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**GENERAL REVISION  
STUDY NO. 10 NOW AVAILABLE**

FAIR USE OF COPYRIGHTED WORKS by Alan Latman, Special Advisor to the Copyright Office, is the tenth in a numbered series of studies prepared by the Copyright Office, under a Congressional authorization, looking toward a general revision of the Copyright Law (Title 17, U.S.C.). This study is now ready for distribution.

Copies of the study, to which are attached the comments and views of the consultants, may be secured by sending a request addressed to R. G. Plumb, Head, Information and Publications Section, Copyright Office, Washington 25, D. C.

Persons and groups concerned with these problems are invited to submit their comments to the Copyright Office.

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## PART I.

## ARTICLES

## 1. THE FRENCH LAW OF MARCH 11, 1957 ON LITERARY AND ARTISTIC PROPERTY

By JEAN-LOUP TOURNIER<sup>1</sup>

Until recently, even though France is preeminently a country of written law, the protection of intellectual works came almost entirely under Common Law. Two organic decrees of the revolutionary era, which set forth essential principles in a remarkably concise manner, constituted the principal source<sup>2</sup> of this protection. They were the decree of 13-19 January, 1791 on Performance Right and the decree of 19-24 July, 1793 on the Right of Reproduction. However, since then, it had fallen upon the French Courts to formulate a system of protection which they have indeed perfected to a great degree. It was especially given to them to conceive the Moral Right, the real keystone of the monument erected to French creative thinking.

For many people this system of Jurisprudence was quite adequate. Why substitute a code of literary and artistic property, necessarily rigid in its declarations and perhaps exhaustive in its terms? Why not conserve, starting from the revolutionary texts, this much more subtle system of creative interpretation of the Courts?

The answer was first that, whatever its undeniable advantages, this conception of a "creative" jurisprudence was directly opposed to that of the positive French Law. Second, France on several occasions had joined numerous international conventions, which had made evident the imperative necessity for a modern Law on Intellectual Property. Let us remember, moreover, that this concern to endow France with a general law on this subject, had inspired a certain number of unsuccessful attempts by the Government, in 1825, 1836 and

1. ©1958 by Jean-Loup Tournier.

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2. The new Law not only rescinds the two above mentioned decrees, but also a certain number of legal texts which came about as a result of the former decrees, and especially: The Decree of March 28 and 30, 1852 relating to the ownership of literary and artistic works published abroad; the Law of July 14, 1866 which had introduced in France the duration of protection of fifty years counting from the death of the author; the Law of April 9, 1910 relating to the protection of author's rights in respect of reproduction of works of art; the Law of May 20, 1920 imposing a levy for the benefit of artists, upon the sale of works of art at public sales.

1841. A more recent endeavor in 1936 resulted in a Copyright Bill, which vainly entered the stage of parliamentary debate.

It can be said, therefore, that the Law of March 11, 1957, the result of twelve years of uninterrupted work of the "Committee of Intellectual Property," successively under the Presidency of Professor Jean Escarra and of Counsellor of State, Henry Puget, is the first French Law on Author's Rights.

Our purpose is not to proceed here with a detailed study of this Law,<sup>3</sup> but to bring out the essentials, in order to give as faithful a picture as possible of the French conception of Author's Rights. For this purpose, we will examine the fundamental principle, the protected works, authorship, the contents and the exploitation of the author's rights and the penalties involved. Finally, to terminate, it will be useful to review the subjects that the Law has not covered.

### *I. The Fundamental Principle.*

Minerva came forth fully armed from the brain of Jupiter. Similarly, the work of the mind, according to the essential principle of the French Law, emerges fully protected from the brain of the author. According to the terms of Article 7 of the Law, "by the mere fact of the author's conception having been realized even if incompletely," the work is endowed with a group of prerogatives that will remain attached to it during its whole career. The first of the 82 Articles of the Law<sup>4</sup> sets forth this principle thusly:

"The author of an intellectual work shall, by the mere fact of its creation, enjoy an exclusive incorporeal property right in the work, effective against all persons."

The legislature has, therefore, wanted to bring out, without circumlocution, that the intellectual work is actually one with the creative thought of the author, in such a way that the prerogatives that are attached to the work are inseparable from the person of the author. The creation of the work does not bring about a rupture between the creator and the product of his genius and of his work. It establishes a legal state, according to which the work remains inseparable from the personality of the author. Between the author and his work, there does not exist the relation of customary law in matters of property between a person and a thing. If the legislature uses the term "property," because it is that which evokes the most solid bond of law, it is, in fact, only a question of a fiction intended to establish, not a relation between the subject and the object of law, but a veritable identity.

3. For a complete study of the Law of March 11, 1957, the reader is referred to the special issue of the R.I.D.A. April 1958, entirely devoted to this subject (Translations in English, German and Spanish).
4. The 82 Articles of the Law are divided into five Headings entitled respectively: I. Author's rights. II. Exploitation of the economic rights of the authors. III. Performance and Publication contracts. IV. Procedure and Penalties. V. Miscellaneous Provisions.

This basic statement, expression of a profound reality, entails two principal consequences:

A. Since the work is protected "by the mere fact of its creation," it comes into legal existence without the help of any formality, be it either constitutive, or even declaratory of rights. We only want to call attention to this principle which has been adopted for a long time in most countries, and even in the U.S.A., where the copyright notice has a constitutive value of law for published works. However, the protection granted by Common Law to unpublished works presents, as has been recently shown,<sup>5</sup> striking analogies to the French and European systems. For example, in view of the strict definition of publication in the U.S.A., a work can be widely exploited, without formality, by records and broadcasts.

B. Since the work and the author are indistinguishable, it is not conceivable that a third person could claim "to acquire the property" of an intellectual work, in the common sense of law. Needless to say, the situation in which the author generally finds himself, in which he must resort to third persons for the commercial exploitation of his work, will give rise to contracts. But the latter, even if they entail the assignment or the concession of certain prerogatives of an economic nature, will never carry total subrogation to the assignee of the work from the assigning author.

We will develop this aspect of the protection of intellectual works under Heading III of this study. Beforehand, it seems opportune to devote a few lines to protected works in virtue of the Law, as well as to authorship.

## II. *Protected works—Authorship.*

A. The Law does not contain any definition of the "protected work." It does not indicate either, which elements of the work, idea, conception, expression are or are not susceptible to appropriation. It cannot be said, however, that it is a question of veritable lacunae. It is necessary to yield to the evidence of the impossibility in which French and foreign legislators always find themselves, and in which they still have found themselves recently, namely to define the intellectual "work," in opposition to simple intellectual "activity," which is non-creative.

At the very most, one can, with the aid of the new text, reason by deduction. Article 7 prescribes that "Independently of any public disclosure, a work shall be deemed to be created by the mere fact of the author's conception having been realized, even if incompletely." Admitting that a work only has existence from the moment when it is "created" in the sense of the Law, this creation implies that the "conception" of the author has been "realized," even if this realization is incomplete.

5. Cf. William Strauss, "Protection of Unpublished Works" p. 6 *et seq.* (General Revision of the Copyright Law. Study No. 7 Copyright Office, Washington, D. C.)

Admitting also, in accordance with the traditional principle, that the idea is not susceptible to appropriation, the "conception" of the author must be understood as the "composition," in the case of a literary or musical work, or "the image" in the case of a figurative work, and the "realization" as the "expression" of the "composition," or the "tangible form" of the "image" in question.

Such intellectual works are protected, as Article 2 of the Law stipulates, "regardless of the kind, form of expression, merit or purpose of such works." One cannot be less demanding. Therefore, it seems possible to say that, in accordance with these texts, each and every idea having *taken form* in the mind of the author, will give birth to a work, on condition that the aforesaid form has itself been the object of an expression. It can be asked, under these conditions, if the musical impromptu, that is born and disappears under the fingers of the composer-pianist, constitutes a protectable work. The reply would have been uncertain before March 11, 1957. It must be resolved by the affirmative, if the expression "conception realized" as used by the Law can be applied to the "interpretation" of the musical work for example; and it seems that the answer must be affirmative.

Despite the fact that the legislature did not judge it appropriate to give a precise definition of the intellectual work, it has deemed it necessary, on the other hand, to give a few examples of works to be undeniably considered as protectable workmanship. In Article 3, it gives a non-limiting nomenclature of original protected works, and in Article 4 a list of derived works also protectable.

Let us note that among these original protected works appear photographic works. In order to accede to the rank of intellectual work, these must, in accordance with the Law, "be of an artistic or documentary character." This reservation, which contradicts the general dispositions of Article 2, seems welcome. Without it, the identity photograph would have been put into the same class as the painting or the tapestry. Undoubtedly, the eventual task of discrimination by the Courts will not be easy; but it is a question, we think, of the lesser evil.

In the same vein, the overly tolerant terms of Article 2, which do not consider the "merit" of the work as a condition for its protection, may be considered regrettable. It is undeniable that, in view of the variety of productions of the mind and the caprice of human taste, the evaluation of merit of the works remains an extremely delicate problem. The almost general incompetence of the courts in the domain of artistic analysis must be admitted. Proof of this incompetence has been given, all over the world, each time cases have been referred to the courts, in the matter of plagiarisms, for example. Nevertheless, the combination of the observations made above in connection with a musical

impromptu, on the protectable character of works that are not of a lasting or permanent form of expression, with the large tolerance of the terms of Article 2, gives rise to a fear that authorship will hereafter be claimed and legally justly so, by a constantly increasing category of individuals, who, like Mr. Jourdain, will discover with pride that they are "writing prose without knowing it." Without this remark being intended to offend, we think for example of a radio commentator in charge of weather forecasting, who will eventually put forth a claim to performance rights against the station that employs him!

In short, the definition of Article 2 of the Berne Convention, as revised at Brussels, which avoids mentioning the "merit" of the work and which, consequently, does not prevent this merit from being precisely taken into consideration, seems preferable. It appears certainly regrettable to us that the French Law has insisted on deliberately placing on the same level the masterpieces and the simple "realized expression" of the most modest intellectual effort.

Article 3 of the Law places the works, of which it cites the most current, in the three categories of musical, literary and artistic works. Contrary to the Brussels Convention, scientific works are not mentioned.

The Committee of Intellectual Property considered at great length this last category of works. After having consulted with scientists, they agreed that it was impossible to protect "scientific works," as such. Indeed, when these works are written, they are literary works, and are therefore protected in this quality. As to non-literary scientific works, it seemed that it was impossible to protect them by virtue of copyright. Protection, and consequently a special law, is necessary.

Cinematographic works, according to a uniform Jurisprudence in France, are naturally included in the Law of March 11. It is the same with regard to works for broadcasting or television, the object of Article 18.

The fiction of the "sound record" as an "intellectual work" was not considered with favor by the legislature.

We will now examine briefly authorship in view of the new Law.

B. By its Article 8: "In the absence of proof to the contrary, authorship shall belong to the person or persons under whose name the work is disclosed," the Law establishes a simple presumption of paternity, subject to proof to the contrary, to the benefit of the person or persons under whose name the work is disclosed. There does not exist in the Law any definition of "disclosure." Nevertheless, it may be interpreted that the legislature, in choosing this term, wanted to give to the concept of disclosure the largest possible meaning. Each and every publication, representation, presentation, in other words, externalization of the work, will constitute a public disclosure.

It is appreciated that the presumption established by Article 8 could have constituted a serious danger to certain authors when put in a weak economic position in relation to certain employers, physical persons or legal entities, desirous of seeing credited to their name, or transferred to themselves, the right of paternity.

This danger, however, is averted by the altogether extraordinary dispositions of the last line of the first Article. This Article disposes, in effect, that "The existence, or the conclusion by the author of an intellectual work of a contract to let out a work on hire, or the creation of an employment contract, shall imply no exception to the enjoyment of the right recognized in the first paragraph."

The term "extraordinary" is used because the French Law has declared itself, in a categorical manner, on a very controversial subject, and also because the present study is intended for American readers who, in a general way, in view of the solutions adopted by American legislation, are accustomed to considering as legitimate a diametrically opposed concept.

In French Law, henceforth, notwithstanding very precise hesitations shown by the Courts on this subject in the past, a contract to let out an author's work on hire cannot have any influence on the indissoluble bonds established between himself and his work.

On one hand, the paternity cannot be credited to the name of the employer, in the case of an employment contract. On the other hand, the hirer of a work cannot obtain from the author the total or partial abdication of his exclusive rights.<sup>6</sup>

This solution is altogether in harmony with the fundamental principle of French Author's Rights, such as we have succinctly described under Heading I of the present study. No more than it is possible for a physical person to attribute to himself, by reason of a certain concurrence of circumstances, the paternity of a child conceived by another, is it possible for an employer or anybody else to cause to exist for his benefit, the original rights that belong only to the author.

Of course, in the hypothesis where the employer, physical person, or the hirer of work, has collaborated, according to the definition given by the Law (Art. 9), in other words, has contributed to the creation of the work, his co-authorship will not be disputed.

The first danger for the author having been averted, there remained a second, just as formidable, and which refers precisely to the possibility for certain legal entities or physical persons to arrogate for themselves, without any

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6. Cf. H. Desbois, "Le Droit d'Auteur" (Daloz, 1950) p. 184 *et seq.*

title, the prerogatives of author or even of collaborator. As far as legal entities are concerned, the law gives them only the possibility to accede to the status of author *in the hypothesis of "collective works."* The latter, according to Article 13, can become the property of legal entities under the name of which they are disclosed; in this hypothesis, the legal entity is invested with the rights of authorship.

This solution finds its explanation in the fact that, in the case of collective works, it is impossible, by definition, to distinguish the contribution of each author. It is so, as an example, for the "Dictionary of the French Academy" the elaboration of which was collaborated upon by the "Forty Immortals."

But everything indicates that this solution must remain exceptional. Indeed, the Law decrees, in principle, that the work of collaboration "is a work in which several *physical persons* have contributed to its creation" (*italics ours*). With regard to works for radio or television, of which it might be held that, in certain cases, they are elaborated upon with the collaboration of radio or television organizations, usually legal entities, the Law specifies again in Article 18, that their authors are the *physical person or persons* who brought about the intellectual creation.

It seems, therefore, that the new French legislation refuses, with the exception of the case of collective works, authorship to legal entities, either private or public. In the domain of cinematographic works this position, it will be seen, appears with even more preciseness.

It is public knowledge that the producers of films, in Europe at least, have endeavored, practically since the discovery of the sound film, to be recognized as authors of cinematographic productions. Their thesis is well known: The producer has not only the initiative of the production, which, without him, could not be born, be it only for reasons of a financial nature; but, also, the creation of the cinematographic work goes through a long process that he directs and over which he maintains control.

Their fears are also known: That the distribution of the completed film might be frustrated by one of the various prerogatives of an economic nature belonging to one or several collaborators on the film, for example the composer of the music; even more, that the author might exercise his moral prerogatives which could wrongly impede the career of the film.

It is not for us to write a critique here of this thesis. Let us only note that the recognition of the "producer-author" does necessarily involve that of the "legal entity-author," in view of the fact that the producer usually operates as a commercial firm.

French Law has altogether rejected the concept of the producer-author.

Indeed, in accordance with the terms of its Article 14, a presumption of pater-  
nity is established for the benefit of the following authors *only*:

Author of the script

Author of the adaptation

Author of the dialogue

Author of the musical compositions, with or without words, especially  
composed for the work

Director

Complying with considerations exclusively of a practical nature, at the request of the interested parties, the legislature judged it opportune to include also among the co-authors of the cinematographic work, the authors of pre-existing works or scripts still protected, from which the cinematographic work in question can be adapted. (Article 14-in fine). This assimilation, which comes out of the domain of fiction, is legally debatable, and seems regrettable, in that it weakens the legal edifice of the cinematographic work as elaborated by the French doctrine.

The producer is deliberately omitted from this enumeration. However, as Article 17 stipulates, he "may be the author or one of the co-authors of the work if he comes within the definition given in Article 14." Now, Article 14 stipulates that authorship of a cinematographic work belongs to "the *physical person or persons* who brought about the intellectual creation thereof." (Italics ours.)

Therefore, in any case, even were it possible for a producer as a physical person, who collaborates in the creation of the work, to accede to authorship of a cinematographic work, this accession remains forbidden to producers, as legal entities.

As will be seen with regard to the study of economic attributes of the author, the Law has made important concessions to film producers in the form especially of simple presumption of assignment. But it can be said that at least as far as principles are concerned, the producers have failed. It is most satisfactory that the legislature did not receive their thesis favorably; the systematic attribution of authorship to the producer would have constituted a fiction, whatever its economic justifications. Now, in our opinion, the right of the author, which is derived from the noblest quality of the human mind, i.e., its creative faculties, is incompatible with subterfuges which would substitute industry or technique for creativity.

Having thus given to the reader an insight of the way in which the French legislature has regulated the problem of the definition of the intellectual work and of its authors, we will now go on to examine the author's rights with respect to his work. To do this, we will first examine the duration, then successively the intellectual, moral and economic attributes.

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### III. *The Author's rights.*

#### A. The duration..

The duration of protected works, in virtue of the new Law has not given rise, to our knowledge, to serious controversies within the Committee of Intellectual Property. It is true that the history of this protection in France, as well as the membership of this country in the Brussels Convention, limited the possibility of any such controversies.

Article 6 of the Law recognizes the principle of the *perpetuity* of the *moral* attributes of the author.

Article 21 limits the duration of *economic* rights of exploitation to the duration of the author's life and to fifty years after the end of the current calendar year of his death.

These durations of protection apply to *all* the works protected by the Law; be they literary, musical or *artistic* works.

Consequently, the works of the applied arts, as well as photographic works, benefit from the fifty year post mortem protection. Such a solution could seem excessive to some. It follows logically, however, from the fact that the Law of March 11 accords full protection to certain works, such as photographs. That which can be disputed is that they are accorded full protection at all. But the duration of protection must be uniformly applied to all works judged worthy of this name. In view of the fact that neither the "merit" of the work nor its kind is taken into consideration, it is not possible to establish a distinction, necessarily arbitrary, between works or parts of works.

With respect to works of collaboration, posthumous protection begins on January 1st of the year after the death of the last collaborator.

Let us add that the new Law has retained the legislation regarding war extensions. In the present state of jurisprudence, the minimum of the extension relative to the first World War is six years and eighty-three days, for works not in the public domain at the promulgation of the Law of February 3rd, 1919. The recent interpretation by the Court of Appeals of Paris tends to extend this term to six years and one hundred and fifty-two days.<sup>7</sup>

As to the extension due to the Second World War, the period of extension is from September 3rd, 1939 to January 1st, 1948, for all works published before this date and not in the public domain on August 13, 1941.

The total protection, taking into account the necessary conditions, is, therefore, of a minimum of sixty-four years and two hundred and five days.

The duration of protection for pseudonymous, collective and posthumous works obeys particular rules.

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7. Cf. R. Castelain, R.I.D.A. April 1958, p. 383.

Article 22 of the Law provides for pseudonymous works a duration of protection of fifty years from January 1st of the current calendar year following the year of publication. If publication of different elements by the same author is staggered in time, the protection applies counting from January 1st of the current calendar year following that of publication of each element.

The Law does not give a definition of publication. One finds here the traditional prudence of legislators in the field of author's rights in France, as abroad.

The Law only makes reference in Article 22 (Paragraph 1) to "any means of proof recognized under general rules of law, and especially by legal deposit."

With respect to posthumous works, the controversy which existed concerning their protection duration has been resolved because the law has adopted a precise solution.

They will be protected fifty years after their publication. Let us note that the right of exploitation of posthumous works, in conformity with Article 23, belongs to the successors of the author, if publication is disclosed during the duration of legal protection. But the right devolves successively to the proprietors or the other title holders of the work if the disclosure comes about after the expiration of the legal duration.

#### B. Intellectual, moral and economic attributes.

The second paragraph of Article 1 of the French law enumerates the constitutive elements of the author's right:

"This right includes attributes of an intellectual and moral nature as well as attributes of an economic nature as determined by this law."

Let us first review the intellectual and moral attributes. The legislature has placed these attributes in the first rank of the author's prerogatives, and they rank before exploitation rights, thus illustrating in a direct way the supremacy of "Moral Right" over "Economic Right."

It is not surprising that the Parliament should have enacted, and thereby given homage to, this creation of French jurisprudence. This had already been done by the Rome Convention, which, in 1928, had adopted the Article 6, repeated as we know it, in the Brussels text.

However, the Law does not use the expression "Moral Right"; it substitutes for it the double concept of "intellectual and moral attributes."

Even though it is not possible to affirm that the legislature wanted to establish a formal distinction between *intellectual* and *moral* prerogatives, the sum of which constitutes "moral right," it is, we find, interesting to make a distinction, which is suitable, and which can lead to fruitful conclusions, if and when developed.

1. *Intellectual* attributes are described in a number of articles. We think it opportune to specify the nature of these attributes.

a) The first is the manifestation of the discretionary power of the author over his work. Absolute master of his thoughts, the author disposes of the *right of publication* before anything else. He can sovereignly decide either that his work will not be published, or even disclosed, or that it will be. In the latter case, he alone can decide in which form and according to which limits the disclosure will be made. Article 19 stipulates, in effect: "The author alone shall have the right to disclose his work. He shall determine the method of disclosure, and fix the conditions thereof. . . ."

The right of publication, in the general sense of the term, or disclosure, i.e., communication to the public, is recognized as belonging to the author throughout the civilized world. In its negative aspect it can be called the right of non-disclosure. But it appears that the French law is innovating when it specifies that the proceeding and the conditions of the disclosure depend strictly on the will of the author. In other words, the right of non-disclosure subsists in so far as the author has not relinquished it.

Assuming, for example, that he consents to his work being commercially *recorded*, it does not follow from this that the author consents that the work be *publicly performed*. Consequently, even after the expiration of the legal period of protection, the work in question could not be publicly performed, because this performance would violate the intellectual attributes of the author or his heirs. These attributes must be considered as perpetual because they are part of the moral right. Moreover, the last paragraph of Article 19 expressly states: "This right (to disclose) may be exercised even after the expiration of the exclusive right of exploitation specified in Article 21."

However, the law has wisely prevented the abuses of the right of non-disclosure on the part of the various executors of the author, after his death. Article 20 stipulates in effect that "In case of manifest abuse of the exercise or non-exercise of the right to disclose a work by the deceased author's representatives referred to in the preceding article, the civil court (Tribunal civil) may order any appropriate measure. The same shall apply if there is conflict between the aforesaid representatives, if there is no known successor in title, the estate is in abeyance (*vacance*) or in case of escheat (*déshérence*)."

The appreciation of the abuse will consequently be essentially a question of interpretation of the will of the author, which would be submitted to the arbitration of the Civil Jurisdiction. Such matter can be referred to this tribunal by the Minister in charge of Arts and Letters.

b) The second of the intellectual attributes of the author concerns that which we shall call his post-creative activity. In following the career of his work, after having consented to its publication, the author alone may adopt one of two attitudes towards its future disposition. He may estimate that this work is permanent in its consistency, and no modification of it may

be made. Or, on the contrary, he may feel that it is advisable to reshape it, i.e., to arrange it, to adapt it, to translate it, in order to assure a larger and more varied diffusion.

According to Article 4 of the law, arrangers, adaptors, translators, or authors of modifications are protected but "without prejudice to the rights of the author of the original works."

This certainly signifies that the author of a work, making use of the *right of adaptation* as an attribute of his creative thinking, can exercise discretion in the use of this right, either in its negative aspect to forbid any and all arrangements or adaptations, or, on the other hand, in its positive aspect, to devote himself to arrangements or eventually to entrust this work to a third party, who will remain under his control.

c) The third intellectual attribute of the author is certainly that which finds the largest number of opponents amongst the American copyright experts. Often, it is inexactly identified in the minds of some, as this "moral right" in its most ill-fated aspect!

This prerogative is named *right to re-consider* or *right to retract*.

This right proceeds from the idea that the author can be led, in certain cases, to repudiate partially or entirely a work, even published, and/or having been the object of assignment, if, in the light of his experience or according to the evolution of his personality, he arrives at the point where he condemns it as an error of conception or of expression.

He can then say "mea culpa" and make use of the right contained in Article 32 of the Law which reads as follows:

"Notwithstanding the transfer of his exploitation rights, the author, even after the publication of his work, shall enjoy, in relation to the transferee, the right to re-consider or retract. He may, however, only exercise this right provided he indemnifies the transferee in advance for any loss that such re-consideration or retraction may cause him."

Introduced by the Civil Chamber of the French Supreme Court, on two occasions, the Lecoq case in 1902 and the Canal case in 1945,<sup>8</sup> the notion of the right to re-consider or of the right to retract had been analysed only in the relations between married people, and not between author and exploiters. On this point, the new law takes a broad form. The author, in virtue of his moral right, can intervene, after the publication of the work, either to modify it, or even to withdraw it entirely from circulation. Moreover, no accounting will be asked of him, because the motives which will have led him to ask for the modification or the withdrawal will be essentially personal, and will escape from the control of the Courts.

8. Desbois, *op. cit.* p. 574, 575.

However, in view of the fact that this right can only be exercised to the detriment of part or all of the assignee's economic rights, the Law wisely provides: on one hand, that the author will have to indemnify his assignee; on the other hand, that in the case where the above-mentioned author would change his mind and would decide, after having exercised his right to re-consider or retract, to have his work republished, he must offer, in the first instance, this work to the original assignee, under the conditions originally determined.

These two barriers to the exercise of the right provided by Article 32, will be an excellent safeguard for the assignees, publishers especially, against an abusive use of the right to re-consider. Furthermore, when examining this right, it is fitting to bear in mind that it is to the best interest of the author to see his work published and exploited, and that it is consequently contrary to his normal interest to end its career. Undoubtedly, this is the reason why this right will be used extremely rarely, and only in cases where the author will sacrifice all economic considerations to certain principles which he will have deemed absolutely essential to his esthetic ideal.

## 2. Moral attributes.

As their qualifier indicates, these attributes concern the *moral* aspect of the personality of the author, and the respect which is due to him *personally* through his work.

These attributes are incorporated in a remarkably concise way, in Article 6 of the Law which states:

"The author shall enjoy the right to respect for his name, his authorship and his work. . . ."

It is not necessary to comment lengthily on this Article of which the meaning is quite clear.

To respect the name of the author means to abstain from usurpation or misuse to the detriment of the honor or reputation of the author. To respect authorship and the author's work means to exploit the work with absolute fidelity as to the author's meaning. All aspersions cast on the integrity of the work will injure the person of the author.

Moreover, after the death of the author, this moral right will continue as long as the work endures, and will be exercised by the author's heirs.

During his life, the author does not have the power to delegate these rights to third persons. He can only delegate them by testamentary dispositions.

Before finishing with this aspect of author's rights, according to the Law of March 11th, it is essential to underline the restriction that is established by the law as to the author's right of free disposition of the *material object* of his work. Article 29, paragraph 1, recalls first the principles, according to which the incorporeal property of the work, i.e., all the attributes that are attached to the

author's rights, is independent of property rights in the material object. The painter who sells his painting consequently retains intact all his author's rights. However, supposing that at a later date, the painter wishes to have his painting reproduced in a review or an album, *it will not be possible for him to demand* that the owner put the painting at his disposal. His only legal recourse will be to appeal to the Civil Court. Even then, the Court has jurisdiction to take appropriate steps to give satisfaction to the author or his heirs, *only* in case "manifest abuse by such proprietor prevents the exercise of the right of disclosure." The procedure will be long and the difficult burden of proof falls to the author plaintiff.

The question that remains open is that of determining whether or not the *proprietor of the material object*, canvas, manuscript, etc., can, with impunity, and if he so desires, destroy the work of which he is the sole possessor. In certain cases, this destruction would constitute a veritable crime against culture, but the Law does not state the punishment.

### 3. Economic attributes.

The first paragraph of Article 21 recognizes for the benefit of the author "the exclusive right to exploit his work under any form whatever and to derive monetary profit therefrom."

Article 26 specifies that this right of exploitation is divided into two major categories, the performance right, and the right of reproduction.

Articles 27 and 28 analyse the contents of each of these two rights.

Before making a resume of their tenure, let us insist on the epithet *exclusive* which is applied to the right of exploitation.

This epithet, in accordance with the French tradition of author's rights, reaffirmed by the new Law, is taken in its most categorical acceptance.

