewise, preserve for the Copyright Office its long established right to exercise discretion in performing its duties of issuing certificates of registration. In this way, the presumption that a valid claim to copyright exists by virtue of the issuance of a certificate of copyright registration will be maintained, and at the same time, the copyright owner will be afforded the protection necessary for enforcing his rights where such rights in fact exist.

180. THE ROME CONVENTION FOR THE PROTECTION OF PERFORMERS, PRODUCERS OF PHONOGRAMS AND BROADCASTING ORGANIZATIONS—PART II¹

By EUGEN ULMER²

II. THE PRINCIPLES UNDERLYING THE CONVENTION

A. Relations to Copyright

1. Neighboring rights derive their name from the fact that their origins are to be found in the neighborhood of copyright. However, neighboring rights not only differ from copyright in the extent of protection afforded by them, but also with regard to the subjects to which they relate: the subjects of copyright are literary and artistic works; the subjects of neighboring rights are performances, phonograms and broadcasts.

If only by virtue of the dissimilarity of subject matter, it is apparent that any regulation of neighboring rights leaves untouched the protection of works of literature and art. Still, it is a fact that the protection of neighboring rights goes side by side with the protection of authors. Whenever protected works are duplicated or communicated to the public, the authors' consent is invariably required. Recognition of neighboring rights requires that, for the use of performances, phonograms and broadcasts in the instances cited in the Convention, as in domestic legislation, the consent of the performers, producers of phonograms and broadcasting organizations be obtained, or that equitable remuneration be paid to these holders of the neighboring rights.

That the protection of the rights of authors and their legal successors remains untouched is therefore really self-evident. It nevertheless seemed advisable to enunciate this principle specifically in the Convention, as had been done in the Hague Draft and in the preceding Drafts in order to take into account the authors' wishes on this point and to obviate any possible misunderstanding.

The demands of the authors' associations, however, went further. They pointed to the fact that the creation of literary and artistic works necessarily precedes interpretation by performers and that in most cases of sound recordings and broadcasts, those which are recorded or broadcast are, again, literary and artistic works. From this basic position the authors derived their demand

1. Authorized translation of an article which appeared in *Gewerblicher Rechtsschutz und Urheberrecht, Auslands- und Internationaler Teil*, 569-594, December 1961.

2. Professor of Law, University of Munich, Germany; Head of the Delegation of the Federal Republic of Germany to the Rome Conference.

for recognition of the primacy of copyright and demanded that any possibility of encroachment, however indirect, on the authors' interests must remain excluded.

In conformity with this demand of the authors' associations and the relevant resolutions passed by the Legislative Committee of CISAC and by ALAI at their conferences at Tel Aviv and Florence, respectively, it was proposed in Rome by the French and Italian Delegations that a protective clause for authors be formulated to the effect that neighboring rights must in no way affect the *exercise* of authors' rights with respect to works performed, fixed on phonograms or broadcast. The primacy of copyright was given as the reason for this proposal, without mentioning the practical consequences of the proposal.

When examining the Franco-Italian proposal (which was obviously influenced by Piola Caselli's well known theory that the author's exclusive right left no room for a further exclusive right) we had no difficulty in detecting that its acceptance would have the effect of weakening neighboring rights to a considerable extent. If, for example, a protected work is performed and the author wants the performance to be broadcast by radio, it would, according to the Franco-Italian proposal, restrict the exercise of the copyright in the work performed if the performers were to exercise their right to prohibit the broadcast. The same argument also applies in the case of the rights of producers of phonograms and broadcasting organizations. Under the Convention, the reproduction of a phonogram requires, in addition to the consent of the author, the consent of the producer of the phonogram; and the rebroadcasting of a broadcast requires, in addition to the consent of the author, the permission of the broadcasting organization which transmitted the original broadcast. According to the Franco-Italian proposal, however, any assertion of the right belonging to the producers of phonograms or the broadcasting organizations, as the case may be, to prohibit the reproduction of a phonogram or the rebroadcasting of a broadcast, though desired by the author, would imply a limitation of the exercise of the copyright with respect to the work recorded or broadcast.

These consequences of the Franco-Italian proposal were pointed out by the Delegations of Germany and the Netherlands, and when the French and Italian Delegations were asked to comment on them, they conceded that the reason for which they suggested that the safeguard clause be drafted in the way proposed by them was the following: domestic legislation and courts should be enabled to exclude—in certain cases, and in order to guarantee the unhampered exercise of copyright in the performed, recorded or broadcast work—the requirement of authorization by the performer, record producer or broadcaster. The French and Italian Delegations added that such exclusions would apply only in extreme situations. But it had to be taken into

account that a conflict between the interests of the author in the exploitation of his performed, recorded, or broadcast work, and the interests of the performer, record producer or broadcaster in being able to prohibit certain methods of exploitation, may arise every time works under copyright protection are involved. Thus, the Franco-Italian proposal would have applied as a rule, the exception being where the performed, recorded or broadcast work has already fallen in the public domain.

The clarification of the intent and real meaning of the Franco-Italian proposal, as well as the emphatic statement made by the head of the British Delegation, Comptroller-General Gordon Grant, that, should such a proposal be accepted, signature of the Convention by the United Kingdom would be out of the question, resulted in the defeat of the proposal by a large majority of votes.

The Conference retained the protective clause already provided in the preliminary Drafts, whereby copyright as such is safeguarded, but not its exercise with respect to the performance, recording or broadcasting of the work. Following a proposal made by the Swiss Delegation, the protective clause (now contained in Article 1 of the Convention) was accordingly formulated as follows:

Protection granted under this Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Convention may be interpreted as prejudicing such protection.

2. Another wish of the authors' associations, which had already been expressed in the *principes interauteurs*, was that the Convention should only be effective between countries enjoying mutual copyright protection by virtue of a multilateral convention (Revised Berne Convention or Universal Copyright Convention).

Safeguarding the primacy of authors' rights is an idea which readily suggests itself. It is true that since neighboring rights are not derivative but original rights, they are not, logically speaking, dependent on copyright protection. Common sense considerations, however, indicate that authors must first be protected before there can be any question of protecting their "neighbors." If we had only one major multilateral convention, it would be obvious that—just as the protection of neighboring rights is usually incorporated in national copyright legislation—international provisions on neighboring rights would be included, if not in such a convention itself, at any rate in a convention supplementary thereto. In such a case, it would be self-evident that accession to the copyright convention would be a prerequisite for signing the supplementary convention. Provision was accordingly made

in the Monaco Draft and in the Hague Draft for the Convention to be effective only among parties to the Universal Copyright Convention or members of the Berne Union. Authors' associations also demanded that the contracting countries among which a convention on neighboring rights was to have effect must be parties to *the same* multilateral copyright convention. This demand was not satisfied since it was recognized as sufficient for making effective a convention on neighboring rights that the countries parties to such a convention should, by their accession to either of the two major copyright conventions, profess allegiance to the protection of copyright on a world-wide basis.

There was no dearth of proposals in Rome to refrain from a linking with the copyright conventions. In particular, the representatives of Czechoslovakia and other countries of the Eastern Bloc wanted, for obvious reasons, to make accession to the Rome Convention possible for countries which are not parties either to the Universal Copyright Convention or to the Revised Berne Convention. Copyright protection, they argued, could also be safeguarded, in the countries' relations with each other, by means other than accession to one or the other of the above mentioned conventions. The majority of the delegations, however, insisted on maintaining the solution provided at Monaco and The Hague. Questions of administering the future convention also played a role in this decision. It would, for example, be natural if the Intergovernmental Committee provided for in article 32 (which, after the coming into force of the Convention, is to study questions concerning its application and operation and also to prepare possible revisions) would hold joint meetings with the Permanent Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention, which have for many years been engaged in fruitful co-operation.

Finally, then, it was agreed to link the Convention with the two major copyright conventions, as envisaged at Monaco and The Hague. Following the proposal made by a number of governments on the Hague Draft, however, more was done than merely to confine the effectiveness of the Convention to those countries which are parties to one of the two copyright conventions. Being party to the Universal Copyright Convention or being member of the Berne Union was made a prerequisite of signing, and acceding to, the Neighboring Rights Convention. If this prerequisite is fulfilled, the right to sign the Convention is open to any country which had been invited to attend the Diplomatic Conference, and the right to accede to the Convention is open to any country which had either been invited to attend the Conference or which is a member of the United Nations. A country which, at the time of signature or accession, was either a party to the Universal Copyright Convention or a member of the Berne Union, but no longer fulfills this condition at a later date, ceases from that time to be a contracting country of the Convention on

Neighboring Rights; see Articles 23, 24(2) and 28(4) of the Rome Convention.

B. National Treatment and Minimum Protection

Like the Berne Convention and the Universal Copyright Convention, the Convention on Neighboring Rights is based upon the principle of national treatment and the granting of minimum rights.

1. The notion of "national treatment" is defined in detail in article 2(1) of the Rome Convention: national treatment means the protection granted by the domestic law of a contracting country to performers who are its nationals with respect to performances taking place, first fixed in, or broadcast from, its territory; to producers of phonograms who are its nationals with respect to phonograms first fixed or published on its territory; and to broadcasting organizations which have their headquarters on its territory with respect to broadcasts transmitted from transmitters situated on its territory.

The text, which originates in a proposal made by the U.S. Delegation, takes into account the fact that contracting countries may, in their national legislation, provide different criteria as to the cases in which they grant protection. They may provide as a requisite of national protection that performers or producers of phonograms must be their nationals or, in the case of broadcasting organizations, that they must have their headquarters on their national territory. They may, however, also make protection of performers dependent on the prerequisite that the performances shall take place, or be first fixed in, or broadcast from, their territory, and provide, with reference to producers of phonograms, that the first fixation of the sound or first publication of phonograms shall take place in their territory, and, with reference to broadcasting organizations, that the broadcasts shall be transmitted from their territory. The wording of article 2(1) of the Rome Convention makes it clear that national treatment shall mean the domestic protection granted by the contracting countries regardless of which of the above mentioned criteria they apply, singly or in conjunction with each other, to determine whether the case is domestic.

2. The principle of national treatment is supplemented by the provisions concerning minimum protection contained in articles 7, 10, 12, 13 and 14. Article 2(2) makes specific reference to this supplementation and to the fact that exceptions from national treatment are made in some individual provisions. As stated in the General Report, such reference to the rules contained in subsequent articles was not absolutely necessary; it was incorporated, however, to facilitate understanding of the Convention and to make it clear at the outset that the protection afforded by the Convention may in certain cases be greater or less than domestic protection.

3. With regard to both national treatment and minimum rights, the question arises as to how the provisions of the Convention are to be transformed into national law. Does the effectiveness of the provisions of the Convention depend on their enactment in the form of domestic statutes resulting in express incorporation by domestic law? Or are the provisions of the Convention directly applicable within the countries ratifying the Convention or acceding to it?

On this question, as was demonstrated by the discussions at The Hague and in Rome, there were some misunderstandings. To avoid them, it is necessary to keep sight of the fact that the manner in which this transformation is effected is not determined by the Convention but by the domestic legal system of each country. The principles underlying these legal systems differ:¹ in Great Britain and the Scandinavian countries, no automatic transformation takes place; in these countries, internal effect invariably requires incorporation of the relevant provisions into national legislation. The situation is different under U.S. law where it is recognized that, as far as their nature and contents allow, provisions of international conventions ratified are self-executory and that consequently no transformation into domestic law is necessary. Similarly, in the majority of Continental countries and, in particular, in Austria, France, Germany, Italy, and Switzerland, the possibility of direct application of provisions of international conventions is recognized. In Germany, article 59(2) of the Constitution governs treaties dealing with matters within the jurisdiction of federal legislation providing that treaties require approval by the legislature in the form of a federal statute. Such a statute has a twofold function: it empowers the Federal President to effect ratification and at the same time raises the provisions of the treaty or convention, as far as they qualify for such consideration, to the status of national legislation and invests them with formal statutory force and effect.

The question whether the provisions of the Rome Convention are applicable in a direct manner in contracting countries may therefore only be raised with reference to those countries whose legal systems admit of direct transformation. For this limited number of countries the determining factor in each instance is whether the provisions of the Convention have, as to content and form, been expressed in a way which permits of their direct application as norms of private law. In this context, however, one should not stick to the letter, as is occasionally done. In the Rome Convention the French text of article 10, for example, provides that: "The producers of phonograms *enjoy* the right to authorize or prohibit the direct or indirect reproduction of their phonograms". In the English and Spanish texts, on the other hand, it

1. On this question cf. my paper, published in GRUR Ausl. 1960, p. 57 et seq., concerning comparison of terms under the Universal Copyright Convention.

is said that the producers of phonograms *shall* enjoy this right. According to article 33(1) all three texts are equally authentic. Thus, if the question of direct transformation were dependent upon whether the Convention uses statutory language (as in the French text of articles 10 and 13) or contractual language (as in the English and Spanish text of articles 10 and 13), the problem of interpretation would be insoluble.

Actually, we must not proceed from the literal wording, but rather ask whether the provision has been framed with sufficient clarity to qualify for direct application in those contracting countries where such a transformation is admissible. Irrespective of the difference between the texts—which is of no relevance—this is to be answered in the affirmative both as regards the minimum rights of producers of phonograms (article 10) and the minimum rights of broadcasting organizations (article 13). Similarly, it is to be assumed that the provisions contained in articles 4, 5 and 6, relating to national treatment, are applicable in a direct way in those contracting countries whose legal systems admit of this possibility. The position is different as far as minimum rights of performers are concerned. With reference to these it is stated in article 7 that the protection provided in the Convention must afford the possibility of preventing the broadcast, communication to the public, fixation, etc., of a performance. The more detailed definition of the legal remedies to be made available for this purpose, including in particular whether there should be private law sanctions or criminal law sanctions, is left to the national legislation of the various countries. Here, then, there can be no question of any direct transformation. This is an inconsistency which may be regretted, but which—as will be shown in III. A. 1. below—could not be avoided in view of the differences in the regulations provided by the various internal legal systems.

C. Criteria of Eligibility for Protection under the Convention.

The Rome Conference adhered to the principle of The Hague Draft to the effect that the Convention should only apply to international situations and that the regulation of domestic situations should be reserved for the domestic legislation of the various countries. Although it was proposed in Rome, particularly by the Belgian Delegation, that the Convention should be extended to cover domestic situations, the proposal was not accepted in view of the fundamental misgivings pressed by other delegations and, in particular, by the U. S. Delegation, regarding regulation of domestic situations by international Convention. However, the Convention will doubtless have an indirect effect on domestic situations, as it is unlikely that the protection granted on the domestic level will lag behind that granted in cases involving contact with foreign countries.

It was therefore the task of the Conference to determine those international situations in which protection under the Convention should be available.

In this connection, particular care was exercised in determining the applicable criteria. Following a proposal by the U.S. Delegation, the point of departure selected was not, as at The Hague, the concept of "country of origin," a concept which in The Hague Draft was used in various contexts and resulted in complicated interpretations. Instead, provisions were adopted which directly define the situations in which performers, producers of phonograms and broadcasting organizations are entitled to protection under the Convention.

1. According to the provisions of article 4, performers enjoy protection under the Convention if any of the following conditions are fulfilled:

- a) if the performance takes place in another contracting country;
- b) if the performance is incorporated in a phonogram which is protected under article 5;
- c) if the performance, not being fixed on a phonogram, is carried by a broadcast which is protected under article 6.

The primary criterion of protectibility is, consequently, the place where the performance occurs. The proposal, previously made, that the performer's nationality should instead be adopted as a criterion, was rejected on the grounds that, considering performances by a number of performers of different nationality, nationality does not appear to be an appropriate criterion.

The range of cases falling under the Convention is extended—as already provided for in the Geneva and Hague Drafts—to those cases where the performance is incorporated in a phonogram or, if not being so recorded, is broadcast. In such cases performers are protected even if their performance did not take place in another contracting country, if the prerequisites for protection of the phonograms or of the broadcasts, respectively, have been satisfied.

A further extension of the protection had, in the performers' interest, been proposed in Rome by the German Delegation based on the Federal Government's comments. The proposal was prompted by the consideration that, in their domestic legislation, the contracting countries may use, as criterion, the nationality of the performer. In such a case, there is a loophole in the protection enjoyed by performers. If, say, Switzerland were to grant protection, in its domestic legislation, to performers of Swiss nationality only, then, according to article 4, a German artist performing in Germany, Italy, or France would be protected in Switzerland, always provided the Convention had been ratified by the countries concerned. In the event of a performance in Switzerland, however, he would enjoy legal protection neither on the strength of domestic legislation nor on the strength of the Convention. To fill this loophole, the German Delegation suggested that a provision along the lines of article 5 of the Revised Berne Convention be adopted: performers nationals

of a contracting country should enjoy the same protection with respect to their performances taking place in another contracting country as performers who are nationals of the latter country. Other delegations—the U. S. Delegation in particular—expressed doubts, whether this presents an international situation. These doubts seemed unfounded to us. In view of the resistance with which the proposal was met, however, its further pursuit did not hold out any promise of success.

2. Particular difficulties were presented in Rome by the question of the prerequisites for producers of phonograms to enjoy the protection granted by the Convention. The Hague Draft had stipulated the country of first publication in respect of published phonograms, and the country of first fixation in respect of unpublished phonograms, while additionally requiring that in the latter case, fixation be carried out by a national of a contracting country.

In Rome these provisions of The Hague Draft were objected to on the ground that, in the case of the protection of unpublished phonograms, the cumulation of the criteria of first fixation and nationality would excessively restrict the availability of protection under the Convention. Furthermore, and even more importantly, objections were made to the application of the criterion of the place of first publication in the case of published phonograms.

The question was closely connected with the definition of publication. If the country of first publication were to be considered to be the country where the phonograms are first reproduced and offered to the public, these misgivings would possibly have been put aside. It is true, that an interpretation of the concept of first publication in this sense seemed compatible with the definition contained in the Hague Draft, where it is stated that publication is the multiplication of copies of phonograms and the offering of such copies to the public in reasonable quantity. The view was, however, overwhelmingly held that the definition of publication in the Hague Draft—like the definition in Article VI of the Universal Copyright Convention—referred to the multiplication of phonograms only because it necessarily precedes any offering of copies, and that the emphasis of the provision was on the offering to the public. It was in this sense, and in conformity with the interpretation of the concept of publication in international copyright, that the concept of publication was defined in the final version of the Convention. "Publication"—it is stated in article 3 of the Rome Convention—"means the offering of copies of a phonogram to the public in reasonable quantity." At the same time it was provided in article 5(2) of the Rome Convention, in accordance with the definition of simultaneous publication in the Revised Berne Convention, that publication in a contracting country is to be regarded as first publication therein even when it takes place up to 30 days after the actual first publication in a non contracting country.

In view of this definition of first publication, the proposal that published phonograms should enjoy the protection granted by the Convention in a contracting country if first publication has taken place in another contracting country met with the objection that producers of phonograms interested in protection would have an easy way of meeting the condition of first publication since all they would have to do is to offer for sale in a contracting country a part of the phonograms produced by them. If, for instance, the United States kept aloof from the Convention, American producers would be able to secure protection under the Convention by simultaneous first publication in a contracting country, e.g., Canada or Great Britain.

For this reason, several delegations proposed that in the case of published phonograms, too, the criterion should not be first publication, but first fixation. However, the objection was raised that the place of fixation is frequently a matter of chance. An American, British, or German record manufacturer may, for example, engage the Vienna Philharmonic Orchestra to record a work by Mozart. The recording will in such a case take place wherever the orchestra happens to be at the relevant time, which may be in Vienna or Munich, in Paris or London, in Prague or Budapest. It would, however, be manifestly unwarranted for the protection of phonograms to founder on the fact that the place selected for recording for reasons of convenience is not in a contracting country.

A way out of this critical situation was found by means of a proposal of the German Delegation. We pointed out that it was the aim of the contracting countries to protect the record industry of their own countries. This aim, we maintained, was best served by linking the protection of phonograms first and foremost to the producers' nationality. The criteria of first fixation and first publication could still be retained with the proviso that contracting countries may exclude, by means of an appropriate reservation, one or the other.

The acceptance of this proposal led to the provision contained in article 5(1) and (3) of the Rome Convention: Producers of phonograms enjoy in each contracting country the protection granted by the Convention if any of the following conditions are met:

- a) if the producer of the phonograms is a national of another Contracting State (criterion of nationality¹);

1. If the producer is, as in most cases, a legal person, the decisive factor according to the well known principles of private international law in the Continental legal systems is the country of the headquarters and in the Anglo-American legal systems the country under whose law the legal person was incorporated. Cf. Martin Wolff, *Internationales Privatrecht*, 3rd ed. p. 115.

- b*) if the first fixation of sound was made in another Contracting State (criterion of fixation);
- c*) if the phonogram was first published in another Contracting State (criterion of publication).

With regard to criteria *b* and *c*, contracting countries may choose between two alternatives: they may, by virtue of a declaration which is to be deposited with the Secretary-General of the United Nations, exclude either the criterion of publication or the criterion of fixation. If they exclude the criterion of fixation, they must protect unpublished phonograms only if the producer is a national of another contracting country, but must, on the other hand, protect published phonograms even if first publication took place in another contracting country. If they exclude the criterion of first publication, they must protect both unpublished and published phonograms if the producer is a national of, or if first fixation took place in another contracting country. It must be admitted that this provision failed to satisfy the Scandinavian countries, Denmark and Sweden, which recently passed new copyright laws in which detailed provisions on neighboring rights were included. In this connection, Denmark adopted the criterion of first fixation with regard to the protection of producers of phonograms from secondary uses, while Sweden adopted this criterion with regard also to protection from reproduction. The Swedish Delegation, in particular, emphasized that modification of laws which had only just been promulgated would meet with considerable difficulties. Following a British proposal, it was therefore provided in article 17 of the Rome Convention that any contracting country which, on October 26, 1961 (the date upon which the Convention was signed), granted protection to phonograms only if the criterion of fixation was satisfied, could, by a notification deposited with the Secretary-General of the United Nations, declare that it adhered to this criterion as the only one. This exception seemed acceptable because the number of countries which apply exclusively the criterion of fixation, can be ascertained without difficulty. Contracting countries which do not as yet have any legislation concerning the protection of producers of phonograms or whose existing legislation does not provide the criterion of fixation as the only criterion, remain subject to the general rule.

3. With regard to broadcasting organizations, the provisions in The Hague Draft were accepted; according to article 6 of the Rome Convention, broadcasting organizations enjoy in each contracting country the protection granted by the Convention if either of the following conditions is fulfilled:

- a*) if the headquarters of the broadcasting organization is situated in another Contracting State;

- b) if the broadcast was transmitted from a transmitter situated in another Contracting State.

It is, however, possible for Contracting States, by a declaration which is to be deposited with the Secretary-General of the United Nations, to require the fulfilment of both these conditions and grant protection only if the broadcasting organization has its headquarters in another Contracting State and the broadcast is transmitted from a transmitter situated in the territory of *that* Contracting State. By allowing this reservation, the provisions enacted in Great Britain by the Copyright Act of 1956 were taken into account.

D. Definitions

The Rome Convention contains in article 3 a number of definitions. The anticipation and enumeration of definitions corresponds to Anglo-American legal style; in Continental Europe we prefer to begin with the substantive provisions and explain the concepts, as far as necessary, within the framework of the relevant legal provisions. We concede, however, that in a convention in which new ground is covered and concepts are used which have not yet been defined in legal language, such anticipation of definitions may facilitate interpretation.

Of the concepts defined in article 3 we have already discussed that of publication, in C. 2., above. The concept of reproduction which is defined in article 3 as meaning the making of one or more copies of a fixation, conforms to the relevant concept in copyright and needs no special explanation. The following definitions remain:

1. "Performers" within the meaning of the Convention are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works (article 3(a)). As pointed out in the General Report, the concept of literary and artistic works is to be construed in this context in the same way in which it is used in the Revised Berne Convention and in the Universal Copyright Convention; it thus includes, in particular, dramatic, musical, and dramatico-musical works. There was also agreement that the conductor of an orchestra or chorus comes within the concept of performers.

The consequence of this conceptual definition is that artists who do not perform works are not performers within the meaning of the Convention. This applies, in particular, to artistes within the sphere of the variety stage and the circus, to variety artistes and acrobats, equestrian performers, lion-tamers, etc. There was no lack of proposals to the effect that the protection of the Convention should also be granted to these artists. The majority of

delegations, however, were of the opinion that if the criterion of performance of literary and artistic works were waived, the concept of what was a performer would lose its clear outlines. True, it cannot be disputed that variety and circus artistes also need protection from the danger of their performances being broadcast by radio or fixed on films without their consent. Similar protection is, however, also needed in the case of athletes who take part in sporting events, competitors in horse-shows, boxers, etc. Inclusion of this category in the Convention would, however, lead to an excessive broadening of the concept of performers, which would justify misgivings. Accordingly, the Conference, following The Hague Draft, accepted the provision set forth in article 9, which is to the effect that it is left to the discretion of domestic legislation of the various countries to grant the protection of the Convention also to artistes who do not perform works of literature or art. This is a reference, addressed to the legislators of the contracting countries, to the legitimate need for protection of those artistes who are not performers within the meaning of the Convention. As far as German law is concerned, the recognition of a general personal right, secured by the decisions of the Federal Supreme Court, is likely to provide an adequate basis for granting the necessary protection.

2. "Phonograms" within the meaning of the Convention are exclusively aural fixations of sounds of performance or of other sounds (article 3(b)). This conceptual definition provides twofold clarification: The protection of phonograms is not confined as in the case of performers to cases where literary and artistic works are performed, but it also includes fixation of other sounds, for example, birds' songs and other sounds of nature. On the other hand, the concept of phonograms does not include fixations of sounds which are combined with fixations of pictures. In particular, sound-tracks of films are not, unlike in the Ministerial Draft of a new German Copyright Law, to be considered phonograms within the meaning of the Convention.

3. "Producers of phonograms" within the meaning of the Convention are the persons who or the legal entities which first fix the sound of a performance or other sounds (article 3(c)). By this definition it is made clear that the decisive process is the recording of the sounds, and not the subsequent production of the matrix or of the final product (i.e., the records intended for sale). The right to protection vests in the person who makes the recording. Not only firms in the phonograph industry qualify for consideration in this connection, but also broadcasting organizations which make sound recordings for broadcasting purposes, as well as private persons who make fixations on magnetic tape recorders or other equipment. Manufacturers using fixations made by another party in the manufacture of records must obtain by contract the rights of the person who, or the legal entity which, made the first fixation.

Since the treaty refers not only to persons, but also to legal entities when it speaks about the makers of sound recordings, it is clear that if the recording is made in the course of the activities of an enterprise, the right to protection vests not in the person who services the recording devices but in the owner of the enterprise, which may also be a legal entity. It was pointed out by the Austrian Delegation that there was a loophole in the definition, in that the enterprise may also be owned by a private partnership (*offene Handelsgesellschaft*) or by a limited partnership (*Kommanditgesellschaft*), which, according to the view prevailing in the area where German law obtains, is not a legal entity, but a "joint venture" (*Gemeinschaft zur gesamten Hand*). We did not share the concern felt by the Austrian Delegation that this might give rise to difficulties, because we believed that the interpretation of a concept that is used in an international Convention is not tied down to the connotation it has in the various national legal systems and that it is in keeping with the nature of things that private partnerships under commercial law—which, even at the national level, have to a considerable extent, been approximated to legal entities—should, within the meaning of the Convention, be considered as legal entities. We agreed, nevertheless, to this interpretation being specifically clarified in the General Report.

4. "Broadcasting" within the meaning of the Convention is the transmission by wireless means for public reception of sounds or of images and sounds (article 3(f)). This makes it clear that the provisions of the Convention, unlike those of the Ministerial Draft of a new German Copyright Law, do not relate to wire transmissions.

"Rebroadcasting" according to the Convention, means the simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization (article 3(g)). In the event of re-transmission at a different time, there is, accordingly, no rebroadcast. Any delay necessarily entails fixation. Consequently, in such a case, the provisions of the Convention relating to fixation of a broadcast, and not those concerning rebroadcasting, are to be applied.

[Conclusion will follow in the next issue.]

PART II.

**LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS**

I. UNITED STATES OF AMERICA AND TERRITORIES

181. U. S. CONGRESS. HOUSE.

H.R. 323. A bill to encourage the creation of original ornamental designs of useful articles by protecting the authors of such designs for a limited time against unauthorized copying. Introduced by Mr. Flynt on January 9, 1963, and referred to the Committee on the Judiciary. 27 p. (88th Cong., 1st sess.)

A reintroduction of H.R. 6776 (87th Cong., 1st sess.) with changes which, for the most part, consist of refinements in language. See 8 BULL. CR. SOC. 302, Item 275 (1961).

182. U. S. CONGRESS. HOUSE.

H.R. 336. A bill to establish a National Spelling Commission to reform the spelling of English words, to publish the United States Official Dictionary, and for other purposes. Introduced by Mr. Hagen, on January 9, 1963, and referred to the Committee on Education and Labor. 4 p. (88th Cong., 1st sess.)

Like its predecessor H.R. 2468 (87th Cong., 1st sess.) this bill would establish a National Spelling Commission which, *inter alia*, would investigate the desirability of obtaining a copyright for the United States Official Dictionary to be prepared and edited by the Commission.

183. U. S. CONGRESS. HOUSE.

H.R. 769. A bill to encourage the creation of original ornamental designs of useful articles by protecting the authors of such designs for a limited time against unauthorized copying. Introduced by Mr. Ford, Jan. 9, 1963, and referred to the Committee on the Judiciary. 27 p. (88th Cong., 1st sess.)

Identical with H.R. 323 (88th Cong., 1st sess.) See Item 181, *supra*.

184. U. S. CONGRESS. HOUSE.

H.R. 1045. A bill to provide for the payment of royalties by juke-box operators to the owners of performance rights in copyrighted music and for the fair and orderly determination of the amount and distribution of such royalties, and for other purposes. Introduced by Mr. Celler, Jan. 9, 1963, and referred to the Committee on the Judiciary. 7 p. (88th Cong., 1st sess.)

Identical with H.R. 12450 (87th Cong., 2d sess.). See 9 BULL. CR. SOC. 482, Item 357 (1962).

185. U. S. CONGRESS. HOUSE.

H.R. 1046. A bill to require juke box operators to pay royalty fees for the use of the musical property of composers, authors, and copyright owners. Introduced by Mr. Celler, Jan. 9, 1963, and referred to the Committee on the Judiciary. 2 p. (88th Cong., 1st sess.)

Identical with H.R. 70 (87th Cong., 1st sess.) See 9 BULL. CR. SOC. 183, Item 135 (1961).

186. U. S. CONGRESS. HOUSE.

H.R. 2519. A bill relating to the tax treatment of transfers of rights to copyrights and literary, musical, and artistic compositions. Introduced by Mr. Lindsay, January 24, 1963, and referred to the Committee on Ways and Means. 5 p. (88th Cong., 1st sess.)

Substantially similar to H.R. 9524, H.R. 10170 and S. 3383 introduced during the 87th Congress, with the addition of two limitations: (1) that the work in question must be substantially completed; and (2) that the treatment of the transfer as a sale or exchange of a capital asset is restricted to one copyright or composition a year.

187. U. S. CONGRESS. HOUSE.

H.R. 2520. A bill to amend the Internal Revenue Code of 1954 to provide for the averaging of income derived from literary, musical, and artistic compositions and copyrights by the individuals whose efforts created such property. Introduced by Mr. Lindsay, January 24, 1963, and referred to the Committee on Ways and Means. 2 p. (88th Cong., 1st sess.)

This bill would amend section 1302 of the Internal Revenue Code so as to limit the tax for a taxable year attributable to amounts in respect of a particular artistic work included by an individual in gross income

to a sum no greater than the aggregate of the taxes attributable to such amounts had they been received ratably over the period during which the work on such artistic work took place. Includes a definition of the term "artistic work."

188. U. S. CONGRESS. HOUSE.

H.R. 3668. A bill to provide for the establishment of the National Academy of Foreign Affairs, and for other purposes. Introduced by Mr. Hays (by request) February 11, 1963, and referred to the Committee on Foreign Affairs. 13 p. (88th Cong., 1st sess.)

Section 7 of this bill provides as follows:

"Members of the Board from private life, Chancellor, members of the faculty, and persons in attendance at, or serving with, the Academy shall be encouraged to write and speak on subjects within their special competence, and such writings and speeches other than those required in the performance of their official duties shall not be considered publications of the United States Government within the meaning of the Act of March 4, 1909, as amended (17 U.S.C. 8), or the Act of January 12, 1895, as amended (44 U.S.C. 58)."

189. U. S. CONGRESS. HOUSE.

H.R. 3937. A bill to provide for the establishment of the National Academy of Foreign Affairs, and for other purposes. Introduced by Mr. Fascell, February 21, 1963, and referred to the Committee on Foreign Affairs. 13 p. (88th Cong., 1st sess.)

Identical with H.R. 3668. See Item 188, *supra*.

190. U. S. CONGRESS. HOUSE.

H.Res. 39. Resolution [to authorize an investigation into practices of Government copyrights, and for other purposes]. Submitted by Mr. Cramer, January 9, 1963, and referred to the Committee on Rules. 2 p. (88th Cong., 1st sess.)

Identical with H.Res. 794 and 829, submitted by Messrs. Mathias and Cramer respectively, during the previous session. See 10 BULL. CR. SOC. 42, Items 9 and 10 (1962).

191. U. S. CONGRESS. SENATE.

S. 405. A bill to amend the copyright laws with respect to certain rights of copyright holders in musical compositions. Introduced by Mr.

Ellender, January 22 (legislative day, January 15), 1963, and referred to the Committee on the Judiciary. 2 p. (88th Cong., 1st sess.)

This bill would amend 17 U.S.C. 101 by adding a new subsection (f). This subsection would provide that the playing for broadcast by radio or television of phonograph records or transcription discs produced subsequent to the enactment of the subsection would not be a copyright infringement unless the record or disc bore the name of the copyright proprietor or unless the person responsible for the playing had reason to believe that such playing would be an infringement.

192. U. S. CONGRESS. SENATE.

S. 497. A bill relating to the tax treatment of transfers of rights to copyrights and literary, musical, and artistic compositions. Introduced by Mr. Javits, and referred to the Committee on Finance. 5 p. (88th Cong., 1st sess.)

A companion bill to H.R. 2519. See Item 186, *supra*.

193. U. S. CONGRESS. SENATE.

S. 498. A bill to amend the Internal Revenue Code of 1954 to provide for the averaging of income derived from literary, musical, and artistic compositions and copyrights by the individuals whose efforts created such property. Introduced by Mr. Javits, January 24 (legislative day, January 15), 1963, and referred to the Committee on Finance. 2 p. (88th Cong., 1st sess.)

A companion bill to H.R. 2520. See Item 187, *supra*.

194. U. S. CONGRESS. SENATE.

S. 776. A bill to encourage the creation of original ornamental designs of useful articles by protecting the authors of such designs for a limited time against unauthorized copying. Introduced by Mr. Hart (for himself and Mr. Talmadge), February 11, 1963, and referred to the Committee on the Judiciary. 26 p. (88th Cong., 1st sess.)

A companion bill to H.R. 323 and H.R. 769. See Items 181 and 183, *supra*.

195. U. S. COPYRIGHT OFFICE.

Cessions et documents y relatifs. *Interauteurs*, no. 149 (4th quarter 1962), p. 449-450. "Circulaire 10."

A French translation of Copyright Office Circular no. 10, Assignments and related documents.

196. U. S. COPYRIGHT OFFICE.

Enregistrement de demandes de copyright pour les oeuvres picturales, graphiques et de sculpture. *Interauteurs*, no. 149 (4th quarter 1962), pp. 454-455. "Tableau 70."

A chart accompanying Circular 70, Registration of copyright claims for pictorial, graphic, and sculptural works, in French translation. See Item 199, *infra*; 9 BULL. CR. SOC. 485, Item 367 (1962).

197. U. S. COPYRIGHT OFFICE.

Nouvelles versions et réimpressions. *Interauteurs*, no. 149 (4th quarter 1962), pp. 451-453. "Circulaire 35B."

A French translation of Copyright Office Circular no. 35B, New versions and reprints. See 6 BULL. CR. SOC. 248, Item 253 (1959).

198. U. S. COPYRIGHT OFFICE.

Protezione del copyright negli Stati Uniti secondo la Convenzione Universale sul diritto di autore. *Il Diritto di Autore*, vol. 33, no. 2-3 (Apr.-Sept. 1962), pp. 338-340. "Copyright Office Circulare UCC2."

An Italian translation of the Copyright Office Circular UCC 2, Copyright protection in the United States under the Universal Copyright Convention. See 7 BULL. CR. SOC. 171, Item 232 (1960).

199. U. S. COPYRIGHT OFFICE.

Renseignements en matière de copyright sur les oeuvres picturales, graphiques et de sculpture. *Interauteurs*, no. 149 (4th quarter 1962), pp. 453-454. "Circulaire 70."

A French translation of Copyright Office Circular no. 70, Copyright information about pictorial, graphic, and sculptural works. See 9 BULL. CR. SOC. 484, Item 366 (1962).

200. U. S. COPYRIGHT OFFICE.

"Utilisation loyale et de bonne foi" d'oeuvres protégés par le copyright. *Interauteurs*, no. 149 (4th quarter 1962), pp. 450-451. "Circulaire 20."

A French translation of Copyright Office Circular no. 20, "Fair use" of copyrighted works. See 6 BULL. CR. SOC. 133, Item 116 (1959).

2. FOREIGN NATIONS

201. CANADA. *Secretary of State.*

Copyright Act: Act extended to certain countries. (96 *The Canada Gazette*, pt. II, 868, no. 16, Aug. 22, 1962.)

"Statutory orders and regulations 1962, SOR/62-313."

An extension, effective from August 10, 1962, of the protection of the Canadian Copyright Act, pursuant to subsection 2 of section 4 of the Act, to Andorra, Argentina, Cambodia, Chile, Costa Rica, Cuba, Ecuador, Haiti, Laos, Liberia, Mexico, Nicaragua, Nigeria, and Paraguay. The Statutory Order obviously was issued in implementation of Canada's adherence to the Universal Copyright Convention.

202. CANADA. *Secretary of State.*

Copyright Act: Act extended to Republic of Panama. (96 *The Canada Gazette*, pt. II, 1171, no. 21, Nov. 14, 1962.)

"Statutory orders and regulations 1962, SOR/62-423."

An extension, effective from October 17, 1962, of the protection of the Canadian Copyright Act, pursuant to subsection 2 of section 4 of the Act, to Panama.

The Statutory Order obviously was issued in implementation of Canada's adherence to the Universal Copyright Convention.

203. DENMARK. *Laws, statutes, etc.*

Legge n. 158 del 31 maggio 1961, relative al diritto di autore sulle opere letterarie ed artistiche. (33 *Il Diritto di Autore* 357-374, no. 2-3, Apr.-Sept. 1962.)

Italian translation of the Danish law on copyright in literary and artistic works.

204. MEXICO. CONGRESO. *Cámara de Diputados. Primera Comisión de Educación Pública.*

Dictamen en relación con el proyecto de reformas y adiciones que a la ley federal del derecho de autor propone el ejecutivo de la Unión. [Mexico, 1962] 71 p.

A report of the Commission on Public Education of the Mexican Chamber of Deputies on a recently introduced copyright revision bill.

205. NORWAY. *Laws, statutes, etc.*

Act of December 2, 1955. *Amendment*. (1955 *Le Droit d'Auteur* 118.)

Our Correspondent in Norway, Mr. B. Stuevold Lassen, reports as follows: A temporary prolongation of copyright was decreed here by Act of December 14, 1962, No. 2, which adds a new third paragraph to Section 1 of the prolongation Act of December 2, 1955. The new act states: "With regard to works the term of protection of which would otherwise expire in 1962, 1963, 1964 or 1965, the term of protection of copyright shall nevertheless be extended to December 31, 1966, unless the King decides otherwise."

Mr. Lassen adds that the ordinary term of protection in Norway is 50 years *post mortem auctoris*, plus six extra years for war losses.

206. SWEDEN. *Laws, statutes, etc.*

Legge n. 729 del 30 dicembre 1960, relativa al diritto di autore sulle opere letterarie e artistiche. (33 *Il Diritto di Autore* 375-389, no. 2-3, Apr.-Sept. 1962.)

Italian translation of the Swedish law on copyright in literary and artistic works.

207. SWEDEN. *Laws, statutes, etc.*

Legge n. 730 del 30 dicembre 1960 relativa al diritto sulle immagini fotografiche. (33 *Il Diritto di Autore* 389-393, no. 2-3, Apr.-Sept. 1962.)

Italian translation of the Swedish law on copyright in photographic pictures.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS208. UNIVERSAL COPYRIGHT CONVENTION. *Adherence of Finland.*

The Copyright Office advises that it has learned, as yet unofficially, that on January 16, 1963, Finland deposited with the Director-General of Unesco its instrument of ratification of the Universal Copyright Convention and Protocols 2 and 3 annexed thereto.

Under Article IX, paragraph 2, of the Convention, the latter will come into force in respect of Finland three months after the deposit of its instrument of ratification, i.e., on April 16, 1963.

Finland is the 45th country to adhere to the Convention.

PART IV.

**JUDICIAL DEVELOPMENTS IN LITERARY
AND ARTISTIC PROPERTY**

A. DECISIONS OF U.S. COURTS

1. Federal Court Decisions

209. *Universal Statuary Corporation v. Gaines*, 310 F. 2d 647, 135 U.S.P.Q. 483 (5th Cir., Dec. 5, 1962) (per curiam).

Action for copyright infringement. Plaintiff appeals from limitation of damages, in judgment in its favor, to \$250.00, actual damages not having been proved. The district court had found thirteen copyrights to be infringed.

Held, reversed.

It was held that since it was shown that actual damages could not be proved, plaintiff was entitled to statutory damages of \$250 to \$5,000 with respect to each of the thirteen separate copyrights which were found to have been infringed. The court said:

"The appeal is meritorious. The governing statute is clear.

"The Supreme Court has so held in a multiple-copyright infringement case, *L.A. Westermann Company v. Dispatch Printing Company*, 1919, 249 U.S. 100, 73 S.Ct. 225, and has also held that the discretion of the trial court in assessing such damages as appear just is limited by the statutory minimum of \$250 and maximum of \$5,000. *Westermann*, *supra*; *Jewell-LaSalle Realty Company v. Buck*, 1931, 283 U.S. 202, 73 S.Ct. 226; *Douglas v. Cunningham*, 1935, 294 U.S. 207, 73 S. Ct. 224; and *F.W. Woolworth Company v. Contemporary Arts, Inc.*, 1952, 344 U.S. 228, 73 S. Ct. 222. Recent cases involving the award of damages in multiple-copyright infringement cases, and where the teachings of the supreme Court were followed are *Edwin H. Morris & Company v. Burton*, E.D. La., 1961, 201 F. Supp. 36; *Inter-City Press, Inc. v. Siegfried*, W.D. Mo., 1958, 172 F. Supp. 37; and *Local Trademarks, Inc. v. Grantham*, D.C. Neb., 1957, 166 F. Supp. 494.

"While we would ordinarily remand with the direction that the District Court fix damages within the statutory limits, it will not be necessary here because counsel for Appellant has agreed that the Appellant will accept the statutory minimum of \$250.00 for each of the thirteen copyrights infringed."

210. *Wibstol v. Crow*, 135 U.S.P.Q. 385 (8th Cir., Nov. 27, 1962) (Sanborn, J.) *For decision below see* 132 U.S.P.Q. 392 (S.D. Iowa 1961), *reported at* 9 BULL. CR. SOC. 331, Item No. 210.

Appeal from judgment dismissing complaint in action for copyright infringement. Defendant Crow, a choral instructor, made a new arrangement of plaintiff's copyrighted hymn, "My God and I." He made a number of copies of his arrangement on a high school duplicating machine, and caused his high school and church choirs to perform it. The District Court held that defendant's activity with respect to the hymn constituted a fair use and was not a copyright infringement.

Held, reversed.

I. It was held that Crow had infringed plaintiffs' copyrights by making copies of the songs and by making the arrangement. The court said:

"Obviously the plaintiffs had the exclusive right to copy their copyrighted song, and obviously Nelson E. Crow had no right whatever to copy it. The fact that his copying was done without the intent to infringe would be of no help to him, as the trial court recognized, if the copying constituted an infringement.

"The trial court, however, was of the opinion that innocent intent had a bearing on the question of fair use, and ruled that Crow did nothing more than make a fair, noninfringing use of the copyrighted song in suit.

"Whatever may be the breadth of the doctrine of 'fair use,' it is not conceivable to us that the copying of all, or substantially all of a copyrighted song can be held to be a 'fair use' merely because the infringer had no intent to infringe." *Bradbury v. Columbia Broadcasting System, Inc.*, 287 F. 2d 478, 128 U.S.P.Q. 376 (9th Cir.)

"It must be kept in mind that the applicable law is purely statutory and that the Copyright Act has little elasticity or flexibility."

II. The court held that both the copyright in plaintiff's original version of his hymn and the copyright in a later revised version had been infringed. The court said:

"Crow's new arrangement of the song included the music and lyrics of the 1935 version as copyrighted. The arrangement also included the plaintiffs' 1944 copyrighted version, which contained changes in the music and an addition to the lyrics of the 1935 version. Under the Copyright Act, 17 U.S.C. §7, each version of the song is covered by a separate valid copyright.

"From a practical standpoint, it would seem that Crow, who copied only one song, should be held liable for only one infringement. We have, however, reluctantly concluded that, under the language of the Copyright Act, his copying must be held to have infringed both of the copyrights of the plaintiffs."

III. It was held that The Clarinda School District could not be held liable for Crow's copyright infringement. The court said:

"Whether the School District can be subjected to liability for the copyright infringement by Crow is a debatable question. A suit against the State of Iowa, for the infringement of a copyright, clearly could not be maintained because of the Eleventh Amendment to the Constitution of the United States . . .

"In *Ex parte In re State of New York*, 256 U.S. 490, 497-500, it was held that a state could not be sued without its consent, even in Admiralty. The court said (page 500):

'As to what is to be deemed a suit against a State, the early suggestion that the inhibition might be confined to those in which the State was a party to the record . . . has long since been abandoned . . .'

"The Clarinda School District is an instrumentality of the State of Iowa, constituting a part of its educational system and engaged in performing a state governmental function under state law and at state expense. The plaintiffs are seeking to obtain a judgment against the School District for damages payable out of public funds. That, we think, they cannot do."

IV. The First Methodist Church of Clarinda argued that it was not liable for its use of Crow's arrangement of plaintiff's song because Crow was an independent contractor. The court held, however, that selecting and arranging the song in question was in the course and scope of his employment by the church.

211. *Simon & Schuster, Inc. v. Cove Vitamin & Pharmaceutical, Inc.*, 136 U.S.P.Q. 32 (S.D.N.Y., Nov. 26, 1962) (Tyler, J.)

In action for copyright infringement, motion to stay proceedings pending outcome of breach of contract action brought in state court. Defendants used, in advertising their "CDC" pills, the title, cover and excerpts from Dr. Herman Taller's book, "Calories Don't Count." They allege that this use is authorized by virtue of a contract with the copyright owner, plaintiff Simon & Schuster. This contract is the subject of an action brought by defendant Cove in the Supreme Court of the State of New York. Simon & Schuster claims that no such contract exists and that defendants' use of "Calories Don't Count," being unauthorized, is a copyright infringement.

Held, motion denied.

It was held that a stay was not justified because a decision in the prior-filed state action would not necessarily be dispositive of the controlling issues in the federal action. Defendants argued that if the alleged contract authorizing their use of Taller's book were established in the state court breach of contract action, this would be a complete answer to the charge of copyright infringement upon which the federal suit is grounded. The court, however, found that the issues were not "quite as uncomplicated" as defendants contended.

I. The court reasoned that the state court action might well be decided without disposing of the question of infringement in any one of several ways, for example, by finding that the contract, if it existed, had not been breached. In addition, the court questioned whether Herman and Sylvia Taller, parties in the federal action but not in the state court action, would be sufficiently bound by a decision in the state action.

II. The court also raised a question as to the effect that a state court decision on a copyright question would have, by way of estoppel, in future federal proceedings. The court said:

"Another factor is that . . . federal jurisdiction of the claim here, being one for copyright infringement, is an exclusive jurisdiction (28 U.S.C. 1338(a)). Parenthetically, this suggests the question as to just what effect, in the nature of estoppel, the state court action would have upon subsequent federal court proceedings. See *Lyons v. Westinghouse Electric Corp.*, 222 F. 2d 184, 188-90 (2d Cir. 1955). Indeed, keeping in mind the policy consideration

that a multiplicity of suits is to be avoided, there might be an argument for preferring the federal action here upon the theory that this is the only forum in which all of the rights of all parties can be fully litigated."

212. *Mailer v. RKO Teleradio Pictures, Inc.*, 213 F.Supp. 294, 136 U.S.P.Q. 300 (S.D.N.Y., Jan. 11, 1963) (Dawson, J.)

Action to recover rights in literary property. Defendant RKO produced and co-defendant Warner Bros. Pictures, Inc. distributed a motion picture made from "The Naked and the Dead," a novel by plaintiff Norman Mailer. The contract between Mailer and the producer provided that "if the production of a feature length photoplay is not completed pursuant hereto within three (3) years and six (6) months from the date hereof, all rights transferred and assigned hereunder shall automatically revert to the Owner" Plaintiff claimed that the photoplay had not been completed by the cut-off date.

Held, judgment for defendants.

The court held that for the purposes of such a reversionary clause, a motion picture is "completed" when principal photography and principal editing are done, and the film is in such condition that it may be shown to the public. The court stated that minor changes made in the movie in this case after the cut-off date were merely improvements on an already completed product. The court said:

"Boiled down to its essentials, the plaintiff is contending that certain changes and alterations were made in the picture after the cut-off date, rather than that a completed motion picture was not produced by that date Specially written music was added to the final score; certain deletions were made, which the defendants thought would improve the public acceptability of the picture. . . . A picture may be completed by a certain date and improved thereafter Because certain changes were made after April 14, 1958 plaintiff now wishes the defendant's investment in this picture to be entirely scrapped and to secure for himself the right to renegotiate with somebody else for production of a motion picture. The changes which were made were made for his benefit, as well as for the benefit of the producer of the picture. They do not alter the fact that at the cut-off date there was a completed motion picture in existence."

213. *S. C. Johnson & Son, Inc. v. Drop Dead Co., Inc.*, 135 U.S.P.Q. 292 (S.D. Cal., Nov. 16, 1962) (Yankwich, J.). *See also* 201 F. Supp. 704, 132 U.S.P.Q. 309 (S.D. Calif. 1961), *reported at* 9 BULL. CR. SOC. 333, Item No. 211.

Action for copyright infringement, trademark infringement and unfair competition. Plaintiff and defendant both manufacture household furniture polishes. Defendant was charged with copying plaintiff's copyrighted label and with using a name for its product, "Promise", so similar to plaintiff's "Pledge" as to constitute a trademark infringement.

Held, judgment for plaintiff.

I. The court found that plaintiff's copyright in the label affixed to cans of "Pledge" was valid since it carried a proper copyright notice and had been registered in the Copyright Office. It was also found that defendant's label was clearly copied from plaintiff's, thus constituting a copyright infringement.

II. The "slavish imitation" by defendant of plaintiff's label was held to be unfair competition as well as copyright infringement, inasmuch as it caused actual confusion as to source and resulted in consumer's purchasing defendant's product in the belief that they were purchasing plaintiff's product.

III. The defendant's name "Promise" was held to infringe plaintiff's trademark "Pledge". It was found that the two names were so similar that confusion as to source resulted even after defendant modified its label so that it was no longer a copy of plaintiff's label. The court commented that:

"A label which is not purely descriptive may be made the subject of copyright and trademark. *Callaghan v. Myers*, 1888, 128 U.S. 617, 652; *Higgins v. Keuffel*, 1891, 140 U.S. 428, 435."

214. *Porter v. Marriot Motor Hotels, Inc.* (N.D. Tex., Nov. 23, 1962) (*not yet reported*).

Action for copyright infringement. Plaintiffs Cole Porter and Lerner and Loewe charged that "C'est Magnifique" and "I Could Have Danced All Night" had been performed publicly for profit at "The Sirloin & Saddle Club" in Dallas, which claimed to be a private club. The club was operated by the Marriot Motor Hotel on its premises, and every hotel guest was automatically made a temporary member of the club. Plaintiffs moved for summary judgment.

Held, judgment for plaintiffs.

It was held that for the purpose of determining whether the copyrighted musical compositions were performed publicly for profit, the Sirloin & Saddle Club, of which guests at the Marriot Hotel became members automatically, and to which they could bring non-member guests, was a public place. The court found the club to be a facility of the hotel, "a place of business for public entertainment," operated for the "entertainment, amusement and refreshment of lodgers of such hotel, as well as other members of the general public who may be invited . . . by such lodgers."

2. State Court Decisions

215. *A. J. Sandy, Inc. v. Junior City, Inc.*, 234 N.Y.S. 2d 508, 136 U.S.P.Q. 144 (N.Y. App. Div., 1st Dept., December 4, 1962) (Stevens, J.). *For decision below, see* 36 Misc. 2d 138, 232 N.Y.S. 2d 9 (1962) *reported at* 10 BULL. CR. SOC. 63, Item No. 41 (1962).

Action for copyright infringement, "conversion of copyrightable materials," and unfair competition. Plaintiff created a dress with a detachable extra skirt, which could be removed or replaced by use of a hidden zipper. Plaintiff called the dress the "Zip-Around." The complaint charges the defendant with copying the dress and other materials and with using the name "Zip-Around." Appeal from order denying motion to dismiss complaint.

Held, modified.

I. It was held that the complaint did not state a good cause of action for common law copyright infringement. The court said:

"The first and second causes of action link inseparably dress design, artwork, photographs and literary material under the broad heading 'copyrightable materials.' In the absence of copyright or design patent, dress designs clearly are not protected by so-called common law copyright for design copyrights do not exist at common law. *Chas. D. Briddell, Inc. v. Alglobe Trading Corp.*, 194 F. 2d 416, 92 USPQ 100; *Millinery Creators' Guild, Inc. v. Federal Trade Commission*, 109 F. 2d 175. And there is no protection against what has come to be known as style piracy. Cf. *Varsity Sportswear, Inc. v. Princess Fabrics Co., Inc.*, 174 Misc. 298, 302, 45 USPQ 189, 192.

" The first and second causes make reference to certain literary material, artwork and photographs. While there can be no literary property in ideas as such, '(t)here may be literary property in a particular combination of ideas or in the form in which such ideas are embodied.' Cf. *Fendler v. Morosco*, 253 N.Y. 281, 287. There are no exhibits before us so no judgment can be passed thereon. . . . Nor can we tell from the pleading if the alleged pirating and distribution by defendants occurred before publication by plaintiff. Plaintiff should be afforded an opportunity to replead."

II. The court held that the complaint did not state a good cause of action for "conversion of copyrightable materials" because it did not make clear whether plaintiff was alleging theft of ideas or an actual conversion of physical property. Here too, plaintiff was given leave to replead.

II. The causes of action for unfair competition were held to be sufficiently stated. The court said:

"Here there is an allegation of secondary meaning, confusion in the minds of the purchasing public, and damage, all because of defendants' wrongful acts. It may be noted that the scope of liability in this field is constantly expanding and goes beyond the restricted concept of palming off."

216. *Gordon v. Goren*, 17 A.D. 2d 381, 136 U.S.P.Q. 148 (1st Dept., Dec. 11, 1962) (*per curiam*).

Action for infringement of common law copyright. Plaintiff produced a television pilot film embodying his idea of showing a bridge hand being played, and following this by an analysis of the hand by an outstanding bridge expert. The pilot starred defendant Charles H. Goren, who made the analyses. It was presented to defendant American Broadcasting-Paramount Theatres, Inc., which rejected the idea. This company later televised a program, also starring Goren, based on the same formula. Plaintiff sought an injunction and an accounting as against both defendants. Defendant Goren here appeals from an order denying his motion to dismiss the complaint as to him.

Held, reversed.

The court rejected plaintiff's contention that Goren was liable for the infringement as a contributor thereto. The court said:

"The theory of the complaint is that plaintiff had a literary property in the subject matter of the pilot film akin, if not amounting to, a common law copyright, and that defendant, as a participant in the infringement, is liable for the consequences. While the bald statement has some support in the decided cases, the word 'participated' is a word of art and does not embrace every person who had a connection with the corporate defendant's production. To be liable it must be shown that the defendant not only contributed to the production but to the infringement. Such activities would be appropriating material from the original presentation (*Universal Pictures v. Harold Lloyd Corp.*, 162 F. 2d 354, 73 USPQ 317; *Cain v. Universal Pictures Co.*, 47 F. Supp. 1013, 56 USPQ 8), issuing licenses to reproduce it (*American Tel. & Tel. Co. v. Radio Audion Co.*, 281 F. 200) and like activity (*Gross v. Van Dyke Gravure Co.*, 230 F. 412). Here the defendant's contribution was not to the infringement. The purpose of his selection for both programs was that he would bring his reputation for experience and expertness, and would necessarily supply his own material. But it is not alleged that he had anything to do with formulating the original idea or making possible the pirating of that idea, if it was so pirated. Though apparently a logical choice for performing the role he was retained for, he was not the only person who could have done it, so he was not responsible for the infringement in the sense that it could not have resulted without his participation. Nor is the fact that he was aware of plaintiff's original program of any significance. He neither communicated nor revealed the format to his co-defendant. The plaintiff did that himself.

"If plaintiff's theory is correct, an expert in any field who once accepts employment in a venture can thereafter accept employment in another venture only at the peril of liability for damages if it afterwards is found that the second venture infringes on the first. The mere rendition of the professional service is sufficient to bring about this result, as nothing material in addition to that is alleged. We do not believe that to be the law."

Dissenting opinion of Rabin, J.:

Presiding Justice Rabin dissented on the ground that the complaint was sufficiently broad to permit proof that Goren had contributed to the infringement as well as acting as a performer, and on the further ground that to get complete injunctive relief against further use of

plaintiff's literary property, Goren as well as the corporate defendant should be enjoined. Justice Rabin said:

"I agree with the majority of this Court in its conclusion that the complaint is essentially one seeking redress for the alleged infringement of a common law copyright. However, I disagree with the majority's conclusion that Goren's participation in the production of the infringing program as alleged does not constitute participation in the infringement so as to entitle plaintiff to relief against him.

"I conclude that a liberal construction of the complaint permits proof of and an ultimate finding that Goren was a knowing participant in the infringement itself rather than merely a participant in the performance. . . .

"However, even were Goren not alleged to be a participant in the infringement per se he could still be held liable. . . . (C)onsidering the history of copyright protection and the purpose to be served it could well be argued, as the authorities indicate, that mere performance in an infringing production, constitutes participation in the infringement and suffices to render an actor answerable to the creator of the work. More so when a performer is uniquely qualified to fit the role to which he is assigned in the infringing production.

"The complaint alleges that Goren 'is a world famous bridge playing expert . . . and is currently recognized by the bridge playing public and the entire world as a leading authority on, and analyst of, the game of contract bridge' In the light of such allegations it could well be found that Goren's services were unique. In addition (h)is expertise was essential to the program's development and presentation. . . . That there might be other persons who could meet such unusual qualifications—if in fact there are—does not detract from the critical role Goren played in the program. . . .

"All other considerations aside, this complaint should be held sufficient as against Goren for another reason. It should be noted that the complaint seeks injunctive relief as well as money damages. If it should be found that the program constitutes an infringement surely equity may intervene and restrain its continuance. In order to afford the plaintiff effective relief—should he be entitled to enjoin the production—all performers as well as the pro-

ducers may be enjoined whether or not they may be held liable for damages."

Also of Interest:

217. *Warner Bros. Pictures, Inc. v. Wally Frank, Ltd.*, 135 U.S.P.Q. 409 (P.O. Trademark Trials & App. Bd., Oct. 12, 1962) (Waldstreicher, member.)

Opposition to registration of the trademark "Maverick" for cigars.

Held, dismissed.

The Board held that although the opposer's television character, "Maverick," smokes cigars, he is not so identified with that product that the name "Maverick" for cigars necessarily implies to the public that the owners of the television show are sponsoring the cigars.

PART V.

BIBLIOGRAPHY

A. BOOKS AND TREATISES

1. United States Publications

218. Book publishing in the U.S.S.R.; report of the delegation of U.S. book publishers visiting the U.S.S.R., August 20-September 17, 1962. New York, American Book Publishers Council [and] American Textbook Publishers Institute [1963] 112 p.

A report prepared by a group of American book publishers which visited the Soviet Union under the official U.S.A.-U.S.S.R. Exchanges Agreement of March 8, 1962, and was composed of members named by the American Book Publishers Council and the American Textbook Publishers Institute in New York. Chapter XV of the report deals with royalties paid in the Soviet book publishing industry, and Chapter XVI is concerned with international copyright problems involved between the Soviet Union and the United States.

219. McCANNON, MARJORIE. The manufacturing clause of the U. S. copyright law, by Marjorie McCannon with the assistance of Benjamin W. Rudd. Washington, Copyright Office, Feb. 1963. 100, 24 p. (General revision of the copyright law.) Multilithed, limited edition.

An additional study in the series of the general revision studies issued by the Copyright Office.

220. PILPEL, HARRIET F. A copyright guide, by Harriet F. Pilpel and Morton David Goldberg. [2d ed.] New York, R. R. Bowker Co. in co-operation with the Copyright Society of the U.S.A., 1963. 40 p.

A revised edition of the manual, in the form of questions and answers, on U. S. and international copyright. See 7 BULL. CR. SOC. 248, Item 329 (1960).

2. Foreign Publications

221. BAPPERT, WALTER. *Wege zum Urheberrecht; die geschichtliche Entwicklung des Urheberrechtsgedankens*. Frankfurt am Main, V. Klostermann, 1962. 326 p.

The development of copyright philosophy from the earliest beginnings to modern times, with special emphasis on the history of copyright in Germany. Particular attention is devoted to various theories of copyright expounded by German jurists.

222. HUBMANN, HEINRICH. *Gewerblicher Rechtsschutz (Patent-, Gebrauchsmuster-, Geschmacksmuster-, Warenzeichen- und Wettbewerbsrecht); ein Studienbuch*. München, C. H. Beck, 1962. 290 p. (Juristische Kurz-Lehrbücher)

A textbook, based on recent West German case law and pertinent literature, which deals with theoretical and practical aspects of industrial property, comprising a systematic study of the law of patents, utility models, design patents, trademarks and unfair competition. The law of copyright is not discussed since the author, unlike Elster, Riezler, Troller and others, regards it as an entirely different field of intellectual creation.

223. INSTITUTE OF ECONOMIC AFFAIRS, *London*. *Libraries: free for all? Some issues in political economy*, by Ralph Harris. The rate for the reading; an appeal to Parliament from authors and publishers, prepared by A. P. Herbert. [London] 1962. 60 p. (Hobart paper 19.)

"Sir Alan Herbert argues and documents the case for a new form of intellectual property rights for authors, which he calls the Public Lending Right, requiring a new charge to be paid by public library borrowers. The General Director of the Institute [of Economic Affairs, Ralph Harris] outlines the wider economic principles and points to conclusions for policy on public libraries in the interest of the reader and the consumer at large."

224. PAN AMERICAN UNION. *General Legal Division*. *Proteccion del derecho de autor en America*. 3. ed., rev. y aumentada. Washington, Union Pan-americana, 1962. ix, 180 p.

The Spanish version of the 3d edition of *Copyright Protection in the Americas*. See 10 BULL. CR. SOC. 64, item 43 (1962).

225. United Nations Educational, Scientific and Cultural Organization. *Lois et traités sur le droit d'auteur; recueil établi par l'Organisation des*

Nations Unies por l'Éducation, la Science et la Culture et le Bureaux Internationaux Réunis pour la Protection de la Propriété Industrielle, Littéraire et Artistique. Paris, Librairie Générale de Droit et de Jurisprudence, 1962. 3 v.

The French version of the *Copyright Laws and Treaties of the World* which includes most of the changes found by a UNESCO inquiry undertaken for the year 1960.

226. WEBER, WERNER. Urheberrecht und Verfassung; Vortrag, gehalten auf dem Kongress der Internationalen Gesellschaft für Urheberrecht am 30. April 1960 in Wien. Berlin, F. Vahlen [c1961] 33 p. (Internationale Gesellschaft für Urheberrecht. Schriftenreihe, Bd. 24.)

A reprint of a lecture delivered at the Congress of the International Copyright Society held in Vienna on April 30, 1960, in which the author explores the relationship between the West German copyright law and the Bonn Constitution.

B. LAW REVIEW ARTICLES

1. United States

227. COLBY, RICHARD. Copyright formalities and copyright revision. (2 *Publishing, Entertainment, Advertising and Allied Fields Law Quarterly* 275-289, no. 3, Dec. 1962.)

This paper, based on the author's contribution to a Symposium on Copyright Revision held under the auspices of the American Bar Association and other groups on December 1 and 2, at New York University Law Center, considers "certain of the recommendations on revision of the United States Copyright Act contained in the Report of the Register of Copyrights submitted to the Congress in July of 1961, including the formalities of copyright notice and domestic manufacture and the penalties for late registration of copyright under a proposed new Act."

228. NATHANIELSZ, AULT M. Copyrights: abandonment by publication. (39 *Dicta* 236-248, no. 4, July-Aug. 1962.)

This paper was awarded the first prize in the 1962 Nathan Burkan Memorial Competition at the University of Denver College of Law.

229. NIMMER, MELVILLE B. The nature of the rights protected by copyright. 10 *U.C.L.A. Law Review* 60-124, no. 1, Nov. 1962.)