Contrary to many foreign laws that also use the term "exclusive," the French Law does not, after having proclaimed the principle of exclusiveness, cut it up or restrict it considerably by legal or compulsory licenses. While many countries, as a matter of internal policy, more or less yielding to pressures by industrial powers, considerations of a general nature, and social and political currents of the modern world, have added restrictions and appropriate limitations to the author's rights and their exercise, France absolutely ignores all forms of legal or compulsory licenses. Are these licenses not moreover a direct negation of author's rights, in that they demote the author-proprietor to the rank of simple creditor of an equitable remuneration?

#### a) The exclusive performance right.

In accordance with terms of Article 27, this right is applied to all forms of direct communication of the work to the public, i.e., public recitation, dramatic performance, radio and television transmission, etc.

In view of the fact that controversies had arisen in this connection, and given

rise to an abundance of legal cases in France, the Law specifies that the broadcasting of the work on radio, by loudspeaker, or another method, in public, or the rediffusion by whatever method, telephone, cable, etc., constitute communications to the public, and fall within the exclusive right of the author. The Law finds it useful to specify in Article 45, paragraph 4, that "an authorization to broadcast shall not imply authorizations to communicate the broadcast work publicly by means of a loud-speaker or any analogous instrument which transmits signs, sounds or images."

Performances of a non-profit, charitable or disinterested nature also do not escape from the exercise of the performance right. At most, one will find in Article 46 of the Law a reduction of tariffs to the benefit of communities and recognized societies for popular education. This restriction concerns only the *amount* of royalties that can be fixed by the author. The requirement of the prior consent of the author for all performances by these privileged institutions remains in force.

Of course, the Law has preserved the impunity of *private* performances. The question of which performances are private and what criteria to adopt, has always been in all countries, and particularly in France, the source of a considerable jurisprudence. In France, the concept of publicity was not absolutely clear. The law has thrown light on this subject, in specifying that the author can not forbid "free, private performances produced exclusively within the family circle." Without a doubt this reference to the "family circle" does restrict the "private circle" until now traced by French jurisprudence, and will therefore permit the collection of monies in the hypothesis which was doubtful until now.

b) The exclusive right of reproduction.

Reproduction is defined by the Law in Article 28 as the "material fixation of the work by all methods that permit of indirect communication to the public."

The formula is the broadest one possible. It embodies specifically the "printing, drawing, engraving, photographing, casting and all processes of the graphic and plastic arts, and by mechanical, cinematographic or magnetic recording."

There does not exist in the field of mechanical right any important reservation as to the exclusive character of the right of reproduction. However, as expected, the problem of "ephemeral" recordings has created a division of opinion.

The principle of their being immune from the author's right has, however, been rejected because Article 45, second paragraph, stipulates that ". . . the authorization to broadcast shall not imply authorization to record the broadcast work by means of instruments fixing sounds and images," the reproduced text of Article 11 bis of the Brussels Convention. An important reservation to this

principle appears, we know, at the end of this article of the Brussels Convention: "It shall however, be a matter for legislation in the Countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting body by means of its own facilities and used for its own emissions. The preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be authorized by legislation." The French Bill, as adopted by the National Assembly, contained a disposition corresponding in substance to that of Article 11 bis of the Union Convention. In the Council of the Republic, however, the Chairman, finding a contradiction between the *ephemeral* character of the recordings and the possibility of *conserving them*, had called for a vote, on an amendment, which, when passed, excluded the notion of ephemeral recordings; this amendment, after adoption by the National Assembly at the second reading, became the third paragraph of Article 45 which disposes:

"However, as an exception, certain recordings shall be authorized by reason of the national interest which they may represent or of their documentary character. Conditions of their materialization and use shall be fixed by the parties, or, in the absence of an Agreement, by a decision signed jointly by the Minister in charge of Fine Arts (Ministre chargé des Beaux-Arts) and the Minister in charge of Information (Ministre chargé de l'Information). These recordings may be preserved in the official archives."

This text should certainly not be interpreted as according impunity to *all* ephemeral recordings realized by radio broadcasting organizations.

It is indeed extremely limited in its terms, and is aimed only at certain recordings of "*national interest*." The methods of their realization and utilization have not yet been fixed.

Article 41 of the Law defines the conditions by which the works can be the object of a "fair use," escaping naturally from the control of the author.

It is so, essentially in the case of "reproductions reserved strictly for the private use of the copyist and not intended for collective use, with the exception of copies of works of art intended to be used for purposes identical with these for which the original work was created,"<sup>9</sup> as well as analyses and short citations (on

9. Cf. Alphonse Tournier, R.I.D.A. April 1958, p. 97:

"French law has always permitted the copying of a work for private use, and rightly so, for in the days when copies were made by hand such work was always undertaken for the purpose of education, study and record.

The legislator of 1957 has thoughtlessly extended this permission to modern methods of copying. Certain mechanical devices now on sale can automatically record any direct or indirect performance. When, for example, the broadcast of a concert is simultaneously picked up by a large number of devices of this kind, we are obviously no longer dealing with an individual and isolated copy but rather with a collective reproduction, equivalent to a publication. In a case like this copyright is definitely being infringed."

condition that the name of the author and the source are indicated), press reviews, parodies and pastiches, with due consideration for the laws regarding this type of work.

#### IV. *The exploitation of the author's rights.*

When one examines the problem of the exercise by the authors of the various prerogatives that are accorded to them by the Law, one finds that they almost never exercise these prerogatives themselves. This apparent paradox stems from the undeniable discrepancy that generally exists between the intellectual creation and the most often commercial, concrete exploitation of intellectual works. The intervention of third persons, intermediaries between the author and the public, is quasi-compulsory. This fact suggests two remarks.

First of all, the legislature, in its solicitude towards the author, has wisely protected him against himself, by regulating in a very severe way the publication contract.

Moreover, recognizing the undeniable utility of Performing Rights Societies, the legislature has strictly regulated the contract of performance, to facilitate their work, and to permit them to better serve the authors who are their members.

Let us examine the principles that have guided the legislature in this double road. Then, let us consider successively the solutions that it adopted with regard to the publication contract, the performance contract, and the right to follow-up belonging to authors of artistic works.

##### A. The principles.

The analysis that we have made in Title I of this study of the contents of author's rights, as defined by the new French Law, permits us to disengage those attributes of these rights that can be the object of an *assignment* by the author to a third party.

*Moral* attributes are expressly excluded from all possible assignment. On this subject, Article 6 formally states: "The author shall enjoy the right to respect for his name, his authorship and his work. This right shall be attached to his person. It shall be perpetual, *inalienable* and *imprescriptible*."

There exists no precise disposition of the Law that prescribes the inalienability of intellectual attributes of the author's rights as we have described them in Title III, B. But this inalienability does not seem doubtful, in the case of the right of non-publication, of adaptation or even of the right to re-consider or retract. All these attributes originate in the personal will of the author or his creative activity. They are, therefore, inherent to the person of the author and *can not* be detached.

It seems appropriate to make a remark here about the adaptation rights. The arrangements, adaptations, and translations, although of a subsidiary nature,

are protected in the same way as original works. These derived works, as we have seen, can be the deed of the author of the original work, himself, when he wants to utilize his right of modification, or even when he wants to realize himself the adaptation or the arrangement of his work; they can also be the work of third persons, especially when the author desires to have his work exploited abroad. Then, it is generally impossible for him to exercise himself his intellectual right to choose the adaptor. He naturally resorts to his publisher, who expedites this adaptation through his connection with a foreign publisher. However, in this case, the original publisher will *not act as an assignee*, because the right of modification of the author is, in our opinion, inalienable, but as an *authorized agent* invested with the confidence of the author.

The French Law foresees expressly that the *economic* attributes of the author's rights are assignable. Article 30 stipulates:

"Performance rights and reproduction rights may be transferred with or without valuable consideration."

The principle having been set forth, the legislature seriously limits its scope in regulating the publication contract.

#### B. The publication contract.

The publication contract obeys, in the new Law, imperative conditions of form and substance. Article 31 disposes, first of all, that the contract must be drafted *in writing*. However, "when special conditions so require," the contract can validly intervene by telegram.

The definition of the publication contract given by Article 48 merits careful examination:

"A contract whereby the author of an intellectual work or his successors in title transfer, under specified conditions, to a person called the publisher, the right to manufacture or to have manufactured in quantity, copies of the work, on condition that he shall assure the publication and dissemination of the work, shall be deemed a publication contract."

As a result of this text, the publisher is the one who undertakes to manufacture, or have manufactured the "*copies* of the work." The translation of the French word "*exemplaire*" by "copy" must not, however, deceive. It is a fact that the effect of translation may result in a misunderstanding. Article 4 of the Brussels Convention has been considered, according to the English version, as applying exclusively to "graphic copies of the work", that is "printed copies."

Article 48 of the French Law can certainly not be interpreted with this restriction. In this way, the word "copy" surely covers the sound recording, including the sound and visual cinematographic track.

It follows that, if they fulfill all the conditions stipulated by the law, the *record manufacturers* and the *producers of films*, amongst others, are *publishers*

in the same way as the graphic publishers of literary and musical works.

Television enterprises, which produce original films for reproduction through magnetic recordings, are also publishers.

All these categories of publishers must, according to the Law, respect rigid basic conditions in the contracts that they propose for the signature of the author.

In this connection, three Articles of the Law are particularly to be noted: Articles 31, 35 and 52.

1. In the act of assignment (which will generally be a publication contract) the assignee must protect his own interests by *specifying what he is acquiring*, because it will be understood that the author has kept that which he has not expressly assigned. The interpretation of Article 31 (third paragraph) can only be restrictive:

"The transfer of author's rights shall be subject to the condition that each of the rights transferred shall be specifically mentioned in the act of transfer, and that the field of exploitation of the rights transferred shall be delimited as to extent, place, and duration."

Let us note, in the reading of this Article, that it confirms the principle, already adopted by French jurisprudence, of the perfect "divisibility" of the author's rights. Furthermore, it extends the principle, to permit an infinite division of the various economic prerogatives of the author. The latter can, for example, assign the right to publicly perform (right transferred) by a Chamber Orchestra (extent) for an audience of children under the age of 16 years (purpose) at the Pleyel Theatre in Paris (place) for a period of one year (duration) one of his works.

One can, therefore, ask if it is *possible* to make a distinction in French law between the "license" and the "assignment." In any event, the interest in such a distinction does not seem to appear because each and every license, even be it non-exclusive or extremely limited in its extent, will appear as an assignment. In fact, the difference between the licenses and the assignee will be found in the answer to the question of who has the right to sue, just as it happens in American law. The controversy, if any, will center on who, among those who deal with the author, will need, for self-protection, the right to sue; and who will not need it, either because he can fear nothing, or because he fears only the author, himself, who, by contract, will have given all guarantees.

However, the distinction between the simple authorization or licence and the assignment remains very important, in one respect. The holder of the authorization will *escape* from all the legal obligations that the law *imposes on the assignee*, and which are to be found, in particular, in Articles 35 and 52.

2. Article 35 stipulates for example:

"The transfer by the author of the rights in his work may be total

or partial. It must confer to the author's benefit a proportionate participation in the receipts resulting from the sale or exploitation of the work."

The scope of this Article is apparent. The French legislature has abolished the method of lump sum remuneration, in which the author forsakes all future interest in the exploitation of his work. This disposition of the new law is certainly the most original and the most extraordinary that is to be found here. Some go so far as to say that were the French law reduced to this innovation, consecrated by Article 35, it would still justify its existence.

The misery endured by certain authors who became famous without the fair accompaniment of adequate remuneration, had undeniably influenced the members of the "Committee of Intellectual Property"!

*The principle of proportionate remuneration* to the author's benefit, from the receipts of his work must, we think, be considered *imperative*, even though the law does not expressly stipulate the habitual expression "under pain of being declared void." In view of the motives which led to its adoption by the legislature, the possibility of avoiding this principle through contractual means, would render without object a large number of Articles of the law. Moreover, the law is emphatic in its statement, since as the Article indicates, the assignment "*must confer. . .*" (Italics ours).

Let us point out, too, that, according to Article 33, "Total transfer of future works shall be null and void."

There exist, however, a *few exceptions* to the principle of the proportionate remuneration. These exceptions concern first of all the cases in which it is practically impossible to know the basis for calculation of such participation.<sup>10</sup>

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10. Article 35:

"However, the remuneration of the author may be calculated as a lump sum in cases where:

1. A basis for calculating a proportionate participation cannot be practically determined.
2. The means of controlling proportionate participation are lacking.
3. The operating expenses of calculating and controlling would be out of proportion to the result to be expected.
4. The nature or the condition of the exploitation makes the application of the rule for proportionate remuneration impossible, either because the author's contribution does not constitute one of the essential elements of the intellectual creation of the work, or because the use of the work is only of an accessory character in relation to the object exploited.

The transformation at the author's request of the rights resulting from existing contracts into lump sum annuities, by agreement between the parties, for such terms of duration as may be determined between them, shall also be lawful."

Furthermore, publishers have obtained a certain number of concessions exempting certain types of publications from the proportionate remuneration, *when the authors are expressly in agreement*. The reading of Article 36 is sufficient in itself.<sup>11</sup>

Paragraph 3 will interest American book publishers or translators, because it stipulates that the assignment of rights in book editions (only), from or to foreign countries, can be the object of a lump sum remuneration to the author.

In order to avoid the abuses in the fixing of all of these lump sum remunerations, Article 37 provides that the author can obtain the revision of the contract in case of wrong of more than seven twelfths.

3. Finally, the assignee of the author does not only acquire rights. The publication convention is a bilateral contract which entails for the assignee obligations, that show that the French legislature did not consider the assignee of certain economic rights, as the proprietor of a thing of which he could dispose as he wished.

The second paragraph of Article 52 imposes on the assignee (in the case of point the "publisher" which, as we have seen, includes numerous categories) the *obligation to exploit* the assigned rights. "The publisher *shall be required to manufacture* the work or have it manufactured under the conditions, in the form, and according to the modes of expression, provided in the contract." (Italics ours).

11. Article 36:

"In case of trade editions, the remuneration of the author for the first edition may also be in the form of a lump sum, upon the formally expressed agreement of the author, in the following cases:

- Scientific and technical works.
- Anthologies and encyclopedias.
- Prefaces, annotations, introductions, forewords.
- Limited de luxe editions.
- Prayer books.
- Upon the demand of the translator, for translations.
- Cheap popular editions.
- Cheap picture books for children.

A lump sum may also be paid for the transfer of rights by or to a person or organization established abroad.

In the case of intellectual works published in newspapers and periodicals of all kinds and by press agencies the remuneration of the author who is bound to a news agency by a contract to make a work or an employment contract may also be a lump sum. In the case of all works thus published in a newspaper or periodical, the author shall, in the absence of any stipulation to the contrary, preserve the right to have the works reproduced, and to exploit them in any form whatever, provided the aforesaid reproduction and exploitation is not of a kind which might cause competition with the particular newspaper or periodical in question."

The result is that the graphic publishers *must* consequently publish the sheet music, the record manufacturer-publisher *must* manufacture records, the film producer-publisher *must* make the film—if they do not want to see the author taking away from them, with the full support of the Law, the economic rights which he had previously assigned to them. Besides, it will become impossible for any of these categories of publishers to acquire validly any of the rights of the author, which they manifestly are not in a position to exploit by the "manufacture" demanded by the Law.

As one can see, the three Articles 31, 35 and 52 join together to assure to the author an effective and complete protection of his economic rights.

Each assignment of each right must be express.

Each assigned right must be exploited by the assignee.

Each exploitation, save limiting exceptions, must stipulate a proportionate remuneration to the profit of the author.

### C. The performance contract.

The first chapter of Title III of the Law is consecrated to the performance contract. In France this contract intervenes principally between professional Performing Rights Societies, namely the French Society of Authors, Composers and Publishers (of Music), the Dramatic Society of Authors and Composers, on one hand, and the theatrical producers, on the other hand. The legislature has come to reinforce the author's rights and, in fact, the rights of these Societies, in expressly sanctioning the validity of the *blanket licence formulae* by which they grant to the users the option of using either the whole or part of their repertoires. Article 43, paragraph 2, stipulates that:

"A contract whereby a professional organization of authors confers on a theatrical producer the faculty to perform, for the term of the contract, the existing or future works constituting the repertory of the organization, under conditions determined by the author or his successors in title, shall be deemed a general performance contract."

In this connection, the invalidity that strikes the assignment of future total works is lifted in so far as regards these Performing Rights Societies, which, like the French Society of Authors, Composers and Publishers (of Music), for example, are effective assignees of the performance right in the works, present and future, of their author members, during the whole of their membership.

Furthermore, the theatrical producer, in order to permit a just distribution of the monies that he pays the Performing Rights Societies, must, in accord with Article 46 of the Law, remit to them the programs of the works performed, as well as statements showing exactly his gross receipts.

With regard to the exercise of the performance right, we must note again the special regulations which apply to cinematographic works. If the legislature, as we have previously shown, did not want automatically to give the

right of authorship of the film to the producer, or even, of proprietor of the film, it has however, in Article 17 of the law, *given credit to certain economic considerations.*

In order to facilitate for the producer the acquisition of the exploitation rights of the cinematographic work, Article 17 establishes for his benefit a simple presumption of assignment by the co-authors of the film, of their various exploitation rights.

These exploitation rights include, in accordance with the terms of Article 26, the right of reproduction or of synchronization, and the performance right.

However, this presumption is valid only "in the absence of a clause to the contrary." Each of the authors of the film has therefore the possibility to reserve his rights of exploitation in his dealings with the producer. *A further far reaching reservation is that this presumption of assignment does not apply to "authors of musical compositions with or without words,"* i.e., the composer of the background score and authors and composers of songs synchronized with the film. This important reservation confirms in fact the status quo in the field of collection by the French Society of Authors, Composers and Publishers (of Music) from cinematographic theatres.

Finally, notwithstanding this presumed assignment of their exploitation rights, the authors of the film retain the benefit of the dispositions of Article 35, which impose on the assignee the remuneration of the author, in proportion to the financial career of the work. The authors of the film must therefore have an interest in the receipts of the film.

To terminate this heading dedicated to the exploitation of the author's economic rights, we will say a word on the "follow-up right" belonging to authors of graphic and plastic works.

#### D. The follow-up right.

Introduced in French legislation by the Law of May 20, 1920, the follow-up right is a right of participation in the proceeds of *resales* of these works "by public auction or through a dealer," designed for the benefit of authors of works of the figurative arts, i.e., exclusively graphic works, designs, paintings, etc., and for the creators of plastic works. This right only applies when the works are *resold*. In the matter of original sale, there is complete freedom of contract between the artist and the merchant or the private collector. The new Law has extended the application of the right to *resales between dealers*, while previous legislation limited it to *sales by public auction*.

For the former progressive rate of 1% to 3%, a unified rate of 3% without deduction of any sort on the gross price has been substituted. The minimum of the sale price, basis for the percentage, has been increased from 50 to 10,000 francs.

This right is inalienable and, in view of its personal character, only passes, at the death of the artist, to his heirs, to the exclusion of all legatees and trustees. The surviving spouse eventually collects the life interest.

#### V. Penalties.

The protective net with which the French legislature has surrounded the intellectual property is without a break, but the efficacy of a right is measured by the penalties resulting from the violation. In this connection, the new French law does not seem to have left anything to be desired. Its Heading IV deals with the procedure and penalties.

In so far as procedure is concerned, it is interesting to note that the law attributes in a general way the competence in matters of author's rights to civil courts. It recognizes for "*regularly-constituted organizations for professional defense*", i.e., Performing Rights Societies, for instance, the right to sue in civil court. (Italics ours.)

As far as the penalties are concerned, the law contains an innovation which unifies the substance of the offense of "*contrefaçon*." While in the preceding system, "*contrefaçon*" applied only to the violation of the reproduction right, the new law assimilates the offense of illicit performance with that of illicit reproduction.

The new Article 425, as well as Article 426 of the Penal Code, defines thusly the infringement:

- A. The illegal publishing of written matter, of musical compositions, drawings, paintings, etc., whatever the place where the infraction took place, in France or abroad.
- B. The sale, export and import of infringing copies.
- C. Any reproduction, *performance*, or dissemination, by whatever method, of an intellectual work in violation of the author's rights."

The penalties applicable to offenders have been reinforced. They have been raised to from 36,000 to 1,200,000 francs. And in the case of habitual offenders, to from 3 months to 2 years imprisonment, and from 80,000 to 2,000,000 francs fine. Finally, *confiscation* of the material or the infringing copies as well as the receipts or parts of the receipts, resulting from unlawful reproductions, performances or distribution, can be pronounced by the competent jurisdiction.

Article 66 of the Law regulates the seizures, which aim to establish the evidence of the offenses, and to prevent the distribution of infringing copies or the continuation of the offence, as well as to allow the tribunal to proceed with the above-mentioned confiscations.

In the matter of illegal reproduction, the plaintiff has the choice between:

1. Calling upon the police commissioner, or where there are no police commissioners, the justice of the peace, in order to seize the infringing copies.
2. Asking the President of the Civil Court to ordain the suspension of the illegal manufacture, the seizure of copies already manufactured, or the seizure of receipts realized by the sale of the infringing copies.

In the manner of illegal performances, the author must have recourse to the assistance of the President of the Civil Court to ordain the seizure of receipts.

Finally, to facilitate the exercise of the proof by the author, the law, in Article 75, stipulates that the agents designated by regularly-constituted professional societies, can note the infractions and administer thus the proof of the infringements.

#### CONCLUSION

One ought not actually write a "conclusion" to the presentation of a Law which has just seen the light of day, and which, like a young ship, is still wet with the champagne of its christening. One must be content to make a few remarks and avoid giving them the appearance of judgments.

The French Law of March 11, 1957 is, in our opinion, characterized by its remarkable homogeneity; however, it does, doubtless, possess its lacunae. It is regrettable, for example, that none of its dispositions regulates the protection of foreign works in France. The Law does not even possess a definition of the "French work" as opposed to the latter.

If it is at all possible to define the "French work" or the protection of foreign works in France, such definition must be found in the terms of the international conventions which France has joined, such as the Brussels Convention or the Universal Convention. The question of knowing if all foreign works receive the benefit of French protection, without condition of reciprocity, also remains without an answer in the Law. The abrogation of the Decree of 28-30 of March, 1852, on which an extremely liberal Jurisprudence was based for the benefit of Russian works, in particular, will perhaps have the effect of reversing a tendency which may have been too generous. But it is not possible to anticipate in this connection.

Certain jurists will probably consider, in other respects, as a lacuna, the absence of any disposition of the Law regarding the so-called "Neighbouring Rights." But influenced in error by the unfortunate example given, amongst others, in the recent British Law, which in many respects assimilates "Neighbouring Rights" with "Author's Rights," they ought not forget that the essential characteristic of these rights called "neighbouring" is precisely to remain neighbours!

To others, in its fidelity to the principles of Revolutionary Law, the new French Law may appear as showing retrograde conservatism.

But let us not make the error of considering as necessarily good all so-called *modern* laws on author's rights, the draftees of which may have, in fact, been primarily impressed with the interests of the Industry.

In an era when legislative assemblies and governments are, alas, most of the time, preoccupied with matters of a different nature, the new French Law constitutes a worthy effort accurately aimed at the efficient protection of intellectual and artistic creations.

## 2. JOINT MEETING OF UNESCO INTERGOVERNMENTAL COPYRIGHT COMMITTEE AND BERNE PERMANENT COMMITTEE AUGUST 18-23 AT GENEVA

By ARPAD BOGSCH\*

The Intergovernmental Copyright Committee and the Permanent Committee of the Berne Copyright Union held their third and seventh sessions, respectively, at the end of August 1958, in Geneva, Switzerland.

The first is an organ established by the 1952 Universal Copyright Convention to study the problems concerning the application and operation of the U.C.C., to make preparation for periodic revision of the U.C.C., and to study other problems concerning the international protection of copyright. The latter was established at the 1948 revision conference of the Berne Union at Brussels in order to prepare further revisions and to study problems concerning the general development of the Berne Union. Each has twelve countries as members.

The Geneva sessions were the first during which the two Committees held joint meetings. In the world of international copyright, the joint sessions are regarded as being of historical significance, as the first major palpable manifestations of effective cooperation between the two systems—the Universal and the Berne—of worldwide scope.

Whereas on several points the Committee did and will continue to work on their own, on others their efforts will be joint in the future: questions concerning the protection of designs, of the so-called neighbouring rights, of news and other press information, and of the publications concerning the law of copyright of the Berne Bureau and of UNESCO.

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Under the name of applied art or designs and models, not less than four international instruments try, today, to regulate the international protection of designs of useful articles. They are: the Universal Copyright Convention, the Berne-Brussels Convention, the Convention of the International (Paris) Union for the Protection of Industrial Property, and The Hague Arrangement concerning the international deposit and registration of designs. The two Committees note that there is a considerable lack of coordination among at least three of these instruments and that better coordination would doubtless result in more effective protection and the elimination of possible gaps and overlaps. In order to explore the possibilities of better coordination, the two Committees, in their Geneva sessions, decided to set up a study group and invited the Paris Union for the Protection of Industrial Property to participate in the work of the study group. There was a widespread belief among the members of the two Committees that the time for a reappraisal of the international situation was particularly well chosen, as in many industrially and artistically important countries—the United States, the United Kingdom, Germany, Italy, the Benelux and the Scandinavian countries, and some others—there is a reform movement on the domestic level. This situation, in which both the national and the international rules are open to discussion, should make it possible that thinking on both the national and the international levels should, to the maximum possible extent, follow the same lines. Effective international protection of designs is, of course, of primary interest to countries which are great exporters of articles having an attractive design. The United States is doubtless one of the greatest of such exporting countries.

In relation to neighboring rights (protection of certain rights of performing artists, phonograph record producers, and broadcasting organizations) the two committees were asked, by the Director General of UNESCO and by the Director of the Bureau of the Berne Copyright Union, to give their advice on a plan devised by the said Directors and the Director General of the International Labor Organization (I.L.O.). According to the plan, no further effort would be made to regulate *in the same* international instrument certain proprietary rights of the performers, recorders and broadcasters, and certain labor relations between performers and their employers. Instead, UNESCO and the Berne Union, in cooperation, would continue to explore the possibilities of concluding an instrument on the proprietary rights; whereas I.L.O. would alone sponsor a possible international action in regard to the labor problems. The UNESCO-Berne action would precede the I.L.O. action. The plan, subject to certain clarification, has been endorsed by the two Committees and will now be submitted for final approval to the General Conference of UNESCO and the Governing Board of I.L.O.

The meetings of the two Committees were attended not only by representatives of eleven member countries (Argentina, Brazil, France, German Federal Republic, India, Italy, Japan, Spain, Switzerland, the United Kingdom, and the United States), but also by delegates from fifteen States not represented on the committee (including eight States which have adhered to the U.C.C.), and non-governmental organizations such as the Confédération internationale des sociétés d'auteurs et compositeurs (CISAC), the International Chamber of Commerce, the International Phonographic Industry, the European Broadcasting Organization, and the International Federation of Musicians. The United States was represented by Mr. Arthur Fisher, Register of Copyrights, who served as chairman of the Intergovernmental Copyright Committee in 1957-58. For the following year, both Committees elected as chairman Mr. Plinio Bolla (Switzerland) and as vice-chairman Mr. William Wallace (United Kingdom). The Copyright Society of the U.S.A. was recognized as observer in both Committees and was represented by its president, Mr. Walter J. Derenberg.

The full text of the resolutions adopted by the Intergovernmental Copyright Committee are reprinted below. The Permanent Committee of the Berne Copyright Union adopted essentially identical resolutions on the questions of neighboring rights, designs, and cooperation.

*Edit. Note:* Cf. also *Appendix*, Library of Congress Information Bulletin, Sept. 29, 1958.

## R E S O L U T I O N S

### RESOLUTION No. 18(III)—NEIGHBOURING RIGHTS(A)

The Intergovernmental Copyright Committee,

*Considering* the comments that various governments made in connection with the procedure to be followed in the field of neighbouring rights in relation to the Monaco and ILO Drafts,

*Considering* the "Summary Record of the meeting between the Director-General of the International Labour Office, the Director-General of Unesco and the Director of the United International Bureaux for the Protection of Industrial and Literary Property" of 9 July 1958,

*Considering* the "Tentative delimitation of the field to be covered by the Unesco-Berne Union international instrument and the international instrument of the ILO" of 23 and 24 July 1958,

*Considering* that the Director-General of Unesco asks for the advice of the Intergovernmental Copyright Committee,

Expresses the opinion that these arrangements may constitute a useful basis for further work, it being understood that the Unesco-Berne Union instrument dealing with rights *erga omnes* (rights of authorization and to equitable remuneration, and protection derived from penal sanctions) be, as is normal, concluded first and within a reasonable time, and it being also understood that paragraph 9 of the "Tentative delimitation" must be interpreted in the light of the paragraphs which precede it, and that *all* the rights *erga omnes* whether or not connected with "secondary uses" should be dealt with in the Unesco-Berne instrument.

**RESOLUTION No. 19(III)—NEIGHBOURING RIGHTS (B)**

The Intergovernmental Copyright Committee  
 Recommends to the Director-General of Unesco

1. That the new Committee of Experts on Neighbouring Rights which he intends to convene in 1959 jointly with the Director of the International Union for the Protection of Literary and Artistic Works, be composed of experts acting in their personal capacity, designated or approved by a certain number of Governments, taking into account an equitable geographical distribution,

2. That representatives of interested non-governmental organizations be invited to the Committee of Experts with full right of participation in the discussions, without the right to vote.

**RESOLUTION No. 20(III)—NEWS AND OTHER PRESS INFORMATION**

The Intergovernmental Copyright Committee,

Considering the reports by Mr. W. Wallace, the Unesco Secretariat, and the Bureau of the International Union for the Protection of Literary and Artistic Works, concerning the protection of news and other press information,

Expresses its thanks for the excellent information contained in these reports,

Considers that there is no reason to provide for a special protection of news and other press information through a new intellectual property right,

Recommends that the Director-General of Unesco transmit Mr. Wallace's report, as approved by the Committee, to the Economic and Social Council of the United Nations.

**RESOLUTION No. 21 (III)—APPLIED ARTS (DESIGNS AND MODELS)**

The Intergovernmental Copyright Committee,

Considering that the Conventions of the International Unions for the Protection of Literary and Artistic Works and of Industrial Property (hereafter referred to as Berne and Paris Unions) and the Universal Copyright Convention deal with the protection of works of applied art, designs and models, and that better co-ordination between the provisions of these Conventions would result in more effective protection in this field and the elimination of possible gaps and overlaps,

Considering that the possibilities of improving the present state of international protection could be most effectively explored by joint studies of the Intergovernmental Copyright Committee, the Permanent Committee of the Berne Union, and the Paris Union,

(a) decides to continue, in co-operation with the Berne Union, the study of the best means of international protection of works of applied art, designs and models,

(b) herewith invites the Paris Union to participate, on a footing of equality, in these studies and in any meetings that will consider them,

(c) requests the Chairman of the Intergovernmental Copyright Committee—in co-operation with the Chairman of the Permanent Committee of the Berne Union and, if the Paris Union accepts the invitation under (b), the competent authorities of that Union—to appoint a study group for preparing a report on the above questions; this study group to be open, in addition to the members nominated as above provided, to representatives of any other country party to one or more of the above conventions;

(d) recommends that, pending the completion of the studies,

(1) the possible revision of those provisions of the Berne and Universal Copyright Conventions which deal with works of applied art, be held in abeyance;

(2) consideration be given to this resolution at the forthcoming Lisbon Conference for the revision of the instruments of the Paris Union.

**RESOLUTION No. 22(III)—APPLICATION OF THE UNIVERSAL COPYRIGHT CONVENTION**

The Intergovernmental Copyright Committee

Invites the Secretariat to take up with Governments of countries parties to the Universal Copyright Convention any cases in which it would seem that the domestic laws of the country in question are not in conformity with that country's obligations under the Convention.

**RESOLUTION No. 23(III)—DOUBLE TAXATION OF AUTHORS' ROYALTIES**

The Intergovernmental Copyright Committee,

Considering the reports submitted by the Secretariat on the question of the double taxation of authors' royalties and the enquiries now in progress by the Secretary-General of the United Nations,

Considering that the primary responsibilities with respect to international fiscal matters rests with the United Nations rather than with this Committee,

Recommends that the Secretariat follow the work of the United Nations and report, from time to time, on the progress made in the field of eliminating or reducing the instances of double taxation of copyright royalties as well as any relevant information on this point which is brought to its attention.

RESOLUTION No. 24(III)—*"DROIT DE SUITE"*

The Intergovernmental Copyright Committee,

Considering that only a limited number of governments have, up to the present time, made known their views on the question of "droit de suite" (Resolution No. 15 [II]B).

Expresses the wish that the Secretariat report to the next session of this Committee any further comments which it may receive.

RESOLUTION No. 25(III)—*PUBLICATIONS*

The Intergovernmental Copyright Committee

Expresses its satisfaction over the continued publication by Unesco, in cooperation with the Board of Trade of the United Kingdom and the Copyright Office of the United States of America, of "Copyright Laws and Treaties of the World,"

Expresses its satisfaction over the progress made with respect to the publication by Unesco, in co-operation with the Mexican and Spanish Governments and the Pan-American Union, of "Repertorio Universal de Legislacion sobre Derecho de Autor."

Expresses the hope that the preparation of the "Recueil des Lois et Traités sur le Droit d'Auteur" by Unesco and the Bureau of the International Union for the Protection of Literary and Artistic Works will commence, and publication will take place, within the shortest possible period of time,

Recommends that the possibility of the publication of the most significant court decisions on copyright and of the laws on works of applied art, designs and models, as well as the most appropriate means of co-ordinating the various publications dealing with copyright law, be examined.

RESOLUTION No. 26(III)—*CO-OPERATION AMONG INTERGOVERNMENTAL ORGANIZATIONS DEALING WITH COPYRIGHT*

The Intergovernmental Copyright Committee,

Having noted the report presented by its Chairman concerning proposals relative to co-operation among intergovernmental organizations dealing with copyright,

Notes with satisfaction the co-operation which has already taken place between the Bureau of the Berne Union and the Secretariat of Unesco on the following points:

1. preparatory work in the preparation of an international instrument in the field of neighbouring rights;
2. joint publication of the "Recueil des lois et traités sur le droit d'auteur";
3. study on the protection of news and other press information;
4. study on the works of applied arts.

Notes that as a result of the resolutions adopted during the third session of the Intergovernmental Copyright Committee, on the one hand, and during the seventh session of the Permanent Committee of the Berne Union on the other, a collaboration between the Intergovernmental Copyright Committee and the Permanent Committee is envisaged,

Is of the opinion that the collaboration which has already taken place as well as that which is envisaged for the future, have already had and will have, happy results for the international protection of copyright, as well as for those questions which may affect copyright,

Expresses the hope that arrangements may be taken in order that the fourth session of the Intergovernmental Copyright Committee and the eighth session of the Permanent Committee of the Berne Union should take place in the same town and about the same time, without, however, the two Committees taking decisions in joint meetings.

RESOLUTION No. 27(III)—*PLACE OF THE FOURTH SESSION*

The Intergovernmental Copyright Committee,

Having noted with thanks the invitation extended by the Government of the German Federal Republic,

Expresses the wish that the necessary arrangements be made to convene its next regular session in the German Federal Republic.

## PART II.

**LEGISLATIVE AND ADMINISTRATIVE  
DEVELOPMENTS**

## 1. UNITED STATES OF AMERICA AND TERRITORIES

## 3. U. S. CONGRESS. SENATE.

S. 4287. A bill to amend the Act of July 27, 1956, relating to detention of mail for temporary periods in certain cases. Introduced by Mr. Monroney, August 13 (legislative day, August 12), 1958, and referred to the Committee on Post Office and Civil Service. Washington, 1958. 2 p. (85th Cong., 2d Sess.)

This bill proposes to amend sec. 2 of the Act of July 27, 1956 to read as follows: "The provisions of this Act shall not apply to mail addressed to publishers of publications which have entry as second-class matter under the Act of March 3, 1879, as amended (ch. 180, 20 Stat. 358; 39 U.S.C. 221, and the following), or to mail addressed to the agents of such publishers." Favorably reported on August 14 (S.Rept. no. 2386) and approved August 27 (P.L. 85-789). See also Items 5 and 6 *infra*.

## 4. U. S. CONGRESS. SENATE.

S. 4317. A bill to extend the copyright provisions of title 17 of the United States Code to musical compositions produced without the use of a conventional system of notations. (Introduced by Mr. Humphrey, August 20, 1958, and referred to the Committee on the Judiciary.) 2 p. (85th Cong., 2d Sess.)

This bill proposes to amend section (1e) by adding the following paragraph: "As used in this title, the term 'musical composition' includes a composition of sounds produced directly upon a magnetic tape, a phonograph disc, or a photographic sound track without the use of a conventional system of notation."

In his remarks to the Senate when he introduced the bill (104 *Cong. Rec.* 17145) Senator Humphrey indicated the need for protecting American composers of electronic music and stated that although he knew that the bill could not be passed so late in the session, he intended to in-

roduce an identical bill next January with the hope that reports from "the appropriate agencies" will be prepared and available to the Committee on the Judiciary.

5. U. S. CONGRESS. SENATE. COMMITTEE ON POST OFFICE AND CIVIL SERVICE.

Strengthening the law prohibiting mailing of obscene matter. Report to accompany S.4287. Submitted by Mr. Johnston and ordered to be printed August 14, 1958. Washington, 1958. 5 p. (85th Cong., 2d Sess., S.Rept. no. 2386.)

The bill (S.4287) to amend the act of July 27, 1956, relating to detention, by postal authorities, of mail for temporary periods in certain cases, and based on an official recommendation of the Post Office Department, is favorably reported without amendment, and recommended for passage. The bill passed the Senate on August 16 and the House on August 18. (Approved by the President on August 27 (P.L. 85-789). See also Items 3 and 6.

6. U. S. LAWS, STATUTES, ETC.

Public Law 85-789, 85th Congress, S.4287, August 27, 1958. An Act to amend the Act of July 27, 1956, relating to detention of mail for temporary periods in certain cases. Washington, G.P.O., 1958. 1 p. (72 Stat. 940; 39 U.S.C. 259 c.)

This law is designed to prevent the use of the United States mails for the dissemination of obscene matter. The previous law had exempted mail addressed to publishers or distributors of publications with entry as second-class matter and copyrighted matter. Under the new law, the only exemption retained is that for mail addressed to publishers of publications with entry as second-class matter or for mail addressed to agents of such publishers. See also Items 3 and 5.

7. U. S. LAWS, STATUTES, ETC.

Public Law 85-866, 85th Congress, H.R. 8381, September 2, 1958. An Act to amend the Internal Revenue Code of 1954 to correct unintended benefits and hardships and to make technical amendments, and for other purposes. Washington, 1958. 80 p. (72 Stat. 1606.)

The provisions of H.R. 4952, introduced by Mr. Simpson on Feb. 8, 1957, during the first session of the 85th Congress, are embodied in section 103 (Foreign tax credit for United Kingdom income tax paid with respect to royalties, etc.) of this new Act. See 4 BULL. CR. SOC. 132, Item 312 (1957) and 5 BULL. CR. SOC. 17, Item 11 (1957).

## 8. U. S. LAWS, STATUTES, ETC.

Public Law 85-905, 85th Congress, H.R. 13678, September 2, 1958. An Act to provide in the Department of Health, Education, and Welfare for a loan service of captioned films for the deaf. Washington, GPO, 1958. 1 p. (72 Stat. 1742.)

H.R. 13678, the bill which led to this law, was introduced by Congressman McGovern on August 5, 1958, and passed the House on August 15. S. 1889, a companion bill which passed the Senate on August 23, 1957, is identical with H.R. 13678 except that the former contains an additional section which establishes in the Department of Health, Education, and Welfare a paid Advisory Council on Captioned Films. The law charges the Secretary of Health, Education, and Welfare with the responsibility of carrying out the objectives of the loan service through the acquisition by purchase, lease or gift and the captioning and distribution for nonprofit performance, for the benefit of the deaf, of motion picture film including film made available to the Library of Congress under the copyright laws.

## 2. FOREIGN NATIONS

## 9. GREAT BRITAIN. BOARD OF TRADE.

Réglement d'application de la loi sur le droit d'auteur concernant l'avis de publication. (N<sup>o</sup> 865, du 17 mai 1957). *Le Droit d'Auteur*, vol. 71, no. 8 (Aug. 1958), pp. 124-125.

French translation of "The Copyright (Notice of Publication) Regulations, 1957." See 5 BULL. CR. SOC. 19, Item 16 (1957).

## 10. GREAT BRITAIN. BOARD OF TRADE.

Réglement d'application de la loi sur le droit d'auteur concernant le système des redevances relatives aux phonogrammes. (N<sup>o</sup> 866, du 17 mai 1957). *Le Droit d'Auteur*, vol. 71, no. 7 (July 1958), pp. 101-103.

French translation of the regulations with respect to the application of the compulsory license provisions of the U.K. Copyright Act of 1956. See 5 BULL. CR. SOC. 19, Item 17 (1957).

## 11. GREAT BRITAIN. LAWS, STATUTES, ETC.

Dramatic and Musical Performers' Protection Act, 1958. 6 & 7 Eliz. 2, ch. 44. London, H.M. Stationery Off., 1958. 3, 1 p.

This Act, which was enacted July 23, 1958, and provides for its coming into operation at the expiration of one month beginning with the

date of its enactment, consolidates the Dramatic and Musical Performers' Protection Act, 1925, and the provisions of the Copyright Act, 1956, amending it. Under its terms, performers, while not given any property rights in the performance of works, are given summary remedies to prevent the unauthorized making of records, films, or broadcasts of their performances.

12. GREAT BRITAIN. PRIVY COUNCIL.

The Copyright (International Conventions) (Amendment) Order, 1958. London, H.M. Stationery Off., 1958. 2 p. (Statutory instruments, 1958, no. 1254: copyright.)

By this recent amendatory Order-in-Council, effective August 11, 1958, Great Britain has extended protection of all works under the Universal Copyright Convention to the same term as that enjoyed by British citizens, (generally, life of the author plus 50 years) with the proviso that works in the public domain are not to come back into copyright as a result of the order. Prior to the issuance of this order, the works of United States nationals were protected under the U.C.C. in Great Britain for a term of only 28 years.

The reason for this modification is stated in the Order to be that it is "expedient that the term of copyright in a work or other subject-matter in which copyright subsists by virtue of the Principal Order (*i.e.*, the Copyright (International Conventions) Order, 1957, which the instant Order amends), should be the same as that enjoyed under the Act in respect of a British work or subject-matter of the same class."

The recent Order also includes the Republic of Ireland in the list of countries in which copyright in sound recordings is to include the exclusive right to perform in public and to broadcast.

Inasmuch as India ratified the U.C.C. subsequent to the issuance of the 1957 Principal Order, the present Order recognizes this fact by including that country in the list of parties to the Universal Copyright Convention. See 5 BULL. CR. SOC. 86, Item 113 (1957).

13. IRELAND (EIRE). PARLIAMENT.

Industrial and Commercial Property (Protection) (Amendment) Bill, 1958, as passed by both houses of the Oireachtas, 16th July 1958. Dublin, Stationery Off., 1958. 3, 1 p.

This Act, which will come into force on a day to be appointed by a Ministerial Order, was introduced for the purpose of bringing the Irish copyright law, as regards translation rights, into line with Irish obliga-

tions under the Berne Copyright Convention. Under its terms, a provision in the Irish law for the compulsory translation of works into Irish under certain conditions, which has been in effect since 1927, is removed.

14. IRELAND (EIRE). PARLIAMENT. SENATE.

Industrial and Commercial Property Protection (Amendment) Bill, 1958; second and subsequent stages. *Parliamentary Debates*, vol. 49, no. 9 (July 16, 1958), columns 892-900.

The debates in the Senate on the second and subsequent stages of the Bill, during which reference was made by Mr. S. Lemass, Minister for Industry and Commerce, to proposals for a general overhaul and modernization of the Irish copyright law. See Item 13, *supra*.

PART III.

CONVENTIONS, TREATIES AND  
PROCLAMATIONS

15. INTERGOVERNMENTAL COPYRIGHT COMMITTEE.

Resolutions, third session, Geneva, August 1958, Geneva, Aug. 25, 1958. 5 p. (IGC/III/26.)

The following topics are covered: neighbouring rights, news and other press information, applied arts (designs and models), application of the Universal Copyright Convention, double taxation of authors' royalties, "droit de suite," publications, co-operation among intergovernmental bodies dealing with copyright, and place of the fourth session. See Item 2, *supra*.

16. INTERGOVERNMENTAL COPYRIGHT COMMITTEE.

Summary records of the second session, Washington, D. C., 7-11 October, 1957. *UNESCO Copyright Bulletin*, vol. 11, no. 1 (1958), pp. 5-32.

Also in French and Spanish. The *Records* (Report, Advisory Opinion no. 1, Resolutions, List of participants) of the second session were published in *UNESCO Copyright Bulletin*, vol. 10, no. 2 (1957). See 5 BULL. CR. SOC. 228, Item 281 (1958).

## 17. INTERNATIONAL COPYRIGHT UNION.

Recueil des réponses des Gouvernements à la consultation sur les projets de Convention internationale concernant les droits voisins. Berne, Bureau international pour la protection des oeuvres littéraires et artistiques, 1958. 165 p.

French and English texts of communications received from forty-one countries by Mr. Secretan, director of the United International Bureaux, in response to a circular letter accompanied by texts of the I.L.O. and Monaco drafts, sent to various countries of the world soliciting the views and suggestions of their Governments on the drafts.

## 18. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION. COPYRIGHT SECTION.

Universal Copyright Convention: state of ratifications and accessions as at 15 May 1958. *UNESCO Copyright Bulletin*, vol. 11, no. 1 (1958), pp. 3-4. Also in *French and Spanish*.

## PART IV

## JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY

### A. DECISIONS OF U. S. COURTS

#### 1. Federal Court Decisions

19. *Inter-City Press, Inc. v. Siegfried, d.b.a. The Pictorial Shopper et al.*, 118 U.S.P.Q. 446 (D.C.W.D.Mo., July 22, 1958).

Action for permanent injunction, damages and accounting based on copyright infringements. Plaintiff was the owner or lessor of several newspapers in Jackson County, Mo., and defendant published two papers in the same county. Plaintiff alleged that a news item, a cartoon and several advertisements published in its copyrighted newspapers were copied by defendant.

*Held*, for plaintiff as to the news item and cartoon, but for defendant as to the advertisements.

Defendant first contended that plaintiff's copyright notice on its newspapers was too small; the Court found that "it is true that the notice is of a slightly smaller type than the rest of the newsprint, yet it is quite legible to the eye. The Court is not obligated to look beyond the face of the notice to determine its sufficiency, and in this instance, the notice given was sufficient to reasonably inform an intelligent person that the newspaper was copyrighted."

The news item recited certain information regarding a proposed county bond election, and alluded to various statements of an "Emergency Bond Committee." Defendant published five days later a copy of this article, verbatim except for its final paragraph, but claimed it was a news release issued by the bond committee and that plaintiff failed adequately to show originality and ownership. But the Court found the burden of proof was on the defendant, and he merely testified he believed there had been such a press release.

The cartoon was copied in full. Defendant's paper acknowledged authorship of the cartoon, but this did not "exculpate defendant of the infringement when it was done without the plaintiff's consent."

Plaintiff's principal complaint was that it had set up ads and run them in its papers, using the "letter press" process, and that defendant copied the ads, using the less expensive "off-set" process, thus being able to charge his advertisers less. But the Court found that if the copyrights were not infringed, plaintiff could not complain of the method of defendant's copying. The Court then reviewed the various ads copied by defendant and found that they were not copyrightable. The cuts, or matrices, prices and other information were furnished by the advertiser, and the advertiser and advertising salesman cooperated in preparing the ads. "The advertiser certainly retains the property rights in such ads, and may cause them to be run and re-run as he desires."

As to the cartoon and news article, the Court assessed the minimum \$1 award for each of the 4,000 (2,000 each) copies published, since it was unable to find any actual damage in excess thereof.

20. *Harms, Inc. et al. v. F. W. Woolworth Co., et al.; M. Witmark & Sons et al. v. May Co. et al.*, 163 F.Supp. 484, 118 U.S.P.Q. 436 (D.C.S.D. Calif., July 16, 1958).

Actions for copyright infringements. Defendants moved for dismissal of the complaint, to have the claims stated separately, to have the claims stated more definitely and to strike certain portions of the complaint. Plaintiffs moved for partial summary judgment.

*Held*, partial summary judgment granted to plaintiffs under Rule 56(a) and (c), as to liability only; all other motions denied.

The complaints, being in the usual form, sufficiently apprised defendants of plaintiffs' claims; and being "seller defendants," they were in a better position than plaintiff to know more precisely what, if any, of the musical compositions they had sold.

As to the issue of liability, the Court adhered to its position stated in *Harms, Inc. v. Tops Music Enterprises*, 160 F.Supp. 77, 5 BULL. CR. SOC. 306, Item 386 (1958).

The court also was of the view that *Shapiro, Bernstein & Co. v. Goody*, 248 F.2d 260, 5 BULL. CR. SOC. 21, Item 22 (1957) "correctly expresses the law that persons who sell and distribute records of pirated songs are liable in an independent action under the Copyright Law." This decision, in contrast to the differing lower Court holding, "has, at least, the implicit approval of the Supreme Court which . . . denied certiorari."

Defendant's argument that by allowing suit to be brought against manufacturers the copyright owners may be allowed to recover more than the minimum royalty under 17 U.S.C. §101(b), or even more than the profit made by the dealers, was answered by the U.S. Supreme Court in *F. W. Woolworth Co. v. Contemporary Arts*, 344 U.S. 228(1952).

21. *Gorham, d.b.a. Nestor Records v. Edwards et al.*, 118 U.S.P.Q. 532 (D.C.S.D.N.Y., Aug. 29, 1958).

Plaintiff asked for a declaration that he was the owner of the copyright, a direction to the Register of Copyrights to indicate this on his records, an injunction, accounting, and damages computed pursuant to the copyright laws. Plaintiff's amended complaint, served after the original complaint had been dismissed (160 F.Supp. 928, April 11, 1958), alleged that one of the defendants, a member of a vocal group, wrote the song "Get a Job"; that in consideration of plaintiff's promise to record the song, the song was sold to plaintiff, including the right to copyright it; that plaintiff and the quartet made a contract covering their services as singers; that plaintiff recorded the song but it was copyrighted, re-recorded and published by other defendants who have issued licenses, etc.

*Held*, amended complaint dismissed.

The fact that five of the defendants were citizens of Pennsylvania, as was plaintiff, defeated diversity jurisdiction. Also, the Court does not have jurisdiction over cases in which copyrights are "involved," or over controversies about copyrighted material, but only where the case is one arising under any Act of Congress relating to copyrights. "The issue presented

by this suit is one of title to the copyright. Resolution of this question depends on the rules of the common law, and the interpretation of plaintiff's contract, and not on any statute of the United States."

Plaintiff further suggested that he be considered the equitable owner of the copyright and the particular defendant a trustee ex malificio. But plaintiff was not the author, and the copyright was not secured on his behalf; nor did plaintiff allege that the contract assigned to him rights in copyrighted material. "To extend the equitable ownership doctrine to this case would, through the device of a legal fiction, vest the federal courts with jurisdiction to determine title to a copyright, where that question depends on the interpretation of a contract."

22. *Stern et al. v. United States*, 118 U.S.P.Q. 474 (D.C.E.D. La., New OrL. Div., Aug. 11, 1958).

Action for overpayment of tax. Plaintiff, a newspaper publisher, wrote stories, two novels and screenplays involving Francis, the talking mule. In 1950 he transferred all of his "right, title and interest . . . in and to . . . that certain character known as 'Francis,' conceived and created by him," together with all his rights in the two novels, etc. to Universal for \$50,000 plus 5% of the profits, etc., as well as future fixed compensation; if Universal failed to pay the latter, all rights were to revert to plaintiff. He reported the amounts received from Universal as capital gain, but the Treasury Department treated it as ordinary income. Plaintiff paid the additional tax and sued for refund, for the years 1950 to 1953.

*Held*, for the United States, except for the year 1950.

The Government's position was first that the transfer to Universal was not a sale, and thus in no case subject to capital gains, because it provided for contingent payments of indeterminate sums similar to royalties, and because the property could have reverted to plaintiff. "But the tax cases interpreting Section 117 [of the 1939 Code] have so long and so consistently held such contracts to be sales that the Internal Revenue Service itself in a recent ruling is now indicating its acquiescence in this classification."

The Government's next contention was that even if a sale, the income therefrom was not entitled to capital gains treatment since it was from property held primarily for sale to customers in the ordinary course of trade or business [Sec. 117(a)(1)(A) of the 1939 Code]. But before coming into this classification, a business must be "an occupational undertaking which required the habitual devotion of time, attention and effort with substantial regularity," and plaintiff wrote only as a hobby.

But the Government prevailed, as to the years subsequent to 1950, because of the 1950 amendment to the 1939 Code (applicable to years subsequent to 1950 only), excluding from capital gains income from the sale of "a copyright, a literary, musical or artistic composition; or similar property" held by "a taxpayer, whose personal efforts created such property." Plaintiff argued that "Francis" is not covered by this amendment because it is an "intellectual creation," not subject to copyright. But the Court found it to be a literary composition. "The character Francis gets its definition and its delineation from the book . . . It would be absurd to attribute to Congress the intention, under the 1950 amendment, of covering whole literary compositions but not parts thereof, particularly in view of the catch-all, 'or similar property,' which appears at the end of the amendment."

23. *McIntyre v. Double-A Music Corp., et al.*, 119 U.S.P.Q. 106 (D.C.S.D. Calif. Gen. Div. Sept. 30, 1958), courtesy of William Klein II, member of the firm, Hays, St. John, Abramson & Heilbron.

Action based on common law copyright and unfair competition under California law and the Lanham Act, for an injunction, accounting and exemplary damages. Defendants were the owners of the renewal copyright to the song "Tonight You Belong To Me," which had been commercially moribund when in 1956 plaintiff made an arrangement of it. Without copyrighting it, he recorded it privately and sold the master record and recording rights to Liberty, which obtained a compulsory recording license from the defendants. Half a million records were sold; and defendants, without plaintiff's permission and without giving him credit, issued a revised edition of the sheet music using plaintiff's arrangement and copyrighting it as their own.

*Held*, for defendants.

Unlimited distribution of the record to the general public was, in the Court's view, "a general publication of plaintiff's arrangement under the common law." Neither had plaintiff a cause of action for unfair competition, since in view of the general publication "he had no protectible property right which the defendants appropriated."

In any case, plaintiff's composition was insufficient for either a common law or statutory copyright. His own contribution, an introduction, a repetition of the same in the breaks, several bars of harmony and an ending, involved only "the addition of certain inconsequential melodic and harmonic embellishments such as are frequently improvised by any competent musician." They were de minimis and did not qualify for copyright protection. Neither were defendants estopped from denying the sub-

stantiality of plaintiff's contribution by having registered a copyright on his arrangement. "A certificate of registration is only prima facie evidence of the facts therein stated, . . . and such facts may be controverted by the defendants as well as the plaintiff." Nor was there detrimental reliance. Also, plaintiff was not entitled to credit, in view of his de minimis contribution and of the industry custom that on regular copies of sheet music, as opposed to instrumental arrangements, the arranger is generally not credited.

- 23a. *Beardsley et al. v. Continental Casualty Co., et al.*, 253 F.2d 702 (7th Cir. 1958), 5 BULL. CR. SOC. 285, *certiorari denied* Oct. 13, 1958.
- 23b. *DuBoyes, Inc., et al. v. Boucher et al.*, 253 F.2d 948 (2d Cir. 1958), 5 BULL. CR. SOC. 381, *certiorari denied* June 30, 1958.

## PART V

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25. BOGSCH, ARPAD. *Universal Copyright Convention; an analysis and commentary*. New York, R. R. Bowker Co. in co-operation with the Copyright Society of the U.S.A., 1958. 279 p.

An article-by-article commentary on the text of the Convention. The appendices include the authoritative texts of the Convention in English,

French and Spanish, and other documents of the Geneva Conference and of the Intergovernmental Copyright Committee which was established by Article XI of the Convention.

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The tenth in a series of studies issued by the Copyright Office to interested persons with invitations to submit statements of their views.

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(c) In Spanish

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"The purpose of this article is to trace the history of the disputed papers and thereby to lend perspective and clarity to the legal elements of the case." [First Trust Co. of St. Paul *v.* Minnesota Historical Society, 146 F.Supp. 652 (D. Minn. 1956), *aff'd sub nom.* U. S. *v.* First Trust Co. of St. Paul, 251 F.2d 686 (8th Cir. 1958)].