This article, which is a chapter with certain alterations from a forthcoming treatise, is concerned with an "examination of the rights accorded to an owner of literary property under the Copyright Act."

230. WADE, JOHN W. Defamation and the right of privacy. (15 *Vanderbilt Law Review* 1093-1125, no. 4, Oct. 1962.)

"In this article Dean Wade discusses the scope of the tort of unwarranted invasion of the right of privacy, comparing and contrasting it with the tort of defamation. He observes that the action for invasion of the right of privacy may come to supplant the action for defamation and that this development should be welcomed by the courts and writers. Finally, he concludes that the whole law of privacy may someday become a part of the larger, more comprehensive tort of intentional infliction of mental suffering."

2. Foreign

1. In English

231. PRETNAR, STOJAN. Contemporary problems of the rights of the authors of scientific discoveries. (1 *Industrial Property* 264-271, no. 11, Nov. 1962; 286-297, no. 12, Dec. 1962.)

A section of the study is captioned "The relation of the scientific discovery to patent law and copyright."

232. RONGA, GIULIO. The law on press information. (*E.B.U. Review* 28-31, No. 77 B Jan. 1963.)

The purpose of this study is "to make a contribution to the legal thinking on the protection which might to a certain extent be universally granted to news or other press information."

2. In French

233. FARELL CUBILLAS, ARSENIO. L'évolution historique et juridique du droit d'auteur au Mexique. (*Interauteurs* 373-385, no. 149, 4th quarter 1962.)

An outline of the historical and legal evolution of copyright in Mexico.

234. NAWROCKI, BOLESŁAW. Notion de représentation ou exécution publique et droit d'auteur. (*Interauteurs* 259-278, no. 148, 3d quarter 1962.)

A comparative study on the problem of distinguishing between a public and private performance of an author's work, with the conclusion that, at least for the time being, a precise definition of "public performance" is difficult to formulate, even on a national level.

235. SCHULZE, ERICH. La réforme du droit d'auteur dans la République Fédérale d'Allemagne. (*Interauteurs* 246-258, no. 148, 3d quarter 1962.)

The position of GEMA, West German performing rights society, on the present draft copyright laws, stated by the society's president.

3. In German

236. FROMM, FRIEDRICH KARL. Das Recht des Regisseurs und der Schutz seiner künstlerischen Leistung. (64 *Gewerblicher Rechtsschutz und Urheberrecht* 561-566, no. 11, Nov. 1962.)

A discussion of the legal protection of the artistic work of a producer in West Germany in which the author comes to the conclusion that the producer of stage plays, unlike his colleague, the producer of motion pictures, television or pantomime, is a mere stepchild of the copyright law because, except in certain cases, he can enjoy only a very doubtful protection offered by the law of unfair competition.

237. REIMER, DIETRICH. Schranken der Rechtsübertragung im Urheberrecht. (64 *Gewerblicher Rechtsschutz und Urheberrecht* 619-635, no. 12, Dec. 1962.)

A study of the legal limitations on copyright transfers under the West German copyright law which is concerned with two problems: (1) whether an author's property rights can be transferred *in toto*, and what legal restrictions stand in the way of such transfers; and (2) whether an author's property rights are divisible.

238. STREULI, ADOLF. Weitere Etappen auf dem Gebiete des Schutzes der ausübenden Künstler, der Hersteller von Tonträgern und der Sendeunternehmungen. (*Schweizerische Mitteilungen über Gewerblichen Rechtsschutz- und Urheberrecht* 131-135, no. 2, Nov. 1962.)

A brief comment on the latest developments in Switzerland in the field of neighboring rights, with special reference to the Rome Convention which the Swiss government failed to sign before the expiration of the June 30, 1962 deadline.

4. In Italian

239. BOGSCH, ARPAD. Prolungamento del termine di protezione di copyright in alcuni casi negli Stati Uniti. (33 *Il Diritto di Autore* 276-283, no. 2-3, Apr.-Sept. 1962.)

A note on the recent extension of the duration of copyright protection in the United States, accompanied by the English texts of H.Rep. No. 1742, 87th Cong., 2d Sess. (1962) and S.Rept. No. 1888, 87th Cong., 2d Sess. (1962) on the extension resolution (H.J.Res. 627).

240. PIPERNO, ROBERTO. Appunti sul contratto di edizione nella legislazione italiana, francese e inglese. (33 *Il Diritto di Autore* 285-331, no. 2-3, Apr.-Sept. 1962.)

This article, which is an excerpt from a doctoral dissertation submitted to the Law Faculty of the University of Rome in the academic year 1960-61, is a comparative study of Italian, French and English law relating to publishing contracts.

C. ARTICLES PERTAINING TO COPYRIGHT FROM TRADE MAGAZINES

1. United States

241. BMI, Florence Agreement and book industry cooperation. (182 *Publishers' Weekly* 40, no. 10, Sept. 3, 1962.) Signed: C.B.G.

An editorial on the recently issued policy statement of the Book Manufacturers' Institute.

242. British ruling on renewal rights studied for import. (73 *Billboard Music Week* 6, no. 48, Dec. 1, 1962.)

A brief note on a decision affecting U. S. renewal rights on British songs, recently handed down by Mr. Justice Wilberforce in the British High Court.

243. Copyright: how the procedure operates for books. (183 *Publishers' Weekly* 29-31, no. 8, Feb. 25, 1963.)

An article on a seminar, sponsored by a joint copyright committee of the American Book Publishers Council and the American Textbook Publishers Institute and held in New York City on February 5th. The seminar was devoted primarily to an explanation by officials of the

Copyright Office of how domestic, foreign, and ad interim applications for books should be completed.

244. ERNST, MORRIS L. Attorney-author's program to advance culture. (229 *Variety* 23, No. 7, Jan. 9, 1963.)

Mr. Ernst presents 27 suggestions relating to the advancement of the national culture through books.

245. GOEB, ROGER. Revision of the U. S. copyright law. (23 *National Music Council Bulletin* 7-8, no. 1, Winter 1962.)

"Reprinted . . . from the *A[merican] C[omposers] A[lliance] Bulletin*, vol. X, no. 2."

A critical survey, by a composer, of the Register's report on general revision "in those areas where composers are or will be affected."

246. GORDON, MITCHELL. Bootlegging of prints of hit films plagues the movie industry. (161 *Wall Street Journal*, no. 3, Jan. 4, 1963.)

This article describes some illegal practices in the rentals of 16-mm prints of films originally made in 35-mm versions for theater showing.

247. LIPPA, SIMON. The '6th season'—pirate free. (106 *Women's Wear Daily* 30, no. 15, Jan. 22, 1963.)

An article on a seminar on design piracy held recently at the Fashion Institute of Technology in New York.

248. PILPEL, HARRIET F. Who's In Charge Here—Tax-Raise Wise? (229 *Variety* 36, No. 7, Jan. 9, 1963.)

Quoting an item headed "Deferred Income for Floyd Patterson" from *Variety*, Oct. 8, 1962, Mrs. Pilpel discusses tax problems of "authors and others" on lump sum payments falling within one year.

249. PILPEL, HARRIET F. But can you do that? (183 *Publishers' Weekly* 46, Feb. 4, 1963).

The case of *People v. Smith* in the California Superior Court is discussed under the title, "What community's standards govern obscenity?"; the libel case of *American Broadcasting-Paramount Theatres, Inc. v. Simpson* and "deliberate copying" (the Dan Kasoff case) are also noted.

250. PILPEL, HARRIET F. But can you do that? (183 *Publishers' Weekly* 36, Feb. 25, 1963.)

"Relief for Booksellers from censorship pressures" again reviews the problems involved in local extralegal censorship (*Bunis d.b.a. Clinton Book Shop v. Conway*).

251. ROTHENBERG, STANLEY. Performers' Rights. (229 *Variety* 189, No. 7, Jan. 9, 1963.)

Mr. Rothenberg briefly reviews Wagner-Nichols and other cases with respect to performers' rights and unfair competition.

252. SHERMAN, PAUL. How private is your 'privacy'? (229 *Variety* 29, 37, No. 7, January 9, 1963.)

The decisions in *Shirley Booth v. Holiday*, *Sidis v. New Yorker*, *Hill v. Life*, and *Goelet v. Confidential* are compared.

253. SUCHECKI, STANLEY M. Piracy by design; introducing the "knockoff artist"—the textile design pirate. Reprinted from "Textile Industries" for February 1962 for National Committee for Effective Design Legislation, New York. [10] p.

A survey of past and present efforts to secure effective legislation for protection against design piracy, including a review of several court cases involving copyright infringement of textile designs.

254. The Three-year extension of second-term copyrights. (182 *Publishers' Weekly* 31, no. 15, Oct. 8, 1962.)

Brief editorial comments on the new extension law, the principle of a longer term of copyright, the Lindsay bill providing capital gains tax treatment for copyright properties, the McDowell bill (*domaine public payant*), and the Mathias resolution in regard to an investigation into the copyrighting of materials prepared by Government employees. The commentator favors all these matters with the exception of the McDowell bill which he hopes will die "an early death."

255. WINCOR, RICHARD. Copyright and the Spin-Off Hero: B. O. Value of Incidental Characters. (229 *Variety* 8, 41, No. 7, Jan. 9, 1963.)

Protection of individual fictional characters under present-day television and playwriting trends.

2. England

256. Copyright in design; Board of Trade issues its Report. (*The Bookseller* 1052-1054, no. 2957, Aug. 25, 1962.)

A summary of the recent report of the Departmental Committee on Industrial Designs of the British Board of Trade.

257. "Fair use" of copyright material; first step towards a universal treatment. (*The Bookseller* 1954-1960, no. 2942, May 12, 1962.)

A summary of a report delivered by R. E. Barker and R. H. Code Holland at the 16th Congress of the International Publishers Association held in Barcelona, May 1962.

258. PENNING-ROWSELL, EDMUND. The book world in Czechoslovakia. (*The Bookseller* 1216-1218, no. 2959, Sept. 8, 1962.)

Information on book publishing in Czechoslovakia gleaned by the writer "while on holiday in Prague." Includes a brief comment on the favorable royalty rates paid to native authors and to certain British authors whose works had been published in Czechoslovakia.

NEWS BRIEFS

259. ADDITIONAL REVISION STUDY ON THE MANUFACTURING CLAUSE

The special attention of our readers should be called to an additional copyright law Revision Study on the manufacturing clause just published by the Copyright Office in multilith form. This study, prepared by Marjorie McCannon, Assistant Chief of the Reference Division, with the assistance of Benjamin W. Rudd, General Attorney-Librarian, of the Copyright Office, is entitled "The Manufacturing Clause of the U.S. Copyright Law." It constitutes the most complete and scholarly study to date of the manufacturing provision, not only in its legal aspects but its economic impact as well. The study should prove of invaluable assistance in the further deliberations concerning the revision of our Copyright Act.

The Register of Copyrights and the authors of this study are to be congratulated upon presenting a timely and objective work.

260. A SYMPOSIUM ON COPYRIGHT IN INDIA

From our Indian Correspondent, Dr. Rustom R. Dadachanji, comes word of a symposium on the subject of copyright to be published in the June 1963 issue of "Cultural Forum", the organ of the Ministry of Scientific Research and Cultural Affairs, New Delhi. The Deputy Secretary of the Ministry, T. S. Krishnamurti, plans to include articles by some half-dozen copyright experts of India.

Copyright Society of the U.S.A.

c/o Fred B. Rothman & Co.

57 Leaning Street

South Hackensack, N. J.

—
Return Requested

Bulk Rate
U. S. POSTAGE
PAID
Hackensack, N. J.
Permit No. 2408

Bulletin of The Copyright Society of the U. S. A.

EDITORIAL BOARD

WALTER J. DERENBERG, *Chairman*

RICHARD COLBY
EDWARD M. CRAMER
GEORGE E. FROST
HARRY G. HENN
ARTHUR S. KATZ
ROBERT J. KAUFMAN
BERNARD KORMAN

DR. STEPHEN P. LADAS
ALAN LATMAN
MELVILLE B. NIMMER
RICHARD H. ROEMER
STANLEY ROTHENBERG
CHARLES B. SETON
PAUL J. SHERMAN

JUDITH GRAD, *Associate Editor*
MARY T. HUNTER, *Assistant Editor*

The Copyright Society of the U. S. A.

OFFICERS

President

HARRY G. HENN

Vice-Presidents

LEONARD ZISSU
EDWARD A. SARGOY

Secretary

CHARLES B. SETON

Assistant Secretary

ALAN LATMAN

Treasurer

SIDNEY A. DIAMOND

Assistant Treasurer

EDWARD M. CRAMER

Executive Director
WALTER J. DERENBERG

BOARD OF TRUSTEES

JOSEPH S. DUBIN, Universal City, California
CARLETON ELDRIDGE, New York City
ROBERT V. EVANS, New York City
HERMAN FINKELSTEIN, New York City
GEORGE E. FROST, Chicago
PROFESSOR HARRY G. HENN, Cornell University
PROFESSOR BENJAMIN KAPLAN, Harvard University
IRWIN KARP, New York City
LEONARD KAUFMAN, New York City
SYDNEY M. KAYE, New York City
LEON KELLMAN, New York City
PROFESSOR JOHN M. KERNOCHAN, Columbia University
PROFESSOR ADRIAN A. KRAGEN, University of California
ISABELLE MARKS, New York City
E. GABRIEL PERLE, New York City
JOHN R. PETERSON, Boston
CEDRIC W. PORTER, Boston
BARBARA A. RINGER, Washington, D. C.
BENJAMIN W. RUDD, Washington, D. C.
EDWARD A. SARGOY, New York City
JOHN SCHULMAN, New York City
PAUL SHERMAN, New York City
STUART SPRAGUE, New York City
SAMUEL W. TANNENBAUM, New York City
THEODORA S. ZAVIN, New York City
LEONARD ZISSU, New York City

Published at New York University Law Center
40 Washington Sq. South, New York 11, N. Y.

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

© 1963 by The Copyright Society of the U. S. A.

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

Published at
NEW YORK UNIVERSITY LAW CENTER

VOL. 10, NO. 4

APRIL, 1963

CONTENTS

	PAGE
Frederic G. Melcher. <i>In Memoriam</i>	207
PART I. ARTICLES.	
MILES, JAMES W. Copyright Legislation in New Zealand Affecting Artistic Works	209
GOLDBERG, MORTON DAVID. "Copyright Law Revision, Part 2", <i>A Review of the Record</i>	214
ULMER, EUGEN. The Rome Convention for the Protection of Per- formers, Producers of Phonograms, and Broadcasting Organiza- tions, Part III	219
Correspondence Concerning Middleton, "Rights and Royalties of Foreign Authors and Composers in War Time", <i>Stage Perform- ings Rights Fees</i>	249
Corrigendum to Bogesch, "The First Decade of the Universal Copy- right Convention," <i>Issue of Certificates by Canada</i>	252
PART II. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS.	
1. United States of America and Territories	253
2. Foreign Nations	257
PART III. CONVENTIONS, TREATIES AND PROCLAMATIONS	260
PART IV. JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY.	
A. Decisions of U.S. Courts.	
1. Federal Court Decisions	261
2. State Court Decisions	273
B. Decisions of Foreign Courts.	
1. Canada	278
2. England	280
PART V. BIBLIOGRAPHY.	
A. Books and Treatises.	
1. United States Publications	286
2. Foreign Publications	286
B. Law Review Articles.	
1. United States	287
2. Foreign	288
C. Articles Pertaining to Copyright from Trade Magazines.	
1. United States	289
2. England	290
1962 ASCAP Nathan Burkan Copyright Competition Awards	291
NEWS BRIEFS	292

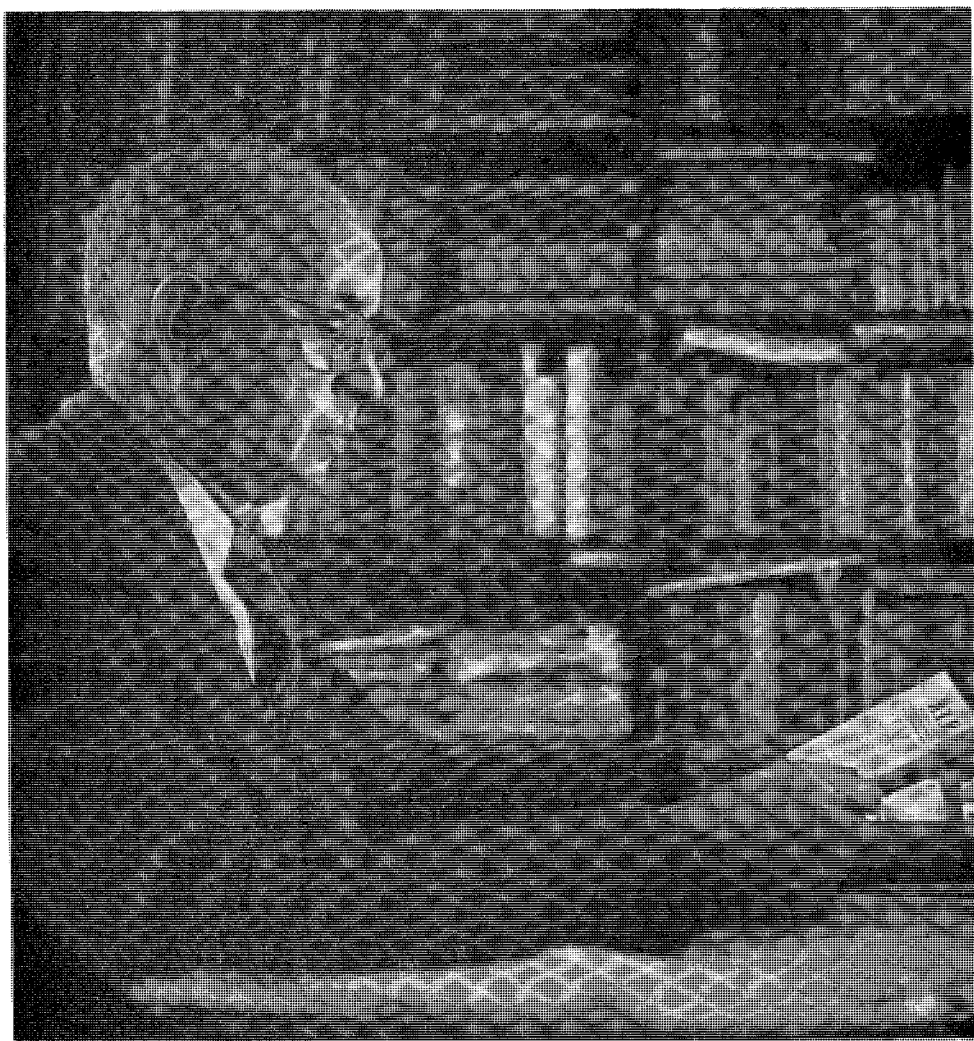
THE BULLETIN of The Copyright Society of the U.S.A. is published 6 times a year by The Society at the Law Center of New York University, 40 Washington Square South, New York 11, New York: Harry G. Henn, *President*; Leonard Zissu, Edward A. Sargoy, *Vice-Presidents*; Sidney A. Diamond, *Treasurer*; Charles B. Seton, *Secretary*; Edward M. Cramer, *Assistant Treasurer*; Alan Latman, *Assistant Secretary*; and Walter J. Derenberg, *Executive Director*.

Annual subscription: \$25.

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 11, N. Y.

Business correspondence regarding subscriptions, bills, etc., should be addressed to the distributor, Fred B. Rothman & Co., 57 Leuning Street, South Hackensack, N. J.

CITE: 10 BULL. CR. SOC. page no., Item (1963).



Frederic G. Melcher

April 12, 1879–March 9, 1963

Frederic G. Melcher

Frederic Gershom Melcher, a Member and former Vice President of our Society, died a few weeks before his 84th birthday, on March 9, 1963, at Montclair, New Jersey. He was, as Hallowell Bowser said in the *Saturday Review*, "America's Elder Statesman" in the world of books and publishing. But Fred Melcher was not only an outstanding bookman and leader in the publishing field; he was most active until the very end in copyright circles and was particularly concerned in the program for revision of the copyright law. A year ago he generously turned over to the Copyright Publications Center at New York University his personal files, containing much invaluable material covering over half a century of records with regard to the protection of literary property in the United States.

At his death, Frederic Melcher was chairman of R. R. Bowker Company, of which he had been president for 25 years, and he was, as he had been for over 40 years, co-editor of *Publishers' Weekly*, which he had first joined in 1918.

Frederic Melcher was born at Malden and grew up at Newton Center, Massachusetts. He graduated from Newton High School and enrolled at Massachusetts Institute of Technology, but interrupted his studies to go to work at Estes & Lauriat's Boston bookstore at the age of sixteen. He later joined W. K. Stewart in Indianapolis. Always interested in the building of home libraries and in good books for children, among Fred Melcher's initiations were the Newbery and Caldecott Medals for distinguished contributions to children's literature and picture books. He was a founder of Children's Book Week, and, reflecting his interest in the graphic art, the Carey-Thomas Award for creative publishing. In 1947, at the invitation of General Douglas MacArthur, he went to Japan as special consultant on rebuilding the Japanese publishing industry and establishing copyright procedures.

Not only the Copyright Society, but everyone interested in the promotion and legal protection of cultural and literary works will long remain indebted to Frederic Melcher for his active spirit and his never-failing interest. Many tributes were paid to him during his lifetime, and many have been published in recent weeks. We quote below from the statement issued by the President, Igor Kropotkin, and Executive Director, Joseph A. Duffy, of the American Booksellers Association:

"The booksellers of America recognize an extraordinary indebtedness to Frederic G. Melcher, whose lifetime contributions to the cause of bookselling cannot be measured in ordinary terms.

"His career included participation in our affairs as practicing bookseller, secretary of the ABA, co-founder of the ABA White House Library and recipient of our highest honor, the 'Booksellers' Award of Merit,' bestowed upon him in 1957. He identified himself as 'bookseller' and, titan though he became in the book industry at large, he remained the staunchest champion American bookselling has ever known. For us words alone cannot appraise the worth of this man."

William Spaulding, president of the American Book Publishers Council, said:

"Frederic G. Melcher devoted a long life to the service of books, and through books to men, women and children everywhere. For 68 years, the world of books had been not only his profession, but the object of his devotion. He had been bookseller, editor, publisher, mentor and inspirer. He was at home among librarians as among publishers and booksellers. . . . To all of these manifold activities he brought a sweetness, an idealism, and an integrity that ennobled our common profession.

"It was one of his characteristic generousities to give an annual award for a distinguished achievement in publishing. In a sense, his own life may well be the most distinguished achievement in that profession that we have known. The American Book Publishers Council joins his family and his friends everywhere in sorrow and will always remember him with affection and admiration."

Speaking for the Authors League of America, Rex Stout, League president, said: "Fred Melcher will be remembered with affection and appreciation by the Authors League, of which he was a member for many years. His contributions to American publishing, his recording of its changes and growth, his work to make American publishing and literature a part of the world's culture, have been invaluable. But in a more personal way, authors will also remember his wise, helpful and varied counsel in matters of importance to them and their organization, and will miss him."

John Boon, president of the Publishers Association, London, cabled: "The officers and council of the Publishers Association have learnt with the deepest regret of the passing of a great bookman, Frederic Melcher, and send on behalf of all British publishers a salute to his memory and condolences to his wife, family and colleagues. By his deeds and not only his words will he long be remembered."

Many of Mr. Melcher's friends are making contributions in his memory to the Melcher Scholarship Fund, c/o Mrs. Harriet K. Holsman, ALA, 50 E. Huron St., Chicago 11.

PART I.

ARTICLES

261. COPYRIGHT LEGISLATION IN NEW ZEALAND AFFECTING ARTISTIC WORKS.

By JAMES W. MILES*

The new Copyright law which came into force in New Zealand on 1st April 1963¹ has a particular interest for other British Commonwealth countries and the United States in regard to the protection of industrial designs and, in particular, the protection by copyright of artistic designs applied in industry.

New Zealand is the first country in the British Commonwealth to adopt in its copyright law the general principle, sanctioned by the copyright law in most Berne Convention countries, that an artistic work is protected by copyright irrespective of its industrial application or utilitarian use. This principle is also in general agreement with the leading United States case of *Mazer v. Stein*.²

The previous position in New Zealand followed the United Kingdom copyright law which, in 1911, introduced an innovation intended to exclude from the protection by copyright, artistic works in the category of industrial designs. It was thought that it was not only logical to channel all this subject matter into the field of design law, but that this would also result in a very desirable solution of the incipient problem of overlapping between these two branches of law.³ Furthermore, it appeared relatively simple to achieve this

* Dr. Miles is a Barrister of the Supreme Court of New Zealand, and has represented his country as delegate to various international conferences. He was a member of the New Zealand Copyright Committee (1957-1959) and is the author of "National and International Aspects of Industrial Property" (1944); and "International Aspects in Regard to the Protection of Industrial Designs," 8 BULL. CR. SOC. 149 (1961).

1. An Act to consolidate and amend the law relating to copyright, Act No. 33 (1962). 83 p. Wellington, R. E. Owen, Govt. Printer. See, for a summary of the Statutes Revision Committee report, House of Representatives, 7 BULL. CR. SOC. 63, Item 80 (1959).

2. 347 U.S. 201 (1954).

3. It would seem that it was not recognized at that time how far this would operate as a restriction of the legitimate scope of international copyright.

by making copyright and design law mutually exclusive in this respect.⁴ It was found, however, that this was much more difficult than was expected. In the first place some confusion and uncertainty resulted because it was not possible to say at the time of the creation of the artistic work whether it was in, or would come within, the category of a design protected only by the design law, and in the second place there were anomalies because of the necessity for the creation of an artificial line of demarcation between these two branches of law. The first gave rise to doubts and difficulties arising out of a terminable copyright and the second to inequitable consequences resulting from the virtual impossibility of making a clear cut and satisfactory division between these two branches of law for this purpose.⁵

Artistic works have, in recent years, been applied in industry and commerce to a very large extent indeed in the whole range of industry, and their exclusion from the scope of copyright protection for this reason only has resulted in very serious loss of rights. It was originally thought, when this excluding provision was first included in the United Kingdom copyright law, that the U.K. design law was an adequate protection for industry in such cases, but this has been found to be very far from being the case. The result, indeed, has been that a large proportion of artistic works so used in industry, and for that reason denied copyright protection, have had no legal protection whatever. The design law, which it was thought would provide this, had often just the reverse effect. As it was known that it was to a large extent impossible for industry to comply with the conditions necessary to obtain protection, this encouraged and assisted plagiarists and others to "pirate" the most successful artistic designs which manufacturers had evolved at considerable effort and expense.

Complaints in regard to such cases in New Zealand led to the reconsideration de novo, of this excluding provision, and the conclusions arrived at were: that the provision in attempting to make the copyright and design law mutually exclusive, necessarily created insuperable difficulties, which have been accentuated with the modern importance of artistic design in industry: that such a provision was completely out of harmony with the basic principles of the copyright law: that the retention of this provision in the copyright law was not only not necessary, but that the restoration of copyright to its full and

4. In 1911 U.K. design law was, among Berne Convention countries, a relatively new branch of law which had been working well in some industries, but there seems to have been some confusion of thought in so extending its scope at the expense of the copyright law.

5. Both of these difficulties remain in Section 10 of the U.K. Copyright Act, 1956.

legitimate scope in respect of artistic works, would largely provide industry with the protection it needed in respect of its artistic designs.⁶

The international aspects of this change in the copyright law in New Zealand are interesting and important. The law of designs and models is international in character in two respects: priority rights can be invoked under Article 4 of the International Convention for the Protection of Industrial Property; and international registration may be effected under the Arrangement of The Hague. The law of copyright is also international in character but in its operation it has great advantages,⁷ because, under the Berne Convention, protection arises at once, without the compliance with any formalities. There is nothing in the international conventions covering these two fields of law to prevent them being complementary in regard to the protection of artistic designs used in industry, and Article 18 of the Arrangement of The Hague specifically gives recognition to this.

As protection by copyright under the Berne Convention is independent of formalities and provides, in effect, for immediate international protection, it is important to consider the effect, now that the provision in New Zealand copyright law corresponding to Section 22 of the U.K. Copyright Act 1911, has been repealed. The result is that all artistic works will equally obtain international copyright protection and the hitherto disabling effects of industrial application have no effect on the acquisition or enjoyment of such copyright. There is also the possibility of an alternative protection under the design law; in other words, this recognition in New Zealand copyright law of the "totality of copyright" in respect of artistic works does not debar those still wanting to take advantage of the design law. In practice, however, this design law protection will, for the most part, not be necessary as the speedy, effective and extensive international protection by copyright will be sufficient.⁸

There is another great advantage. A large proportion of the major industrial countries who are members of the Berne Copyright Convention already recognize and give effect to this same principle in their copyright law, so that New Zealand is contributing to greater international uniformity in this respect. It has been ascertained that some 35 member states of the

6. The esthetic and utilitarian characteristics of works of art have been interwoven since the earliest times and the industrial application of copyright works is merely the normal exercise of the right that copyright confers.

7. These advantages are at the root of the movement for an international bridge to join the gap between U.S. copyright law and that in Berne Convention countries and it was largely due to the efforts of the United States that success was achieved in the formation of the Universal Copyright Convention.

8. The investigation of cases of "piracy" over a long period shows that the mere knowledge of the existence of legal protection would have operated as a deterrent.

Berne Convention protect "applied art" by copyright⁹ and by joining this large number, New Zealand at once obtains the benefit of an extensive and effective protection for the large proportion of industrial designs which are in this category.

These matters, which are at the root of this change in the copyright law in New Zealand, apply with substantially the same force in other British Commonwealth countries. Canada and Australia are now giving consideration to the review of their copyright law, and the United Kingdom, after having done so, has again found it necessary to seek a better solution than that adopted in Section 10 of the U.K. Copyright Act 1956.

In the Report of the U.K. Designs Committee 1959,¹⁰ it is clear that the most careful and thorough efforts have been made to retain the principle of the innovation of Section 22 of the U.K. Copyright Act of 1911, in some modified form. It can be said that these efforts have failed to achieve the solution desired by U.K. industry and the British Board of Trade¹¹—a cheap and effective international protection for industrial designs—and, as substantially the same legal and other issues were considered in New Zealand, it would seem desirable and appropriate to consider the advantages, both from a British Commonwealth and the wider international point-of-view, of coming into line with other Berne Convention countries by restoring all artistic works to their full and legitimate scope in the field of copyright protection.

In many Berne Convention countries there are, as is to be expected, differences of detail in the application of the principle of the protection of "applied art" by copyright, but this does not constitute a valid reason for not accepting the principle itself. The Berne Convention operates quite successfully without a definition of "artistic work" and it is generally accepted that it is unnecessary and would be unwise to attempt to formulate one. It also is not necessary to define "applied art" in order to remove from the copyright law the disabling effects of industrial application of artistic works. In the United States the action now being taken to improve the design law specifically preserves the principle of the "totality of copyright", so that the improvement of the U.S. design law will not be at the expense of the copyright law.¹²

This, in effect, is confirmation of the principle in *Mazer v. Stein*, which itself can be reconciled with the internationally recognized principle of the

9. See XXV Revue Internationale du Droit d'Auteur 65.

10. Cmnd. 1808.

11. Id. See *terms of reference*, p. 5.

12. H.R. 323; H.R. 769; S. 776 (88th Cong., 1st Sess.). See Item 271 *infra*.

copyright protection of "applied art". It is recognized, of course, that the present problem of the better protection of industrial designs demands also reconsideration of the design law, and here there are some problems which do not admit of any simple national or international solution. While these matters are very important from the design law aspect, it is necessary to bear in mind that, in relation to the problem as a whole, the speedy, effective, cheap and extensive international protection by copyright is of paramount importance. In all these vital factors comparable protection under the design law is not at present possible, or likely to be achieved. This, of course, does not in any way mean that the design law should not remain and continue to be improved. The Johnston Report in the United Kingdom has made important recommendations in this respect.¹³

In assuring that the progress to date will be maintained in the further developments both in the national law and in achieving greater international uniformity, it is necessary to bear in mind that the problem is virtually world wide, and incidental to modern international trade. This makes it very important that further improvements should be capable of international application in principle, and of sanction in the international conventions, which have already been of such value in the closely allied fields of copyright and industrial property.

Both copyright and design law must be considered as complementary in regard to the necessary legal protection of industrial designs. To these we might also add in this connection, the law of trademarks and the law of unfair competition. These all serve a separate purpose but are complementary in contributing to the wide objective of preserving fair and honest customs in national and international trade and commerce.

13. See pp. 115-118 Cmnd. 1808.

262. "COPYRIGHT LAW REVISION, PART 2" *—*A Review of the Record*

By MORTON DAVID GOLDBERG**

The current program for revision of the copyright law gained initial momentum from the thirty-four Copyright Office Studies of the major problems to be covered in revision. The Studies commenced in 1955 and required more than five years for their completion.¹ Based on these Studies—probably the most encyclopedic review of the copyright law extant—and the comments received on them, the Copyright Office in July, 1961, issued its "Report" containing tentative recommendations for a revised Copyright Act.²

In the fall of 1961 and spring of 1962, four meetings of the Register's Panel of Consultants were held to discuss the recommendations contained in the Report. The Report was also discussed in two lengthy symposia: one, at New York University on December 1-2, 1961, under the auspices of the Copyright Society of the U.S.A., the American Bar Association and others; and the second, at a special three-day session, August 1-3, 1962, of the American Bar Association's Committee on the Program for Revision of the Copyright Law at the A.B.A. annual meeting in San Francisco. Unfortunately for analysts of the revision proposals and annalists of their history, there are no official transcripts of the N.Y.U. or San Francisco meetings. Fortunately, however, we now have printed official transcripts of the 1961-1962 meetings of the Register's Panel.

The transcripts are contained in "COPYRIGHT LAW REVISION, Part 2," issued on February 15th of this year by the Copyright Office with the cooperation of the House Committee on the Judiciary. In addition to the transcripts, which occupy approximately one-half of the volume, *Part 2* contains the written comments on the Report received from approximately forty persons and organizations. The entire volume constitutes an excellent Baedeker to

* COPYRIGHT LAW REVISION, Part 2; Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law. Washington, House Committee on the Judiciary, 88th Cong., 1st Sess., Feb. 1963. vii, 419 p.

** Member of the New York Bar; Chairman, A.B.A. Committee on Copyright Office Affairs; Member, A.B.A. Committee on Program for Revision of the Copyright Law.

1. The Studies, together with an index thereto, have been issued in twelve Senate Committee Prints: Subcommittee on Patents, Trademarks and Copyrights, Senate Committee on the Judiciary, 86th Congress, 1st and 2d Sessions (1960-1961).

2. COPYRIGHT LAW REVISION: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law. House Committee Print: Subcommittee on Patents, Trademarks and Copyrights, House Committee on the Judiciary, 87th Congress, 1st Session (1961).

the areas of agreement and disagreement among the respective commentators and Panel participants; and reading it together with the comments and views annexed to the printed Copyright Office Studies, we have a fair picture of what controversies lie unresolved in the revision program.

The Copyright Office deserves our thanks for making the contents of *Part 2* available. The three Panel meetings held in Washington this year have discussed draft sections of a proposed revision, prepared by the Copyright Office largely on the basis of the contents of two documents, the Report and *Part 2*. The latter document will be of substantial value in appraising the provisions already drafted and those still to be proposed.

The combination of the transcripts and the formal written comments in one document is helpful. While the formal comments tend to present a more precise analysis of the merits of the proposals, the informal oral comments—as is their nature—frequently are more lucid for their spontaneity (if not for their syntax).

It is my impression that a progression in attitudes can be discerned in the comments received by the Copyright Office over the last several years: from the comments annexed to the Studies, through the comments contained in the letters and transcripts printed in *Part 2*, to the comments expressed at the more recent Panel meetings this year. The progression appears to be from apprehension or hostility to the Copyright Office proposals to, instead, a spirit of practical compromise, a give-and-take. There is still apprehension on the part of various groups as to whether copyright revision will leave them better or worse off than their lot under the 1909 Act,³ but the overall progression in attitudes appears to be propitious for the cause of copyright revision.

This is not to say that all controversies have been resolved. They have not. They include at the present time arguments with respect to a twenty-year limitation on assignments (with a reversion to the grantor after that period); abolition of compulsory licensing for musical compositions; the scope of fair use, including specifically the question of photocopying by libraries; and government publications (both their definition and their copyright status). The list just given is not exhaustive. Additions can be made by the various groups affected by copyright legislation. Controversy is to be expected in the discussion of copyright revision—if there were none, the revision proposals would likely be too innocuous to accomplish any meaningful purpose.

3. See, e.g., "Writers Fear a Booby-Trap," *Variety*, April 17, 1963, p. 5.

The Copyright Office has indicated⁴ that the comments received have persuaded it to modify certain of its recommendations and, in other cases, to prepare alternative sections in the draft bill now being discussed by the Panel. For example, the Report recommended the inception of statutory copyright with the "first public dissemination" of the work. But after receiving the views of those who emphasized the evidentiary and other problems involved in the adoption of such a proposal, the Register has now indicated that he will probably reject this proposal, at least in its present form. Similarly, the Register, in his Report, originally rejected the use of the author's life as a base point for measurement of the copyright term, while much of the sentiment communicated to the Copyright Office has favored such a system. After consideration of the comments received, the Register has now stated that an alternative version of the draft bill will contain a provision incorporating a life-plus system. Also, the Register has now modified his position on the continuation of the present dual—i.e., statutory and common law—system of copyright. The sentiment expressed to the Register has for the most part strongly supported a unified system of federal statutory copyright, and the Register appears now to be sympathetic to that position.

In reading *Part 2*, examination of the affiliations of the participants at Panel meetings and of those submitting written comments leads one to a conclusion not too surprising: namely, these persons are, primarily, lawyers actively engaged in copyright practice on behalf of their respective clients and, secondarily, those—lawyers and non-lawyers—with organizations some of whose day-to-day activities would be much affected by modification of the Copyright Act. In the former category, for example, are the lawyers in private practice or in corporate legal departments whose clients or employers constitute major creators and/or users in the copyright industries. In the latter category, we find not only representatives of organizations in the copyright field (as it is usually thought of) but also other groups such as public and university libraries, churches, schools and government agencies. These groups are much concerned with such questions as fair use, photocopying, the "for profit" limitation on the performance right, disqualification of government publications from copyright, etc.

The reviewer has commented elsewhere⁵ that the various copyright industry groups, both creators and users, must compose their differences if they

4. See address of the Hon. Abraham L. Kaminstein, Register of Copyrights, before the Copyright Luncheon Circle, New York City, November 16, 1962, 10 BULL. CR. SOC. 81, Item 69 (1962); Report No. 107, Subcommittee on Patents, Trademarks and Copyrights, Senate Committee on the Judiciary, 88th Cong., 1st Sess., at 13 (1963).
5. Goldberg, "Promoting the Progress of Science and Useful Arts: A Commentary on the Copyright Office Report on the General Revision of the United States Copyright Law," 47 Cornell Law Quarterly 549, 626 (1962).

expect any action by Congress. A significant comment on this point, received from a distinguished member of the Copyright Bar, expressed agreement with this point, but went on: "I would only add that when they do present a united front, then it's time for the public at large to watch out."

It is perhaps a metaphysical question to ask where the "public interest" lies; and the question of how—and by whom—the public interest is to be expressed may be no more susceptible of a specific answer than the question of how many angels may dance on the head of a pin. Having so stated the questions, it is obvious that the answers will not be given here. These are questions, nonetheless, which deserve more than passing attention. If we can assume that the public interest is of concern in copyright revision, it would seem appropriate that, at the very least, some attempt should be made to keep the public informed in this area, even if only in the most elementary terms.

It is to the great credit of such media as *Variety* and *Publishers' Weekly* that they have kept their readers well-posted on the progress of the copyright revision program. But surely the "public" must include more than show business and the publishing industry. Yet neither the *New York Times Index* nor the *Reader's Guide to Periodical Literature* (exclusive of references to *Publishers' Weekly* articles) for the past few years discloses any significant coverage of the progress of copyright revision. It is anomalous that the copyright industries appear to have made no significant effort to communicate to the public about copyright revision. These are industries whose component of the national income exceeds \$6 billion⁶ and which presumably have sums budgeted for public relations. To my knowledge, however, little has been devoted to the matter with which we are now concerned.

To believe that the public would devour the contents of the *Register's Report* and *Part 2* would require more credulity than our legal training permits. Nonetheless, perhaps we of the copyright bar have suffered a mild case of myopia. Our concerns in copyright revision are not parochial, although the technical nature of Title 17 may appear to make them such. We owe an obligation, as individuals and as representatives of groups in the copyright field, to improve the public relations of the program for copyright revision.

The Copyright Office is making every effort to have a revision bill ready for introduction in Congress in the near future, presumably after draft

6. See Blaisdell, "Size of the Copyright Industries," *Copyright Law Revision Study No. 2* (1960).

provisions have been discussed by the Panel. Perhaps the trilogy will be completed by a volume of "COPYRIGHT LAW REVISION—Part 3," consisting of transcripts of the current series of Panel meetings on the draft bill and a compilation of comments received on the draft. As valuable as is *Part 2*, *Part 3* could be even more valuable by the addition of comments received from that group most affected—the public.

263. THE ROME CONVENTION FOR THE PROTECTION OF PERFORMERS, PRODUCERS OF PHONOGRAMS AND BROADCASTING ORGANIZATIONS—PART III¹

By EUGEN ULMER²

III. MINIMUM RIGHTS OF PERFORMERS AND PRODUCERS OF PHONOGRAMS; FORMALITIES

The Convention deals, in Article 7, with the minimum rights of performers and, in Article 10, with the minimum rights of producers of phonograms. Apart from this, Article 12 provides for a right to remuneration in the event of commercial records being used for communication to the public. Whether this right is given to the performers, or to the producers of phonograms, or to both of them jointly is a question which each contracting country is free to resolve in the way it wishes. The provision contained in Article 11, which settles the question as to whether and to what extent it is permissible for contracting countries to make the protection of phonograms and of performances fixed on them dependent upon the observance of formalities, similarly relates to the rights of both groups.

In this account we will follow the structure of the Convention by discussing first the special minimum rights provided for the benefit of performers and producers of phonograms, then the provisions dealing with the right to remuneration of both groups in the event of secondary uses, and, finally, the question of formalities.

A. *Minimum Protection of Performers*

Even on the national level it is difficult to provide for a just measure of protection of performers. It is even more difficult to do so on the international level because of the differences between the systems upon which the various national provisions are based, and also on account of divergent views concerning the extent of protection which is to be granted to performers.

Article 7 of the Rome Convention, which contains the provisions on minimum protection of performers, was therefore the result of particularly exhaustive deliberations. These dealt with: (1) the legal nature of the

-
1. Authorized translation of an article which appeared in *Gewerblicher Rechtsschutz und Urheberrecht, Auslands- und Internationaler Teil*, 569-594, December 1961.
 2. Professor of Law, University of Munich, Germany; Head of the Delegation of the Federal Republic of Germany to the Rome Conference.

protection, (2) the definition of the general scope of the protection, (3) the special question of the rights, if any, of performers in connection with the further use in broadcasting of performances whose broadcast was authorized by them, (4) the transferability of rights, and (5) the exercise of the rights in case of group performances.

1. With regard to the *legal nature* of the minimum protection accorded performers, several delegations (the Czechoslovakian Delegation in particular) advocated a personal property right, sanctioned by a civil cause of action, thus protecting performers in the same manner in which the convention protects producers of phonograms and broadcasting organizations. Militating against this proposal, however, was the fact that in Great Britain and other countries of the British Commonwealth, performers are not granted such a right but are rather protected by means of provisions of the criminal law. Moreover, it was the opinion of the British Delegation that this method of protection has proved successful and that no other would be considered. The French and Italian Delegations, in response to the misgivings expressed by the authors' associations, also expressed preference for a formula which avoided an *ex jure conventionis* recognition of these rights.

Ultimately, the formula of The Hague Draft, to the effect that the protection accorded performers must afford the possibility of preventing their performances from being used without their consent in certain specified cases, was accepted. Of course, contracting countries may go further and provide performers with a property right sanctioned by civil cause of action. However, no such provision is made on an *ex jure conventionis* basis; performers are only guaranteed a certain legal position which is to be safeguarded by appropriate sanctions, the details of which are left to the discretion of the contracting countries. References to performers' "rights" in the Convention, as in this article, are merely made for the sake of simple terminology; strictly speaking, we should refer, not to performers' rights, but rather to the legal position of performers.

2. The *scope of the protection* granted to performers (apart from the special rules which apply to the use for broadcasting purposes of broadcasts which were made with the performers' consent) is provided by Article 7(1).

(a) Performers are protected against the broadcasting and the communication to the public, without their consent, of their performances.

Broadcasting organizations, therefore, must obtain the performers' consent to broadcast concert, theatrical, or other performances. "Communication to the public" is thought to include the transmission of performances by other technical means than radio-electric waves. For example, it is possible to relay

concerts by wire, thereby rendering the performances publicly audible, not only at the site of the event but also elsewhere.

There was agreement on requiring the consent of the performers in the case of broadcasting. On the other hand, misgivings were expressed by the British Delegation over the inclusion of other forms of communication to the public. This is not provided by current British legislation. Moreover, it was pointed out by Mr. Wallace on behalf of the British Delegation that the matter was not important in international relations. True, it is possible that a wire might cross the frontier of a country and that a concert taking place, say, in Holland would be relayed to a neighboring town in Belgium and communicated to the public by loudspeaker there. As a rule, however, the facts will be such that contacts with foreign countries are not involved. Nevertheless, the opinion of the majority of delegations was that this contingency, too, should be provided for in the Convention. In taking this view they also considered that, while the immediate task of the Convention is only to provide for international situations, the incorporation of such a provision would serve the purpose of pointing out desirability of regulation by domestic legislation.

In The Hague Draft, the protection of performers from broadcasting and other forms of communications to the public was confined to live performances. This limitation was, in principle, also adhered to in Rome. The communication to the public of a broadcast and the use of phonograms or films for the purpose of communication to the public are not to be made dependent upon the consent of the performers whose performances are the subject of the broadcast or fixation in question; the use of commercial records for communication to the public is specially provided for in Article 12. A definition of live performance, however, would have met with considerable difficulties, as the discussion on this point demonstrated. Following a proposal made by Dr. Bogsch (U.S.), it was therefore made clear in Article 7(1)(a) that, while avoiding the concept of live performance, the protection is inoperative if the performance used for broadcasting or for any other form of communication to the public (i) is already a broadcast performance or (ii) is made from a fixation.

(b) Performers further enjoy protection against the fixation, without their consent, of their performances, provided such fixation is not made from an already existing fixation (Article 7(1)(b)). This rule relates both to fixation on phonograms and on films. It also applies to broadcast performances. However, if what is broadcast is a fixation, the protection of Article 7(1)(b) does not operate. In that case, as in others where the performance is already fixed, it is in the legal sense a reproduction of a fixed performance, to which the provisions of Article 7(1)(c) apply.

(c) The opinions of the various delegations differed on the question of the extent to which performers should enjoy protection from reproduction of their fixed performances. The Hague Draft made provision for such protection only in special cases. On the other hand, it was advocated in Rome by the U.S. Delegation that performers should be protected in a general way from reproduction of their fixed performances. For our part, we were able to agree to this proposal, if only because the Ministerial Draft of a new German Copyright Law also grants the right of reproduction to performers generally, and not only in special cases. The proposal met, however, with resistance from other delegations. Dr. Straschnov (Monaco) pointed out that, in broadcasting records, broadcasting organizations were, for technical reasons, dependent upon the reproduction of records; it would be carrying things too far if not only the consent of the producers of phonograms but also that of the performers should have to be obtained for this purpose. Professor Bodenhausen (Netherlands) also wanted—without limitation to the special case of reproducing in the operation of broadcasting organizations—the piling up of necessary consents to be avoided. Generally speaking, he argued, it was sufficient if the consent of the producer of the phonograms had to be procured. The performers' interests were to be safeguarded by the contract between them and the producer; from this contract there could arise the obligation, on the producer's part, to proceed against reproductions by third parties in the interest of the performers as well. Based upon these considerations, the majority of the delegations rejected a general right of reproduction for the benefit of performers, so that the limitation of protection to special cases was accepted.

The Convention accordingly provides in Article 7(1)(c) that in the following cases reproduction of fixed performances is only permissible with the performers' consent:

- (i) if the original fixation itself was made without the performers' consent³;
- (ii) if the reproduction is made for purposes different from those for which the performers gave their consent;
- (iii) if the original fixation was made in accordance with the provisions of Article 15 and the reproduction of the fixation is made for purposes different from those referred to in Article 15.

The most important of these special cases is that referred to in (ii). This provision, among other things, protects musicians from the danger that their

3. As the case of a fixation made on the basis of the exceptional provisions of Art. 15 without the performers' consent is specially provided for in (iii), (i) is logically to be limited to those cases where the fixation was made without the required consent.

performances which are fixed on the magnetic tapes of broadcasting organizations may be used for the production of commercial records, or that records on which their performances have been fixed may be used for the production of the sound-track of a film.

3. With regard to the relations of performers with broadcasting organizations, The Hague Draft had provided that in cases where performers have given their consent, protection from rebroadcasting as well as reproduction for broadcasting purposes is to be left to the domestic legislation of the various countries. It would also be the task of domestic legislation to lay down the conditions for the use of fixations made for broadcasting purposes.

This leaves wide scope for domestic legislation. Once the performer has consented to the broadcast, any further protection of his performance may be withheld from him. This *carte blanche* to domestic legislation was emphatically defended in Rome: The proposal made by the German Delegation, on the strength of the Federal Government's comments, that performers be granted protection from rebroadcasting on a *ex jure conventionis* basis, proved unsuccessful. The same fate befell an American proposal, which went even further, suggesting that the special rules concerning the relationship of performers with broadcasting organizations be deleted, since the broadcasting organizations could secure by contract all the rights they required. On the other hand, success attended a British proposal to safeguard the primacy of contractual arrangements, and to proscribe the restriction of freedom of contract by means of compulsory licensing provisions in domestic legislation. Accordingly, the above mentioned provisions of The Hague Draft were accepted in Rome but with the addition of a provision to the effect that domestic legislation must not deprive performers of the ability to control their relations with broadcasting organizations by contractual arrangements. The notion of contractual arrangements in this connection also includes, as was specifically clarified in the General Report at the request of the Belgian and Dutch Delegations, collective agreements between performers' associations and broadcasting organizations (Article 7(2) of the Rome Convention).

4. The Convention remains silent on the question of the transferability of performers' rights. The matter is left to the domestic legislation of the various countries. The British system of a right safeguarded by criminal sanctions rules out assignability by its very nature. On the other hand, if domestic legislation grants performers a property right sanctioned by a civil cause of action, transferability is likely to be the rule; yet here, too, the possibility remains of limiting the assignability of rights.

In view of the consequences which might ensue from an anticipatory assignment of the performers' rights to a performing rights society or trade-

union, it was proposed by the Austrian Delegation that there be incorporated in the Convention the provision contained in the Geneva Draft to the effect that, notwithstanding any assignment, performers may exercise their rights to the extent necessary for the fulfilment of contracts in which they undertake to perform for the purposes of a recording or a broadcast. A similar provision is also contained in the Ministerial Draft of a new German Copyright Law. However, misgivings about such a provision were expressed by other delegations and, in particular, the United States Delegation, on the ground that it would amount to restriction of the freedom of contract, a restriction, which, although admitted on the level of domestic legislation, ought to be avoided on an international level. The Austrian proposal accordingly failed to gain necessary support.

5. In the cases of performances involving the participation of a number of performers and, in particular, in the case of choral and orchestral, as well as stage, performances, it is necessary to decide who is entitled to exercise the joint rights of the performers. The Hague Draft provided that contracting countries may, by their domestic laws, specify the conditions under which performers exercise their rights in such cases. The Rome Convention maintained the freedom given to domestic laws. Following an American proposal, however, the wording of the provision was amended, as the term "conditions," with the meaning it has in the Revised Berne Convention, would also enable contracting countries to introduce a system of compulsory licensing. It is therefore now stated in Article 8 of the Rome Convention that the domestic law of contracting countries may specify the manner in which performers will be represented in connection with the exercise of their rights if several of them participate in the same performance.

B. The Rights of Producers of Phonograms

1. For the benefit of producers of phonograms, Article 10 of the Rome Convention provides as follows: Producers shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms. By mentioning indirect reproduction, it is made clear that the producers' right is infringed not only by the pressing of copies of the phonograms or by their rerecording, but also if a fixation is made of the broadcast of a phonogram. On the other hand, a special reference to partial reproduction, which had been proposed by the Belgian Delegation, was rejected on the strength of the consideration that the extension of protection to partial reproduction was self-evident and that it would be hazardous to refer to partial use in Article 10, but not in the rules concerning the rights of performers and broadcasting organizations.

There was unanimous agreement that this right of producers of phonograms, unlike those of performers, is an exclusive property right. This is also the view taken by English law: the rights of producers of phonograms are, within the meaning of the Copyright Act, in the nature of copyright, related to the film copyright which English law grants to film producers.

The Austrian Delegation proposed that, apart from the right of reproduction, producers of phonograms should also be granted a right of distribution as a minimum right guaranteed by the Convention. Militating against acceptance of this proposal, however, was the fact that—notwithstanding the fact that the concept of a right of distribution is established not only in Austrian but also in German law and the law of some other countries—it lacks international recognition. Although Article 14 of the Revised Berne Convention, in addition to “reproduction”, also mentions distribution (*mise en circulation*), the concept of a right of distribution is not yet generally accepted. The 1957 French Copyright Law, for example, grants authors only the right of reproduction, and not that of distribution.

A proposal made by the Scandinavian countries and India seemed at first to succeed. These countries proposed that provision be made for the possibility of seizing phonograms, unlawfully produced within the meaning of the Convention, if they are imported into a contracting country. The provision would have followed the example of Article 16 of the Revised Berne Convention and of Article 4 of the European Convention for the Protection of Television Broadcasts. Had this proposal been accepted in connection with the rights of producers of phonograms, it would also have been necessary to make similar provision, with reference to the rights of performers and broadcasting organizations. After a discussion of the arguments for and against the proposal, the majority of the delegations, prompted by the desire to make the Convention as simple and clear as possible, rejected it. This might have been partly due to the fact that the wording of the above-mentioned provisions of the Revised Berne Convention and the European Convention for the Protection of Television Broadcasts are far from being clear.

C. *The Right to Remuneration in the Case of Secondary Uses*

Article 12 of the Rome Convention reads as follows: “If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. . . .”

This provision is supplemented by Article 16 regarding the admissibility of reservations: Contracting countries may, at any time, declare, by a notifica-

tion to be deposited with the Secretary-General of the United Nations, that they will not apply the provisions of Article 12 or that they will exclude its application with respect to certain uses. Account is also taken of the principle of reciprocity by the admission of further reservations: With regard to phonograms the producer of which is not a national of another contracting country, any contracting country may exclude the application of Article 12. With regard to phonograms the producer of which is a national of another contracting country, protection may be limited, in extent and duration, to that granted by the said contracting country to phonograms the producer of which is a national of the country making the reservation.

1. The provisions contained in Article 12 were actively opposed by a minority. As already mentioned, this was a question on which the opposition of the authors' associations combined with the resistance of the European Broadcasting Union. The delegations which, in accordance with the demands of the authors' associations and the European Broadcasting Union, were opposed to an obligation to pay remuneration were not satisfied with the possibilities of limitations or complete exclusion by way of reservation. Considerations of principle led them actively to oppose incorporation in the Convention of the obligation to pay remuneration. They suggested, in conformity with the solution provided for in the Monaco Draft, that this question be left to the domestic legislation of the various countries and that the Convention merely provide that countries which grant a right to remuneration be permitted to deny national treatment where there is no reciprocity. The majority of the delegations in Working Party No. 2 and in the Main Commission voted in favor of acceptance of Article 12. However, the number of dissenting votes was considerable. It seemed uncertain whether, in the Plenary Meeting, the required two-thirds majority would be attained. There was much activity behind the scenes. Interested groups were seeking the votes of the delegates of the developing countries, who had not as yet finally fixed their positions. New instructions were sought and received from the various governments. Delegations which, owing to their composition, were favorably inclined towards authors' associations and broadcasting organizations, were instructed by their governments, guided by social considerations, to vote in favor of Article 12 or, at any rate, to abstain from voting. The decision was arrived at by a roll-call vote in the Plenary Meeting of October 25 (the day before the Convention was signed). The delegations of 20 countries (Argentina, Australia, Austria, Brazil, Cambodia, Chile, Congo (Leopoldville), Cuba, Czechoslovakia, Federal Republic of Germany, Great Britain, Iceland, India, Ireland, Israel, Italy, Mauretania, Mexico, Peru and Poland) voted in favor of acceptance of Article 12. The delegations of 8 countries (France, Japan, Luxembourg, Monaco, Netherlands, South Africa, Tunisia and Yugoslavia)

voted against. Nine delegations (Belgium, Denmark, Finland, Norway, Portugal, Spain, Sweden, Switzerland and the United States) abstained from voting. The necessary two-thirds majority had thus been attained. The decision, which ensures effective protection of the interests of performers and producers of phonograms, was welcomed with vigorous applause. Mr. Kaminstein (U.S.) declared that, bearing in mind the special situation existing in the United States, he had abstained from voting, but that he congratulated the majority of countries and, in particular, the European countries, on the solution agreed upon by them.

2. Article 12 deals with phonograms published for commercial purposes, and provides that a single equitable remuneration is to be paid for their direct use for broadcasting or any other form of communication to the public. Its formulation defines the substance and, at the same time, the limits, of protection:

a) Only the use of phonograms published for commercial purposes is to give rise to an obligation to pay remuneration. In other words, only commercial records are involved, that is phonograms which are mass-produced by the phonograph industry and are intended for sale. Phonograms not intended for the trade, including, in particular, magnetic tapes of broadcasting organizations, are outside the scope of Article 12. Under the terms of the Convention, there is no obligation to pay remuneration for the use of these in broadcasting.

German law goes further in this connection: The protection provided in Article 2(2) of the Law on Copyright in Literary and Musical Works arises as a result of the fixation of the sounds of works of literature and music, irrespective of whether the fixations are intended for trade or not. This view, which had been generally held previously, was confirmed by the Federal Supreme Court in its decision of May 31, 1960 (BGHZ 33, 40).⁴ In accordance with the existing law, the Ministerial Draft of a new German Copyright Law does not discriminate between commercial records and other fixation regarding the obligation to pay remuneration. Nevertheless, provision is made for the right to remuneration of performers employed by a broadcasting organization to be governed exclusively by the terms of their employment contract.

b) The obligation to pay remuneration, as provided for in Rome, is confined to the direct use of records for broadcasting or communication to the

4. Whether Article 2(2), is also applicable to the sound-tracks of films is open to dispute. The Federal Supreme Court affirmed this in an *obiter dictum* (RGZ 140, 240 et seq.), without taking into account the consequences ensuing from such application of Article 2(2). In my opinion, Article 2(2) is, in the case of films, just as inapplicable to sound-tracks as to the picture portion of the film. Cf. in this context my "Urheber- und Verlagsrecht" (2nd ed., 1960), p. 428 et seq.

public. Accordingly, if, for example, the broadcast of a record by a broadcasting organization is rebroadcast by another broadcasting organization or communicated to the public in a restaurant or other public place, no obligation to pay remuneration arises in the second broadcasting organization or the restaurateur, respectively. Here the protection which the Convention provides for the benefit of performers or, as the case may be, for producers of phonograms, intentionally lags behind the protection enjoyed by authors under the provisions of the Revised Berne Convention (Article 11bis). This is a restriction which is accounted for by the endeavor to proceed with caution in creating new rights. The authors have fought for and attained a high standard of protection in the course of a long historic development. In the case of performers and producers of phonograms, it is new ground on which the foundations must first be laid; further extension must be reserved for consideration at a later stage.

Following the line of international development, the Ministerial Draft of a new German Copyright Law provided for remuneration to be paid to performers for the use of phonograms in broadcasts and communication to the public, but not for the communication to the public of such broadcasts using records. The Federal Supreme Court went further when, on the basis of Article 2(2) of the Law on Copyright in Literary and Musical Works, and the general principles of personal law and unfair competition, concluded in its above-mentioned decision of May 31, 1960 (BGHZ 33, 40 ff.), that performers have rights also when the broadcast of records is made audible in places open to the public.

c) The remuneration payable to performers, or to producers of phonograms, or to both is to be a *single* equitable remuneration. Any provision for a claim to remuneration for both performers and producers of phonograms would lead to the imposition of a twofold burden upon broadcasting organizations and other organizers of performances which the Rome Convention attempts to avoid in the interests not only of organizers of performances, but also of authors. These being the motives underlying the provision, the question arises whether, contrary to the rule (which is that the Convention establishes a *minimum* protection), the Convention is intended to establish an upper limit to the protection of the two groups concerned, in other words, to fix a *maximum* protection. The question of whether a given Conventional provision is to be interpreted to mean maximum protection is one which is known from the literature concerning the Berne Convention. As far as the Revised Berne Convention is concerned, I think, as does the International Bureau, that the answer is negative.⁵ On the other hand, I believe that, within the framework

5. E. Ulmer, *Urheber- und Verlagsrecht*, 2nd edition 1960, p. 79 et seq., citing other sources.

of the Convention on Neighboring Rights, and in view of the endeavor to arrive at a compromise between the interests of the groups concerned, the problem of maximum protection with reference to the question discussed here will still need special consideration.

3. Recipients of remuneration are to be performers, producers of phonograms, or both.

More detailed provision specifying the beneficiary is left to the national legislation of the various countries. True, it is consistent with the development in those countries which already have relevant provisions or are envisaging these in their plans for legislative reforms, to make the proceeds ultimately available to both groups by distributing the remuneration between performers and producers of phonograms in a way similar to that in which the royalties paid for broadcasts and performances are split between composers and music publishers by the performing rights societies. However, the legal bases from which the various countries proceed differ and, as had already been apparent at The Hague, it is not possible at the present time to agree on an international level. Many proposals were made in Rome for a more specific definition of the recipient of the remuneration. Thus, the Belgian Delegation had taken up the Lenoble proposal, to the effect that the right to remuneration be granted to producers, but that the obligation to allow the performers a share in the remuneration be imposed upon them at the same time. It did not, however, seem possible to reach agreement on such a system. Countries which lay stronger emphasis on the protection of performers opposed it. For example, the Ministerial Draft of a new German Copyright Law would grant the right to the performers and would impose upon them the obligation of allowing the producers a share in the proceeds. Such a provision comes close to the Lenoble proposal as far as its practical effects are concerned, but differs from it in that it gives primacy to the performers on the basis that they are the ones whose contribution primarily deserves recognition. On the other hand, the attempts made to provide in the Convention that the performers are to be granted at least a share in the proceeds, foundered on the resistance of the British Delegation: The 1956 Copyright Act grants producers of phonograms the exclusive right of authorizing the use of phonograms for broadcasts and public performances. Consequently, the producers are the beneficiaries of the licensing agreements. It is true that the phonograph industry of Great Britain nowadays grants performers a share in the proceeds. There is, however, no obligation to do so. In the view of the British Delegation, the interests involved are thereby balanced in an objective manner, and it is not advisable to jeopardize, by amending the relevant provisions of the law, the place between the conflicting interests within the framework of existing legislation.

4. Declarations of reservations are admissible: According to Article 16 the contracting countries may, by means of a notification to be deposited with the Secretary-General of the United Nations, declare that they will not apply the provision of Article 12 or that they will limit its application to certain uses. In this connection it is possible to make a restriction to the effect that remuneration must be paid when phonograms are used for broadcasting, but need not be paid when they are used for other forms of communication to the public. It is also possible to differentiate between various types of broadcasts (e.g., commercial broadcasts and broadcasts of a cultural nature) and between various types of communications to the public (e.g., performances in public restaurants and performances on the premises of clubs).

5. Fairness demands that payments for secondary uses should not pass in a one-way flow from one contracting country to another. There was agreement that, in respect to the obligation to pay remuneration, national treatment may be withheld in the absence of reciprocity. In this connection, it was advisable to choose a uniform criterion, irrespective of whether the rights of performers, of producers of phonograms, or of both, are involved. The criterion chosen was the nationality of the producer of the phonograms, which is in keeping with the fact that nationality is the most important criterion in connection with the protection of producers of phonograms (cf. II C 2).⁶

The following further reservations are also admissible:

a) In the case of phonograms the producer of which is not a national of another contracting country, any contracting country may exclude the application of Article 12. If, for example, a performance is fixed in contracting country A by a producer who is not a national of a contracting country, performers will enjoy in contracting country B the protection of Article 7; and the producer, too, will be protected, in accordance with Article 10, from unauthorized reproduction in contracting country B (unless B has excluded the criterion of fixation). Payment of remuneration for secondary uses, however may in such a case be excluded by virtue of a declaration of reservation, regardless of whether the exclusion pertains to the rights of performers, of producers of phonograms, or of both.

6. An exception from the rule was also provided for in this connection, for the reasons mentioned in II C 2 above, to the benefit of the Scandinavian countries: contracting countries which, at the time of the signature of the Convention, protect producers of phonograms solely on the basis of the criterion of fixation may couple the declaration that they will apply, with reference to Art. 5, this criterion alone, with the further declaration that they will also apply the criterion of fixation, instead of nationality, for the purposes of Article 16(1)(a) (iii) and (iv) (Article 17 of the Rome Convention).

b) In the case of phonograms the producer of which is a national of another contracting country, the protection may be limited, in extent and duration, to that granted by the contracting country of which the producer is a national to phonograms the producer of which is a national of the country which makes the relevant reservation. This fully takes into account the demand for reciprocity: The obligation to pay remuneration is inoperative, in whole or in part, in the contracting country which has made the reservation, if protection is inexistent, in whole or in part, in the contracting country of which the producer is a national. Apart from limiting the extent, it is also possible to reduce the duration of the protection to the duration granted in the country of production: If the country of production grants a right to remuneration for a period of 20 years, but the country in which the protection is claimed grants this right for a period of 50 years, no protection exceeding 20 years need be granted in the country in which protection is claimed to phonograms of the country of production. Thus, as far as duration of protection is concerned, reservation results in comparison of terms.

6. Lastly, a decision had to be made on the question of whether denial of national treatment was also to be admissible if recipients of compensation are defined differently in the country of production from the protecting country.

The question was gone into in great detail, and it was found, first of all, that under no circumstances must all differences in definition of beneficiaries be allowed to provide a cause for withholding national treatment. If, for example, it is provided in country A that the right to remuneration belongs to the producers, subject to the obligation of allowing the performers a share in the proceeds, while, on the other hand, country B provided that the performers are the owners of the right but are obliged to allow the producers a share, then, in view of the ultimate affinity existing between the two provisions, exclusion of the protection in the mutual relations of these countries would be manifestly wrong. A similar conclusion was reached in respect to those cases where, in country X, the right to remuneration is granted only to performers and, in country Y, jointly to performers and producers: In actual practice, it is to be expected that the performers of country X will grant the producers—in a way similar to that in which such participation is granted by the authors to the music publishers—a share in the proceeds on a contractual basis. In such a case, too, there are consequently no grounds for allowing national treatment to be withheld.

The point on which it proved the most difficult to form a conclusive opinion was the relationship between countries which, like Great Britain, grant the right to remuneration to producers only and those which award the right to performers or ensure the latter's participation on a statutory basis. Several

delegations which attached special importance to the protection of performers inclined to the view that in such a case denial of national treatment ought to be admissible. However, the ready argument that no contracting country aiming to protect performers could be reasonably expected to impose upon those who communicate a phonogram to the public the obligation of making payments to producers of phonograms, did not prove sound in this context. If, for example, phonograms, the producer of which is a British subject, are broadcast or used for communication to the public in Argentina, the person who causes the broadcast to be made in Argentina is, of course, not liable to make any payment to the British producer, but, in pursuance of Argentine law, to the performers. Producers become beneficiaries only in the converse situation, that is, if records manufactured by an Argentine producer are imported into England and used there for communication to the public. For the rest, it was realized that producers even in those countries where they are sole statutory beneficiaries, have already adopted the practice of granting performers a share in the proceeds on a contractual basis and that in view of the existing political development, no change in this practice is to be expected. Also of interest in this connection was the statement made by Mr. Leuzinger, Secretary-General of the International Federation of Musicians, in his capacity as observer, that the performers were convinced of the possibility of reaching an understanding with the phonograph industry and would therefore welcome a decision not to apply the denial of national treatment in the cases considered in this context.

The outcome of the deliberations was that Article 16(1)(a)(iv) provides that difference of beneficiary is not to be considered as a difference in extent of protection. In adopting this provision, the Conference drew the appropriate conclusion from the conviction that, notwithstanding differences in statutory provisions concerning the holder of the right to remuneration, the payment of remuneration will, in all contracting countries, ultimately benefit both performers and producers of phonograms. It is to be anticipated that collection of the remuneration will be entrusted to performing rights societies, which will make distributions both to performers and to producers of phonograms.

D. Formalities

The question whether and how the protection of phonograms, and of the performances which are fixed thereon, may be made dependent upon the observance of formalities has been settled in Article 11 of the Rome Convention.

1. In Germany, we take the view that the protection of phonograms, and of the performances fixed thereon, is possible, as in the case of copyright, without any formalities. This view is also shared by other Continental coun-

tries. For Americans, on the other hand, the need to observe formalities is understandable, if only because even in the case of the protection of authors they still adhere to the prerequisite of a copyright notice. Moreover, the British Copyright Act also requires that formalities be observed.

2. It was therefore not possible to incorporate in the Rome Convention a provision along the lines of Article 4(2) of the Revised Berne Convention, to the effect that protection is to be granted regardless of the observance of formalities. Rather, a provision was devised along the lines of the provision concerning formalities contained in the Universal Copyright Convention (Article III, paragraph 1). Contracting countries may decree formalities. However, they must regard them as having been fulfilled if all copies in commerce, or their containers, bear the symbol (P) accompanied by the year date of first publication, placed in such a manner as to give reasonable notice of the claim of protection. If, on the copies or on their containers, there is no indication of the producer or of his licensee (his name, trademark or other appropriate designation), the notice must also include the name of the owner of the rights of the producer; furthermore, if the copies or their containers fail to indicate the principal performers, the notice must also include the name of the person who, in the country of fixation, owns the rights of such performers.

IV. MINIMUM RIGHTS OF BROADCASTING ORGANIZATIONS

Minimum rights of broadcasting organizations are set forth in Article 13 of the Rome Convention.

1. The provisions of Article 13 agree, apart from alterations in wording, with those of The Hague Draft. A substantial divergence, however, is to be found in the provisions of Article 16, concerning the admissibility of declarations of reservation: The possibility of excluding the application of the provisions concerning the protection of broadcasting organizations has been substantially reduced.

The main factor responsible for the change in Article 16 was a change in the attitude of the United States. Both in Monaco and at The Hague it had been pointed out by the American experts that, for the time being, the United States was not prepared to protect broadcasts by granting property rights in them. It is true that it was decided by the Supreme Court of the State of New York in the *Metropolitan Opera* case⁷ that the unauthorized fixation of a broadcast constituted an act of unfair competition not only in

7. *Metropolitan Opera Assn. et al. v. Wagner-Nichols Recorder Corp. et al.*, 101 N.Y.S. 2d 483 (Sup. Ct. 1950).

relation to the performers but also in relation to the broadcasting organization. Furthermore unauthorized rebroadcasting is prohibited by the provisions of the Federal Communications Act⁸; deliberate infringements are liable to prosecution and may entail withdrawal of the broadcasting license. No interest formerly existed in protection under private law on the part of American broadcasting organizations.

This attitude, however, has changed. American broadcasting organizations have realized that the recognition of property rights is useful, at any rate as far as international relations are concerned. Under these circumstances the United States was no longer interested in the possibility, provided for in Monaco and at The Hague, of excluding any provisions concerning the protection of broadcasting organizations. Consequently, it was possible to limit considerably the right to make reservations concerning the application of the relevant provisions: the Rome Convention admits reservation in respect to one right only, namely the right to protection from communication to the public of television broadcasts (Article 16(b)).

2. The rights of broadcasting organizations with respect to which no reservations may be made, relate to rebroadcasting, fixation of the broadcast, and reproduction of such fixation. It makes no difference in this connection whether the broadcast is by radio or television.

a) Broadcasting organizations may authorize or prohibit the rebroadcasting and the fixation of their broadcasts. Rebroadcasting, within the meaning of the Convention, is the simultaneous transmission of a broadcast of another broadcasting organization (cf. II D 4 above). In the event of *subsequent* transmission, the interests of the broadcasting organizations are safeguarded by the fact that their consent is required for fixation, which is the prerequisite for any subsequent transmission.

Like the rights of performers and producers of phonograms, the rights of broadcasting organizations are infringed even by partial use of protected broadcasts. Accordingly, fixation is not permitted, even if only extracts of a broadcast are the subject of the fixation. It was proposed by the Austrian and Swiss Delegations in this connection that, in conformity with the provisions embodied in the European Convention for the Protection of Television Broadcasts, it should be made clear that even the fixation of individual images is not permitted. The majority of delegations, however, took the view that the incorporation of so detailed a provision in an international convention on neighboring rights was not advisable. Accordingly, the decision as to whether the mere recording of individual images is to be regarded as fixation of a

8. 47 U.S.C. §325.

part of the broadcast is left to the legislatures and courts of the contracting countries.

b) Broadcasting organizations furthermore enjoy the right to authorize or prohibit the reproduction:

- (i) of fixations, made without their consent, of their broadcasts⁹
- (ii) of fixations, made in accordance with the provisions of Article 15, of their broadcasts if the reproduction is made for purposes different from those referred to in those provisions.

3. Protection from communication to the public of television broadcasts has, in accordance with The Hague Draft, been settled in such a way that broadcasting organizations enjoy the right of authorizing or prohibiting the communications to the public of television transmissions if such communications are made in places accessible to the public against payment of an entrance fee. It is left to the domestic laws of the various countries to determine the conditions of the exercise of this right.

A proposal aiming at the deletion of this provision was as unsuccessful as the proposals to extend protection to all instances of communication to the public of television broadcasts, or at any rate to those cases where the communication is made for commercial purposes.

The reason that, in the case of television transmissions (but not in the case of radio broadcasts), protection is granted from communication to the public, is found in the recognition of a special interest on the part of the broadcasting organization: When sports events, theatrical performances, etc., are televised, there is a danger that there might be a drop in attendances at such events. This danger is increased if the transmission is carried in public places. With regard to the broadcasting organizations' bargaining position vis-à-vis those who organize such events or performances it is important for the broadcasting organizations to be able to prohibit communications to the public. To be sure, the argument loses weight as the number of private owners of television sets increases: If it is possible to watch the broadcast at home, the danger that there might be a drop in attendance at sports events, theatrical performances, etc., as a result of the television broadcast, is no longer increased by the fact that the transmission is also communicated to the public in restaurants and other public places. It therefore seems appro-

9. What has been stated in footnote 3, *supra*, p. 222, must also apply to the interpretation in this instance: Since the case of a fixation made without the performers' consent under the exceptional provisions of Article 15 is specially provided for in (ii), Article 15 (i) is logically to be limited to those cases where the fixation was made without the *required* consent.

priate that the Convention does not provide for any protection from communications in hotels, restaurants, etc., but, rather, limits the protection to communications for which a special admission fee is charged and, in particular, in cinemas, where the pictures are exhibited enlarged and thus attract more people.

This development is most advanced in the United States. There, communication to the public of television broadcasts has, like that of radio broadcasts, long been established and not objected to by the broadcasting organizations. In view of this, Article 16(1)(b) permits contracting countries to exclude the application of Article 13(d) by a declaration containing the relevant reservation. If such a reservation is made, the other contracting countries are not obliged to protect broadcasting organizations, which have their headquarters in the country which has made the reservation, from communications to the public of their television broadcasts.

In addition, the contracting countries are entitled, even without the declaration of such a reservation, to determine in their domestic legislation the conditions under which the right in respect of communications to the public may be exercised. The concept "conditions" of exercise is to be interpreted in accordance with the meaning a similar phrase has in the Revised Berne Convention, that is, that provision may also be made for compulsory licenses.

V. TERM OF PROTECTION

In setting forth the term of protection, Article 14 of the Rome Convention confines itself to provisions concerning the minimum period of protection. If the contracting countries, in their domestic legislation, make provision for a longer period of protection, it follows from the principle of national treatment that this longer period is also available to the performers, producers of phonograms and broadcasting organizations enjoying the protection of the Convention. For the reasons set forth in (3) below, it was decided not to make any provision within the framework of Article 14, regarding comparison of terms of protection.

1. Article 14 specifies, in accordance with The Hague Draft, that the minimum term of protection must be 20 years.

There was no dearth of proposals for other terms: Austria, supported by France, suggested a period of protection of 30 years, the United States one of 25 years, Poland one of 10 years. These proposals were unsuccessful: the majority of delegations voted in favor of a minimum term of 20 years. The running of the minimum term commences:

a) With respect to phonograms and the performances incorporated thereon: at the end of the year in which the fixation was made;

b) With respect to performances not fixed on phonograms: at the end of the year in which the performance took place;

c) With respect to broadcasts, at the end of the year in which the broadcast took place.

2. In connection with these provisions, account was taken, *inter alia*, of the following:

a) The minimum period is to be calculated, both for unpublished and published phonograms, from the date of the fixation. The Hague Draft differed on this point in that it provided, for published phonograms, for a term to be computed from the date of first publication. This proposal met with resistance from the Scandinavian countries, whose new copyright laws apply the date of first fixation also in the case of published phonograms. In complying with the wish of the Scandinavian countries that regard be shown for this rule of their domestic law, the Conference took into account that the Convention decrees only the minimum period of protection and that there is consequently nothing to prevent contracting countries, in their domestic legislation, from calculating the term of protection of published phonograms from first publication.

b) The provisions of Article 14(b) and (c) (regarding performances and broadcasts) were opposed by the Czechoslovakian Delegation as unnecessary. It argued that duration of protection is an issue only where a fixation is concerned.

This argument is, in principle, correct: The protection of performers from the fixation or broadcasting of their performances, like the protection granted to broadcasting organizations from rebroadcasting and fixation of their broadcasts need only be available at the time of the performance or broadcast. Still, the provisions contained in Article 14(b) and (c) serve a purpose. As to performers, performances fixed on films are a case in point. If the performer consented to the film being made, then, under the provision of Article 19 (see point VII B 1 below), he may not assert any further rights with respect to the use of the film. If, however, the film was made without his consent, he may, under Article 7, prohibit the reproduction of the film until the term of protection has expired. As to broadcasting organizations, establishment of a term of protection and the date upon which it commences is likewise necessary, in view of the provisions concerning the reproduction of fixations of broadcasts (Article 13(c)).

3. Bearing in mind the possibility that domestic legislation might fix a longer term of protection than required under the Convention, the Hague Draft, like the Geneva and Monaco Drafts, provided for a rule also contained

in copyright conventions, on comparison of terms: No contracting country is to be obliged to grant protection for a longer period than that granted by the legislation of the country of origin.

The question whether it was necessary to incorporate a provision on comparison of terms in a convention on neighboring rights was examined more carefully in Rome. As importance attaches to the term of protection only in the case of those rights which relate to the use of fixations, it was a matter of investigating the reasonableness of comparison of terms with respect to these rights. It was found that in assessing this question it is necessary to distinguish between the right to remuneration provided for to secondary uses and the other rights:

a) In the case of the right to remuneration provided for in Article 12 for the public communication of phonograms, important practical significance attaches to the comparison of terms. If contracting country A grants the right to remuneration for a term of 20 years, and contracting country B for a term of 50 years, calculated from the date of fixation, it would be inconsistent with the principle of reciprocity if the users in country B were to make payments for the use of phonograms originating in country A up to the expiration of the 50-year term, while users in country A were only to make such payments until the expiration of the 20-year term. This matter was taken into account in the Convention by means of the provision of Article 16(1) (a) (iv), which has already been mentioned: In the case of phonograms the producer of which is a national of another contracting country, contracting countries may limit the protection from secondary uses, in extent and duration, to that which is granted by the other contracting country.

b) The position is different with regard to the remaining rights relating to fixation.

The most important of these is the right of reproduction of producers of phonograms. The terms of protection provided for in the actual or proposed domestic laws of the various countries differ in length. For example, the British Copyright Act specifies a term of protection of 50 years, and the German Ministerial Draft one of 25 years. It is to be noted, however, that even after expiration of the term of protection there still exists, in a number of countries, the possibility of prohibiting the unauthorized reproduction of records as unfair competition; in the German Ministerial Draft, to eliminate any doubts as to the applicability of the law against unfair competition in such cases, it is specifically provided that the protection granted under other provisions of the law is not affected by the special provisions concerning the rights of producers of phonograms. It would therefore be illogical if Great Britain, by invoking the comparison of terms of protection,

were to grant records of German origin only 25 years' protection, while, in Germany, records of British origin are protected from reproduction even after the expiration of the 25-year term by the law of unfair competition.

In the case of performers, the question only arises—apart from the right to remuneration for secondary uses—in those special cases where protection is granted from the reproduction of a fixation. In view of the limited range of these provisions there are no sufficient grounds for providing for a comparison of terms. For broadcasting organizations, where protection from the reproduction of fixations is at stake, the position is similar to that of the producers of phonograms: here, too, it is to be expected that even after expiration of the term of protection claims will be made on the basis of the law of unfair competition.

Examination of these questions thus led to the conclusion that it is sufficient to provide for a comparison of terms, as is done in Article 16(1)(a)(iv), with regard to right to remuneration for secondary uses. Within the framework of Article 14, no rule concerning a comparison of terms is required. As regards the legal structure of the Convention, this decision made it possible to dispense with the concept of country of origin, the definition of which would have met with considerable difficulties, in view of the fact that the Convention specifies in Articles 5 to 7 a variety of criteria for all three groups of beneficiaries.

VI. EXCEPTIONS

As in the case of copyright, there arises in connection with neighboring rights, the question of the extent to which contracting countries are to be permitted to make exceptions from the rights guaranteed under the Convention, including, in particular, those which, in copyright literature, are usually described as "small exceptions".

1. In The Hague Draft, provision was made for contracting countries to make exceptions from the protection of performers, producers of phonograms and broadcasting organizations, with respect to private use, use of short excerpts in connection with the reporting of current events, ephemeral fixations made by broadcasting organizations with their own facilities and for their own broadcasts, and uses which serve exclusively educational purposes.

However, as was emphasized by the comments of a number of governments, such an enumeration of permissible exceptions fails to meet the situation. It was, for instance, pointed out by the Scandinavian countries that it was also necessary to permit exceptions for quotations and other special cases known in the field of copyright. Comparison with the relevant provisions of the German Ministerial Draft also demonstrated that the exceptions pro-

vided for in The Hague Draft were insufficient. What of performances at events which do not serve a business purpose and to which listeners are admitted free of charge, or the testing, in business enterprises, of magnetic tape and other equipment, which is customary in conjunction with the marketing of such equipment and which serves the purpose of instructing clients and which also frequently relates to making reproductions of phonograms?

Experience with the Revised Berne Convention has made us aware of the difficulty of arriving at an equitable definition of permitted exceptions. Article 11 of the Revised Berne Convention, as formulated by the Brussels Conference, grants to composers the right of public performance without allowing any restriction thereof. In the General Report, however, as a result of the deliberations which had taken place in the Committee appointed by the Conference, it is stated that the domestic legislation of countries subscribing to the Revised Berne Convention may make certain minor exceptions, in particular with reference to religious ceremonies, military parades, and educational purposes. This has, however, given rise to the vexatious problem of whether, in interpreting the Convention, it is admissible to fall back on the General Report in cases where the wording of the relevant Conventional provision is unequivocal.¹⁰

Although the right of reproduction is the most important of the rights which constitute copyright, it is not—unlike the rights of performance, broadcasting, filming and translation—dealt with in the Revised Berne Convention. The reason for this omission lies in the fact that in the event of the right of reproduction being granted by the Convention, provisions would also be required to specify the exceptions which countries subscribing to the Convention are allowed to provide for in their domestic legislation. Agreement on such provisions would be very difficult.

In view of this situation it was proposed by the German Delegation that the problem should be solved by allowing contracting countries to apply to the provisions on neighboring rights the exceptions from the protection of authors contained in the domestic copyright legislation of the various countries. This proposal was agreed to by the Conference: the enumeration of specific exceptions was maintained and supplemented by a provision referring to the exceptions provided for in the domestic copyright legislation of the various countries.

2. Accordingly, Article 15(1) mentions certain cases where contracting countries may provide, in their domestic legislation, for exceptions from the

10. Cf. in this context Troller, "Die internationalen Beziehungen in den Referentenentwürfen zur Urheberrechtsreform" (1955) and my review of Troller's paper in *Rabels Zeitschrift* 1956, p. 187 et seq.

protection guaranteed by the Convention. There are the cases for which provision had already been made at The Hague, viz. private use, the use of short excerpts in connection with the reporting of current events, and ephemeral fixations effected by broadcasting organizations by means of their own facilities and for their own broadcasts. The exception provided for at The Hague, regarding exclusive use for educational purposes, has been extended on the basis of an Indian proposal, by the inclusion of use solely for the purposes of scientific research.

3. Article 15(2) provides that contracting countries may limit the protection of performers, producers of phonograms and broadcasting organizations in the same manner and to the same extent as the protection of authors is limited in their domestic copyright legislation.

However, neighboring rights may not be made subject to compulsory licenses,¹¹ as are authors' mechanical reproduction rights and broadcasting rights in a number of countries (as permitted by Articles 11bis(2) and 13(2) of the Revised Berne Convention); the *ratio legis* underlying such limitations of authors' rights is not applicable to neighboring rights. Accordingly, Article 15(2), sentence 2, provides that compulsory licenses may be imposed only to the extent to which they are compatible with the Convention. Compulsory licenses for the public communication of television broadcasts, which are allowable under Article 13(d), are thus an example of compulsory licenses which are compatible with the Convention. The right to remuneration for secondary uses may be thought of, in the legal sense, as an exclusive property right limited by a compulsory license.

VII. NEIGHBORING RIGHTS AND MOTION PICTURES

A. *The Motion Picture Clause of the Convention*

1. A Convention which protects performers and broadcasting organizations from certain types of uses of their performances and broadcasts, necessarily also extends to the field of motion pictures.

In this connection, it must be asked whether the general rules concerning the protection of performers and broadcasting organizations are appropriate when applied to fixations which are intended for visual or audio-visual communication to the public, or whether, in view of the particular nature of films, special provisions are needed.

11. The notion of compulsory license is to be construed in this context in the wider sense, in which it also includes statutory licenses.

2. This dilemma is exacerbated by the unsettled issues which plague international motion picture law. These issues proved as disturbing in Rome as they had done at The Hague. For one thing, protection of performers from the use of their performances in films was frequently confused with the protection which the authors of the films enjoy. For another, it was proposed that limitations on the protection of neighboring rights should be imposed only upon performances in cinematographic works, and not in other types of films. The uncertain location of the demarcation-line between cinematographic works and other types of films, especially in the television field, was forgotten. It is to be hoped that the studies exploring ways to reform international protection of motion pictures, which were launched with such vigor, will contribute to the clarification of the issues involved.

The situation was further complicated by the misgivings expressed by representatives of the film industry. They were concerned that recognition of neighboring rights might create new problems for their industry. They would have preferred, actually, complete immunity of films to the effects of neighboring rights.

3. Article 6 of the Monaco Draft had provided the most extreme limitation, on the application of the Convention to films, of any of the preliminary drafts. It provided that no provision was to be interpreted as applicable to the reproduction, or any other use, of motion pictures or other visual or audio-visual fixations. Acceptance of such a provision would, *inter alia*, have led to a very severe, apparently unwarranted, restriction of the rights of broadcasting organizations, which would enjoy protection only for their live television broadcasts and not for their television broadcasts using fixations (commercial films or fixations made by the broadcaster for use in broadcasting).¹² While The Hague Draft adopted the motion picture clause of the Monaco Draft, protection of broadcasting organizations was excluded from the exception. In the case of performers The Hague Draft provided that the Convention was not to apply to the reproduction of performances fixed on films where the purpose of the reproduction is different from the purpose understood by the performers when they consented to the original fixation.

4. Article 19 of the Rome Convention replaces the motion picture clause of The Hague Draft. For all practical purposes it comes close to its predecessor, but, in line with a proposal of the American Delegation, it is simpler and clearer. It provides that notwithstanding anything in the Convention, Article 7 shall have no further application once a performer has consented to the incorporation of his performance in a visual or audio-visual fixation.

12. Cf. in this context Straschnov's justified criticism of the motion picture clause of the Monaco Draft, in "Les droits voisins", p. 177 et seq.

B. Effect of the Provision on Performers and Broadcasting Organizations

1. Under Article 7 of the Rome Convention, performers enjoy protection from the fixation, on phonograms or films, of their previously unfixed performances.

Once they have consented to the making of the film, then, under Article 19, further application of Article 7 is excluded: performers can only prohibit the reproduction of a film made without their consent. Conversely, the protection of Article 7(1)(c)(ii) is inapplicable to films: performers cannot prohibit the use of a film, as they can of a phonogram, for purposes other than those for which they gave their consent.

There is good reason to doubt whether this restriction is just. If musicians consent to a sound recording for the purpose of production of commercial records, they may prohibit the use of the records for the production of films. If, on the other hand, they participate in the making of a film, they cannot prohibit the use of the sound-track of the film for the production of commercial records. This is not, to say the least, a consistent solution. Nor, in our opinion, does it appear why the actors who took part in the making of a film should not be protected from reproductions for purposes other than those to which they originally consented—why they should not, say, have the right to prohibit the incorporation of their performances in another film.

The German Government therefore proposed that performers should also be protected from reproductions of this kind in the case of films. However, in view of the existing lack of clarity, and the resistance offered by the film industry, the proposal was not successful.

2. With reference to broadcasting organizations, on the other hand, as previously at The Hague, no restriction was provided for. Broadcasting organizations enjoy, both with respect to television and radio broadcasts, protection from rebroadcasting, fixation of the broadcast or reproduction of such a fixation, regardless of whether the broadcast is a live broadcast or based on an audio, visual, or audio-visual, fixation. Nor does the protection of television broadcasts from communications to the public apply only to live broadcasts, but extends also to broadcasts made from films, including television recordings. In making this provision, the necessary conclusion was drawn—at least in the sphere of broadcasting—from the close connection which nowadays exists between film and television.

C. The Film Producer

Protection granted under the Convention to producers is confined to producers of phonograms. Film producers in their capacity as producers of visual or audio-visual fixations, remain excluded from protection.

This is in accordance with the position of the preliminary Drafts. It takes account of the fact that film producers themselves do not want to be protected by neighboring rights, as they consider such rights to constitute a danger to recognition of their copyright in the film or at any rate of their right to exercise the property rights belonging to the authors of the film.

The demarcation line which was thus drawn was unavoidable on an international level at this time. It may, however, be doubted whether it will be possible to maintain it in the long run and whether it will not be necessary, sooner or later, to draw the obvious conclusions from the unmistakable affinity between aural and visual fixations.

1. This loophole in the provisions is particularly apparent in the case of sound tracks of films: Manufacturers of phonograms are protected from the use of their records for the production of sound tracks of films. Film producers, however, lack any protection from the use of the sound tracks of their films for the production of records. It is true that, where copyrighted music is used, the manufacturer of phonograms, when taking over the music of the film, interferes with the composer's copyright. As, however, the composer assigns his rights to the film producer only for the purpose of film use, the producer is unable to invoke copyright protection on his own behalf. Accordingly, unless domestic legislation goes further than the Convention—as does, for example, the German Ministerial Draft—, film producers are no more in a position to prohibit the use of the sound tracks for the purpose of producing commercial phonograms in the case of music protected by copyright than they are in the case of music in the public domain.

2. Apart from this, however, it will not be possible, in the long run, to avoid the question whether the producer is to be granted a neighboring right with respect to visual fixations and thus in the film as a whole.

Such protection would be in the interest of the producers, particularly in the case of films which are not cinematographic works, as it would—unlike copyright in photographs, which may be claimed in the individual pictures of the films, but only in respect to them—relate to the entire film as such. This kind of protection may be desirable even in the case of cinematographic works and would not prejudice the protection enjoyed by the authors. Such solution requires, of course, a theoretical differentiation between cinematographic works, objects of copyright, and audio-visual fixations, objects of neighboring rights;

it will, however, in all probability, take considerable time before this view will achieve international recognition.

On the whole, the relationship that the Rome Convention establishes between neighboring rights and films is satisfactory as far as the rights of the broadcasting organizations are concerned. However, as far as performers and producers of phonograms are concerned, there are some loopholes in the Convention. In view of the practical differences that exist between the distribution of commercial records and films, the question of the protection from secondary uses arises only with respect to records. But in all other respects, the need for protection is the same for phonograms as it is for films. It is therefore to be foreseen that in the event of a revision of the Convention, the problem of solving the questions concerning films, as far as they are still excluded from protection, will occupy a prominent position.

VIII. TRANSITIONAL AND FINAL PROVISIONS

The transitional and final provisions are contained in Articles 20 to 34 of the Rome Convention.

1. Article 20 regulates transitional problems: Rights which had been acquired in a contracting country at a time prior to the effective date of the Convention in that country are not affected. On the other hand, a contracting country is not bound to apply the provisions of the Convention to performances, broadcasts and phonograms which took place or were made in that country prior to the effective date therein of the Convention.

2. Articles 21 and 22 recognize the possibility of claiming protection under sources of law other than the Convention and reserve the right to contracting countries to enter into special agreements. In particular, the provision of Article 21, to the effect that protection granted under the Rome Convention does not exclude protection from other sources, makes it clear that the Convention does not exclude protection from unfair competition. The right, reserved to contracting countries in Article 22, to enter into special agreements among themselves which grant performers, producers of phonograms and broadcasting organizations more extensive rights than those granted by the Rome Convention, or contain other provisions not contrary to that Convention, corresponds to the right to conclude special agreements which Article 20 of the Revised Berne Convention reserves to member countries of the Berne Union.

3. Reference has already been made—when discussing the relationship with copyright (II A 2)—to the provision contained in Articles 23 and 24(2),

to the effect that the signing of the Convention and accession thereto is open only to countries which are parties to the Berne Union or the Universal Copyright Convention. A further prerequisite of signature of the Convention is invitation to participate in the Rome Conferences, and of accession, such invitation or membership in the United Nations.

Like the original text of the Convention itself, instruments of ratification, acceptance and accession are to be deposited with the Secretary-General of the United Nations. Denunciation of the Convention may be declared after the expiration of a period of five years after the Convention came into effect in the country concerned. It is effected by a notification to the Secretary-General of the United Nations and takes effect twelve months after receipt of such notification. A country ceases to be party to the Convention without notice of denunciation if it is no longer a party to either of the two multilateral Copyright Conventions (Revised Berne Convention and Universal Copyright Convention) (Articles 24(3) and 28).

4. The number of the ratifications, acceptances or accessions which should constitute the prerequisite of the coming into force of the Convention was disputed.

The draft of the final clauses, as prepared by the three international organizations, provided that three adherences should suffice. The French and Italian Delegations wanted to make the coming into force of the Convention dependent upon adherence by 12 countries. The corresponding provision in Article IX of the Universal Copyright Convention was invoked in this connection. It is obvious, however that the position that the neighboring rights convention should only come into force after a large number of adherences was influenced by the general reservations with which these two delegations viewed the Convention.

The German Delegation proposed that adherence by six countries should be sufficient to make the Convention come into force. We pointed out that the Universal Copyright Convention could not be used as a model in this connection: copyright is a classic field; legislation to protect authors, which makes it possible to become a party to the Universal Copyright Convention, exists in a large number of countries. Neighboring rights, however, constitute pioneer territory, where the majority of countries have yet to build the foundations of legal protection. Adherences will therefore be made only gradually. The first countries to adhere will probably be those which already provide, or plan to provide, in their domestic legislation for protection of neighboring rights along the lines of the Convention. In this connection, Great Britain, three Scandinavian countries, Austria and—after completion of its copyright reform—the German Federal Republic, may be mentioned.

In the event of adherence by 6 countries, it seems appropriate, in view of the interest in reciprocity, that the Convention should come into force; legitimate interests of countries which have not yet adhered will not be affected thereby.

The German proposal was accepted in Working Group No. 3 by a large majority. However, the French and Italian Delegations repeated their proposal both in the Main Commission and at the Plenary Meeting, where they ultimately reduced the number from 12 to 9, but were not successful in asserting their view when the matter was put to the vote. Instead, the provision contained in Article 25 was accepted: The Convention will come into force three months after the sixth instrument of ratification, acceptance or accession has been deposited. Subsequently, the Convention comes into force for each country three months after the depositing of its instrument of ratification, acceptance or accession.

5. The procedure for convening revision conferences is provided in Article 29 of the Rome Convention: it may be requested, at the earliest five years after the coming into force of the Convention, by a notification addressed to the Secretary-General of the United Nations, who in turn will notify contracting countries of the request and, in the event of its being supported by at least one-half of the contracting countries, will inform the Director-General of the International Labor Office, the Director-General of UNESCO, and the Director of the Bureau of the Berne Union, of this request. It is then incumbent upon the Directors of these three international organizations to convene a revision conference in cooperation with the Intergovernmental Committee. Also, to clarify this question from the outset, it was provided that acceptance of a revision of the Convention requires a two-thirds majority of the countries attending the revision conference, provided that this majority includes a two-thirds majority of the countries which are parties to the Convention at the time of the revision conference.

The composition and duties of the Intergovernmental Committee, which is modeled on the Permanent Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention, and which is to be set up 12 months after the coming into force of the Rome Convention, are provided in Article 32. The Committee is to consist of representatives of contracting countries, with due regard to equitable geographical distribution. If there are 12 contracting countries or less, the Committee is to consist of 6 members, if there are 13 to 18, of 9, and if there are more than 18, of 12 members. The Committee's duty is to study questions concerning the application and operation of the Convention, as well as to receive proposals and prepare studies for possible revisions of the Convention.

The duties of the Secretariat of the Intergovernmental Committee are to be entrusted by the Directors-General of the International Labor Office and UNESCO, and by the Director of the Bureau of the Berne Union, to officials of their organizations. These three international organizations, which sponsored the preparatory work of the conference and whose duties include the convening of revision conferences, will thus be the agencies administering the Convention in the future.

6. The Convention has been drawn up in English, French and Spanish. For its interpretation all three texts are equally authentic (Article 33(1)).

In addition, official texts of the Convention will also be drawn up in German, Italian and Portuguese (Article 33(2)). The preparation of these texts is the duty of the governments of the countries having German, Italian and Portuguese as their respective national language. As official texts of the Convention, they will be published by the three international organizations in the same way as the authentic English, French and Spanish texts. For interpretation in case of doubt, the authentic texts are to be relied upon. However, the fact that the German, Italian and Portuguese texts are not merely translations, but enjoy the status of official texts of the Convention, is to be regarded as a public recognition of the importance which these languages have in international life.

264. CORRESPONDENCE Concerning MIDDLETON, "RIGHTS AND ROYALTIES OF FOREIGN AUTHORS AND COMPOSERS IN WAR TIME:" *Stage Performing Rights Fees*.

The following letter dated March 25, 1963, has been received from Dr. E. Roth, Chairman of the Board of Directors, Boosey & Hawkes Limited, London:

The Editor:

My attention has been drawn to Mr. George Middleton's article "Rights and Royalties of Foreign Authors and Composers in War Time" in Vol. 10, No. 1, of October 1962 of your *Bulletin* and in particular to the statement on page 33 of that issue which reads:

"Opera agreements in Europe, as with Strauss, were generally made between composer and music publisher, who in turn leased them separately to each opera house, at fees depending on its 'status'. Unlike stage royalties on a play, the fee was always a flat sum, since box-office receipts of operas are mainly affected by stars or conductors."

As Chairman of this company, which publishes the operas of Richard Strauss (and of other prominent opera composers), may I be allowed to point out that, as far as the world outside the United States is concerned, Mr. Middleton's statement is at variance with the facts? In all these countries stage performing fees have been paid as a percentage of the gross box-office receipts for a very long time. There is one Authors Society in Europe (Société des Auteurs et Compositeurs Dramatique—SACD) established by Beaumarchais in about 1776 for the collection and distribution of stage performing fees of every type of stage performance (plays, operas, operettas, revues) in all countries of "French expression" (France and the Communauté française, Monaco, Luxembourg, French speaking Belgium and French speaking Switzerland). This society collects from theatres in Paris (Académie Nationale and Opéra Comique) 12½%, in the provinces and other countries 10% of the gross box-office receipts. In countries outside the domain of that society it is the publisher who collects 10% for full length operas and proportionately less for shorter works. This has been the general practice for over 100 years.

As far as Richard Strauss in particular is concerned, the agreement of the 31st March, 1935, made between him and his publisher at the time, Adolph Furstner, states expressly that the composer's share in stage performing fees after deduction of the publisher's share must never be less than 7% of the gross box-office receipts.

All this applies equally to opera houses in the Western Hemisphere, such as the Teatro Colon in Buenos Aires. Only the United States is an ex-

ception and opera houses and other organizers of operatic performances still insist on paying flat sums per performance instead of a percentage of the gross takings. This goes back to the heydays of the Metropolitan Opera House when Gatti-Casazza assembled for a comparatively short season all the singing and conducting stars of the world and patrons paid liberal sums for the privilege of attending performances. It seemed right then to pay to the composer a flat sum (then still very considerable) instead of a percentage of the contributions of wealthy patrons. However, all this is a matter of the past. American opera houses are now working on the same system as opera houses in the rest of the world and there is no longer any justification for insisting on flat sums which, in spite of the higher standard of living in the United States, have fallen below the remuneration authors are receiving in Europe. At an average it takes the composer three years to write a full length opera, the mere manual work of writing the orchestral score being enormous. By its very nature an opera cannot have as many performances as a play. To reward the opera composer at a lower scale than the playwright constitutes a great injustice and it is hoped that American opera houses will eventually follow the example of opera houses in the rest of the world and pay percentages of box-office receipts instead of flat sums. It has done no harm to operatic life elsewhere and will do no harm to operatic life in the U.S.A. On the contrary, it may encourage many an American composer to try his hand at opera who at present can ill afford it.

I am, Sir,

Yours sincerely,

E. Roth

MR. MIDDLETON'S REPLY:

April 11, 1963

I appreciate the opportunity given me to comment on Dr. E. Roth's letter of March 25, 1963, re a statement in my recent article.

In connection with operas, the policy of the Office of Alien Property in vesting enemy interests or those taken under "Protective Custody", was to collect and administer all sums payable on such works, subject to copyright, when performed in the United States. This applied to the production of any entire Strauss opera, the fee on which, as Dr. Roth admits, was based upon a flat sum for each performance. OAP also collected fees for the use of any selections from the opera score, its outstanding arias subject to license, orchestral suites or concert selections, radio and TV diffusion, mechanical disks, and even films—as evidenced by the lovely recent *Der Rosenkavalier* in which OAP was associated.

Copies were equally requested and supplied on all basic contracts between foreign composers and their music publishers who had exploitation control of the property. These contracts, which varied in numerous ways, dealt largely with the internal arrangements between the two. OAP in no way interfered with these nor ever moved to prevent the public performance of any opera in this country which contained enemy interests—as did the Richard Strauss-Adolph Furstner 1935 German Agreement, which Dr. Roth pinpoints.

Since I knew that Boosey and Hawkes (as successors in interest) had reported and paid to OAP a flat fee on all Strauss operas, my recollection was that returns on performances, outside the United States, were similarly based. But on re-reading this complicated all-embracing 1935 Agreement, I now find that such payments were based, as Dr. Roth stated in his letter, upon a percentage of gross box office receipts. Not having read the contract for ten years, this minimal error in my article which was due to a faulty recollection, fortunately has no legal significance and in no way affected OAP's administration, in which Boosey and Hawkes efficiently cooperated.

Though all operas have, by recent legislation, been returned to their former owners (with only the enemy royalties being held in the War Claims Fund for any future action), Dr. Roth has suggested an overall reform in one aspect of the present accounting processes for all American opera houses. This reaches into the future. He thus opens a door that could warrant extensive analysis of the many phases of international copyrights and trade customs, which I observed at close range from the vantage point of my official position in OAP. I shall, however, merely make a personal comment on his specific proposal.

His plea to have all opera royalties based only upon box office receipts indicates a commendable hope, without any statistics to support it, that it may thus increase the income of both composer and publisher. How any further administrative expenses, if substantial, might affect the tight budgets under which most opera houses must now function, is moot. Contributions by wealthy patrons to meet yearly deficits on grand opera and great orchestras is almost the general rule. But beyond all the recognized reasons for the great costs involved, rests one fundamental factor which should not be overlooked: The opera itself *does not necessarily constitute the audience drawing appeal*. Box office receipts are undoubtedly influenced by the program presence of great singers and conductors. This principle of such personal participation, in creating and thus appraising financial values, has been legally recognized in the famous Letty Lynton case.¹

1. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F. 2d 49.

Dr. Roth comments that "to reward the opera composer at a lower scale than the playwright constitutes a great injustice." We American dramatists, however, have a powerful Dramatists Guild, which regulates, under a Minimum Basic Agreement, relations between its author and composer members and the stage producing managers. This is in no respect related to any financial contract regarding flat fees or otherwise which the Metropolitan Opera, for example, may make with any European composer or publisher. Dr. Roth's further suggestion as to the existence of different scales of payments between operas and plays is apparently not true in France. According to his letter, the French Society of Authors and Composers (SACD) has royalty percentage payment agreements with all the theatres in Paris and the provinces "for the collection and distribution of stage performing fees of every type of stage performance of [plays, operas, operettas, revues]". The famous Opéra Comique in Paris is among those cited.

Whatever the method of financial accounting on the production of an opera in the United States, the composer will also continue to receive his share of the revenues from all subsidiary rights, as defined above. This is a far cry from the days when, in 1859, Charles Gounod sold outright to his publisher, for 500 francs, all his world-wide rights in his *Ave Maria*, based on the Bach *Prelude*.

Although under mandatory retirement and no longer officially connected with OPA, I shall suggest that Dr. Roth's stimulating letter and my comment be placed in the official files.

Sincerely,

George Middleton

265. CORRIGENDUM to BOGSCH, "THE FIRST DECADE OF THE UNIVERSAL COPYRIGHT CONVENTION."

In the December 1962 issue (10 BULL. CR. SOC. 71), I wrote, at page 74, last full paragraph, that as far as I knew, Canada had not yet issued certificates extending the benefits of the Canadian Copyright Act to such countries parties to the Universal Copyright Convention which are not members of the Berne Copyright Union. I have learned in the meantime that such certificates have been issued on August 7 and October 17, 1962, by the Secretary of State of Canada, so that protection under the Canadian Copyright Act extends to all countries parties to the Universal Convention.

Arpad Bogsch

PART II.

**LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS**

I. UNITED STATES OF AMERICA AND TERRITORIES

266. U. S. CONGRESS. HOUSE.

H.R. 4567. A bill to amend title 17, United States Code (copyrights), to permit a further extension of copyrights for a fifteen-year period and to provide that one-half of the royalties received during that period shall be used to assist promising young composers and authors. Introduced by Mr. McDowell, March 6, 1963, and referred to the Committee on the Judiciary. 4 p. (88th Cong., 1st sess.)

This bill would grant to the proprietor of a copyright in a musical or literary work an additional extension of copyright protection for fifteen years, provided that (A) application for such further renewal and extension expires, and (B) the proprietor of such copyright agrees, with respect to the use of such musical or literary work, during such fifteen-year period, to pay to the Secretary of the Treasury on or before April 1 of each year an amount equal to one-half of all royalties (whether lump sum or periodic in nature) which were received by himself or any other person or persons during the preceding calendar year for use of such musical or literary work.

267. U. S. CONGRESS. HOUSE.

H.R. 4651. A bill to provide civil remedies to persons damaged by unfair commercial activities in or affecting commerce. Introduced by Mr. Lindsay, March 7, 1963, and referred to the Committee on Interstate and Foreign Commerce. 6 p. (88th Cong., 1st sess.)

A companion bill to S. 1038. See Item 273, *infra*.

268. U. S. CONGRESS. HOUSE.

H.R. 5136. A bill to amend title 17, United States Code, with relation to the fees to be charged. Introduced by Mr. Steed, March 25, 1963, and referred to the Committee on the Judiciary. 3 p. (88th Cong., 1st sess.)

A bill to increase the copyright registration fees, as follows:

SEC. 2. Section 215 of said title 17, United States Code, is amended to read as follows:

"FEES.—The Register of Copyrights shall receive, and the persons to whom the services designated are rendered shall pay, the following fees:

"For the registration of a claim to copyright in any work, including a print or label used for articles of merchandise, \$6; for the registration of a claim to renewal of copyright, \$6; which fees shall include a certification for each registration: *Provided*, That only one registration fee shall be required in the case of several volumes of the same book published and deposited at the same time: *And provided further*, That with respect to works of foreign origin, in lieu of payment of the copyright fee of \$6 together with one copy of the work and application, the foreign author or proprietor may at any time within six months from the date of first publication abroad deposit in the Copyright Office an application for registration and two copies of the work which shall be accompanied by a catalog card in form and content satisfactory to the Register of Copyrights.

"For every additional certificate of registration, \$2.

"For certifying a copy of an application for registration of copyright, and for all other certifications, \$3.

"For recording every assignment, agreement, power of attorney, or other paper not exceeding six pages, \$5; for each additional page or less, 50 cents; for each title over one in the paper recorded, 50 cents additional.

"For recording a notice of use, or notice of intention to use, \$3, for each notice of not more than five titles; and 50 cents for each additional title.

"For any requested search of Copyright Office records, works deposited, or other available material, or services rendered in connection therewith, \$5, for each hour of time consumed."

269. U. S. CONGRESS. HOUSE.

H.R. 5174. A bill to provide for the payment of royalties for the public performance of copyrighted musical compositions by means of coin-operated machines, and for other purposes. Introduced by Mr. Celler, March 28, 1963, and referred to the Committee on the Judiciary. 5 p. (88th Cong., 1st sess.)

A new juke-box bill which provides, *inter alia*, for the establishment, in the Copyright Office, of a "Performing Rights Administration under the direction of the Register of Copyrights, who, in addition to his other duties shall hold the position of Performing Rights Administrator." This Administration is to be charged with responsibilities for the collection and distribution of license fees, which would be \$5 annually for each machine.

270. U. S. CONGRESS. HOUSE.

H.R. 5217. A bill to amend title 18 of the United States Code to make it a crime to steal certain trade secrets or to transport stolen trade secrets in interstate or foreign commerce, and for other purposes. Introduced by Mr. McDowell, March 28, 1963, and referred to the Committee on the Judiciary. 5 p. (88th Cong., 1st sess.)

Section 2 of this bill defines a "trade secret" as follows: "'Trade secret' means and includes any confidential technical or other confidential business information, regardless of whether it is in written or other tangible form, which is not generally available to the public, and which gives one who uses it an advantage over competitors who do not know or use it. It includes, but is not limited to, secret formulas, processes, patterns, drawings, specifications, memorandums, maps, lists, statistics, and any copies thereof regardless of by whom made."

271. U. S. CONGRESS. HOUSE.

H.R. 5523. A bill to encourage the creation of original ornamental designs of useful articles by protecting the authors of such designs for a limited time against unauthorized copying. Introduced by Mr. Libonati, April 8, 1963, and referred to the Committee on the Judiciary. 26 p. (88th Cong., 1st sess.)

Identical with H.R. 323, H.R. 769 and S. 776. See 10 BULL. CR. SOC. 179, Items 181, 182 and 183 (Feb. 1963).

272. U. S. CONGRESS. SENATE.

S. 865. A bill to provide for the establishment of the National Academy of Foreign Affairs, and for other purposes. Introduced by Mr. Symington (for himself, Mr. Saltonstall, Mr. Bayh, Mr. Boggs, Mr. Byrd of West Virginia, Mr. Clark, Mr. Engle, Mr. Gruening, Mr. Humphrey, Mr. Inouye, Mr. Long of Missouri, Mr. Mansfield, Mr. McGee, Mr. Moss, Mrs. Neuberger, Mr. Randolph, Mr. Ribicoff, Mr. Smathers, Mr. Williams of New Jersey, and Mr. Yarborough) and

referred to the Committee on Foreign Affairs. 13 p. (88th Cong., 1st sess.)

A companion bill to H.R. 3668 and H.R. 3937. See 10 BULL. CR. SOC. 181, Items 188 and 189 (Feb. 1963).

273. U. S. CONGRESS. SENATE.

S. 1038. A bill to provide civil remedies to persons damaged by unfair commercial activities in or affecting commerce. Introduced by Mr. Javits, March 7, 1963, and referred to the Committee on Commerce. 6 p. (88th Cong., 1st sess.)

A companion bill to H.R. 4651. Essentially the same as H.R. 7833, 86th Cong., 1st sess. (1961); S. 1036, 87th Cong., 1st sess. (1961); H.R. 10038, 87th Cong., 2d sess. (1962); and S. 2784, 87th Cong., 2d sess. (1962).

274. U. S. CONGRESS. SENATE. COMMITTEE ON THE JUDICIARY.

Patents, trademarks, and copyrights; report of the Committee on the Judiciary, United States Senate, made by its Subcommittee on Patents, Trademarks, and Copyrights, pursuant to S.Res. 267, Eighty-seventh Congress, second session as extended. 14 p. Report No. 107, April 3, 1963 (88th Cong., 1st sess.)

The annual report of the activities of the subcommittee covering the second session of the 87th Congress. The review of copyright matters includes brief notes on two enactments (Pub. L. No. 87-688: extension of copyright term, and Pub. L. No. 87-773: counterfeiting of phonograph records); the design bill (S. 1884); and the following statement with respect to the copyright law revision program:

"The Register of Copyrights has informed the subcommittee that the Copyright Office is presently engaged in the drafting of a general revision bill. The Register has indicated that the bill to be submitted to the Congress will not in all respects follow the tentative recommendations made by the Register to the Congress in his report of July 10, 1961. The Register has indicated that he is now convinced that the recommendation made in his report for the adoption of a concept of "public dissemination" to supersede for certain purposes the present concept of publication would create new problems. The Register has also indicated that he finds considerable merit in the proposal for the adoption of a single Federal copyright law rather than to retain the present system of common law protection for works that have not been made avail-

able to the public. The Copyright Office has also stated that it is giving serious consideration to the views of those who favor a life-plus term of protection rather than the original proposal of the Register to increase the term of protection from 56 to 76 years."

275. U. S. COPYRIGHT OFFICE.

Copyright law revision—Part 2. Discussion and comments on Report of the Register of Copyrights on the general revision of the U. S. Copyright law. Printed for the use of the House Committee on the Judiciary. Washington, U. S. Govt. Print. Off., February 1963. 419 p.

At head of title: 88th Cong., 1st sess., House committee print.

"The transcript of four meetings convened by the Register of Copyrights for discussion of the Report, and comments received by the Copyright Office or by this committee on the tentative recommendations presented in the Report." See Item 262, *supra*.

276. U. S. COPYRIGHT OFFICE.

United States copyright relations of current interest; a selective listing of proclamations, treaties and conventions concerning copyright relations of the United States with other countries. Rev. to Feb. 1, 1963. Washington, Mar. 1963. 14 p. (37 ICR 1)

2. FOREIGN NATIONS

277. FINLAND. *Laws, statutes, etc.*

Act on rights in photographic pictures; Act no. 405/61, of July 8th, 1961. *Le Droit d'Auteur* [English inset], vol. 76, no. 2 (Feb. 1963), pp. 27-30.

English translation of the Finnish Act on rights in photographic pictures. See 9 BULL. CR. SOC. 488, Item 373 (1962).

278. FINLAND. *Laws, statutes, etc.*

Copyright Act; Act no. 404/61, of July 8th, 1961. *Le Droit d'Auteur* [English inset], vol. 76, no. 2 (Feb. 1963), pp. 21-26.

English translation of the Finnish Copyright Act. See 9 BULL. CR. SOC. 488, Item 372 (1962).

279. FINLAND. *Laws, statutes, etc.*

Decree relating to a more effective application of the copyright law, of August 25th, 1961. *Le Droit d'Auteur* [English inset], vol. 76, no. 2 (Feb. 1963), p. 30.

English translation of the Finnish decree providing that a permit to organize a public entertainment, and to operate a restaurant, café or hotel must be accompanied by a statement to the effect that the provisions of the copyright law have to be complied with. See 9 BULL. CR. SOC. 487, Item 371 (1962).

280. NORWAY. *Laws, statutes, etc.*

Act on modification of the Act of December 2d, 1955 relating to provisional extension of the term of copyright. *Le Droit d'Auteur* [English inset], vol. 76, no. 2 (Feb. 1962), p. 32.

Also appears in French in the main section of the same issue of *Le Droit d'Auteur*.

An act extending the term of copyright protection until December 31, 1966, in cases where, under the present Norwegian law, such protection would expire in 1962, 1963, 1964 or 1965.

281. NORWAY. *Laws, statutes, etc.*

Act on rights in photographs, June 17th, 1960. *Le Droit d'Auteur* [English inset], vol. 76, no. 2 (Feb. 1963), pp. 31-32.

Also appears in French in the main section of the same issue of *Le Droit d'Auteur*.

English translation of the Norwegian law on rights in photographic pictures.

282. PERU. *Laws, statutes, etc.*

Copyright regulations under Law No. 13714 on Copyright, of October 18th, 1962. *Le Droit d'Auteur* [English inset], vol. 76, no. 3 (Mar. 1963), pp. 46-50.

Also appears in French in the main section of the same issue of *Le Droit d'Auteur*.

Translation of a decree implementing the Peruvian copyright law. The official Spanish text was published in *El Peruano*, Oct. 26, 1962. See 10 BULL. CR. SOC. 103, Item 79 (1962).

283. UNITED KINGDOM. BERMUDA. *Laws, statutes, etc.*

Copyright Act, 1956 Made Applicable to Bermuda.

The American Consul General, George W. Renchard, at Hamilton, Bermuda, has issued the following announcement which has been made public by the Department of State:

On December 22, 1962, the Governor, Major General Sir Julian Gascoigne, signed the Copyright Acts (Repeal) Act, 1962, copies enclosed, which repeals Bermuda's Copyright Acts of 1912 and 1914. With the Governor's signature the United Kingdom Copyright Act, 1956, took effect in Bermuda from December 6, 1962.

The inconsistency of Bermuda having its own copyright laws when in fact the Colony was governed by United Kingdom copyright laws was only recently discovered. For the sake of uniformity throughout the Commonwealth it was, therefore, necessary to repeal Bermuda's Copyright Acts of 1912 and 1914 and to make the United Kingdom Copyright Act, 1956, applicable to this Colony. The enactment of Bermuda's Copyright Acts (Repeal) Act, 1962, achieved this end.

284. VENEZUELA. *Laws, statutes, etc.*

Ley sobre el derecho de autor. *Gaceta Oficial de la Republica de Venezuela*, vol. 91, Mes III, nº 823 extraordinario (Jan. 3, 1963), pp. 1-11.

The new Venezuelan copyright law.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

285. Diplomatic Conference on Neighboring Rights, *Rome, 1961.*

Report of Mr. Abraham L. Kaminstein, Rapporteur-General. 15 *UNESCO Copyright Bulletin*, no. 1 (1962), pp. 11-33, 63-88, 117-141; no. 2 (1962), pp. 177-188, 215-227, 255-267.

In English, French and Spanish.

286. UNIVERSAL COPYRIGHT CONVENTION. *Deposit by Finland.*

The Department of State has been officially informed by the Director-General of Unesco that on January 16, 1963, Finland deposited its instrument of accession to Protocol 1 annexed to the Universal Copyright Convention, together with its instrument of ratification of the Convention and of Protocols 2 and 3 annexed.

In accordance with paragraph 2(b) of Protocols 1 and 2, these Protocols will come into force in respect of Finland on the same day as the Convention. Under paragraph 6(b) of Protocol 3 annexed, the latter came into force in respect of Finland on the date of deposit of its instrument of ratification. See 10 BULL. CR. SOC. 186, Item 208 (Feb. 1963).

PART IV.

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

287. *H.M. Kolbe Co., Inc. v. Armigus Textile Co., Inc.*, 315 F. 2d 70, 137 U.S.P.Q. 9 (2d Cir., Mar. 14, 1963) (Waterman, J.). *For decision below, see* 135 U.S.P.Q. 11 (S.D.N.Y. 1962), 10 BULL. CR. SOC. 119, Item No. 91 (1962).

Appeal from judgment against defendant Happy Cottons, Inc. in action for infringement of a copyrighted textile design consisting of clusters of purple roses, each cluster enclosed and separated from the next cluster by a square border of leaves and petals, with the clusters inverted in alternate eight inch squares, forming an all-over checkerboard design. The court below granted a permanent injunction against infringement of the design and appointed a master to take testimony on the amount of damages. Defendant Armigus Textile Company, Inc., as to whom the complaint had been dismissed, also appeals, seeking an award of costs.

Held, modified (as to costs) and affirmed.

I. Defendant Happy Cottons, Inc. contended that plaintiff's copyright notice was insufficient because a notice each 16 inches along the selvage did not constitute compliance with the statutory requirement of a notice "affixed to each copy" of the design. The court held, however, that the notice, since it appeared once for each turn of the printing roller and at least once for each commercial unit of fabric (one yard), was sufficient. The court said:

"The 'work' or 'reproduction of a work of art' which Kolbe sought to copyright was not merely the single rose square from which its textile design was created. It was rather the composite design itself, which depends for its aesthetic effect upon both the rose figure and the manner in which the reproductions of that figure are arranged in relation to each other upon the fabric. We find no error in the determination below that the work, as thus construed, was sufficiently original for copyright protection. To be sure, a checkerboard configuration, considered apart from the original component squares here present, does not possess even

the modest originality that the copyright laws require. But we find no authority for the proposition that every element of an original work must itself bear the marks of originality.

"However, to hold, as we now do, that the copyright in suit covered plaintiff's composite design rather than a single element thereof, does not dispose of appellants' contention that, even so, there was insufficient notice of that copyright to satisfy 17 U.S.C. §10. Because of the continuous nature of the composite design printed on Kolbe's fabric there are conceptual difficulties inherent in determining the limits of the protected 'work', and the number of 'copies' thereof contained in a bolt of the printed fabric.

"In satisfaction of the registration requirements of 17 U.S.C. §13, Kolbe deposited with the Register of Copyrights two swatches of printed fabric, each of which was of bolt width and approximately one yard long. If these deposited 'copies' define the scope of the protected work, it is clear that plaintiff complied with the requirements of the statute by repeating its notice of copyright every 16 inches along the length of its printed fabric. We recognize however, that to permit the scope of a protected textile design to turn upon the size of the copy deposited by the copyright proprietor 'would mean that a single notice, if sufficiently legible, would suffice for the whole bolt * * * if this were what (an owner) purported to copyright.' *H.M. Kolbe Co. v. Armagus Textile Co.*, 279 F. 2d 555 at 557 (dissenting opinion). In the case of continuous textile designs, therefore, we view the officially deposited 'copy' as setting no more than an outer limit within which published copies must bear the statutory notice. See *Dejonge & Co. v. Breuker & Kessler Co.*, 235 U.S. 33 (1914). Two additional considerations, however, establish to our satisfaction that within that outer limit the statutory requirements have been fully met for each published copy on Kolbe's composite design.

"1. From the trial record it appears that patterned textiles of the kind in suit are printed by a single roller which embodies the master pattern and transfers it, through continuous revolutions, to the unmarked fabric. An examination of the printed Kolbe fabric offered as an exhibit below reveals that the basic pattern, as thus defined, is repeated every 16 inches throughout the length of the material. As the notice of copyright is itself printed by the master roller, it, too, is repeated and appears at least once for each repetition of the basic design.

"2. By the enactment of 17 U.S.C. §10, Congress sought to minimize the likelihood of innocent infringement by insuring that each purchaser of a protected work would be alerted to the existence of the copyright claims. See *Stecher Lithographic Co. v. Dunston Lithographic Co.*, 233

F. 601, 603; *Shapiro Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F. 2d 406, 409 (2 Cir. 1941), cert. denied, 331 U.S. 820. Textiles are normally sold by the bolt at wholesale, in units of a yard at retail. By repeating its notice of copyright every 16 inches down the length of its printed fabric, therefore, Kolbe affixed at least one statutory notice to each smallest commercial unit by which its product is normally sold. No other practicable arrangement of copyright notices would better have warned defendants below, or other potential infringers, of Kolbe's claim. See *Boucher v. Du Boyes, Inc.*, 253 F. 2d 948 (2 Cir. 1958); *Scarves by Vera, Inc. v. United Merchants and Manufacturers, Inc.*, 173 F. Supp. 625 (S.D.N.Y. 1959)."

II. Defendant also argued that plaintiff had forfeited its copyright by permitting two dress manufacturers, co-defendants in this suit with whom it arrived at settlements, to complete and sell dresses made from the infringing fabric made by Happy Cottons, Inc., which fabric contained no copyright notice. The court held, however, that defendants had failed to "sustain their burden of establishing that the sales in question were 'authorized' by Kolbe within the statutory meaning of that term." The court said:

"Section 10 does not impose upon copyright proprietors the duty of policing the distribution of pirated works. Only goods sold 'by the authority of the copyright proprietor' are required, lest the copyright owner lose the copyright protection that is his, to carry the statutory notice. Normally, of course, the copyright owner will have discharged his obligation in this respect by seeing that each copy of the protected work has the notice affixed to it at the time it leaves his control. Therefore, the fact that unmarked copies of a work have somehow come into the possession of one whom the copyright owner alleges to be an infringer will not, without more, justify the denial of an injunction to protect the copyright owner from further unauthorized distribution." *Gerlach-Barklow Co. v. Morris & Bendien, Inc.*, 23 F. 2d 159 (2 Cir. 1927); *Falk v. Gast Lith. & Eng. Co.*, 54 F. 890, 893 (2 Cir. 1893). . . .

"Hence as the copyright proprietor has no affirmative duty to police subsequent distributions of his *own* products, *a fortiori* he has no affirmative duty with respect to subsequent distributions of copies which were never authorized by him to be distributed.

"Appellants, of course, charge Kolbe with more than the failure, merely, to *prohibit* the sale of unmarked garments by Youthline Fashions and Bea Wright Frocks. They maintain that Kolbe not only knowingly permitted the sales, but also expressly authorized them; and so they maintain the copyright owner thereby forfeited all subsequent protection of

its textile design. An examination of the record below, however, does not support this contention.

"The president of Youthline Fashions . . . stated that Kolbe's representative 'knew' that Youthline 'had to get rid of' the garments already manufactured or in the course of manufacture at the commencement of the present action. . . . Indeed, it is clear that Kolbe had no interest in furthering these competing sales, but its interest lay in limiting, so far as practicable, the sales of Happy Cottons' fabrics bearing the pirated design. . . . Kolbe's acquiescence was clearly a part of a larger endeavor to limit infringing sales by Youthline and Bea Wright insofar as that could be accomplished by an out-of-court settlement with them."

III. The court held that as Armigus Textile Co., Inc. had prevailed below, it was entitled to full costs, and that the judgment below should be modified accordingly.

288. *Gelles-Widmer Co. v. Milton Bradley Co.*, 313 F. 2d 143, 136 U.S.P.Q. 240 (7th Cir., Jan. 11, 1963) rehearing denied Feb. 12, 1963 (Duffy, J.). *For decision below, see* 132 U.S.P.Q. 30 (N.D. Ill., 1961); 9 BULL. CR. SOC. 259, Item No. 156 (1962).

In action for copyright infringement and unfair competition, appeal by both parties from judgment partly for plaintiff and partly for defendant. The court below held that defendant, in copying plaintiff's educational flash card sets, had infringed plaintiff's copyright, but that defendant's activities in inducing customers to buy defendant's copies rather than plaintiff's product did not constitute unfair competition.

Held, affirmed.

Defendants argued that plaintiff's flash card sets were not sufficiently original to be copyrightable, but the court held that the standard of originality in the copyright law had been met by the "selection, arrangement and combinations" of the simple material, such as standard arithmetic examples, in the sets. The court said:

"(Defendants') arguments for testing the validity of a copyright come close to judging copyrighted works by patent standards.

In *Wihtol v. Wells*, 231 F. 2d 550, this Court stated . . . 'The language in some court opinions seems to confuse the law of copyrights with that of patents. The Constitution itself differentiates between 'authors' and their 'writings' from 'inventors' and their 'discoveries.' A copyright protects an original work and is not dependent upon novelty. * * * It is clear, then, that nothing in the Constitution commands that

copyrighted material be strikingly unique or novel. Accordingly, we were not ignoring the Constitution when we stated that a 'copy of something in the public domain' will support a copyright if it is a distinguishable variation. . . . Originality in this context 'means little more than a prohibition of actual copying. . . .'

Defendants urge no one can obtain copyright protection on the basic arithmetical combinations used in any of the sets. We do not understand the plaintiff to make any such claim. What the District Court found to be infringed was the selection, arrangements and combinations contained in plaintiff's copyrighted sets. These were more than mere compilations. We agree with plaintiff that these combinations of problems selected as they were, together with the test sheets and the instructions, were more analogous to an education book. . . . [T]he arrangement, the plan and the manner in which they were put together by the author does constitute originality."

II. Defendants also contended that the copyrights in suit were invalid because the copyright notices on some of the sets were in the name of "School Aid Products Company" instead of "The Gelles-Widmer Company." The court held however, that because of substantial identity between the two corporations, the copyright proprietor was sufficiently identified in these notices. The court said:

"The District Court found that School Aid Products Company had the same officers, employees, agents, directors and shareholders, whose respective interests are the same as those of the officers, employees, agents, directors and shareholders of plaintiff.

The interests of the two companies were precisely the same. Defendants were in no way prejudiced by any reliance on the notice on the small sets. Taft admitted that during his year of development and research resulting in the infringing sets, he had before him the plaintiff's cards which contained a proper notice. This same defense was raised by the defendant in *National Comics Publications, Inc. v. Fawcett Publications, Inc.*, 2 Cir., 191 F. 2d 594, 90 USPQ 274. There, the notice of copyright gave the corporation 'Superman, Inc.' as the name of the proprietor instead of 'Detective', the proprietor in fact. The Court, by Judge Learned Hand, rejected the defense, pointing out that the two corporations had the same officers, directors and shareholders. The court said, at page 602, 90 USPQ at 281: 'Since, however, the interests of the two corporations were precisely the same, we think that a notice was sufficient which used the dummy's name as "proprietor".'

We hold, under the circumstances of this case, the use of the notice of the copyright by School Aid Products Company did not invalidate plaintiff's copyrights."

III. Defendants' argument that the copyrights were invalid because these educational aids are "solely utilitarian" was rejected by the court as "without validity." *Mazer v. Stein*, 347 U.S. 201, 100 U.S.P.Q. 325.

IV. On the issue of unfair competition, the court agreed with the District Court that the plaintiff had failed to meet its burden of proof, in that likelihood of confusion, or fraud, or misrepresentation as to source were not sufficiently shown.