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"The article examines . . . [the copyright] clause of the Constitution as to its background, textual meaning, and interpretation by the courts, and arrives at the conclusion that the objective of the Willis Bill [see 5 BULL. CR. SOC. 16, Item 7 (1957)] is within the legislative power of Congress as granted by the copyright clause of the Constitution."

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A brief summary of the various steps that led to the Convention.

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A review of a comparative study, by Walter Bappert and Egon Wagner, of translation rights under the Bern and Universal Copyright Conventions, which appeared in the February and March, 1958 issues of *Le Droit d'Auteur*, with additional comments, by the reviewer, of interest to Dutch readers.

## NEWS BRIEFS

## 69. STATUTE OF LIMITATIONS NOW IN EFFECT.

In keeping with its practice of furnishing information concerning important copyright developments to attorneys and others interested in copyright matters, the Copyright Office has called attention to the fact that Public Law 85-313 (71 Stat. 633) took effect on September 7, 1958. This Act, to amend title 17 of the United States Code to provide for a statute of limitations with respect to civil actions, was approved September 7, 1957, to take effect one year after the date of enactment.

## 70. BUREAU OF CUSTOMS RAISES FEES FOR RECORDATION OF COPYRIGHTS.

The Bureau of Customs, Treasury Department, has announced in the *Federal Register*, October 18, 1958, that, effective 30 days after the date of publication, the fees for recordation of copyrights with the Treasury Department will be increased from \$25 to \$75. This action, which was announced in the *Federal Register* on August 8, 1958 (23 F.R. 6032) as the result of a review of the cost of recording trademarks, trade names and copyrights with the Department, which indicated that the present fee is not adequate to recover the cost of providing this service, is taken "after due consideration of the data, views, and arguments submitted." Section 24.12(a)(1)(i) is amended by deleting the semicolon and the word "or" after the word "copyright" and inserting in lieu thereof ", \$75;". The announcement by Acting Commissioner D. B. Strubinger adds that these amendments are not retroactive and shall be effective only on applications received on or after the effective date thereof (November 18, 1958).





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WORKS MADE FOR HIRE AND ON COMMISSION by Borge Varmer, Attorney-Advisor, Copyright Office, and THE ECONOMIC ASPECTS OF THE COMPULSORY LICENSE IN THE COPYRIGHT LAW, by W. M. Blaisdell, Economist, Copyright Office, are the eleventh and twelfth in a numbered series of studies prepared by the Copyright Office, under a Congressional authorization, looking toward a general revision of the Copyright Law (Title 17, U.S.C.). These studies are now ready for distribution.

General Revision Study No. 12 supplements Study No. 1 "The Compulsory License Provisions of the United States Copyright Law" by Professor Harry G. Henn.

Copies of the studies, to which are attached the comments and views of the consultants, may be secured by sending a request addressed to R. G. Plumb, Head, Information and Publications Section, Copyright Office, Washington 25, D. C.

Persons and groups concerned with these problems are invited to submit their comments to the Copyright Office.

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## PART I.

## ARTICLES

71. PARODY AND BURLESQUE OF COPYRIGHTED WORKS  
AS INFRINGEMENT

By HERMAN F. SELVIN\*

Parody or burlesque—the terms were used interchangeably in the recent "Gaslight" litigation<sup>1</sup> which, I assume, furnished the inspiration for inclusion of the subject in this symposium—is an art of ancient ancestry. Yet it was not until that litigation that any serious judicial investigation into the subject had been made.<sup>2</sup> It is the unfortunate consequence of the litigation that those aligned on the side of the copyright proprietor—client and counsel alike—have been pictured in such eminent law reviews as the *New York Times*, the *Manchester Guardian* and the *Saturday Review* as being against laughter. It is perhaps too late now to deny that canard—but deny it I do. We were not against laughter—at least so long as the laugh was not at our expense.

What we were against was the unauthorized appropriation of copyrighted material to an extent which, in any form of reproduction other than parody, concededly would have been an infringement. We were buttressed in that position, not irrationally we thought, by the belief that if on any given night 25,000,000 people, in preference to being at a theatre to see a good MGM movie,

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\*Address delivered by Herman F. Selvin, of the law firm of Loeb and Loeb, Los Angeles, before the Section of Patent, Trademark and Copyright Law of the American Bar Association, at Los Angeles, August 23, 1958. We are indebted to the author for permission to reprint the article, which has also appeared in *New York Law Journal*, Oct. 22-23, 1958.

1. *Loew's, Inc. v. Columbia Broadcasting System*, S. D. Cal. 131 F. Supp. 165 (1955) affirmed sub. nom. *Benny v. Loew's, Inc.*, 9 Cir., 239 F. 2d 532 (1956) affirmed by evenly divided court sub. nom. *Columbia Broadcasting System v. Loew's, Inc.*, 356 U. S. 43 (1958). See, also, *Columbia Pictures Corp. v. National Broadcasting Co.*, S.D.Cal., 137 F. Supp. 348 (1955).
2. What can only be called superficial approaches to the problem were made in *Hill v. Whalen & Martell* S.D.N.Y., 220 Fed. 359 (1914); *Green v. Luby*, C.C.N.Y., 177 Fed. 287 (1909); *Green v. Minzenheimer*, C.C.N.Y., 177 Fed. 286 (1909); *Bloom v. Hamlin & Nixon*, C.C. Pa., 125 Fed. 977 (1903); *Glyn v. Weston Feature Film Co.*, [1916] 1 Ch. 261. And see, *Copinger & Skone James, Law of Copyright* (8th ed. 1948) 129, 131-132; *Clarke, Copyright & Industrial Design* (1951), 63, 83; 8 *Halsbury's Laws of England* (3rd ed. Lord Simonds, 1954), 433, §786, n.(d); *Weil, American Copyright Law* (1917) 430, 432, §§1134, 1142.

were to stay at home to watch Jack Benny over CBS television advertise Lucky Strikes, they should at least be kept at home by Benny's material not MGM's. When District Judge Carter, later affirmed by the Court of Appeals for the Ninth Circuit, held that a substantial appropriation would be an infringement even when made for purposes of parody, that holding should not have come as a shock to those who know that the right secured to authors by copyright is, and under the Constitution must be, exclusive. Yet it did come as a shock, not alone to a number of those interested in literature and the other creative arts, but as well to some lawyers. So, too, the subsequent affirmance by an evenly divided Supreme Court would indicate that it was a holding which, for reasons not specified, did not commend itself to four justices of that Court.

I start, therefore, with the concession, difficult for an advocate to make, that there may be, indeed that there is, room for reasonable differences of opinion over what the law in this regard should be. So I set for myself the task of exploring the bases of that disagreement, attempting, in the process, to identify the competing considerations of policy which lie at the bottom of the dispute.

We all know, of course, what in a general sense is meant by infringement. It is the unauthorized copying of copyrighted material to a substantial extent.<sup>3</sup> No doubt the purpose for which the appropriation is made, the nature of the medium into which the appropriated material is copied, may be considered as one of the criteria by which substantiality is determined. Yet no one, I suppose, would quarrel with the proposition that, except to this limited extent, the fact of copying is not made privileged by the medium in which the appropriated material is reproduced. Notwithstanding, for example, that the art of the dramatist is at least as old as that of the novelist and as important to the culture of a literate people as parody, he would be a hardy soul today who argued that unauthorized transformation of a copyrighted novel into a drama would not be an infringement.<sup>4</sup> So, too, it would be futile, I think, to argue that an abridgement, a condensation, or a foreign language translation would not infringe, notwithstanding that these examples of what might be called the parasitic or derivative arts cannot live without the use of a pre-existing original.<sup>5</sup>

3. *Universal Pictures Co. v. Harold Lloyd Corp.*, 9 Cir., 162 F. 2d 354 (1947); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 2 Cir., 106 F. 2d 45 (1939), affirmed 309 U. S. 390; *Ansehl v. Puritan Phar. Co.*, 8 Cir., 61 F. 2d 131, cert. den. 287 U. S. 666; *Chatterton v. Cave*, 3 App. Cas. 483 (Eng. H. of L. 1878); *Bohn v. Bogue*, 7 L.T. (O.S.) 277 (1846).
4. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 2 Cir., 81 F. 2d 49 (1936), cert. den. 298 U. S. 669; *Dam v. Kirk La Shelle Co.*, 2 Cir., 175 Fed. 902.
5. 17 U.S.C.A., §1. *Lawrence v. Dana*, C.C.Mass., 15 Fed. Cas. (#8136) 26, 59-60 (1869); *Reed v. Holliday*, W. D. Pa., 19 Fed. 325 (1884); *Nutt v. National Institute*, 2 Cir., 31 F. 2d 236, 238 (1929); *King Features Syndicate v. Fleischer*,

What then, is the argument for the idea that parody should be an exception, so that substantial copying for that purpose would not infringe? It is this. Parody is an ancient art. From necessity a parody must be patterned upon a earlier work. It must take enough of that earlier work to fashion a recognizable tie between the two, so that there will be a point to its humor and to its criticism of the original. Humor in and of itself is good for man; and criticism is essential to learning and culture. Copyright, under the Constitution, is granted to advance the progress of science and the useful arts. That great constitutional objective cannot be burked by notions of exclusive right so strict as to force parody out of existence. The emphasis in this reasoning is upon the social aim of copyright—the advancement of science and the useful arts.

The emphasis, of course, is not misplaced—but like most emphasis it distorts. For there is more to copyright than the purpose of disseminating learning. There is also the method by which that purpose is to be achieved—what the U. S. Supreme Court has called the “economic philosophy behind the clause—the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors . . .”<sup>6</sup> Indeed, the concept of copyright as we know it is itself a practical method of reconciling these two competing desires—free availability of learning on the one hand; encouragement of individual effort by opportunity for personal gain on the other. It is the expression of the method by which to attain the purpose of spreading knowledge—a method by which economic gain is made the incentive for exercise of creative ability and dissemination of its product.

The argument for parody as an exception is really an argument against copyright. The notion of exclusive right, at least for limited times, is implicit in the very concept of copyright. Without it copyright is an ineffective instrument with which to accomplish its social purpose.

It is, of course, desirable that the ideas and discoveries of the ingenious and the learned should be available for the use and instruction of all. But it is also desirable that the laborer in the vineyard should be able to reap the fruits of his toil—not alone that he may be compensated for his work, but that he may have an incentive to do the work. To accomplish the first of these desires no restriction on copying or use by others should be permitted. To supply the

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2 Cir., 299 Fed. 533, 535-536 (1924). Even when unauthorized abridgements were permissible, some intellectual labor and judgment had to be expended. They had to be bona fide condensations, not merely a copy of a series of extracts from the original. [*Folsom v. Marsh*, C.C.Mass., 9 Fed.Cas. (#4901) 342 (1841); *Macmillan Co. v. King*, D.C.Mass., 223 Fed. 862 (1914); *Story v. Holcombe*, C.C.Ch., 23 Fed.Cas. (#13497) 171 (1847).]

6. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

incentive, some restriction is necessary if the author is to be able to exploit his work commercially.

To be sure, many create simply for the joy of creation; for them, perhaps, a commercial incentive is not necessary. Even to them, however, this comment, made in 1769 by Justice Willes in *Millar v. Taylor*,<sup>7</sup> is applicable:

"It is wise in any state, to encourage letters, and the painful researches of learned men. The easiest and most equal way of doing it, is, by securing to them the property of their own works . . .

"A writer's fame will not be the less, that he has bread, without being under the necessity of prostituting his pen to flattery or party to get it.

"He who engages in a laborious work (such, for instance, as Johnson's Dictionary,) which may employ his whole life, will do it with more spirit, if, besides his own glory, he thinks it may be a provision for his family."

But, whatever the author's incentive, if his work is to achieve any substantial dissemination—itsself a *sine qua non* if science and the useful arts are to be advanced—some thought must be given to the publisher or producer who, it is to be supposed, has a payroll to meet.

This conflict of desires was seen and faced in the very beginning of English copyright law. In *Sayre v. Moore*,<sup>8</sup> decided in 1875, Lord Mansfield said:

". . . we must take care to guard against two extremes equally prejudicial; the one that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labor; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded . . ."

And it is not without significance or interest that the first copyright statutes in America—those of the original colonies—owed their enactment in considerable measure to the lobbying of Noah Webster who wanted an exclusive right to his spelling book.<sup>9</sup>

The Founding Fathers were fully aware of the economic philosophy which lies behind copyright. Mr. Justice Story—no doubt familiar with the contemporary colonial scene—has said that the copyright power vested in Congress by the Constitution was beneficial to all parties—especially so:

". . . to the public, as it would promote the progress of science and the useful arts, and admit the people at large, after a short interval,

7. 4 Burr. 2303, 2335, 98 Eng. Rep. 201, 218 (1769).

8. 1 East. 361 n., 39 Eng. Rep. 139 n.

9. House Report No. 2222, 60th Cong., 2d Sess., 2.

to the full possession and enjoyment of all writings and inventions without restraint. In short" he went on, "the only boon which could be offered to inventors to disclose the secret of their discoveries, would be the exclusive right and profit of them as a monopoly, for a limited period. And authors would have little inducement to prepare elaborate works for the public, if their publication was to be at large expense, and, as soon as they were published there would be an unlimited right of depredation and piracy of their copyright . . ."10

Article I, section 8 of the Constitution reflects that point of view. The section began really with the enactment on January 8, 1873 in Connecticut of the first copyright statute on this continent.<sup>11</sup> That Act did not leave either its purpose or the method by which the purpose was to be accomplished to conjecture. It recited, in a preamble, that:

" . . . it is perfectly agreeable to the principles of natural equity and justice, that every author should be secured in receiving the profits that may arise from the sale of his works, and such security may encourage men of learning and genius to publish their writings . . ."

Within a couple of months of the enactment of that statute the Continental Congress appointed a committee, of which James Madison was a member, "to consider the most proper means of cherishing genius and useful arts throughout the United States by securing to the authors or publishers of new books their property in such works."<sup>12</sup> Note, again, the coupling of the object in view with the method by which it is to be attained.

That Committee recommended and the Continental Congress adopted a resolution requesting all of the states to enact laws securing authors in the right to their works. The expressed reason for this action was that:

"nothing is more properly a man's own than the fruit of his study, and that the protection and security of literary property would greatly tend to encourage genius, to promote useful discoveries and to the general extension of arts and commerce . . ."<sup>13</sup>

All but one of the states responded by adopting copyright statutes similar to Connecticut's and with a recitation of underlying policy conforming to the Committee's statement of reasons.<sup>14</sup>

Madison—whose concurrence in this philosophy of copyright cannot be doubted—together with Charles Pinckney, presented to the Constitutional Con-

10. 2 Story, *Commentaries on the Constitution of the United States* (5th ed.) 84, §1152.

11. *Copyright Laws 1783-1952* (Cop.Off. 1953) 1.

12. 24 *Journals of the Continental Congress* (Gov. Print. Off.) 180, 211, 326.

13. *Op. cit.*, supra, n. 12.

14. *Copyright Laws 1783-1952* (Cop.Off.), 4-21.

vention the proposal for a power in Congress "to secure to literary authors their copyright for a limited time, to encourage by premiums and provisions, the advancement of useful knowledge and discoveries."<sup>15</sup> The result was section 8 of Article I—and it may be helpful to recall its exact wording:

"The Congress shall have power . . . To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

So once again we see the expression of purpose and the delineation of a precise method—the only method specified, it is well to note—by which that purpose is to be achieved.

The purpose can take no priority over the method—especially as the Congress has only such powers as are conferred upon it. It has not been left to the Congress to advance the purpose by securing a non-exclusive right—a right which does not exclude others from freely appropriating that which one has created—even if to permit such an appropriation would, in some particular case, more immediately advance the progress of the arts. That advancement was to be achieved through the encouragement of men of genius and learning to create and to publish new works by securing to them an "exclusive right to their respective writings . . ." By thus encouraging publication the spread of knowledge was to be furthered. And by limiting the period of exclusivity, the opportunity was afforded for an even wider diffusion of knowledge, for on the expiration of the limited time the theretofore exclusive right would become the common property of all.

Courts, responding to felt needs and reasoning for the most part from unarticulated premises, have carried the composition between these competing desires a step or two farther. Not all that goes into a copyrighted work, they have said, becomes the author's exclusive property, even for the limited term of his copyright. His ideas and intellectual conceptions, in short, the teachings of his work, are from the beginning available to and for all. It is only his expression of those teachings which may not be copied.<sup>16</sup>

Well, then, the argument goes, why should they not do as much for parody? The short answer is: they have. In telling the parodist that he may not take more from a copyrighted work than may his fellow craftsmen of the literary and dramatic arts, they have not told him he cannot take as much. In denying the

15. Warren, *The Making of the Constitution* (1928) 625, n. 1; 5 Eliot, *Debates on the Federal Constitution*, 439-440.

16. *Holmes v. Hurst*, 174 U. S. 82 (1899); *Baker v. Selden*, 101 U. S. 99 (1879); *Dellar v. Goldwyn*, 2 Circ., 150 F. 2d 612 (1945); *Fendler v. Morosco*, 253 N.Y. 281, 171 N. E. 56 (1930); *Burtis v. Universal Pictures Corp.*, 40 Cal. 2d 823, 256 P. 2d 933 (1953).

parodist a preferred position they have not relegated him to a subordinate seat. All still sit together in first row center.

But, it is encountered, parody must take more if it is to be parody. That, I suggest, takes us out of the field of law into the field of literary and dramatic construction. But if one, who in respect of the art of parody is a layman with no pretension to professional qualifications, may venture an opinion it is that the supposed necessity does not exist.

Parody—certainly creative parody—is more frequently than not a lampoon of ideas and styles, of attitudes and philosophies, rather than of the specific content of a book or play.<sup>17</sup> The ideas and teachings of the original work—that which historically has been the subject of true parody—may be freely appropriated—by the parodist as well as by anyone else. The first great parody in the English language—at least so I am informed by the Cambridge History of English Literature—was Chaucer's *Rime of Sir Thopas*.<sup>18</sup> It parodied no one work, but a whole school of works—the metrical romances. It burlesqued their style, their long-windedness and their lack of a sense of proportion, but not their specific content. What was true of *Thopas* has been generally true of parody in the bulk, so far as such researches as I have been able to make disclose.

Before deciding that parody is to occupy an exceptional position vis-a-vis the supposed exclusivity of copyright the factual bases for the argument of necessity should be carefully studied. If the great mass of parody does not in fact need a more extensive right of free appropriation than the other arts we should think twice before beginning the process of eroding the notion of exclusive right. In fairness, as well as logic, exceptional status would also have to be granted the other derivative arts. They too, probably to an even greater degree than parody, must feed on the meat of earlier works. The considerations which guided the thinking of the Framers, their insight into human nature, which brought to the service of a diffusion of knowledge the appeal to the acquisitive instinct should not be casually or needlessly cast aside.

So, I repeat, if we are to make an exception of parody, thereby subordinating the constitutional method to the constitutional objective, we need be concerned in the main only with parody in the true and creative sense, not with the occasional carbon copy. It is, after all, no great feat of creation, it takes no literary or dramatic imagination, to copy slavishly the heart of a book or a play and make it a parody by interpolating a few obvious and banal inversions. Anyone who can read and write can copy, and where the original reads black change it to white. The function of the exclusive right in advancing the social

17. See, 17 *Encyclopedia Britannica* (1957) 333; Wells, *Parody Anthology* (1904) xxv; Kitchin, *Survey of Burlesque and Parody in English* (Oliver and Boyd, 1931), *passim*.

18. 1 *Cambridge History of English Literature* (1907) 314, 354.

aim of copyright is too important to be sacrificed in order that one may copy a substantial part of an original work for his own commercial purposes, and go unscathed by merely adding to it a pratfall.

Creative parody can and does go on despite the "Gaslight" case. I need, perhaps, do no more than refer to *Columbia Pictures Corp. v. National Broadcasting Co.*<sup>19</sup> in which Judge Carter, shortly after his "Gaslight" decision held a Sid Caesar parody of "From Here To Eternity" not to infringe because it had not copied substantial copyrightable material although enough had been taken to identify it with the original. Many of you, I am sure, have seen on television those imaginative and engaging, and I might add, original parodists, Wayne and Schuster. You may recall, for instance, their "Comedy of Errors, Hits and Runs"—which was Shakespeare—not his words or even plots, but his meter and style and flavor—transferred to baseball. Even if Shakespeare's works were still, if they ever were, copyrighted, no one could have complained on that account of such delights as this protest addressed to an umpire who had just ruled a long ball foul:

"So fair a foul I have not seen. Accursed knave with heart as black as coat you wear upon your back! Now, for the bum thou art, stand'st thou revealed! Thy head is emptier than Ebbets Field!"

The point is that parody, in its true and creative sense—parody which lampoons and entertains, which criticizes and instructs—needs no more of the original than it is and was always open to anyone to take. The slavish copyist in the field of parody is entitled to no more consideration than the copyist in any other field. To go farther than that requires a break with the experience and the thinking upon which the whole concept of copyright is based. The one social justification advanced for such a break is not, in my opinion, grounded in fact. It is not needed to save parody in the mass; while the benefit to be gained from the few which are unimaginative copies is not enough to justify the cost.

What then, of "fair use"? The answer is, nothing; unless, as I think history and analysis will disprove, fair use means something more than such use as, judged by ordinary standards, is not infringement. I realize that we have been accustomed to thinking loosely of fair use as importing the privilege, for certain purposes, of *substantial* appropriation—one which, but for the nature and purpose of the reproduction, would be an infringement. My suggestion is that this is a deduction not from the decisions or from principle but from the label or tag which has been adopted as shorthand for the general doctrine of infringement. I should be content, in this regard, to rest upon the authority of Judge Learned Hand, whose use of the locution bespeaks its origin and its meaning. The question in any case, he has said, "is whether the part so taken is substan-

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19. *Supra*, n. 1.

tial, and therefore not a fair use of the copyrighted work . . .";<sup>20</sup> and, on another occasion, ". . . 'copying' might at times be a 'fair use'; but it is convenient to define such a use by saying that others may 'copy' the 'theme' or 'ideas,' or the like, of a work, though not its 'expression.' . . ."<sup>21</sup>

The term apparently was originated by Lord Eldon in 1810 when, in *Wilkins v. Aikin*<sup>22</sup> he contrasted what he called "fair quotation" with the taking of the "whole or a part," meaning a substantial or material part, of another's work. In the working out of that thought—that only the taking of a substantial part is infringement—the English judges seem to have fallen into the habit of referring to an appropriation not substantial enough to infringe as a "fair use."<sup>23</sup> Certainly, by 1878 we find Lord Hatherly in *Chatterton v. Cave*<sup>24</sup> saying that "if the quantity taken be neither substantial nor material, if, as it has been expressed by some Judges, a 'fair use' only be made of the publication, no wrong is done and no action can be brought . . ." American judges, speaking the same language; not unnaturally adopted the expression.

The notion that "fair use" imports a privilege of substantial appropriation is given some added currency by the fact that the phrase usually occurs in cases involving works designed and intended for some reproductive use by others—the learned and scientific treatises, dictionaries, digests, statistical compilations and the like. Here, no doubt, courts are inclined to some greater degree of liberality toward the copyist.<sup>25</sup> They are impelled to do so, I should think, by the feeling that the nature or character of the work is somewhat of an invitation to others to use it in the way and for the purpose for which it was designed and published.<sup>26</sup> But even then, when they enunciate the criteria by which they

20. *Nichols v. Universal Pictures Corp.*, 2 Cir., 45 F. 2d 119, 121 (1930) cert. den. 282 U. S. 902.

21. *Sheldon v. Metro-Goldwyn Pictures Corp.*, supra, n. 4, 81 F. 2d at 54. See, also: *West Pub. Co. v. Edw. Thompson Co.*, E.D.N.Y., 169 Fed. 833, 861, 862 (1909) mod. and affirmed 2 Cir., 176 Fed. 833; *Warner Bros. Pictures Corp. v. Columbia Broadcasting System*, S.D. Cal., 102 F. Supp. 141, 148-149 (1951); *Towle v. Ross*, D. C. Ore., 32 F. Supp. 125, 127, n. 4 (1940).

22. 17 Ves. 422, 424, 34 Eng. Rep. 163, 164 (1810).

23. e.g., *Jarrould v. Houlston*, 3 K. & J. 708, 714-715, 69 Eng. Rep. 1294, 1297 (1857); *Scott v. Stanford*, L.R. 3 Eq. 718 (1867); *Lewis v. Fullarton*, 2 Beav. 6, 48 Eng. Rep. 1080 (1839).

24. 3 App. Cas. at 492.

25. e.g., *West Pub. Co. v. Edw. Thompson Co.*, E.D.N.Y., 169 Fed. 833 (1910) affirmed 2 Cir., 176 Fed. 833; *Webb v. Powers*, C.C. Mass., 29 Fed. Cas. (#17323) 511 (1847).

26. Cf., *Baker v. Selden*, supra, 101 U. S. at 102-103; *Sampson & Murdock v. Seaver-Radford Co.*, 1 Cir., 140 Fed. 539, 541-542; *Karll v. Curtis Pub. Co.*, E.D.Wis., 39 F. Supp. 836, 837-838 (1941); *Towle v. Ross*, supra, n. 21, 32 F. Supp. at 127.

profess to be guided the tests are exactly those to which they resort in the ordinary case of literary or dramatic plagiarism.<sup>27</sup> This seeming liberality is explainable, as I have intimated, by the greater emphasis given in the so-called "fair use" case to one of these criteria — the purpose or object for which the appropriation is made. No case, however, can be found, as one Court of Appeals has said, to support the proposition that "wholesale copying and publication of copyrighted material can ever be fair use . . ."<sup>28</sup>

A word or two may be added about "criticism." Parody, it is said, is invariably a form of criticism or review; and quotation for that purpose has always been considered fair. That is only partly true. Criticism or review, when it is genuinely such, has been and I am sure will continue to be liberally treated by the courts, the important considerations being two of the ordinary criteria of substantiality—purpose of the appropriation, and effect upon or injury to the original.<sup>29</sup> But "criticism" which is only a cover for a substantial appropriation made for one's commercial purposes, to which criticism is only incidental or even unintended, is in a different category.<sup>30</sup> There is a readily discernible difference between an honest dramatic review of "Gaslight", in which the story of the play is rather generously outlined, and a closely copied parody of "Gaslight" presented for the purpose of attracting an audience to whom the virtues of Lucky Strikes may be extolled.<sup>31</sup> The ordinary tests of substantiality or infringement differentiate the two examples; those tests are adequate to preserve the professional and artistic freedom of reviews and critics generally.

You may ask, of course, for the drawing of a more precise line. To that I should answer as in other connections Mr. Justice Holmes frequently used to do:

". . . I should not dream of asking where the line can be drawn, since the great body of the law consists in drawing such lines, yet when you realize that you are dealing with a matter of degree you must realize that reasonable men may differ widely as to the place where the line should fall. . . ."<sup>32</sup>

27. e.g. *Mathews Conveyor Co. v. Palmer-Bee Co.*, 6 Cir., 135 F. 2d 73, 84-85 (1943).

28. *Leon v. Pacific T. & T. Co.*, 9 Cir., 91 F. 2d 484, 486 (1937).

29. See, *Story v. Holcombe*, supra, n. 5, 23 Fed. Cas. at 173; *Folsom v. Marsh*, C.C.Mass., 9 Fed. Cas. (#4901) 342, 344 (1841); *Hill v. Whalen & Martel*, supra, n. 2, at 360; *Bell v. Whitehead*, 8 L.J.N.S. 141 (1839); *Wittingham v. Wooler*, 2 Swans. 428, 36 Eng. Rep. 679 (1817).

30. *Sayers v. Spaeth*, S.D.N.Y., Cop. Off. Bull. No. 20, 625 (1932); *Campbell v. Scott*, 11 Sim. 31, 59 Eng. Rep. 784 (1842); *University of London Press v. University Tutorial Press*, [1916] 2 Ch. 601; *Smith v. Chatto*, 31 L.T.N.S. 775 (1874).

31. Cf., *Associated Music Publishers v. Debs Memorial Radio Fund*, 2 Cir., 141 F. 2d 852, 855 (1944) cert. den. 323 U.S. 766; *Henry Holt & Co. v. Liggett & Myers Tob. Co.*, E.D.Pa., 23 F. Supp. 302, 303-304 (1938).

32. *Schlesinger v. Wisconsin*, 270 U. S. 230, 241 (1926).