289. *Muse v. Mellin*, 212 F. Supp. 315, 136 U.S.P.Q. 297 (S.D.N.Y., Dec. 27, 1962) (Levet, J.).

Action for declaratory judgment. Clarence Muse, one of the three co-authors of the song, "When It's Sleepy Time Down South," assigned "all right, title and interest" in the song to plaintiff Mills Music, Inc. in 1931, and executed a "confirmatory" agreement in 1957 specifically directed to the renewal rights. In 1951, Muse assigned the renewal rights to defendants Robert Mellin. Plaintiffs seek a determination that Mills Music, and not Mellin, owns the one-third interest in the copyright derived from Muse. The court raised the issue of jurisdiction on its own motion.

Held, complaint dismissed.

It was held that there was no federal jurisdiction because the complaint did not set forth a cause of action arising under the copyright law, but rather set forth a dispute over ownership of an interest in a copyright pursuant to conflicting assignments. The court said:

"The prerequisite for federal jurisdiction is that the suit arise *under* the copyright law. 'A suit arises under the law that creates the cause of action.' *American Well Works Co. v. Lane Bowler Co.*, 241 U.S. 257, 260. The mere fact that a controversy involves a patent or copyright does not give rise to federal jurisdiction. *Wells v. Universal Pictures Co.*, 2 Cir. 1948, 166 F. 2d 690, 691, 77 USPQ 1, 2. . . .

"The plaintiffs contend that this is an action for copyright infringement. The pre-trial order states, 'both parties concede that this is an action for copyright infringement.' If it is, there is no doubt that it arises under the copyright law. 17 U.S.C. §§101, 112; cf. *The Fair v. Kohler Die & Specialty Co.*, 1913, 228 U.S. 22.

"Obviously, cases in which the sole issues raised are the validity of the copyright or its infringement are cases arising under the copyright

laws. See 17 U.S.C. §§101, 112. The more difficult cases are those of a hybrid nature, such as this, in which the plaintiff claims rights under the copyright laws, and has alleged infringement of these rights, but in which at least a preliminary question arises unrelated to the copyright laws. Unfortunately, the distinction between cases arising under the copyright law and those, which do not, but yet involve a copyright, has not always been clear.

"The determinative factor appears to be the cause of action alleged in the complaint. *Bell v. Hood*, 327 U.S. 678 (1946). . . .

"The only reference to infringement [in this complaint] is in the prayer for relief. The only portion of the complaint which can be read as charging an act of infringement is paragraph 22, which alleges that the defendant ASCAP, without the plaintiff's consent, has licensed the public performance rights of the song. No allegation is made that the plaintiffs have given defendants notice of their infringement. . . .

"However, in this circuit the courts have held jurisdiction where the plaintiffs allege they are the equitable owners of the copyright and the defendant the holder of the copyright as trustee ex maleficio. In such cases the courts, as ancillary to the power to adjudicate a claim of infringement, have permitted the plaintiff, as a preliminary matter, to establish the facts as to his ownership interest on which his right to sue for infringement depends. *Cohan v. Richmond*, 2 Cir. 1936, 86 F. 2d 680, 32 USPQ 98; compare *Wells v. Universal Pictures Co.*, supra. See also *Wooster v. Crane & Co.*, 8 Cir. 1906, 147 F. 515. Contra, *Dill Mfg. Co. v. Goff*, 6 Cir. 1942, 125 F. 2d 676, 52 USPQ 517; *Lion Mfg. Corp. v. Chicago Flexible Shaft Co.*, 7 Cir. 1939, 106 F.2d 930, 43 USPQ 1. . . .

"That is not this case. There is no allegation that the plaintiff is the equitable owner of the copyright. This is simply a declaratory judgment action between one assignee against another assignee of the same one-third interest to determine the ownership of the elusive one-third interest. Of such actions, the federal courts lack jurisdiction. . . .

"The principal issue in this case is title. As the prayer for relief makes evident, the plaintiff must first obtain title to the copyright as a basis for his right to relief for infringement. The allegation of infringement in this case must be construed as an allegation that the plaintiff, after his title to the copyright has been established, will seek relief from infringement. The primary and controlling purpose of the complaint is to secure an interpretation of the various assignments of the one-third interest. Of such suits the federal courts lack jurisdiction. *Lockett v. Delpark, Inc.*, 270 U.S. 496."

290. *Mailer v. RKO Teleradio Pictures, Inc.* (S.D.N.Y., Feb. 6, 1963) (not yet reported).

Application for counsel fees in suit for return of copyright rights. Norman Mailer, who had assigned motion picture rights in his novel, "The Naked and the Dead", sued for return of the rights on the ground that the film had not been completed within the time specified in the contract between the parties, and that a reversionary clause was therefore operative. Judge Dawson held on January 10, 1963, in the Southern District of New York (213 F. Supp. 294, 136 U.S.P.Q. 300; see 10 BULL. CR. SOC. 191, Item No. 212) that since the motion picture was sufficiently complete to be shown to the public on the cut-off date, although special scoring was later added and minor changes made, it was "completed" in time and defendants were entitled to retain the rights assigned. The question of the amount of costs and counsel fees to be awarded to the successful defendants was reserved for subsequent hearing.

Held, \$5,000. in counsel fees awarded to defendant RKO Teleradio Pictures, Inc., in addition to taxable costs.

The court held that while Mailer's suit was neither "synthetic" nor "capricious", it was unreasonable under all the circumstances, and that an award of counsel fees to defendant was therefore justified. The court said:

"The award of counsel fees to a successful defendant is made in compliance with the general principle that attorney's fees are awarded only 'where dictated by equity and good conscience'. *National Grass Co. v. Michigan Hardware Co.*, 75 F. Supp. 140 (D.C. Mich., 1948). As the Court pointed out in *Barton Candy Corp. v. Tell Chocolate Novelties Corp.*, 178 F. Supp. 577 (E.D.N.Y., 1959):

' . . . They have generally been denied unless plaintiff's claim was capricious or unreasonable . . . or unless the situation calls for "penalization of the losing party".'

See also *Cloth v. Hyman*, 146 F. Supp. 185 (S.D.N.Y. 1956).

In this case it cannot be said that the claim of the plaintiff was 'synthetic' or 'capricious'. Whether the claim was 'reasonable' is another matter. . . .

This was not a case of piracy of a literary work, or the unqualified refusal to recognize the validity of a copyright. Plaintiff . . . took a rather technical position; that despite the expenditure of approximately Two Million Dollars by the defendant to produce the motion picture, he was now in a position where he could, in effect, cause this investment

of the defendant to be scrapped so that he would be put in a bargaining position with the defendant to be paid off again. He had a legal argument. Whether he had an argument which was good as a matter of conscience is open to more doubt.

Under the circumstances the Court believes that a moderate attorney's fee should be allowed to the defendant RKO Teleradio Pictures, Inc. The moving papers show that the attorneys for the defendant had expended in the aggregate over 873 hours in the defense of this action. No award that the Court can make under the decisions would be sufficient adequately to compensate them for the time spent. However, they should not go completely uncompensated, in view of the background of this action. The Court therefore awards to the attorneys for the defendant RKO Teleradio Pictures, Inc. the sum of \$5,000.00 as counsel fees, to be included as costs.

An application is also made by the attorneys for Warner Bros. Pictures, Inc. for the allowance of counsel fees. It appears, however, that Warner Bros. Pictures, Inc. had an indemnity agreement with the other defendant, by which they would be indemnified if any judgment was entered against them. Under the circumstances the Court denies any application for counsel fees by Warner Bros. Pictures, Inc."

291. *DeSilva Construction Corp. v. Herral*, 213 F. Supp. 184, 137 U.S.P.Q. 96 (M.D. Fla., Dec. 5, 1962) (Lieb, J.)

Action for infringement of copyright in an architectural plan for a house. In November, 1962, Frank Weissman, president of DeSilva Construction Corporation, a New York corporation, filed plans for a house with the City of Sarasota, Florida, in his own name as an individual, in connection with his application for a building permit. The plans so filed, like the copies later given to subcontractors for their use in building the house, bore no copyright notice. Weissman's house was completed in February, 1961 and was freely exhibited to the public as a model house. Advertisements which included a floor plan of the house were published. At the end of March, 1961, the plans were revised to conform to the house as actually built, and the revised plans, bearing a copyright notice in the name of DeSilva Construction Corporation, were registered with the Copyright Office. Thereafter the plaintiff, also called DeSilva Construction Corporation, was incorporated by Weissman in Florida, and the copyright in the plans was assigned to it. Plaintiff charges that two former prospects to whom it had tried to sell houses by showing them the model house had similar houses built by other builders instead, and that this constitutes an infringement of the copyright in its architectural plan. All of the defendants, including the other builders, had

access to the model house and to the original plans filed with the City of Sarasota.

Held, judgment for defendants.

I. It was held that since the assignment of the copyright from the New York corporation to plaintiff was subsequent to the alleged acts of infringement, and copyright assignments do not carry with them preexisting causes of action, absent language to such effect, plaintiff could not recover even if the copyright were valid and infringed.

II. The court also held that there was no cause of action for copyright infringement in any event, because the plans were in the public domain.

A. The court held that the filing of the plans with the City of Sarasota, although the law required obtaining a building permit, was a publication, and that, since it was a publication without copyright notice, the common law copyright was lost and no statutory copyright was obtained. The court said:

"It is the contention of the defendants that the common law copyright in the architectural plans involved here was lost through publication . . . when said plans were filed with the Building Inspection Department of the City of Sarasota by Frank Weissman.

"Research of counsel and independent research failed to disclose any Federal authority for this proposition. However, state courts, considering the same problem, held, with one exception, that the filing of architectural plans in a public office, even though it is required by statute or ordinance, is tantamount to publication of said plans and amounts to a dedication to the public, terminating the author's common law copyright in said plans." See *Callaghan v. Myers*, 128 U.S. 617; *Wright v. Eisle*, 86 App. Div. 356, 83 N.Y.S. 887 (1903). See also *Kurfiss v. Cowherd*, 233 Mo. App. 397, 121 S.W.2d 282 (1938); *Gendell v. Orr*, 13 Phila. 191 (Ct. Common Pleas, Phila. Pa. 1879). *Contra*, *Smith v. Paul*, 174 Cal. App. 2d 744, 345 P. 2d 546.

B. The defendants also argued that the construction of the model house from the plans, and the exhibition of the house to the public, amounted to publication of the plans. The court held however, that using the plans in this way did not amount to publication. The court said:

"While the authorities cited treat the filing of the architectural plans with governmental agencies regulating building permits, and the subsequent construction of the building itself, equally, i.e., holding both acts to amount to publication, this view does not bear close analysis. The protection extended by Congress to the proprietor of a copyright in archi-

tectural plans does not encompass the protection of the buildings or structures themselves, but it is limited only to the plans. The Copyright Act itself is silent on this point. However, it appears to be the unanimous view of respected text writers that, under the current copyright laws of the United States, the architect does not have the exclusive right to build structures embodied in his technical writings. . . .

"If the protection of the copyright laws does not extend to the structure or the building itself, but is limited to the plans themselves, it is difficult to perceive how the construction of the building can amount to a publication of the plans. . . . [T]he Court is of the opinion that the construction of the building does not amount to publication. . . . The building is not a copy of the plans. . . ."

292. *Holdredge v. Knight Publishing Corp.*, 214 F. Supp. 921, 136 U.S.P.Q. 615 (S.D. Cal., Feb. 27, 1963 (Carter, J.)

Action for infringement of the copyright in plaintiff's biographical works "Mammy Pleasant" and "Mammy Pleasant's Partner." Defendant Merwin wrote an article on the same subject which appeared in the magazine "Adam" and was entitled "Mammy Pleasant." Plaintiff charged that Merwin had plagiarized her books.

Held, judgment for plaintiff.

I. Defendants contended that although Merwin concededly had used plaintiff's "Mammy Pleasant's Partner" as source material for his article, he had not gone beyond a fair use of the historical material contained in the book, and so was not guilty of infringement. The court held, however, that defendant's article was not an independent work using the same public domain factual material, but was substantially and unfairly copied from plaintiff's copyrighted work. The court said:

"The cases are clear on the proposition that when an alleged infringer has done his own independent research, and based his own work on that research, there can be no infringement of another's work regardless of the degree of similarity between the two publications. *Eisenschiml v. Fawcett Publications*, (7 Cir. 1957) 246 F. 2d 598; *Toksvig v. Bruce Publ'g Co.*, (7 Cir. 1950) 181 F. 2d 664; *Greenbie v. Noble*, (S.D.N.Y. 1957) 151 F. Supp. 45. The 'test is whether the one charged with the infringement has made an independent production, or made a substantial and unfair use of the complainant's work', *Toksvig v. Bruce Publ'g Co.*, *supra*, at page 667. . . .

"Merwin testified that 'Mammy Pleasant's Partner' was the source for much of the 'Adam' article and made no pretense that he had done

any original research on the subject of Mammy Pleasant, other than to skim through two other books, not authored by the plaintiff. It is apparent that, whether or not original sources for Merwin's work were available to him, he did not avail himself of them. . . .

Though the facts concerning the actual life of an historic character are in the public domain and are not entitled to copyright protection, *I.N.S. v. Assoc. Press*, (1918) 248 U.S. 215, 234, a copyright holder nevertheless has the exclusive right to exploit the form of his expression. The association, arrangement and combination of ideas and thoughts and their form of expression may entitle a particular literary composition to protection." *Eisenschiml v. Fawcett Publications*, *supra*; *Greenbie v. Noble*, *supra*. . . .

" . . . [S]everal . . . instances of almost identical phrasing are, alone, probably not enough to support a claim of infringement. However, to constitute an infringement of copyright, the infringing composition need not be identical with the infringed; paraphrasing is an infringement. *Warner Bros. Pictures v. C.B.S.*, (9 Cir. 1954) 216 F. 2d 945; *Ansehl v. Puritan Pharm. Co.*, (8 Cir. 1932) 61 F. 2d 131, cert. den. 287 U.S. 665; *Borden v. General Motors Corp.*, (S.D.N.Y. 1939) 28 F. Supp. 330.

"Merwin's article was in large part a paraphrase of portions of the plaintiff's book, 'Mammy Pleasant's Partner'. Merwin extracted therefrom numerous passages which, though synonyms for certain words are substituted and certain phrases rearranged, are otherwise unchanged in form.

"In the ordinary case, applying the principles set out above, copyright infringement would be apparent. However, the concept of 'fair use' has been established and applied in cases involving scientific, medical and historical materials. If Merwin's use of the plaintiff's book (which the plaintiff claimed to be a serious, historically sound work) was a 'fair use', then there has been no actionable infringement.

" 'Fair use' may be defined as a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent. Though technically an infringement of copyright, it is allowed by law on the ground that the appropriation is reasonable and customary. *Toksvig v. Bruce Publ'g Co.*, *supra*; *Loew's Inc. v. C.B.S.*, (S.D. Cal. 1955) 131 F. Supp. 165.

"Whether or not the defendant's use was a 'fair use' is a matter of fact. *Eisenschiml v. Fawcett Publications*, *supra*; *Mathews Conveyer Co. v. Palmer-Bee Co.*, (6 Cir. 1943) 135 F. 2d 73.

"Some use of the plaintiff's book as a source for an article on Mammy Pleasant as an historical personage could certainly be termed 'fair'. But not only is Merwin's article based in large part on 'Mammy Pleasant's Partner', it mirrors the manner and style in which the plaintiff chose to set down the factual and historical material she used, and to express her thoughts and conclusions. Such an extensive use is well outside the scope of the concept of 'fair use', being neither reasonable nor customary, and the defendants cannot avail themselves of this defense.

III. Actual damages not having been proved, and the amount of profits being uncertain, the court awarded statutory damages of \$2,000. Counsel fees in the amount of \$500 were also awarded.

2. State Court Decisions

293. *Metro-Goldwyn-Mayer, Inc. v. Monte Lee Enterprises*, 212 A.C.A. 30 (Cal. Dist. Ct. App., Jan. 17, 1963) (Files, J.)

Action for unfair competition. Appeal from order granting preliminary injunction against defendant's use of an advertising slogan. Defendants' advertisement for an old German film read, "A Wonderful World of the Grimm Brothers is depicted in Grimm Brothers 'Grimms Fairy Tales' wide screen and color soon to be released by Monte Lee Enterprises." Plaintiff charged that this unfairly capitalized on the extensive publicity for plaintiff's not yet completed film, "The Wonderful World of the Brothers Grimm."

Held, affirmed.

I. It was held that the injunction was justified because defendants' advertising was misleading and because it made unfair use of plaintiff's title. The court said:

"The injunction issued here is expressly authorized by section 3369, Civil Code. Subdivision 2 of section 3369 provides: 'Any person performing or proposing to perform an act of unfair competition within this State may be enjoined in any court of competent jurisdiction.' Unfair competition is defined in subdivision 3 as 'unfair or fraudulent business practice and unfair, untrue or misleading advertising.' . . .

Defendants' advertisement is clearly misleading in that it seeks by imitation of plaintiffs' title to convey the impression that defendants' film is the same or similar to plaintiff's production. Large type is employed for the phrase "A Wonderful World of the Grimm Brothers," which is followed by smaller type for the remaining portions of advertisement. While a literal reading of the language used identifies defendants as

the source of the rival film, were technical accuracy of statements is not a defense where the overall effect is to mislead. . . .

A second basis for the decision rendered by the trial court is set out in the statute, to wit: Use of the advertising slogan employed here is manifestly unfair to the plaintiff. Both plaintiff and defendant concur in the view that extensive prerelease publicity is an economic necessity in the film industry. To permit defendants to describe their picture as they have done here allows trading on plaintiff's expenditure of time, money and effort in securing the necessary advance interest in their film and causes a dilution of the interest generated by those efforts."

II. Defendants argued that the phrase "Wonderful World" could not have a secondary meaning in connection with a film which had not yet been completed and shown to the public. The court held, however, that the pre-release publicity was sufficient to establish a public expectation of a specified product from a particular source, and that this was equivalent to secondary meaning. The court said:

"It is defendants' position that plaintiffs are not legally entitled to protection by injunction, under the theory of secondary meaning, for the title to a motion picture which has never been shown to the public and which is not yet completed when relief is sought. They assert the title has not been 'used' because the thing described, i.e., the film, is not yet in existence. To support this position defendants rely upon trademark cases and cases involving protection of proprietary interests in literary titles. It is our view, however, that the problem presented rests upon a different footing. We are dealing here not with the protection of literary titles as such, but with a proposed title used as an element of an advertising and publicity campaign. It is, in the posture of the case at time of hearing, an imaginative and fanciful phrase employed by plaintiffs as the distinguishing mark of their advertising and publicity for the film. . . .

Reduced to fundamentals, secondary meaning is a shorthand phrase which describes the existence of conditions from which public confusion will flow if the defendant is permitted to pursue his deceptive scheme (see *Family Record Plan, Inc. v. Mitchell*, 172 Cal. App. 2d 235, 244, 342 P.2d 10). If words have been *used* or *employed* by an author or manufacturer in such a manner that the public has learned to associate them with the thing described, they acquire a secondary meaning (*Jackson v. Universal International Pictures, Inc.*, 36 Cal. 2d 116, 121, 222 P.2d 433). In the case of an advertising slogan or other distinguishing feature used in a publicity campaign, its full use is accomplished when employed

through communication to the public. If an association is thereby formed in the minds of the public which fixes plaintiffs as the source of something of a particular nature to be available at a particular place, this is sufficient, because it follows that public deception may result if a distinguishing feature of the plaintiffs' program is adopted and used in an unfair and misleading manner by another. . . ."

294. *Dane v. M. & H. Co.*, 136 U.S.P.Q. 426 (N.Y. Sup. Ct., Jan. 25, 1963) (Aurelio, J.)

Action for infringement of common law copyright and for unfair competition. Plaintiff Faith Dane originated a comedy dance number in which she did bumps and grinds while playing a stylized version of reveille on a trumpet. She used this routine in nightclubs, and as an audition number when she applied for a role in the Broadway musical, "Gypsy." Miss Dane was hired for the show, and did the above-described dance in "Gypsy" without change. Plaintiff now charges that the continued use of her dance routine in the show after she left the cast constitutes an infringement of the common law copyright in her choreographic creation.

Held, judgment for defendants.

The court held that plaintiff's dance routine was not a "dramatic or dramatico-musical" composition, and so, even if it could be classed as a choreographic work, was not copyrightable. The court said:

"Plaintiff's contribution to the play consumed approximately 30-45 seconds. It is not denied that she performed her number well and that it was a 'show stopper' and caused the audience to engage in much laughter and applause. . . .

"The principal basis of plaintiff's claim for infringement of a common law copyright is that she created a musical choreographic composition which combines music and action in such a manner as to provoke an emotion, portray a character, and have a theme, or tell a story. The foregoing rule has been interpreted by our courts so as to permit choreographic works to be subject to copyright under Title 17 U.S.C.A., section 5, class D, which provides for registration of 'dramatic or dramatico-musical composition.' *Seltzer v. Sunbrook*, 22 F. Supp. 621, 37 USPQ 491; *Fuller v. Bemis*, 50 F. 298. Plaintiff has attempted to give her 30-45 second choreographic composition of the resemblance of a story by her own interpretation. . . . From all the evidence adduced before me, I am of the opinion that the so-called 'stories given to plaintiff's choreographic composition do not constitute copyright material. . . .

"The court further finds that . . . when . . . [plaintiff] performed at the audition it was her skill as an actress or dancer which she was trying to sell rather than a piece of property.

"Plaintiff has testified that no part of her number was ever reduced to concrete form and that she never had any other material copyrighted during her career. While this alone would not preclude plaintiff from her right to assert her ownership to the piece of property, the court finds that plaintiff's material, even if same could be characterized as a choreographic composition, of itself would not be subject to copyright protection.

"The words 'dramatic or dramatico-musical composition' as used in the statute, must be held to include only those representations and exhibitions which tend at least 'to promote the progress of science and useful arts.' Where a performance contains nothing of a literary, dramatic or musical character which is calculated to elevate, cultivate, inform or improve the moral or intellectual natures of the audience, it does not . . . fall within the purview of the statute as a production tending to promote the progress of science and useful arts."

295. *Melody Lane Publications, Ltd. v. Nor Va Jak Music, Inc.*, 235 N.Y.S. 2d 898, 136 U.S.P.Q. 278 (Sup. Ct., Dec. 6, 1962) (Fine, J.)

Action on contract. Plaintiff had obtained from defendant "sole and exclusive rights" to a number of musical compositions, including "Sugartime" and "Sugartime Twist" for a territory defined in the agreement as "all the countries of the world." The contract provided that plaintiff's rights to each song would continue for the life of the copyright therein, unless plaintiff failed to print an edition of the song "in any part of the territory." In that case, the plaintiff's rights in the song would end upon expiration or termination of the underlying agreement. Plaintiff charges that defendant, in violation of the contract, has been licensing "Sugartime Twist" to third parties. Plaintiff moved for summary judgment.

Held, judgment for plaintiff.

Defendant argued that plaintiff had lost its rights to "Sugartime Twist" by not publishing the song throughout the licensed territory. The court held, however, that publication anywhere in the world would be sufficient to establish plaintiff's rights in the song for the life of the copyright. The court said:

"The contract provides that if plaintiff should fail to print an edition of a composition 'in any part of the territory,' plaintiff's exclusive right to the composition shall end at the expiration of the contract or any extended term thereof. The 'territory' is defined in the agreement

as 'all countries of the world.' Defendant contends that the word 'any' is to be construed in the sense of 'every.' This would mean that plaintiff would lose its right to all compositions unless it should print editions thereof in each and every part of the world. This interpretation could not reasonably have been intended by the parties. Taking into consideration the words 'all of which shall be in your [plaintiff's] discretion,' which immediately follow the words 'in any part of the territory,' the court holds that plaintiff is entitled to keep the exclusive rights to any composition which it prints in any part of the world which it, in its discretion, may select."

II. The court held that even if plaintiff had lost its rights to "Sugartime Twist," the defendant would still have had no right under the contract to license this composition to third parties, because "Sugartime Twist" and "Sugartime" were substantially identical, and plaintiff still had exclusive rights to "Sugartime."

Also of Interest:

296. *Jacobs v. Hill*, 26 Cal. Rptr. 591 (Dist. Ct. App., Nov. 26, 1962) (Wood, J.)

Appeal from summary judgment for defendants in action for infringement of common law copyright. Plaintiff charged that the movie "Trapeze" and the book from which it was made, "The Killing Frost" by Max Catto, infringed the common law copyright in her unpublished work, "No Alternative."

Held, affirmed.

Neither similarity between plaintiff's and defendants' works nor proof of access were found. It was held, therefore, that there was no plagiarism.

297. *Ass'n for the Preservation of Freedom of Choice, Inc. v. Emergency Civil Liberties Committee*, 236 N.Y.S. 2d 216 (Sup. Ct., Dec. 11, 1962) (Fine, J.)

Action for invasion of right of privacy. Defendant moved to dismiss the complaint for insufficiency in law.

Held, motion denied.

It was held that the absence of a common law right of privacy in New York does not necessarily preclude a suit in New York for invasion of common law right of privacy in other states, where New York is only one of the states where the publication complained of occurred, because the single publication rule compels application of New York law only if New York had the most significant contacts with such publication.

B. DECISIONS OF FOREIGN COURTS

1. Canada

298. *Composers Authors & Publishers Ass'n of Canada Ltd. v. International Good Music, Inc.* (Canada, Sup. Ct., Jan. 22, 1963. Martland, J.) (not yet reported).

Action for copyright infringement; appeal from order of Exchequer Court which set aside an ex parte order giving leave to serve two American defendants ex juris. The signal from the television station owned by International Good Music, Inc. in the State of Washington is received in Canada as well as in the United States, and this defendant states in its advertising that the station reaches 1,000,000 people in British Columbia and 300,000 in the State of Washington. Plaintiff charges that defendants are infringing the Canadian copyrights in musical works which they beam from the United States into Canada. The Exchequer Court held that a television broadcast in the United States did not constitute a tort—copyright infringement—committed in Canada, and that service ex juris was therefore not proper under the applicable rules.

Held, reversed.

Stating that to justify an order for service ex juris, a plaintiff is not required to fully establish the merits of his claim, but that he is required to present a "good arguable case," the court held that the allegations of copyright infringement in Canada by means of television broadcasts into Canada from the United States did constitute a "good arguable case." The court said:

"When the affidavit in this case is read in conjunction with the statement of claim, it appears to me that it sufficiently alleges that the appellant's claim is that the respondents have committed a tort in Canada by the transmission of programmes, beamed at Canada, in which musical works, in respect of which the appellant had a copyright, were played . . .

"This does not end the matter, because the learned President was of the opinion that this was not proper case for an order for service ex juris. . . . He considered that, on an examination of all of the material before him, there was nothing to indicate an infringement of the appellant's copyright, and he went on to say:

'I am unable to see how it could reasonably be said that this right was infringed by a broadcast or telecast of a programme ema-

nating from a television station outside Canada, even if such programme included musical works which would in Canada be within the plaintiff's repertoire and in which it would have in Canada the copyright referred to and even if the programme was beamed towards Canada in order to reach Canadian audiences. These is nothing to indicate the commission of any tort in Canada.' . . .

"The Chief Justice adopted the test of 'a good arguable case' and that is the test which the learned President states, in his reasons, should be applied in the present case.

"With great respect, I am not in agreement with the conclusion which the latter has reached in applying that test. The issue which would have to be determined in the present case, if it is tried, is as to whether a person who operates a television transmitter outside Canada, but with the primary object of transmitting programmes for reception in Canada, can be held to have communicated a musical work by radio communication in Canada so as to have infringed the rights of the holder of the Canadian copyright in such work.

"This is a matter on which there does not appear to be any direct authority. The closest analogy which was brought to our attention by counsel is that in the case of *Jenner v. Sun Oil Co. Ltd.*, (1952) 2 D.L.R. 526, which dealt with an application to set aside an order for service ex juris. The issue raised in that case was as to whether, when defamatory statements were broadcast in the United States and received in Ontario, a tort had been committed in Ontario. McRuer C.J.H.C. reached the conclusion that there was 'a good arguable case' that the defamatory words were so transmitted as to be published within Ontario.

"I have not formed, and would not, at this stage of the proceedings, wish to express, an opinion as to whether or not, assuming as established the allegations contained in the statement of claim, the appellant has a good cause of action against the respondents, but I am satisfied that, on the basis of those allegations and the other material which was before the learned President, the appellant has got 'a good arguable case'. To me it seems arguable that a person who has held himself out to advertisers as being able to communicate, by means of his American television transmitter, with some 1,000,000 persons in British Columbia, if he transmits musical works, of which the appellant has the Canadian copyright, to viewers in Canada who receive such programmes, has thereby communicated in Canada such musical works by radio communication, within the provisions of the *Copyright Act*, c. 55, R.S.C. 1952. The purpose of this action is to determine that very legal point and, in my

opinion, it should not be determined at this stage of the proceedings, but ought to be tried."

2. England

299. *Cinematograph Exhibitors' Ass'n of Great Britain & Ireland v. The Performing Right Society Ltd.*, (Performing Right Tribunal, Mar. 18, 1963).

Reference with respect to licensing fees. The Performing Right Society Limited, which license performing rights in music, set a fee of 9d. per 100 seats estimated seating capacity per "session" for the use of music (at intermissions, etc.) at Bingo games. The Cinematograph Exhibitors' Association (Bingo games are usually held in motion picture theaters and dance halls in England) objects to these fees, charging that they are excessive.

Held, fee approved.

Referor argued that the fees for the use of music at Bingo sessions are excessive because they are far greater than those charged to other entertainments, such as greyhound races and theaters, where the use of music, as in Bingo, is only incidental. The Tribunal held, however, that it is not at all necessary to charge the same fees for music licenses to different kinds of users. The Tribunal said:

"The P.R.S. deny that any of these tariffs is properly comparable with that now under reference. The greyhound racing and football match tariffs, they point out, are based on average attendance, whereas the Bingo tariff is based (without objection) on estimated capacity. As for the theatres, the annual and weekly rates payable on actual seating capacity, regardless of the number of performances or even the maximum number of seats expected to be filled, are not susceptible, it can be argued, of more than an unrealistic mathematical comparison with the Bingo tariff, which is linked to actual 'sessions' as well as estimated capacity.

"Furthermore, the P.R.S. urge that the prosperity of greyhound racing, theatres and football matches is, at any rate at present, in eclipse. It is therefore feared that if fees were to be substantially raised against these long-standing licensees, the effect might well be a loss to the P.R.S. of revenue due to many of the past holders of licenses finding it no longer economically advantageous to continue to use copyright music.

"It is also argued on the part of the P.R.S. that the right to perform copyright music commands its own price, which varies from time to time and from user to user, and that while it is not irrelevant to make proper comparisons in arriving at that price, the mere fact, taken by itself,

that a particular user continues to enjoy the benefit of a low fee does not establish that that fee represents the value of the right in question to every other applicant for a similar license.

"The Tribunal is impressed by these arguments of the P.R.S. It vigilantly considers any newly proposed tariff where there could be any ground for supposing that a fee had been extracted from a would-be licensee whose business was so dependent on the use of copyright music that he had virtually no choice but to pay whatever was demanded of him. It draws no hard and fast distinction between copyright music which is essential to the business of the licensee and that which is loosely termed 'an amenity'. The latter may vary within wide limits in its value to the user. The Tribunal is only able, and indeed entitled, to deal with the matter actually in reference.

"The Tribunal feels that there is a fallacy in the argument of the C.E.A. that the proper yardstick to be applied in arriving at the fair fee to be charged to a particular user of copyright music is necessarily the fee which is charged to other users who use it for a similar purpose and length of time. Purpose and length of time are not the only relevant similarities to be taken into account. The basis of assessment must be strictly comparable. So must the readiness, willingness and ability of any particular user to pay, as well as the eagerness of the P.R.S. to retain that user as a customer. . . .

[I]t is also borne in mind that it is not the Cinematograph Exhibitors as such that are concerned with the tariff, but that the scheme applies to the proprietors of Bingo Clubs, some of which are owned by the proprietors or lessees of cinemas. The Tribunal notes that, while the C.E.A. has stood out, on a purely bargaining basis, for a lower fee, a substantial number of its members, in common with other owners of Bingo clubs, such as dance hall proprietors, have, pending this reference, taken out licenses on the terms of the scheme . . . [I]t seems to the Tribunal that their almost universal readiness to pay the fee demanded by the P.R.S. rather than forego the use of copyright music pending the outcome of this reference, is a fair indication of the value to proprietors of Bingo clubs of the right to perform such music.

"The C.E.A. have, in the view of the Tribunal, made out no case for any lower figure, and accordingly, the Tribunal approves the license fee of 9d. per 100 persons per 'session' provided by the scheme."

[EDITOR'S NOTE: We are pleased to print the following observations by the Assistant General Manager of The Performing Right Society Ltd., Mr. R. F. Whale, who has been kind enough to make them available to us.]

We do not think it is disputed that where the law grants a right of public performance in non-dramatic music it is essential to the effective exercise of that right that the composers, lyric writers and their assignees combine in an organisation able to grant the music users anything from a license to perform a single work up to a blanket license under which the users may perform, to whatever extent they elect, any and every work in the repertoire of the licensing body. Such a body is an equal necessity to the large-scale music user, who would otherwise find it impossible to comply with his legal obligations in respect of the performing right.

In the U.S.A. the existence of a single such licensing body is not compatible with the public distrust of monopolies, and, at least in one sector, that is the motion picture theatres, has been adjudged to infringe the anti-trust laws. There exist consequently several such bodies in the U.S.A.

In Europe the single body is general, and is not without its advantages, even from the users' point of view, particularly when it is subject to some degree of control. Such control, however, must not, it is submitted, nullify the purpose of the law in granting the right, and must not predicate original sin in the constitution of a body which offers the only practical means of exercising the right.

The Performing Right Tribunal constituted under the British Copyright Act 1956 proceeded from a declaration made by the British Delegation to the 1948 Conference for the revision of the Convention of the Berne Copyright Union to the effect that the United Kingdom government

"remains free to enact such legislation as they may consider necessary in the public interest to prevent or deal with any abuse of the monopoly rights conferred upon owners of copyright by the law of the United Kingdom."

Nevertheless, the Tribunal's powers have not by definition in its constitution been specifically limited to the curbing of abuse but, in essence, are to

"consider the matter in dispute, and, after giving the parties to the reference an opportunity of presenting their cases respectively . . . make such order . . . as the Tribunal may determine to be reasonable in the circumstances" (Section 25(5) Copyright Act 1956).

Nothing in the Tribunal's decisions or in its manner of conducting proceedings before it suggests that it in any way applies to its judgments the

criterion of whether the performing right licensing body has or has not abused its so-called "monopoly rights". The Tribunal acts strictly in accordance with its designated mission to do what it determines to be reasonable. It might be objected to this system that it is not compatible with the reservation by the British delegation to the Brussels Conference (see above), but perhaps an equally valid objection is that neither the music user nor the licensing body have any reliable basis for estimating whether their case is likely to find favour in the Tribunal's eyes. Time may indeed remedy this defect in the present system by establishing a body of "Tribunal case law" and the Tribunal's latest decision does indeed erect some signposts in this hitherto virtually uncharted territory.

The decision in question was on the P.R.S. tariff for music in connection with "Bingo" sessions.

Bingo (also known as "Tombola", "Housey-Housey" and by other names) is a game in which each player is provided with a set of cards bearing numbers (differing to some extent for each player). Numbers are then called out following some method of chance selection, and the player whose full set of numbers is first called out wins the game. The playing of this game for money was until recently illegal, but by passing of the Betting and Gaming Act 1960 has been legalized as part of the activities of a club, and there has been a boom in such clubs.

The P.R.S. Bingo tariff covers the playing of music before, during and after sessions, and the tariff charge was nine pence per 100 seats of the full seating capacity, that is equivalent to one shilling per 100 seats sold on the assumption that the sessions would on the average be three-quarters full.

There is no association of Bingo club proprietors, and Bingo is played at a variety of halls, but principally at motion picture theatres and dance halls. The reference to the Tribunal was made by the Cinema Exhibitors' Association (C.E.A.) most of whose members operating Bingo clubs had in fact taken up the P.R.S. licence. The reference was not supported directly or indirectly by any other group, such as the associations of dance hall proprietors.

The C.E.A. case was based on two facts, both admitted by the P.R.S.:—

- (1) that music at a Bingo club is no more than an unessential amenity.
- (2) that the Bingo tariff was several times higher than some other tariffs for amenity music, such as those for greyhound and football meetings, and particularly for overture, entr-acte and exit music at theatres.

The P.R.S. argued that as most of the Bingo promoters do provide music for their patrons it is clearly established that this amenity, although not

essential, has commercial value for them. Moreover, the P.R.S. has not, in regard to this category of user, a monopoly of musical rights because, unlike, for example, the commercial dance hall proprietors, who must use copyright music, the Bingo promoters can go to the public domain for their music and so are not obliged to take out a P.R.S. license.

It was further contended for the P.R.S. that its charges must be reasonable because the majority of Bingo promoters, by taking out the Society's license, although their form of enterprise did not constrain them to provide copyright music, had themselves demonstrated that the license was worth what they were asked to pay for it.

With regard to the difference in the level of its tariffs for amenity music, the P.R.S. argued that it was justified in taking into consideration that while Bingo was at the moment, at least, a flourishing enterprise, some other users of amenity music were not prospering.

In essence, therefore, the C.E.A.'s contention was that the P.R.S. charge for a mere amenity was excessive as shown by a comparison with charges for other amenity uses of the P.R.S. repertoire, and the contention of the P.R.S. that charges cannot be regarded as excessive which are acceptable to those who are under no necessity to purchase the commodity for which the charges are proposed.

It may be questioned whether if the issue had been understood in advance to be: whether the P.R.S. had abused its "monopoly rights", this reference would ever have come before the Tribunal. On a literal reading of Section 25(5) of the Copyright Act 1956, the basis on which the Tribunal had to decide the reference was, however, the much more indefinite one of what would be a reasonable decision to make in the given circumstances.

It may be considered that the scene as thus set bears a certain similarity to that famous production of "Hamlet" in which the role of the Prince of Denmark was omitted, in that what should, we suggest, be the protagonist in this matter, that is the basic legal right of the author to control the use of the work he has created, was not conspicuously present.

In rejecting the C.E.A.'s appeal, and confirming the tariff, the Tribunal found there was a "fallacy" in the comparison which the C.E.A. had sought to establish between the tariff rates for Bingo, on the one hand, and those for music at greyhound races, football matches and as overture entr-acte and exit music at theatres, on the other hand, and declined to endorse the C.E.A.'s contention that the proper yardstick to apply in assessing a fair fee for a particular user of copyright music was the fee charged to other users who employed music for a similar purpose and length of time.

The Tribunal, it stated, was "impressed" by the licensing body's argument that "the right to perform copyright music commands its own price, which varies from time to time and from user to user", and considered that "while it is not irrelevant to make proper comparisons in arriving at that price, the mere fact that a particular user continues to enjoy the benefit of a low fee does not establish that this fee represents the value of the right to every other applicant for a similar license".

"The basis of assessment" (as between two tariffs) "had to be strictly comparable, and so had the willingness or ability of any particular user to pay, as well as the eagerness of the P.R.S. to retain that user as a customer. That is another way of saying that the value of the commodity to the customer and the value of the customer to the supplier must approximate closely in each case with which comparison is made to the same elements in the case under consideration".

The principle to be adduced from the Tribunal's decision would seem to be this: that the licensing body does not have to regard the entire field of amenity music as a consistent and logical whole, but may take into account the economic situation within each sector of the field, so that it is not obliged for the sake of uniformity to charge less in the prosperous sectors than the music users can justifiably be asked to pay, nor in the less flourishing sectors to price itself out of the market. It may also take into consideration such a factor as the growing or waning appreciation of the value of amenity music in particular sectors and at different times, or any other factor that, sector by sector, may affect the economic value of its license.

This does not mean that the licensing body may fix its tariffs capriciously, without any regard to comparisons and other factors which the Tribunal may find to be relevant, but does, it seems, mean that the licensing body is not necessarily tied in every sector to its lowest tariffs in the field.

This principle may appear to be obvious, but it needed to be laid down by the Tribunal, because negotiations between the licensing body and the music users could only with difficulty be kept on a realistic basis so long as the latter felt they could as a matter of course claim parity with the lowest tariff in the relevant field.

Since copyright tribunals or similar machinery for settling copyright licensing disputes have been established on the British model in several countries (the Irish Republic, New Zealand, India, Pakistan) and are proposed in others (Australia, Republic of South Africa), it may be hoped, in the interest of copyright owners, that this decision (after a four-day hearing) will be noted in these other countries.

R. F. WHALE

London, 29 March 1963

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

300. WALLS, HOWARD. The copyright handbook for fine and applied arts. New York, Watson-Guptill Publications [1963]. 125 p.

A nontechnical digest embracing subject matter selected and edited from United States statutes and treaties, congressional reports, presidential proclamations, federal regulations and rules of practice, federal court decisions, articles of international conventions, copyright studies of the U. S. Senate Committee on the Judiciary, reports of the Register of Copyrights, and various official government publications and bulletins relating to copyright.

2. Foreign Publications

301. BONASI-BENUCCI, EDUARDO. Tutela della forma nel diritto industriale; forme distintive e modelli industriali. Milano, A. Giuffrè, 1963. 349 p. (Saggi di diritto commerciale)

A study of the protection of "form" under industrial property laws, with chapters on creative works and applied arts, models and ornamental designs, utility models, and "discipline of creations of form in international conventions and private international law."

302. SCHULZE, ERICH. Urheberrechtliche Verwertungsgesellschaften im Rechts- und Wirtschaftsleben; ein Vortrag vor dem Seminar für Wirtschaftsrecht der Wirtschafts- und Sozialwissenschaftlichen Fakultät der Universität Erlangen-Nürnberg im Sommersemester 1962. Berlin, Verlag Musik und Dichtung, [c1963] 31 p.

A brief lecture, by the General Director of GEMA, on legal and economic aspects of performing rights societies, with special reference to West Germany, held before a seminar of the Faculty of Economic and Social Sciences of the University of Erlangen-Nurnberg in the summer semester 1962.

B. LAW REVIEW ARTICLES

1. United States

303. BRITTAN, LEON. The right of privacy in England and the United States. (37 *Tulane Law Review* 235-268, no. 2, Feb. 1963.)

An examination of the reasons for the nature of the development and growth of the right of privacy in the United States, as compared with its absence in England, in the light of the recent introduction into the House of Lords of Lord Mancroft's Right of Privacy Bill.

304. FINKELSTEIN, HERMAN. Practical copyright problems. (7 *The Anti-trust Bulletin* 723-731, no. 5, Sept.-Oct. 1962.)

A brief article on ASCAP and the licensing of performance rights in music.

305. KEEGAN, RICHARD J. [Review of] Copyright and Antitrust by Joseph Taubman, New York: Federal Legal Publications, Inc., 1960. (22 *Federal Bar Journal* 261-262, no. 3, Summer 1962.)

See 8 BULL. CR. SOC. 270, Item 231. (1961).

306. VERST, EDWARD C. Unfair competition—injunction against publication of solutions to problems in college physics books. (31 *University of Cincinnati Law Review* 473-479, no. 4, Fall 1962.)

A case note on *Addison-Wesley Publishing Co. v. Brown*, 207 F.Supp. 678, 9 BULL. CR. SOC. 492, Item 379 (E.D.N.Y. 1962).

307. VESTAL, ALLAN D. *Erie R. R. v. Tompkins*: a projection (40 *Iowa Law Review* 248-273, no. 2, Winter 1963.)

A study of the impact of the *Erie* doctrine on a federal judge's decision as to what law should be applied in a given case.

308. WHICHER, JOHN F. Criminal copyright infringement and the general revision of the copyright law. (2 *Publishing, Entertainment, Advertising and Allied Fields Law Quarterly* 391-398, no. 4, Mar. 1963.)

"It is the purpose of this study to examine the kind of revision of § 104 [of the U. S. Copyright Statute] which is needed to make this criminal provision of our copyright statute effective and workable."

2. FOREIGN

1. In English

309. ABEL, PAUL. Letter from Great Britain. (76 *Le Droit d'Auteur* [English inset] 35-40, no. 2, Feb. 1963; 51-62, no. 3, Mar. 1963.)

Also appears in French in the main sections of the same issues of *Le Droit d'Auteur*.

An annual survey of "events which happened in 1962—partly still in 1961—in Great Britain in the field of copyright and related matters which might be of interest to authors—which term includes composers—and artists, newspapermen, journalists and critics."

310. DERENBERG, WALTER J. Letter from the United States of America. (76 *Le Droit d'Auteur* [English inset] 8-15, no. 1, Jan. 1963.)

Also appears in French in the main section of the same issue of *Le Droit d'Auteur*.

A survey of recent legislative and judicial developments in the field of copyright and related matters in the United States.

311. MALAPLATE, LÉON. Some reflections on the Ghanaian Copyright Act. (76 *Le Droit d'Auteur* [English inset] 33-34, no. 2, Feb. 1963.)

Also appears in French in the main section of the same issue of *Le Droit d'Auteur*.

An enumeration of the main deficiencies of the Ghanaian Copyright Act of 1961.

312. STERLING, D. B. International copyright control: a Canadian viewpoint, by D. B. Sterling and W. J. MacLeod. (1 *Current Law and Social Problems* 68-106, 1960.)

"The purpose of this paper is to consider Canada's place in international copyright and to underline what are believed to be certain weaknesses in the country's position. Part one of the essay summarizes the treaty background that has developed during the last one hundred years."

313. Summaries of articles published [in 1961-62] in "*Le Droit d'Auteur*." (15 *UNESCO Copyright Bulletin* 197-207; 237-248; 277-288; no. 2, 1962.)

Contents: Letter from Israel, by Arno A. Blum. Copyright protection for cinematographic works under the Universal Copyright Con-

vention, by Richard Colby. Letter from Turkey, by Ismail Kemal Elbir. Further comments on the international protection of cinematographic works, by Gérard Lyon-Caen. Structural evolution of the international unions for the protection of intellectual property, by Jacques Secretan. The Ghanaian copyright act, by G. Straschnov.

In English, French and Spanish.

2. In French

314. FRANÇON, ANDRÉ. A propos d'une éventuelle modification de l'article 4, alinéa (3), de la Convention de Berne sur le pays d'origine de l'oeuvre publiée. (76 *Le Droit d'Auteur* 32-37, no. 2, Feb. 1963.)

A discussion of the question of eventual revision of article 4, paragraph 3 of the Berne Convention with respect to defining what is to be deemed as the country of origin for published works.

C. ARTICLES PERTAINING TO COPYRIGHT FROM TRADE MAGAZINES

1. United States

315. The American reading public. Cambridge, Mass., American Academy of Arts and Sciences, c1962. 194 p. (*Daedalus*, Winter 1963.)

Contents: Book reading and the reading of books, by Reuben A. Brower. Statement and struggle: a note on teaching against the environment, by Benjamin De Mott. In books, they call it revolution, by Marshall A. Best. The economics of publishing, or Adam Smith and literature, by Dan Lacy. A criticism of commercial publishing, by Jason Epstein. The professors and their publishers, by Roger W. Shugg. American book publishing: hazards and opportunities, by Thomas J. Wilson. The bookshop in America, by Edward Shils. The book in search of a reader, by Leonard Schatzkin. Newspapers in the age of television, by Leo Bogart. What is wrong with American bookreviewing? by Henri Peyre. Some animadversions on current reviewing, by John Hollander.

"This issue, devoted to *The American Reading Public*, expresses the deep concern which many in this country feel about the present state of publishing."

316. LANDRY, ROBERT J. Authors and who-gets-what; skepticism on 1964 copyright. (230 *Variety* 5, 20, no. 4, Mar. 20, 1963.)

An article dealing with the critical reactions of authors toward the "non-sympathy of the Dept. of Justice" and the positions of "culture

administrators" and librarians on various issues involved in the drafting of a new copyright law "expected to go to Congress in 1964."

317. MOSETTIG, MIKE. 60 advisors help write revised U. S. copyright; infinitely complex; film distribs very much involved. (260 *Variety* 5, 20, no. 4, Mar. 20, 1963.)

An article on the controversial issues facing the drafters of a new copyright law and on the recent panel meetings of the "60-Man Brain-trust."

318. PILPEL, HARRIET. Rights and copyrights, by Harriet Pilpel and Nancy Wechsler. *Writer's Yearbook* 12-18, no. 34, 1963.)

"A series of hypothetical questions that reflect the most troubling problems," involving copyright and related matters, faced by writers, and the answers which "are intended to elucidate basic legal principles."

319. WATSON, RUSSELL. More vocalists publish songs they record for extra copyright profit; Paul Anka's Spanka Company sets up subsidiaries abroad. Problems for disc concerns. (161 *The Wall Street Journal* 1, no. 52, Mar. 15, 1963.)

An article which describes the present practice of popular singers of setting up their own publishing companies in order to control the copyrights in songs they sing and record.

2. England

320. U.S. Publishers Discuss Copyright with the Russians. *The Bookseller*, no. 2979 (Jan. 26, 1963), pp. 174-176.

A continuation of the report of the American Publishers' delegation which visited Russia last autumn under the U.S.A.-U.S.S.R. Cultural Exchanges Agreement. A "similar" agreement between Britain and the U.S.S.R. was signed in London during the last week of January, 1963.

321. What are writers worth? The present rewards of authorship. *The Bookseller*, no. 2986 (Mar. 16, 1963), pp. 1308-1312.

A summary of a booklet entitled "What are Writers Worth?" by Richard Findlater, which was prepared for, and recently issued by, the Society of Authors. The booklet deals with the economic conditions of the British author and makes some suggestions for improving them.

322. 1962 ASCAP NATHAN BURKAN COPYRIGHT COMPETITION AWARDS.

Judge Frederick G. Hamley, of the United States Court of Appeals for the Ninth Circuit, and Judge John Minor Wisdom, of the United States Court of Appeals for the Fifth Circuit, announced on March 27, 1963, that Robert A. Gorman of New York is the winner of the \$1000 National First Prize in the Nathan Burkan Memorial Competition for the best paper on copyright law submitted by law students throughout the United States.

Mr. Gorman, a graduate summa cum laude of Harvard College, a Fulbright Scholar at Oxford, 1958-59, and a graduate of the Harvard Law School, magna cum laude, in 1962, is serving as law clerk to Judge Irving A. Kaufman, of the United States Court of Appeals for the Second Circuit. His prize-winning essay is entitled "Copyright Protection for the Collection and Representation of Facts."

Tied for the Second Prize of \$500 each were Milton D. Andrews, University of Oklahoma School of Law, 1962, and Arnold B. Silverman, University of Pittsburgh School of Law. Mr. Silverman is a patent attorney with the Aluminum Company of America. The subject of his paper is "Copyrighting Reproductions of Physical Objects." The essay submitted by Mr. Andrews is entitled "The Scope of Protection of Copyrights and Design Patents in the United States."

Selected for honorable mention were papers by Elery Wilmarth, University of Colorado School of Law, entitled "Statutory Remedies for Record Piracy"; Juan G. Burciaga, University of New Mexico School of Law, entitled "Divestative Publication—A Two-Century Dilemma"; Thomas B. Morris, Jr., Harvard Law School, entitled "The Origins of the Statute of Anne".

The national winners were chosen from among fifty-one papers first selected by law school deans across the country and awarded prizes as the best essays submitted by students in their own schools. The Judges commented on the excellence of the papers submitted in this Competition and observed that "The calibre of the papers submitted in this Competition reflects great credit on our law schools. The subject of intellectual property is one of growing importance, but is not generally taught as a separate subject. The Nathan Burkan Memorial Competition has produced a great amount of the literature on the subject for many years. It is a great tribute to legal education in America that law students have the capacity and the interest to do so much constructive work. This Competition has served both to promote a better understanding

of the laws relating to intellectual property and an appreciation by the students of the importance of the literary quality of legal writing."

Stanley Adams, President of the Society also announced that the winning papers will be published in the Twelfth Copyright Law Symposium, together with the award papers of the 1961 Competition.

NEWS BRIEFS

323. The Register of Copyrights has announced that Miss Barbara A. Ringer's title has been changed as of April 3, 1963, from Chief of the Examining Division to Assistant Register of Copyrights for Examining, to reflect the wider duties entrusted to her.
-

Copyright Society of the U.S.A.

c/o Fred B. Rothman & Co.

57 Leuning Street

South Hackensack, N. J.

Return Requested

Bulk Rate

U. S. POSTAGE

P A I D

Hackensack, N. J.

Permit No. 2408

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

Published at
NEW YORK UNIVERSITY LAW CENTER

VOL. 10, NO. 5

JUNE, 1963

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

EDITORIAL BOARD

WALTER J. DERENBERG, *Chairman*

RICHARD COLBY
ANNA FELDMAN
GEORGE E. FROST
MORTON D. GOLDBERG
PROF. HARRY G. HENN
DR. STEPHEN P. LADAS

ALAN LATMAN
PROF. MELVILLE B. NIMMER
STANLEY ROTHENBERG
PAUL J. SHERMAN
JOHN F. WHICHER

JUDITH GRAD, *Associate Editor*
MARY T. HUNTER, *Assistant Editor*

THE COPYRIGHT SOCIETY OF THE U. S. A.

OFFICERS

President
EDWARD A. SARGOY

Vice-Presidents
SIDNEY A. DIAMOND
CHARLES B. SETON

Secretary
ALAN LATMAN

Assistant Secretary
MORTON D. GOLDBERG

Treasurer
EDWARD M. CRAMER

Assistant Treasurer
STANLEY ROTHENBERG

Executive Director
WALTER J. DERENBERG

BOARD OF TRUSTEES

JULIAN T. ABELES, New York City
SIDNEY A. DIAMOND, New York City
JOSEPH S. DUBIN, Universal City, Calif.
GEORGE E. FROST, Chicago
PROFESSOR HARRY G. HENN, Cornell Law School, Ithaca, N. Y.
PROFESSOR BENJAMIN KAPLAN, Harvard Law School,
Cambridge, Mass.
SYDNEY M. KAYE, New York City
LEON KELLMAN, New York City
PROFESSOR JOHN M. KERNOCHAN, Columbia University
Law School, New York City
BERNARD KORMAN, New York City
HORACE MANGES, New York City
ISABELLE MARKS, New York City
PROFESSOR MELVILLE B. NIMMER, University of California
Law School, Los Angeles, Calif.
HARRY R. OLSSON, JR., New York City
HAROLD ORENSTEIN, New York City
E. GABRIEL PERLE, New York City
JOHN R. PETERSON, Boston, Mass.
HARRIET F. PILPEL, New York City
CEDRIC W. PORTER, Boston, Mass.
BARBARA A. RINGER, Washington, D. C.
BENJAMIN W. RUDD, Washington, D. C.
EDWARD A. SARGOY, New York City
SIDNEY SCHREIBER, New York City
CHARLES B. SETON, New York City
SAMUEL W. TANNENBAUM, New York City
THEODORA S. ZAVIN, New York City
LEONARD ZISSU, New York City

Published at New York University Law Center
40 Washington Sq. South, New York 11, N. Y.

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

© 1963 by The Copyright Society of the U. S. A.

CONTENTS

	PAGE		
The Copyright Society of the U.S.A. Celebrates Its Tenth Anniversary	293		
PART I. ARTICLES.			
MACCARTENEY, RICHARD S. <i>De Origine</i>	297		
ALDOUS, GUY. The Philosophy Behind the English Copyright Law. <i>The First Annual Jean Geiringer Memorial Lecture</i>	302		
PART II. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS.			
1. United States of America and Territories	325		
2. Foreign Nations	326		
PART III. CONVENTIONS, TREATIES AND PROCLAMATIONS		329	
PART IV. JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY.			
A. Decisions of U.S. Courts.			
1. Federal Court Decisions	330		
2. State Court Decisions	340		
PART V. BIBLIOGRAPHY.			
A. Books and Treatises.			
1. United States Publications	343		
2. Foreign Publications	343		
B. Law Review Articles.			
1. United States	344		
2. Foreign	345		
NEWS BRIEFS			349

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 11, New York: Edward A. Sargoy, *President*; Sidney A. Diamond and Charles B. Seton, *Vice Presidents*; Edward M. Cramer, *Treasurer*; Alan Latman, *Secretary*; Stanley Rothenberg, *Assistant Treasurer*; Morton D. Goldberg, *Assistant Secretary*; and Walter J. Derenberg, *Executive Director*.

Annual subscription: \$25.

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 11, N. Y.

Business correspondence regarding subscriptions, bills, etc., should be addressed to the distributor, Fred B. Rothman & Co., 57 Leuning Street, South Hackensack, N. J.

CITE: 10 BULL. CR. SOC. page no., Item (1963).

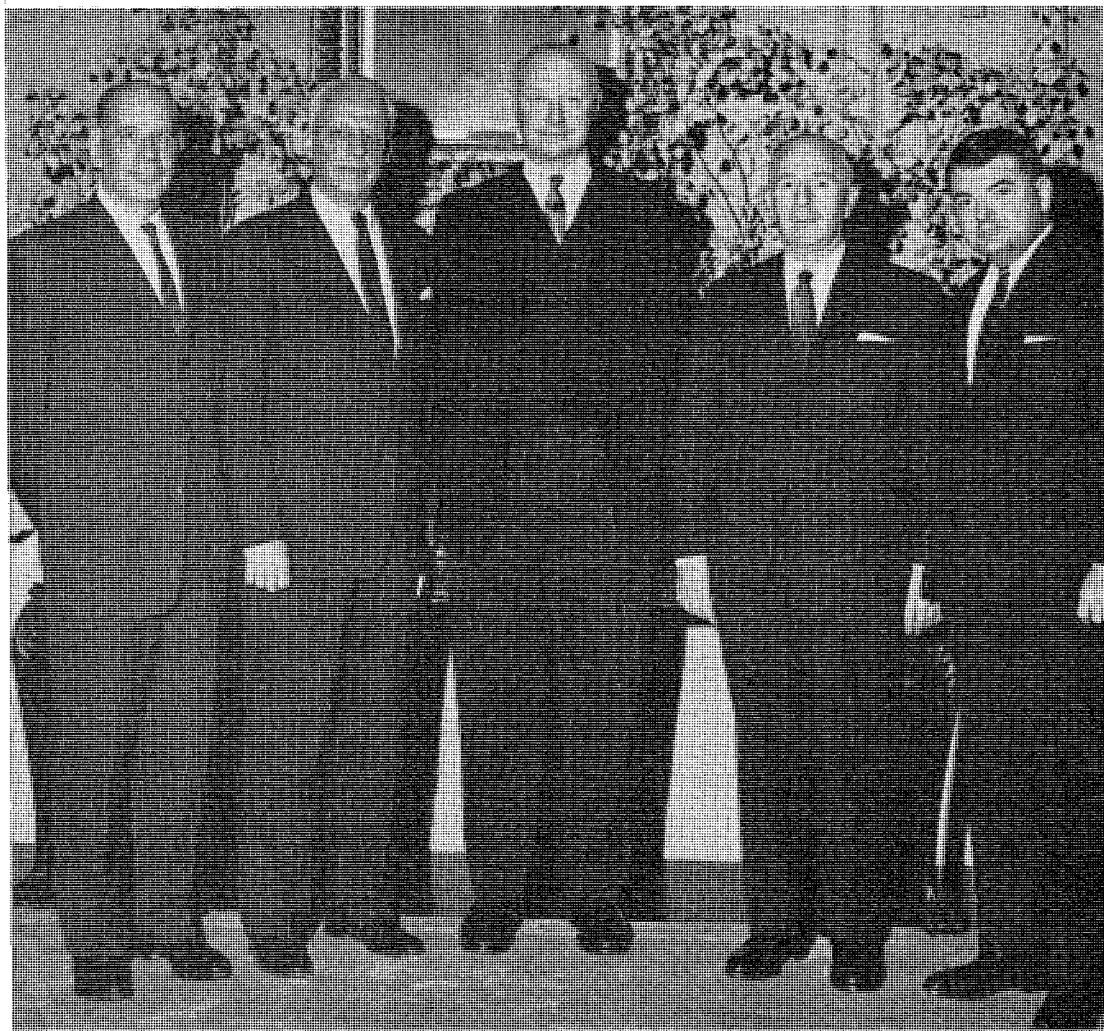
THE COPYRIGHT SOCIETY OF THE U. S. A. CELEBRATES ITS TENTH ANNIVERSARY

The highlight of our current year was our Tenth Anniversary Celebration Dinner in the Marie Antoinette room of The Number One Fifth Avenue Hotel, New York City, on Friday evening, April 19, 1963, following the first annual Jean Geiringer Memorial Lecture, given by Guy Aldous, Q.C., of London, England. More than 225 members and friends of the Society were present on this occasion. The speakers included the Honorable Leonard P. Moore, Judge of the United States Court of Appeals for the Second Circuit, and the Honorable Abraham L. Kaminstein, Register of Copyrights. Formal tributes were rendered the late Joseph A. McDonald, President of the Society, 1955-1957 and the late Frederic G. Melcher, Vice-President of the Society, 1956-1958. The Tenth Anniversary Celebration Citation of the Society was presented to Professor Walter J. Derenberg. The Celebration Committee was under the able chairmanship of Edward A. Sargoy, the newly-elected President of the Society, and included Theodore R. Jackson, Theodore R. Kupferman, Harold Orenstein, Sigrid R. Pedersen, Charles B. Seton, Samuel W. Tannenbaum (President of the Society, 1953-1955), John F. Whicher and Leonard Zissu.

The appreciation of our Society was again expressed to Dean Russell D. Niles and Associate Dean Miguel A. de Capriles of New York University School of Law, for their support and for having made available to our Society the facilities of the New York University Law Center.

One of the most gratifying aspects of the presidency of our Society is that, on the numerous occasions when cooperation and assistance of various members are requested, each one, without exception, responds enthusiastically and gives full support to our objectives and programs. With such *esprit de corps*, our Society completes its first ten years with an auspicious heritage for its future.

HARRY G. HENN
President, 1961-63



AT THE FIRST ANNUAL JEAN GEIRINGER MEMORIAL LECTURE

Guy Aldous, Q.C., of London, delivered the first in this new series of copyright law lectures established at New York University Law School through the efforts of Harold Orenstein and other friends of the late Jean Geiringer. Mr. Aldous's lecture was delivered on the afternoon of April 19, 1963, on the subject, "The Philosophy Behind the English Copyright Law." (See *infra*, at page 302.)

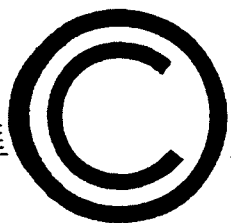
Shown here, following the lecture, are (from left to right): Professor Walter J. Derenberg and Dean Russell D. Niles, New York University Law School; Mr. Aldous; Harold Orenstein, Chairman of the Jean Geiringer Memorial Lecture Fund, and Professor Harry G. Henn, of Cornell Law School, President, 1961-1963, The Copyright Society of the U.S.A.



PRESENTATION OF THE TENTH ANNIVERSARY CELEBRATION CITATION
TO PROFESSOR WALTER J. DERENBERG

From left to right: The Honorable Leonard P. Moore, Judge of the United States Court of Appeals for the Second Circuit; Professor Harry G. Henn, of Cornell Law School, President of the Society, 1961-63; the Honorable Abraham L. Kaminstein, Register of Copyrights; and Professor Derenberg.

The Tenth Anniversary Citation is reproduced on the next page.



The Copyright Society of the U.S.A.

In recognition of the continuing inspiration, outstanding leadership, and devoted service which

Walter J. Derenberg

Professor of Law, New York University School of Law, and distinguished member of the New York Bar, has given to The Copyright Society of the U.S.A. during the ten years since it was founded, not only as Chairman of the Editorial Board of its Bulletin throughout the period but also as a trustee, as Vice-President of The Society during the years 1955-1956, as its President during the years 1957-1961, and as its Executive Director thereafter; and in especial appreciation of the scholarly distinction, high ideals, sound judgment, and practical wisdom which he has ever brought to the achievement of The Society's goals, Now, Therefore,

The Copyright Society of the U.S.A.

through its Board of Trustees, as part of the celebration of the Society's first decennial, does confer upon him this Citation, as a testimonial of its high regard, great affection, and deep appreciation, and, in token thereof, does award him this Certificate at its Tenth Anniversary Celebration Dinner.

Dated at New York, N.Y., this 19th day of April, 1963

The Copyright Society of the U.S.A.

Harry S. Henn
Harry S. Henn, President

Charles B. Seton
Charles B. Seton, Secretary

Attest:



PART I.

ARTICLES

324.

DE ORIGINE

By RICHARD S. MACCARTENEY*

Ten years ago, on June 15, 1953, there appeared for the first time in the law offices concerned with copyright, a slim, 9" x 6" grey-cover publication. The purple ink title on the cover proclaimed it to be the *BULLETIN OF THE COPYRIGHT SOCIETY OF THE U. S. A.* and its expressed aim, according to the prefatory message, was "the dissemination, in periodical form, of current information in the field of copyright and intellectual property." The roster of its editorial board, officers, and board of trustees, read like a veritable "Who's Who" of practitioners in the field of literary property in the United States. Let us recall the names as they were listed in that first, slim issue.

The *BULLETIN's* Editorial Board: Professor Walter J. Derenberg, Chairman, with members Edward M. Cramer, George E. Frost, Professor Harry G. Henn, Arthur S. Katz, William Klein II, Robert J. Kaufman, Dr. Stephen P. Ladas, Alfred Lorber, Lawrence H. Reed, and Paul J. Sherman. David H. Vernon was Managing Editor.