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I would not answer that parody must always and invariably be an infringement. Nor would I say that it can never be. It is, as is most of the law, a question of degree, with the line between the infringing and the fair picked out in any given case by a consideration of those guides to decision which are customarily employed in copyright cases, due regard being had not alone for the social philosophy of copyright but as well for its economic motivation.

I have had enough experience with committees on arrangements for annual meetings of the Bar to know that in a symposium of this sort the preference of most lawyers is for what they call "bread and butter" discussions. This talk has not been of that sort. One decision is, after all, hardly enough upon which to base a cyclopedia of law and procedure. I am in no better position than anyone else to attempt to predict the course which the law will take in picking out the line to which I have referred. This much I think it is fair to say: So long as we retain the basic notion that science and the arts are better advanced by securing authors in the exclusive right to their writings, so long should it be held that parody in common with all the others, must exist by the creative talent of its practitioners, not by the facile use of a duplicating machine.

## 72. USES OF TITLES FOR COPYRIGHTED AND PUBLIC DOMAIN WORKS

By SAMUEL W. TANNENBAUM\*

### *Introduction:*

#### *I. The Importance of a Good Title to the Motion Picture, Radio, Television and Amusement Industries.*

There is no industry which is more concerned with the importance of an attractive title or name for its product than the amusement field. The oldest and most effective lure is a title which is short, attractive and easily associated in the public mind with the product and its owner.

With this concept in mind, the amusement industry, with which this discourse will be primarily concerned, has been for generations, and still is, unrelentlessly zealous in its quest for a simple, magnetic title.

The reservoir of novel and attractive titles, having evaporated almost to a state of aridity, has not only seriously limited the area of selection, but has also created keener competition in the choice of a title among those engaged in literature, drama and in the motion picture, radio and television fields.

Even though the world's phenomenal scientific and technological growth has spawned many original terms, readily adaptable as titles for novels, plays, motion pictures, radio and television presentations, it has not reduced, to any great extent, the rivalry in the adoption of titles.

As "the first gleam of a gilded title" lightens the eyes of a reader, so does an attractive title gladden the heart of a theatrical and motion picture producer and radio and television broadcaster.

A luminous marqu e announcing the plays or motion pictures, WITNESS FOR THE PROSECUTION; SOUTH PACIFIC; OKLAHOMA!; or THE CAINE MUTINY, will continue to insure increased public interest for a long time to come.<sup>1</sup>

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\*Address delivered by Mr. Tannenbaum, member of the law firm of Johnson & Tannenbaum, New York City, before the Section of Patent, Trademark and Copyright Law of the American Bar Association, at Los Angeles, August 23, 1958. We are indebted to the author for permission to reprint the article, which has also appeared in *New York Law Journal*, Sept. 24-26, 1957.

1. "It is generally believed by motion picture executives and theatre managers that an appropriate and intriguing title that arouses public curiosity, or a title that has achieved fame and wide popularity as a book or play, has a profound influence on the success or popularity of a motion picture. Numerous examples of distinctive and

As far back as 1936, a motion picture company was said to have paid \$22,500 for the use of the title to the novel, *WAKE UP AND LIVE*, which was then considered to be the highest price for the use of a title.<sup>2</sup>

In 1937, there were 36,000 titles of feature pictures and short subjects registered on the release index of the Motion Picture Association of America; today there are over 50,000 titles registered.<sup>3</sup>

On November 15, 1947, there were 13 stations on the air with regular television programs in the United States.<sup>4</sup> As of June 1, 1957, there were 544 television stations operating in 272 U. S. cities, 48 States, Hawaii, District of Columbia and Puerto Rico.<sup>5</sup>

## *II. A Title Is Not Protected by Copyright.*

It is firmly established that a title, i.e. the name of the work, is not protected by the copyright of the work.<sup>6</sup> The foregoing principle enunciated as far back as 1852, has been consistently followed.<sup>7</sup> Not only laymen but also lawyers frequently speak erroneously of securing "copyright" for a title.

While the forum for the determination of issues arising under statutory copyright is exclusively the Federal Court, controversies limited to the unlawful uses of titles are governed by the principles of unfair competition and are triable in the State Courts. A claim of unfair competition "may be joined with a substantial and related claim under the copyright, patent or trade mark laws."<sup>8</sup>

As the only means of preventing the use of a conflicting title is by injunction in a court of chancery, the wide discretion of that court makes it rather difficult to find consistency in the great body of conflicting opinions. As was so quaintly stated by John Selden (1584-1654), "one chancellor has a long foot, another a short foot, a third an indifferent foot—'tis the same thing in the chancellor's conscience."<sup>9</sup>

In the same vein, Judge Leon R. Yankwich, Chief Judge, U. S. District

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unusual titles on widely popular pictures support the theory. For this reason more and more attention is being given to titles by the producers and distributors of modern motion pictures, *FILM DAILY YEAR BOOK OF MOTION PICTURES*, 1958, p. 951.

2. *VARIETY*, May 3, 1936.

3. *Op. Cit. Supra* N. 1, p. 952.

4. 1948 *Radio Annual*, p. 45.

5. *Op. Cit. Supra* N. 1, p. 911.

6. *Jollie v. Jacques* 1 Blatch. 618 (1852).

7. *Columbia Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348. (DSCD Cal. 1955).

8. Title 28 of the Federal Judicial Code, Sec. 1338 (b) revised in 1948.

9. *Table Talk-Equity*. (1689).

Court, Southern District of California, cites the following incident:

"Some years ago, Professor Zechariah Chaffee, Jr. began an article on unfair competition with a story: 'Several years ago when Edward S. Rogers, one of the leading American writers and practitioners in the field, was lecturing on Unfair Competition, he asked a student: 'What is your idea of this subject? He got the answer: 'Well, it seems to me that the courts try to stop people from playing dirty tricks.' Mr. Rogers comments, 'One might spend weeks reading cases and find many definitions less satisfactory than this'.'<sup>10</sup>

### *III. Developments in the Law of Unfair Competition.*

Judge Learned Hand, more than thirty-three years ago, stated: ". . . there is no part of the law which is more plastic than unfair competition, and what was not reckoned an actionable wrong 25 years ago may have become such today."<sup>11</sup> The distinguished jurist, well steeped in the classics, undoubtedly intended the word "plastic" to connote "developing" or "growing", derived from its Greek and Latin origin.

The early rigid formalistic principles have given way to the present broad and more realistic doctrine, in response to the ethical as well as the economic needs of society.<sup>12</sup>

"Palming Off" and competition in the same or similar industry or territory were absolute prerequisites for recovery. The misappropriation of one's name, reputation or business good will are the present criteria, irrespective of the existence of actual competition between and the location of the parties.<sup>13</sup>

The invasion of a property, acquired by one's contribution of effort, money, resources and industry is the present test. The terse statement by the Federal Court in Alaska, aptly expresses the present ethical touchstone, "One may no longer earn his bread by the sweat of someone else's brow."<sup>14</sup>

A few illustrative cases contrasting the old and new principles of unfair competition may suffice:

In 1913, the publisher of the well-known "Nick Carter" stories was denied an injunction against a motion picture company using the title NICK CARTER, THE GREAT AMERICAN DETECTIVE, SOLVING THE \$100,000 JEWEL

10. "Patent, Copyright and Trade Mark Cases" by Leon R. Yankwich—Notre Dame Lawyer, May, 1957, p. 440. 3- e

11. Ely-Norris Safe Co. v. Mosler Safe Co. 7 F(2) 603, 604, (CCA 2, 1925).

12. Metropolitan Opera Assn. v. Wagner-Nichols Recorder Corp. 101 NYS (2) 483, 492. (Sup. Ct. 1950) affd. 107 NYS (8) 795 (1951).

13. Ibid. p. 491.

14. Vetch v. Wagner 116 F. Supp. 904 (D. C. Alaska, 1953).

MYSTERY, on the theory that no competition existed between a novel and a motion picture.<sup>15</sup>

This decision may perhaps be justified by the then recent birth of the motion picture industry, the impact of which had not yet been felt. Motion pictures in and about 1913 were, in the main, shorts based on sketches or single incidents, rather than on more developed plots and stories built around a character.

It was not until 1912, that "motion picture photoplays" and "motion pictures other than photoplays" were granted statutory copyright protection, as such.<sup>16</sup> Prior thereto, they secured statutory copyright as photographs under Section 5 (j).

It is now well settled that "direct competition" is not a necessary element of proof. The existence of "any form of unfair invasion or infringement" or "commercial immorality" is sufficient.<sup>17</sup> This departure was clearly established by the U. S. Supreme Court in 1918.<sup>18</sup>

The author of a poem entitled THE BALLAD OF YUKON JAKE prevented the use of the title YUKON JAKE for a motion picture, even though the plot and incidents were entirely dissimilar.<sup>19</sup>

The author of the FRANK MERRIWELL series of stories enjoined a motion picture company from using the title FRANK MERRIWELL, even though there was no similarity in "theme, design or plot."<sup>20</sup>

A radio broadcasting company was prevented from using the title STELLA DALLAS, which was the title of the well-known novel, play and motion picture.<sup>21</sup>

The use of the plaintiff's title for the popular radio program, INFORMATION PLEASE by the defendant for a magazine was enjoined. The Court stated that while "in the early days" the two words "INFORMATION" and "PLEASE" would have been deemed commonplace and descriptive for use as a magazine, "at the present time, however, the law of 'unfair competition' lays stress upon

15. *Atlas v. Street & Smith* 204 F. 398 (CCA 8th, 1913): p. 406: "It is not thought that the public will be deceived into belief that it is seeing a reproduction of one of complainant's stories when it witnesses that displayed from defendant's film . . . We do not think a moving-picture show is of the same class as a written book. One belongs to the field of literature; the other to the domain of theatrical". The dissenting opinion of Judge Hook evidenced a more prophetic attitude.

16. U. S. Copyright Act, Aug. 24, 1912, Sec. 5 (1) (m).

17. *Op. Cit. Supra* N. 11.

18. *International News Service v. Associated Press* 248 U. S. 215 (1918).

19. *Paramore v. Mack Sennett* 9 F(2) 66 (S. D. Cal 1925).

20. *Patten v. Superior Talking Pictures* 8 F Supp 196 (S D N Y 1934).

21. *Prouty v. National Broadcasting Co.* 26 F. Supp 265 (D C Mass 1939).

the element of unfairness rather than upon the element of competition."<sup>22</sup>

Jack Lait and Lee Mortimer had written several popular books under the titles, NEW YORK CONFIDENTIAL, CHICAGO CONFIDENTIAL, and WASHINGTON CONFIDENTIAL. Jack Lait had also conducted a radio program, JACK LAIT CONFIDENTIAL. One of the defendants published a book, BASEBALL CONFIDENTIAL. The plaintiffs contended that they had a "property right" in the word "Confidential," "flowing either from a common law trademark, the acquisition of a secondary meaning or the good will that the distinctive titles using the word 'confidential' have created." The Court disposed of these contentions by holding that the word "Confidential" was "a descriptive one of every day usage" and that even when used with "Washington", "New York", "Chicago" and "Baseball", "it connotes, in common parlance, the inside story of the subject treated by the book."<sup>23</sup>

#### a. *Song Titles*

For many years, there were published innumerable songs bearing the identical title. So long as there existed no similarity of words or music, no attempt was made to enjoin such use. The U. S. Copyright Catalogues of music including published and unpublished songs are replete with songs bearing identical titles by different composers, the words and music being dissimilar.

However, as recently as 1951, the composers of the song RED ROSES FOR MY BLUE BABY brought an action against the publisher for breach of contract or trust for the latter's alleged failure to promote the sale of plaintiffs' song, asserting that the publisher had "successfully promoted the infringing and competing work, "RED ROSES FOR A BLUE LADY" which was published by the same publisher. The Court stated that "mere similarity of titles might not ordinarily be significant, but it takes on some significance in view of the fact that defendant published both songs."<sup>24</sup>

In what appears to be one of the earliest decisions, which involved the use by a motion picture company of the title THE MAN WHO BROKE THE BANK AT MONTE CARLO, which was previously used for a song, the Canadian lower court awarded a money judgment against the motion picture company for such competing use. The Canadian appellate court reversed. Thereafter, the Privy Council dismissed the appeal and upheld the Canadian appellate court, stating that the title of the song was not infringed by its use as the title of the film; that since only the title of the work was involved, there

22. *Golenpaul v. Rosett* 18 NYS (2) 890, 891 (Sup Ct NY 1940).

23. *Crown Publishers Inc. v. David McKay Co.* 107 NYS (2) 176, 177 (Sup Ct N Y 1951).

24. *Nelson v. Mills Music Inc.* 104 NYS (2) 605, 606 (Sup Ct NY 1951) *affd* 112 NYS (2) 495 (1952), *affd* 304 NY 739 (1952).

could be no claim of copyright infringement nor any "passing off"; that no competition existed between the use of the same title for a song and a motion picture.<sup>25</sup>

The U. S. Circuit Court of Appeals (7th Circuit) in *Becker v. Loew's Inc.*<sup>26</sup> citing with approval the above decision, stated:

"It seems inconceivable that when or if he bought a ticket for the motion picture, he imagined he was going to hear a performance of the familiar song. The two things are completely different, and incapable of comparison in any reasonable sense. The thing said to be passed off must resemble the thing for which it is passed off. A frying pan cannot be passed off as a kettle."

Nevertheless, at present, as the use of the title of a popular song for the title of a motion picture frequently results in added publicity and advertising, motion picture companies pay considerable sums for the use of the title as well as the music.

\$40,000 is said to have been paid for the use of the title and the background music of Richard Rodgers' song *SLAUGHTER ON TENTH AVENUE*.<sup>27</sup>

\$15,000 was reported to have been the price for the use of the song title *YOUNG AT HEART* and the music.<sup>28</sup>

Illustrative of the close association between the use of titles of songs and motion pictures are the following: *A CERTAIN SMILE*; *THREE COINS IN THE FOUNTAIN*; *LOVE IS A MANY SPLENDORED THING*; and *HIGH NOON*, the music of the latter three having won Academy Awards. During the past six years, at least four of the most popular motion pictures used the same title as the title of the popular song included in the motion picture.<sup>29</sup>

However, from 1935 to 1951, it does not appear that any song which won an Academy Award bore the same title as the title of the motion picture in which it was used.

Before the phenomenal growth of the recording industry, the popularity of a song resulted from its "plugging" by professional singers in theatres, cabarets and restaurants, engaged mainly by music publishers. This created sub-

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25. *Francis, Day & Hunter, Ltd. v. Twentieth Century Fox A. C.* 112 (1940).

26. 133 F (2) 889, 893 (1943).

27. *New York Times*, May 4, 1957.

28. *BILLBOARD*, May 17, 1954.

29. *THE BRIDGE ON THE RIVER KWAI* (1957)  
*AROUND THE WORLD IN EIGHTY DAYS* (1956)  
*MARTY* (1955)  
*FROM HERE TO ETERNITY* (1953).

stantial sales of the sheet music. By reason of the present meteoric popularity of musical recordings and use of music in motion pictures and more recently in radio and television, titles of songs have attained great importance and have acquired substantial values as property. In my opinion, the use of song titles for motion pictures, radio and television indicates a tendency toward competition in these areas.

#### *IV. Sources from Which Titles Are Derived.*

Sir James M. Barrie was frequently beseeched by young authors for his advice in the choice of an attractive title for their books. On one occasion, an aspiring author handed Barrie his 1,500 page manuscript. Barrie made no attempt to open it, but said, "Tell me, young man: are there any drums, or any trumpets in your novel?" Taken back, the young author replied, "Mr. Barrie, it's not that kind of a novel at all." Barrie then retorted, "Perfect, call it 'No Drums, No Trumpets.'"

Aside from facetious incidents such as the foregoing, the origin of most titles stems from the sources hereinafter discussed.

##### *a. The Bible.*

The Bible is a treasure-trove of titles for books, plays, and motion pictures. A few of such outstanding titles are: TEN COMMANDMENTS; DAVID AND SAUL; THE ROBE; VOICE OF THE TURTLE; CYMBALS OF DAVID; THE STORY OF RUTH.

##### *b. Historical.*

History, both ancient and modern, has furnished many titles for successful motion pictures: ATTLA THE HUN; MAYERLING; THE CLANSMAN; ALL QUIET ON THE WESTERN FRONT.

##### *c. Popular Book or Play.*

The titles of recognized literary works are a fruitful source: MOBY DICK; THE HUNCHBACK OF NOTRE DAME; WAR AND PEACE; IVANHOE; QUO VADIS; BEN HUR; AROUND THE WORLD IN 80 DAYS.

Titles of books on the Best Seller list are avidly sought by motion picture producers: THE YOUNG LIONS; PEYTON PLACE; MARJORIE MORNINGSTAR; BONJOUR TRISTESSE.

Titles are also taken from popular plays, old or current: THE DEVIL'S DISCIPLE; ANNA LUCASTA; CYRANO DE BERGERAC; STREETCAR NAMED DESIRE; DESIRE UNDER THE ELMS; DEATH OF A SALESMAN.

d. *Biographical.*

Titles of dramatizations and picturizations of the lives and exploits of famous people of the past or present are especially attractive: ABE LINCOLN IN ILLINOIS; SUNRISE AT CAMPOBELLO; THE JOLSON STORY; STORY OF LOUIS PASTEUR; J'ACCUSE (Emile Zola); ST. LOUIS BLUES (W. C. Handy); THE SPIRIT OF ST. LOUIS (Lindbergh).

e. *Current Events.*

Dramatic news events are followed by a mad rush by motion picture producers and broadcasting companies to secure priority in the use of the title:

Sputnik caused a spurt, resulting in the filing of the following titles with the Motion Picture Association of America: RED SATELLITE; LOST SATELLITE; RUNAWAY SATELLITE; SATELLITE TO THE MOON; RACE TO THE MOON; MEN (or MAN) IN THE SKY; THE ASTRONAUTS; ARTIFICIAL MOON; BABY MOON; CIRCLING THE GLOBE; MAN MADE MOON; EXPLORING THE UNIVERSE; 18,000 MILES AN HOUR; 560 MILES UP.

Russia would not be outdone. The Moscow Science Fiction Film Studio has been working on I AM A SPACE PILOT.<sup>30</sup>

Musical compositions have derived many titles from dramatic current events. Lindbergh's heroic trans-oceanic plane trip in 1927 brought forth a flood of song titles, such as, LINDY; LUCKY LINDY; LINDY, YOUTH WITH THE HEART OF GOLD; LIKE AN ANGEL YOU FLEW INTO EVERYONE'S HEART.

World War I produced: OVER THERE; WHERE DO WE GO FROM HERE?; ANCHORS AWEIGH; IT'S A LONG WAY TO TIPPERARY.

f. *Accidental Occurrences.*

Clifford Odets conceived the title, THE FLOWERING PEACH, in an odd way. Although its theme is about Noah and the Flood, the title was not of biblical origin. While reading the newspaper, Odets noted that the third hole of President's favorite golf course in Atlanta was called THE FLOWERING PEACH. In Odets' play reference is made to a peach tree, which flowered after the Flood, symbolic of the renewal of life.<sup>31</sup>

A spontaneous utterance often accidentally furnishes a composer with a good title for his song. Under the escort of Maurice Chevalier, Alan Jay Lerner and Frederick Loewe were partaking of France's stimulating potions at a sidewalk cafe in the Bois de Boulogne. Chevalier, observing their swivelling

30. FILM DAILY, Dec. 5, 1957.

31. N. Y. Times, Dec. 12, 1954.

heads, as the girls rushed for the bus station, is said to have remarked to Lerner and Loewe, "You know boys, I'm glad I'm not young any more." Thus was born the title for their popular song in the motion picture GIGI.<sup>32</sup>

#### V. *Works in the Public Domain.*

As previously stated, copyright does not grant the copyright proprietor the exclusive right to the use of the title of the work, even during the term of the copyright; nor does it prevent the use of the title for an entirely different work.<sup>33</sup> Whether the work has copyright protection or is in the public domain, the remedy is an action for unfair competition.

The Mark Twain case has furnished us with a decision which clearly sets forth the principle applicable to the use of a title of a work in the public domain. In that case, some of Mark Twain's writings were published without copyright protection. The defendant published some of Mark Twain's work as "Sketches by Mark Twain". The demurrer to Mark Twain's complaint was sustained. By Mark Twain's failure to protect the work by copyright, "it becomes public property, and any person who chooses to do so, has the right to republish it, and to state the name of the author in such form in the book, either upon the title page or otherwise, as to show who was the writer or author thereof."<sup>34</sup>

However, had the defendant published his version of the Mark Twain work with new matter under the title SKETCHES BY MARK TWAIN, he would have made a false statement, subjecting him to an action for unfair competition.

Where the work has fallen into the public domain, the title is said "to go with it". It may be freely used, subject however, to the principles of unfair competition, as previously discussed. This is well recognized and still consistently followed.<sup>35</sup>

#### VI. *Substantial Claims for Misappropriation of Title.*

An interesting decision emanating from the courts of California was Jackson v. Universal Pictures.<sup>36</sup>

32. N. Y. Herald Tribune, May 11, 1958.

33. Corbett v. Purdy 80 F 901 (S D NY 1897) citing Osgood v. Allen, I. Holmes 185, F Cas No. 10, 603, (DC Maine 1872). This principle has been consistently followed.

34. Clemens v. Belford 14 F 728, 730; Atlas Mfg. v. Street & Smith 204 F 398 (CCA 8th, 1913) appeal dismissed 231 US 348 (1913) (CCND Ill. 1883) cited with approval in Shostakovich v. Twentieth Century Fox 80 NYS (2) 575 (Sup. Ct. N.Y. 1948) affd. 87 NYS (2) 430 (1949).

35. 13 C.J. Sec. 243; 18 C J S Sec. 80 and cases cited.

36. Jackson v. Universal International Pictures 212 P (2) 574 (Cal D. C. App, 1949); reversed 222 P (2) 443 (Sup Ct Cal, 1950).

Seventeen thousand five hundred dollars was awarded by the jury to a dramatist, where a motion picture company used his play title SLIGHTLY SCANDALOUS, the plot, incidents and characters being dissimilar. The play opened in Philadelphia, where it was "panned" in all the Philadelphia papers, closing after 15 performances in less than two weeks, an average of 200 persons, attending each performance, although the theatre had a capacity of over 1500 persons. In New York, the play was also "panned" by the newspapers, where it closed after seven performances, with an attendance not exceeding 750 persons, an average of 100 persons a performance. There were no other presentations of the play.

On appeal to the District Court of Appeals, the Court held that the "evidence was not sufficient to warrant the implied findings that the title SLIGHTLY SCANDALOUS acquired and retained a secondary meaning in relation to respondent's play."

The Supreme Court of California reversed and held that not only were the damages of \$17,500 not excessive, but that the title had acquired a secondary meaning, because it was publicized in three of the largest cities in the country; rehearsals and production were announced in dramatic and motion picture journals in Hollywood and New York; that the small attendance at the performances is only "important in connection with the amount of damages which should be awarded, but it does not determine whether the title has acquired a secondary meaning."

The Court further observed that "the record includes testimony to the effect that other titles to unsuccessful plays had been sold for larger amounts. The value of property wrongfully taken is a matter for the determination of the jury and the evidence as a whole supports the award in Jackson's favor"; and that "Popularity is not a requirement for secondary meaning because notoriety and adverse discussion may bring about widespread identification of the play by its title and may pique the public interest. Likewise, advertising, even of an unpopular play, may cause the public to identify it as one which has been a 'Broadway production.'"

On the other hand, in *Herzig v. 20th Century Fox*, the plaintiff dramatist asked for \$250,000 damages and injunction for the use of the title VICKI. The Federal Court denied the plaintiff's application for an injunction, holding that as plaintiff's play was a "flop" it could not be claimed that defendant's use interfered with plaintiff's possible sale of motion picture rights, as the purchase of stage "flops" by a motion picture company is based on the story and not on the title.<sup>37</sup>

37. *Herzig v. 20th Century Fox* (S D Cal. not officially reported) See *VARIETY*, Nov. 23, 1955.

### VII. *Foreign Protection of Titles.*

While the British theory of the protection of titles to literary works is similar to ours, that is, the prevention of deception of the public, the British grant relief based on "passing off".<sup>38</sup> We, however, are gradually departing from our theory of "palming off".<sup>39</sup>

The British maintain that there must be a "common field of activity" to sustain an action for unfair competition. On that theory, the court denied relief to the publishers of a song, the title of which was used by a motion picture company.<sup>40</sup> Yet, the views of our courts appear to be contra.<sup>41</sup>

There is a paucity of decisions in France dealing with the protection of titles. Most of the controversies are settled under the rules of the various societies of authors, composers and producers. Few disputes are presented to the courts.

"Originality" is the touchstone of French protection. Although a title, as such, is not considered a writing and hence not protected by the laws governing writings, the one who first attaches a word or phrase to a literary product acquires certain proprietary rights therein.<sup>42</sup>

On Feb. 22, 1944 the French Legislature formalized this protection, at least in the area of motion picture titles by establishing a body not unlike our Motion Picture Association of America, and requiring the deposit and clearance of proposed titles.

In some other countries, such as Belgium, Egypt, Mexico, Ecuador, Venezuela and Portugal, there is a varying degree of protection for the title of literary property.<sup>43</sup>

The multilateral international copyright conventions have, with a single exception, omitted any provision for the protection of titles. The exception is the Washington Convention in 1946, which granted a limited protection within the member countries. Protection will be granted when (1) the original work has gained international recognition, and (2) the conflicting title is used on a work

38. Copinger and Skone James on THE LAW OF COPYRIGHT (9th ed. 1958) pp. 87 et seq.

39. Metropolitan Opera Assn. Inc. v. Wagner-Nichols, 101 NYS (2) 483, at p. 491.

40. Francis, Day & Hunter, Ltd. v. Twentieth Century Fox Ltd. supra; Copinger and Skone James; op. cit. supra. n. 36, at p. 92.

41. "The courts have thus recognized that in the complex pattern of modern business relationships, persons in theoretically non-competitive fields may, by unethical business practices, inflict as severe and reprehensible injuries upon others as can direct competitors". Metropolitan Opera Assn. v. Wagner-Nichols, p. 492, supra, n. 39.

42. Borel d'Hauterive v. Aubert, June 28, 1847.

43. Joseph S. Dubin, Motion Picture Rights: U. S. and International, 28 So. Calif. L.R. 205 at 214 (April, 1955).

of similar kind and character, involving a possibility of confusion. This was merely a statutory declaration of the common law of the United States.<sup>44</sup>

Aside from the purely legal problems, motion picture companies releasing U. S. pictures abroad are busy changing the English titles to make them understandable in foreign countries. For example, when "Guys and Dolls", the title taken from Damon Runyon's story of that name, was given to the motion picture, the question arose, what are the foreign equivalents? In Hebrew, it is THE BOYS AND THE ATTRACTIVE EASY-GOING GIRLS; in French, it is BLANCHES COLOMBES ET VILLAINS MESSIEURS; in Spanish, THEYS AND THEYS or HE'S AND SHE'S. The German equivalent is SCHWERE YUNGEN-LEICHTE MAEDCHEN (TOUGH GUYS AND LIGHT-HEARTED GIRLS), and in Swedish, ANGELS OF BROADWAY. I am not aware whether a Russian title has been given the picture.

### *VIII. Suggestions.*

I will endeavor to summarize briefly the principles applicable in the choice of a title and steps to safeguard its use:

1. Institute a careful search of all prior users of your proposed title, before making any public announcements of the publication or performance of the work.
2. If your search discloses no prior use for stories, books, plays, motion pictures, music, radio or television, it would be reasonably safe to use the title.
3. Should your search disclose but one use, especially if fairly recent, avoid it; if used, ten or more years ago, it would appear to be safe to use it.
4. Should there be a number of prior uses, but one or more uses fairly recently by a recognized author or for a best seller or pocket book, don't use it.
5. If you contemplate using a title of an old book, play, motion picture or musical composition, check carefully for possible recent republications of the book, especially pocket book; if a play, recent revivals; if a picture, reissues or television use.
6. Avoid a suggestive or vulgar title.
7. Once you adopt a title, continue its use to avoid a claim of abandonment.

The foregoing are my suggestions; what a court of equity may decide, from time to time, is problematical.

Remember Selden: The size of the Chancellor's Foot.

44. Report of the Council of the Section of International and Comparative Law (Pan American Union, June, 1946).

### 73. DESIGN PROTECTION AT THE LISBON DIPLOMATIC CONFERENCE OF 1958.

As most of the readers of the Bulletin may be aware, a diplomatic meeting was held in October 1958 in Lisbon for the purpose of revising the International Union for the Protection of Industrial Property, commonly called the Paris Union.