The Copyright Society of the U. S. A. Officers: President, Samuel W. Tannenbaum; Vice-Presidents, Louis E. Swarts and Joseph A. McDonald; Secretary, Theodore R. Kupferman; Assistant Secretary, Charles B. Seton; Treasurer, Paul J. Sherman; Assistant Treasurer, Theodore R. Jackson.

Finally, there was the notable Board of Trustees: William E. Anderson, Professor Ralph S. Brown, Jr., Dean Miguel A. de Capriles, Professor Walter J. Derenberg, Joseph S. Dubin, Herman Finkelstein, Professor Harry G. Henn, Theodore R. Jackson, Professor Benjamin Kaplan, Sydney M. Kaye, Theodore R. Kupferman, Joseph A. McDonald, Horace S. Manges, Robert P. Myers, Cedric W. Porter, Edward A. Sargoy, Morton Schaeffer, John Schulman, Charles B. Seton, Charles Shepard, Paul J. Sherman, Louis C. Smith, Wilma P. Stine, Louis E. Swarts, Samuel W. Tannenbaum, Sidney W. Wattenberg, Philip Wittenberg, James P. Wobensmith.

* Chief, Reference Division, Copyright Office; former member Board of Trustees, The Copyright Society of the U. S. A.

Since then many other distinguished names have appeared in the roster.

Today, ten years later, the BULLETIN is, from the point of view of domestic, comparative and international law, the key current bibliographical work in the copyright field.

The incentive and the initiative, not surprisingly, came from Arthur Fisher. Early in March 1952, he wrote to a number of copyright experts:

"We have recently started a monthly inter-office 'Bibliographical Bulletin' primarily for the use of our lawyers here covering new texts, cases, laws, etc. on copyright.

It occurs to me that you might be interested in seeing a copy. Perhaps you will have suggestions as to omissions and additions for our next Bulletin. Any other ideas you have on the matter would be of interest."

Sincerely yours,

Arthur Fisher

Register of Copyrights

All of the replies were enthusiastic. A monthly publication like the sample sent would be extremely valuable, the lawyers wrote. They expressed keen interest in being able to secure copies as issued. The fact that there was at that time no periodical in English devoted exclusively to copyright and related subjects, made the *Bibliographical Bulletin* unique. It was, according to one typical reply, "of such great value that it should be continued at all cost to lawyers interested."

The replies were carefully studied in the Copyright Office, and on July 17, 1952, it was decided to mail copies of the *Bibliographical Bulletin* to a selective list, for comment. The list included nearly all of the nationally and internationally known figures in the field of copyright.

By September 19, 1952, Miss Wilma Stine, the Office Librarian, who compiled and edited the *Bibliographical Bulletin* and who was immediately responsible for its dissemination, had heard from 150 of the addressees contacted here and abroad. Of this number, all but 3 were eager for the Office to continue the service and wished to receive future issues. But the very success of the experimental venture was resulting in an ever-increasing burden on the facilities of the Copyright Office and a proportionate increase in the time spent on the project.

By the autumn of 1952, the question of an independent organization, in which, however, the Copyright Office could participate to the extent of providing material for publication, was being discussed. There was another practical reason, in addition to the work factor, why the Register of Copy-

rights hesitated to continue the general circulation which had grown out of the original intra-office list. He felt that in any summarization or comment on items listed, it would be preferable for an independent organization to review and sponsor the publication.

On November 7, 1952, a questionnaire was sent out from the Copyright Office, to those receiving the *Bibliographical Bulletin* to ascertain whether there was sentiment favoring the formation of an organization to be known as "The Copyright Society of the U. S. A.," or some similar name, with the immediate purpose of publishing and distributing the *Copyright Office Bibliographical Bulletin* and for such other purposes as might be agreed upon by the members. The replies received were overwhelmingly in favor of such an organization. The membership and subscription fees suggested were agreeable.

Some research had been undertaken in the Copyright Office with regard to a possible name for the organization. It was found that an *American Copyright Club* existed in the 1840's in New York at least. An *International Copyright Association of the District of Columbia* was apparently organized sometime in the 1800's, also, and there is a report of a meeting in New York in 1868 of an *International Copyright Association*. *American Copyright League* was the name of an organization active in the hearings on the 1909 copyright bill. There was an existing business organization located in New York named *American Copyright Association, Inc.*

The Register of Copyrights inclined to the name "The Copyright Society of the U. S. A." This name was embodied in the announcement accompanying the questionnaire noted in the preceding paragraph.

Now indeed the organization of the Society was under way. The Copyright Committee of the Bar Association of the City of New York met in mid-November, 1952, and appointed a sub-Committee to consider means of cooperating with the Copyright Office and soliciting ideas as to how The Copyright Society would be set up.

Professor Walter J. Derenberg, of New York University Law School and a member of the law firm of Alexander, Maltitz, Derenberg & Kunin, and others suggested that in addition to the publication of the BULLETIN, a Copyright Institute be formed to strengthen American resources for research and study in the field of copyright. Still other members of the bar and the Register of Copyrights favored the Society taking on only the immediate task of publishing the BULLETIN, leaving the question of the broader Institute to a later date. And this view finally prevailed.

The Register now took counsel with members of the copyright bar with a view to naming officers to get the Society started and to serve until incor-

poration or a first annual meeting. Samuel W. Tannenbaum, of the New York law firm of Johnson & Tannenbaum, was asked to consent to be named as President, at least for the pre-incorporation period. He agreed to serve and the roster of officers, directors and editorial board was quickly completed. With very few exceptions these were the same men whose names appeared in the first issue of the BULLETIN, as noted above.

On March 17, 1953, the Register met with some twelve persons at the National Republican Club in New York to discuss the formation of "The Copyright Society of the U. S. A.," the name agreed upon. There was also general agreement that the title of the Society's publication should be "THE BULLETIN OF THE COPYRIGHT SOCIETY OF THE U. S. A." Since publication of the BULLETIN was to be the only initial activity of the Society, no point was seen in having memberships not receiving the BULLETIN. The meeting accordingly simplified the membership structure, providing two classes of members—Sustaining at \$25.00 and annual regular memberships with the BULLETIN at \$10.00.

At this meeting the Editorial Advisory Board was changed to "Board of Governors" to include officers. The "Board of Directors" was also eliminated. The BULLETIN was to be published at the New York University Law Center, under a charter obtained from the Regents. President Tannenbaum informed the Register that clearance had been obtained of the name THE COPYRIGHT SOCIETY OF THE U. S. A. from the Board of Regents of the University of the State of New York. A draft of the proposed charter under the Education Law of the State of New York, outlining the objects of the Society, had been submitted to the Board of Regents for approval. The provisional charter was granted on May 22, 1953. Before that date, on March 30, 1953, the Register was referring in correspondence to the "Board of Governors." On April 2, he called the body the "Board of Trustees." This designation stuck, was incorporated in the charter, and the Board of Governors, as such, vanished.

A measure of the prestige of the new Society, as yet scarcely in operation, was the fact that some attorneys expressed disappointment at having been left off the Board of Trustees. As Arthur Fisher commented, at least this was better than objections from persons who were included in the management.

The first meeting of the Board of Trustees of The Copyright Society of the U. S. A. coincided with the date of first publication of the BULLETIN. It took place at 4:00 P.M. on June 15, 1953, at the office of the Society at New York University Law Center, 40 Washington Square South, New York City. At this meeting Officers, the Executive Committee and the Editorial Board were elected by the unanimous vote of the trustees present, all having

consented to act as trustees. Proposed by-laws were given careful consideration by the meeting and a revised set was duly adopted. At this meeting, Joseph A. McDonald at first presided as Acting Chairman. Later he turned the meeting over to Samuel W. Tannenbaum, the newly elected President. Theodore R. Kupferman, elected Secretary, acted in this capacity. The agreement between the Society and Fred B. Rothman & Co., covering the printing and distribution of the BULLETIN of the Society was ratified. On the date of the first financial report, August 31, 1953, the Society had 222 members, with subscriptions to the BULLETIN amounting to 339.

The first President of the Society headed the introduction to the first issue of the BULLETIN with a modest quotation from Cicero, "*Omnium rerum principia parva sunt*—The beginnings of all things are small." From these small beginnings the BULLETIN has indeed become, as he went on to hope in this introduction, "A useful reference source and ready tool to all interested in receiving information on copyright."

325. THE PHILOSOPHY BEHIND THE ENGLISH COPYRIGHT LAW—
*The First Annual Jean Geiringer Memorial Lecture.**

By GUY ALDOUS, Q.C.**

I did not know the late Mr. Geiringer, but I am told that he was a man held in universal esteem. This address is the first of those which, I understand, will be given annually to mark his memory. I hope that it may do so adequately.

I wish to make it clear at the outset that I am no international copyright jurist. I am a practicing English barrister with no pretensions to any knowledge of the copyright laws of other countries.

The practical lawyer may not be able to compare with the professor of law in saying what the law ought to be. But on the other hand, the practical lawyer will always be ready to say what the law is; subject of course, so far as English barristers are concerned, to the proviso that no action for negligence can be brought against them for giving a wrong opinion. On the other hand, so far as I know, professors of law have no similar protection against actions for negligence.

You will by now have appreciated why I have taken care to emphasize that I am an English barrister, before I give any opinion upon the law.

The Committee responsible for organizing this series of addresses has asked me to deal with the "Philosophy Behind the English Copyright Law and Its Practical Application to the Trial of a Copyright Cause in England."

The Committee are copyright lawyers of great experience and I believe that they chose a title of so great a length with a view to claiming copyright in this title as an independent literary work. However, their choice has made it easy for me to deal with the questions involved in two parts and I shall therefore deal first with:

THE PHILOSOPHY BEHIND THE ENGLISH COPYRIGHT LAW

You will, I hope, understand that the philosophy of the practicing English barrister as to the law is practical and not theoretical, being based upon the principles of law that he finds established by decisions of the courts and not upon his own views of what are morally right or wrong.

* Delivered at New York University Law Center, Friday, April 19, 1963.

** Queens Counsel, a member of the Inner Temple, London, and a leading authority on British copyright law.

The son of one of our most eminent judges once told me that his father gave him this advice when he first began to practice in the law: "Remember only the decisions that are wrongly decided — the decisions that are rightly decided, you can work out for yourself; but those that are wrongly decided may help you to win a case that you otherwise would lose."

There are, however, two possible criticisms of this advice; firstly, that, if one wins a case upon a wrong decision of law, it is likely to be reversed by an appellate court and the final result will be of no benefit to one's clients; and secondly, that before one can work out for oneself the correct law, one has to be certain what is its correct basis.

I have not come here from England to expound upon any decisions of the English Courts upon copyright law which I may think are wrongly decided. Indeed, the advocate often thinks that only the cases he loses were wrongly decided and I have no desire to give you a list of those cases in which I have been unsuccessful in my advocacy. But if I can deal adequately with the basis of English copyright law, it should follow that anyone of you, who may in the future find yourself concerned in any details of English copyright law, will find no difficulty in working out the law for yourself. We can, I feel sure, dismiss from our minds the possibility that any one of you could come to a wrong conclusion, although there may be precedents for eminent lawyers arriving at diametrically opposed conclusions of law.

I do not know to what extent your copyright law has the same basis as English copyright law, but I should not be surprised to learn that it has the same root stock — the common law, by which I mean that great system of law evolved by judges in the past in the course of their practical administration of the law for the purpose of ensuring that justice is both available and is done to every man. For myself I believe that the common law is one of the foundations of your and our civilizations. It might indeed be easier to have a stable association of all these nations whose domestic law is based upon the common law, than any association based upon economic or military objectives. In the nations of such an association there would at least be a similar recognition of what is right and what is wrong.

In considering the basis of the law of copyright, it is necessary to distinguish between:

(1) the right of the author of an unpublished work to restrain its unauthorized publication; and

(2) the right of the author, who has authorized a publication of his work, to restrain a subsequent further publication of it.

As to the right of the author of an unpublished work to restrain its unauthorized publication, one must not confuse the right of property in a manuscript as a physical thing with the right of property in the incorporeal work embodied in the manuscript. The right of property in the manuscript itself is no different from that which any owner possesses in any other physical thing. In view of the number of women present, some I believe not being specialists in the law except for ties of marriage, I should perhaps explain that I am putting on one side the right of property of a husband in his wife, which is a right of a different kind and is at the present day analogous more to the right of property which the chicken has in the fox. But the right of property in the work is of a different nature to the right of property in a physical thing and its protection must depend upon the recognition by the courts of a right of property in the incorporeal work itself.

Basically, English law is the result of one Court having granted relief to a party, when it found that such was required to do justice and to remedy a wrong, and of the practice of other Courts following that decision and subsequently granting similar relief to other litigants in similar circumstances. It has the advantage of being founded upon practice and not theory, but it requires an examination of previously decided cases in order to ascertain what are the rights which the Courts have recognized and for the infringement of which they will grant a remedy. For the moment I am putting on one side the Statute law, which brings to the lawyer's life so much speculation as to the intentions, if any, of the legislature.

In the case of copyright, the Courts have for very many years recognized that at common law an author had a proprietary right in his unpublished literary productions. As was stated by Lord Brougham in *Jefferys v. Boosey*:¹ "The right of the author before publication we may take to be unquestioned and we may even assume that it never was, when accurately defined, denied. He has the undisputed right to his manuscript; he may withhold, or he may communicate it and, communicating, he may limit the number of persons to whom it is imparted and impose such restrictions as he pleases upon their use of it. The fulfillment of the annexed conditions he may proceed to enforce and for their breach he may enforce compensation." The nature of this right was explained by Lord Cozens Hardy, M.R. in *Mansell v. Valley Printing Co.*² in the following words:

The law thus laid down is based upon property, irrespective of implied contract or breach of duty. It does not depend upon property

1. (1884) 4 H.L.C. 815, 862.

2. (1908) 2 Ch. 441, 445.

in the paper or manuscript. It is an incorporeal property. . . . A very important case came before the House of Lords, *Donaldsons v. Beckett* decided in 1887 (4 Burr. 2408). . . . The Judges were summoned and several questions were put to them of which the first was as follows:— (1) Whether at common law an author of any book or literary composition had the sole right of first printing and publishing the same for sale and might bring an action against any person who printed, published and sold the same without his consent. All the judges except three answered this question in the affirmative. It shows that an action on the case would lie against any person who prints and publishes an unpublished book without consent. And when it is established that the right is a proprietary right, it is plain that the element of motive or intention on the part of the defendant is wholly irrelevant.

This common law right extended to pictures as well as to literary works (see *Mansell v. Valley Printing Co.*, *supra*).

Common law copyright has been abolished (see *Copyright Act 1956*, section 46(5)) and all rights of copyright are now governed by the 1956 Act, but it still remains important to know what is the essential nature of that which the law regards as being the right of "copyright".

Questions often arise as to whether a work is of a nature sufficient to be susceptible of copyright or whether a possible infringement takes sufficient from a copyright work to be an infringement. Neither of these questions can be answered in border-line cases without knowing what it is that is the basis of the right of property which is the subject of the copyright and the answer to this question cannot be found from the Statute alone. As a general rule, the practical lawyer does not concern himself with what is the basis for the Courts recognizing that there is a right which they will protect. It is enough that there is an established cause of action which covers the facts of the particular case. But where, as in the case of copyright, one is concerned with an incorporeal right of property, then it will often be necessary to find an answer to the question, "property in what?" before one can ascertain the limits of what the Court will protect. I should like to defer answering this question until I have considered the cause of action for "breach of confidence" in so far as it affects the right to prevent an unauthorized publication of an unpublished work, because a similar question arises as to what right of property in an unpublished work can be protected by the action for breach of confidence and, in my view, the "property" to be protected is the same in each case.

An unpublished work is usually "confidential" and the cause of action of "confidence" is expressly preserved by Section 46(4) of the Act. I would

like to quote the definition of "confidential information" expressed by Lord Greene, the greatest English equity lawyer of recent years, in the case of *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.*³

This case was one in which the defendants had used the plaintiff's drawings to manufacture for the plaintiffs certain machine tools for making leather punches, but, instead of delivering such tools to the plaintiffs, the defendants used them for manufacturing leather punches for themselves and they also made a second set of tools, either from the original drawings or from the first set of tools. The plaintiffs sued for infringement of copyright, breach of confidence and breach of contract. Lord Greene's definition of "confidential information" is to be found at page 215, in a passage in which he was dealing with the defendants' liability for making the second set of tools:—

The defendants in point of fact not merely made use of the tools made in accordance with the original drawings . . . , but they also manufactured a second set of tools. I do not want to say anything more about that than this: I am satisfied that, in manufacturing the second set of tools or some of them, use was made of the confidential information contained in the original drawings, or in a set of tools made from them under the original contract. They made a second set of drawings and, in order to make those drawings, they had recourse to some material derived from the original drawings.

I think that I shall not be stating the principle wrongly if I say this with regard to the use of confidential information. The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.

What the defendants did in this case was to dispense in certain material respects with the necessity of going through the process which has been gone through in compiling these drawings, and thereby to save themselves a great deal of labour and calculation and careful draughtsmanship. No doubt, if they had taken the finished article, namely, the leather punch, which they might have bought in a shop, and given it to

3. (1948) 65 R.P.C. 203.

an expert draughtsman, that draughtsman could have produced the necessary drawings for the manufacture of machine tools required for making that particular finished article. In at any rate a very material respect they saved themselves that trouble of obtaining the necessary information either from the original drawings or from the tools made in accordance with them. That in my opinion was a breach of confidence.

Lord Greene defined the cause of action for breach of confidence in a passage on page 213 as follows:

If a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without the consent, express or implied, of the plaintiff, he will be guilty of an infringement of the plaintiff's rights.

It will be observed that all that is necessary to produce a work that will be protected against a breach of confidence is that the author should have "used his brain and thus produced a result which could only be produced by somebody who goes through the same process". There is no requirement of literary, artistic or musical merit in order to acquire such a right of property. Nor is it essential for there to be inventive brain work, so long as there has been so great an amount of work as the law will recognize as substantial.

It would be inconsistent if the law were to demand a different standard of mental work from the author to acquire a right which could be protected under the law of copyright than to acquire a right which could be protected under the law of confidence, and it appears that in fact the test is the same in copyright as in confidence. Thus, as to copyright, I quote the words of Peterson J. in *University of London Press Ltd.*,⁴ a case in which the infringement consisted in the unauthorized reproduction of examination questions set by the University of London:

The first question that is raised is: Are those examination papers the subject of copyright? Sect. 1(i) of the Copyright Act 1911 provides for copyright in "every original literary dramatic musical and artistic work" . . . and the question is, therefore, whether these examination papers are, within the meaning of this Act, original literary works. . . . It may be difficult to define "literary work" as used in the Copyright Act 1911, but it seems to be plain that it is not confined to "literary work" in the sense in which that phrase is applied, for instance, to Meredith's novels and the writings of Robert Louis Stevenson. In speaking of such writings as literary works, one thinks of the quality, the style, and the literary finish which they exhibit. Under the Act of 1842,

4. (1916) 2 Ch. at 608-9.

which protected "books", many things which had no pretensions to literary style acquired copyright; for example, a list of registered bills of sale, a list of foxhounds and hunting days, and trade catalogues; and I see no ground for coming to the conclusion that the present Act was intended to curtail the rights of authors. In my view the words "literary work" cover work which is expressed in print or writing, irrespective of the question whether the quality or style is high. The word "literary" seems to be used in a sense somewhat similar to the use of the word "literature" in political or electioneering literature and refers to written or printed matter.

Assuming that they are "literary work" the question then is whether they are original. The word "original" does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought and, in the case of "literary work", with the expression of thought in printing and writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work — that it should originate from the author.

These words apply equally to the 1956 Act, which Act, like the 1911 Act, includes within the expression "literary work" documents defined as "written tables and compilations", of which typical examples would be mathematical tables and street directories.

My conclusion is that there is recognized under English law the basic conception that there may be a "property" in the product of mental work irrespective of its quality and that such will be protected by the Courts provided that the amount of work done is sufficient to merit its protection. In my view, it is this concept that underlies the statutory right of copyright. So far as unpublished works are concerned, this right may in many cases also be protected by an action for breach of confidence. It must be recognized that the law of copyright exists to protect from copying that which is written or otherwise fixed in form, but, in deciding whether there has been in substance copying, the Court should have regard to whether there has been copying of a substantial amount of the mental work of the author, because it is that which is the basis of the copyright.

This brings me to a consideration of the right under English law of the author after he has authorized a publication of his work, to restrain a subsequent publication. There has never been, except for copyright, any recognition that mental work can be protected under the common law after the owner has published it. For instance, an inventor, who publishes his invention

without having first obtained patent protection for it, has never had any right to prevent others from using his invention or any right to claim payment for its use.

There has, however, been a difference of judicial opinion in the past in England as to whether there was a "common law copyright" by which the author could prevent persons from copying without his consent an authorized publication of his work. Before the first Copyright Act was passed in 1709 there was some reason to suppose that the Court did recognize such a common law right (see *Miller v. Taylor*).⁵ But after the Copyright Act 1842 had given statutory copyright to the author in respect of his published works for the period of his life and 7 years, or, alternatively, 42 years from the date of publication, whichever period was the greater, there was no need for "common law copyright" in published works. It was decided in 1884 in *Jefferys v. Boosey, supra*, that this "common law" right did not exist, but my own view is that the common law would have enforced such a right if there had been no statutory copyright in order to ensure that justice was done to the author. But, whatever might have been the legal position in the past, it is now clear that, so far as copyright is concerned, the author who has published his work has now to rely solely upon his statutory copyright.

Statutory copyright subsists in every original literary, dramatic, musical or artistic work of which the author was (to use the words of the *Copyright Act 1956*) a "qualified person", in the case of an unpublished work, at the time the work was made or, in the case of a published work, when it was first published. The limitation of the grant of copyright to "qualified persons" limits the rights, for instance, of U.S. citizens in respect of works made or published in the United States before it became a member of the Universal Copyright Convention. But as from September 27, 1957 the Copyright Act 1956 became applicable to U.S. citizens equally as if they were British subjects and U.S. citizens are now entitled to the same British rights of copyright as are British subjects.

By express definition in the Act the expression "literary work" includes "any written table or compilation" and the expression "artistic work" includes "paintings, sculptures, drawings, engravings and photographs irrespective of their artistic quality and also works of architecture and artistic craftsmanship". There is no definition in the Act of what is meant by the word "original" and this word should be given the meaning given to it in the extract I have read from the judgment of Peterson J. It is implicit in this extract that the originator should have done substantial mental work in producing that for which he claims copyright, as otherwise he will merely have reproduced the

5. (1769) 4 Burr. 2303.

works of others. It is, however, impossible to lay down any exact criteria as to the amount of mental work required to found the right of copyright and the decision as to what amount is required is one that must be left in the end to the common sense of the tribunal which adjudicates. The question arises most often in the case of "compilations", where the author does no more than assemble matter which he has not originated, the mental work required in the selection justifying the copyright in his final work. The following extract from the speech of Lord Porter, in a case in which the House of Lords differed from the Court of Appeal, *G.A. Cramp & Sons Ltd. v. Frank Smythson Ltd.*,⁶ will illustrate the principle and exemplify the difficulties:

It is not denied that compilations are susceptible of copyright even though the matter complained of contains nothing new. . . . Nor does it matter, if a substantial portion of the compilation be taken, that the copier added fresh matter of his own or took only a part of the original compilation. On the other hand, as was conceded, no copyright exists merely by reason of the order in which the various items are placed. It is their selection, not their position inter se, which is alleged to constitute copyright. Bearing these considerations in mind, the question to be answered is, have the appellants succeeded in showing that the almanac in question is not susceptible of copyright? I think they have. It is conceded that, if the work, labour and skill required to make the selection and to compile the tables which form its items is negligible, then no copyright can subsist in it. Whether enough work, labour and skill is involved, and what its value is, must always be a question of degree. Different minds will differ, as may be seen in the present case from the divergence of opinion in the Courts below. . . . I think that apart from any evidence, the compilation for which copyright is claimed is nothing more than a commonplace selection or arrangement of scraps of information, neither of which has involved any real exercise of labour, judgment or skill. . . . I find the present case 'near the line' but, speaking for myself, I would put it on that side on which copyright does not subsist. If a further example be of assistance it is to be found in *Mac-Millan & Co. Ltd. v. K. & J. Cooper*, L.R. 51 Ind. App. 109, where a selection of passages from Plutarch's Life was held not to be susceptible of copyright, whereas certain notes appended to it were protected, though of a commonplace nature and at least in part themselves selected from older sources. . . . I think it impossible for the respondents to establish that the amount of knowledge, labour, judgment or literary skill or taste applied to the compilation of the tables at the beginning of the respondents' diary . . . entitles that compilation to copyright.

6. (1944) A.C. 329, 340-1.

These statutory rights extend to every form of exploitation of the work; for instance there is a statutory copyright in the conversion of a book into a play or a cinematograph film; there is a copyright in the right of public performance of the work and also in the right to record it whether on a gramophone record or on a film. Further these rights can be separately exploited, so that for instance a composer will receive royalties every time that his work is publicly performed and in addition every time that a record of his work is made. As a result of the formation of organizations, such as the Performing Rights Society which collects royalties in respect of the performance of copyright works on behalf of its members, composers are now able to collect royalties for every public performance of their works and also in respect of every recording made.

Further by reason of international conventions the copyright owner now obtains automatically copyright protection in very many countries and the rights he is granted extend for a considerable number of years. The period of copyright in England now continues until the end of the period of 50 years from the end of the calendar year in which the author died.

Thus, although common law copyright has become extinguished and the only copyright subsisting is that which arises under Statute, copyright owners cannot complain that they have suffered any hardship and, indeed some have made large fortunes by the exploitation of their copyrights.

Authors should, however, not overlook that a Legislature will normally adopt a different standpoint to the Common Law, as the Legislature is primarily concerned not so much with the rights of persons *inter se* but with benefits to the community as a whole, not so much to see that the individual gets fair treatment but to ensure that the community as a whole is fairly treated. For instance, the first Copyright Act 1709 was passed, not to ensure that authors were fairly remunerated for their work, but as it stated to "Encourage learned men to compose and write useful books". There will always be a tendency for any Legislature, if left to itself, to limit the extent of statutory copyright to that which is necessary only for the benefit of the community, irrespective of its adequacy as remuneration for the author. But, under sufficient pressure, every Legislature will legislate to protect the individual and authors are well placed to apply the pressure necessary for them to be given adequate protection. For myself, I think that the present statutory right of copyright gives to the author a reasonably good *quid pro quo* for the publication of his work. But where a Legislature grants a statutory right, it is desirable in the public interest that it should impose all such conditions on the exercise of that right as may be necessary in order to protect the community. Thus Statutory copyright is granted, subject to a number of exceptions of which the following are probably the most important:—

(i) "Fair Dealing" for the purposes of research or private study is excepted from infringement of copyright, whether the work is literary, dramatic, musical or artistic (Sections 6(1) and 9(1)).

(ii) Similarly, "fair dealing" for the purposes of criticism or review is excepted, provided that such is accompanied by a sufficient acknowledgment (Sections 6(2) (10) and 9(2)).

(iii) "Fair dealing" with a literary, dramatic or musical work is excepted provided that it is for the purpose of reporting current events either in a newspaper or the like or by means of broadcasting or in a cinematograph film (Section 6(4)). This permits for instance a news film to be exhibited of a band marching along a street and playing music the subject of copyright.

(iv) Where a person is authorized to broadcast a literary, dramatic or musical work, it is permissible for him to make a recording and broadcast that recording, even if he does not possess any recording rights, provided that such recording is only used for the purpose of the broadcast and is destroyed within 28 days after it is first used for broadcasting (Section 6(7)). This permits recording a television play with actors who could not be present at the time when the broadcast is to be made.

(v) Gramophone records can be made for retail sale, if previously an authorized record has been made or imported into the United Kingdom, for the purposes of retail sale subject to first giving the prescribed notice and to paying the specified royalty (Section 8).

(vi) Statutory copyright is lost in respect of an artistic work to the extent that it is applied "industrially" by the owner of the copyright (Section 10) and if the copyright owner wants protection for an industrial application, he must obtain a Registered Design for it. For instance, if a sculptor were to make a model of my face, he would possess artistic copyright in the sculpture, but, if he were to apply that sculpture to the manufacture of door knobs, he would lose his copyright in so far as it extended to door knobs and would have no protection at all in respect of door knobs unless he had applied for and been granted a Registered Design.

It is conceivable that these exceptions might be increased from time to time as might be thought by the Legislature to be necessary in the public interest. For instance, if a published copyright work has been out of print for a considerable time, it might be thought to be desirable that any publisher wishing to publish the work should be entitled to a compulsory license to enable him to do so.

I have not said anything about the question of the performer's rights. This question became of importance when it became possible to record a performance by an artist which converted that performance, which was previously evanescent and therefore not susceptible of copyright, into one which was fixed and permanent in form. In these circumstances, the performance when so recorded could logically be said to be susceptible of copyright, quite apart from any right that either the owner of the copyright in the music or the persons who made the recording might have in that record. My own feeling is that, if there had never been any copyright statutes, the common law would have recognized that a performer had a right of property in such a recorded performance.

But the English Legislature has dealt with this question, not by giving a copyright to the performer, but by making it a criminal offense to make, sell or hire, or use for the purpose of a public performance, any record of a dramatic or musical work made without the consent in writing of the performers (*The Dramatic and Musical Performers Act 1925*). The practical result is to a great extent similar to a recognition of a performer's copyright in that the performer can bargain for appropriate remuneration before he makes a recording and the application of this Act has been extended to cinematograph films and broadcasting. (*Copyright Act 1956* Section 45 and the Sixth Schedule.) It can be said that it is illogical to prohibit the recording of a performance without the performer's consent, if the performer has no "right" in his performance. But the arrangement has worked well in practice, which is all that matters because, although English Law aims to do justice, it does not purport to do so in every case by conforming to any logical theory of law.

I have dealt with what I believe to be the fundamentals of English Copyright Law and I will now turn to

THE TRIAL OF A COPYRIGHT CAUSE IN ENGLAND

I have always found it easier to consider any question by reference to some concrete facts. I will therefore assume that one of you finds yourself representing a U.S. corporation, who claims to own valuable world serial, including newspaper, rights in a book recently written by a prominent U.S. citizen, and that the U.S. corporation wishes to stop, if it possibly can do so, an English newspaper from publishing extracts from this book. The matter is urgent and you decide to fly at once to England, but before you do so I suggest that you should obtain and take with you copies, preferably photographic copies, of the U.S. corporation's documents of title. Further, it would be desirable to obtain copies of any other documents, if there be such, by which the author has assigned any other rights of copyright, to make sure that the author has

not in fact assigned the right to publish extracts in newspapers in England to someone else before the date of your clients' first document of title. I have known cases where persons have believed with good reason that they have copyrights, which full investigation has shown that they do not possess at all because the author had, without their knowledge, previously assigned those rights to another. The importance of obtaining these photographic copies and making these investigations before you leave the United States will appear from what I have to say later.

The first step you will have to take in England is to consult a firm of English solicitors. In England, solicitors do not practice as advocates, except on occasion in the minor Courts, and few specialize in any one branch of the law. Your solicitors will therefore probably take you at once to the chambers of a barrister, who they know has had considerable experience in conducting copyright cases in the Courts, with the object of obtaining his advice. Although, for the sake of convenience, half a dozen barristers may have rooms in one set of chambers, employing one senior clerk, yet there is no partnership between barristers and your solicitors will select the particular barrister, out of all those practicing in all the various chambers, that they think is the most suitable to advise you. In a normal case, they would take the opinion of a junior counsel, but in exceptional cases they would take the opinion of a Queens Counsel, probably jointly with a junior counsel. Your solicitors will be in no way limited in their selection of their counsel, because it is a rule of the English Bar that every counsel must accept instructions to advise and appear for any client in any branch of the law in which he normally practices and at his normal fees, provided that he is not embarrassed by, for instance, having already advised on the other side. You may find your counsel's chambers a little old fashioned, some of them have existed for a great many years, and the etiquette of the English Bar may also seem a little old fashioned too, although it has its advantages and I would not myself wish it to be altered. For instance, counsel do not themselves fix their fees, such questions being dealt with solely between their senior clerks and their instructing solicitors and, although counsel have no legal claim to be paid their fees, the solicitors as a matter of honour consider themselves responsible for meeting these fees. Personally, I like this system as it enables me to meet my clients and discuss with them their problems without there being any embarrassment between us over fees; for instance, if the client is impoverished, he only need tell his solicitors, who will then usually find no difficulty in arranging with the barrister's clerk that only a modest fee should be charged and this is done without any embarrassment to the client. A very important part of our system of law is the practice of appointing the Judges from practicing members of the Bar and the Judges are appointed, certainly in recent years, irrespective of their

political opinions. This practice of appointing Judges from the Bar results in a close association between the Bench and the Bar, and the Judges rely upon counsel to see that their client's case is put fairly before the Court but not in a manner that could result in an abuse of legal procedure. You will, therefore, appreciate that there are many things which a barrister will not be prepared to do to further his client's interests. What I have said about English legal practice is not special to copyright law, but it is an essential part of the English legal system, which is not always understood in other countries.

Let me now assume you have gone with your solicitor to copyright counsel. Your solicitor will have already ascertained from you the important facts and will explain them, with your help, to your counsel and will probably end with a question, such as:— "Do you think we have a good case and, if so, what do you advise should be done?"

Your counsel has then to consider a number of questions:

1. *Is the subject matter of your clients' work susceptible of copyright?*

It is here that an understanding of the basic conceptions of copyright may become important. In the majority of cases there will be no difficulty, but there are borderline cases where no certain opinion can be given whether the amount of mental work done by the author was sufficient to produce a literary, artistic or musical work which the Court will protect as being "original". I have already dealt with the principles upon which the Court will decide this question. In the case we are considering there should be no difficulty in giving an affirmative answer to this question.

2. *Does copyright in your clients' work exist in the United Kingdom?*

If the work has not been published anywhere with the author's consent, then the question whether there is statutory copyright depends upon whether the author was a "qualified person", when he wrote the work, within the meaning of that expression in the *Copyright Act 1956*, Sections 1(5), 2(1), 3(2), 31 and 32. These provisions may require careful consideration in some cases, but in your case there will be no difficulty because we are assuming that the book has been written recently and the provisions of the *Copyright Act 1956* were applied by *The Copyright (International Conventions) Order 1957* so as to put a U.S. citizen or a person resident in the United States, or a corporation incorporated under the laws of the United States, in the same position as a British subject.

If the work has been published with the author's consent, then there will be no difficulty in your case if the work was published after September 27, 1957, when the above Order came into effect, but there may be complexities

if the work was first published earlier in a country not a member of the Berne Convention.

In the case we are assuming, the book has been recently written and therefore there will be no difficulty in giving an affirmative answer to this question also.

3. *Have your clients a good title to the copyright?*

Experience shows that this often proves to be one of the most difficult questions, because authors are prone to exploit their copyright by signing agreements of various kinds without fully understanding them. There are certain presumptions of title (see Section 20), but these are rebuttable and are unlikely to help in the sort of case that we are considering. The answer to this question will depend upon the construction of the documents of title of which you have brought copies with you. There is nothing that I can say further on this question, except that I have seen on occasions assignments of copyright drafted in the U.S.A. which contain very many complex clauses and which are exceedingly difficult to understand. For myself, I believe that in general a good draft should be short, that a long draft is, in general, a bad draft, and that in any case all drafts should be in such simple language that the laymen signing them should be able easily to understand them. I have seen many documents drafted by lawyers of many nationalities, including English, which do not conform to this view, and plainly it is not one which is universally accepted.

I will assume that your counsel comes to the conclusion that your clients can probably prove that they have a good title to the English newspaper rights; but he may also bear in mind that it is possible that the author might have previously granted such rights to someone else unknown to your clients as a consideration to be taken into account in deciding whether to apply for an interlocutory injunction, a matter which I shall refer to later.

4. *Is there an infringement or threatened infringement?*

For myself I divide this question into two parts:—

(a) *Is there copying?*

The word "copying" is not to be found in the *Copyright Act 1956* and a person reading that Act, without any knowledge of the underlying principles of English copyright law, might suppose that, if a subsequent work sufficiently resembled an earlier copyright work, then the subsequent work would be an infringement of copyright whether or not there was in fact copying. Indeed a statutory monopoly is given to the owner of a Registered Design, giving to

him a special copyright in his registered design by which he obtains the exclusive right, for a maximum of 15 years, to make, import or sell any article for which the design is registered, if there has been applied to that article "the registered design or a design not substantially different from the registered design" (*Registered Designs Act 1949*, Section 7 (i)). A person will therefore infringe this special copyright in a Registered Design without copying, provided that the design of the article, that he makes, imports or sells, sufficiently resembles the registered design. But the monopoly right given by a Registered Design bears little relationship to the general copyright law and more nearly resembles the patent monopoly. So far as the general law is concerned, the common law does not favour monopolies and common law copyright did not confer any monopoly in the work but only the right to prevent others from copying it. Similarly, statutory copyright under the Copyright Act does not confer any monopoly, but only gives to the copyright owner the right to prevent his work from being copied by others for a specified number of years.

The question whether or not there has been copying is sometimes difficult to answer, for instance, where the defendant says that he did not copy the plaintiff's work but obtained his information from the same source as had the plaintiff himself. Thus in the case of an alleged infringement of the copyright in a street directory, the infringer usually says that he or his servants went to the houses themselves to get the information. In this sort of case a copied mistake may negative such a defence and some publishers of directories have intentionally introduced some mistakes in order to prove infringement if their directories are copied by competitors.

But in the particular case we are considering, this sort of defence would not be possible and your counsel's answer again would be in the affirmative.

(b) *Assuming that there is copying, has the defendant a good defence to infringement?*

There are two possible defences:—

(i) That a substantial part has not been copied, as the Act states that there is infringement only if the work or a substantial part of the work is copied (see Section 49(1)). The Act does not define what is a substantial part, but presumably if the part which is copied is itself susceptible of copyright, then there must have been taken a part which is substantial. I have already dealt with the question as to what amount of work is required to originate copyright and the same considerations appear to be equally applicable to the question as to what is a substantial part.

It would seem unlikely that this defence would be put forward by a newspaper intending to publish extracts in a number of issues of their newspaper, except perhaps if they were to rewrite the book in their own language and then contend that what they had taken was only the "plot" of the book in which there was no copyright. The law in England is not very clear as to infringement where only the "plot" has been taken, but probably the same principle applies, viz: that, if the author originated the plot and such required a substantial amount of brain work, then it is the subject of copyright; on the other hand, if the plot was not new and did not require a substantial amount of brain work on the part of the author of the book, then there would be no infringement, even if there were copying of the plot.

Probably the answer in the case we are assuming would be that this defence would be unlikely to succeed.

(ii) It is possible that the newspaper might contend that all that they had published and were intending to publish was excepted from being an infringement as being a "fair dealing for the purpose of criticism or review" (Section 6(2)) or a "fair dealing for the purpose of reporting current events" (Section 6(3)). This statutory exception would, however, not entitle the newspaper to serialize the book under colour of criticism, review or reporting current events. The line may be difficult to draw in a borderline case, but any publication by the newspaper of such an extensive kind as would damage the serialization rights would, I think, fall undoubtedly into the class of an infringement. If the newspaper have published one installment and have announced that they intend to publish further installments, such would not on the face of it accord with any of the statutory defences to infringement of copyright.

I will, therefore, assume that, after consideration of all the above matters, the conclusion is reached that it is probable that it could be proved that the newspaper have infringed and intend to continue to infringe your clients' copyright. The question then arises as to what should be done and the first matter to be considered is:—

5. Should an interlocutory injunction be sought?

In order to obtain an interlocutory injunction it is necessary for the plaintiff to prove a strong prima facie case and that, if the infringement is permitted to continue, he will suffer an injury which cannot be compensated subsequently by an award of damages. The plaintiff must also show that he has not delayed in coming to the Court to obtain relief. Provided that the plaintiff can establish the above, then the Court will grant an injunction if it concludes that in all the circumstances the balance of convenience is in favour of granting

an immediate injunction rather than, for instance, directing a speedy trial, which in a case such as we are considering could not be for some weeks, by which time all the damage would have been done. If an interlocutory injunction is ordered by the Court, then there will be imposed upon the plaintiff a cross-undertaking that he will indemnify the defendant against all the damages that he may suffer as a result of the interlocutory injunction, if it be decided at the trial that the plaintiff is not entitled to an injunction. It is a material factor that a plaintiff is resident outside the jurisdiction, because the cross-undertaking might be unenforceable against such a person, and the Court in such a case might require the plaintiff, as a condition of being granted an interlocutory injunction, to provide a suitable guarantee or to pay a sum of money into Court.

There are occasions where other considerations may arise bearing upon the desirability of seeking an interlocutory injunction, because in these applications the parties put their evidence upon affidavit. Experience shows that in, for instance, "street directory" cases, an application for an interlocutory injunction may result in an infringing defendant putting upon oath in his affidavit in answer an explanation of why his directory resembles the plaintiffs' directory, which explanation may be able to be shown to be false by evidence in reply referring to a copied mistake. If such were to happen, then the consequence would probably be that the defendant would be advised that his evidence would not be believed and that he should submit finally to the relief asked, thus saving all the expense and trouble of a trial. Similar considerations may apply in cases other than those relating to street directories.

But in the present case, probably the sole consideration will be whether the damage that your clients will suffer, if the infringement is permitted to continue, is likely to be so great that it is imperative to apply at once to stop the infringement.

In the case of an undoubted flagrant infringement the Courts will grant an immediate *ex parte* interlocutory injunction. The evidence in an application for an interlocutory injunction will have to be by affidavit, but the facts stated need not be known personally to the deponent but can be put forward by him "on information and belief". It would therefore be possible for you to confer with your counsel in the morning, for your junior counsel to draft at once an affidavit for you to make, exhibiting the copies of your clients' documents of title and proving what it is that the newspaper has published and threatens to publish, for an application to be made by counsel to the Judge on the same day (say at 4 p.m.) for an interlocutory injunction, and for the Judge to grant *ex parte* an interlocutory injunction in time to stop the printing of the next installment in the following day's issue of the newspaper. This

is not a fanciful suggestion, but one that is quite practicable if the circumstances warrant it.

There will be imposed on the person who obtains an interlocutory injunction *ex parte* a similar cross-undertaking as to damages as is imposed if an interlocutory injunction is granted pending the trial after the Judge has heard both parties. This cross-undertaking may become extremely onerous in certain circumstances, if the party obtaining it fails to succeed at the trial. There is usually little risk of an interlocutory injunction being wrongly granted, except upon an *ex parte* application where the party applying does not know and therefore does not put all the facts before the Judge, because a Judge will not grant an interlocutory injunction which is likely to cause considerable damage except in a clear case. The risk is greater, in the case of an *ex parte* injunction, of a mistake being made and it is more difficult to obtain such an injunction, but in a suitable case the application should be made and the injunction may be obtained.

You will now appreciate why I pointed out that, before you flew to England, you should obtain copies, if possible photographic copies, of your clients' documents of title.

If an *ex parte* injunction is granted, that will only be for a very short time, e.g. two days, to enable the defendant to be brought before the Court and for the application to be adjudicated upon in the presence of both parties. The defendant is entitled to file affidavit evidence in answer and the plaintiff to file affidavit evidence in reply and there may therefore be a delay of two weeks before the application is finally ready for hearing.

I should perhaps point out that a party who applies *ex parte* for an injunction is under a duty to act *uberrimae fidei* and to put before the Court all the material known to him which might affect the Court's decision to grant or refuse an interlocutory injunction.

It is possible that, if an interlocutory injunction is granted, the defendant will consent to treat the hearing of the application as the final hearing of the action and submit to all the relief sought in the action. But, if he does not do so, then the action will proceed to trial in the normal way of actions in the English Courts. I will now consider the relevant English legal procedure as to the preparation of an action for trial, and you will observe that there are differences between English and United States practice. There is nothing in the procedure to which I shall refer which is special to copyright actions.

6. Preparation of an action for trial in the High Court.

The action is commenced by a Writ of Summons and this is followed by the Statement of Claim, a document known as a "pleading" which is drafted

and signed by the plaintiff's junior counsel. The Statement of Claim sets out all the material facts and the relief which the plaintiff claims he is entitled to obtain upon those facts being established. All necessary particulars must be given and in a copyright action particulars will have to be given by the plaintiff of all those instances of copying upon which the plaintiff intends to rely at the trial to establish infringement. It will be appreciated that these particulars will require careful preparation. The Statement of Claim is followed by the Defence, the defendants' pleading corresponding to and answering the Statement of Claim, in which the defendant states which of the facts alleged in the Statement of Claim are admitted and which are denied and what is his defence to the plaintiff's claim; there is frequently delivered by the plaintiff (in answer to the Defence) a further pleading known as the Reply. The Defence and Reply may be the first documents, if the real dispute is as to the plaintiffs' title to the copyright, which particularize the exact issues which the Court will have to try. There are rare occasions when further pleadings may be delivered to clarify the issues to be tried, at the end of which the matter comes before a subordinate officer of the Court known as a "Master", who makes an order containing directions as to how the parties shall further proceed to prepare the case for trial.

An important direction made by him is that both parties shall file affidavits, specifying on oath all the material documents which they or their agents have or have had in their possession, custody, or power, and in the case of any such documents not at the time in their possession, custody, or power, stating what has become of them. Inspection has to be given of all those documents, unless they are, for one reason or another, privileged from inspection, for instance, as being an advice given to a party by his lawyer.

An Order can on occasions be obtained that the other party shall answer on oath certain written questions known as interrogatories, but these questions are limited to the matters in issue and are not permitted to extend to cross-examination generally.

There is no provision for any pretrial examination or cross-examination of potential witnesses, except where a party obtains leave to have the evidence of one or his own witness taken before the trial, because, for instance, the witness is ill or of such an age that he might die before the trial. Further, if a witness is resident outside the United Kingdom and it is unreasonable for him to come, or he is unwilling to come to the U.K. to give evidence, then his evidence may be permitted to be taken abroad.

Your solicitors will prepare and normally agree with the other party's solicitors on the documents required for the trial. They will interview and take statements of evidence from those persons who you intend to call as

witnesses to give oral evidence at the trial. It is not the custom for counsel to interview any of the witnesses before the trial. Usually the statements of witnesses are taken by the solicitors' managing clerk who deals with litigation, a person with great experience of obtaining from a prospective witness what his true views are. Experience shows that if a witness is persuaded before trial to express views other than those he really holds, then he will resile from those views when he gives his evidence. It is the view of English lawyers that the interests of one's own client and of the administration of justice generally are best served if the witness states in evidence what he really believes, without being in any way influenced by a previous discussion with counsel in which he may learn from counsel what is necessary to prove the case and may thereafter consciously or unconsciously trim his evidence accordingly. The effect of a witness resiling in cross-examination from the evidence he has given in chief may have the result that the Judge disregards his evidence completely and such may even make the Judge doubt the veracity of the other witnesses giving evidence on the same side. I appreciate that in countries like the United States, where the attorneys do the work both of solicitors and barristers, it may appear strange that English counsel do not interview the witnesses, but the English practice has its advantages and works well. Of course, the rule does not extend to prevent the parties seeing their own counsel and discussing their case with him nor does it extend to expert witnesses, and counsel consult freely with both the parties and with their experts, although always in the presence of the solicitors.

There are occasions in copyright cases where expert witnesses are required and this particularly applies to actions for infringement of musical copyright, especially where the only proof of copying lies in the musical similarity of the two works. But in a musical copyright case, if the defendant composer gives evidence that he had not copied and if he appears to the Judge to be truthful, then it is unlikely that the Judge would reject his evidence and accept that of an expert.

The trial of a copyright case is conducted before a Judge sitting without a jury and the witnesses give their evidence orally in answer to questions put to them by the counsel for the parties in examination—in-chief, cross-examination and re-examination. A shorthand note is taken automatically of all the evidence, in case there may be subsequently an appeal. Judgment is given orally, frequently immediately after the conclusion of the final speeches of counsel. If the Judge decides in favour of the plaintiff, then he may specify in his judgment what is to be the relief to be granted or alternatively he may leave this to be decided subsequently after argument as to what is the appropriate relief, having regard to the conclusions expressed in his judgment. In a copyright action there may be the following:

Relief:

(a) *An injunction* for the remainder of the life of the copyright. This would be the primary relief sought in the particular action that we have been considering. There is one exception in the Copyright Act 1956 to the grant of an injunction, namely that by reason of Section 17(4) an injunction will not be granted either to prevent the completion of a building after its construction has been begun or to require its demolition.

(b) *Damages:* (i) *for infringement* so as to compensate the plaintiff for any injury caused to him in the exploitation of his copyright. Damages will not be awarded against a defendant who can prove that at the time of the infringement he was not aware and had no reasonable ground for suspecting that copyright subsisted in the work (Section 17(2)). Normally a defendant finds it impossible to prove this.

(ii) *for conversion*, upon the basis that the infringing work is to be deemed to be the physical property of the copyright owner. In the case of an infringement in one issue of a newspaper, the sum of damages for conversion would be calculated by first estimating the fraction of the value of the infringing part to that of the newspaper as a whole, and then multiplying together that fraction, the retail selling price of that issue of the newspaper, and the total number of copies of that issue printed. If the value of the infringing material be considerable, then the damages for conversion may be high.

Damages for conversion cannot, however, be obtained against a defendant who proves that at the time of the conversion he had reasonable grounds for believing that there had been no infringement (see Section 18(2) for the precise language).

(iii) *Additional damages* may be awarded if the Court is satisfied that effective relief would not otherwise be available to the plaintiff, having regard to the flagrancy of the infringement and to the benefit which the defendant obtained from the infringement. One might perhaps describe these damages as being at least in part "punitive".

(iv) As an alternative to damages, the plaintiff can obtain *an account of profits* and is entitled to this relief even if the defendant can prove that he had no knowledge or suspicion that copyright subsisted in the work.

(v) The plaintiff can additionally obtain *an order for delivery up of all infringing copies*.

(vi) Finally the plaintiff, if successful, will normally obtain an order that the defendant shall pay him his *costs of the action* to be fixed by an officer of the Court upon a basis which in fact reduces all expenses to a bare minimum and usually results in the plaintiff only receiving about 2/3rds of

his actual costs and having to pay about 1/3rd himself. The Courts have a discretion as to the order they may make as to costs and a party, who has succeeded on some issues but lost on other issues, may find that there will be an apportionment of costs. Similarly, if the defendant is successful, he will normally obtain an order that his costs shall be paid by the plaintiff. But one must remember that the award of costs is in the discretion of the Judge, who may for instance refuse to make an order for costs in favour of a successful party if he has acted in an improper manner.

So far as an appeal is concerned there is nothing that is special to copyright:—

An unsuccessful party can appeal without leave to the Court of Appeal which is a Court consisting of three appellate judges. The parties' cases are argued orally before this Court by their respective counsel upon the evidence which had been put before the Judge of first instance and, except in very rare instances, no further evidence is admissible in the Court of Appeal.

An appeal to the House of Lords requires the leave either of the Court of Appeal or the House of Lords and leave to appeal will not normally be given if there are concurrent findings of all the judges and no important issue of law is involved. If leave is given, then the parties have to put their respective cases into writing but, as in the Court of Appeal, the actual hearing of the appeal is conducted orally by the parties' counsel.

I hope that I have now said sufficient about English copyright law and practice so that, if any of you were to be confronted with the question of what can be done to prevent an infringement of copyright in England, you will know not only how to go about solving it but also what is likely to happen if litigation should ensue.

If you are able to conclude, having heard my address, that English copyright law and practice is fundamentally similar to your own, I shall be pleased, because I believe that your jurisprudence and ours are both founded on the same principles of the same Common Law and the less our systems of law diverge the better. There would no doubt be great advantages if the laws of all countries were the same in all essential respects but, should that ever become a possibility, there might be a danger that the politicians, in order to get agreement and for the sake of expediency, would be prepared to jettison many basic principles of our Common Law which I regard as vital. As I get older, so do I appreciate more and more the value of that great heritage of the Common Law that has been handed down to us from the past. I hope that we both in my country and in yours will be able to hand it on, improved and not impaired, to those who will come after us.

PART II.

**LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS****I. UNITED STATES OF AMERICA AND TERRITORIES****326. U. S. CONGRESS. HOUSE.**

H.R. 6017. A bill to provide for the payment of royalties for the public performance of copyrighted musical compositions by means of coin-operated machines, and for other purposes. Introduced by Mr. Halpern, May 2, 1963, and referred to the Committee on the Judiciary. 5 p. (88th Cong., 1st sess.)

Identical with H.R. 5174 of the same Congress.

327. U. S. CONGRESS. HOUSE.

H.R. 6234. A bill to amend section 526 of the Tariff Act of 1930 to prohibit the importation of merchandise of foreign manufacture which simulates merchandise covered by an American copyright or design patent, and for other purposes. Introduced by Mr. Ashley (by request) May 13, 1963, and referred to the Committee on Ways and Means. 2 p. (88th Cong., 1st sess.)

A bill prohibiting the unauthorized importation of foreign manufactured goods which copy or simulate merchandise covered by valid American design patents and copyrights.

328. U. S. CONGRESS. HOUSE.

H.R. 6745. A bill to amend title 17 of the United States Code, "Copyrights", to bar actions for infringement of copyright in certain instances, and for other purposes. Introduced by Mr. Lindsay, June 3, 1963, and referred to the Committee on the Judiciary. 2 p. (88th Cong., 1st sess.)

This bill would amend the copyright statute by adding a new section at the end of chapter 2 which would bar any action for copyright infringement with respect to sound reproductions made for the use by the blind or quadriplegic residents of the United States. The Librarian of Congress would be entrusted with the procurement of books published on sound recordings and reproducers which would become

the property of the Library of Congress for the exclusive use by such handicapped persons.

329. U. S. CONGRESS. HOUSE.

Tariff Act amendment, by Thomas L. Ashley. *Congressional Record*, vol. 109, no. 70 (daily ed., May 13, 1963), pp. 7900-7901.

Extension of remarks of Mr. Ashley in connection with his introduction of H.R. 6234. See Item 327, *supra*.

330. U. S. COPYRIGHT OFFICE.

Sixty-fifth annual report of the Register of Copyrights for the fiscal year ending June 30, 1962. Washington, 1963. 22 p.

"Reprinted from the *Annual report of the Librarian of Congress* for the fiscal year ending June 30, 1962.

Includes an account of "The status of general revision of the copyright law."

331. UNITED STATES. *Laws, statutes, etc.*

Loi publique 87-773 du 9 octobre 1962 (87e Congrès, H.R. 11793); loi prévoyant des sanctions pénales pour le trafic de phonogrammes portant des étiquettes falsifiées ou contrefaites. Washington, Govt. Print. Off., 1962. *Interauteurs*, no. 150 (1st quarter 1963), pp. 62-63.

A French translation of the "Act to provide criminal penalties for trafficking in phonograph records bearing forged or counterfeit labels." See 10 BULL. CR. SOC. 37, Item 4 (1962).

2. FOREIGN NATIONS

332. FINLAND. *Laws, statutes, etc.*

Decret en application des lois du 8 juillet 1961, n^{os} 404/61 et 405/61, relatives au droit d'auteur sur les oeuvres littéraires et artistiques et au droit sur les images photographiques, du 25 août 1961. *Revue Internationale du Droit d'Auteur*, no. 36-37 (July-Oct. 1961), pp. 290-294.

The decree of August 25, 1961, implementing the Finnish copyright laws of 1961, in the official French translation prepared by the Ministry of Public Education. See, for English text, 10 BULL. CR. SOC. 257, Item 279 (1963).

333. FINLAND. *Laws, statutes, etc.*

Décret relatif à la meilleure application de la loi du 8 juillet 1961, n° 404/61 relative au droit d'auteur sur les oeuvres littéraires et artistiques, du 25 août 1961. *Revue Internationale du Droit d'Auteur*, no. 36-37 (July-Oct. 1962), p. 295.

A French translation of the decree of August 25, 1961, implementing the provisions of the Finnish copyright statute of 1961 with respect to public performance of copyrighted works. See, for English text, 10 BULL. CR. SOC. 257, Item 278 (1963).

334. FINLAND. *Laws, statutes, etc.*

Loi relative au droit sur les images photographiques, n° 405/61 du 8 juillet 1961. *Revue Internationale du Droit d'Auteur*, no. 36-37 (July-Oct. 1962), pp. 287-290.

The Finnish law of copyright in photographic pictures in the official French translation prepared by the Ministry of Public Education. See, for English text, 10 BULL. CR. SOC. 257, Item 277 (1963).

335. ITALY. *Laws, statutes, etc.*

Loi modifiant le délai fixé par l'article 1^{er} de la loi n° 1421 du 19 décembre 1956 concernant la prorogation de la période de protection des oeuvres intellectuelles, n° 1337, du 27 décembre 1961. *Revue Internationale du Droit d'Auteur*, no. 36-37 (July-Oct. 1962), p. 305.

The French translation of the Italian copyright extension act of 1961. (No English translation has yet been reported on this legislation.)

336. NORWAY. *Laws, statutes, etc.*

Loi du 14 décembre 1962, modifiant la loi du 2 décembre 1955 sur la prolongation provisoire du délai de protection des oeuvres intellectuelles. *Interauteurs*, no. 150 (1st quarter 1963), p. 63.

A French translation of the Norwegian copyright extension law of December 2, 1962. See 10 BULL. CR. SOC. 185, Item 205 (1962).

337. RUSSIA (1923 U.S.S.R.). *Laws, statutes, etc.*

Loi de l'Union des Républiques Socialistes Soviétiques concernant l'approbation des principes de la législation sur le droit civil de l'Union des Républiques Socialistes Soviétiques et des législations des républiques

fédérées. *Revue Internationale du Droit d'Auteur*, no. 36-37 (July-Oct. 1962), pp. 306-309.

The French translation of the recently enacted Soviet copyright law.

338. SOUTH AFRICA, REPUBLIC OF. *Laws, statutes, etc.* (Bills).

Copyright bill, (As read a first time). Bill to consolidate and amend the law relating to copyright and materials incidental thereto. Introduced by the Minister of Economic Affairs. [Pretoria] 1963. 86 p. (A.B. 51-'63)

The new draft copyright law of the Republic of South Africa which is generally patterned on the United Kingdom Act of 1956.

339. VENEZUELA. *Laws, statutes, etc.*

Loi sur le droit d'auteur du 12 décembre 1962. *Interauteurs*, no. 150 (1st quarter 1963), pp. 63-78.

A French translation of the new Venezuelan copyright statute. See 10 BULL. CR. SOC. 259, Item 284 (1963).

340. VENEZUELA. *Laws, statutes, etc.*

Law relating to copyright of December 12th, 1962. (76 *Le Droit d'Auteur* [English inset] 80-90, no. 5, May 1963.)

Also appears in French in the main section of the same issue of *Le Droit d'Auteur*.

The English version of the recent Venezuelan copyright statute. See 10 BULL. CR. SOC. 259, Item 284 (1963), and Item 339, *supra*.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS341. UNIVERSAL COPYRIGHT CONVENTION. *Deposit by Greece.*

The Copyright Office advises that it has learned, as yet unofficially, that on May 24, 1963, Greece deposited with the Director-General of Unesco its instrument of accession to the Universal Copyright Convention and its annexed three Protocols.

Under Article IX, paragraph 2, of the Convention, the latter will come into force in respect of Greece three months after the deposit of its instrument of accession, i.e., on August 24, 1963. Greece is the 46th country to adhere to the Convention.

PART IV.

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

342. *Shapiro, Bernstein & Co., Inc. v. H. L. Green Co., Inc.*, 316 F.2d 304, 137 U.S.P.Q. 275 (2d Cir., Apr. 15, 1963) (Kaufman, J.). *For decision below, see* 135 U.S.P.Q. 181, 10 BULL. CR. SOC. 120, Item No. 92 (1962).

Appeal from judgment for defendant H. L. Green Company, Inc. in action for copyright infringement. Defendant Jalen Amusement Company, Inc. manufactured bootleg phonograph records, which were sold in stores owned by defendant H. L. Green. Jalen operated the H. L. Green record departments as a concessionaire, with the store owner receiving a percentage of record sales in lieu of rent. The district court rendered a judgment against Jalen but held that H. L. Green Company, Inc. had not participated in the sales of infringing merchandise in its stores and was, therefore, not guilty of copyright infringement.

Held, reversed.

I. The court held that the participation of defendant H. L. Green Company, Inc. in the operation of the record department concessions in its stores was sufficient to make it a "seller" of the records, liable for copyright infringement. The court said:

At the time of suit, Jalen had been operating under license from Green the phonograph record department in twenty-three of its stores, in some for as long as thirteen years. The licensing agreements provided that Jalen and its employees were to "abide by, observe and obey all rules and regulations promulgated from time to time by H. L. Green Company, Inc. . . ." Green, in its "unreviewable discretion," had the authority to discharge any employee believed to be conducting himself improperly. . . . Significantly, the licenses provided that Green was to receive a percentage—in some cases 10%, in others 12%—of Jalen's gross receipts from the sale of records, as its full compensation as licensor.

In the actual day-to-day functioning of the record department, Jalen ordered and purchased all records, was billed for them, and paid for them. All sales were made by Jalen employees, who, as the District Court found, were under the effective control and supervision of Jalen. All of the daily proceeds from record sales went into Green's cash registers. . . . At regular accounting periods, Green deducted its 10% or 12% commission and deducted the salaries of the Jalen employees, which salaries were handed over by the Green cashier to one of Jalen's employees to be distributed to the others. Social security and withholding taxes were withheld from the salaries of the employees by Green, and the withholding then turned over to Jalen. Only then was the balance of the gross receipts of the record department given to Jalen. Customers purchasing records were given a receipt on a printed form marked "H. L. Green Company, Inc."; Jalen's name was wholly absent from the premises. The District Judge found that Green did not actively participate in the sale of the records and that it had no knowledge of the unauthorized manufacture of the records.

When a District Court's determination of infringement hinges upon such purely factual questions as whether the defendant had access to the plaintiff's copyrighted materials and whether the physical acts of copying or selling actually occurred, the scope of review on appeal is limited to determining if the District Court's conclusions are clearly erroneous. *Rosen v. Loew's, Inc.*, 162 F. 2d 785, 74 USPQ 196 (2d Cir. 1947); *Arnstein v. Porter*, 154 F. 2d 464, 469, 68 USPQ 288, 293-294 (2d Cir. 1946). But where, as here, the facts are undisputed, and the issue of infringement depends merely upon a legal conclusion to be drawn from a consideration of the parties' relationship, we feel that an appellate court's power of review need not be so constrained. On the facts before us, therefore, we hold that appellee Green is liable for the sale of the infringing "bootleg" records. . . .

The two lines of precedent most nearly relevant to the case before us are those which deal, on the one hand, with the landlord leasing his property at a fixed rental to a tenant who engages in copyright-infringing conduct on the leased premises and, on the other hand, the proprietor or manager of a dance hall or music hall leasing his premises to or hiring a dance band, which brings in customers and profits to the proprietor by performing copyrighted music but without complying with the terms of the Copyright Act. If the landlord lets his premises without knowledge of the impending infringement by his tenant, exercises no supervision over him, charges a fixed rental and receives no other benefit from the infringement, and contributes in no way to it,

it has been held that the landlord is not liable for his tenant's wrongdoing. See *Deutsch v. Arnold*, 98 F. 2d 686, 39 USPQ 5 (2d Cir. 1938) . . . But, the cases are legion which hold the dance hall proprietor liable for the infringement of copyright resulting from the performance of a musical composition by a band or orchestra whose activities provide the proprietor with a source of customers and enhanced income. He is liable whether the bandleader is considered, as a technical matter, an employee or an independent contractor, and whether or not the proprietor has knowledge of the compositions to be played or any control over their selection. See *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 198-99, 9 USPQ 17, 18-19 (1931). . . .

We believe that the principle which can be extracted from the dance hall cases is a sound one and, under the facts of the cases before us, is here applicable. Those cases and this one lie closer on the spectrum to the employer-employee model than to the landlord-tenant model. Green licensed one facet of its variegated business enterprise, for some thirteen years, to the Jalen Amusement Company. Green retained the ultimate right of supervision over the conduct of the record concession and its employees. By reserving for itself a proportionate share of the gross receipts from Jalen's sales of phonograph records, Green had a most definite financial interest in the success of Jalen's concession; 10% or 12% of the sales price of every record sold by Jalen, whether "bootleg" or legitimate, found its way—both literally and figuratively—into the coffers of the Green Company. We therefore conclude, on the particular facts before us, that Green's relationship to its infringing licensee, as well as its strong concern for the financial success of the phonograph record concession, renders it liable for the unauthorized sales of the "bootleg" records.

II. It was also held that because the judgment against Jalen related solely to the "manufacture" of the bootleg records, Green was severally liable for infringement for selling the records, rather than jointly with Jalen. The court said:

Since the plaintiff's complaint was apparently deliberately drawn so as to state a cause of action against Jalen only for unauthorized manufacture, and since the District Court found Jalen liable only for that and not for unlawful sales, the question whether Green is liable in addition to Jalen, or merely as an alternative to Jalen, is moot, and need not be decided at this time.

343. *Platt & Munk Co. v. Republic Graphics, Inc.*, 315 F.2d 847, 137 U.S.P.Q. 268 (2d Cir., Apr. 3, 1963) (Friendly, J.), modifying 137 U.S.P.Q. 412 (S.D.N.Y., Sept. 12, 1962) (Cooper, J.)

Appeal from order granting preliminary injunction in action for copyright infringement. Under contract with plaintiff, defendant did printing and related work in connection with plaintiff's copyrighted games. There was a dispute about alleged defects in certain of the games manufactured for plaintiff by defendant, and defendant, not having been paid, asserted that it had a right to sell the merchandise as an "unpaid seller" within the terms of New York Personal Property Law §§133-141. It also alleged that, being lawfully in possession of the goods, it came within the exception stated in §27 of the Copyright Act, viz: "but nothing in this title shall be deemed to forbid, prevent or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained." The district court held that: *a*) defendant was not an unpaid seller within the meaning of the New York Personal Property Law; *b*) that even if defendant were an "unpaid seller," that would not give it a "license to infringe," and *c*) that defendant did not come within the §27 exception because it never had title to the copyrighted goods; the court granted an injunction restraining defendant's sale of the games and restraining further resale by co-defendants to whom the manufacturer had sold some of the games. Defendants appealed.

Held, modified.

The court rejected defendants' contention that the "but nothing" clause in §27 of the Copyright Act allows any person lawfully in possession of copyrighted merchandise (although without title to the merchandise) to sell it without being an infringer of the copyright. It was also held, however, that the first sale of copyright goods by the proprietor, exhausting his exclusive right to vend as to the particular goods, may be a judicial or other involuntary sale.

I. The court held that the "but nothing" clause of §27 relates to the preceding language in that clause with regard to the difference between ownership of copyright and ownership of tangible objects, and does not limit the exclusive right to vend granted in §1(a). The court said:

Although defendants have been "vending" copyrighted works without any express license from the copyright proprietor, it is contended that, despite the exclusive right to vend granted to the proprietor by §(a) of the Copyright Act, 17 U.S.C. §1(a), they are entitled to do this because of §27 of the Act, especially its final clause. Section 27 provides:

"The copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the

material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object; but nothing in this title shall be deemed to forbid, prevent or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained."

Since Republic's possession of the goods was "lawfully obtained" under its contract with Platt & Munk, and since, as is quite reasonably asserted, the other defendants through their purchases from Republic have acquired not merely lawful possession of the material objects but title as well, it is contended that §27 precludes invoking the Copyright Act "to forbid, prevent or restrict the transfer" of the goods in question.

Such a literal reading of the "but nothing" clause is unacceptable. If lawful possession by another sufficed to deprive the copyright proprietor of his right to control the transfer of the copyrighted objects, any bailee of such objects could sell them without infringing the copyright, whatever his liability for conversion might be. In view of the necessary role played by manufacturers, shippers, and others in producing and distributing copies of copyrighted works, the result in many cases would be that a copyright proprietor could not present his work to the public without risking the loss of part of his copyright protection. True, only the right to vend is involved; the copyright proprietor could still prevent possessors and even owners of the objects from making copies of them. *Stevens v. Gladding*, 17 How. (58 U.S.) 447 (1855). But "the author is just as much injured by being deprived of the price of a genuine copy as by having a piratical copy substituted for it." *Henry Bill Pub. Co. v. Smythe*, 27 F. 914, 922 (C.C.S.D. Ohio 1886). A literal reading of the clause would mean, moreover, that an innocent purchaser of a copy from a conceded pirate would be free to resell it without liability for infringement. Yet the cases to the contrary are legion. E.g., *F. W. Woolworth v. Contemporary Arts, Inc.*, 344 U.S. 228, 229, 95 USPQ 396, 397 (1952); *Shapiro, Bernstein & Co. v. Goody*, 248 F. 2d 260, 264, 115 USPQ 36, 39 (2 Cir. 1957), cert. denied, 355 U.S. 952, 116 USPQ 601 (1958). . . .

More reasonable results are reached if the clause is construed in the light of its role as a limitation on the first half of §27, and also with the aid of the explanation proffered by the House Committee on Patents at the time the section was enacted:

"Section 41 [of the Act of 1909, which is identical to §27 of the present statute] is not intended to change in any way existing law, but simply to recognize the distinction, long established, between the

material object and the right to produce copies thereof. The concluding clause in the section, that 'nothing in this act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a work copyrighted under this act the possession of which has been lawfully obtained', is inserted in order to make it clear that there is no intention to enlarge in any way the construction to be given to the word 'vend' in the first section of the bill. Your committee feel that it would be most unwise to permit the copyright proprietor to exercise any control whatever over the article which is the subject of copyright after said proprietor has made the first sale." H.R. Rep. No. 2222, 60th Cong., 2d Sess. (1909).

In accordance with the committee's statement, the "but nothing" clause—as well as the prior law, which §27 was "not intended to change in any way"—has never been regarded by the courts as terminating the proprietor's control over the sale of a copyrighted object merely by virtue of his having allowed another person to obtain lawful possession of it. . . . In the fact situations most nearly comparable to the one at bar, the courts have formulated the pivotal question as whether "lawful ownership" of the copyrighted object has been "transferred to a first purchaser," *Independent News Co. v. Williams*, 293 F. 2d 510, 129 USPQ 377 (3 Cir. 1961); whether the proprietor had "parted with the title to one who had acquired full dominion over it and had given a satisfactory price for it," *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350 (1908); or whether the object has been "sold by authority of the owner of the copyright," *ibid.* . . .

II. Plaintiff contended that the copyright proprietor retains his exclusive right to vend the copyrighted work until he has made a voluntary "first sale." The court held, however, that the "first sale" can be compulsory. The court said:

The proprietor retains his exclusive right to vend the copyrighted work, it is contended, until he himself has made or authorized one truly voluntary "sale" and received a satisfactory "price" from the "purchaser." But the House Committee's statement "that it would be most unwise to permit the copyright proprietor to exercise any control whatever over the article which is the subject of copyright after said proprietor has made the first sale" does not necessarily mark the limit of the committee's views as to un wisdom; the committee might well have thought it equally unwise that copyrighted goods should enjoy total immunity from the ordinary obligations of commercial life, such as judicial sales on execution or foreclosure or by an equity receiver or a bankruptcy trustee. There is nothing in the language or the legislative history of §27 that requires

such an unreasonable result, and nothing in the judicial authority under the "first sale" doctrine either. True it is that during the first three-quarters of the nineteenth century it was often suggested in this country that copyright and patent rights could not be reached by creditors at all, or subjected to any compulsory transfer of ownership. . . . But in 1882 the Supreme Court made clear that a court of equity could subject a patent right to the payment of a judgment debt of the patentee, and declared that "the provisions of the patent and copyright Acts, securing a sole and exclusive right to the patentee, do not exonerate the right and property thereby acquired by him . . . from liability to be subjected by suitable judicial proceedings to the payment of his debts." *Ager v. Murray*, 105 U.S. 126, 128 (1882). . . . [I]t was held in 1883 that a patented object in the patentee's hands, as distinguished from the patent itself, could be reached even at law, so that a purchaser at a sheriff's sale conducted under an execution against the patentee took the same rights that the purchaser would have taken if he had been an orthodox "first purchaser" under a voluntary sale by the patentee. *Wilder v. Kent*, 15 F. 217 (C.C.W.D. Pa. 1883). While the intervening years have seen an occasional recrudescence of the view that one who purchases a copyrighted or patented object at a judicial sale is guilty of infringement if he sells it . . . we see no reason to doubt that the sensible rule of *Wilder v. Kent* is the law today.

The foregoing makes it clear that the "first sale" which terminates the exclusive right to vend patented or copyrighted objects need not be a truly voluntary one, but can consist of some reasonable and recognized form of compulsory transfer, such as a judicial sale or court-compelled assignment.

III. The defendants argued that Platt & Munk's exclusive right to vend never attached, because it never acquired title from the manufacturer, and that defendant Republic was therefore free to sell the games, as an unpaid seller, under §141 of the New York Personal Property Law. The court held, however, that because of the copyright nature of the goods, an adjudication that the plaintiff had unjustifiably refused to pay for the goods, or that it "has been in default of the payment of the price an unreasonable time" was required in order to proceed under §141. The court said:

[Defendants argued] . . . that Republic, having manufactured the goods and not yet having delivered them to Platt & Munk, was "prior in title to the copyright holder"—with the asserted result that Platt & Munk's exclusive right to vend never attached. Assuming arguendo that Republic did have title to the goods under state law and that this title

had not yet passed to Platt & Munk, we see no reason why this type of title should be superior, for the purpose of alienating rights from the copyright proprietor, to title acquired by buying from an agent of the proprietor who had apparent but not actual authority to sell, or by buying in good faith from someone who has bought from such an agent. If the raw materials that went into the goods had been supplied by Platt & Munk instead of Republic, title would have been in the former rather than the latter . . . Yet it would seem exceedingly odd that copyright protection should turn on which party has furnished the physical stuff to which the copyrighted conception is affixed—with the protection lost if the author does not assume a role for which others are usually better suited.

Although Republic thus obtained no right to sell the goods solely by virtue of its title to the materials, this does not mean that such a right may not have arisen from the contract relationship between Republic and Platt & Munk, as a result of default by the latter. Defendants' final contention is, in fact, that Republic has the "right of resale" granted to an "unpaid seller" under §141 of the New York Personal Property Law (Uniform Sales Act, §60). It is true that our interpretation of the "first sale" doctrine leads to the conclusion that if Republic had obtained an adjudication that Platt & Munk was in default on the contract price or that Republic had a valid lien on the goods and a right to resell them, Republic and the other defendants could sell without liability for infringement, just as a judgment creditor or another lienor foreclosing through the judicial process could do. . . . The difficulty comes from the fact that the law gives an unpaid manufacturer a right to sell without prior adjudication of the merits of his claim . . . In the present case . . . Republic has obtained no adjudication that Platt & Munk's refusal to pay for allegedly defective goods was unjustified, or that Platt & Munk "has been in default in the payment of the price an unreasonable time". Where the copyright owner makes a good faith claim that its failure to pay for the goods was justified, the manufacturer ought not be allowed to resort to the normal remedy of self-help with the result of impairing the rights granted by the Federal copyright law; to that extent state contract or lien law must yield to the federally created right.

The court modified the district court orders to provide that upon filing of a counterclaim for the purchase price, and adjudication thereof, the injunction on sale of the games should be lifted as to such goods as plaintiff was not justified in refusing to accept, unless plaintiff pays the contract price, plus interest, for such goods, within fifteen days after the question of plaintiff's right to refuse the goods is judicially determined.

344. *Toulmin v. The Rike-Kumler Co.*, 137 U.S.P.Q. 533 (S.D. Ohio, June 30, 1962) (Weinman, J.), affirmed, per curiam, 316 F. 2d 232, 137 U.S.P.Q. 499 (6th Cir., Apr. 17, 1963).

Action for copyright infringement and unfair competition. Plaintiff's book, "With Pershing in Mexico," a factual account of Pershing's expedition against Pancho Villa in 1916, was published in 1935 and has been out of print since 1936. Plaintiff charges that the 1958 historical novel, "They Came to Cordura", infringes his copyright because part of a paragraph from his book, about 50 words, is quoted in the introduction to the novel. This quotation is also the basis of his claim of unfair competition.

Held, judgment for defendants.

I. The court held that the quotation from plaintiff's book was a fair use, and that it was so insubstantial as to constitute a case of "de minimis." The court said:

The charge of alleged infringement is based on the following passage appearing in the Foreword of "Cordura":

"Of the terrain, one officer, writing twenty years later, concluded that 'If God had set out to mold a country as a stage for a cavalry campaign, he would have made . . . Chihuahua. . . This was a stage five hundred miles long and a hundred miles wide across which snow, sandstorms, tropic heat and sharp cold added to the misery of the actors.'"

. . . Swarthout selected these two sentences and quoted them, stating that "one officer, writing twenty years later, concluded that . . ." in order to lend an air of authenticity to his book.

In the "Pershing" book, Toulmin followed the same pattern as Swarthout as to quoting from an unidentified cavalry officer.

The use of one sentence and a part of another by Swarthout in "Cordura" taken from "Pershing" represents neither a substantial nor material part of the latter, was insignificant in value and extent of the copyrighted material, did not in any degree prejudice the sale, diminish the profits or supersede the objects of the original work, and was thus a "fair use" thereof. . . .

The sentences used in "Cordura" are not the heart and core of the entire theme of the Toulmin book; they do not in fact relate to that theme at all.

The clear facts and the only possible inferences that can be drawn from them establish beyond possibility that this case is a clear case of *de minimis*.

II. The court held that since "the 'Pershing' book had been out of print for at least 22 years before 'Cordura' was published there was not and could not have been any unfair competition."

345. *Dugan v. American Broadcasting Corp.*, 137 U.S.P.Q. 238, 216 F.Supp. 763 (S.D. Cal., Mar. 14, 1963) (Crary, J.)

Action for copyright infringement. Plaintiff charged that both the ABC program "About Faces," a contest series, and a Steve Allen comedy sketch infringed his "playlet" of a program to be entitled "Opportunity."

Held, judgment for defendants.

The court held that there was no substantial similarity between plaintiff's sketch and defendants' programs (although some of the ideas were similar), and that in a copyright infringement suit, summary judgment is proper where lack of similarity is shown. The court said:

The law is well settled that a copyright protects only the "expression of ideas", not the ideas themselves. *Dellar v. Samuel Goldwyn, Inc.*, 150 F. 2d 612, 66 USPQ 9 (2nd Cir.), *Richards v. Columbia Broadcasting System*, 161 F. Supp. 516 (1958).

In considering a motion for summary judgment, Rule 56(c) of the Federal Rules of Civil Procedure provides, "The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that *there is no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law." Emphasis ours. As stated in the *Richards* case, *supra*, at page 518, 117 USPQ at 175, of the opinion:

"Thus, it is upon the issue of substantial similarity that the decision of defendant's motion for summary judgment must be based. This similarity is not one of ideas as such, but of the embodiment of these ideas in written or other form since an author cannot obtain a copyright on his ideas apart from their expression. . . . The fundamental idea of an original work may even be borrowed as long as the specific details of the author's literary efforts are not copies."

The details of the format of plaintiff's "Opportunity" and the programs of defendants are basically dissimilar "expressions of ideas." Assuming access to defendants of plaintiff's playlet, and even assuming

copying by defendants of the ideas of obtaining photographs from the public, selecting one from a drum containing such photographs, and possibly awarding a prize, but for different reasons, the similar ideas involved do not create, the court concludes, as a matter of law, a substantial similarity between the plaintiff's script and the defendant's programs. . . .

A comparison of the scripts of defendants with plaintiff's copyrighted playlet evidences the fact that points of essential difference so far outnumber the points of similarity that it does not appear anyone could persuade himself that one was borrowed from the other. . . . [A]lthough courts are reticent to order summary judgments because of the scarcity of cases in which a material fact is not involved, in the instant matter, for the reasons set forth hereinabove, defendants' motion for summary judgment is granted.

2. State Court Decisions

346. *Television Adventure Films Corp. v. KCOP Television, Inc.*, 137 U.S.P.Q. 254 (Cal. Super., Mar. 20, 1963) (David, J.)

Action for plagiarism and unfair competition. Both plaintiff and defendants have television shows in which a master of ceremonies introduces travel and adventure films and interviews the photographers. Plaintiff Television Adventure Films Corp. is under contract to defendant KCOP and plaintiffs' shows appear on that station. Plaintiffs charge that defendants' "Open Road" is copied from and is imitative of plaintiffs' shows, and that KCOP has caused confusion in the mind of the viewing public by presenting "Open Road" in plaintiffs' usual time slot. Defendants demurred to the complaint.

Held, demurrer sustained, with leave to replead cause of action for unfair competition.

I. The court held that plaintiffs had no protectible interest in their not very unusual format. The court said:

[T]he Court expressly holds . . . that none of the plaintiffs have any exclusive or proprietary interest in those elements dominated as the "format". . . . The interview-master-of-ceremonies technique, lecture by a traveler, etc., are completely in the public domain and can not be appropriated so as to exclude others. One M.C. is like another; one can not say that the first on a stage has a special right to be an M.C., because the second functionally duplicates the operation. There was an entire absence of showing the adoption of purely personal mannerisms; as would happen if Harold Lloyd pretended to be Charlie Chaplin in pantomime.

Plaintiffs in their recitative take the position that because Douglas first showed foreign scenes, he pre-empted the right to do so. This is legal fantasy.

II. Although the formal count of plagiarism was dropped from the amended complaint, the court found this cause of action "implicit" in the terminology of the amended complaint, and held that no plagiarism was shown. The judge based this finding on the exhibition of plaintiffs' and defendants' films in connection with the plagiarism count in the original complaint, and on the court's "declared knowledge" in that, "in open court, the court declared to counsel for the parties his addiction to viewing substantially all of the travelogues produced by both Douglas and Burrud over the past several years, including those exhibited to the Court as such, and substantially all of those referred to in the complaints, and suggesting they might find him disqualified; whereupon it was stipulated he would not be deemed disqualified. It was suggested by both counsel this was an advantage to both."

III. Plaintiff charged that defendants were guilty of unfair competition not only because they imitated plaintiffs' format, but also because they put defendants' shows on in a time slot formerly occupied by plaintiffs' shows. The court held, however, that there was no imitation, as shown by the exhibits, and that switching time slots would not ordinarily be unfair competition. The court said:

We do not believe that, in the absence of a contract reserving a specific time for a specific program, or excluding competition, such confusion arising from want of ordinary perception of the obvious is actionable. If the public were at all interested, each production directly identified the master of ceremonies concerned. We can understand the materiality of the audience reaction, inasmuch as that in turn determines the sponsorship of particular programs, and the audience polls or correspondence indicates those programs to which they listen.

But if the general public are unable to distinguish between a Ford and a Chevrolet, each driving along the street at the same time, or reversing times on successive days, that does not prove unfair competition on the part of either, because their article is not so distinctively labeled as to make such confusion negligible.

The court stated, however, that some of the allegations inferred but not stated in the affidavits might constitute a cause of action, and therefore leave was given to replead. The court said:

If it can truthfully be alleged, as is now inferred, that the defendants, having an exclusive contract with Douglas, determined after the

acquisition of the property interest in the Burrud program to willfully and deliberately shift program times to foster his program and to depreciate that of Douglas for the express purpose of appreciating their investment and depreciating that of Douglas, it may be that a cause of action exists.

Also of Interest:

347. *Wembley, Inc. v. Diplomat Tie Co.*, 137 U.S.P.Q. 107, 216 F.Supp. 565 (D. Md., Mar. 11, 1963) (Friedman, J.)

In an action for trademark infringement and unfair competition, it was held that a merchandising plan featuring the slogan, "The Tie With the Color Guide" was not protectible under any theory. The court stated that plaintiff was attempting through the trademark registration statutes to do indirectly what it could not do under the patent and copyright laws, i.e., "obtain protection of, and a monopolistic standing in regard to, the attaching of permanent fabric labels on neckties."

348. *Dietrich v. Standard Brands, Inc.*, 137 U.S.P.Q. 146 (E.D. Pa., Mar. 21, 1963) (Friedman, J.)

In an action for infringement of copyright in a slide-rule calculator designed for figuring prices, plaintiff's motion for summary judgment was denied on the ground that defendant's answer and affidavits raised triable issues of fact. The court said that it must apply Rule 56 of the Federal Rules of Civil Procedure as it stood and could not anticipate the effect of a proposed amendment to the Rules which would permit a court to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial."

349. *Morro Music Corp. v. Seeco Records, Inc.*, not yet reported. (Sup. Ct., N.Y. Co., May 2, 1963) (Greenberg, J.)

In a suit against a licensee of copyrighted music for failure to comply with the license agreement, the court held that plaintiff, who had already recovered a judgment in "a foreign country," had not adequately proved the additional items of damage which it claimed in the suit at bar.

PART V.

BIBLIOGRAPHY

A. BOOKS AND TREATISES

1. United States Publications

350. DESIGN LAWS AND TREATIES OF THE WORLD. Washington, The Bureau of National Affairs, Inc. (with A. W. Sythoff, Leyden, The Netherlands). 1962. Looseleaf. Edited by Arpad Bogsch. Third installment of yearly supplements.

Among the countries covered for the first time are Ceylon, Czechoslovakia, Ireland, Malaya, Norway, Philippines, Portugal, Rhodesia and Nyasaland, Spain and Venezuela.

351. COPYRIGHT LAWS AND TREATIES OF THE WORLD. Paris, United Nations Educational, Scientific and Cultural Organization; Washington, The Bureau of National Affairs, Inc., 1962. Looseleaf.

The new supplement includes an additional section dealing with the rights defined in the Rome Treaty of October 26, 1961, as well as additional information received by UNESCO from various States on copyright provisions in force in the territories for the international relations of which they are responsible.

2. Foreign Publications

352. FINDLATER, RICHARD. What are writers worth? A survey of authorship prepared for the Society of Authors. London, Society of Authors, 1963. 29 p.

A factual survey of the economic situation of writers in Great Britain which intends to "point the way to more comprehensive investigation in the near future."

353. LASSEN, OTTO. Comparative survey of the provisions laid down in the new copyright acts of the Scandinavian countries to govern the rights of performing artists and gramophone companies. København, Danske Gruppe af Grammofonindustriens Internationale Federation, 1962. 14 p.

354. HUBMANN, HEINRICH, and SPAIĆ, VOJISLAV. Das Filmrecht des deutschen Regierungsentwurfs, von Heinrich Hubmann. Das Urheberrecht und der Film, von Vojislav Spaić. Berlin, F. Vahlen, 1962. 74 p. Internationale Gesellschaft für Urheberrecht, Schriftenreihe, Bd. 26.

Two studies, the first of which is a critical analysis of those provisions of the latest West German draft copyright law [Regierungsentwurf] which are concerned with motion pictures. The second study, which is a reprint of a lecture delivered at the Vienna Congress of the International Copyright Society on April 30, 1960, deals with the problems of copyright in motion pictures under the laws of various countries and international conventions.

B. LAW REVIEW ARTICLES

1. United States

355. ALAND, ROBERT HARRIS. Copyright protection afforded officials and employees of the Federal Government. (15 *Alabama Law Review* 120-138, no. 1, Fall 1962.)

This comment, which received first place award in the 1962 Nathan Burkan Memorial Competition at the University of Alabama School of Law, purposes to "review the decisions and policy considerations in this area of copyright law [*i.e.*, the applicability of Section 8 to material produced by an official or employee of the Federal Government] and to suggest a rational, realistic, and workable approach to aid the courts when confronted with this problem."

356. Antitrust—block booking of copyrighted feature films for television exhibition held violative of Sherman Act. (31 *Fordham Law Review* 807-812, no. 4 Apr. 1963.)

A case note on *United States v. Loew's, Inc.*, 371 U.S. 38, 10 BULL. CR. SOC. 105, Item 84 (1962), *modifying* 189 F.Supp. 373, 9 BULL. CR. SOC. 264, Item 160 (S.D.N.Y. 1960).

357. FINKELSTEIN, HERMAN. [A review of] Cases on copyright, unfair competition, and other topics bearing on the protection of literary, musical and artistic works by Benjamin Kaplan and Ralph S. Brown, Jr. Brooklyn: The Foundation Press, 1960. (72 *The Yale Law Journal* 844-852, no. 4 Mar. 1963.)

A rather comprehensive review devoted for the most part to an examination of some of the cases included in the work reviewed.

358. GORDON, MICHAEL W. Remedies available for infringement of statutory common-law copyrights. (37 *Connecticut Bar Journal* 187-200, no. 1, Mar. 1963.)

"This paper [which was awarded first prize in the Nathan Burkan Memorial Competition at the University of Connecticut School of Law for the year 1961-1962] will be limited to a discussion of the equitable and legal remedies for infringement of copyrights which are available under the common law and under the statutory law."

359. KELLMAN, LEON. [Review of] Howell's Copyright law (Revised edition). By Alan Latman. Washington, D. C.: BNA Incorporated, 1932 [*i.e.* 1962] . . . (29 *Brooklyn Law Review* 181-182, no. 1, Dec. 1962.)

The reviewer concludes that "all in all, the book is a most comforting tool to have around the office."

360. MOTT, KELSEY MARTIN. The concept of small patent in European legal systems and equivalent protection under United States law. Reprinted from 49 *Virginia Law Review* 232-261, no. 2, Mar. 1963.

An exploration of "some of the major systems which employ a short-term patent for the protection of innovations requiring less originality than ordinary patents . . . The arguments for and against this type of legislation are presented in light of the possibility that this sort of protection may be provided in the United States."

361. WHICHER, JOHN F. Originality, cartography, and copyright. (38 *New York University Law Review* 280-300, no. 2, Apr. 1963.)

A well-reasoned critique on the failure of the courts to apply the classic rule on originality to maps in copyright decisions handed down during the past thirty years.

2. Foreign

1. In English

362. [BODENHAUSEN, GEORG HENDRIK CHRISTIAAN]. The evolution of the United International Bureaux. (76 *Le Droit d'Auteur* [English inset] 91-98, no. 5, May 1963.)

Also appears in French in the main section of the same issue of *Le Droit d'Auteur*.

"A broad outline of the structural evolution, both as regards the Bureaux themselves and the Unions which sustain them, the state of evolution of their tasks, and their resources, in order to determine their present situation and the measures which should be taken to improve it."

Also appears in 2 *Industrial Property* 85-92, no. 4, Apr. 1963.

363. OLSSON, HARRY R., JR. Dreams for sale: some observations on the law of idea submissions and problems arising therefrom. *E.B.U. Review*, no. 78B (Mar. 1963), pp. 46-54; no. 79B (May 1963), pp. 41-46.

A reprint of an article, with the omission of some footnotes, first published in 23 *Law & Contemp. Prob.* 34 (1958). See 5 BULL. CR. SOC. 369, Item 488 (1958).

2. In French

364. MALAPLATE, LÉON. Les démarches entreprises par la CISAC, depuis sa création, pour obtenir une protection des auteurs étrangers sur le territoire de l'Union soviétique. *Interauteurs*, no. 150 (1st quarter 1963), pp. 39-46.

An historical account of the efforts undertaken by CISAC to obtain copyright protection for works of foreign authors in the Soviet Union.

365. Régime des enregistrements éphémères dans la législation des pays appartenant à la Convention de Berne. Supplément à la *Revue Internationale du Droit d'Auteur*, no. 36-37 (July-Oct. 1962). 2 fold. 1.

The French text of the provisions concerning ephemeral recordings in the legislation of the Berne member countries. The texts are given on two folded sheets, and are issued as a supplement to the July-Oct. 1962 issue of the *Revue*.

366. VAUNOIS, LOUIS. Lettre de France. (76 *Le Droit d'Auteur* 82-87, no. 4, Apr., 1963; 113-117, 5 May, 1963.)

A survey of recent French court decisions in the field of copyright and related subjects.

3. French, English & Spanish

367. CASTELLAIN, RAOUL. Cinéma et révision de la Convention de Berne. *Revue Internationale du Droit d'Auteur*, no. 36-37 (July-Oct. 1962), pp. 52-83.

The purpose of this article is to call attention to various problems involved in the international protection of cinematographic works, and

to investigate the necessity of revising the pertinent provisions of the Berne Convention at the forthcoming conference in Stockholm in 1965.

368. HIRSCH-BALLIN, ERNEST D. La protection des arts appliqués à l'industrie aux Pays-Bas. *Revue Internationale du Droit d'Auteur*, no. 36-37 (July-Oct. 1962), pp. 232-236.

This study, which is a reprint of a report presented by the Dutch delegation to the Sixth Congress of the International Academy of Comparative Law held at Hamburg in the summer of 1962, is concerned with the protection of works of applied art under the Dutch copyright statute of 1912.

369. LIMPERG, TH. La protection des oeuvres typographiques néerlandaises aux Pays-Bas et à l'étranger. *Revue Internationale du Droit d'Auteur*, no. 36-37 (July-Oct. 1962), pp. 146-231.

A discussion of the legal protection of Dutch typography in the Netherlands and abroad, with suggestions for improvement.

370. MASSOUYÉ, CLAUDE. Décolonisation, indépendance et droit d'auteur; les nouveaux états et l'Union de Berne. *Revue Internationale du Droit d'Auteur*, no. 36-37 (July-Oct. 1962), pp. 84-145.

An investigation of copyright problems involved in the extension of membership in the Berne Union to newly independent countries which originally formed parts of various colonial powers.

371. TOURNIER, ALPHONSE. Les articles 11 bis et 13 de la Convention de Bruxelles. *Revue Internationale du Droit d'Auteur*, no. 36-37 (July-Oct. 1962), pp. 4-31.

A critical analysis of articles 11 bis and 13 of the Brussels Convention, dealing with broadcasting and recording rights respectively, with suggestion for changes to be adopted by the forthcoming Stockholm Conference.

372. VILBOIS, JEAN. La procédure de révision de la Convention de Berne. *Revue Internationale du Droit d'Auteur*, no. 36-37 (July-Oct. 1962), pp. 32-51.

A discussion of the procedure to be adopted for the revision of the Berne Convention at the forthcoming conference at Stockholm.

4. In German

373. BAPPERT, WALTER. Die Freiheit der Film- und Funkbericht- erstattung nach dem sog. Wochenschaugesetz. (65 *Gewerblicher Rechtsschutz und Urheberrecht* 16-24, no. 1, Jan. 1963.)

A study of legal problems involved in the German law of April 30, 1936, which grants to the producer of a motion picture the right to use copyrighted works for the production and distribution of newsreels.

374. DITTRICH, ROBERT. Der Stand des österreichischen Urheberrechts im Lichte der neueren Rechtsprechung. *Gewerblicher Rechtsschutz und Urheberrecht*, Auslands- und Internationaler Teil, no. 1 (Jan. 1963), pp. 11-19.

The original German version of an article which appeared under the title "Lettre d'Autriche" in 75 *Le Droit d'Auteur* 201-210, no. 9, Sept. 1962. See 10 BULL. CR. SOC. 133, Item 132 (1962).

375. KRAUSE-ABLASS, GÜNTER B. Der Anspruch auf das Belegexemplar bei Film, Rundfunk und Schallplatte. (64 *Gewerblicher Rechtsschutz und Urheberrecht* 566-567, no. 11, Nov. 1962.)

A discussion whether Section 25, paragraph 1 of the [West] German Act concerning the Law of Publication, under which the publisher of literary and musical works is required to furnish to the author a certain number of free copies, can be applied, by analogy, to motion pictures, broadcasts and phonograph records.

5. In Italian

376. GERACI, LUIGI. Il diritto d'autore nell'opera cinematografica. (33 *Il Diritto di Autore* 517-529, no. 4, Oct.-Dec. 1962.)

A lecture on copyright in motion pictures under Italian law, delivered in the summer of 1961 at a course organized by Centro Internazionale Magistrati "L. Severini," in Perugia. See 9 BULL. CR. SOC. 425, Item 322 (1962).

377. LEONELLI, LEONELLO. Protezione penale del diritto morale d'autore. (33 *Il Diritto di Autore* 502-516, no. 4, Oct.-Dec. 1962.)

A study of the penal protection of moral rights of an author under the Italian copyright law.

378. SANCTIS, VALERIO DE. La Convenzione internazionale per la protezione degli artisti interpreti o esecutori, dei produttori di fonogrammi e degli organismi di radiodiffusione (Roma, 26 ottobre 1961). (33 *Il Diritto di Autore* 6-39, no. 1, Jan.-March 1962; 157-205, no. 2-3, Apr.-Sept. 1962; 443-501, no. 4, Oct.-Dec. 1962.)

An analysis of the provisions of the Rome Convention on Neighboring Rights, preceded by a brief historical survey of previous efforts toward an international regulation of neighboring rights, and a report on the work of the Convention written from the point of view of the Italian delegation.

NEWS BRIEFS

379. DISTINGUISHED SERVICE AWARD TO DR. BOGSCH

Dr. Arpad L. Bogisch, for nine years Legal Advisor, Copyright Office, and now on a one-year leave of absence, received from the Librarian of Congress on June 6 a Distinguished Service Award, accompanied by the sum of \$500. Dr. Bogisch made a brief visit to the United States from Geneva, where he is acting as Special Assistant to the Director of the United International Bureaux for the Protection of Intellectual Property. The citation was "for his unique skills, expert knowledge, and tireless effort and cooperation displayed during the Neighboring Rights Diplomatic Conference as Chief Advisor to the Chairman of the United States delegation" in Rome, October 10-26, 1961.

Copyright Society of the U.S.A.

c/o Fred B. Rothman & Co.

57 Lenox Street

South Hackensack, N. J.

Return Requested

Bulk Rate

U. S. POSTAGE

PAID

Hackensack, N. J.

Permit No. 2408

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

0

Published at
NEW YORK UNIVERSITY LAW CENTER

VOL. 10, NO. 6

AUGUST, 1963

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

EDITORIAL BOARD

WALTER J. DERENBERG, *Chairman*

RICHARD COLBY
ANNA FELDMAN
GEORGE E. FROST
MORTON D. GOLDBERG
PROF. HARRY G. HENN
DR. STEPHEN P. LADAS

ALAN LATMAN
PROF. MELVILLE B. NIMMER
STANLEY ROTHENBERG
PAUL J. SHERMAN
JOHN F. WHICHER

JUDITH GRAD, *Associate Editor*
MARY T. HUNTER, *Assistant Editor*

THE COPYRIGHT SOCIETY OF THE U. S. A.

OFFICERS

President
EDWARD A. SARGOY

Vice-Presidents
SIDNEY A. DIAMOND
CHARLES B. SETON

Secretary
ALAN LATMAN

Assistant Secretary
MORTON D. GOLDBERG

Treasurer
EDWARD M. CRAMER

Assistant Treasurer
STANLEY ROTHENBERG

Executive Director
WALTER J. DERENBERG

BOARD OF TRUSTEES

JULIAN T. ABELES, New York City
SIDNEY A. DIAMOND, New York City
JOSEPH S. DUBIN, Universal City, Calif.
GEORGE E. FROST, Chicago
PROFESSOR HARRY G. HENN, Cornell Law School, Ithaca, N. Y.
PROFESSOR BENJAMIN KAPLAN, Harvard Law School,
Cambridge, Mass.
SYDNEY M. KAYE, New York City
LEON KELLMAN, New York City
PROFESSOR JOHN M. KERNOCHAN, Columbia University
Law School, New York City
BERNARD KORMAN, New York City
HORACE MANGES, New York City
ISABELLE MARKS, New York City
PROFESSOR MELVILLE B. NIMMER, University of California
Law School, Los Angeles, Calif.
HARRY R. OLSSON, JR., New York City
HAROLD ORENSTEIN, New York City
E. GABRIEL PERLE, New York City
JOHN R. PETERSON, Boston, Mass.
HARRIET F. PILPEL, New York City
CEDRIC W. PORTER, Boston, Mass.
BARBARA A. RINGER, Washington, D. C.
BENJAMIN W. RUDD, Washington, D. C.
EDWARD A. SARGOY, New York City
SIDNEY SCHREIBER, New York City
CHARLES B. SETON, New York City
SAMUEL W. TANNENBAUM, New York City
THEODORA S. ZAVIN, New York City
LEONARD ZISSU, New York City

Published at New York University Law Center
40 Washington Sq. South, New York 11, N. Y.

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

© 1963 by The Copyright Society of the U. S. A.

BINDING NOTICE

This issue of the Bulletin completes volume 10. A title page and index to the volume are included herein in order to facilitate its use.

Bound copies of the Bulletin may be readily obtained. Volumes 1 through 10, soundly bound in cloth, with title and volume stamped thereon, are offered:

To members or subscribers returning the six issues....ea. vol. \$3.50 postpaid

To members or subscribers who wish to keep their unbound
issues, the complete volumes 1 to 4, bound....ea. vol. \$10.00 postpaid
the complete volumes 5 to 9, bound....ea. vol. \$19.00 postpaid

To new members and subscribers,
volumes 1 to 4, bound....ea. vol. \$13.50 postpaid
volumes 5 to 9, bound....ea. vol. \$28.50 postpaid

Single back numbers, volumes 1-4\$2.00 ea.
volumes 5-9\$4.50 ea.

The Copyright Society of the U.S.A.
c/o Fred B. Rothman & Co.
57 Leuning Street
South Hackensack, N. J.

Enclosed please find check in the amount of \$.....
in payment of the following:

Bound copy of:

vol. 1 ☐

vol. 2 ☐

vol. 3 ☐

vol. 4 ☐

vol. 5 ☐

vol. 6 ☐

vol. 7 ☐

vol. 8 ☐

vol. 9 ☐

vol. 10 ☐

@ \$3.50 per vol. \$.....

Ship to: Name

Address

City Zone State

Please make remittances payable to THE COPYRIGHT SOCIETY OF U.S.A.

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

VOLUME 10

OCTOBER 1962 - AUGUST 1963

Published at
NEW YORK UNIVERSITY LAW CENTER

Printed in the United States of America. Copyright © 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, by The Copyright Society of the U.S.A., 40 Washington Square South, New York 11, N.Y.

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 11, New York: Edward A. Sargoy, *President*; Sidney A. Diamond and Charles B. Seton, *Vice Presidents*; Edward M. Cramer, *Treasurer*; Alan Latman, *Secretary*; Stanley Rothenberg, *Assistant Treasurer*; Morton D. Goldberg, *Assistant Secretary*; and Walter J. Derenberg, *Executive Director*.

Annual subscription: \$25.

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 11, N. Y.

Business correspondence regarding subscriptions, bills, etc., should be addressed to the distributor, Fred B. Rothman & Co., 57 Leuning Street, South Hackensack, N. J.

CITE: 10 BULL. CR. SOC. page no., Item (1963).

EDITORIAL BOARD

WALTER J. DERENBERG, *Chairman*

RICHARD COLBY
ANNA FELDMAN
GEORGE E. FROST
MORTON D. GOLDBERG
PROF. HARRY G. HENN
DR. STEPHEN P. LADAS

ALAN LATMAN
PROF. MELVILLE B. NIMMER
STANLEY ROTHENBERG
PAUL J. SHERMAN
JOHN F. WHICHER

JUDITH GRAD, *Associate Editor*
MARY T. HUNTER, *Assistant Editor*

BOARD OF TRUSTEES

JULIAN T. ABELES, New York City
SIDNEY A. DIAMOND, New York City
JOSEPH S. DUBIN, Universal City, Calif.
GEORGE E. FROST, Chicago
PROFESSOR HARRY G. HENN, Cornell L. S.
PROFESSOR BENJAMIN KAPLAN, Harvard L. S.
SYDNEY M. KAYE, New York City
LEON KELLMAN, New York City
PROFESSOR JOHN M. KERNOCHAN,
Columbia L. S.
BERNARD KORMAN, New York City
HORACE MANGES, New York City
ISABELLE MARKS, New York City
PROFESSOR MELVILLE B. NIMMER, U. of
Calif. L. S.

HARRY R. OLSSON, JR., New York City
HAROLD ORENSTEIN, New York City
E. GABRIEL PERLE, New York City
JOHN R. PETERSON, Boston, Mass.
HARRIET F. PILPEL, New York City
CEDRIC W. PORTER, Boston, Mass.
BARBARA A. RINGER, Washington, D. C.
BENJAMIN W. RUDD, Washington, D. C.
EDWARD A. SARGOY, New York City
SIDNEY SCHREIBER, New York City
CHARLES B. SETON, New York City
SAMUEL W. TANNENBAUM, New York City
THEODORA S. ZAVIN, New York City
LEONARD ZISSU, New York City

CONTENTS

PART I.	ARTICLES.	PAGES
	First Annual Report of the Committee to Investigate Problems Affecting Communication in Science and Education	1-17
	<i>Foreword</i> L. B. Heilprin	1-2
	<i>Clearing House as Optimum Solution to Copyright Problems Affecting Communication of Educational and Scientific Information</i> Robert W. Hampton	18-25
	Rights and Royalties of Foreign Authors and Composers in War Time George Middleton	26-36
	The First Decade of the Universal Copyright Convention Arpad Bogsch	71-80
	The General Revision Program..Abraham L. Kaminstein	81-83
	Copyright—New Frontiers Emanuel Celler	84-89
	The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Part I Eugen Ulmer	90-101
	<i>In Memoriam.</i> Joseph A. McDonald Harry G. Henn	145-146
	Refusal to Register—A Roadblock to Copyright Owners. Martin J. Beran	147-164
	The Rome Convention, Part II Eugen Ulmer	165-178
	<i>In Memoriam.</i> Frederic G. Melcher	207-208
	Copyright Legislation in New Zealand Affecting Artistic Works James W. Miles	209-213
	"Copyright Law Revision, Part 2", A review. Morton David Goldberg	214-218
	The Rome Convention, Part III Eugen Ulmer	219-248
	Correspondence concerning Middleton, "Rights and Royalties of Foreign Authors and Composers in War Time": <i>Stage Performing Rights Fees.</i> Dr. E. Roth, Boosey & Hawkes Limited, London	249-250
	George Middleton, <i>Reply</i>	250-252
	Corrigendum to Bogsch, "The First Decade of the Universal Copyright Convention"	252
	The Copyright Society of the U.S.A. Celebrates Its Tenth Anniversary Harry G. Henn	293

	PAGES
<i>De Origine</i> Richard S. MacCarteney	297-301
The Philosophy Behind the English Copyright Law and Trial of a Copyright Cause in England— The First Annual Jean Geiringer Memorial Lecture.	
Guy Aldous	302-324
Unfair Use of Elaborated Ideas Stanley Rubinstein	351-361
Intentional Interference with Exclusive Talent Agree- ments Stanley Rothenberg	362-369
Anatomy of a Symposium— <i>A review of the meeting in Washington, May 20-23, 1963, on Photocopying.</i>	
Peter T. Kennedy	370-372
The Inter-American Authors' Rights Meeting at Lima— <i>Seminario Interamericano de Expertos sobre Derecho de Autor, May 20-24, 1963. Address by Herman Finkelstein</i>	373-374
PART II. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS.	
1. United States of America and Territories	37, 102, 179, 253, 325, 375
2. Foreign Nations	46, 102, 184, 257, 326, 376
PART III. CONVENTIONS, TREATIES AND PROCLAMATIONS	
	48, 104, 186, 260, 329, 377
PART IV. JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY.	
A. Decisions of U.S. Courts.	
1. Federal Court Decisions	49, 105, 187, 261, 330, 394
2. State Court Decisions	59, 193, 273, 340, 385
B. Decisions of Foreign Courts.	
1. Great Britain	121, 280
<i>Observations, R. F. Whale</i>	282-285
2. Canada	278
PART V. BIBLIOGRAPHY.	
A. Books and Treatises.	
1. United States Publications	64, 125, 198, 286, 343, 396
2. Foreign Publications.	
1. In Danish	343
2. In English	126, 199, 343
3. In French	125, 199, 397

	PAGES
4. In German	66, 125, 199, 200, 286, 344, 397, 398
5. In Italian	286
6. In Spanish	64, 125, 199
 B. Law Review Articles.	
1. United States	66, 126, 200, 287, 344, 398
2. Foreign.	
1. In Dutch	127
2. In English	128, 201, 288, 345, 402
3. In English and French	130
4. In English, French and Spanish	131, 346, 404
5. In French	132, 201, 289, 346, 403
6. In German	135, 202, 348, 405
7. In Italian	142, 203, 348, 408
8. In Swedish	142
 C. Articles Pertaining to Copyright from Trade Magazines.	
1. United States	203, 289, 409
2. England	206, 290, 410
NEWS BRIEFS	206, 292, 349
1962 ASCAP Nathan Burkan Copyright Competition Awards	291
INDEX—Volume 10, October 1962-August 1963	412

PART I.

ARTICLES

380. UNFAIR USE OF ELABORATED IDEAS*

By STANLEY RUBINSTEIN**

It may well be that the title of my talk, which would in England be "Unfair Dealing with Elaborated Ideas" but which I have Americanized into "Unfair Use of Elaborated Ideas", needs some explanation. To do so I shall have to go back some dozen years to explain to you how I became interested in copyright. I should not be talking to you about copyright today if (and this may sound strange) the best English oysters were not called "Natives".

Some dozen years ago I was strolling up Regent Street in London after a sumptuous oyster feast with an old friend, when I met Mr. Leslie Boosey of the famous English music publishing house of Boosey & Hawkes, and who was at that time the Chairman of the English Performing Right Society. I only knew him because he was and is a Trustee of the Henry Wood National Memorial Trust of which I am the Honorary Solicitor.

We greeted each other, and he said "Oh Mr. Rubinstein, I am so glad to meet you, I have been meaning to ring you up; do you speak French?"

Now, if Mr. Boosey had rung me up and asked me "Do you speak French?" I should have replied "Honesty compels me to tell you that I forgot all my school-boy French years ago", but coming after that sumptuous oyster feast, I could think of only one answer, and I replied "Like a 'Native'".

"I am so glad," he said, "because the Performing Right Society would like to nominate you to the Legislation Commission of an International Confederation of copyright royalty collecting societies which meets on the Continent three or four times a year to discuss international copyright problems."

I accepted out of hand, and then ran home to learn French and copyright with which, as a solicitor in general law practice, I had only a nodding acquaintance.

* © by Stanley Rubinstein, 1963. Text of an address delivered before the Copyright Luncheon Circle at the Overseas Press Club, New York City, on April 26, 1963.

** Mr. Rubinstein is the distinguished English copyright lawyer. His article, "No Photographs", was reprinted in 8 BULL. CR. SOC. 363, Item 352 (August 1961).

Copyright experts are born, not made. I am only a copyright consultant. And the difference? The copyright expert knows it all. The copyright consultant knows that he doesn't, but he knows where to find it.

My colleagues on the Legislation Commission were international copyright experts who wrote learned reports on matters connected with international copyright, and it became necessary to prove to them that I could do the same. I had become interested in protection for elaborated ideas, and I should explain why:

In 1849 a young Englishman by the name of Henry Mayhew commenced to write for the daily newspaper, "The Morning Chronicle", about the men and women who earned their living in the London streets.

Every day he was out and about, not only to classify the several categories of street traders, but to report their stories in their own words: how much they earned, how they lived and died, in fact all the details which he thought might touch the hearts and consciences of his readers. A few years later, his reports, with daguerreotype photographs of several of the street traders, were published in three volumes. He died in 1887, and the public forgot about the man and his work.

I bought the three volumes over 30 years ago, and reading them I conceived the idea of a book which should contain the personal histories of some of these street traders, in their own words, and with a running commentary on them. The idea lay dormant until 1946 when I became friendly with the director of a publishing house to whom I showed Mayhew's three books, and to whom I knew I could safely disclose my idea. He approved it, and my book with the lives of 23 street traders and their photographs appeared the following year.

It received considerably more than its fair share of good reviews, and I wrote to the British Broadcasting Corporation to suggest a program to be entitled "In Town a Hundred Years Ago". This was a variation of a feature program entitled "In Town Tonight", which the British Broadcasting Corporation had been producing every Saturday night for years. The program consisted of interviews by a B.B.C. official with a variety of important and not so important people who had just arrived in London.

I knew, of course, that there is no copyright in a simple idea, but knowledge without intelligence can be dangerous, and I elaborated my idea, that is to say, I outlined the suggested program in writing, showing what I intended and how my intentions should be carried out. Henry Mayhew, whom I hoped to impersonate myself, would interview some street traders, whose parts would, of course, be taken by professional actors and actresses.

My script commenced: "This is Henry Mayhew speaking to you in 1849. 'The Morning Chronicle' has commissioned me to undertake a survey of the men and women who earn their living in the streets of London. I intend to write a history of these street traders, telling in their own words the details of their work and how much they earn, showing how they suffer and how their families live; in short, the conditions in which these people survive and exist. In the meantime, I have invited into the studio some of the people whom I have met," and I mentioned a seller of dog collars—an oyster woman, a seller of rhubarb, and four other characters, all of whose stories were in my book, and which would make up a program lasting half an hour.

My suggestion was not accepted, but when in 1949 the book became a Choice Book of the Reader's Union, I submitted my elaborated idea to the B.B.C. for the second time. For the second time it was refused. Then in 1952 I learned that the B.B.C. had put out two radio programs entitled "Henry Mayhew and his Characters". This was not the first occasion on which I had had a prophetic vision of a B.B.C. program, and weary of being a prophet without profit, I wrote to the Director General of the B.B.C., sending him a copy of the twice rejected script, and asking if I might be allowed to read a copy of the scripts of "Henry Mayhew and his Characters". They were sent to me and confirmed me in my suspicion that their authors had had the same idea as I had had five years previously, although they had interviewed other traders than those to whom I had referred in my script.

I did not doubt their good faith or that they believed that they had the right to use Mayhew's books upon which to base their scripts, but I was intrigued to find that in an article dealing with their programs, published in "The Listener", one of the weekly periodicals of the B.B.C., two of the photographs from my book were reproduced, which might have been an interesting point from which to commence investigations if I had been looking for a lawsuit. But I have too much sense, and too little money to start suing the B.B.C., so instead of doing so, I decided to try to find a means of protecting authors against a repetition of these sufficiently serious facts, and I asked for and was given an opportunity of discussing the matter with the B.B.C.'s Controller of Sound Broadcasting.

He received me courteously and listened whilst I outlined the position. I defined, for the purposes of the discussion, an elaborated idea to consist of one or more simple ideas, which an author has coalesced and worked on and, as it were, edited, in order to show how it should be treated so as to arrive at the 'end product'. I emphasized the importance of procuring some measure of protection for the elaborated ideas of authors written for

limited markets, such as motion pictures and the radio, because if a work has to be completed—the last “i” dotted, the last “t” crossed—before it can obtain protection it becomes so much Love’s Labour Lost if it does not appeal to the “customer” (alias the “Boss”) in these limited markets.

The Controller was sympathetic, and mentioned that the case might be even worse than I imagined it to be because he understood that the writers of “Henry Mayhew and his characters” had not even heard of Henry Mayhew until they saw my book in the B.B.C. Library. However, he explained some of the difficulties which would have to be overcome if my suggestion was to be seriously considered: so many people write to the B.B.C. submitting ideas, good, bad and indifferent, and it is a problem to know how to utilise them, indeed whether it is worth while trying to develop them. He added that in any case the broadcasting authorities prefer to choose an author of experience to do the developing, because most of those who submit ideas are not experienced writers.

After a further exchange of views the Controller invited me to submit a memorandum, which I did, outlining the problem and submitting that it should be possible to solve it without jeopardizing the interests of the B.B.C., and I added that I assumed that the officials of the B.B.C. had no desire to deprive authors of their rights.

The memorandum was examined by the lawyer for the B.B.C., which I thought was a little unfortunate, because the duty of a lawyer is to consider the law as it is, and not as it ought to be; and of course he has to protect his client against claims made by disgruntled authors. As I had made no claim for compensation, I contented myself with looking for a solution which would satisfy both the B.B.C. and authors.

Asked how I would propose to protect authors against such treatment, I suggested a central index for the registration of all elaborated ideas submitted to the B.B.C.

I pointed out that in submitting an elaborated idea to an official of the B.B.C., an author should be entitled to consider that he had technically submitted it to the B.B.C. itself; that a legal document can be served at an official Registered Office, and that there should be an official Registered Office where authors could submit elaborated ideas for distribution to various producers.

But I was told that my proposal was impractical. I reminded the lawyer that the index at the Patent Office must be more complicated than my suggested central index would be; I even indicated how to set up such an index and worked it out in detail, but I could not move him. He was firmly, but

politely, of the opinion that if an elaborated idea was what he called "a layout", that is to say a project on which the B.B.C. could produce a program, then the B.B.C. would pay for it; if the B.B.C. didn't use the "layout", the matter had to be regarded as dead and buried. I emphasized that it was the principle of protection for which I was struggling; if the principle of protection as a right was conceded, the right to payment would follow automatically.

In resisting the claim, the B.B.C. lawyer went even further: he told me that if, after a "layout" had been rejected, a second author submitted a similar layout and it was used, it would be the second and not the first—the original author—who would be remunerated. I expressed my horror at this, and I pointed out that it is always possible that an employee of the B.B.C. could be transferred to another department or promoted to be a producer himself, and when asked to prepare a feature program, might dig out of his subconscious, and quite innocently put forward as his own, an elaborated idea which had been submitted years earlier to the producer for whom he was working at the time, and which he had heard talked about, to which the B.B.C. lawyer replied "so much the worse". I told him that I was even more horrified, and that in my view an author should have the right to believe that if he has worked out and elaborated an idea, he has created something which he, and only he, should be entitled to complete and, conversely, that he should be entitled to stop another person utilizing his elaboration of the idea to complete it.

In trying to show the necessity for protecting elaborated ideas, it is inevitable that some of the arguments which have already been used in the never-ending battle for copyright protection should sound the same, but the history of copyright in England is not free from repetition.

The English Copyright Act, 1956, is the fiftieth Act dealing with copyright to reach the Statute Book since the Stationers' Company, nearly two hundred and fifty years ago, succeeded in securing what most lawyers call, quite inaccurately, the Copyright Act 1709. Its full title was "An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors or Purchasers of such Copies, during the times therein mentioned", and Lord Hardwicke, who was Lord Chancellor at the same time as he was Lord Chief Justice, described it as "a universal patent for authors".

What, since that date, the law has done for authors is to create a number of artificial rights, thus emphasizing that copyright is artificial, man-made. What the law should have done is to recognize the authors' natural rights—rights which are natural to all men. The right of the creative artist to the product of his brain should be as natural as is the right to live, to breathe,

to eat and drink and to sleep. It should be as natural a right as is the right of the artisan to the product of his hands. But, as Mr. Edward Jenkins, Member of Parliament, and a member of the then current Copyright Commission, pointed out over fifty years ago: "The statute law *creates*, it does not *recognise*, copyright."

It follows, as one of the strange results of this attitude that not only is the product of the artisan's hands protected by the law, but his hands themselves are also objects of the law's solicitude. Brains, too, in their physical sense, are protected and kept alive for as long as possible by scientists and lawyers, aided and abetted by their policemen; but the product of a brain, if it fits into the cranium of a creative artist, as distinct from an artisan, is at the mercy of every brainless beachcomber. Surely it is even more important to protect the product of the brain than it is to protect the brain itself. The brain will inevitably die—its product lives on—perhaps to benefit mankind.

The authors of legal text books tell us that there can be no copyright in mere ideas, because ideas are not capable either of a visible possession or of sustaining any one of the qualities or incidents of property, and as they have no bounds whatever, they cannot, it is argued, be the subject of property.

This argument dates back to 1769. "Ideas", said Mr. Justice Yates, in the course of his judgment in the case of Millar versus Taylor in 1769, "are free. But while the author confines them to his study, they are like birds in a cage, which none but he can have a right to fly; for, till he thinks proper to emancipate them, they are under his own dominion . . ."

Mr. Justice Yates no doubt was thinking of an idea as a "mental image", which is how Dr. Johnson had defined it in his dictionary; it is a pity that Mr. Justice Yates who, incidentally, was a very good judge, but who had not been asked for his views on the subject, did not live long enough to hear the English Law Lord Atkinson remark, in the case of Macmillan versus Cooper, decided through 1923 to 1928, that the moral basis upon which the protective provisions of the Copyright Act, 1911, rested is the Eighth Commandment. Lord Atkinson knew that honest men don't steal, and we are entitled to brand anyone who wilfully steals another man's elaborated ideas as a thief. A thief by any other name is just as dishonest, and I suspect that, unlike Lord Atkinson, Mr. Justice Yates found it easy to visualize birds safely tucked up in a cage until the owner let them out for exercise when they could be seized and claimed by anybody, but failed to visualize the ingenuity of an author called upon to recognize and recover his birds once they had been allowed to leave the parental cage. The modern pigeon fancier could have told him.

Of course, Mr. Justice Yates lived before the days when an inventor could obtain "provisional protection" for his invention before filing the complete specification; and if someone had foretold to Mr. Justice Yates that the time would come when a British author's works would automatically enjoy copyright in the United States of America, Mr. Justice Yates might have been tempted to condemn him to be burned at the stake as a queer son of a witch.

But the bird seed planted in the legal mind of Mr. Justice Yates took root, and the legend has grown into a belief that ideas are in the public domain—free for all.

Every literary work must be preceded by an idea, but since it is difficult if not impossible to find a new idea, it follows that it is the originality of the way in which the idea is elaborated towards the completion of the work which is of importance. So often the completed work consists in the arrangement and elaboration of a number of ideas, good, bad or merely indifferent, which individually are not protected, but which, when collected together and elaborated, should be.

The French writer Boileau observed, in the preface to his works, that wit and fine writing do not consist so much in advancing things that are new, as in giving things that are known an agreeable turn.

And the English essayist Joseph Addison points out in the *Spectator* that writers in the 18th century were not able "to make observations in criticism, morality, or in any art or science, which have not been touched upon by others. We have little else left us," he wrote, "but to represent the common sense of mankind in more strong, more beautiful, or more uncommon lights. If a reader examines Horace's *Art of Poetry*, he will find but very few precepts in it which he may not meet with in Aristotle, and which were not commonly known by all the poets of the Augustan age. His way of expressing and applying them, not his invention of them, is what we are chiefly to admire."

It follows that we have to distinguish and differentiate between the simple idea and the elaborated idea which can be identified with its author. The accident is on identification, and it is the elaboration of the idea which makes identification possible.

If an author writes out his elaborated idea in an exercise book, on the cover of which is his name and address, and leaves it in an omnibus, the finder is obliged to return it to him, under pains and penalties of being branded as a thief and punished, but suppose that the finder returns the book after he has copied out the elaborated idea and has completed the work as

envisaged by the author? Then, says the law, he is not a thief, and cannot be punished.

Horace Walpole's gentle enquiry, "Has one better claim to praise one has not earned, than to money one has stolen?" still holds good, but how many good ideas—"mental images"—are born to blush unseen, because their authors have realized the futility of spending time and effort in elaborating them for somebody else's benefit? And yet it is only by encouraging people to produce good ideas, and to elaborate them that a civilized culture can be developed.

Industrialists are now becoming alive to the importance of encouraging the practical man—on the spot in the factory—to produce elaborated ideas by paying for them. As this becomes general practice, and more and more honest employers recognize its importance, so does it become increasingly important to protect the author of elaborated ideas from the dishonest employer who will not lag far behind the honest one.

The elaboration of an idea does not imply thousands, even hundreds of words. An elaborated idea for a new television show, for instance, may consist only of one paragraph, because the reader of that paragraph may, by the time he has finished reading it, know exactly what the writer was driving at, in other words, visualize the "end product".

And if the "end product", the completed article (in its journalistic as well as its material sense) is protected by the law, surely the author who points the way and "lights up", or spotlights the "end product" so that the intelligent interpreter can see what he is driving at, should be entitled to prevent the interpreter from hiring a faster stenographer and getting there first, that is, producing the "end product" first, and claiming the credit and the cash.

The protection of elaborated ideas would not put a brake on thinking; it would not, as has been suggested, be necessary to fill in an enquiry form in order to find out whether an idea is original before using it, because I am not proposing the protection of ideas as such, but of elaborated ideas, ideas which have been worked on to "expose" the "end product".

It may not always be easy to decide at what point an idea will be so elaborated as to be entitled to protection; the facts may well be different in each case but surely the test will be: could the "interpreter" have produced the finished article, the "end product", if he hadn't had access to the author's elaborated idea?

If the answer to that question is "No, he couldn't", then surely the author must have a right in his elaborated idea, and the "interpreter" should be

obliged to recognize that right. As the English law stands at present he is under no such obligation, and I submit that the time has come when we should extend to elaborated ideas which can be identified with their author that protection which we have become accustomed to call copyright, but which the French so more usefully term "*les droits d'auteur*"; quite simply, the author's rights.

If an author has a novel and original "mental image" and decides to clothe it in a costume of his own fashioning—the fabric, the needle and thread, the thimble, lie on his study table with a sketch showing what the rehabilitated idea will look like—then surely only he should be allowed to work on the sketch and finish off the "costume", a "costume" which, but for the author, would never have existed in that form.

Every newly born idea has a road to run before becoming a complete work entitled to copyright, but somewhere on the road it becomes sufficiently elaborated to entitle it also to protection.

Each of us may visualize this road differently. Let us imagine a man who leaves his home town to travel to a fortified city, and whose path crosses a country infested with highwaymen. At a certain spot the traveller arrives within sight of the city and comes under the protection of its artillery and he is safe from the highwaymen, although he hasn't yet reached the city. Algebraically speaking, as it were, we can equate the traveller with an idea which, at a definite point in its elaboration should find itself under the protection of the copyright laws.

At a Conference on the Arts, Publishing and the Law held at the Law School of the University of Chicago in May, 1952, Norman R. Tyre, a lawyer from Los Angeles, introduced fresh arguments into his report which he entitled, "Protection of Idea (Radio, Television and Movies)" and those of us who are concerned with progress have appreciated how experts in the United States have realized the necessity for applying the law to the practical consideration of new problems. I quote the distinguished Lord Justice Cardozo, "The inn that shelters for the night is not the journey's end. The law, like the traveller, must be ready for the morrow. It must have a principle of growth." But to return to Mr. Tyre: He argued, and again I quote: "The use of an idea may be characterized as the bone which one may take with impunity so long as one does not take with it any treatment, expression or development, which may be characterized as the blood, muscles and tissue connected with the bone. The application of the principle to facts seems no less different than Shylock's problem in delivering a pound of flesh, no more or less."

Difficult as that problem was, a lady trial lawyer by the name of Portia solved it.

There may well be difficulties in interpreting or administering a law giving protection to elaborated ideas; there have been difficulties in interpreting and administering every one of the fifty English Copyright Acts. In the 8th edition of Copinger's Law of Copyright published in 1948, no less than 650 cases were cited. In the current 9th Edition published in 1958, no less than 672 cases are cited. Legislation and litigation are brothers-in-law; a legal action is but a step farther to an Act of Parliament. There will be difficulties in interpreting and administering the Copyright Act of 1956, but that would not be accepted as a ground for abolishing all copyright protection. It is only where an elaborated idea is made use of behind the back of the author that the need for protection becomes of importance, and an Act giving protection to elaborated ideas would be well worth while even if it did no more than discourage the thieving of such ideas, and checkmated the literary pickpocket who, having no brains of his own, earns a handsome living by picking the brains of other people.

What ultimately has to be decided is whether what is complained of was done unwittingly and innocently, or, on the other hand, knowingly and wilfully.

Most of such cases would depend upon the sworn evidence of the plaintiff and the defendant, and judges are usually able to decide whether a witness is telling the truth or not.

But we are told that the judges neither make nor alter the law, they can only apply it; so authors need another Act of Parliament to protect them.

The English Copyright Act of 1911 provided, and the Act of 1956 provides, *inter alia*, that certain things which might otherwise constitute an infringement of copyright can be justified as "fair dealing"—or, as you would call it, "fair use". I suggest an act which will attempt to put an end to "unfair dealing". Bearing in mind Mr. Justice Kekewick's *cri de coeur* of fifty years ago: "I am not sure that any man really understands the Copyright Act", it will be quite short, in fact it will consist of only one—the following—section:

"Unfair dealing with a literary work shall constitute an infringement of the copyright in that work. In this section, a literary work shall include an author's ideas for an unwritten work so far elaborated as to enable another person to complete the work as envisaged by the author without further assistance from the author, and the usage by that other person of the author's elaborated ideas to complete the work as envisaged by the author without

the consent in writing of the author shall constitute an unfair dealing with the author's work."

Would it work? It might be difficult to prophesy with any confidence that it would, but still more difficult to prophesy that it wouldn't.

After all, what do you think King Solomon would have said if one of his prophets had told him that if he had been born a few thousand years later he would have been entitled to collect a royalty every time anybody sang his Song in public?

I think he would have demoted the prophet to be his Court Jester and have ordered him to be crowned with an Ass Cap.

381. INTENTIONAL INTERFERENCE WITH EXCLUSIVE TALENT AGREEMENTS*

By STANLEY ROTHENBERG

The title of this article describes the dominant cause of action in the recent case of *Roulette Records, Inc. v. Princess Production Corporation et al.*¹ Reference will also be made to the plaintiff's second cause of action, a claim in unfair competition.

The action was commenced on August 25, 1960, in the Supreme Court, New York County, by the service of a summons and complaint, together with a motion for a preliminary injunction. The plaintiff was a phonograph record manufacturer, Roulette Records, Inc. The named defendants were (1) an independent motion picture production company, Princess Production Corporation, producer of the motion picture "Murder, Inc.", (2) the individual producer-director of the motion picture, who was also president of Princess, Burt Balaban, (3) a well-known recording artist and night club performer, Sarah Vaughan, (4) the distributor of the "Murder, Inc." motion picture, Twentieth Century-Fox Film Corp., (5) a phonograph record manufacturer, Canadian-American Records, Ltd., and (6) a distributor of phonograph records, Portem Distributing, Inc.

Princess, the defendant motion picture production company, employed defendant, Sarah Vaughan, in mid-April, 1960, for its motion picture "Murder, Inc.", for which Miss Vaughan was promptly filmed and recorded singing two musical compositions written especially for the motion picture. "Murder, Inc." opened on Broadway June 28, 1960. One month later, defendant Canadian-American Records, as a licensee of Princess, manufactured and released a sound track phonograph record from the motion picture which featured Sarah Vaughan prominently on the album jacket and contained, in addition to performances by others, her rendition of the two songs in the motion picture. Within a few days after the release of the "Murder, Inc." phonograph record, plaintiff Roulette Records, through its counsel, informed the defendants that Roulette Records had an exclusive recording agreement with Sarah Vaughan, demanded that the defendants take the records off the market and stated that the defendants would be held fully accountable for any damages suffered

* This article is derived from a talk delivered on May 24, 1963, before the Copyright Luncheon Circle at the Overseas Press Club, New York City. The author represented defendants Princess Production Corporation and Burt Balaban.

1. 15 App. Div. 2d 335 (1st Dept., Feb. 8, 1962), aff'd without opinion, 12 N.Y.2d 815 (Dec. 6, 1963).

by Roulette Records. The defendant motion picture producer, defendant record manufacturer and defendant Portem, the distributor of the soundtrack records, refused to recall the records from the market. Thereupon plaintiff served the summons and complaint and moved for a temporary injunction.