The Lisbon meeting was the first diplomatic meeting since the revision of the Convention at London in 1943.

While the Convention deals primarily with patents and trademarks it also includes certain provisions concerning international protection of "Industrial Designs and Models" and the Lisbon agenda included three major topics with regard thereto. The three proposals were these:

1) It was proposed to amend the 1934 text of the Paris Convention itself for the purpose of strengthening International Protection of Industrial Designs.

2) There were discussions to amend the special Hague Arrangement concerning International Deposit of Industrial Designs and Models (of which the United States is not a member).

3) Suggestions were made for closer cooperation and joint study of the problems of design protection, both by the members of the Paris Convention and by the two intergovernmental copyright committees established under the Berne Union and the Universal Copyright Convention.

The resolutions finally adopted at the Lisbon Conference with regard to design protection are printed hereafter in full.

In connection with these resolutions a few additional observations may not be amiss concerning each of the three proposals.

Ad. 1. The resolution as finally adopted resulted only in the addition of one sentence to the Convention which will make it mandatory for each country of the Union to protect Industrial Designs. However, no definition of the concept of Industrial Design was included nor was any minimum term of protection agreed upon.

It is therefore left to each convention country to determine by its own domestic law what types of designs shall be protected and what the period of protection should be.

Ad 2. The Hague Arrangement for the International Deposit of Industrial Designs is in effect today only between thirteen of the total number of forty-five countries which are members of the Paris Union. Among the more important members of this special Convention are France, Germany and

Switzerland. The United States, Great Britain, Italy, the Scandinavian countries and many others, while members of the Paris Union, have not ratified the Hague Arrangement. Even with regard to the member countries of this Convention no agreement toward major changes therein was reached, particularly since certain far-reaching proposals offered by The Netherlands came before the members of the Convention too late to permit discussion at Lisbon. It was accordingly decided not to attempt any revision of the Hague Arrangement at Lisbon but to reserve this subject for a special diplomatic conference to be held in 1960 in Holland. It is expected that the new special Berne Union, Unesco and Paris Union study group, (see below under 3,) will play an important role in the preparation of a proposed revision of the Hague Arrangement.

Ad 3. As reported in the last issue of this Bulletin (Volume 6, No. 1, page 26), the IGC and the Permanent Committee of the Berne Copyright Union, in parallel resolutions adopted in August, 1955 at Geneva, have extended an invitation to the Paris Union to study jointly the best means of international protection of works of applied art, designs and models, and to set up to this effect a joint study group. The resolution recalled that questions of international protection of works of applied art and designs are now dealt with in four different Conventions, which are not wholly coordinated, and that the present state of international protection could bear some improvement.

The Lisbon Conference of the Paris Union accepted the invitation by unanimous resolution, voted by some forty countries (see Resolution No. VIII, reprinted on page 78). Thus the conditions for constituting the joint study group appear to have been set. The work of this newly formed group is expected to start early in 1959.

Resolutions Concerning International Action in Respect to the  
Protection of Designs

Unanimously adopted by  
The Revision Conference of the International (Paris) Union for the Protection  
of Industrial Property, on October 31, 1958, at Lisbon, Portugal.

N.B. The following forty countries of the Union participated in the Conference: Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Cuba, Czechoslovakia, Denmark, Dominican Republic, Finland, France, Germany, Hungary, Indonesia, Ireland, Israel, Italy, Japan, Liechtenstein, Luxemburg, Mexico, Monaco, Morocco, Netherlands, New Zealand, Norway, Poland, Portugal, Rhodesia-Nyassaland, Rumania, Spain, Sweden, Switzerland, Turkey, Union of South Africa, United Kingdom, United States of America, Viet-Nam, Yugoslavia.

*Resolution No. VII*  
*Designs and Models*

The Conference, having noted the Resolutions of the Permanent Committee of the International Union for the Protection of Literary and Artistic Works, and of the Inter-governmental Copyright Committee, both of August 1958, relating to applied arts, designs and models,

Considering that the conventions of the International Unions for the Protection of Industrial Property and of Literary and Artistic Works and the Universal Copyright Convention deal with the works of applied art, designs and models, and that better coordination between the provisions of these conventions would result in more effective protection in this field and possibly filling gaps and preventing overlapping,

Considering that the possibilities of improving the present status of international protection could most effectively be explored by joint studies of the International Union for the Protection of Industrial Property, the Permanent Committee of the International Union for the Protection of Literary and Artistic Works, and the Intergovernmental Copyright Committee,

Accepts the invitation extended by the Permanent Committee of the International Union for the Protection of Literary and Artistic Works and the Intergovernmental Copyright Committee to the International Union for the Protection of Industrial Property to participate, on an equal footing, in the studies and meetings envisaged for the purpose of ensuring the best means of international protection of works of applied art, designs and models,

Invites the Director of the Bureau of the International Union for the Protection of Industrial Property to co-operate in the establishment and work of the contemplated Study Group for preparing a report on the above questions; it being understood that participation in the Study Group shall be open also to all persons designated by any member country of the International Union for the Protection of Industrial Property.

*Resolution No. VIII*  
*Arrangement of The Hague*

The States party to the Arrangement of The Hague concerning the International Deposit of Industrial Designs or Models,

Considering that more drastic amendments than those at present contemplated are necessary to maintain the existing to maintain the existing number of countries party to this Arrangement and to allow other States to adhere,

Considering that the proposals to this effect formulated by certain States at the present Conference make a fuller examination desirable, particularly with regard to detailed methods of application,

Considering that such examination could usefully take place within the existing framework of industrial property and could profit from the studies to be undertaken by the Study Group provided for in the resolution of the Permanent Committee of the International Union for the Protection of Literary and Artistic Works and by the Intergovernmental Copyright Committee at their meetings at Geneva (18-23 August, 1958), without in any way delaying the study suggested in the preceding paragraph,

Decide to postpone the revision of the Arrangement of The Hague to a subsequent date, not later than 1960;

Welcome the invitation issued on behalf of the Netherlands Government for a Conference for that purpose to meet in its country.

The Conference also adopted the following new article in the General Convention of the Paris Union:

*"Article 5-quinquies.* Industrial designs shall be protected in all the countries of the Union."

## PART II.

**LEGISLATIVE AND ADMINISTRATIVE  
DEVELOPMENTS**

## 1. UNITED STATES OF AMERICA AND TERRITORIES

## 74. U. S. BUREAU OF CUSTOMS.

Title 19—Customs duties, Chapter I—Bureau of Customs, Department of the Treasury. [T.D. 54713] Part II—Packing and stamping; marking; trade-marks and trade names; copyrights. Part 24—Customs financial and accounting procedure. Miscellaneous amendments. (23 *Federal Register* 8055, no. 205, Oct. 18, 1958.)

Under this amendatory regulation, the fee for the recordation with the Treasury Dept. of copyrighted works to secure Customs protection against importation of piratical copies is increased from \$25.00 to \$75.00, effective Nov. 18, 1958.

## 75. U. S. CONGRESS. SENATE. COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE.

Amendments to Communications Act of 1934 (prohibiting radio and television stations from engaging in music publishing or recording business). Hearings before the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, United States Senate, Eighty-fifth Congress, second session, on S.2834, A Bill to provide that a license for a radio or television broadcasting station shall not be granted to, or held by, any person or corporation engaged directly or indirectly in the business of publishing music or of manufacturing or selling musical recordings. March 11, 12, 13, 19, 20, April 15, 16, 17, May 6, 7, 20, 21, July 15, and 23, 1958. Washington, U. S. Govt. Print. Off., 1958. 1237 p. John O. Pastore, chairman of subcommittee.

## 76. U. S. COPYRIGHT OFFICE.

Copyright in commercial prints and labels. Washington, U. S. Govt. Print. Off., Sept. 1958. 2 p. Circular no. 46.

This circular explains the Copyright Office procedures for the registration of claims to commercial prints and labels.

## 77. U. S. COPYRIGHT OFFICE.

Parties to the Convention on Literary and Artistic Property signed at the Fourth International Conference of American States, Buenos Aires, 1910. Washington, U. S. Govt. Print. Off., Sept. 1958. 1 p. Circular no. 37, Annex B.

A list of the 17 American states which are parties to the Buenos Aires Copyright Convention, 1910, as of Sept. 1958.

## 78. U. S. COPYRIGHT OFFICE.

Trademarks. Washington, U. S. Govt. Print Off., Sept. 1958. 1 p. Circular no. 13.

This circular explains that trademarks, service marks, and words, names, symbols, or devices which identify or are capable of distinguishing goods or services are within the jurisdiction of the Patent Office, and not the Copyright Office.

## 2. FOREIGN NATIONS

## 79. ARGENTINE REPUBLIC. LAWS, STATUTES, ETC.

Dekret Nr. 1155 betreffend die in Artikel V des Welturheberrechtsabkommens vorgesehenen Übersetzungslizenzen, vom 31. Januar 1958. (*60 Blatt für Patent-, Muster- und Zeichenwesen*, 211-212, no. 9, Sept. 1958.)

German translation of a decree of Jan. 31, 1958 regulating the granting of licenses for translation rights to foreign works in compliance with Article V of the U.C.C. See 5 BULL. CR. SOC. 296, Item 269 (1958).

## 80. ECUADOR. LAWS, STATUTES, ETC.

Resolucion Ministerial No. 204 de 28 de Febrero del presente ano, designo una comision para que elabore el Proyecto de Reglamento de aplicacion de la Ley de Propiedad Intelectual. Palacio Nacional, en Quito a 25 de agosto de 1958. (*III Registro Oficial*, No. 604, p. 4976, Sept. 2, 1958.)

The new Ecuador law regarding copyright will be discussed in a forthcoming issue of **THE BULLETIN**.

## 81. YUGOSLAVIA. LAWS, STATUTES, ETC.

Gesetz über das Urheberrecht vom 9 Juli 1957. Amsblatt FVRJ Nr. 36/1957 vom 28 August 1957. (25 *Archiv für Urheber-, Film-, Funk- und Theaterrecht*, 214-232, nos. 3/4, Mar. 1, 1958.)

A German translation, by Prof. Pavel Marc, of the Yugoslav copyright law of July 9, 1957, effective Nov. 29, 1957.

## PART III.

**CONVENTIONS, TREATIES AND  
PROCLAMATIONS**82. U. S. TREATIES, ETC., 1953- (*Eisenhower.*)

Ordonnance du Président des États-Unis d'Amérique concernant l'application aux ressortissants brésiliens des dispositions du Titre 17 du Code des États-Unis intitulé "Copyrights." (71 *Le Droit d'Auteur* 135-136, no. 9, Sept. 1958.)

French translation of a proclamation issued by President Eisenhower on April 2, 1957, to establish a supplementary copyright arrangement between the United States and Brazil, preceded by the texts, in French, of the diplomatic notes exchanged between the two countries in regard to this arrangement. See 4 BULL. CR. SOC. 136 and 158, Items 237 and 380 (1957).

## PART IV.

**JUDICIAL DEVELOPMENTS IN LITERARY AND  
ARTISTIC PROPERTY**

## A. DECISIONS OF U.S. COURTS

## 1. Federal Court Decisions

83. *Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co., Inc.*, 260 F.2d 637 (2nd Cir., Oct. 21, 1958).

Action for infringement of copyright and design patent on plaintiff's watch "Galaxy", which used jewels for its numerals and hands. On defend-

ant's motion to dismiss, the lower Court, 5 BULL. CR. SOC., Item 129 (1958), found the watch not copyrightable, without having to decide whether an action could be brought where plaintiff had attempted but failed to obtain a certificate of registration. But it held the design patent valid and granted a permanent injunction against defendant without trial because it had put in evidence all the earlier watches on which it relied as anticipations. Both parties appealed.

*Held*, dismissal of copyright count affirmed on different grounds; permanent injunction on design patent count reversed and remanded for trial. Concurring and dissenting opinions.

Assuming, *arguendo*, that plaintiff's watch was copyrightable, 17 U.S.C. §13 forbade any action for infringement since the Register of Copyrights had refused to accept registration. The Court (by Judge Hand) reviewed "the few decisions on the question [which] leave the answer uncertain"; but in *Bouvé v. 20th Century-Fox Film Corp.*, 122 F.2d 51, 50 U.S.P.Q. 338 (1941) the Circuit Court for the District of Columbia affirmed the lower Court's mandamus to register an item, and since mandamus should not be granted where another adequate remedy exists, "the affirmance of the judgment below necessarily presupposes that no action for infringement would lie in which the question of 'registration' could be decided". In the instant case it could be argued that the Register's decision involved such an exercise of discretion that mandamus would not go to review it, but there were no disputed facts and "the mere fact that the meaning of the phrase, 'works of art', admits of debate does not make it different from many statutes whose interpretation is every day regarded as reviewable by courts."—The Court found confirmation for its conclusion in the last sentence of 17 U.S.C. §13, denying the right to sue for infringement "until the provisions of this title with respect to the deposit of copies and registration of such work have been complied with", and this imports more than the mere "deposit of copies". The Court added that "since the owner must submit an application and pay the required fees in order to make a deposit . . . , we can think of no added condition for 'registration' but acceptance by the Register."

On the design patent count, even though there was a legitimate inference that the combination of "sticks" and "floaters" that sparkle was not obvious to those skilled in the art, it was necessary to "adduce the testimony of those so skilled as to whether in their judgment it was the combination of the three elements that constituted the attraction of the watch. Without such testimony we cannot say that the success of the watch was not due to the skill of the patentee in marketing its goods."

It was not necessary to discuss defendant's further defense that both

a copyright and a design patent could not be secured on the same disclosure. In *Korzybski v. Underwood & Underwood, Inc.*, 36 F.2d 727, 3 U.S.P.Q. 242 (1929) this Court held "that the grant of a patent presupposed a dedication to the public of the disclosure, except so far as the statute specifically reserved it to the patentee. Since we are holding that there was no enforceable copyright in the watch, we need not now reconsider our decision; for we do not think that a copyright which is not enforceable, even though it may be theoretically in existence, is an obstacle in securing and enforcing a patent."

Judge Lumbard, concurring, stated that while he agreed with the lower Court that summary judgment sustaining the design patent was permissible, "I concur with Judge Hand's opinion to send that part of the case back for further hearing as it is the only common denominator on which two of us can agree for disposition of the design cause of action".

Chief Judge Clark, dissenting, stated that "all the judges . . . have substantially agreed that copying of plaintiff's watch would call for some remedial action by the court, but we have disagreed on the rationale to support this conclusion." He felt that lack of invention was thoroughly demonstrated, and to remand the design patent count for a new trial was "rather an abomination to expectant litigants and harassed trial courts". The copyright issue was much more in point, and plaintiff's watches were as much entitled to copyright as the ornamental lamp bases in *Mazer v. Stein*, 347 U.S. 201. Refusal by the Office of the Register of Copyrights to accept registration was purely a ruling of law which was erroneous and beyond the authority of the official making it. ". . . I doubt if the ministerial grant of a certificate is a condition precedent to a suit for copyright; but however this question is answered, it seems to me clear that a plaintiff situated as is this one is entitled to at least interim relief . . . The plaintiff should at any rate have an injunction preventing further wrongdoing until it is able to seek mandamus against the Register in the District of Columbia."

84. *Trowler, d.b.a. Standard Maps v. Phillips, d.b.a. M. Penn Phillips Associates, et al*, 119 U.S.P.Q. 164 (9th Cir., Sept. 29, 1958).

Action against four defendants for infringement of copyrights on two maps. At a pre-trial conference the actions were consolidated for trial and it was agreed that plaintiff should submit an affidavit setting forth his method of compiling the maps. As to his first map, plaintiff listed as source materials tract sheets, sheets of the county road system, a county map, Department of Interior maps, state highway maps and railroad maps, and he mentioned problems of tying the maps together, adjustment of

scales, elimination of much source material, addition of landmarks from personal observation and straightening out of many street names. As to the second map, he stated he followed substantially the same procedure. The lower Court granted defendants' motion for summary judgment on the ground of insufficient originality, and plaintiff appealed.

*Held*, reversed.

The Court said that frequently the preparation of findings of fact and conclusions of law, as was done by the lower court, "are the telltale flag that points the way to a discovery that summary judgment should not have been granted. Here we think there were issues of fact not to be resolved by merely briefly describing the method of compilation; that an examination of the source material was needed to see if the end product met the standards of copyrightability." As to the first map, plaintiff was deprived of his right to trial. As to the second map, the short reference in the affidavit "just didn't fit the case at all because too many of the facts alleged with respect to [the first map] . . . were peculiar to [it] . . . So, on [the second map] . . . there should also be a trial." But the Court did not intend to intimate plaintiff's maps were or were not copyrightable, nor did it reach the issue of infringement.

## 2. State Court Decisions

85. *Vidor v. Serlin et al.*, 119 U.S.P.Q. 104 (N.Y.S.Ct., Spec.Term, N.Y.Co., Jan. 21, 1958).

In 1940 an agreement was entered into by Bass and Sylvester, acting as attorney in fact for Romola Nijinsky. This agreement was assigned to Serlin later the same year, but neither of these agreements, though recordable, was recorded with the Copyright Office until November 1954. On March 5, 1954 plaintiff entered into an agreement with Nijinsky which was filed in the Copyright Office on March 12, 1954.

Held, plaintiff was the sole owner of the motion picture and other allied rights in the literary work involved.

The Court could not find any actual notice to the plaintiff of the rights asserted by Serlin, nor was there implied notice; "the record is barren of any evidence other than certain news reports and gossip items which appeared in theatrical trade papers and other columns in the press, but there is nothing in the record to show that any of these items were brought to the attention of the plaintiff, and, in fact, even if they had been brought to plaintiff's attention, it is very doubtful whether they would have constituted the actual notice required by the authorities." A search had been made on plaintiff's behalf in the Copyright Office

and by a firm of attorneys specializing in these matters, and this search had failed to disclose anything that would impute to plaintiff knowledge of Serlin's claim.

86. *Joy Music, Inc. et al. v. Seeco Records, Inc.*, 166 F.Supp. 549 (D.C.S.D.N.Y., Oct. 21, 1958).

Action for copyright infringement under Sec. 1(e) of the Copyright Act. The parties departed from the exact terms of the statute by varying the accounting period, lowering the royalties for several songs and dispensing with notice requirements.

*Held*, defendant's motion to dismiss denied and plaintiffs' motion to strike granted

Parties remain free to substitute private licensing agreements for the protection afforded by Sec. 1(e). But the mutually convenient variations involved here were not sufficient to show that this was a private licensing agreement enforceable in state courts only. Letters relied upon by defendant seemed to indicate rather that the parties intended to be governed by Sec. 1(e), and "absent a clear showing to the contrary, it will not be presumed that this departure from the exact terms of the statute was intended as a waiver of its protection".

## PART V.

# BIBLIOGRAPHY

## A. BOOKS AND TREATISES

### 1. United States Publications

87. NATIONAL COMMITTEE FOR EFFECTIVE DESIGN LEGISLATION. Summary of the provisions of Willis design protection bill (H.R. 8873, 85th Congress). New York 1958. 7 p.
88. VARMER, BORGE. Works made for hire and on commission; a study prepared for the United States Copyright Office . . . with Comments and views submitted to the Copyright Office. Washington, Copyright Office, Oct. 1958. 29, 14 p. (*General revision of the copyright law, study no. 11*).

The eleventh in a series of studies issued by the Copyright Office to interested persons with invitations to submit statements of their views. submit statements of their views.

## 2. Foreign Publications

## (a) In French

89. PLAISANT, ROBERT. *Droit fiscal de la propriété industrielle, littéraire et artistique* [par] Robert Plaisant, Jean Leblond [et] René Blancher. Paris, Librairies techniques, 1958. 191 p.

A treatise on French tax law pertaining to industrial, literary, and artistic property, organized into the following main topics: 1. General characteristics of the laws of industrial, literary, and artistic property and of the appurtenant tax laws. 2. Income and "turnover" taxes. 3. Licenses. 4. Registration tax. 5. Double taxation treaties.

## (b) In German

90. GERSTENBERG, EKKEHARD. *Photograph and Urheberrecht. Im Anhang: Muster für Urheberrechtsstempel, Vertragsbeispiele, Text des [i.e., des] Urheberrechtsgesetzes.* Hann, Münden, Klie 1956. 36 p. (Schriftenreihe des Centralbandes des Deutschen Photographenhandwerks, Heft 1.)

A handbook for the professional photographer on copyright law with reference to photography in West Germany. The appendices include specimen contract forms and the text of the German copyright statute on works of art and photography.

91. GIERL, KARL HEINRICH. *Urheberrechte und angrenzende Rechte beim Fernsehen.* München, 1956. 126 l. Inaug-Diss.—Munich.

A doctoral dissertation on copyright and neighboring rights involving television in West Germany.

## (c) In Yugoslav

92. SPAIC, VOJISLAV. *Autorsko pravo.* Sarajevo, Izdavacko preduzece "Veselin Maslesa," 1957. 377 p.

A treatise on Yugoslav copyright law, including chapters on neighboring rights and international copyright. The appendices include texts of Yugoslav copyright laws, the Brussels revision of the Bern Convention, and the U. C. C.

## B. LAW REVIEW ARTICLES

## 1. United States

93. AMERICAN PATENT LAW ASSOCIATION. Bulletin. Sept. 1958. Washington 1958. pp. 219-282.

Among the committee reports for 1957-58 is one by the Standing Committee on Copyrights which includes brief summaries of bills pertinent to copyright which have been introduced in the 85th Congress, and the minutes of the committee meeting of Oct. 9, 1957, to consider the Willis design protection bill, H.R. 8873.

94. DERENBERG, WALTER J. Recent publications in the field of literary, artistic, and industrial property. (7 AM. J. Comp. L., 289-297. no. 2, spring 1958.)

In a brief survey, the reader's attention is called to some publications of the last 18 months of major interest to the student of comparative law.

## 2. Foreign

## (a) French

95. CARBONNIER, JEAN. L'héritage d'André Gide. (25 *Archiv für Urheber-, Film-, Funk- und Theaterrecht*, 279-285, nos. 5/6, April 1, 1958.)

A comment on the legal problems involved in a French case (Trib. civ. Seine, 13 juillet 1955, JCP 1956. II.9043) concerning the capital value of the copyrights, for taxation purposes, of André Gide who died intestate in 1951.

96. DESBOIS, HENRI. La loi indienne du 4 juin 1957. (71 *Le Droit d'Auteur*, 126-132, no. 8, Aug. 1958; 139-143., no. 9 Sept. 1958.)

A review of the principal innovations of the new copyright law of the Republic of India by comparison with the draft law.

97. VANDER HAEGEN, ALFRED. La Convention universelle sur le droit d'auteur dite de Genève vue en droit belge. (35 *Revue de Droit International et de Droit Comparé*, 274-287, nos. 2-3 1958.)

A case is made for Belgian ratification of the U.C.C. by a study of some of its provisions of interest to Belgium especially in relation to the domestic copyright law.

## (b) German

98. GOLDBAUM, WENZEL. Simultanveröffentlichung — Römische Ubereinkunft und Welturheberrechtsabkommen. (25 *Archiv für Urheber-, Film-, Funk- und Theaterrecht*, 414-420, nos. 7/8, May 1, 1958.)

A comment on the effect of simultaneous publication under the Rome version of the Bern Copyright Convention and the U.C.C.

99. HAEGER, SIEGFRIED. Der Film als Gesamtwerk; ein Beitrag zur Reform des Urheberrechts. (25 *Archiv für Urheber-, Film-, Funk- und Theaterrecht*, 166-213, nos. 3/4, Mar. 1, 1958; 285-334, nos. 5/6, Apr. 1, 1958.)

"The motion picture as a composite work; a contribution to the reform of the [West-German] copyright law."

100. HIRSCH BALLIN, ERNST D. Gewisse, sogenannte an das Urheberrecht grenzende Rechte. (25 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 257-278, nos. 5/6, Apr. 1, 1958.)

A commentary on the Monaco and I.L.O. draft conventions for the international protection of neighboring rights. A Dutch version was previously issued in *Rechtsgel. Mag. Themis*, afl. 6, 1957. See 5 BULL. CR. SOC. 247, Item 316 (1957).

101. GRECO, PAOLO. Die Struktur des Filmwerke und deren Stellung im System des Urheberrechts; eine rechtsvergleichende Betrachtung. (25 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 497-557, nos. 9/10, June 1, 1958.)

A comparative study of the structure of the cinematographic work and its place in the copyright system.

102. GROPLER, BURKART. Wider den Urheberrechtsmonismus. (25 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 385-414, nos. 7/8, May 1, 1958.)

A commentary opposing the doctrine of "monistic" copyright advanced by German jurists, particularly Allfeld and Ulmer. Under this doctrine copyright is neither a separate moral right nor a property right but a right *sui generis*, consisting of both moral and property rights which terminate at the same time.

103. LOGDBERG, AKE. Musik während der Arbeit; aus der schwedischen Rechtsprechung. (25 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 558-560, nos. 9/10, June 1, 1958.)

A case note on a recent Swedish supreme court decision holding that the consent of the composer is not required for the playing of his recorded copyrighted music in industrial plants during working hours. The trial and appellate courts had held that such consent was required. See 3 BULL. CR. SOC. 163, Item 458 (1956).

104. PFENNIG, BRUNO. Kartellrechtliche Fragen im urheberrechtlichen Geschäftsverkehr; ein Beitrag darüber aus Anlass des Erscheinens des Buches "Die Wettbewerbsbeschränkung" von Oswald Lehnich. (25 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 129-151, nos. 3/4, Mar. 1, 1958.)

A discussion of legal problems of monopolistic cartels in commercial transactions involving copyrights in West Germany. Offered as a contribution occasioned by the publication of a work by Oswald Lehnich on restrictive trade practices (*Die Wettbewerbsbeschränkung*, C. Heymann, Köln, 1956).

105. WILDE, WALTER. Wirtschaftswerbung durch Einblendung in Spielfilmen. (25 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 152-165, nos. 3/4, Mar. 1, 1958.)

A discussion of the question whether subliminal or other indirect advertising, in a feature film, of a trade mark, trade-name, industrial product or enterprise is permissible under existing West German laws, especially laws of copyright, motion pictures, and unfair competition.

(c) Italian

106. GIANNINI, AMEDEO. Agenzie di informazioni e tutela delle informazioni. (29 *Il Diritto di Autore* 183-198, no. 2, Apr.-June, 1958.)

A discussion of information and news agencies and the problem of protecting information in Italy with some reference to other countries and to the Bern and Paris Conventions.

107. VALERIO, ETTORE. Legislazione sul diritto di autore nell'U.R.S.S. e in altri paesi dell' Europa orientale. (29 *Il Diritto di Autore* 292-305, no. 2, Apr.-June 1958.)

A brief survey of the copyright legislation of Russia, Bulgaria, Czechoslovakia, Yugoslavia, Poland, and Rumania, prefaced by a comparison with Italian legislation.

108. ZWEHL, HANS FRITZ VON. Posizione giuridica dell'autore di televisione in Germania. (29 *Il Diritto di Autore* 305-309, no. 2, Apr.-June, 1958.)  
A discussion, translated into Italian from German manuscript, of some legal aspects of the protection of authors with respect to television in West Germany.

#### NEWS NOTES

109. TWO NEW ADHERENCES TO THE UNIVERSAL COPYRIGHT CONVENTION.  
Word has been received from UNESCO that on Monday, October 20, 1958, the Irish Republic deposited its instrument of ratification to the Universal Copyright Convention and Protocols 1, 2, and 3, thereto, effective January 20, 1959.  
On October 22, 1958, Liechtenstein deposited its instrument of accession to the Convention and Protocols 1 and 2. The Convention will enter into force in respect to Liechtenstein on January 22, 1959.



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**GENERAL REVISION STUDY  
NO. 13 NOW AVAILABLE**

JOINT OWNERSHIP OF COPYRIGHTS by George D. Cary, General Counsel, Copyright Office, with the assistance of John W. Coleman, is the thirteenth in a numbered series of studies prepared by the Copyright Office, under a Congressional authorization, looking toward a general revision of the Copyright Law (Title 17, U.S.C.). This study is now ready for distribution.

Copies of the studies, to which are attached the comments and views of the consultants, may be secured by sending a request addressed to R. G. Plumb, Head, Information and Publications Section, Copyright Office, Washington 25, D.C.

Persons and groups concerned with these problems are invited to submit their comments to the Copyright Office.