The distributor of the motion picture, Twentieth Century-Fox Film Corp., disclaimed any connection with or interest in the licensing, manufacture or exploitation of the sound track phonograph record and the plaintiff discontinued the action against it.

Sarah Vaughan was not served, apparently because subsequent to the preparation of the complaint plaintiff considered that Miss Vaughan had not granted to the defendant motion picture producer the right to issue sound track phonograph records.

The complaint alleged that the defendants, "with full knowledge" of plaintiff's exclusive recording agreement with Sarah Vaughan, issued the phonograph records containing Miss Vaughan's performance. On the motion for a preliminary injunction, Justice George Tilzer, sitting in Special Term, stated, among other things, that it is "common knowledge in the field that artists such as Vaughan are under exclusive contract," *Roulette Records, Inc. v. Sarah Vaughan et al.*² Accordingly, the court issued an injunction pendente lite against the four remaining defendants, restraining the further manufacture and distribution of the records (upon condition that plaintiff post a \$25,000 bond, which condition was not met) and directed an immediate trial of the issues.

At the trial the plaintiff sought by various means to establish the publicity given to its exclusive agreement, namely, (1) press releases in the trade papers, "Variety" and "Billboard"; (2) advertisements in those trade papers and other trade papers of Roulette's Sarah Vaughan records, and (3) posters and streamers distributed for display in retail stores. There was no testimony or other direct evidence of knowledge on the part of defendants of plaintiff's contract with Sarah Vaughan. There was, however, expert testimony that a record company when signing a recording artist would ask the artist if she has any other recording commitments which might conflict.

The trial judge, Justice Abraham D. Levy, did not find, as plaintiff requested in its submitted Findings of Fact, that the defendants had "full knowledge" of plaintiff's exclusive rights. Instead, Justice Levy found that the defendants acted with knowledge that they could or should have had of plaintiff's exclusive rights, and he issued a permanent injunction against all four defendants and an \$8,600 monetary award against Princess, the motion

2. 144 N.Y. L.J. 12 (Spec. Term, Sup.Ct., N.Y. Co., Sept. 20, 1960).

picture production company, and Burt Balaban, the individual defendant who produced and directed the motion picture and headed the production company.³

Defendants Princess and Balaban appealed. Defendants Canadian-American Records and Portem Distributing did not appeal from the injunction against them.

On appeal to the Appellate Division, the appellants' points included the argument that in order to sustain an action for intentional interference with a contract, it is essential for plaintiff to establish, among other things,⁴ that the defendant had *actual knowledge* of plaintiff's contractual rights, whereas, defendants-appellants contended in the case at bar the plaintiff failed to establish actual knowledge on the part of the defendants-appellants. Moreover, the defendants-appellants argued, the trial judge did not make a finding of actual knowledge, but rather of knowledge which by reasonable inquiry defendants could or should have had.

The plaintiff, on the other hand, argued that: (1) the trial court *in effect* found actual knowledge on defendants' part; (2) apart from the language of the judge's finding there was in fact actual knowledge; (3) the kind of knowledge sufficient for this action is not different from the sort of knowledge required generally in torts, which includes knowledge which proper inquiry would disclose to an ordinary prudent man under the surrounding circumstances; and (4) in any event this is an action for the violation of plaintiff's property rights in Sarah Vaughan's performances such as were recognized in the case of *Metropolitan Opera Association, Inc. et al. v. Wagner-Nichols Recorder Corporation*.⁵

The defendants put in a reply brief in which they sought to show that as mentioned above, the trial judge rejected a proposed finding of actual knowledge, that the record could not sustain such a finding and that the

3. *Roulette Records, Inc. v. Sarah Vaughan, et al.*, *not reported* (Sup.Ct., N.Y. County, Dec. 20, 1960).

4. The other essential elements are: plaintiff's contractual rights; defendant's interference with the rights, intentionally and without justification; resulting in damages to plaintiff. *Associated Flour Haulers & Warehousemen, Inc. v. Hoffman*, 282 N.Y. 173; *Rheiner v. North American Newspaper Alliance*, 259 N.Y. 250; *Hornstein v. Podwitz*, 254 N.Y. 443; *Campbell v. Gates*, 236 N.Y. 457; *Lamb v. Cheney & Son*, 227 N.Y. 418. Parenthetically, all of the foregoing decisions of the New York Court of Appeals were cited by the Appellate Division in the case at bar with respect to the requirement that plaintiff establish defendant's "actual knowledge" of plaintiff's contractual rights. 15 App. Div.2d 335 at 338.

5. 119 Misc. 786 (Sup.Ct., N.Y. County, 1950) *aff'd* 279 App. Div. 632 (1st Dept., 1951).

real issues before the Court were: (1) does *negligent* interference with a contract constitute a tort and, if so, was the defendants' interference a result of negligence; and (2) apart from whether the interference is intentional or negligent, is an exclusive talent agreement a property right the invasion of which, in a case such as this one, will result in an injunction and a monetary award.

Other arguments were made by the defendants relating to waiver, estoppel, laches, interpretation of the plaintiff's contract, inconsistency of the money judgment and the correct measure of damages, some of which will be referred to, out of order, below.

The Appellate Division in an opinion by Justice McNally reversed the trial court upon the law and upon the facts and ordered a new trial, with costs to abide the result of the final judgment in the action. *Roulette Records, Inc. v. Princess Production Corporation et al.*⁶ Two of the five judges sitting on the case dissented in an opinion by Justice Aaron Steuer.

Justice McNally stated that there was no evidence that the defendants were informed prior to plaintiff's claim letter, by either Sarah Vaughan or the plaintiff, of plaintiff's contract with Sarah Vaughan and that the sound track records were manufactured and distributed prior to receipt of the claim letter. Justice McNally then went on to adopt the defendants-appellants' argument that on this record the sole basis for recovery is intentional interference without justification and without knowledge of the contract, that plaintiff was required to establish actual knowledge of the underlying agreement on the part of the defendants in order to support a recovery for intentional interference therewith, and that the trial court did not find, and on this record the evidence was sufficient to sustain a finding of, actual knowledge.

Justice McNally also stated that proof of actual knowledge may be predicated upon circumstantial evidence, but that this record did not demonstrate it.

Justice Steuer wrote a vigorous opinion in which he dissented and voted to affirm the trial court:

Let us assume the accuracy of the text writers that there is no liability for negligent interference with contract (Harper and James, *The Law of Torts*, vol. 1, 509; Prosser, *Handbook of the Law of Torts*, 2d ed. p. 732, et seq.). There is quite a distinction between a negligent failure to know and a deliberate intent to stay in ignorance of what one suspects.⁷

6. 15 App. Div. 2d 335 (1st Dept., 1962).

7. At 339.

In Justice Steuer's view of the evidence it was a reasonable conclusion for the trier of the fact to draw that the failure of the defendants to inquire was due to a desire not to be told, and that this is the equivalent of knowledge. The dissent also disagreed with the majority regarding damages. Justice McNally held that:

The award does not reflect a deduction for payment of \$4,800. made by or for the appellants to the musicians' union for the privilege of reproducing the sound track of the instrumentalists who supported the performance of defendant Sarah Vaughan, nor does the award take into consideration that the phonograph records here involved include the recordings of other artists.⁸

Justice Steuer refused to consider as a deductible expense in computing defendants' profit \$4,800 received by Princess from Canadian-American Records for payment to the musicians' union and treated under their contract as an "advance against royalties." The judge said: "What they did with the royalties does not change the character of the receipts." Justice Steuer was also unsympathetic to defendants' argument, adapted from *Sheldon v. MGM*,⁹ and apparently accepted to some extent by the majority, that since the 24-minute sound track record contained only 2 minutes, 51 seconds of Sarah Vaughan's performance, only 1/8 of defendants' profit (if any) should have been allocated to her performance.

The plaintiff was apparently faced with a dilemma. On the basis of the majority's findings with respect to the measure and computation of damages, a new trial might result in its retaining the injunction but in not keeping the money judgment even if it could establish knowledge on the part of the defendants. On the other hand, in view of the ordering of a new trial the Appellate Division order was not a final determination. Accordingly, in order to appeal to the Court of Appeals it would be necessary for plaintiff to stipulate that if the order appealed from be affirmed then judgment absolute shall be rendered against the plaintiff, that is to say, if the Appellate Division was correct in ordering a new trial even though it might be wrong on the law, the defendants would emerge with a judgment in their favor. Therefore, if the Appellate Division was correct in its assessment that the trial court erred in its findings of fact and that there were issues of fact to be resolved, then the ordering of a new trial was appropriate and the order would have to be affirmed by the Court of Appeals, regardless of whether the Appellate Division was in error in so far as the law was involved. On the other hand, if there

8. At 338.

9. 309 U.S. 390 (1940).

are only legal issues, then the Court of Appeals will review them. And, of course, if the evidence permits only one inference, a finding of fact to the contrary is error as a matter of law.¹⁰

In this procedural framework the plaintiff chose to persuade the Court of Appeals that there were no factual questions; that either there was manifestly actual knowledge or its equivalent or that actual knowledge was not a requirement.

The Court, all seven judges concurring, affirmed with costs, and judgment absolute was ordered against the plaintiff on the stipulation, *Roulette Records, Inc. v. Princess Production Corporation et al.*¹¹ Regrettably, the Court of Appeals did not write an opinion.

Now, what effect, if any, does this case have on the tort of intentional interference with an exclusive talent agreement?

First, on facts such as these, the owner of rights under an exclusive talent agreement must establish intentional interference. He does not have a property right in performances for which he has not paid and which were not rendered to him and which were not "passed off" as his—thereby distinguishing this case from the *Metropolitan Opera* case supra, which might be more particularly identified as a case involving the misappropriation of performers' rights (although a cause of action in intentional interference was also sustained).

Second, we learn from this case that the tort of intentional interference with a contract requires the plaintiff to establish that the defendant had *actual* knowledge of the contract with which he interfered *and* that it is not enough (i.e., until the Court of Appeals informs us otherwise) that the defendant should have made inquiry which if prudently conducted would have given him knowledge of plaintiff's contract.

Third, it is equally important to bear in mind that two out of five of the Appellate Division judges sitting on the *Roulette Records* case consider certain conduct as the equivalent of actual knowledge.

In reviewing the Appellate Division majority decision a particular statement by Justice McNally gives rise to additional questions. Consider the following:

10. Civil Practice Act §588, subdiv. 3, and §604; *Rockowitz Corset & Brassiere Corp. v. Madam X Co.*, 248 N.Y. 272; *Curcio v. City of New York*, 275 N.Y. 20; *Cohen & Karger, Powers of the New York Court of Appeals* 295-297; 9 *Carmody-Wait* 458-459.

11. 12 N.Y.2d 815 (1963).

On August 8, 1960 plaintiff wrote to the appellants and informed them of the said contract [between plaintiff and Vaughan]. *Plaintiff knew of the agreement dated April 19, 1960 between the appellants and defendant Sarah Vaughan on the day following the making of said agreement.* The phonograph records which are the subject of this action were manufactured and distributed prior to August, 1960.¹²

Why does the Court report the emphasized sentence? Of what relevance is it that plaintiff knew of the agreement between defendant Princess and Vaughan? The relevance of the sentence, it is submitted, becomes apparent when we refer to defendants-appellants' brief in which they argued that: (1) plaintiff's contract prohibited Vaughan from performing for any means of reproduction, including motion pictures and (2) Princess' contract with Vaughan included the right to issue the sound track phonograph record. Accordingly, defendants-appellants argued, if point 2 is correct then plaintiff waived the limitations on Vaughan when with knowledge of Princess' contract on April 20, 1960 it did not give notice immediately to Princess of its own contract with Vaughan. By the same reasoning, defendants' argument continued, if Vaughan's contract purported to give Princess the right to issue sound track records, plaintiff's failure to give Princess immediate notice resulted in the affirmative defenses of estoppel or laches. A collateral argument by defendants-appellants in support of each point was grounded in the case regarding the right granted by Mrs. Glenn Miller to Universal Pictures to use the Glenn Miller music in a motion picture. There, the Appellate Division stated (*Miller v. Universal Pictures*):¹³

Nor is there a provision authorizing Universal Pictures to make recordings, directly or indirectly, from the sound track.¹⁴

Nor under the circumstances here present should a negative covenant be implied, namely, that Universal would not so use the sound track as to compete with the royalty-yielding license granted to RCA * * * the recording of motion picture sound tracks for commercial purposes did not involve a new medium of entertainment.¹⁵

In other words, the Court said that a grant of motion picture music rights includes the right to issue commercial sound track phonograph records.

12. 15 App. Div. 2d 345 at 337 (emphasis added).

13. 11 App. Div. 2d 47 (1st Dept., 1960), *aff'd* on the *per curiam* opinion, 10 N.Y.2d 972 (1962).

14. At 48.

15. At 48-49.

With this background, it seems plain that Justice McNally treated the plaintiff Roulette Records as the party with knowledge of defendants' conflicting (or potentially interfering) contract and as being under a duty to give the defendant notice of its prior rights. In contrast, without this interpretation, the underscored sentence would be superfluous in an opinion otherwise marked by its trimness. *Quaere*, would the result in this 3-2 decision have been different in the absence of plaintiff's knowledge of defendant's contract?

382. ANATOMY OF A SYMPOSIUM—*A Review of the Meeting in Washington, May 20-23, 1963, on Photocopying.*

By PETER T. KENNEDY*

As modern technology sweeps aside the limitations that men have been accepting, the art of human engineering will increasingly be employed to spread equally the beneficent results of new advances.

In order to consider this process in the field of expanding photoduplication and its effects upon copyright owners, the American University held a four-day symposium in Washington, D. C. from May 20-23, 1963 entitled "Documentation and Copyright Law". The program of distinguished speakers was drawn from libraries, photoduplicating equipment concerns, the copyright office, authors, publishers, and the users of copyright materials.

The issue at once became apparent. It was pointed out that in the public interest, writings that contribute to the advancement of our society in the arts and sciences must be disseminated rapidly. There must be a free flow of communication. On the other hand, the copyright owners of these materials must be protected economically or else there will eventually be no original materials from which copies can be made. No positive conclusions or recommendations resulted, but the meeting was most fruitful in that much information was exchanged from which a greater understanding of the respective views was reached. The bulk of this report therefore will deal with the information gleaned at the meeting.

The world's storehouse of information is increasing at a phenomenal rate. Every ten years our information doubles. Contributing to this is the fact that 90% of all the engineers and scientists that have ever been trained are living today. In order to properly utilize new data there is a need for selective dissemination, getting pertinent information to all interested parties. Information centers are needed.

Modern technology has made great strides in research on the storage and retrieval of information. Techniques employed include both computer and microfilm storage. Whether reducing the copyrighted matter for storage, and thereafter reproducing it, is copying and infringement will present complex legal problems. It is envisioned that the day will come when all one has to do to copy is to lay a polaroid type of paper over the material to be copied. The legal complexities that may flow from these techniques while imminent are not yet fully upon us.

* Associate Counsel, The First Church of Christ, Scientist, Boston.

Today we are faced with challenges that arise through the use of photoduplicating machines. The first is the accurate pronunciation and definition of a new word, *reprography*, coined with the advent of mass duplication. The simplest definition given is that it refers to the reproduction of written materials.

After World War II, photoduplication was still in its infancy. Today, there are 174 types of copying machines that utilize chemicals, heat, or electrostatic methods of operation. Costs of copying range from 3 cents to 10 cents per page. It is estimated that there are 300,000,000 pages of photocopy made per month, of which 5% consists of materials under copyright protection. It can thus be seen that machine duplication though still in its infancy bears considerably upon the interests of copyright owners.

Presently there are prototypes or, in development, machines that reproduce complete books from one original, or from data fed into the machine. Libraries will no longer have to stock their shelves. Hard cover books, as they are now known, may well become collectors' items. It is envisioned that when a person wants a book, he will dial his need on a machine at his place of business or home. This information is relayed by telephone lines to a central information storage center. From there data is fed back over the same lines to the machine. This machine in turn reproduces and presents to the person the complete book or documents desired.

The basic motives of private enterprise that inspire the scientist and machine producers also motivate the author and publisher. One major publisher of the U. S. indicated that 30% of his business is in the field of technology and science. The average number of copies per book in this field is 3800. If due to mass duplication the volume was materially reduced he would, out of economic necessity, have to stop printing these subjects. He stated that all the talk has been directed toward obtaining the right of copying at a nominal cost but there has been no talk of obtaining the machines or paper at a nominal cost in the interests of the free flow of information. Without an economic incentive the publishers as private businesses cannot underwrite the progress that flows from freely exchanged information and would have to stop producing the originals from which copies are made. The author is similarly motivated. The wellspring of literary ideas that must find expression in writing would soon dry up if the author was not compensated, or subsidized, since he would have to turn to other means of livelihood.

An independent survey of this problem was made by a consultant firm. They concluded that there is no evidence that the protection afforded to authors by the present copyright law is stifling science. They found that the present practices of libraries in duplicating printed matter did not seri-

ously threaten the publishing industry at the present time because of the high cost of the complete reproduction of a book by the use of present photo-duplicating methods, but that this picture may change rapidly as new methods of copying are developed.

A group of dedicated men, drawn from the ranks of science, industry and the arts, formed the Committee to Investigate Copyright Problems affecting Communications in Science. They held their first meeting on May 19, 1959. Their first annual report appeared at 10 BULL. CR. SOC. 1. Several members of this committee made a valuable contribution to the four-day symposium.

At the meeting it was generally agreed that some type of clearing house similar to that used in the music industry should be created that would grant licenses to reproduce copyrighted works and in turn distribute royalties. There was a division of opinion as to whether appropriate legislation to be embodied in the present copyright law revision should be drafted. The C.I.C.P. has determined that its next major area of inquiry will be to undertake a study to determine the methods and procedures through which a clearing house may be organized and operated.

In conclusion, it is significant to repeat that there is no inherent conflict between copyright protection and the free flow of information, that the very constitutional basis of copyright protection is to promote the progress of science and the arts. Surely our advancing technology will be able to make the needed human adjustments.

383. THE INTER-AMERICAN AUTHORS' RIGHTS MEETING AT LIMA—*Seminario Interamericano de Expertos sobre Derecho de Autor*, May 20-24, 1963. Address by Herman Finkelstein.

Under the auspices of the Asociacion Peruana de Autores y Compositores, Antero Aspillaga Delgado, president, lawyers and copyright experts from the Americas met at Lima, Peru in May 1963. Herman Finkelstein, general attorney for the American Society of Composers, Authors and Publishers, reports that discussion centered around the various Conventions and the need to educate both the general public and legislators of each country to an understanding of the laws safeguarding rights of authors.

In addressing the meeting, Mr. Finkelstein offered a blue-print of ASCAP's activities and discussed the international aspects as follows:

We have several systems of international copyright protection—those which are unique to the Western Hemisphere, and are described in Dr. J. V. Fajardo's "Codigo de los Derechos de Autor" (1963), which has been distributed here; and those with broader scope, such as the Berne Convention and the Universal Copyright Convention drawn up in Geneva in 1952. In addition, there are bilateral treaties between many nations.

What should be our objective at this time? I believe that all countries should be encouraged to adhere either to the Berne Convention or the Universal Copyright Convention. One of the main differences between Berne and Universal is the question of formalities: Berne has none; Universal permits the requirement of a copyright notice consisting of the symbol ©, the year of first publication and the name of the copyright proprietor. I believe these formalities should be done away with, in the sense that failure to comply with them should not result in the forfeiture of a copyright.

Another difference between Berne and Universal relates to the term of copyright: Berne provides for a term equal to the author's lifetime plus a period of 50 years after his death; Universal permits a country to limit the term either to 25 years after death or 25 years after first publication. The United States was largely responsible for both these deviations from Berne in the Universal Convention. Our law required formalities and measured the term of copyright from the date of publication. We are now revising our law, and I hope and believe that we will adopt a system of automatic protection without formalities, and that our term of copyright will be for a period of the author's life plus 50 years after his death. If we change our law in these two respects, we will, I believe, go a long way toward removing the differences among the nations which protect authors' rights as a form of property.

We expect to continue registration, but under our law it is not a condition for enjoyment of copyright. It is merely a step that must be taken before bringing an infringement suit.

In discussing the proposals for revising our own law, some people have been concerned about the difficulty of ascertaining the date of a foreign author's death. Among composers, we have no such problem; each performing right society keeps such records for its own members, and makes such information available to other societies. For the public, however, similar information should be available at a central source. I believe that it would be well to establish a central public registry for such records. This would put an end to the argument of those who assert that a notice of copyright is necessary as the only certain date to find out whether a work is in the public domain. Records of the date of an author's death, if kept by an international agency, would be even more certain. In addition it would enable us to have more uniform copyright laws throughout the world, and might, if we move intelligently along the right road, result in our setting the pattern for uniform laws among nations, which those who specialize in other branches of the law, may one day follow.

In conclusion, meetings such as this will help to a better understanding among nations, and may lead ultimately to a uniform system of international copyright protection.

PART II.

**LEGISLATIVE AND ADMINISTRATIVE
DEVELOPMENTS**

1. UNITED STATES OF AMERICA AND TERRITORIES

384. U. S. CONGRESS. HOUSE.

H.R. 5999. A bill to provide for the establishment of the National Academy of Foreign Affairs, and for other purposes. Introduced by Mr. Vanik, May 1, 1963, and referred to the Committee on Foreign Affairs. 13 p. (88th Cong., 1st sess.)

Identical with previous bills of the same Congress. See 10 BULL. CR. SOC. 181, Items 188 and 189 (1963).

385. U. S. CONGRESS. HOUSE.

H.R. 6394. A bill to establish a National Spelling Commission to reform the spelling of English words, to publish the United States Official Dictionary, and for other purposes. Introduced by Mr. Brown, May 16, 1963, and referred to the Committee on Education and Labor. 4 p. (88th Cong., 1st sess.)

Identical with H.R. 336 introduced by Mr. Hagen on January 9, 1963. See 10 BULL. CR. SOC. 179, Item 182 (1963).

386. U. S. CONGRESS. HOUSE.

H.R. 7194. A bill to amend the Copyright Act by repealing the jukebox exemption, and for other purposes. Introduced by Mr. Celler, June 24, 1963, and referred to the Committee on the Judiciary. 2 p. (88th Cong., 1st sess.)

A clean bill which was substituted for the Celler bill, H.R. 5174, as result of action by the Subcommittee on Patents, Trademarks and Copyrights of the House Judiciary Committee. The bill virtually repeals the jukebox exemption with respect to owners of the machines only, except under certain conditions.

On July 25 the House Judiciary Committee ordered this bill reported favorably to the House.

387. U. S. CONGRESS. HOUSE. *Committee on the Judiciary.*

Providing for royalties for musical compositions on coin-operated machines. Hearings before Subcommittee no. 3 of the Committee on the Judiciary, House of Representatives, Eighty-eighth Congress, first session, on H.R. 5174, a bill to provide for the payment of royalties for the public performance of copyrighted musical compositions by means of coin-operated machines, and for other purposes, May 2 and 3, 1963. Washington, U. S. Govt. Print. Off. 224 p. "Serial No. 2."

Hearings on the Celler bill, introduced on March 28, 1963, which provided, *inter alia*, for the establishment, in the Copyright Office, of a Performing Rights Administration under the direction of the Register of Copyrights. See 10 BULL. CR. SOC. 254, Item 269 (1963).

388. U. S. COPYRIGHT OFFICE.

Les instruments ne peuvent pas faire l'objet d'un copyright. In *Interauteurs*, no. 151 (2d quarter 1963), p. 99. "Circulaire 31 B."

A French translation of Copyright Office Circular 31 B which explains that devices and similar articles, designed for computing and measuring, cannot be copyrighted.

2. FOREIGN NATIONS

389. JAPAN. *Laws, statutes, etc.*

Amendments of the copyright legislation. (76 *Le Droit d'Auteur* 104-106, [English inset], no. 6, June 1963.)

The French version appears in the main section of the same issue of *Le Droit d'Auteur*.

390. PAKISTAN. *Laws, statutes, etc.*

Ordinance no. XXXIV of 1962: the Copyright ordinance, 1962; an ordinance to amend and consolidate the law relating to copyright. In *The Gazette of Pakistan*, Extraordinary (June 2, 1962), pp. 827-861. Registered no. S. 1033.

The new copyright law of Pakistan which, according to a letter of May 10, 1963 addressed to UNESCO by the Ministry of Education and Information of Pakistan, could not yet be enforced in view of "certain technical difficulties." The law is generally based on the U. K. Act of 1956.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

391. UNIVERSAL COPYRIGHT CONVENTION. *Deposit by Peru.*

The Copyright Office has learned, as yet unofficially, that on July 16, 1963, Peru deposited with the Director-General of UNESCO its instrument of ratification to the Universal Copyright Convention.

Under Article IX, paragraph 2, of the Convention, the latter will come into force in respect of Peru three months after the deposit of its instrument of ratification, i.e., on October 16, 1963.

Peru is the 47th country to adhere to the Convention.

392. UNIVERSAL COPYRIGHT CONVENTION—List of Accessions and Ratifications.

(As of August 1, 1963)

<i>Country</i>	<i>Effective Date</i>	<i>Country</i>	<i>Effective Date</i>
Andorra	September 16, 1955	Israel	September 16, 1955
Argentina	February 13, 1958	Italy	January 24, 1957
Austria	July 2, 1957	Japan	April 28, 1956
Belgium	August 31, 1960	Laos	September 16, 1955
Brazil	January 13, 1960	Lebanon	October 17, 1959
Cambodia	September 16, 1955	Liberia	July 27, 1956
Canada	August 10, 1962	Liechtenstein	January 22, 1959
Chile	September 16, 1955	Luxembourg	October 15, 1955
Costa Rica	September 16, 1955	Mexico	May 12, 1957
Cuba	June 18, 1957	Monaco	September 16, 1955
Czechoslovakia	January 6, 1960	Nicaragua	August 16, 1961
Denmark	February 9, 1962	Nigeria	February 14, 1962
Ecuador	June 5, 1957	Norway	January 23, 1963
Finland	April 16, 1963	Pakistan	September 16, 1955
France	January 14, 1956	Panama	October 17, 1962
German Federal		Paraguay	March 11, 1962
Republic	September 16, 1955	Peru	October 16, 1963
Ghana	August 22, 1962	*Philippines	November 19, 1955
Greece	August 24, 1963	Portugal	December 25, 1956
Haiti	September 16, 1955	Spain	September 16, 1955
Holy See	October 5, 1955	Sweden	July 1, 1961
Iceland	December 18, 1956	Switzerland	March 30, 1956
India	January 21, 1958	United Kingdom	September 27, 1957
Ireland	January 20, 1959	United States of	
		America	September 16, 1955

* UNESCO has advised the U. S. Government that on November 14, 1955, a letter was received from the Philippine Minister in Paris stating that the Philippine President had directed the withdrawal of the instrument of accession prior to November 19, 1955, the date on which the Convention would become effective in respect of the Philippines. No determination has been made as to the legal effect of this communication.

393. LIST OF CONTRACTING BERNE UNION COUNTRIES.

*(As of January 1, 1963)**

Australia	Japan
Austria	Lebanon
Belgium	Liechtenstein
Brazil	Luxembourg
Bulgaria	Mali
Canada	Monaco
Ceylon	Morocco
Congo (Brazzaville)	Netherlands
Czechoslovakia	New Zealand
Dahomey	Niger
Denmark	Norway
Finland	Pakistan
France	Philippines
Gabon	Poland
Germany	Portugal
Great Britain	Rumania
Greece	Senegal
Holy See	Siam (Thailand)
Hungary	Spain
Iceland	Sweden
India	Switzerland
Ireland	Tunisia
Israel	Turkey
Italy	Union of South Africa
Ivory Coast	Yugoslavia

The "Berne Union" is made up of countries adhering to one or more of the following: the original Berne Convention of 1886 and the successive revisions of Paris 1896, Berlin 1908, Rome 1928, and Brussels 1948. Since different countries have different relationships under one or more of these, persons interested in obtaining detailed information, including application of the various provisions to territorial areas, should consult the Bureau de l'Union internationale pour la protection des œuvres littéraires et artistiques, 32, chemin des Colombettes, Geneva, Switzerland.

* Taken from *Le Droit d'Auteur*, official publication of the Berne Union, issue of January 1963.

PART IV.

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

394. *Surgical Supply Service, Inc. v. Adler*, 138 U.S.P.Q. 263 (3d Cir., June 28, 1963) (Smith, J.). *For decision below, see* 134 U.S.P.Q. 68 (S.D.N.Y. 1962), 9 BULL. CR. SOC. 491, Item No. 378 (1962).

Appeal from judgment for plaintiff on issue of unfair competition in action for unfair competition and copyright infringement. Plaintiff and defendant, who are both in the chiropody supply business, each distribute a combination price list and order form. Plaintiff charged that defendant copied plaintiff's form. The district court held that defendant had copied plaintiff's form in order to deceive customers as to source, that the forms were so similar that confusion was likely, and that actual confusion had resulted. (The further holding that there was no copyright infringement was not challenged on this appeal.)

Held, reversed.

I. Plaintiff contended that the trial court had correctly held that the two order forms were so similar that confusion as to source was likely to result. The court held, however, that plaintiff's and defendant's forms were readily distinguishable and quite unlikely, therefore, to cause confusion, and that plaintiff had no property rights in those features that were similar. The court said:

The general format [of plaintiff's form] is similar to that employed in other commercial enterprises in the preparation of price lists, order forms, catalogues, and like material.

The appellant's trade circular, like that of the appellee, consists of a single sheet of paper and is essentially a combination price list and order form. It embodies several features similar to those embodied in the appellee's circular. Many of the products listed therein are the same as those listed in appellee's order form and, in some instances, are catalogued under identical classification headings. There are other features, such as the use of squares and boxes, which are similar. The general

If the trier of the facts finds that despite certain similarities the defendant's work was not a copy and was independently created (per-

format of the appellant's circular is otherwise distinguishable from that of the appellee's circular . . .

The classification headings . . . are common generic terms descriptive of products in the particular categories. The other classification headings employed by each of the parties, although dissimilar, are also cast in generic terms in common use in the surgical supply business. The terms are used in their primary sense and are therefore not susceptible of exclusive appropriation by either party . . . However, the classification headings employed in the circulars of the respective parties are distinguishable both in general arrangement and in style of print.

The trade circulars are patently dissimilar not only in general appearance but in other important respects. Each is clearly and prominently marked as to source, with the name and address of the supplier.

II. The plaintiff contended that the findings of the trial court could not be disturbed unless "clearly erroneous." The court held, however, that where findings are based on "a comparison of the exhibits, the uncontradicted testimony of a single witness, and the inferences drawn from the evidence," the "clearly erroneous" rule does not apply. It was held that the findings of the trial court on the issue of unfair competition were not supported by the evidence.

395. *Cortley Fabrics Co. v. Slifka*, 138 U.S.P.Q. 110 (S.D.N.Y., Feb. 4, 1963) (Levet, J.). Aff'd per curiam 138 U.S.P.Q. 97 (2d Cir. June 14, 1963). For decision on preliminary injunction, see 175 F. Supp. 66, 122 U.S.P.Q. 321 (1959), 7 BULL. CR. SOC. 49 (1959).

Action for copyright infringement. Defendant's general manager bought a "woman's garment" at Macy's and had the design of the fabric from which the garment was made copied. Defendant manufactured and sold fabric made from this design, in which plaintiff claimed copyright. Plaintiff moved for summary judgment.

Held, judgment for plaintiff.

The court held that the three defenses raised by defendant were all without merit.

I. The defendant contended that plaintiff's fabric design was not original. The court found, however, that the uncontradicted testimony in plaintiff's affidavits and depositions "conclusively demonstrates that the design . . . was an original work within the meaning of the Copyright Act. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 2 Cir. 1951, 191 F. 2d 99, 90 USPQ 153."

II. The court also rejected defendant's contention that the plaintiff's fabric had originally been printed and sold without copyright notice. It said:

The evidence conclusively proves that every time Cortset #445 was produced at the Cranston Print Works Co., a notice of copyright was imprinted on the selvage. The affidavits . . . demonstrate that a notice of copyright was engraved on the rollers and mechanically imprinted on the selvage of each and every repeat of Cortset #445.

III. The defendant also argued that plaintiff could have incorporated its copyright notice as part of the design without impairing the market value of its goods. The court held, however, that it had not been shown that incorporating the notice in the body of the design was feasible, and that, therefore, the notice on the selvage was adequate. The court said:

The defendants have the burden of proving that the notice of copyright could have been incorporated in the body of the design instead of the selvage. *Peter Pan Fabrics v. Martin Weiner Corp.*, 2 Cir. 1960, 274 F. 2d 487, 124 USPQ 154; *Peter Pan Fabrics v. Dixon Textile Corp.*, 2 Cir., 1960, 280 F. 2d 800, 125 USPQ 39. This burden the defendants have failed to carry.

396. *Bellin v. Advanced Music Corp.*, not yet reported. (S.D.N.Y., May 14, 1963) (Cooper, J.)

Action for copyright infringement. Plaintiffs charged that both music and lyrics of defendants' song, "Play Me Hearts and Flowers (I Wanna Cry)" were copied from plaintiffs' "Play Me Hearts and Flowers."

Held, judgment for defendant.

It was held that although there were some similarities between the two songs in question, there was not "that degree of similarity" which would prove copying. The court said:

[E]ssentially what the plaintiff must show is that the defendant had access and that he copied—either consciously or unconsciously. The proof as to access can be slight if the similarities are so striking and encompassing as to make it difficult to believe that they were independently created.

happens from a common source in the public domain) then there is no infringement even if access is proven. . . .

"The copyright law, unlike the patent law, does not reach one who had independently arrived at the same result or even produced an identical work, if this be possible." (Howell's *Copyright Law*, p. 129.)

As the trier of the facts in this case I find that there is some similarity between plaintiffs' Exhibits 4 and 9 [the two songs in question] but not that degree of similarity which the law contemplates. *Arnstein vs. Porter*, 154 Fed 2nd 464 (2d Cir. 1946); *Fisher v. Dillingham*, 298 Fed. 145 (S.D.N.Y. 1924).

397. *Berlin v. E.C. Publications*, 138 U.S.P.Q. 298 (S.D.N.Y., June 27, 1963) (Metzner, J.)

Action for copyright infringement. "Mad" magazine published in one of its issues a section called "Sing Along with Mad" containing a satirical "collection of parody lyrics to 57 old standards which reflect the idiotic world we live in today." After the title of each lyric appeared the words "Sung to the tune of " or "To the tune of ", in each case naming one of the 57 songs. Plaintiffs own copyright in 25 of these songs and claimed that the "Mad" lyrics constituted infringements. Both parties moved for summary judgment.

Held, judgment for defendant on 23 causes of action; defendant's motion denied as to two causes of action; plaintiffs' motion denied.

I. Plaintiffs contended that "Mad's" lyrics were a "counterpart" or parody of their copyrighted material, and hence were infringing. The court held, however, that as to all but two of the songs, the "Mad" lyrics were not really parodies at all, but rather entirely separate and original works resembling the originals only in that the meter was the same, thus permitting defendant's lyrics to be sung to plaintiffs' tunes. The court said:

Infringement occurs when the accused work is a colorable copy or paraphrase of the copyrighted work. The copying must be visible by the ordinary observer, and must be of a substantial portion of the protected work. *Wihl v. Wells*, 231 F. 2d 550, 109 USPQ 200 (7th Cir. 1956); *Ansehl v. Puritan Pharmaceutical Co.*, 61 F. 2d 131, 15 USPQ 38 (8th Cir.), cert. denied, 287 U.S. 666 (1932); *Peter Pan Fabrics, Inc. v. Acadia Co.*, 173 F. Supp. 292, 301, 121 USPQ 81, 87-88 (S.D.N.Y. 1959), aff'd 274 F. 2d 487, 124 USPQ 154 (2d Cir. 1960). In *Harold Lloyd Corp. v. Witwer*, 65 F. 2d 1 (9th Cir.), appeal dismissed per stipulation, 296 U.S. 669 (1933), the court quoted from Justice Story that the true test of piracy is whether defendant used plaintiff's plan as a model, with colorable alterations, or whether defendant's item is a

product of his own labor, that is, whether defendant's book is "a servile or evasive imitation of the plaintiff's work, or a bona fide original compilation from other common or independent sources." 65 F. 2d at 17.

It is obvious that defendants' lyrics have little in common with plaintiffs' but meter and a few words, except in two instances which will be discussed below. Defendants have created original, ingenious lyrics on subjects completely dissimilar from those of plaintiffs' songs.

Much has been made by both plaintiffs and defendants of the parody cases. It is clear that a parody of a copyrighted work is an infringement of the copyright. *Benny v. Loew's Inc.*, 239 F. 2d 532, 112 USPQ 11 (9th Cir. 1956), aff'd, 356 U.S. 43, 116 USPQ 479 (1958); *Hill v. Whalen & Martell*, 220 F. 359 (S.D.N.Y. 1914). A parody is "A writing in which the language and style of an author, or poem, or other work, is closely imitated or mimicked." Webster's New International Dictionary (2d ed. 1960). Defendants have not parodied plaintiffs' lyrics. Rather, they have satirized, in original words and thought, several aspects of modern life. The case relied on most heavily by plaintiffs indicates that the parody rule is inapplicable to the instant case. In *Leo Feist, Inc. v. Song Parodies, Inc.*, 146 F. 2d 400, 64 USPQ 92 (2d Cir. 1944), defendants published song lyric magazines (not a humor magazine) entitled "Popular Parody Hit Songs" and "Hit Parade Parody Songs". At the time, plaintiffs' songs were at the height of their popularity. Defendants included in their magazines certain lyrics on the same subject matter as plaintiffs', which paraphrased plaintiffs' lyrics. The district court held that this constituted clear infringement, finding that defendants' lyrics were

" . . . a colorable alteration and an evasive imitation of the lyrics of said songs, which ordinary observation would cause to be recognizable as having been taken from the lyrics of said songs." Record on Appeal, p. 134.

II. Plaintiffs also argued that defendants "had infringed the copyright in their music by stating that the 'Mad' lyrics can be sung to the tune of plaintiffs' compositions" and that this direction "has the same force and effect, as if the music . . . had been actually printed with defendants' parody lyrics." The court held, however, that this reference to plaintiffs' songs was clearly not equivalent to reprinting the songs. It said:

It is difficult to see how music can be copied when it is not reproduced. Furthermore, if the reader is familiar with the music, it can only be the result of plaintiffs' efforts. Defendants are not the source of this knowledge.

Section 1 of 17 U.S.C. enumerates the exclusive rights granted to copyright holders. Insofar as applicable to songs such as plaintiffs', these rights are:

"To print, reprint, publish, copy and vend the copyrighted work" (section 1(a)); "to arrange or adapt [the work] if it be a musical work" (section 1(b)); "to perform the copyrighted work publicly for profit if it be a musical composition" (section 1(e)). Defendants have not infringed any of these rights by directing that their lyrics be sung to plaintiffs' music.

III. With respect to the songs "Always" and "There's no Business Like Show Business" the court found that there was enough similarity between the original lyric and the "Mad" lyric so that there was a triable issue of fact with respect to copyright infringement. The court said:

The second claim refers to the song "Always". Defendants also entitle their lyric "Always" and caption it "A Psychiatrist Prescribes Treatment for a Patient". I find that there is a question of fact to be determined as to this claim. Plaintiffs' lyric revolves around the word "always" in such a way that it constitutes the theme of the song. The word "always" also appears to be an integral part of the theme of defendants' lyric. Summary judgment on the seventh claim cannot be granted for a similar reason. This claim refers to the song "There's No Business Like Show Business." Defendants use substantially the same title for their lyric and both lyrics revolve around the word "business".

2. State Court Decisions

398. *Radio Corporation of America v. Premier Albums, Inc.*, 240 N.Y.S. 2d 995, 138 U.S.P.Q. 404 (App. Div., 1st Dept., June 20, 1963) (Stevens, J.)

Appeal from order denying temporary injunction in action for unfair competition. By agreement with Tommy Dorsey, plaintiff had an exclusive right to produce and market recordings of his orchestra for many years, including the period, from 1939 to 1942, when Frank Sinatra was a vocalist with the orchestra. Subsequently, in 1955, Dorsey granted to RCA the exclusive right to make and sell records of all performances of the Dorsey orchestra which RCA did not already own. In 1962 Dorsey's widow, then unaware of Dorsey's 1955 agreement with plaintiff, sold some old Dorsey tape recordings to defendant. Defendant released an album containing ten selections, five of them featuring Sinatra and two being selections previously released by RCA.

Held, reversed.

I. The court held that defendant's release of the Dorsey album constituted unfair competition and that irreparable injury had been sufficiently shown. The court said:

There is a substantial difference in the sale price of the record produced by RCA, and that produced by defendants and, it is alleged, the records produced by defendants are of an inferior quality, and thus their sales are detrimental to and detract from RCA's unique and valuable rights in the Dorsey records. . . .

The documentary evidence supports RCA's claim of an exclusive right of reproduction. The moneys expended by RCA over the years in promoting the sales of Dorsey's records, and the unity of artistry of Sinatra and Dorsey all combine to make of the right of reproduction and sale a valuable, and even a unique property right. Such a right, in the absence of other circumstances . . . is entitled to protection. Cf. *Metropolitan Opera Assn. v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 87 USPQ 173, aff'd 279 App. Div. 632; *Dior v. Milton*, 9 Misc. 2d 425, 110 USPQ 563, aff'd 2 App. Div. 2d 878, 113 USPQ 210. Unrestrained commercial exploitation, competitively, would result in irreparable harm to RCA and render the right of little value. Cf. *De Jur-Absco Corp. v. Janrus Camera*, 16 Misc. 2d 772; 28 Am. Jur., *Injunctions*, §26 et seq.

II. Defendant argued that RCA was estopped by its failure sooner to pursue its claim against defendant but the court held that estoppel requires a right and duty as well as an opportunity to act, and that this requirement had not been met.

Premier contends that RCA is estopped by its silence or inaction. "To give rise to an estoppel by silence or inaction, there must be a right and an opportunity to speak, and, in addition, an obligation or duty to do so" (21 N.Y. Jur., *Estoppel*, §32 et seq.) RCA knew nothing of Premier's dealings with . . . Mrs. Dorsey. Moreover, RCA did not have title to the tapes or master records which were owned by State [Dorsey's corporation], it merely had a right to exclusive re-recording of such records or tapes. Defendants' contention that RCA should be estopped also because of inaction following the production by 20th Century-Fox of a Dorsey recording is not persuasive. Apparently RCA did enter into some negotiation with 20th Century-Fox following the appearance of 20th Century's record, for the record on appeal makes reference to a compromise reached between them. The contention of estoppel is rejected.

399. *Youssoupoff v. Columbia Broadcasting System, Inc.*, 149 N.Y.L.J. 121, p. 9 (June 24, 1963) (Sup. Ct., N.Y. Co.) (Gellinoff, J.)

Action for invasion of privacy. Plaintiff, a member of the Russian royal family, "admittedly murdered the Russian monk Rasputin" and has written two books about the event and the surrounding circumstances. Defendant broadcast a television drama called "If I Should Die" which dealt with Rasputin's death and in which plaintiff, impersonated by an actor, was one of the characters. Both parties moved for summary judgment.

Held, both motions denied.

I. Plaintiff contended that even if the play were historically accurate, as defendant claimed, plaintiff's right of privacy was violated by the impersonation of him by an actor and the use of manufactured dialogue. The court held, however, that the use of the dramatic form alone—where the portrayal is historically accurate, is primarily limited to the historical or newsworthy events in which the person portrayed figured, and does not tend "to outrage public opinion or decency in respects other than those produced by the admitted historical facts"—is not sufficient to constitute an invasion of privacy under the New York Civil Rights Law. Citing cases to the effect that the presentation of news is privileged under the Civil Rights Law (*Lahiri v. Daily Mirror*, 162 Misc. 776; *Gautier v. Pro Football*, 304 N.Y. 354; *Molony v. Boy Comics Publishers*, 277 App. Div. 166, *Sidis v. F-R Pub. Corp'n*, 113 F.2d 806 (2d Cir.)), even though no longer current (*Molony v. Boy Comics Publishers*, *supra*), and that the news privilege applies to movies and television as well as to written material (*Gautier v. Pro Football*, *supra*), the court said:

The statute does apply if the treatment is fictionalized (*Binns v. Vitagraph Co. of America*, 210 N. Y. 51; *Sutton v. Hearst Corporation*, 277 App. Div. 155; *Molony v. Boy Comics Publishers*, *supra*, 166, 171-173; *Koussevitzky v. Allen Towne & Heath, Inc.*, 188 Misc. 479, *aff'd* 272 App. Div. 759).

The attorneys for both plaintiff and defendant agree—at least in so far as this case is concerned—that defendant's liability under the privacy statute depends upon the determination as to whether or not the use of an actor to impersonate plaintiff and of imaginary dialogue necessarily constitutes fictionalization within the meaning of the authorities. No decision of a court of this state has been called to this court's attention in which this narrow question has been squarely decided.

Plaintiff relies heavily on the leading case of *Binns v. Vitagraph Co.* (*supra*). It is true that in that case the court, in holding the defendant

liable, stated that the motion picture was (p. 56) "mainly a product of the imagination" and that the series of pictures had been made (p. 52) with prepared scenery and actors to impersonate the plaintiff and others. There were, however, other important factors present in the Binns case upon which the court relied in finding the defendant liable. The motion picture purported to portray (p. 58) Binns' individual "peculiarities of dress and walk," his "personal fads, eccentricities, amusements and even his private life." The last picture of the series "had no connection whatever with any other place or person or with any event" (p. 58) and related to personal movements of Binns which had no connection with the rescue at sea in which Binns had figured as a wireless operator. One of the defendant's officers had admitted at the trial that the picture was largely the product of imagination. . . . In view of these additional facts, the Binns case is by no means clear authority for the proposition that the mere use of an actor to impersonate the plaintiff and of manufactured scenery and dialogue is sufficient, *in itself*, to create liability under our privacy statute

In *Koussevitzky v. Allen Towne & Heath, Inc.* (188 Misc. 479), the plaintiff complained that the publication of an unauthorized biography of his life was a violation of his right of privacy. Mr. Justice Shientag, who wrote the opinion below, expressly recognized that the biography would constitute a violation of the privacy statute if it were fictionalized; nevertheless, although the book contained various untrue and even defamatory statements about the plaintiff, he held that the biography was not so fictionalized as to bring it within the purview of the statute. He pointed out that very little was said in the book about the plaintiff's private life and that (p. 485) "there are . . . no so-called revelations of any intimate details which would tend to outrage public tolerance. There is nothing repugnant to one's sense of decency or that takes the book out of the legitimate dissemination of information on a subject of general interest." Mr. Justice Shientag, in the *Koussevitzky* case (*supra*), further held (p. 484): "That it may contain untrue statements does not transform it [the book] into the class of fiction Truth or falsity does not of itself determine whether the publication comes within the ban of Sections 50 and 51"

In view of plaintiff's concession that the drama was "based upon" historical fact, the court holds that the use of the drama form, with an actor impersonating plaintiff and the scenery and dialogue the product of the author's imagination, does not of itself, as a matter of law, convert privilege from responsibility under our Civil Rights Law into liability. To make out a good cause of action, plaintiff must show in addition, that

the portrayal of plaintiff by the actor who impersonated him, or the dialogue employed, tended to outrage public opinion or decency in respects other than those produced by the admitted historical facts.

II. It was also held that plaintiff, who conceded that the broadcast was not used for advertising purposes, had not sufficiently established that it was used for trade purposes. The court said:

As stated in *Gautier v. Pro-Football, Inc.* (278 App. Div. 431, 434, aff'd 304 N.Y. 354): "Each case must be decided on a weighing of conflicting policies: the public interest in free dissemination of information against the interest in the preservation of the inviolate personality. Among the relevant factors in such decision are the media used, the nature of the subject matter and the extent of the actual invasion of privacy" . . . On the present submission it is impossible to test the necessary criteria in order to determine whether the broadcast was for purposes of trade. A trial, at which all the circumstances of the broadcast are developed is necessary. . . .

III. Plaintiff's concession that the play was historically accurate was for the purposes of his own motion for summary judgment only. The court held that the proof of accuracy offered on the motion was not sufficient to justify judgment for defendant without a trial.

400. *Pottstown Daily News Publishing Co. v. Pottstown Broadcasting Co.*, 192 A.2d 657, 138 U.S.P.Q. 406 (Pa. Sup. Ct., July 2, 1963) (Jones, J.)

Appeal from order denying motion to dismiss complaint in action for copyright infringement and unfair competition. Plaintiff operates a newspaper and defendant operates a radio station in the same town. Plaintiff charged that defendant uses the local news gathered by plaintiff's staff and published in plaintiff's newspaper in defendant's daily news broadcasts, in violation of plaintiff's copyright rights and also in violation of the "property rights of [plaintiff] in the aforesaid news items."

Held, affirmed.

I. It was held that plaintiff's claim that its statutory copyright in its news items was infringed was not cognizable in the Pennsylvania courts, because the federal courts have exclusive jurisdiction over such copyright actions.

II. The defendant argued that the state court was also without jurisdiction over the claim for unfair competition, because it was joined with a substantial and related claim arising under the copyright laws of the United

States. Defendant's contention was that this gave the federal courts exclusive pendent jurisdiction. The court held, however, that although the federal courts might indeed have had pendent jurisdiction over the cause for unfair competition if these two claims had been sued on in a federal court, pendent jurisdiction under 28 U.S.C.A. §1338(b) is not exclusive. The court said:

[I]nsofar as the instant complaint avers and alleges a cause of action relating to a copyright held by the News Company, such cause of action would be cognizable *only* in the federal, and not in the state, courts and, to the extent that this complaint alleges such cause of action, the Common Pleas Court of Montgomery County cannot entertain jurisdiction of such cause of action. The Broadcasting Company properly challenged the jurisdiction of the state court to entertain that cause of action and, if that were the *only* cause of action averred, the complaint would have to be dismissed.

However, the instant complaint avers an additional cause of action, i.e., that the Broadcasting Company is engaging in unfair competition. The question arises whether, under the 1948 statute [Act of June 25, 1948, C. 648, 28 U.S.C.A. §§1338(a), (b)] such action is cognizable *only* in the federal courts. The Broadcasting Company argues that this second cause of action is *exclusively* within the jurisdiction of the federal courts on the theory that it asserts a claim of unfair competition which is joined with a substantial and related claim under the copyright laws of the United States and, by virtue of Section 1338(b) within the jurisdiction of the federal courts.

Assuming, arguendo, that this second cause of action does assert a claim of unfair competition joined to a substantial and related claim under the copyright laws of the United States, does Section 1338(b) vest the federal courts with *exclusive* jurisdiction over such cause of action? Neither historically nor by its language, does Section 1338(b) reach such a result.

Historically, an action for unfair competition is a common law cause of action which does not arise under any law of the United States (*Fry v. Layne-Western Company*, 282 F. 2d 97, 99, 126 USPQ 30, 31) and ordinarily would be cognizable only by the courts of the several states. However, in *Hurn v. Oursler*, 289 U.S. 238, 17 USPQ 195, the United States Supreme Court held that a federal district court *might* accept jurisdiction of a non-federal issue—unfair competition—which is related to a substantial federal issue—one arising under the patent or copyright laws of the United States—if it appears that both the federal and the non-federal issues rested on the same facts. Until *Hurn v. Oursler*,

in the absence of diversity of citizenship, claims based upon unfair competition were determinable only in state courts but, under *Hurn v. Oursler* and its doctrine of *pendent* jurisdiction, federal courts were then permitted to consider claims of unfair competition if related to a substantial federal issue when both issues were based on substantially the same facts and federal courts were permitted to determine such a claim of unfair competition even though the court eventually denied the validity of the claim that a patent, trademark or copyright had been infringed or declared the validity of the patent, trademark or copyright invalid.

The doctrine of *Hurn v. Oursler* became embodied in Section 1338(b) of the 1948 statute. . . . There can be no doubt that . . . federal courts *may* now exercise pendent or derivative jurisdiction over a claim of unfair competition which is joined with a claim under the copyright laws if the latter claim is "substantial and related". However, such *permissive* jurisdiction does not render the jurisdiction of the federal courts *exclusive* in nature or oust state courts of their jurisdiction over claims of unfair competition.

III. The defendant also contended that no valid claim of unfair competition had been stated in the complaint, because the plaintiff did not have a property right in the news items which had been violated. The court held, however, that a limited property right, as against competitors, exists in news, and that plaintiff had set forth a proper cause of action:

The leading case on the subject of unfair competition in the area of the law covered by this second cause of the complaint is *International News Service v. Associated Press*, 248 U.S. 215, 39 S. Ct. 68. In that case, the Associated Press, an unincorporated association of newspaper publishers, engaged in the gathering of news, through trained personnel and at great expense, and such gathered news, *without copyright*, was telegraphed by the Associated Press daily to its assessment-paying members throughout the country for their exclusive publication. The International News Service, a rival corporation . . . , through the media of early publication in newspapers and from bulletins of members of the Associated Press, obtained Associated Press' news and sent such news, either as written or rewritten, to its own newspaper customers throughout the country enabling the latter to compete with newspaper members of the Associated Press in the prompt publication of the news The United States Supreme Court held that the Associated Press, as against the International News Service, possessed an equitable "quasi-property" right in the news, even after its publication, and that the appropriation of such news for its own gain and profit amounted to unfair competition

and such conduct was enjoined The concept of unfair competition set forth in *International* was adopted by our Court in *Waring v. WDAS Station, Inc.*, 327 Pa. 433, 194 A. 631, 35 USPQ 272. . . .

In this day and age no court can fail to take note of the fact that newspapers, radio and television stations compete with each other for advertising which has become a giant in our economy. In fact, the presentation of news and entertainment has become almost a subsidiary function of newspapers, radio and television stations. Advertising is the lifeblood of newspapers, radio and television and the presentation of news by all three media is a service designed to attract advertisers.

Taking into consideration the circumstances and the character of the businesses of the respective parties, as averred, the News Company has a commercial package of news items to service its advertising business upon which to base a cause of action in tort against a competitor allegedly converting the news items to its own uses in pursuit of advertising. The distinction we draw is fine; for the purpose of an action of unfair competition the specialized treatment of news items as a service the newspaper provides for advertisers gives to the News Company a limited property right which the law will guard and protect against wrongful invasion by a competitor whereas, for the purpose of an action for the infringement of copyright, the specialized treatment of the news is protected "because the law seeks to encourage a creative mind". . . .

Competition in business is jealously protected by the law and the law abhors that which tends to diminish or stifle competition. While a competitor may, subject to the patent, copyright and trademark laws, imitate his rival's business practices, processes and methods, yet the protection which the law affords to competition does not and should not countenance the usurpation of a competitor's investment and toil. In the case at bar, if the News Company can establish by proof that the Broadcasting Company has, without authority, used the local news items gathered through the specialized methods and by the trained personnel of the News Company, such unauthorized use constitutes a violation of a property right.

401. *Leavy v. Cooney, not yet reported.* (Cal. Dist. Ct. App., Mar. 27, 1963) (Alley, J.)

Appeal from judgment for plaintiff in action for breach of contract and invasion of privacy. Plaintiff was the prosecutor in the case of *California v. Caryl Chessman*. He appeared, as himself, in a film about Chessman produced by defendant Terence W. Cooney. He authorized exhibition of his

appearance for television only because he feared that if the film were shown theatrically, the public might be led to believe that he had made a financial profit out of his part in the Chessman prosecution. Cooney, however, contracted with defendant Sterling World Distributing Corp., Inc. for theatrical exhibition of the film, and Sterling in turn exhibited it in some 500 to 750 theatres with knowledge of the restrictions Leavy had placed on the use of his "performance" in the film.

Held, affirmed.

I. It was held that the court below had correctly decided that the contract between Leavy and Cooney had been breached, and that compensatory damages for Leavy's "hurt feelings" were properly awarded. The court said:

The record contains evidence which clearly was sufficient to prove an agreement which limited the exhibition to television. Leavy so testified, and there was evidence that Cooney, knowing that Leavy placed a limitation upon the use of the film, proceeded to arrange for its exhibition in theaters. Upon these facts the jury and the court properly concluded that the theatrical use of the film was not authorized by Leavy.

With respect to compensatory damages it is contended on behalf of both defendants that no cause of action was established. Section 3300 of the Civil Code provides that, except where it has been otherwise provided, the measure of damages for breach of contract is the amount which will compensate the party aggrieved for the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom. The section has been construed as limiting the damages to matters that were within the contemplation of the contracting parties. (*Westervelt v. McCullough*, 68 Cal. App. 198.)

In order to maintain their argument of nonliability, defendants take the position that possible injury to plaintiff's feelings from the unauthorized use of the film was not in the minds of Leavy and Cooney when they concluded their arrangement, and that no injury was shown as a proximate result of the breach of the agreement by Cooney. In their argument of the point defendants ignore the reason given by Leavy for refusing to sign a release which would have given consent to projection of the picture in theaters. His parting remark in the interview with Cooney was "I have never made a dime out of any case in which I have participated and I am not going to make it appear as though I have." Cooney could not have failed to understand that Leavy believed that if the picture should be displayed in theaters the viewing public would suspect he had a commercial interest in it. The question for the jury was not whether the public would suspect a mercenary motive upon

Leavy's part from the use of the film in theaters and would not have the same suspicion when viewing it on television; it was what Leavy believed, and Cooney understood Leavy believed would be the public reaction to his participating in making the picture for display in theaters.

II. The court commented that the appeal was "argued as if this action is only one for breach of contract." The court went on to consider the question of invasion of privacy, holding that both Cooney, who was a party to the contract, and Sterling, who was not, were liable in tort. The court said:

Sterling had no contract with Leavy and its conduct was clearly tortious. The contract between Leavy and Cooney related only to exhibition on television, and the wrong of defendants consists not only in the breach of an agreement not to exhibit the film in theaters, but also in the fact that it could not, under any circumstances, be so exhibited without the consent of Leavy, which he had not given. Defendants had no more right to show the pictures in theaters than they would have had if Leavy had refused to permit it to be shown publicly at all.

"For the breach of an obligation not arising from contract, the the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." (Civ. Code #3333.)

As to Cooney the wrong consisted of breach of contract and also of a tortious invasion of Leavy's right of privacy; as to Sterling the wrong was the breach of an obligation not arising out of contract. The detriment caused to Leavy was the proximate result of the wrongs thus committed.

402. *Beardsley v. Columbia Broadcasting System, Inc.*, 137 U.S.P.Q. 260 (Cal. Super., L.A. County, Mar. 25, 1963) (David, J.)

Action for plagiarism. Marion Miller engaged in Communist activities in behalf of the F.B.I. She and her husband entered into a contract with plaintiff Beardsley, giving him permission to base a television pilot and series upon her experiences. The pilot was produced but never sold and the series was not produced. Pursuant to the contract, the rights granted to Beardsley, except the right to continue to use the pilot, reverted to the Millers. Several years later, a television play appeared on CBS which was based on Mrs. Miller's experiences. Plaintiffs charged that this play incorporated material from the story outlines which were shown to the Millers at about the time the pilot for the projected series was being produced and that it also included material from plaintiff's pilot film. Defendants demurred to the complaint.

Held, demurrer sustained as to plaintiff Beardsley, overruled as to plaintiff Canfield.

The court held that the incorporation in the CBS television show of the same actual incidents as were used in Beardsley's pilot film was permissible, since these actual events were in the public domain, and that no original literary material had been copied. The court said:

Obviously, the dramatic core of the actual life events of the Millers, . . . is not protectible. Any original development thereof may be, if compensation was promised, despite the author's disclosure of the story outlines. (Civ. Code Sec. 980; *Desny v. Wilder*, 46 Cal. 2d 715, 733, 110 USPQ 433. . . . The career of Marion Miller in relation to the F.B.I. and communist conspiracy has been conceded by counsel to be in the public domain, upon well established legal principles.—*Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304; *Smith v. National Broadcasting Co.*, 138 Cal. App. 2d 807. . . .

Upon the viewing of the films the Court recognizes the common utilization of dramatic incidents in the public domain; but in all essential details, the Court holds that the *protected literary* material of "Underground U.S.A." was not copied or incorporated in "My Dark Days". . . .

[W]hile the specific dramatic development in the pilot—apart from the basic unprotected plot—is protectible, we have concluded no infringements of plaintiff Beardsley's protectible elements are involved. Protection extends to "a particular combination of ideas", or the "form in which the ideas are embodied", the "creation or construction of the author" . . . or as stated in Civil Code sec. 980, to the "representation or expression thereof."

II. The court found "similarities" between the CBS show and the story outlines written by plaintiff Canfield (for Beardsley's projected television series) but was not able to determine as to these outlines, on the basis of the affidavits and exhibits "the point at which the unprotectible factual core leaves off and the protectible dramatic arrangement and development begins."

403. *Ratner v. University Books, Inc.*, 149 N.Y.L.J., 101, p. 15, May 24, 1963 (Sup. Ct. N.Y. Co.) (Sarafite, J.)

A temporary injunction was granted restraining a publisher from distributing a book containing an introduction by plaintiff on allegations that in the introduction as "proposed to be published there appear deletions, additions, errors and inaccuracies which bring into question [plaintiff's] standing of excellence as a teacher, author and lecturer on philosophical subjects."

PART V.

BIBLIOGRAPHY

A. BOOKS AND TREATISES

1. United States Publications

404. HECKSCHER, AUGUST. The arts and the National Government; a report to the President, submitted by August Heckscher, Special Consultant on the Arts. Washington, May 28, 1963. 80 p. Accompanied by a press release issued by the White House Press Secretary.

Among the recommendations included in the report, the major portion of which is given to an examination of federal programs and policies as they affect the arts, are: revision of the income tax laws to provide for "more realistic and equitable" treatment of the artist, and, in connection with revision of the copyright law, a study of "the suggestions that royalties on works in the public domain should be paid to the Government to be used to support and advance the arts."

405. COPYRIGHT ENACTMENTS; *Laws Passed in the U. S. Since 1783 Relating to Copyright*, Washington, Copyright Office, 1963. 150 p. (Copyright Office Bulletin 3, rev.)

This loose-leaf compilation of United States copyright laws and related matter is essentially a revision of Copyright Office Bulletin No. 3, originally compiled in 1900 by Thorvald Solberg, who was then Register of Copyrights. The new edition has been brought up to date through the year 1962.

406. BEVERLY HILLS BAR ASSOCIATION. Syllabus and forms on producing and financing dramatic and musical plays and acquiring motion picture rights in plays. Los Angeles, May 25, 1963. 1 v. (Ninth Annual program on legal aspects of the entertainment industry, co-sponsored by Beverly Hills Bar Association and University of Southern California School of Law.)

"The syllabus contains a synopsis of talks [delivered at this one-day lecture series] and copies of typical forms of agreement with additional materials on financing plays and taxation problems."

2. Foreign Publications

407. DOCK, MARIE CLAUDE. *Étude sur le droit d'auteur*. Préf. de Henri Desbois. Paris, Librairie générale de droit et de jurisprudence, 1963. 219 p. (Bibliothèque d'histoire du droit et droit romain, t. 8.)

A study on the origins of copyright and its development in France, divided into the following broad headings: 1. Roman antiquity. 2. Ancient France. 3. Toward the recognition of rights of authors. Appended are copies of selected source materials, and a comprehensive bibliography.

408. LELOUP, JEAN MARIE. *Le journal, les journalistes et le droit d'auteur*. [Paris, Librairies techniques, 1962]. 246 p.

A study centered around the concept of a "collective work" under Article 9, paragraph 3 of the French copyright statute of 1957, in its application to newspaper publishing. The author's purpose is to find, from the point of view of the labor and copyright laws, a formula for reconciling the rights of an individual newspaperman with the exigencies of the newspaper collective. The problem of a proper balance between the rights of the writer and those of the corporation which employs him, is approached after a thorough examination of the dual purpose of copyright, as a moral as well as a pecuniary right.

409. MONNET, PIERRE. *Dictionnaire pratique de propriété littéraire*. Paris, Cercle de la Librairie, 1962. 398 p.

"The purpose of this work . . . is to give the customary information [in dictionary format] on the conditions under which literary works are protected in France and abroad."

410. OTTO, KARL, *ed.* *Industrielle Formgebung in den USA; Bericht über die Reise einer Berliner Studiengruppe*. Hrsg. von Karl Otto mit Unterstützung der Berliner Industriebank. Berlin, Berliner Industriebank, 1963. 105 p.

The report of a West Berlin study group which visited the United States from February 28 to April 5, 1961, to investigate the state of affairs in the field of industrial design and its protection. The work includes a foreword, an overall report, six individual reports, a section containing a general evaluation, and an appendix consisting of translations into German of four articles by American designers.

411. TROLLER, ALOIS. Brennpunkte der schweizerischen Urheberrechts-Revision; Referat. Basel, Helbing & Lichtenhahn, 1963. 86 p. Schweizerischer Juristenverein. Referate und Mitteilungen, Heft 1.

A report containing suggestions for revision of the Swiss copyright law, made on the basis of recent European laws, draft laws and other materials.

B. LAW REVIEW ARTICLES

1. United States

412. BERTZ, THOMAS W. Protecting artistic property with the equitable servitude doctrine. (46 *Marquette Law Review* 430-450, no. 4, Spring 1963.)

This article, which was the first place entry in the Nathan Burkan Competition at Marquette University in 1961, explores "the possibility of supplementing the Copyright Act" by applying the doctrine of equitable servitudes as a means of protection against the piracy of those intellectual and artistic works which find no protection under the Act.