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## PART I.

## ARTICLES

EDITOR'S NOTE: One of the copyright concepts least understood in common law countries is the *droit de suite*, i.e., the right of the author of a painting or sculpture and certain other types of works of the fine arts to participate in the proceeds of public and/or private sales of his works and which is vested not only in the artist himself but will descend to his family as an inalienable right.

Recognition of the *droit de suite* has been on the agenda of the Intergovernmental Copyright Committee of UNESCO on several occasions and was most recently brought up again at the Geneva meeting of September 1958. Resolution No. 24, as adopted by the Committee, expressed the wish that the Secretariat give further study to the problem and report to the next session with regard thereto. During the discussions of this right, the presiding officer (Arthur Fisher, United States Register of Copyrights) observed several times that it would greatly promote further consideration of this concept if copyright experts in common law countries and other countries who may not be familiar with the *droit de suite* would be afforded an opportunity to acquire greater knowledge of the nature of this right and of the actual operation of its exercise in several Convention countries.

In view of this acknowledged need for better understanding, the Board of Editors is pleased to make available in this issue two original papers on the *droit de suite*, one by the distinguished former director of the UNESCO Copyright Division, and the other a study in comparative law prepared by a young scholar well versed and trained both in our law and the operation of the *droit de suite* in foreign countries, particularly in France, where this right originated.

W.J.D.

110. ROYALTIES FROM WORKS OF THE FINE ARTS: ORIGIN OF  
THE CONCEPT OF *DROIT DE SUITE* IN COPYRIGHT LAW.

By FRANÇOIS HEPP\*

When the law sanctions copyright and grants it increased protection through specially favorable provisions, it matters little whether this is done in order to assure the protection of a kind of natural right, or in order to encourage the development of culture in the public interest.

In reality, this protection has no other objective than to grant intellectual creators, such as writers, composers, and artists, means whereby they can benefit from the economic exploitation of their works. Thus they are, in a way, associated with the success which their works find with the public.

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\* Mr. Hepp was formerly chief of the Copyright Division of the Secretariat of UNESCO and played a leading role in the preparation of the Universal Copyright Convention. He subsequently served as Secretary General of the Geneva Conference in 1952. He is at present president of the Working Group on Applied Arts, International Chamber of Commerce. On the occasion of his retirement after eight years of service with UNESCO, Mr. Hepp was honored by the publication, *Mélange François Hepp* (Paris, Éditions Inter-Nationale, 1957), 5 BULL. CR. SOC., page 245, item 307.

Thanks to the exclusive enjoyment of their rights which the law grants to authors, they may, at the time they authorize the public dissemination of their creations, make this authorization dependent on financial conditions susceptible of assuring them a certain remuneration.

This is why, in their contracts with publishers, authors generally stipulate that their publishers will pay them royalties computed on the basis of the number of copies sold by the publishers; and it is required by law that, at the time the authorization is granted, this stipulation take place.

If this is true in most cases with respect to literary and musical works, what is the solution in the case of works of the fine arts?

If the painter or sculptor authorizes the reproduction of his work, he usually stipulates royalties. However—and this is curious—when he sells the original work itself, he usually exhausts all his rights. Although this method of sale—which after all relates to an object somewhat different from the manuscript of a book—may seem to be just and practical from the commercial viewpoint, it has been regarded by a number of European jurists as being far from equitable, from the viewpoint of safeguarding the interests of the artist and his heirs. Why is this so? These are the points that require some explanation, as in the majority of the countries the attention of the legislators has not been directed toward the practical consequences of the present general usage.

Works of the fine arts have an economic value which varies considerably, according to the tastes of the public, fashion, and the evolution of artistic views. The greatest masterpieces of art have generally not been recognized at the time they were created. On the other hand, many artists whose works were fashionable at the time of their creation were completely forgotten after their deaths, and their names do not evoke any echo in the minds of subsequent generations.

Unrecognized artists are vindicated after their death. Their works, which they sold when they were poor to some competent art collector and for which they received only a very low price, acquire considerable value. This is a common phenomenon, well illustrated by much-publicized public auctions, in which works completely neglected at the time of their creation have been sold for tens, even hundreds of thousands of dollars. Such sales, however fabulous the prices may be, mean no profit to the artist. He is dead; and his children, even poorer perhaps than he was himself, learn about the extraordinary results of such auctions in the newspapers.

This situation has aroused those jurists, particularly in France, who seek to improve copyright protection. They thought that it was perfectly equitable that the original buyer, who had had a sure enough artistic taste and also courage when he gambled his money on a work without any market value at the time of buying it, should benefit by the increase in value of the work. It is only just that his good taste and courage be rewarded through a good business deal. However, when the work passes into the hands of another buyer who may be

nothing more than a simple businessman without any artistic taste, and who simply wants to make a good business deal by buying an article which is generally recognized to have a high value—would it not be just to give to the artist, old and poor, or to his children if he is dead, a small portion of the price which the buyer pays without taking any chances or showing any courage, because the work is now generally recognized as having a certain commercial value in the market for works of fine arts? It is from this idea, inspired both by feelings of equity and a desire to compensate for the variations in public taste, that the right — juridically not very correctly called the “droit de suite” — to royalties for the authors of works of fine arts is born. This expression was invented somewhat hastily by French jurists by a rather far-fetched analogy with mortgages on real property. It is not surprising that this expression is not quite understood by foreign jurists and causes them, for this very reason, to reject without further examination the concept behind the expression. But if the terminology is forgotten and the essence of the question is examined, it will be seen that what is instituted is not a new right but simply a method whereby the royalties they are now deprived of are granted to authors who sold their works under special circumstances—usually the pressure of necessity—and without realizing the true value of their work.

If the problem is not one of justice, it certainly is one of equity, and deserves the most careful consideration. This way of thinking, which has long been rejected by the legislators of most of the countries of the Berne Copyright Union, has nevertheless finally compelled their attention, and in the Brussels revision conference of the Berne Copyright Convention in 1948, the following text has been adopted as the new Article 14<sup>bis</sup> of that Convention:

(1) The author, or after his death the persons, or institutions authorized by national legislation, shall, in respect of original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first disposal of the work by the author.

(2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the degree permitted by the country where this protection is claimed.

(3) The procedure for collection and the amounts shall be matters for determination by national legislation.

The Intergovernmental Copyright Committee, official body of the signatory countries of the Universal Copyright Convention of 1952, recommended a study of this problem to the Director-General of UNESCO in 1957. UNESCO submitted the report to the third session of the Committee, which met in August 1958, in Geneva. The results of this report are that three countries (the United States, the United Kingdom, and India) have reacted unfavorably to the idea

of the international recognition of "droit de suite". Four countries (Italy, Monaco, Portugal, and Switzerland) gave a favorable reply, whereas three countries (Argentina, Costa Rica and Portugal) have asked for a more detailed study because of the theoretical and practical difficulties of the application of such a right.

The Intergovernmental Copyright Committee adopted the following resolution at the end of the Geneva Session:

The Intergovernmental Copyright Committee,

Considering that only a limited number of governments have, up to the present time, made known their views on the question of 'droit de suite' (Resolution No. 15[II]);

Expresses the wish that the Secretariat report to the next session of this Committee any further comments it may receive.

Thus, the question is being kept on the agenda of the Intergovernmental Copyright Committee and will receive further consideration in the future meetings of the same body.

It is for this reason that it appears to be desirable that the expression "droit de suite" — an expression which is far from self-explanatory — be exactly defined, and its meaning, not only from the legal viewpoint but also and principally from the practical and equitable viewpoint, be fully analyzed.

#### 111. THE FRENCH *DROIT DE SUITE*: THE PROBLEM OF PROTECTION FOR THE UNDERPRIVILEGED ARTIST UNDER THE COPYRIGHT LAW.

By RITA E. HAUSER\*

The folklore of the art world is replete with tales of wealth and poverty, of fortunes made in the gamble of art collecting<sup>1</sup> and of artists, whose paintings now bring vast sums, dying, cold and hungry in a Paris garret, or whose heirs, like *la pauvre fille* of Millet, sold flowers on the streets to subsist. This complete economic separation of the artist from his product, the latter having augmented in value over the years, seems more the *leitmotif* of the art world than any other creative medium. The unknown writer may, it is true, sign away his creation at very disadvantageous terms, but subsequent success at least brings him *some*

\* Rita E. Hauser, A.B., Doctor of Political Economy, *Licence en Droit*, Paris, LL.B., New York University, is with the Appellate Section of the Tax Division, United States Department of Justice. The paper here presented has been prepared by the author during her last semester before graduation from law school, and has been entered by her for consideration in the Nathan Burkan Memorial Competition for 1959.

1. For a colorful description of the world of art collectors, see, for example, Duveen, *ART TREASURES AND INTRIGUE* (1935), and Saarinen, *THE PROUD POSSESSORS* (1958).

share in the augmented profits had on his work. Royalties, or some similar participation in the future profits of the creative work, is standard practice as far as the writer and composer are concerned simply because their works are inherently reproducible. Value is not lodged in the original manuscript or page of music, but, rather, in the fact that the work is performable, exploitable commercially by its mass reproduction. The artist, on the other hand, creates a unique object, a tangible chattel that derives its value exclusively from the knowledge that it is unique, that it is "the original", be it a painting, sculpture, or similar artistic product.<sup>2</sup> This dichotomy as to source of value is, then, inherent in the work product of these diverse creators.<sup>3</sup>

Copyright protection is given to a creator against any unauthorized reproduction, performance, or exhibition of his work;<sup>4</sup> consequently, the writer or composer generally reserves some pecuniary benefits unto himself when he alienates these exclusive rights of reproduction and of performance. In contrast, the artist sells an object rather than intangible rights, much as if he alienated a suit of clothes he had tailored. There is nothing, practically speaking, that he can reserve unto himself, for the painting cannot be exploited in the broad sense of the word. It will hang in the buyer's home, very much outside the realm of wide public diffusion, and, the buyer, justly regarding it as a tangible chattel, will freely do with the painting as he chooses—keep it, reproduce it, sell it, or even destroy it. *Jus uendi et abutendi*. The artist's pecuniary interest is therefore sealed at the moment of the contract, and the work, once alienated, is outside his control.<sup>5</sup>

The French Parliament, after lengthy descriptions were offered before it of artists who died in misery at a time when their paintings were bringing enormous sums, among them Millet, Cezanne, Gauguin, enacted in 1920 what may be deemed by some to be merely a sentimental remedy—*le droit de suite*—which to these same critics presents certain theoretical difficulties for the legal scholar both as to its justification and its practice. It is an attempt to permit the participation of the artist in future sales of his creative work, and is a right

2. Only in recent years have some artists begun to derive substantial income from the mass reproduction of their works to meet the average income art-lover's pocketbook and to supply the new vogue of decorating one's home with prints of the masters. Many of the popular prints are, however, copies of works now in the public domain.
3. For lack of a better generic term in English, we shall employ the translation of *createur* (creator) to indicate the producer of any intellectual product.
4. Copyright Act, 1947, 61 STAT. 652, 17 U.S.C. #1 (1947). For France, the laws of 1791 and 1793, as amended by the law of April 9, 1910, now codified in the new Copyright Act of March 11, 1957.
5. French law admits that certain rights directly related to the personality and reputation of the creator remain with him despite a total alienation of his product. These are termed "moral rights", and are discussed in detail *infra*, p. 103.

wholly independent of contract stipulation. It is inalienable, intended to protect the heirs of the artist as much as the artist himself.

It behooves the American copyright bar to comprehend this scheme of protection now imitated by four other countries and studied by many more, for two basic reasons:

1) as potential legislation in the United States to remedy the incomplete protection now afforded the artist, and

2) because Americans, it would appear, will, by virtue of the Universal Copyright Convention, enjoy this right in those Convention nations that have adopted the *droit de suite*. We propose, then, a brief history of the origin and functioning of the *droit de suite* in France, coupled with a juridical analysis of the nature of the right, its position under the Universal Copyright Convention, and, finally, some suggestions as to its possible place in American law.

*History and Functioning of the Droit de Suite in France.*<sup>6</sup>

In an article in the *Chronique de Paris* of February 25, 1893, Albert Vaunois introduced the concept of the *droit de suite*,<sup>7</sup> and three years later an attorney, Edouard Mack, raised the issue in his report to the Berne Congress of the International Literary and Artistic Association. The seeds thus planted grew, flowering suddenly in 1903 with the creation, in Paris, of the *Société des Amis du Luxembourg* which had the double aim of establishing the Museum of Luxembourg and the enactment of the *droit de suite*. The *Société* produced a draft project in 1904 which served ultimately as the basis for the law of 1920 establishing the *droit de suite*. It was heralded in the French press in somewhat more dramatic fashion than by either the legal supporters or defenders, and undoubtedly created a public opinion in its favor.<sup>8</sup> In the intervening years, various diverse projects emerged authored by men of variegated interests. Two basic lines of thought appeared. One, fathered by Hesse<sup>9</sup> and supported by the Luxembourg *Société*, favored a special legislated right, the other sought the artist's protection through individual contractual stipulations to be enforced by the

6. For a general view of the subject, we suggest the following French works: Benoit, *ETUDE SUR LA PROTECTION LEGALE DE LA PROPRIETE ARTISTIQUE* (1913); Cabrillac, *LA PROTECTION DE LA PERSONALITE DE L'ECRIVAIN ET DE L'ARTISTE* (1926); Duchemin, *LE DROIT DE SUITE DES ARTISTES* (1948); Weiss, *RAPPORT SUR LE DROIT DE SUITE* (1929).

7. This term has been inexactly translated as "the follow-up right". Both because the French term itself is inaccurate (*infra*) and the English translation hardly adequate, we prefer to use the term "*droit de suite*" rather than attempt a translation of the term.

8. See the various articles in the 1904 edition of *L'Eclair* and *l'Humanité*, and especially the series of articles of Jacques Duhr in *Le Journal* of 1908 and in *Le Siecle* of 1909.

9. Proposed law of Andre Hesse of April 13, 1911. *J.O.*, Parliamentary Documents, Chamber of Deputies, Ordinary Session, second sitting of April 13, 1911, Annex 953 (1911).

courts, *i.e.*, the pronouncement by Parliament that the reservation of pecuniary rights by the artist in a work he has sold did not contravene the concepts of property law of the Civil Code, or at best, such a derogation was to be permitted as concerned this peculiar form of "property".<sup>10</sup>

The first line of reasoning prevailed, and a Fine Arts Commission was asked to prepare a report. Its chairman, Abel Ferry, made clear that he founded the proposed *droit de suite* on the rationale that the artist was ill-protected under general copyright law simply because of the nature of his product; that he had, in fact, been overlooked in the 1791 and 1793 copyright legislation.<sup>11</sup> As he concluded in the preamble to his bill, "It is not alms we ask, but a property right".<sup>12</sup>

Ferry was killed in World War I, and his successor, Leon Berard, presented the Commission's report and project in 1913.<sup>13</sup> It was voted into law in 1920, and promulgated by the President of the Republic on May 20th, 1920.

Simply stated, the 1920 law permits an artist to share in the sales price of his work as it later passes from buyer to buyer by the claiming of a statutory percentage. It is unfortunate that the authors of the law designated this right by the nomen "*droit de suite*" which is both inaccurate<sup>14</sup> and belies the funda-

10. See the project of Jose Thery as reported in the *Mercure de France* of August 1, 1904, conceiving the *droit de suite* as a remuneration for work rendered; and that of d'Ajalbert and of Thaller of the same year.
11. This feeling was largely correct, for failure to stipulate specifically in these two laws, which protect the right of presentation and of reproduction respectively, that works of art, once sold, enjoyed protection against reproduction unauthorized by the artist, placed the artist in a precarious position therein. The courts tended to take a most literal view of the statutes. Under the pressure of the group called "Author's Rights for Artists", the law of April 9, 1910 was promulgated. It provides that in the absence of a specific grant of reproduction rights, alienation of a work of art of any kind does not deprive the creator of his protection against unauthorized reproductions. This provision has been maintained in the 1957 Copyright Act. Although applicable to the works of all creators, it obviously has its most important application for the works of artists.
12. *J.O.*, Parliamentary Documents, Chamber of Deputies, Ordinary Session, second sitting of Jan. 23, 1914, Annex 3423 at 150 (1914).
13. *J.O.*, Parliamentary Documents, Chamber of Deputies, session of Sept. 2, 1919, Annex 6794 (1919).
14. The term *droit de suite* comes from French real property law. Under article 2279 of the Civil Code, a taker of *personality* cuts off all rights of the true owner, for "in the matter of personality, possession equals title". The only exception is in the instance where the holder is a thief or finder and the owner vindicates his rights in three years. Rights to realty are, however, more sacred, and an owner or a creditor may pursue the realty in the hands of a taker, even a *bona fide* one. Creditors may not do the same to personality, for the chattel mortgage, as such, does not exist in French law. This right to pursue or follow the property (realty) is called, literally enough, the "follow-up right" (*droit de suite*).

mental concept of the legislature that this was but one of the components of the parcel termed "author's rights" (*droit d'auteur*). It was in no way conceived of as a special, unique right given to artists, but, rather, was intended to insure them a parallel benefit to that which writers and composers derive through royalties. As we shall see, this designation has caused argumentation as to the inclusion of the *droit de suite* in those author's rights protected by the Berne Convention, and, by extension, to the Universal Copyright Convention.

Under the 1920 law, artists may claim a percentage of the gross sales price received on each *public* sale (auction) of their works, provided that the given work is "original" (article 1). That latter term is not defined, but seems to be used in opposition to the word "reproduction".<sup>15</sup> Where difficulty has ensued, however, is in the case of lithographs, engravings, woodcuts, medals, jewelry, and other objects generally reproduced in quantity for sale. In theory, the law applies to all works of the plastic arts, whatever their merit or use, provided they are "original", but it would appear that conservative opinion deems the cut only as the "original", a peculiar result in that the cut is hardly ever sold at auction. Rarely have the copies of these works sold for a price high enough to bring them within the coverage of the 1920 law, and consequently, there are no decisions on the question. It is unfortunate that the 1957 copyright law, which recodifies the 1920 law, did not deal with the problem, nor seek to define the term "original".<sup>16</sup>

Similarly, there is no certitude as to originally illustrated manuscripts, nor architectural works, nor works of art that become fixtures when attached to realty, *e.g.*, murals.<sup>17</sup>

As to joint works, the decree of May 31, 1924 stipulated a simple solution: in the absence of any agreement, equal division among the co-artists. For some

15. It should be noted, however, that French copyright law designates as a reproduction that which is a mere servile copy of the original. An interpretation of the original would constitute a new copyrightable work considered as a derived work of art.
16. Duchemin indicates that this result occurred because of the great divergency of views which prohibited an agreement. The Commission for Intellectual Property wound up simply counseling the interested groups to come to terms, and offered to arbitrate. It appears that several accords have been signed between auctioneers, print dealers and engravers, wherein the number of originals will be limited and executed by the artist himself thereby permitting enforcement of the *droit de suite* in the sale of these "originals". *La Propriete Artistique selon la Loi Francaise du 11 Mars 1957*, XIX *Revue Internationale du Droit d'Auteur* 355 (April, 1958).
17. The original Ferry project used the word "*mobilières*" (personality) after the term "works of art", but in the law of 1920 it simply reads "works of art". It is rare, of course, for buildings to be sold at public auction, so that the question still remains hypothetical. The 1957 amendment, however, bringing *private* sales within the purview of the *droit de suite*, may force the question. It is interesting that the Czechoslovakian law on the *droit de suite* specifically excludes architectural works. Article 35, law of Nov. 24, 1926.

unknown reason, it was dropped in favor of a complex rule set out in the decree of December 24, 1924. If no accord between the co-artists exists, the sum is held in reserve until one is had amicably or through the intermediary of the courts. As we shall see, the practice of the Artists' Union vitiates this procedure completely. It is the Union that vindicates this *droit de suite* for the individual artist who has never, of record, personally claimed his rights under the 1920 Act, preferring the collective force of the organization of artists—the Union of Artistic Property.<sup>18</sup>

Under the 1920 Act, a minimum sales price of 1,000 francs was required before the Act could take effect. This was then so large a sum that few artists benefited in any real sense, and the 1922 modifications brought about the following tariff schedule:<sup>19</sup>

From 50 to 10,000 francs .....	1%
From 10,000 to 20,000 francs .....	1½%
From 20,000 to 50,000 francs .....	2%
Above 50,000 francs .....	3%

The March, 1957 copyright revision, considering the devaluation of the franc since 1922, has upped the minimum price to 10,000 francs (about \$20), and set a uniform rate of 3% in lieu of the progressive tariff above. Not until the 1957 law, effective in 1958, were *private* sales included. It seems best, therefore, because of lack of data under the new law, to view the functioning of the *droit de suite* under the 1920 and 1922 laws.

Without entering into any theoretical difficulties, it can be said that the legislature limited the application of the Act to public auction sales simply because it feared that control over private sales could not be had. Heavy pressure from private art dealers enforced this position. Thus, the *droit de suite* applied only to sales conducted by public officers (*Commissaires-Priseurs*) on French territory; the proportional tariff was affixed to the gross price had at auction whether or not this price was higher or lower than that had on the prior sale of the work<sup>20</sup>. The amount due is paid by the seller. It is clear, then, that the *droit de suite* in no way applies to the original sale of the painting by the artist to the first buyer. Rather, it is in force solely on subsequent sales to which the artist is no longer a party. The right exists as a matter of law, and is inalienable.

How, then, does the artist vindicate his rights? The ministerial decree of

18. *Infra*, pp. 100-102.

19. Law of October 27, 1922.

20. The determination of the base price, be it simply the gross price had on each sale, or the *difference* in price over the prior sale, is the heart of the theoretical debates as to the juridical basis of the *droit de suite*. We therefore defer discussion until the next section. *infra*, pp. 106-107.

December 17, 1920<sup>21</sup> enumerates the formal procedure, which, briefly stated, requires the artist to insert in the *Journal Officiel* a special declaration to the effect that he claims the *droit de suite* in a given artistic work. He indicates his name, address, *artistic* signature, and legal signature, indicating that the procedure was as much conceived of as a means of authenticating works of art as a requisite step in manifesting the artist's intent to benefit from the *droit de suite*.<sup>22</sup>

A duplicate of this declaration is filed with the Minister of Fine Arts. The declaration may be made by the artist at any time, or by his heirs or assigns, and what is of fundamental practical importance, article 3 of the decree permits the making of the declaration and the receipt of the sums due by any designated agent of the artist. Both Ferry and later Berard, in the parliamentary debates, make plain that the virtual functioning of the *droit de suite* presupposes an association of artists which will protect the interests of its members, much as A.S.C.A.P. operates in the United States. Several groupings of artists and authors in France have fought over the years for supremacy, an interesting study in itself; it was, finally, the Union of Artistic Property which prevailed and is now the sole organ of collection of the *droit de suite*. It is amazing to note that no instances can be found, according to the Secretary General of the Union, in which an individual artist or his heirs have attempted to collect directly from the public officer.<sup>23</sup>

As a result of this monopoly, various deviations from the letter of the law have occurred, since the procedure of the Union is the real determinant of the operation of the *droit de suite* in France. The public auction officers, responsible for collecting the *droit de suite* and turning the sums over to the artist within three months, are obliged to keep a special register noting sales had and prices received. The Union has made arrangements to use this register and the auctioneer's catalog which, coupled with the information found in trade papers, provide a complete basis for supervising the collection of sums due. The Union sends a printed statement to the public officer who then indicates on it the price had at auction and the amount thus due under the *droit de suite*. He returns it, plus the sums due, to the Union and by this informal procedure he obviates his legal responsibility, stipulated in the 1920 decree, to see that the sums are turned over to the artist or his heirs. The Union takes over this job; the officer is left

21. This decree is entitled, "Regulations relating to the *droit de suite* and its exercise by artists of foreign nationality", but it encompasses more than its title would indicate.

22. Several of the early projects for the creation of the *droit de suite* were almost entirely devoted to its potential use as a means of authentication to protect the art market from traffic in phony works of art. See the project of Henri-Gabriel Ibels, noted in Candau, *DU DROIT DE L'ARTISTE SUR LE PRIX DE REVENTE DE SES OEUVRES* (Thesis, 1913).

23. Duchemin, *op. cit. supra* note 6 at 83.

with only the duty to collect the sums from the seller. Thus, all the stipulations of the decree concerning possible objection to payment by the seller or refusal by the officer to turn the sums over to the alleged artist are avoided in practice. It is the Union alone that will sue or be sued in connection with the enforcement of the *droit de suite*, save, of course, where the officer neglects or refuses to assess the *droit de suite*.

As of today, almost all French artists belong to the Union, and if one is found who does not, he is immediately solicited to adhere. Formal declarations are therefore no longer made, with the result that the authenticity aspect of the decreed procedure has been totally lost. *Par contra*, the Union, in accord with the auction officers, has produced a workable procedure for collaborated works of art where the artists have not themselves regulated the question. A Union designated expert allocates the total amount of the sale price among the co-artists according to his determination of the "value" of each contribution to the whole, and the *droit de suite* is thereupon calculated. If this is disputed recourse must then be had to the courts.<sup>24</sup>

It seems fairly clear, then, that the practical supervision and operation of collection under the *droit de suite* until the present time has been successful.<sup>25</sup> This is particularly true because the art market is a very small, geographically concentrated one, centering, for France, almost exclusively in Paris, and on a world scale, in Paris, London and New York. Sales are known to the public, records are available. The following data give some idea of the sums drawn for the artist under the *droit de suite* on a typical sale of several items.<sup>26</sup>

	<i>Sale of June 14, 1957</i>	<i>Droit de suite of:</i>
GAUGUIN	104,000,000 frs.	3,120,000
	35,500,000	1,065,000
RENOIR	22,000,000	660,000
	9,800,000	294,000
MONET	17,500,000	525,000
BOUDIN	13,800,000	414,000
	<i>Sale of March 15, 1958</i>	
UTRILLO	7,500,000	225,000

24. *Ibid.*

25. For a comment on the expected operation of the 1920 law, see Vaunois, in *Le Droit d'Auteur* 101 (1920); and for a later comment on the actual operation, *id.* 102 (1937).

26. These figures were kindly supplied to the author by the Secretary General of the Union for Artistic Property.

What is also of key importance is the fact that few disputes have reached the courts. There have been only four reported decisions concerning the *droit de suite*. The Union has come to an effective working agreement with the public auction officers so that assessments are properly made, and most artists seem content in their delegation of authority to the Union. In a significant case to reach the courts, that of *Le Douanier Rousseau*,<sup>27</sup> a nefarious practice of art dealers was brought to light. Frequently, art dealers, with the help of accomplices, bid up works of an unknown, "sold" then to the accomplice who never pays the purchase price. "Success" is thus achieved, and at a subsequent sale the work will go for a higher price. When this occurred, however, in the instant case, the heirs of *Le Douanier Rousseau* claimed the *droit de suite* through the offices of the Union. The seller refused in that he had not received any price for this fictitious sale. The Court upheld the heirs, ruling that the term "works of art sold at public sale" must be read in its largest sense for the benefit of the artist and his heirs.

It will indeed be interesting to determine the results under the new Copyright Act of 1957 which extends the *droit de suite* to all sales made "through the intermediary of a merchant" (article 42). This extension was taken as a natural next step in the history of the *droit de suite*, and much of the punch in the opposition's attack was depleted by the very fact of the successful operation of the *droit de suite* since 1920. The amounts collected under the *droit de suite* are seemingly so small in relation to the sales price that they do not, in practice, serve to limit art sales. Public opposition of the art dealers was therefore overridden in the Assembly by a large vote.<sup>28</sup> Professor Desbois of the Paris law faculty makes clear that the term "intermediary of a merchant" must be taken in its broadest sense so as to include those buying for their own galleries as well as those acting as agents for private buyers.<sup>29</sup>

As under the 1920 Act, the formal procedure requires a declaration by the artist in the *Journal Officiel* after which point the merchant is responsible for collection of the *droit de suite*. He must send a statement of the sales price had to the interested artist in the first fortnight of January and July.<sup>30</sup> Experience under the 1920 Act would tend to indicate that this procedure too will be obviated by the practice of the Artists Union.

27. *Gaz. du Pal.*, Feb. 13, 1931. For an authoritative comment, Wahl, *Revue Trim. de Droit Civil* 613 (1936).

28. For the account of the vivid debates in both the Assembly and the Senate, see Parliamentary Debates, *Conseil de la Republique, J.O.*, first sitting of November 1, 1956, at 2161 *et seq.*

29. *Le Droit d'Auteur* 211 (1957).