413. CLARY, LEE. Unfair competition—defendant's publication and sale of sets of solutions to problems in plaintiff's copyrighted textbooks constitutes unfair competition. (14 *Syracuse Law Review* 534-537, no. 3, Spring 1963.)

A case note on *Addison-Wesley Publishing Co. v. Brown*, 207 F. Supp. 678, 9 BULL. CR. SOC. 492, Item 379 (E.D.N.Y. 1962).

414. DERENBERG, WALTER J. Copyright law. New York, New York University School of Law, © 1963, pp. 577-602. Reprinted from 1962 *Annual Survey of American Law*.

The 1962 annual survey of legislative and judicial copyright developments in the United States.

415. ELBAUM, JEROME D. Torts; defamation; unfair competition; right of privacy; right of publicity. (48 *Cornell Law Quarterly* 360-370, no. 2, Winter 1962.)

A case note on *Labr v. Adell Chemical Co.*, 300 F.2d 256, 9 BULL. CR. SOC. 383, Item 257 (1st Cir. 1962).

416. FARLEY, EARL. The impact of information retrieval on law libraries. (11 *University of Kansas Law Review* 331-341, no. 3, Mar. 1963.)

Includes a brief section on photocopying of copyrighted materials by libraries as a legal problem.

417. GORMAN, ROBERT A. Copyright protection for the collection and representation of facts. (76 *Harvard Law Review* 1569-1605, no. 8, June 1963.)

The paper which won National First Prize in the Nathan Burkan Memorial Competition for the best paper on copyright law submitted by law students throughout the United States. The author "discusses six types of 'fact works'—maps, news and historical accounts, directories, advertising art, photographs, and legal and business forms—and suggests the considerations which should guide the courts in deciding the degree of inventiveness requisite to the copyright of each and the scope of protection which copyright should afford."

418. HUGHES, LOWELL T. Copyright infringement. (51 *Kentucky Law Journal* 358-365, no. 2, Winter 1962.)

This paper, which was entered in the Nathan Burkan Memorial Competition, 1962, "is limited to an elaboration of the following four elements which must always be established to prove infringement: I. Originality in the plaintiff's work; II. Access by the defendant; III. Copying by the defendant; and IV. Substantial appropriation of the copyrighted material."

419. JACKSON, ROY V. Industrial designs in the United Kingdom: the Johns[t]on Committee Report. (45 *Journal of the Patent Office Society* 488-497, no. 6, June 1963.)

An analytical and critical summary of the Report prepared by the Departmental Committee on Industrial Designs of the British Board of Trade. See 10 BULL. CR. SOC. 47, Item 27 (1962).

420. JACKSON, ROY V. Unfair competition by product simulation *v.* copyright protection for designs. (45 *Journal of the Patent Office Society* 422-426, no. 5, May 1963.)

A note on the design bill (S. 1884) introduced during the 87th Congress, with the comment that "the expected advent of an effective copyright-type of design law should provide a new opportunity for

gradual judicial reform of product simulation law by removing the moral pressure on plaintiffs and judges to apply this field of law to a task that it is clearly not adapted to accomplish—the prohibition of piratical copying of original features of products that are not sufficiently well-established in the market place for their 'nonfunctional' features to have acquired a secondary meaning in the trademark sense."

421. KENDALL, F. W. Brand problems in Hong Kong. (53 *The Trademark Reporter* 545-552, no. 5, May 1963.)

Essentially a study of trademark problems confronting foreign businessmen in Hong Kong, with a brief note on copyright infringement which, according to the author, "has been so extensive and so organized, as effectively to nullify the rights of many foreign copyright proprietors of highly desirable works."

422. LORIMER, WALTER L. M. 2¢ plain, why pay more? (10 *UCLA Law Review* 561-574, no. 3, Mar. 1963.)

An investigation into the present practice, by motion picture producers, of paying more than two cents per part for synchronization rights in music despite the compulsory licensing provisions of section 1(e). The conclusion is made that "the administrative savings to both users and licensors which would result from . . . [the application of the compulsory license provisions] might well be reason enough to change the present practice and follow both the letter and the spirit of the statute."

423. MAIER, HAROLD G. Improper copyright notice: rights and remedies. (32 *University of Cincinnati Law Review* 56-70, no. 1, Winter 1963.)

The purpose of this essay, which received first prize in the Nathan Burkan Memorial Competition at the University of Cincinnati, 1962, is "to analyze with some degree of completeness the two major legal 'alternatives' to a letter-perfect compliance with the formal requirements of the notice statute: (1) the judicial doctrine of 'substantial compliance' and (2) the statutory provision of relief for 'accident or mistake' in Section 21 of the copyright laws," in order "to indicate the inter-relationship between the two concepts and to cast some light upon the way in which these concepts might be used to reach a still more equitable application of the notice provisions in the copyright statute."

424. MARTIN, EDWARD J. Indivisibility of copyright. (27 *Albany Law Review* 257-266, no. 2, June 1963.)

This study, which is being submitted to the Nathan Burkan Memorial Competition in substantially the same form, is concerned with legal problems involved in the indivisibility of copyright, with a proposal to amend the U. S. copyright statute by adding provisions for a partial assignment of copyright which "would update the law and make it more fully in accord with modern business practice, [and] . . . would also allow courts to adjudicate rights between litigants who are the real parties in interest without recourse to such legal improvisation as 'compulsory joinder' and 'in trust transfers.'"

425. PIERSON, W. THEODORE, JR. Unfair trade: community antenna television systems receiving and relaying for their own profit network programs exclusively licensed to the local station may be enjoined by the licensee. (31 *George Washington Law Review* 868-874, no. 4, Apr. 1963.)

A case note on *Cable Vision, Inc. v. KUTV, Inc.*, 211 F. Supp. 47, 10 BULL. CR. SOC. 54, Item 36 (D. Idaho 1962).

426. PINES, JEROME M. Antitrust—illegal tying agreement—blockbooking of motion pictures for television. (9 *New York Law Forum* 85-93, no. 1, Mar. 1963.)

A case note on *United States v. Loew's, Inc.*, 371 U.S. 38, 10 BULL. CR. SOC. 105, Item 84 (1962).

427. ROSENBERG, LEWIS. Communications—FCC—unfair competition by community antenna service. (4 *Boston College Industrial and Commercial Law Review* 755-759, no. 3, Spring 1963.)

A case note on *Cable Vision, Inc. v. KUTV, Inc.*, 211 F. Supp. 47, 10 BULL. CR. SOC. 54, Item 36 (D. Idaho 1962).

428. Torts: defamation—right of privacy—unfair competition—imitation of comedian's voice in television commercial may constitute defamation or unfair competition but not invasion of privacy. (76 *Harvard Law Review* 1685-1691, no. 8, June 1963.)

A case note on *Labr v. Adell Chemical Co.*, 300 F.2d 256, 9 BULL. CR. SOC. 383, Item 257 (1st Cir. 1962).

429. What is a "publication of the United States Government"? A search for a meaningful solution. (17 *Rutgers Law Review* 579-601, no. 3, Spring 1963.)

A comment on what the standards or guideposts should be for determining what constitutes a government publication and the reasons therefor.

2. Foreign

1. In English

430. Bodenhause, Georg Hendrik Christiaan. The evolution of the United International Bureaux. (76 *Le Droit d'Auteur* 91-98, [English inset], no. 5, May 1963.)

Also appears in French in the main section of the same issue of *Le Droit d'Auteur*.

"A broad outline of the structural evolution, both as regards the Bureaux themselves and the Unions which sustain them, the state of evolution of their tasks, and their resources, in order to determine their present situation and the measures which should be taken to improve it."

Also appears in 2 *Industrial Property* 85-92, no. 4, Apr. 1963.

431. GRASSI, ALESSANDRO. Notes on the protection of ideas. (*E.B.U. Review* 59-65, no. 80 B, July 1963.)

A study, based on recent decisions handed down by Italian courts, on the general subject of protection of ideas, "with particular reference to what are known as 'elaborated ideas,' which are frequently put to use as the basis of sound radio or television programmes."

432. JACKSON, ROY V. Industrial design legislation. (2 *Industrial Property* 105-108, no. 5, May 1963.)

A French version appears in 79 *La Propriété Industrielle* 105-108, no. 5, May 1963.

An article on "those industrial entities . . . that for various reasons require a form of legal protection other than that already provided under patent and copyright law," in which an analysis is made "of the inherent nature of the entities that are to be protected, the social objectives of such protection, and the legal theory and structure that is best adapted to provide it."

433. NAMUROIS, ALBERT. "Special agreements" under the Rome Convention, 1961. (*E.B.U. Review* 52-58, no. 80 B, July 1963.)

An interpretation of Article 22 of the Rome Convention on Neighboring Rights which reserves the right of the contracting states to enter into special agreements among themselves in so far as such agreements "grant more protection than that in the Convention, or contain other provisions not contrary to the Convention."

434. Report of the British Departmental Committee on Industrial Designs: Report of the Departmental Committee on Industrial Designs, presented to Parliament by the President of the Board of Trade, by command of Her Majesty, August 1962. (2 *Industrial Property* 102-105, no. 5, May 1963.)

Signed G. R. W., French version appears in 79 *La Propriété Industrielle* 102-105, no. 5, May 1963.

A summary of the Committee's report of May 14, 1962. See 10 BULL. CR. SOC. 47, Item 27 (1962).

2. In French

435. Une Étude du Dr Dietrich Reimer sur les limitations au transfert de droit d'auteur. (*Revue Internationale du Droit d'Auteur* 121-124, no. 38, Jan. 1963.)

A French summary of a study, by Dr. Reimer, on the legal limitations on copyright transfers under the West German copyright laws, which was published in 64 *Gewerblicher Rechtsschutz und Urheberrecht* 619-635, no. 12 (Dec. 1962). See 10 BULL. CR. SOC. 202, Item 237 (1963).

436. GOLDBERG, JULIO. L'élargissement du concept de la propriété intellectuelle. (76 *Le Droit d'Auteur* 126-128, no. 6, June 1963.)

A criticism of present practice in national legislation to limit the concept of intellectual property to literary, scientific and artistic works. A proposal is made for the adoption, on an international level, of the following principle: "Every manifestation of the mind which contains original features shall be protected under the law of intellectual property, with the exception of inventions and discoveries which are protected under patent and trademark laws."

437. PALAGYI, ROBERT. Lettre de Hongrie. (76 *Le Droit d'Auteur* 129-143, no. 6, June 1963.)

A survey of recent judicial developments in Hungary pertaining to copyright and related subjects.

438. SANTA, EDUARDO. La propriété intellectuelle en Colombie. (*Interauteurs* 64-78, no. 151, 2d quarter 1963.)

A brief history of Colombian legislation on "intellectual property" [largely confined to copyright] from 1811 to date, with lists of pertinent international conventions and bilateral agreements to which Colombia is a party. Translated from the author's *Regimen de Propriedad Intelectual y Prensa* (Bogotá, 1962).

439. SCHULZE, ERICH. La situation juridique lors de l'enregistrement privé sur bande magnétique. (*Interauteurs* 41-54, no. 151, 2d quarter 1963.)

A translation of an article first published in 38 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 259-279, no. 5/6 (Dec. 1, 1962). See Item 456, *infra*.

440. WHALE, ROYCE F. Nouvelle législation sur le droit d'auteur en Nouvelle-Zélande, au Pakistan et dans la République d'Irlande. (*Interauteurs* 55-63, no. 151, 2d quarter 1963.)

A brief summary of recent legislative developments relating to copyright in New Zealand, Pakistan, and Ireland (Eire).

3. In French, English & Spanish

441. FINKELSTEIN, THOMAS. Six cent ans sur le métier: la loi américaine de 1790 sur le droit d'auteur. (*Revue Internationale du Droit d'Auteur* 34-120, no. 38, Jan. 1963.)

A history of the copyright developments preceding the enactment of the first American copyright statute, in which are considered "(1) the origins of copyright; (2) the growth of copyright in England prior to 1790; (3) the status of copyright and copyright notions in the American Colonies; and, (4) the post-revolutionary copyright movement in the United States."

442. RAYNAL, JEAN. Le romancier et ses personnages, par Jean Raynal et Raoul Castelain. (*Revue Internationale du Droit d'Auteur* 2-33, no. 38, Jan. 1963.)

An analysis of French case law dealing with actions brought against novelists who consciously or unconsciously used living personages as characters in their novels.

4. In German

443. BOHRER, ERICH R. Gemeinfreiheit und Urheberrechtsnachsorgevergütung. (*GEMA Nachrichten* 41-45, no. 56, Dec. 1962.)

An article, first published in 15 *Neue Juristische Wochenschrift* 1892-1895, no. 42, (Oct. 18, 1962), which criticizes the provisions of the West German official draft copyright laws dealing with a *domaine public payant*, based essentially on the contention that this is a matter completely apart from copyright.

444. CALLMANN, RUDOLF. Rückgabe beschlagnahmter Urheberrechte und Warenzeichen in den Vereinigten Staaten. (*Gewerblicher Rechtsschutz und Urheberrecht*, Auslands- und Internationaler Teil 249-250, no. 5, May 1963.)

A brief comment on Public Laws 87-846 and 87-861 which contain provisions concerning divesting of certain copyrights and trademarks of former enemy nationals held under World War II vesting procedures.

445. Dokumentation der parlamentarischen Behandlung von Grundfragen der deutschen Urheberrechtsreform. (38 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 297-328, no. 5/6, Dec. 1, 1962.)

A brief introductory statement, followed by excerpts from texts pertaining to the following four points of the West German draft copyright laws on which the Federal Council (Bundesrat) took positions on February 2, 1962: (1) *Domaine public payant* (Sections 73-79 of the draft law); (2) Payment of royalties from private tape recordings (Section 54, paragraph 3 of the draft law); (3) *Droit de suite* (Section 26 of the draft law) and (4) Author's share in the profits (Section 36 of the draft law). The texts consist of the pertinent draft laws and the official *exposé des motifs* thereon, the position of the Bundesrat, and the position of the Federal Government with respect to the views of the Bundesrat.

446. Der Film in der nationalen und internationalen Rechtsreform: ein Höchstmass an Wachsamkeit erforderlich. Aus einem Vortrag von Georg Roeber in Zürich. (7 *Film und Recht* 8-10, no. 3, Mar. 1963.)

A summary of a lecture delivered by Dr. Roeber at the University of Zurich on February 22, 1963, in which he discussed various aspects of current revision trends in motion picture law on national and international levels.

447. FRIEBERGER, KURT. Zum internationalen Konventionswesen. (38 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 280-296, no. 5/6, Dec. 1, 1962.)

A criticism of attempts, by various individuals and international organizations, to justify international protection of neighboring rights, culminating in the Rome Convention which the writer believes is an encroachment on the economic interests of authors.

448. GEMA, Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte. Stellungnahme der GEMA zum Entwurf eines Gesetzes über Verwertungsgesellschaften auf dem Gebiet der Urheberrechts. (Verwertungsgesellschaftengesetz). (*GEMA Nachrichten* 25-29, no. 56, Dec. 1962.)

The position of GEMA on the West German official draft law concerning performing rights societies in which objections thereto are raised on constitutional grounds.

449. GERSTENBERG, EKKEHARD. Der Begriff des Kunstwerks in der bildenden Kunst; ein Beitrag zur Abgrenzung zwischen Kunstschutz und Geschmacksmusterschutz. (65 *Gewerblicher Rechtsschutz und Urheberrecht* 245-251, no. 5, May 1963.)

A study of the concept of the "work of art" in the law of the Federal Republic of Germany, in which it is suggested, *inter alia*, that the modern definitions used in aesthetics and philosophy be applied to jurisprudence since the definitions in case law are unsatisfactory, having been formulated around 1900. It is also proposed to extend the duration of protection for design patents until the revision of the copyright law on works of applied art, or a law protecting industrial designs, is enacted.

450. GREVSMÜHL, WERNER. Verliert der Verleger seine Macht? Massen-Medien mischen sich ein. (*GEMA Nachrichten* 46-48, no. 56, Dec. 1962.)

A criticism of some provisions of the draft copyright laws of the Federal Republic of Germany which are said to weaken the position of publishers and undermine the established relationship between authors and publishers by legalizing the interference exercised by various mass communication media, such as radio, phonograph records, motion pictures and television.

451. LUTHARDT, A. Urheberrechtliche Probleme des wissenschaftlichen Films. (7 *Film und Recht* 2-8, no. 4, Apr. 1963.)

A discussion of copyright and related problems involved in the production and distribution of scientific motion pictures. It is pointed out that, in essence, the general principles of motion picture law are applicable to scientific films, with certain distinctions which are due to the different purpose of such films as distinct from feature films and documentaries.

452. MÖHRING, PHILIPP. Der Regierungsentwurf eines Gesetzes über Verwertungsgesellschaften auf dem Gebiet des Urheberrechts (Verwertungsgesellschaftengesetz). (*GEMA Nachrichten* 29-39, no. 56, Dec. 1962.)

A reprint of an article first published in 36 *Archiv für Urheber-, Film-, Funk- und Theaterrecht*, 407-427, no. 7/8, May 1, 1962. See 10 BULL. CR. SOC. 139, Item 163 (1962).

453. PLAGE, WILHELM. Freigabe beschlagnahmter Urheberrechte in U.S.A. (*GEMA Nachrichten* 26-28, no. 57, Apr. 1963.)

A comment on Public Law 87-846, which includes provisions whereby most copyrights of former enemy nationals held under World War II vesting procedures are divested. The text of the law and a summary prepared by the U. S. Copyright Office are appended in the original with a German translation (pp. 37-39). See 10 BULL. CR. SOC. 38, Item 5 (1962).

454. ROEBER, GEORG. Aufführungsrechte der GEMA an der Tonfilmusik bei Auswertung deutscher Filme in den USA. (7 *Film und Recht* 5-12, no. 5, May 15, 1963.)

A discussion of GEMA's activities in protecting the performing rights of composers of music used in German motion pictures exhibited in the United States.

455. ROEBER, GEORG. Schweizer Entscheidungen zum Leistungsschutz; Recht zur öffentlichen Aufführung auch für den Schallplattenhersteller verneint. (7 *Film und Recht* 11-13, no. 3, Mar. 15, 1963.)

A comment on two decisions of the Swiss Federal Court in Lausanne, handed down on December 8, 1959 and December 19, 1961, respectively, the first of which denied copyright protection to a performing artist, and the second denied such protection to a producer of phonograph records.

456. SCHULZE, ERICH. Tonbandgeräte und Urheberrecht; die Rechtslage bei privater Tonbandvervielfältigung. (38 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 259-279, no. 5/6, Dec. 1, 1962.)

A lecture, by the General Director of GEMA, at a seminar of the Johann Wolfgang Goethe University at Frankfurt am Main in the winter semester 1962/63, on copyright aspects of tape recording for private use.

457. SCHWAB-FELISCH, HANS. Kritische Gedanken zum neuen Urheberrecht. (*GEMA Nachrichten* 3-10, no. 57, Apr. 1963.)

A reprint of an article, originally published in the review, *Mercur*, 1962, pp. 1056 ff., in which the author expresses some critical views in regard to the draft copyright laws of the West German Government, stressing matters of cultural policy rather than legal considerations.

458. STUMPFE, ORTRUD. Der Autor und die Urheberrechtsreform. (*GEMA Nachrichten* 40-41, no. 56, Dec. 1962.)

A brief comment, first published in the *Frankfurter Allgemeine Zeitung*, no. 258, Nov. 5, 1962, p. 16, on provisions of the West German official draft copyright laws dealing with tape recordings for private use and *domaine public payant*.

5. In Italian

459. FABIANI, MARIO. Considerazioni sulla disciplina giuridica internazionale dei diritti del produttore cinematografico. (34 *Il Diritto di Autore* 13-30, no. 1, Jan.-Mar. 1963.)

A study of the international protection of the rights of motion picture producers, written in view of the forthcoming Stockholm conference for revision of the Berne Convention.

460. RONGA, GIULIO. La protezione delle informazioni di stampa. (34 *Il Diritto di Autore* 1-12, no. 1, Jan.-Mar. 1963.)

The purpose of this article is "to make a contribution to the study of the problem of granting, within determined limits, protection to news items and other press information."

C. ARTICLES PERTAINING TO COPYRIGHT FROM TRADE MAGAZINES

1. United States

461. AAUP: press management and world-wide interests are topics of meeting. (184 *Publishers' Weekly* 30-63, no. 3, July 15, 1963.)

A summary of the proceedings at the 1963 annual meeting of the Association of American University Presses, held June 16-18 in Cambridge, Massachusetts. A feature of the meeting was a Workshop on copyright.

462. BRUMLEY, CAL. Angry inventors: they claim higher tax on sale of patents threatens growth. (161 *The Wall Street Journal* 12, no. 92, May 10, 1963.)

An article on the reaction of inventors to one of the Administration's proposed tax reforms whereby the sale of an inventor's patent would be treated as ordinary income rather than capital gain, as under the present law.

463. CLARKE, ROBERT F. The impact of photocopying on scholarly publishing. (88 *Library Journal* 2625-2629, no. 13, July 1963.) A summary of a doctoral thesis with the same title submitted to the Graduate School of Library Service, Rutgers University, in March 1963.

Summary of a research study in which the author concludes, *inter alia*, that photocopying does not have a significant impact on publishing.

464. Copyright: the problem of revising the law. (183 *Publishers' Weekly* 28-30, no. 22, June 3, 1963.)

Coverage, by *Publishers' Weekly*, of a general copyright session of the annual meeting of the American Book Publishers Council (ABPC), held May 14-16, at Skytop, Pa., during which the main topics discussed were "the pending revision of the U. S. copyright law, the complications of new technological developments for the field of copyright, and the status of copyright in government publications."

465. DALLOS, ROBERT E. Some in record field say 'pressures' make hit tune lists invalid: promoters give stores free discs to lift ratings; some radio 'requests' are phony. (161 *The Wall Street Journal* 1, 14, no. 97, May 17, 1963.)

An article on critical comments directed against tactics used by some record distributors and small record manufacturers designed to influence the published ratings of their records.

466. M[OO]R, P[AU]L. Confessions of an illicit tape recordist. (14 *High Fidelity* 38-40, 109, no. 8, Aug. 1963.)

An interesting article on tape-recording activities of the author in Berlin, in which are discussed the legal efforts by GEMA to secure royalties from private owners of tape recorders.

467. MACDOUGALL, A. KENT. Printing overseas: more U. S. firms have books, catalogs, other items produced abroad. Lower European wages trim art volumes' cost; Japan gets greeting card jobs. American printers alarmed. (161 *Wall Street Journal* 1, 23, no. 74, Apr. 16, 1963.)

A leading article by a staff reporter.

468. Rising use of copiers worries publishers, who fear sales, circulation will suffer. (161 *The Wall Street Journal* 24, no. 115, June 13, 1963.)

An article, by a *Wall Street Journal* staff reporter, on the fears of book and magazine publishers about the growing use of copying machines in the United States. The reporter points out that "worried publishers find scant comfort in copyright laws, because the bulk of the material being copied is reproduced only for internal company use—and this practice doesn't normally bring prosecution under copyright laws."

2. England

469. The Way of the translator is hard; P.E.N. conference discusses status and pay. (*The Bookseller* 2058-2060, no. 2997, June 1, 1963.)

A summary of the report of a P.E.N. conference held at Rome in November 1961 and recently published under the title: *Translation and Translators*. Among the mutual problems discussed by translators from various countries attending the conference were royalties, share of reprint rights, and the relationships between authors and translators.

-
470. What are writers worth? (*The Author* 1-4, Spring, 1963.)

A summary of Richard Findlater's pamphlet, "What are writers worth?" which was commissioned by the [British] Society of Authors as a brief survey of the economic situation of authors in Great Britain.

471. Writing for the machines. (*The Author* 6, 8, Spring 1963.)

A note on the progress in introducing teaching machines and programmed learning in Great Britain, with a brief comment on the adequacy of royalty payments to writers involved in this new field of communication.

INDEX

Volume 10. October 1962-August 1963

LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

	Item	Page
CANADA		
Statutory orders and regulations, SOR/62-313, Aug. 22, 1962.		
Extending copyright act to certain countries	201	184
Statutory orders and regulations, SOR/62-423, Nov. 14, 1962.		
Extending copyright act to Panama	202	184
DENMARK		
Act No. 157 of May 31, 1957. Rights in photographic pictures,		
English translation	74	102
Legge N. 158 del Maggio 1961. Copyright in literary and		
artistic works, Italian translation	203	184
FINLAND		
Act No. 404/61 of July 8, 1961. Copyright in literary and		
artistic works, English translation	278	257
Decree, Aug. 25, 1961. Implementation of Act No. 404/61.		
Public performance of copyrighted works, English translation	279	257
French translation	333	327
Act No. 405/61 of July 8, 1961. Rights in photographic pic-		
tures, English translation	277	257
French translation	334	327
Decree, Aug. 25, 1961. Implementation of Acts Nos. 404/61		
and 405/61, French translation	332	326
GHANA		
Copyright Act 85 of Nov. 8, 1961, French translation	26	47
German translation	25	46
GREAT BRITAIN		
Report of the Board of Trade on Industrial Designs	27	47
Aldous, Guy. The Philosophy Behind the English Copyright		
Law and Trial of a Copyright Cause in England, <i>article</i>	325	302
IRELAND		
An bille coipchirt, 1962. New copyright bill	75	103
ITALY		
Law 1337 of Dec. 27, 1961. Extension act, French translation	335	327

	Item	Page
JAPAN		
Amendments of copyright legislation, English and French translations	389	376
MEXICO		
Dictamen en relación con el proyecto de reformas y adiciones que a la ley federal del derecho de autor propone el ejecutivo de la Union, 1962. Report of the Chamber of Deputies on copyright revision bill	204	184
Agreement under Art. 95 of the statute of July 17, 1962, fixing royalties between author societies and jukebox operators, French translation	76	103
NEW ZEALAND		
Act 63-2, to consolidate and amend law relating to copyright	77	103
Miles, James W. Copyright Legislation in New Zealand Affecting Artistic Works, <i>article</i>	261	209
NORWAY		
Act No. 2 of May 12, 1961. New Norwegian copyright law, English translation	78	103
Act of Dec. 2, 1955. Temporary amendment, prolongation, English translation	205	185
English and French translations	280	258
French translation	336	327
Act of June 17, 1960. Rights in photographic pictures, English and French translations	281	258
PAKISTAN		
Ordinance XXXIV of 1962, Reg. n. S 1033, June 2, 1962. New copyright law, not yet in effect	390	376
PERU		
Decreto Supremo No. 61, reglamento de la Ley No. 13714, Oct. 26, 1962. Decree implementing copyright law of 1961	79	103
English and French translations	282	258
SOUTH AFRICA		
Copyright bill, A.B. 51-63. Draft	338	328
SWEDEN		
Law No. 729 of Dec. 30, 1960. Works of Literature and Art, German translation	29	47
Italian translation	206	185
Law No. 730 of Dec. 30, 1960. Rights in photographic pictures, German translation	30	47
Italian translation	207	185
UNION OF SOCIALIST SOVIET REPUBLICS		
Civil legislation enacted Dec. 8, 1961, principles of copyright, French translation	28,	47,
	337	328
UNITED KINGDOM. BERMUDA.		
Copyright Act, 1956, made applicable to	283	258

	Item	Page
UNITED STATES		
Public Law 87-646, Sept. 7, 1962 (H.R. 10432). To codify laws relating to postal service	72	102
Public Law 87-668, Sept. 19, 1962 (H.J. Res. 627). Extension of renewal term	3	37
French translation	73	102
Public Law 87-748, Oct. 5, 1962. To amend the Judicial Code	7	41
Public Law 87-773, Oct. 9, 1962 (H.R. 11793). Providing criminal penalties for trafficking in phonograph records bearing forged or counterfeit labels	4	37
French translation	331	326
Public Law 87-846, Oct. 22, 1962 (H.R. 7283). To amend War Claims Act of 1948	5	38
Public Law 87-861, Oct. 23, 1962 (H.R. 9045). To amend the Trading with the Enemy Act	6	40
CONGRESS		
House (87th Congress, 2d Session)		
H.R. 12821, Aug. 8, 1962. A bill to implement the Florence Agreement	8	42
H. Res. 794, Sept. 4, 1962. To authorize an investigation into practices of Government copyrights	9	42
Remarks of Congressman Mathias	13	43
H. Res. 829, Oct. 5, 1962. (Identical with H. Res. 794)	10	42
<i>Rhodes, John J.</i> Extension of remarks on copyright restrictions on Government publications	11	42
<i>McDowell, Congressman.</i> Remarks re H.R. 9906	12	43
<i>Dominick, Peter H.</i> Extension of remarks on Government copyrights	14	43
Senate (87th Congress, 2d Session)		
Amendment D., H.R. 11970, Aug. 7, 1962. Unfair commercial activities	15	44
S. Rep. 2154, Sept. 25, 1962. Report on H.R. 11793	16	44
S. Rep. 1888, Aug. 20, 1962. Report to accompany H.J. Res. 627	17	44
<i>Proxmire, Senator.</i> Remarks on Government copyrights	18	45
House (88th Congress, 1st Session)		
H.R. 323, Jan. 9, 1963. A bill to encourage the creation of original ornamental designs. (Reintroduction of H.R. 6776)	181	179
H.R. 336, Jan. 9, 1963. A bill to establish a National Spelling Commission. (Successor bill to H.R. 2468)	183	179
H.R. 769, Jan. 9, 1963. (Identical with H.R. 323)	183	179
H.R. 1045, Jan. 9, 1963. A bill to provide for payment of royalties by jukebox operators. (Identical with H.R. 70)	185	180
H.R. 2519, Jan. 24, 1963. Relating to tax treatment of transfer of rights. (Similar to H.R. 9524, H.R. 10,170 and S. 3383)	186	180

	Item	Page
H.R. 2520, Jan. 24, 1963. To amend Sec. 1302 of the Internal Revenue Code to provide averaging of income derived from compositions and copyrights	187	180
H.R. 3668, Feb. 11, 1963. To provide for the establishment of the National Academy of Foreign Affairs	188	181
H.R. 3937, Feb. 21, 1963. (Identical with H.R. 3668)	189	181
H.R. 4567, Mar. 6, 1963. To permit extension of copyrights to provide royalties to assist young composers and authors	266	253
H.R. 4651, Mar. 7, 1963. To provide civil remedies to persons damaged by unfair commercial activities	267	253
H.R. 5136, Mar. 25, 1963. To increase copyright registration fees	268	253
H.R. 5174, Mar. 28, 1963. To provide for payment of royalties for performance of compositions by coin-operated machines	269	254
<i>Hearings</i> , May 2-3, 1963	387	376
H.R. 5217, Mar. 28, 1963. To make it a crime to steal trade secrets	270	255
H.R. 5223, Apr. 8, 1963. To encourage creation of original ornamental designs. (Identical with H.R. 323, H.R. 769 and S. 776)	271	255
H.R. 5999, May 1, 1963. To provide for the establishment of the National Academy of Foreign Affairs. (Identical with H.R. 3668, H.R. 3937)	384	375
H.R. 6017, May 2, 1963. (Identical with H.R. 5174)	326	325
H.R. 6234, May 13, 1963. To amend Section 526 of the Tariff Act, to prohibit importation of merchandise of foreign manufacture which simulates merchandise covered by U.S. copyright or design patents	327	325
<i>Ashley, Congressman</i> . Remarks	329	326
H.R. 6394, May 16, 1963. To establish a National Spelling Commission. (Identical with H.R. 336)	385	375
H.R. 6745, June 3, 1963. To bar actions for infringement with respect to sound reproductions for use by the blind or quadriplegic residents	328	325
H.R. 7194, June 24, 1963. To repeal the jukebox exemption. (Substitute bill for H.R. 5174)	386	375
H. Res. 39, Jan. 9, 1963. To authorize an investigation into practices of Government copyrights. (Identical with H. Res. 794 and H. Res. 829)	190	181
Senate (88th Congress, 1st Session)		
S. 405, Jan. 22, 1963. To amend the law re infringement of records	191	181
S. 497, Jan. 24, 1963. Relating to tax treatment of transfer of rights. (Companion bill to H.R. 2519)	192	182

	Item	Page
S. 498, Jan. 24, 1963. To amend Sec. 1302 of the Internal Revenue Code to provide averaging of income derived from compositions and copyrights. (Companion bill to H.R. 2520)	193	182
S. 776, Feb. 11, 1963. To encourage the creation of original ornamental designs. (Companion bill to H.R. 323 and H.R. 769)	194	182
S. 865, February 1963. To provide for the establishment of the National Academy of Foreign Affairs. (Companion bill to H.R. 3668 and H.R. 3937)	272	255
S. 1038, Mar. 7, 1963. To provide civil remedies for unfair commercial activities. (Companion bill to H.R. 4651)	273	256
<i>Committee on the Judiciary.</i>		
Report on Patents, trademarks and copyrights, pursuant to S. Res. 267, Apr. 3, 1963	274	256
COPYRIGHT OFFICE		
65th Annual Report of the Register, for the Fiscal year ending June 30, 1963	330	326
Copyright Enactments; Laws Passed in the United States Since 1783 Relating to Copyright	405	396
Copyright Law Revision—Part 2, Feb. 1963. Discussion and comments	275	257
<i>Goldberg, Morton D.</i> , review	262	214
The Manufacturing Clause of the U.S. Copyright Law, by Marjorie McCannon assisted by Benjamin W. Rudd, Revision Study	259	206
U.S. Copyright Relations of Current Interest, revised to Feb. 1, 1963, March 1963	276	257
<i>Circulars</i>		
Antedated Notice, Circular 35, French translation	20	45
Assignments and related documents, Circular 10, French translation	195	182
Commercial prints and labels, Circular 46, French translation	22	46
Devices for computing and measuring, Circular 31 B, French translation	388	376
Fair Use, Circular 20, French translation	200	183
Games, Circular 17, French translation	19	45
Looseleaf publications, Circular 16C, French translation	21	45
New versions and reprints, Circular 35 B, French translation	197	183
Pictorial, Graphic and sculptural works, Circular 70, French translation	199	183
Chart to accompany Circular 70, French translation	196	183
UCC-1, revised, application of the Universal Convention to U.S. works, French translation	23	46
UCC-2, Copyright protection in the U.S. under the Universal Convention, French translation	198	183

	Item	Page
GENERAL SERVICES ADMINISTRATION		
Title 41—Public contracts, Part 5-54—Patents and copyrights	24	46
VENEZUELA		
Ley sobre el derecho de autor No. 823, Dec. 12, 1962. New		
Venezuelan copyright law	284	259
English translation	340	328
French translation	339	328
CONVENTIONS, TREATIES AND PROCLAMATIONS		
International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome 1961, International Labor Organization, UNESCO, Berne Union, <i>The Diplomatic Conference on Neighboring Rights</i> ,		
German translation	81	104
English, French and German translations	82	104
Kaminstein, A. L., Report of the Rapporteur General	83	104
English, French and Spanish translations	285	260
Ulmer, Eugen. Study of the Convention	71	90
	180	165
	263	219
International Union for the Protection of Literary and Artistic Works (Berne Convention), Committee of Experts Concerning Extension of Copyright Protection, Rome, 1962, <i>Desbois, Henri</i> , Report of the Rapporteur General, English and French translations		
	80	104
Design Laws and Treaties of the World	178	143
	350	343
List of Contracting Countries	393	379
UNESCO		
Copyright Laws and Treaties of the World	351	343
Spanish supplement	100	125
Intergovernmental Copyright Committee, Rules of procedure, revised	123	131
Universal Copyright Convention		
List of Contracting Countries	392	378
Finland, Accession to	208	186
Greece, Accession to	286	260
Norway, Accession to	31	48
Peru, Accession to	341	329
	391	377

DECISIONS

	Item
A. J. Sandy, Inc. v. Junior City, Inc., 232 N.Y.S.2d 9 (Sup. Ct., July 16, 1962)	41
A. J. Sandy, Inc. v. Junior City, Inc., 234 N.Y.S.2d 508, 136 U.S.P.Q. 144 (App. Div. 1st Dept., Dec. 4, 1962)	215
Arch Music Co. v. Gladys Music, Inc., N.Y.L.J. 14, June 13, 1962 (Sup.Ct. N.Y.Co., 1962)	40
Association for the Preservation of Freedom of Choice, Inc. v. Emergency Civil Liberties Committee, 236 N.Y.S.2d 216 (Sup.Ct. Dec. 11, 1962) ..	297
Austin v. Steiner, 207 F. Supp. 776, 134 U.S.P.Q. 561 (N.D. Ill., Aug. 27, 1962)	37
Beardsley v. Columbia Broadcasting System, Inc., 137 U.S.P.Q. 260 (Cal. Super.Ct., L.A.Co., March 25, 1963)	402
Bellin v. Advanced Music Corp. (S.D. N.Y. May 14, 1963), not yet reported	396
Berlin v. E. C. Publications, 138 U.S.P.Q. 298 (S.D. N.Y., June 27, 1963) ..	397
Brennan v. Paramount Pictures Corp., 209 F.Supp. 150, 135 U.S.P.Q. 356 (S.D. N.Y. Sept. 20, 1962)	89
Burroughs, Inc. v. Metro-Goldwyn-Mayer, Inc., <i>see</i> Edgar Rice Burroughs, Inc. v. Metro-Goldwyn-Mayer, Inc.	39
Cable Vision v. KUTV, Inc., 211 F.Supp. 47, 135 U.S.P.Q. 2 (D. Idaho, July 30, 1962)	36
Campbell Connelly & Company Ltd. v. Noble (Gr. Br.) (Ch. Nov. 13, 1962), not yet reported	96
Cinematograph Exhibitors' Ass'n of Great Britain & Ireland v. The Performing Right Society Ltd. (Gr. Br.), Performing Right Tribunal (Mar. 18, 1963)	299
Composers, Authors & Publishers Association of Canada Ltd. v. International Good Music, Inc. (Canada) (Sup.Ct. Jan. 22, 1963), not yet reported	298
Cortley Fabrics Co. v. Slifka, 317 F.2d 924, 138 U.S.P.Q. 110 (S.D. N.Y., Feb. 4, 1963), <i>affirmed per curiam</i> , 138 U.S.P.Q. 97 (2d Cir., June 14, 1963)	395
Creative Arts, Inc. v. Abady & Sultan, Inc., 134 U.S.P.Q. 388 (S.D. Fla., Feb. 13, 1962)	35
Cresci v. Music Publishers Holding Corp., 210 F.Supp. 253, 135 U.S.P.Q. 189 (S.D. N.Y., Oct. 23, 1962)	90
Dane v. M. & H. Co., 136 U.S.P.Q. 426 (N.Y. Sup.Ct., Jan. 25, 1963)	294
Dan Kasoff, Inc. v. Gresco Jewelry Co., 308 F.2d 806, 135 U.S.P.Q. 209 (2d Cir., Oct. 25, 1962), <i>affirming per curiam</i> 204 F.Supp. 694, 133 U.S.P.Q. 438 (S.D. N.Y., 1962)	95
Dan Kasoff, Inc. v. Novelty Jewelry Co., 309 F.2d 745, 135 U.S.P.Q. 234 (2d Cir., Nov. 2, 1962)	85
Day-Brite Lighting, Inc. v. Sta-Brite Fluorescent Mfg. Co., 308 F.2d 377, 135 U.S.P.Q. 49 (5th Cir., Sept. 18, 1962)	86
DeSilva Construction Corp. v. Herrald, 213 F.Supp. 184, 137 U.S.P.Q. 96 (M.D. Fla., Dec. 1962)	291

	Item
Dietrich v. Standard Brands, Inc., 32 F.R.D. 325, 137 U.S.P.Q. 146 (E.D. Pa., Mar. 21, 1963)	348
Dugan v. American Broadcasting Corp., 216 F.Supp. 763, 137 U.S.P.Q. 238 (S.D. Cal., Mar. 14, 1963)	345
Edgar Rice Burroughs, Inc. v. Metro-Goldwyn-Mayer, Inc., 23 Cal.Rep. 14, 135 U.S.P.Q. 40 (Cal.Dis.Ct.App., July 5, 1962)	39
Gelles-Widmer Co. v. Milton Bradley Co., 313 F.2d 143, 136 U.S.P.Q. 240 (7th Cir., Jan. 11, 1963)	288
Gordon v. Goren, 17 A.D. 381, 136 U.S.P.Q. 148 (1st Dept., Dec. 11, 1962)	216
Guide-Kalkhoff-Burr, Inc. v. Berinati Press, Inc., 35 Misc.2d 978, 134 U.S.P.Q. 85 (N.Y. Sup.Ct., June 22, 1962)	38
H. M. Kolbe Co., Inc. v. Armigus Textile Co., Inc., 135 U.S.P.Q. 188 (S.D. N.Y., Aug. 17, 1962)	91
H. M. Kolbe Co., Inc. v. Armigus Textile Co., Inc., 315 F.2d 70, 137 U.S.P.Q. 9 (2d Cir., Mar. 14, 1963)	287
Holdredge v. Knight Publishing Corp., 214 F.Supp. 921, 136 U.S.P.Q. 615 (S.D. Cal., Feb. 27, 1963)	292
Jacobs v. Hill, 26 Cal.Rep. 591 (Dis.Ct.App., Nov. 26, 1962)	296
Johnson & Son, Inc. v. Drop Dead Co., Inc., <i>see</i> S. C. Johnson & Son, Inc. v. Drop Dead Co., Inc.	213
Kasoff, Inc. v. Gresco Jewelry Co., <i>see</i> Dan Kasoff, Inc. v. Gresco Jewelry Co.	95
Kasoff, Inc. v. Novelty Jewelry Co., <i>see</i> Dan Kasoff, Inc. v. Novelty Jewelry Co.	85
King Bros. Productions, Inc. v. RKO Teleradio Pictures, Inc., 208 F.Supp. 271, 135 U.S.P.Q. 183 (S.D. N.Y., July 30, 1962)	94
Kolbe Co., Inc. v. Armigus Textile Co., Inc., <i>see</i> H. M. Kolbe Co., Inc. v. Armigus Textile Co., Inc.	91, 287
Leavy v. Cooney (Cal.Dis.Ct.App. Mar. 27, 1963), not yet reported	401
Mailer v. RKO Teleradio Pictures, Inc., 213 F.Supp. 294, 136 U.S.P.Q. 300 (S.D. N.Y., Jan. 11, 1963)	212
Mailer v. RKO Teleradio Pictures, Inc. (S.D. N.Y., Feb. 6, 1963), not yet reported	290
Melody Lane Publications, Ltd. v. Nor Va Jak Music, Inc., 235 N.Y.S.2d 898, 136 U.S.P.Q. 278 (Sup.Ct., Dec. 6, 1962)	295
Metro-Goldwyn-Mayer, Inc. v. Monte Lee Enterprises, 212 A.C.A. 30 (Cal.Dis.Ct.App., Jan. 17, 1963)	293
Morro Music Corp. v. Seeco Records (Sup.Ct. N.Y.Co., May 2, 1963), not yet reported	349
Muse v. Mellin, 212 F. Supp. 315, 136 U.S.P.Q. 297 (S.D. N.Y., Dec. 27, 1962)	289
Osborn v. Boeing Airplane Co., 309 F.2d 99, 135 U.S.P.Q. 145 (9th Cir., Oct. 11, 1962)	93
Platt & Munk Co. v. Republic Graphics, Inc., 315 F.2d 847, 137 U.S.P.Q. 268 (2d Cir., Apr. 3, 1963)	343
Porter v. Marriott Motor Hotels, Inc., 137 U.S.P.Q. 473 (N.D. Tex., Nov. 23, 1962)	214

	Item
Pottstown Daily News Publishing Co. v. Pottstown Broadcasting Co., 192 A.2d 657, 138 U.S.P.Q. 406 (Pa.Sup.Ct., July 2, 1963)	400
Radio Corporation of America v. Premier Albums, Inc., 240 N.Y.S.2d 995, 138 U.S.P.Q. 404 (App.Div. 1st Dept., June 20, 1963)	398
Ratner v. University Books, Inc., 149 N.Y.L.J. 101, p. 15, May 24, 1963 (Sup.Ct., N.Y.Co.)	403
Rico, Ltd. v. Hub Floral Mfg. Co., 206 F.Supp. 192, 134 U.S.P.Q. 70 (S.D. N.Y., June 18, 1962)	33
Rohauer v. Friedman, 306 F.2d 933, 134 U.S.P.Q. 561 (9th Cir., July 25, 1962)	32
Sandy, Inc. v. Junior City, Inc., <i>see</i> A. J. Sandy, Inc. v. Junior City, Inc. .41, 215 S. C. Johnson & Son, Inc. v. Drop Dead Co., Inc., 210 F.Supp. 816, 135 U.S.P.Q. 292 (S.D. Cal., Nov. 16, 1962)	213
Shapiro, Bernstein & Co., Inc. v. H. L. Green Co., 135 U.S.P.Q. 181 (S.D. N.Y., July 30, 1962)	92
Shapiro, Bernstein & Co., Inc. v. H. L. Green Co., Inc., 316 F.2d 304, 137 U.S.P.Q. 275 (2d Cir., Apr. 15, 1963)	342
Simon & Shuster, Inc. v. Cove Vitamin & Pharmaceutical, Inc., 211 F.Supp. 72, 136 U.S.P.Q. 32 (S.D. N.Y., Nov. 26, 1962)	211
Stevens v. Continental Can Co., 308 F.2d 100, 135 U.S.P.Q. 111 (6th Cir., Sept. 28, 1962)	87
Surgical Supply Service, Inc. v. Adler, 138 U.S.P.Q. 263 (3d Cir., June 28, 1963)	394
Television Adventure Films Corp. v. KCOP Television, Inc., 137 U.S.P.Q. 254 (Cal.Sup.Ct., Mar. 20, 1963)	346
Toulmin v. The Rike-Kumler Co., 137 U.S.P.Q. 533 (S.D. Ohio, June 30, 1962)	344
United States v. American Society of Composers, Authors and Publishers, 208 F.Supp. 896, 135 U.S.P.Q. 297 (S.D. N.Y., Sept. 14, 1962)	34
United States v. Loew's, Inc., et al., 371 U.S. 38, 135 U.S.P.Q. 201 (Nov. 5, 1962)	84
Universal Statuary Corporation v. Gaines, 310 F.2d 647, 135 U.S.P.Q. 483 (5th Cir., Dec. 5, 1962)	209
Warner Bros. Pictures, Inc. v. Wally Frank, Ltd., 135 U.S.P.Q. 409 (PO TM TApp Bd Oct. 12, 1962)	217
Welles v. Columbia Broadcasting System, Inc., 308 F.2d 810, 135 U.S.P.Q. 116 (9th Cir., Oct. 3, 1962)	88
Wembley, Inc. v. Diplomat Tie Co., 216 F.Supp. 565, 137 U.S.P.Q. 107 (D. Md., Mar. 11, 1963)	347
Wihtol v. Crow, 309 F.2d 777, 135 U.S.P.Q. 385 (8th Cir., Nov. 27, 1962)	210
Yousoupoff v. Columbia Broadcasting System, Inc., 149 N.Y.L.J. No. 121, 9, June 24, 1963 (Sup.Ct. N.Y.Co., 1963)	399
<i>Reported:</i>	
Addison-Wesley Publishing Company, Inc. v. Brown, et al., 133 U.S.P.Q. 647 (E.D. N.Y., May 24, 1962)	42

A U T H O R S

Item*	Item*
Abel, Paul 309	Dittrich, Robert 132, 148, 374
Ablard, Charles D. 47	Dock, Marie Claude 407
Adam, Klaus 144	Elbaum, Jerome D. 415
Aland, Robert H. 355	Elbir, Ismail Kemal 133, 313
Aldous, Guy p. 302	Elster, Alexander N. 98
Andrews, Milton D. 322	Epstein, Jason 315
Arienzo, Alfredo 175	Ernst, Morris L. 97, 244
Bappert, Walter 221, 373	Fabiani, Mario 459
Barker, Ronald E. 109, 257	Farell Cubillas, Arsenio 233
Beran, Martin J. p. 147, 179	Farley, Earl 416
Bergström, Svante 146	Fields, Peter A. 56
Bertz, Thomas W. 412	Findlater, Richard 321, 352, 470
Best, Marshall A. 315	Finkelstein, Herman ..304, 357, p. 383
Blum, Arno A. 313	Finkelstein, Thomas 441
Bodenhausen, G. H. C. 362, 430	Françon, André 314
Bogart, Leo 315	Frieberger, Kurt 447
Bogsch, Arpad p. 71, 110, 178, 239, 265, 350	Fromm, Friedrich Karl 236
Bohrer, Erich R. 443	Gaylor, Peter J. 57
Bonasi-Benucci, Eduardo 301	Georgi, Arthur 150
Brittan, Leon 303	Geraci, Luigi 376
Brower, Reuben A. 315	Gerstenberg, Ekkehard 449
Brucker, Herbert 18	Goeb, Roger 245
Brumley, Cal 462	Goldberg, Julio 436
Burciarga, Juan G. 322	Goldberg, Morton D. ..58, 220, p. 262
Burrus, Bernie R. 49	Goldman, Abe A. 152
Bussmann, Kurt 98	Goldstein, Richard 59
Callmann, Rudolf 444	Gordon, Michael W. 358
Cary, George D. p. 41, 6, 50	Gordon, Mitchell 246
Castelain, Raoul 367, 442	Gorman, Robert A. 322, 417
Celler, Emanuel p. 84	Grassi, Alessandro 431
Ciampi, Antonio 111	Grevsmühl, Werner 450
Clarke, Robert F. 463	Grzybowski, Kazimierz 44
Clary, Lee 413	Haeger, Siegfried 153
Colby, Richard 227, 313	Hampton, Robert W. p. 18
Colino, Richard R. 51	Harris, Ralph 223
Conzett, Hans 136	Harrison, M. E. 47
Croughan, Richard W. 52	Hase, Andreas von 46
Dallos, Robert E. 465	Heckscher, August 404
Delfosse, Guy 131	Heilprin, L. B. p. 1
Derenberg, Walter J. 53, 54, 310, 414	Henn, Harry G. p. 145, p. 293
Desbois, Henri 80	Hennings, Helmut Dieter 154
Diamond, Sidney A. 55	Herbert, Alan P. 223
	Hesser, Torwald 128
	Hirsch-Ballin, E. D. 368

* Page (p.) numbers refer to articles published in Volume 10.

	Item*		Item*
Hirsch, Ernst E.	155, 168	Miles, James W.	p. 209
Holland, Robert H. C.	109, 257	Miller, Howard W.	61
Hollander, John	315	Möhring, Philipp	163, 452
Hubmann, Heinrich	156, 222, 354	Monnet, Pierre	409
Hughes, Lowell T.	418	Moor, Paul	466
Huguet, André	99	Morris, Jr., Thomas B.	322
Jackson, Roy V.	419, 420, 432	Mosettig, Mike	317
Kaminstein, Abraham L.	18, p. 81, 83, 285	Mott, Benjamin de	315
Karnell, Gunnar	177	Mott, Kelsey Martin	62, 103, 360
Kaufmann, Guy	137	Mouchet, Carlos	45
Keegan, Richard J.	305	Müller-Meiningen, Jr., E.	164
Kellman, Leon	359	Namurois, Albert	114, 433
Kendall, F. W.	421	Nathanielsz, Ault M.	228
Kennedy, Peter T.	p. 370	Nawrocki, Boleslaw	234
Kessler, Arthur	59	Netterville, Victor S.	63
Klaver, F. M. Th.	108	Nimmer, Melville B.	229
Kleine, Heinz	98	Olsson, Jr., Harry R.	363
Knap, Karel	157	Otto, Karl	410
Krause-Ablass, Günter B.	158, 375	Palagy, Robert	128, 437
Kray, Dorothy J.	102	Penning-Rowell, Edmund	258
Lacy, Dan	315	Peter, Wilhelm	165
Lassen, Bengt S.	113, 205	Peyre, Henri	315
Lassen, Otto	353	Pierston, Jr., W. T.	425
Lecuona, Daniel C.	p. 65	Pietzcker, Rolf	98
Leinveber, Gerhard	159	Pilpel, Harriet F.	220, 248, 249, 250, 318
Leloup, Jean Marie	408	Pines, Jerome M.	426
Leonelli, Leonello	377	Pinkstaff, R. Steven	104
Ligi, Franco	120	Piperno, Roberto	240
Limperg, Th.	369	Plage, Wilhelm	453
Lippa, Simon	247	Plaisant, Robert	124
Löffler, Martin	160, 161	Pohlmann, Hansjörg	166
Lorimer, Walter L. M.	422	Potter, Stephen B.	64
Lund, Torben	128	Pretnar, Stojan	231
Luthardt, A.	451	Protetti, Ettore	176
Lyon-Caen, Gérard	138, 313	Raynal, Jean	442
MacCarteney, Richard S.	p. 297	Reimer, Dietrich	237, 435
MacDougall, A. Kent	467	Roeber, Georg	167, 168, 446, 454, 455
MacLeod, W. J.	312	Ronga, Giulio	232, 460
McCannon, Marjorie	219, 259	Rosenberg, Lewis	427
Maier, Harold G.	423	Roth, E.	p. 249
Malaplate, Léon	311, 364	Rothenberg, Stanley	251, p. 362
Martin, Edward J.	424	Rousselet, Marcel	125
Massouyé, Claude	370	Rubinstein, Stanley	p. 351
Megley, Richard B.	60	Rudd, Benjamin W.	219, 259
Mentha, Bénigne	162	Sanctis, Valerio de	135, 139, 378
Middleton, George	p. 26, p. 250		

* Page (p.) numbers refer to articles published in Volume 10.

	Item*		Item*
Santa, Eduardo	438	Troller, Alois	141, 411
Savatier, Rene	99	Ulmer, Eugen	p. 90, p. 165, p. 219, 172
Savignac, F. Willard	116	Vaughan, Denis	122, 128
Schatzkin, Leonard	315	Vaunois, Louis	142, 366
Schieffler, Kurt	169	Verst, Edward C.	306
Schnapper, M. B.	66	Vestal, Allan D.	307
Schnorr von Carolsfeld, L.	170	Vilbois, Jean	372
Schulman, John	126	Wade, John W.	230
Schulze, Erich 235, 302, 439, 456		Walker, Laurence N.	106
Schwab-Felisch, Hans	457	Walls, Howard	300
Schwartz, Alan U.	97	Watson, Russell	319
Secretan, Jacques 117, 140, 313		Weber, Werner	226
Sharpe III, Albert P.	65	Wechsler, Nancy	318
Sherman, Paul	252	Wehringer, Cameron K.	67
Shils, Edward	315	Wenzel	160
Shugg, Roger W.	315	Werhahn, Jürgen W.	173
Silverman, Arnold B. 66, 332		Whale, R. F. p. 282, 440	
Smith, Judith A.	105	Whicher, John F. 308, 361	
Spaić, Vojislav	354	White, T. A. Blanco	101
Sterling, D. B.	312	Wilmarth, Elery	322
Straschnov, Georges 121, 313		Wilson, Thomas J.	315
Streuli, Adolf	171, 238	Wincor, Richard	255
Stumpfe, Ortrud	458	Zakar, János	143
Sucheck, Stanley M.	253	Zelnick, Allan	107
Taubman, Joseph 107, 305		Zini Lamberti, Carlo 119, 174	
Tournier, Alfonse	371		

* Page (p.) numbers refer to articles published in Volume 10.

SUBJECT MATTER

*(All numerals refer to Item; references
are in English except where indicated.)*

Access, 418
AAUP, 461
Advertising, slogan, 293; art, 417
Agreement, exclusive talent, 381; forms, 406
American Book Publishers Council, revision, 464
American Publishers, delegation to USSR, report, 218, 320
ASCAP, 304
Antitrust, 84, 107, 305, 356, 426
Application, rejection, 179
Appropriation, substantial, 418
Architecture, plan, 291
Arrangement, 210
Arts, applied, Netherlands, 368; Hecksher report U.S., 404
Assignment, renewal rights, 289
Austria, 132, 165, 374
Author, deletions, etc., 403; rights, 120, 122, 155, 318; economic interests, 447
Authorship, 321, 352, 470
Bankruptcy, 89
Belgium, design law, 131
Berne Convention, 314, 393, 459
Bingo, music fees, 299
Biographical work, 292
Blanket license, music, England, 299
Block-booking, 84, 356, 426
Board of Trade Report, Gr. Br., 27, 256
Bogsch, Arpad, award, 379
Book Manufacturers' Institute, 241
Book, reviewing, 315; shops, 315
Books, protection, 243; cultural value, 244
Bootlegging, films, 246; records, 342
Broadcasting, 371
Canadian Appeal Board, 116
Cartography, 361
Catalog, 86
Censorship, 250
Character, name, 217; fictional, 255; living, Fr., 442
CICP, 1, 382
CISAC, 135, USSR 364
Collective work, France, 408
Colombia, legislative history, 438
Commissioned work, Gr. Br., 112
Common law, book, 296; dress design, 215; film, 216; infringement, 294;
remedies, 358
Community antenna, 425, 427
Compulsory license, 134
Concessionaire, sale by, 92

- Conflict of laws, 124
Contest, 345
Contract, 94, 211, 212, 295; publishing, 240; English law, 96; French law, 99
Convention, nonmember countries, 170
Copying, 418
"Copyright Laws and Treaties of the World," 351; in French, 225; Spanish, 199, 224
Copyright Society of the U.S.A., Tenth Anniversary, 324
Counsel fees, 290
Counterclaim, 94
Criminal infringement, 308
Czechoslovakia, royalties, 258
Damage, proof of, 349; de minimus, 344
Damages, 209, 292
Dance, 294
Defamation, 230, 415
Denmark, laws, 74
Derenberg, Walter J., Tenth Anniversary Citation, facing, p. 297
Design, 27, 65, 287, 420, 432; law, Belgium, 131; New Zealand, 261; U.K., 101, 115, 256
"Design Laws and Treaties of the World," 178, 350
Developing countries, Berne, 370; book needs, 118
Directories, 417
Domaine public payant, 150, 254, 443, 458
Duration, 3, 17, 239, 254
England, performing rights, fees, 299; Philosophy and Trial of Cause, 325
Equitable servitude, 412
Erie R.R. v. Tompkins, 307
Exclusivity, 343, 398
Fabric design, 91, 395
"Fact" work, 417
Fair use, 1, 109, 257, 292
Fee, synchronization rights, 422
Films, television, 84
Fine arts, 12
Flash cards, 288
Florence Agreement, 8
Formalities, 67, 227
Forms, 301, 417
France, 127, 142, 366; legal history, 407; literary work, 409; living characters, 442; newspapers, 408
Free copies, 375
Games, 19, 343
GEMA, 149, 154, 235, 448, 454, 466
Germany, development of copyright philosophy, 221
Germany, W., Bundesrat, 147, 156; concepts, 166; Constitution, 226; domaine public payant, 443; draft law, 169, 354, 445, 450, 457; motion pictures, 144, 354, 373; performing artist, 167; performing rights societies, 163; publication, free copy, 375; publishers, 159; USSR, 160; producers, 236; recordings,

- 164; tape recording, 145, 151, 153, 161, 439, 456, 458; theory and case law, 222; transfer of rights, 237, 435; "work of art," 449
- Ghana, 25, 26, 121, 311, 313
- Government contract, 24
- Government copyright, 9, 10, 11, 13, 14, 18, 66, 355
- Great Britain, 27; Board of Trade report, 434; recent developments, 309
- Hirsch, Prof. Ernest E., 162, 168
- History of copyright, 417
- Hong Kong, 421
- Howell, 1962 Latman revision, 359
- Hungary, 143, 437
- Hymn, infringement, 210
- Ideas, 93, 363, 431, elaborated, 380
- Importation, 8
- India, 260
- Indivisibility, 424
- Infringement, architectural plan, 291; biographical work, 292; catalog, 86; common law, 88, 215, 216; criminal, 308; decoration, 87; de minimis, 344; fabric design, 91, 395; flash cards, 288; games, 343; Hong Kong, 421; jewelry, 85; label, 213; logmarks, 86; news, 400; order form, 394; play, 345; private club, 214; proof of, 418; records, 342; song, 396, 397; song title, 211; story, 89; television Canada, 298; television drama, 88
- Intellectual property, concept, 436
- Inter-American copyright, 383
- Intergovernmental Copyright Committee, Study Group, 123, 138
- International Academy of Comparative Law, 368
- International conventions, 313
- International protection, 312
- International Publishers Association, 113, 136
- International Union for the Protection of Intellectual Property, 117, 121, 128, 140, 162, 362, 365, 367, 370, 371, 372, 430
- Ireland, recent developments, 440
- Israel, recent developments, 313
- Italy, authors' rights, 176, 377; motion pictures, 376; parody, 175; recent developments, 139
- Jewelry, 85
- Judicial code, mandamus, amendment, 7
- Kaplan-Brown, Casebook, 357
- Label, copying, 213
- Lending right, 113, 223
- Libraries, 1, 223, 416
- License, agreement, 349; compulsory, 92; fee, England, 299; performing rights, 304; third party, 295
- Logmarks, 86
- Looseleaf publication, 21
- Manufacturing clause, 219, 259
- Map, 361, 417
- Mexico, 233
- Misuse, 105

- Moral right, 125; Austria, 163; France, 142; Hungary, 143; West Germany, 165
- Motion pictures, 172, 367; contract, 212; international protection, 313, 459; law, 446
- Nathan Burkan Memorial Competition, 102, 106, 228, 322, 355, 358, 412, 417, 418, 423, 424
- Neighboring rights, 111
- Netherlands, applied art, 368; typography, 369
- News, 232, 400, 417, 460, 461
- Newspapers, effect of television, 315; French publishing, 408
- Newsreels, 373
- New Zealand, design law, 261; recent developments, 440
- Notice, 20, 104, 395, 423
- Obscenity, 249
- Office of Alien Property, 2, 264
- Order form, 394
- Originality, 361, 418
- Origin, country of, Berne Convention, 314
- Owner's rights, 229
- Ownership, equitable, 89
- Pakistan, recent developments, 440
- Parody, Italy, 175; lyric, 397
- Patent, short term, 360
- Peru, 137
- Peru, Asociacion Peruana de Autores y Compositores, 383
- Performance, for profit, 214
- Performing artist, Scandinavian law, 353; rights, 108, 251
- Performing fees, 264
- Performing rights societies, 302
- Personality, right of, 173
- Photocopying, 1, 129, 382, 416, 463, 468
- Photograph, 417
- Pilot film, 216
- Piracy, 253, 412, 420
- Plagiarism, 292, 346, 402
- Printing abroad, 467
- Prints and labels, 22
- Privacy, right of, 97, 297, 303, 399, 401, 415, 428
- Procedure, summary, 102
- Profits, future, 64
- Programmed learning, royalties, 471
- Property right, news, 400
- Protection, form of creative works, 301
- Publication, 429
- Public domain, 72, 402
- Publicity, right of, 415, 428
- Public performance, 234
- Publishing, economics, 315; by recording artist, 319
- Quotation, W. Germany, 158
- Recording, 371, by artist for own sale, 319

- Records, counterfeit, 4, 16; infringement, 92, 342; published ratings, 465
- Register's Report, 134, 152, 177, 245
- Renewal rights, 90, 289; Gr. Br. 96, 242
- Revision, 126, 262, 308, 316, 317, 446, 464
- Right of privacy, 230, 252
- Rights, synchronization, fee, 422
- Ringer, Barbara A., 323
- Rome Convention on Neighboring Rights, 71, 114, 119, 130, 171, 174, 180, 238, 263, 285, 378, 433, 447
- "Rosa Bonheur" case, 125
- Russia, 28
- SACEM, 133
- Scandinavian acts, performing artists, 353
- Scientific discovery, 231
- Scientific films, 451
- Short story, 89
- Slide rule, 348
- Slogan, 347
- Song, 396, 397
- South Asia, laws, 110
- Suggestion, 93
- Surveys, legal and judicial, Great Britain, 309; Hungary, 404; U.S., 310, 414
- Sweden, 29, 30, 128, 146
- Switzerland, 141, 238, 411, 455
- Tape-recording, 439, 456, 458, 466
- Taxation, 103, 248, 254, 404, 406, 462
- Teaching, against environment, 315; machines, royalties, 471
- Television, drama, 88; films, 138; rights, 402; show, infringement, 346
- Temporary injunction, 403
- Textbook, protection, 306, 413
- Textiles, design, 287
- Theatrical films, 138
- Title, 211
- Tort, infringement, Canada, 298
- Trade agreements, international, 15
- Trading with the Enemy Act, amendment, 5, 6, 444, 453
- Translator, 469
- Turkey, 133, 162, 313
- Typography, protection, Netherlands, 369
- UNESCO, 118, 129
- Unfair competition, 88, 213, 398; dance, 294; exclusive talent agreement, 381; flash cards, 288; news, 400; order form, 394; performers' rights, 251; publication of solutions to textbook questions, 306; slogan, 293; television show, 346; voice imitation, 415, 428
- Unfair use, ideas, 380
- United Kingdom, design, Board of Trade report, 419
- United States, design protection, 410; handbook of the law, 300; history of copyright, 441; laws 1783 to date, 405; recent developments, 310; revision, 69, 70, 227; USSR, cultural exchange, 320
- Union of Soviet Socialist Republics, 157, 160, 218, 364

-
- Universal Copyright Convention, 265, 392; first decade, 68; motion pictures,
313
War, authors' rights, 264
War, claims, 2
West Berlin, Study Group, report on U.S. design protection, 410
World War II, divestiture, 444, 453

Copyright Society of the U.S.A.

c/o Fred B. Rothman & Co.

57 Leuning Street

South Hackensack, N. J.

Return Requested

Bulk Rate

U. S. POSTAGE

P A I D

Hackensack, N. J.

Permit No. 2408