30. Under the 1957 Act, a similar procedural change is envisaged for public sales. Auction officers must send statements of the sale within a fortnight of the sale to the interested artist. This is again the *formal* procedure, rather than that which may be carried out in practice.

The *droit de suite* exists, as do other rights of the author in France, for the duration of the life of the artist, and after his death for 50 years for the benefit of his heirs and the usufruct of the surviving spouse.

*Juridical Analysis of the Droit de Suite.*

Because the *droit de suite* is a rule of law rather than a contractual provision for the benefit of the artist, it becomes important to justify or explain its position in the web of French copyright law. French property and contract law would lead to the conclusion that any alienation of a chattel, without reservation of rights by the artist, results in a complete and total divestment of all his interests therein. The artist is stripped of all rights in his product.<sup>31</sup> This clearly appears to be the American result.<sup>32</sup>

French courts, however, have built a body of law, now formally recognized in the 1957 Copyright Act, which enunciates the rule that certain rights clearly attached to the personality and reputation of the creator remain with him despite a complete and total alienation of his work—*les droits moraux* (moral rights). Indeed, such rights are inalienable; any grant of them by the creator may subsequently be renounced by him.<sup>33</sup> A brief explanation of *les droits moraux* is essential for our task of ascertaining the legal identity of the *droit de suite* which, as noted, is also an inalienable right that survives a total divestment of the artist from his product.

Briefly stated, the Copyright laws of 1791 and 1793 in France granted what are now termed by French jurists the creator's "pecuniary rights", to wit, right of presentation and of reproduction. These are the rights that authors and composers generally sell, intangible interests in their works that permit of exploitation and of ultimate profit to them. The physical product itself, as a unique object, is of little import and is rarely sold as such. Because the artist, to the contrary, does sell a given chattel, it was assumed by most courts in France that he sold all rights to exploit it as well absent any stipulation to the contrary. An act of Parliament was required to reverse this presumption as far

31. The law of 1910 (*supra*, n. 11), however, reverses the presumption, as found by the courts, that absent any stipulation, the alienation of a product results in the granting of reproduction rights. The creator is now deemed to reserve them unless specifically granted away.

32. For the alienation of a painting protected only by common law copyright, *Parton v. Prang*, 18 Fed. Cas. No. 10,784 at 1273 (1872); *Pushman v. N.Y. Graphic Society*, 287 N.Y. 302, 39 N.E. 2d 249 (1942). Where work was copyrighted, *Yardley v. Houghton Mifflin Co.*, 108 F.2d 28 (2nd Cir. 1939), *cert. denied*, 309 U.S. 686 (1940).

33. An excellent discussion of the moral right in English may be found in Roeder, *The Doctrine of the Moral Right*, 52 *Harv. L. Rev.* 544 (1940). For a classic French exposition, see Desbois, *COURS DE LA PROPRIÉTÉ ARTISTIQUE, LITTÉRAIRE ET INDUSTRIEL* (1953).

as reproduction rights are concerned.<sup>34</sup> The pecuniary rights, then, are the sum total of protection originally granted by law, and are roughly the quantum of protection afforded American creators under our Copyright Act.

By a gradual process, however, the French courts took cognizance of the fact that intellectual creations differ fundamentally from that of other forms of property in that, unlike a suit or a refrigerator, the artistic product manifests the personality and thoughts of the creator. It bears his spirit, embodies his reputation, reflects his views, and *permanently* remains a part of the work. Consequently, French law admitted several rights which adhere to the creator and are inalienable:

- 1) Right of authorship to insure the reputation of the creator;<sup>35</sup>
- 2) Right of respect to protect the creator's integrity by the prohibition of distortions of his work;<sup>36</sup>
- 3) Right to divulge the work to the public,<sup>37</sup> or to withdraw it later from the public. This permits the creator to refuse to deliver a completed work made under contract,<sup>38</sup> or to recall the work for modification or total suppression.<sup>39</sup> Such action obliges the creator to pay damages, but the exercise of the right cannot be denied even if the judges consider it arbitrary or unfair. The creator is the *sole* decision-maker, for only he can determine potential harm to his reputation or personality.

Without more detail, it can be seen that the moral right permits the creator to survey, control, even suppress the use of his product *no longer in his ownership*. It is, thus, rightly characterized as a complete derogation from the basic rules of exclusive ownership of property, and for this reason several French jurists have suggested the dropping of the rubric "property" to denominate intellectual creations. Exclusive and total ownership, other than by the creator himself, is no longer possible in France, for some of the creator's interests always subsist despite the alienation of the work.

Is then the *droit de suite* a moral or a pecuniary right? At first glance, one is struck by the fact that the right is inalienable, and that its exercise is a deroga-

34. *Supra*, n. 11. It should be repeated that while the 1910 Act applies to all forms of creative work, its most significant application is in the domain of artistic products.

35. Fortin v. Prevost-Blondel, Cour de Paris, July 4, 1865, (1865), Dalloz Periodique 2. 243.

36. Sorel v. Fayard Freres, Tribunal civil de la Seine, Dec. 16, 1899, (1900), Dalloz Periodique 2. 152.

37. Pourchet v. Rosa Bonheur, Cour de Paris, July 4, 1865, (1865), Dalloz Periodique 2. 201.

38. Eden v. Whistler, Tribunal Civil de la Seine, March 20, 1895, (1898), Dalloz Periodique 2. 465; *aff'd.*, Cour de Paris, Dec. 2, 1897, Cour de Cassation, March 14, 1900.

39. See generally Desbois, *op. cit. supra* note 33.

tion from the normal concepts of ownership of a chattel. It is submitted, however, that these are mere legal attributes of a right which must be characterized basically from the point of view of its *raison d'être*. *Les droits moraux* primarily protect what may be termed the spirit rather than the pocketbook of the creator. They permit the designation and perpetuation of the creator's personality as embodied in the work, and prohibit its distortion, perhaps even its destruction.<sup>40</sup> On the contrary, economic or pecuniary rights in an artistic product look to the protection of exploitation, give the power to prevent the use of the product without the creator's consent and presumably only with some participation by him in the gain when he does so consent.

Writers and composers, then, generally share in the exploitation of their product by contract stipulation; creators of a unique chattel do not because the very value of the object depends on its uniqueness, its "original" quality. It cannot be expected that a contractual provision giving the artist a percentage of the subsequent sales price will come about as a general practice simply because the artist is selling a given object, and not intangible rights in it. And even were it realized, the stipulation would not serve to protect the artist after the work has passed from the hands of the first buyer for the artist would be totally alien to the subsequent contracts of sale.

When, then, a painting is sold, the *droit de suite* permits the creator to participate in the sale in the same way the writer or composer shares in the exploitation of his work. It is an economic interest that the *droit de suite* insures, and not a moral one.<sup>41</sup>

The fact that the right is inalienable does not detract from its pecuniary quality, as evidenced by the decision in the *Sisley* case.<sup>42</sup> It was there held that the *droit de suite* passes according to succession laws as any other economic right or interest the artist may have,<sup>43</sup> whereas, as a general rule, the moral rights perish with the creator.<sup>44</sup> As the Substitute Public Minister Jodellet stated,

40. It still an unsettled matter in French law whether the moral rights doctrine may be invoked by the creator to prevent a total destruction of the product by the owner.
41. This point of view was implicit in the Assembly debates of 1920, and has been specifically stated by Ferry and Berard as noted, *supra*. pp. 97-98.
42. Leudet and Lefebvre v. Turquin, Tribunal Civil de la Seine, Feb. 5, 1937, (1937) *Gaz. du Pal.* of Feb. 17, 1937, *Semaine Juridique de Paris* of March 26, 1937.
43. In this case, Sisley's son had inherited his *droit de suite*, but had not exercised it before his death. The plaintiffs, nieces of Sisley, while renouncing the inheritance of Sisley's son, of which they were legal heirs, because it was heavily indebted (in French law, an accepting heir assumes all debts of the estate), nevertheless claimed the *droit de suite*. The court properly ruled that the *droit de suite* passed into the estate of Sisley's son, and could be had by the plaintiffs only by acceptance of the succession by them.
44. The one exception appears to be the right of respect, which passes more as a *duty* to the heirs of the creator than as a benefit.

"The moral right, as its name indicates, is not a pecuniary right, but an extra-patrimonial right. The *droit de suite* is a pecuniary right."<sup>45</sup> Its inalienable character, instituted for the protection of the artist's heirs,<sup>46</sup> in no way denies its economic quality, just as the inalienability of old-age pensions in French law does not detract from the pecuniary nature of the pension right.

If we admit, then, that the artist has an economic interest which the *droit de suite* seeks to protect, on what legal theory may his share in the future sales be justified?

A significant German study explained the participation of the artist on the "theory of intrinsic value",<sup>47</sup> which rests on the idea that the greater value existed, in latent form, in the work, and that any manifest increase in the value is due *solely* to the artist's earlier labors. Artists, therefore, must participate in this gain accruing from their original labor. This theory is enforced by the equitable argument that it is unfair for speculators to benefit from the increased value of the artistic product at the exclusion of its creator. Thus, under the proposed German system, the artist would be entitled to share only in the increased value, in the difference between the present and prior selling price. He was to receive a one-fourth share in this added value.<sup>48</sup> It was this theory which was adopted in the Italian law of the *droit de suite* of April 22, 1941.<sup>49</sup>

French theory, to the contrary, justifies the *droit de suite* as a compensation for the exploitation of the work; it tries to parallel the "natural" participation in the gains had in the creative product which the writer and the composer enjoy through royalty contracts. It is, according to Duchemin, an integral part of the rights of artists. The French, therefore, find no inconsistency in assessing a percentage on the total gross price of each sale, and not simply on the added value, if any, had over the prior sale. Sales of the work constitute an exploitation of them, for which the *droit de suite* insures a participation for the artist.

Can this theory of exploitation justify a mandatory derogation from ownership concepts? Duchemin,<sup>50</sup> for one, feels that the rule of *jus utendi et abutendi*

45. The French use the singular, *le droit moral*, as the generic term, but properly employ the plural, *les droits moraux*, to indicate that several separate rights are involved.

46. Article 24 of the 1957 Copyright Act stipulates that only the heirs and the spouse, for his usufruct, may benefit from the *droit de suite* "to the exclusion of all legatees and assigns".

47. Opet, *Le Droit de l'Auteur d'oeuvres des arts Figuratifs a la plus-value*, *Annalen des Deutschen Reiches*, vol. 46, fasc. 5 (original appearance); Riezler, *Die Beteiligung des Kunstlers an der Wersteigerung seiner Werke*, RECHT UND WISSENSCHAFT, no. 1913, July-August.

48. Proposed article 1 of the German project.

49. Arts. 151-52. The tariff ranges proportionally from 2 to 10 percent in the added value.

50. *Op. cit.* *supra* note 6 at 270-2.

has been so eroded in so many domains that justification along these lines is no longer a necessary task for the jurist. The legislature derogates from traditional views when it serves the interest of a given group it wishes to protect. Duchemin asserts that the *droit de suite* protects those creators who, by the very nature of their product, are ill-equipped to insure their own participation in future profits derived from their work.

*The Droit de Suite under the Universal Copyright Convention.*

If one accepts the theoretical justification of the *droit de suite* offered by most French jurists, there is no difficulty in concluding that the *droit de suite* forms an integral part of that bundle designated as the "rights of the author" and is therefore included under the scope of the Universal Copyright Convention (hereinafter U.C.C.).<sup>51</sup> There are those writers, however, who while accepting the necessity or propriety of assuring artists a percentage in the future sales of their works, nevertheless do not consider the *droit de suite* an "author's right". Rather, it is an extraordinary relief more in the nature of a "private" tax on the sale than a proper subject of copyright law.<sup>52</sup>

It is helpful, then, to view the situation of the *droit de suite* under the Berne Convention in order to better assess its place under the U.C.C. and to permit us to conclude as to rights of American artists whose works are sold in member nations which have adopted the *droit de suite*.<sup>53</sup>

As was noted, it was at the Berne Congress of 1896 that the *droit de suite* was first proposed by Mack, and it reappeared as an item of discussion at the 1925 Paris Congress and following ones. Discussion did, in fact, lead to the adoption of the *droit de suite* by Czechoslovakia in 1926 and later by Poland in 1935, both with certain modifications on the French scheme. Uruguay, not a member of the Berne Convention, followed suit in 1937.<sup>54</sup> These three countries

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51. Art. 1. "To provide for the adequate and effective protection of the rights of authors".
  52. See, for example, Recht, *Has the Droit de Suite a Place in Copyright?*, 3 UNESCO COPYRIGHT BULL. 61 (no. 1, 1950).
  53. While it is true that the U.C.C. in no way repeals or replaces the Berne Convention (art. XVII of the U.C.C.), it would seem that a similar treatment would be accorded the *droit de suite* under the U.C.C. that it enjoyed under the Berne Convention. The Berne designation is also of direct import in that if a work originates in a Berne nation, the U.C.C. is not applicable as far as relations among the Berne countries are concerned. See Bogsch, *THE UNIVERSAL COPYRIGHT CONVENTION* 133-50 (1958).
  54. There is little indication that the *droit de suite* has been more than a paper remedy in these three nations. The Communist system precludes its operations in the two eastern European countries, and Uruguay, while providing a percentage share of 25% in the added value had on the sale (art. 9 of the law of Dec. 17, 1937), has never enacted enabling legislation that would permit actual recovery of the sums due.

directly inserted the *droit de suite* into the general copyright law,<sup>55</sup> whereas Italy regards it as a corollary to the exercise of the rights of the author—a quasi-complete assimilation.<sup>56</sup> Because the originating nation, France, and the first follower, Belgium,<sup>57</sup> accorded a special legislative text to the *droit de suite* rather than an amendment to the general copyright law, the problem of its “true” place in the legal system was posed. It is indeed unfortunate that such was the case, and that some original name was affixed to this right, for there can be no doubt, after reading the Parliamentary debates and the proposed laws, that the authors of the *droit de suite* regarded it as an inherent part of the general copyright scheme of protection. Its incorporation into the Copyright Act has, of course, now taken place in France with the passage of the 1957 law.

Vaunois, for one, had no incertitude in that the *droit de suite*, as an author’s right, automatically extended to Berne Convention artists under the provisions of Article 4 of the Convention. Again, it is unfortunate that in the governmental decree of December 17, 1920 concerning rights of foreign artists, this point is not made clear. That decree (article 10) states that the *droit de suite* is extended to foreign artists on a strict reciprocity basis, *i.e.*, if the national legislation of the country of the foreign artist extends the *droit de suite* to French artists. No reference is made to the Berne Convention, thereby causing substantial confusion. Most French jurists, however, took the decree to mean that it is applicable only to non-Berne Union artists.<sup>58</sup> With this assumption in mind, the French government by a recent decree of September 15, 1956, extended the *droit de suite* (again, presumably to non-Berne artists only) to those foreign artists, absent reciprocity by their country, who have participated in “the life of French art” and who have had at least five years residence (not necessarily consecutive) in France.

Since 1920 attempts have been made to include the *droit de suite* as a substantive right under the Berne Convention.<sup>59</sup> The League of Nation’s International Commission for Intellectual Cooperation proposed an amendment to the Berne Convention to provide for the *droit de suite*, and in 1934 the Bureau of the Union was given the task of preparing a draft resolution. It was at this point that divergent views appeared as to the nature of the *droit de suite*, due principally to the unfortunate wording of the December, 1920 decree con-

55. The text of the laws of these three countries can be found, in French, in Duchemin, *op. cit.*, *supra* note 6 at 294-99.

56. See Piola Caselli, CODICE DEL DIRITTO DI AUTORE 605 *et seq.* (1945).

57. For a detailed study of the Belgian law, Recht, LE DROIT D’AUTEUR EN BELGIQUE 205 *et seq.* (1955).

58. “Specially, it is without any bearings as to the Berne Union. It regulates only non-Union foreigners.” Vaunois, *Droit d’Auteur* 45 (1921).

59. See particularly the work of the Congresses of Lugano of 1927, of Rome, 1928, of Cairo, 1929 and of Montreux, 1935.

cerning the rights of foreign artists in France. Whereas the Rome Convention delegates (1928) seemed to regard the *droit de suite* as an author's right,<sup>60</sup> the 1934 Report of the Bureau considered that the French and Belgian laws did not view the *droit de suite* as an integral part of copyright protection mainly because of the wording of the 1920 decree. The argument was reinforced by the fact that the *droit de suite* had not been directly incorporated into the general Copyright Act of each nation. This view prevailed, and was approved at the Montreux Congress of 1935.

Studies continued on the subject until the war,<sup>61</sup> and included some important work done by the Rome Institute for the Unification of Private Law.<sup>62</sup> In June, 1948, the International Literary and Artistic Association, a working group, met at Lucerne to again study the proposed amendment to the Berne Convention.

The Belgian delegation to the Brussels Convention of 1948 made some careful studies and then offered a proposed text for Article 4<sup>bis</sup> looking to the establishment of the *droit de suite*. It squarely placed the *droit de suite* under the rule of assimilation of Article 4 of the Convention. Some objection was voiced to this for, as the Austrian delegation put it, until all the Berne nations had adopted the *droit de suite*, it would be unrealistic to suppose that an adopting nation would, without reluctance, extend the benefits of the *droit de suite* to a foreigner whose national legislation had not yet afforded it to him. It was finally agreed to limit the proposed Article 4<sup>bis</sup>, as far as foreigners' rights are concerned, to the principle of material reciprocity.<sup>63</sup> This was done on the implicit understanding, by the majority, that the *droit de suite* is an author's right, but that full assimilation under Article 4 would be unfair to those nations which have adopted it at present. Most felt that material reciprocity was an interim solution to prevail until the *droit de suite* was made a substantive right in a large number of the member countries.<sup>64</sup>

60. See the Resolution therein adopted relative to the *droit de suite*, Resolution III.

61. Of particular importance was the project of the Samaden Congress of 1939 which proved abortive due to the war.

62. The Institute did not take a clear position on the point. Rather, it was thought best to avoid difficulties by considering the *droit de suite* as outside the scope of author's rights.

63. "The protection provided by the preceding paragraph (establishing the *droit de suite*) may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the degree permitted by the country where this protection is claimed." See DOCUMENTS OF THE BERNE CONVENTION 5 to 26 June, 1948, Berne Bureau of International Union for the Protection of Literary and Artistic Works, 1951.

64. Only the Dutch delegation specifically stated that in its view the *droit de suite* was not within the scope of copyright law. Britain and the Scandinavian countries, without opposing the *droit de suite*, simply noted that no demand for it had ever been raised by artists' organizations in their country.

In conclusion, then, it would appear that the majority of present international opinion regards the *droit de suite* as an author's right. In this writer's view, there can be no question as to the correctness of this position if one adopts the Ferry-Berard justification of the *droit de suite*. The *droit de suite*, as we have seen, is, according to their view, not a moral right, but a pecuniary one. It is an attempt to protect the artist in the *exploitation* of his product, to give him, by law, what conventional practice affords the writer and composer and which cannot be expected to occur in the contract of sale of the tangible painting or piece of sculpture. It is not based, as the German project would have had it, on any "latent value" concept wherein the artist is deemed to have initially given the labor that results subsequently in an overt increase in the sales price so that failure to share in the added value gives rise to an unjust enrichment situation. Nor does it rest, as the rapporteur of the Belgian law explained it, on the principle of contract law called "*imprévision*" which permits the modification of contracts by the court when hardship results from circumstances unforeseen at the time of the making of the contract.<sup>65</sup> Nor, in our opinion, is it merely a "favor" based on purely sentimental considerations which takes the form of a sort of private tax.<sup>66</sup>

If, then, its true legal character is that of a pecuniary right given as a matter of law because the artist, due to the very nature of his product, is unable, from a practical view, to exact participation in the sales price had on his works, it would follow that the *droit de suite* is part of the sum total of author's rights and properly falls within the coverage of the Universal Copyright Convention. At the present time this remains an untested proposition. It is of importance to the American copyright lawyer simply because now, with the enactment of the U.C.C., American artists whose works sell in Belgian, French or Italian markets can, in our opinion, enjoy the benefits of the *droit de suite* under the assimilative principle of the U.C.C. Reciprocal legislation is, therefore, no longer a requisite for the enjoyment by American artists of the benefits of the *droit de suite* in those Convention countries having adopted it. The question, it would seem, will surely be raised in the near future, and in our view, should be resolved along the lines indicated above.<sup>67</sup>

65. This doctrine, *per se*, is given very limited application in French law in general, rarely being admitted by the *Cour de Cassation* and then only to rescind contracts. It has had wider application in the domaine of administrative contracts under the control of the *Conseil d'Etat*. It is, then, highly improbable that it would have been deemed the legal basis of this purely private, civil, protection given the artist by the *droit de suite*.

66. See Recht, *op. cit.*, *supra* note 52.

67. There is very little writing on the question. Recht, *op. cit.*, *supra* note 52, concludes to the contrary, as does his admirer Secretan (see his unpublished notes on the *droit de suite* prepared for the United States Copyright Office, 1958). Duchemin, Secretary General of the French Union for Artistic Property, and Professor Desbois

*Possibility of Adopting the Droit de Suite in the United States.*

Statutory copyright protection exists in order that an author of any creative work may protect his product against unauthorized use, and consequently, if he chooses, to exact a participation in profits had or expected when he does alienate his product or rights in it. Copyright, then, fundamentally insures the *economic* interests of the author, for it permits of the public exploitation of the product while protecting the creator's rights therein. It is not merely a protection against "copying" as the English title would suggest; copyright affords the positive possibility of exploitation by the creator of what is his intellectual property. The French term "*droit d'auteur*" more aptly phrases the rationale of copyright, for its real significance is more positive than negative.

Copyright protection encompasses all forms of artistic property born of the author's creative powers. No one will suggest that its purpose is the achievement of any minimum pecuniary return to an author; rather, he makes his own bargain and lives with it. But it cannot be denied that the vast realm of copyright law centers essentially on the protection of what has been termed "the invisible, intangible rights" that exist separate from the physical product itself—rights of performance and reproduction essentially. American law, while seemingly divided as to the question of whether a writer or composer who alienates his physical product also alienates his intangible rights therein, absent any stipulation, finds little hesitation in concluding that all rights (ie., reproduction rights) pass on the sale of a tangible artistic product such as a painting or sculpture, again absent any stipulation to the contrary.<sup>68</sup>

This is, perhaps, a logical result, for such works are only chattels on which our traditional property and ownership concepts are fixed, whereas few regard the sale of a book as that of the sale of the writing paper itself. The physical product is minimal; the rights therein are primary.<sup>69</sup> Consequently, practice bears out the difference. Participation in future sales is a *sine qua non* of the writer's or composer's contract with the publisher or impresario, and while it may afford only a small percentage to an unknown or take effect only after a given number of copies have been sold or performances rendered, it still results in a continued pecuniary participation into the future. The artist does not enjoy the

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of the Paris law faculty concur in our view, and as Duchemin notes, the French law has already been given a very liberal interpretation when applied to Berne Union artists. He cites the cases of Sisley (British), VanGogh (Dutch), Picasso (Spanish). The French have always considered this part of the rights of the author, and as such, available to all Berne Union artists under Article 4. By extension, the same should apply to all U.C.C. artists.

68. *Op. cit. supra* note 32. French law, of course, now reverses this presumption (law of 1910).

69. Save for such things as originally illustrated manuscripts, the one-of-a-kind variety.

same prerogative, and as we have noted, due to both practical and legal considerations,<sup>70</sup> it is unlikely that he could stipulate the same kind of participation as the painting passes from buyer to buyer.

It would appear, therefore, that the *droit de suite* is an essential copyright protection that should be enacted in order to insure the artist his fair share of the exploitation of his work. We do not urge that this result be reached solely out of a sense that it is "unfair" for others to speculate so well and so often in the artist's work, but rather on a strict analysis of the essence and rationale of copyright protection. Present provisions and practice simply do not permit the artist generally to exploit his unique product fully.

We submit that the *droit de suite* can function from a practical point of view. Assessment of a percentage could be regarded as a form of servitude that follows the work from owner to owner, and its collection can be as easily achieved as is the assessment and collection of music royalties in America. Like Ferry, we assume the existence of some association of artists, such as A.S.C.A.P., that will survey and enforce the right. Indeed, it is a far simpler matter than the collection of music royalties which extends down to the individual small restaurateur playing unauthorized music on his radio for the benefit of his customers. The art market centers predominantly in New York and only secondarily in a few other large cities. Like the French law, a minimum sales price should be established before the *droit de suite* will come into operation, for example, \$200. Payment by art dealers can be set on a quarterly basis much the same as the administration of a local business tax.

We would limit the application of the *droit de suite* to that of "original works", taken to mean unique paintings, sculptures, illustrated manuscripts, for example. It should not be extended to prints, etchings, engravings, and other industrial arts which enjoy copyright protection because they afford a gain to the creator by virtue of their reproduction and large-scale sale. Nor would we protect the work of architects.

Lastly, we do not find that the *droit de suite* abuses traditional concepts of contract and property law. It is a pecuniary reservation, albeit by law, that equates to a contractual reservation made by the parties to any publication contract. Rights in private property are constantly subjected to limitations imposed by the legislature. Indeed, in the very field of American copyright we find that the law governing renewal rights prohibits an owner of them, the creator, from alienating them *in futuro* so as to destroy the interests of a class of people

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70. It is difficult to envisage any effective third party beneficiary stipulation that would continue to be in operation with each successive transfer of the property.

the legislature is desirous of protecting—the spouse and children of the creator.<sup>71</sup> Unless he survives to the 28th year, any alienation of his renewal rights are deemed void by law.<sup>72</sup>

Even in the situation where the creator never owned the original copyright, *e.g.*, he contributes a work to a magazine and copyright is secured by the publisher for the contents of the whole, the 1909 Act awards the renewal rights to the creator, a clear derogation from the concept of absolute ownership. As was said in the House of Representatives to justify this result:<sup>73</sup>

It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of 28 years, your committee felt that it should be the exclusive right of the author to take the renewal term.

This does indeed sound familiar to the French arguments for the *droite de suite!*

Legislation is always the creature of need, the protector of valid interests. It serves America to assist the artist economically, to help insure his pecuniary well-being in some manner, for well we recognize the contribution he offers to interpret, in a lasting way, the spirit of our times. He does, as Conrad put it, "above all else . . . make us see".

71. Section 24 of the Copyright Act. See also Howell, *THE COPYRIGHT LAW* 109-19 (3rd ed. 1952).

72. *Silverman v. Sunrise Pictures Corp.*, 273 F. 909 (2nd Cir. 1921).

73. H.R. Rep. No. 2222, 60th Cong., 2nd Sess. Appendix (1909).

## 112. CITIZENS WHO PUBLISH ABROAD: A STUDY IN THE PATHOLOGY OF AMERICAN COPYRIGHT LAW

By IRVING YOUNGER<sup>1</sup>

*A prophet is not without honour,  
save in his own country, and in his house.<sup>2</sup>*

It is a familiar complaint among authors,<sup>3</sup> publishers,<sup>4</sup> and scholars<sup>5</sup> that Title Seventeen of the United States Code stands in urgent need of reform. To that end the leaders of our intellectual community have argued for more than a century. Despite powerful rhetoric and persuasive logic, their success has been only moderate. To be sure, the copyright statute of 1909 was in many ways a proud achievement; yet it left much undone. In the decades that followed it, our society burgeoned beyond the dreams of the most prescient legislator or visionary reformer. Issues which the draftsmen of the 1909 act sensed but chose to skirt took on unexpected importance (*e.g.*, international copyright); problems of which they were necessarily ignorant appeared on the legal horizon (*e.g.*, television). Law has failed to keep step with society, and today some say that it has fallen intolerably far behind. To the authors, American copyright law is a thicket full of hidden snares. To the publishers, it is a quicksand of imprudent business practices. To the scholars, it is a hodgepodge of outmoded tradition and rigid conceptualism.

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EDITOR'S NOTE: Mr. Younger is a member of the New York Bar associated with the firm of Paul, Weiss, Rifkind, Wharton and Garrison. This article is reprinted, with permission, from XLIV *Cornell Law Quarterly*, No. 2, Winter, 1959.

1. The author wishes to acknowledge, if not discharge, a debt to Professor Walter J. Derenberg, who suggested this problem to him. This article has been entered in the Nathan Burkan Memorial Competition for 1958.
2. Matthew: 13:57.
3. *E.g.*, Hearings before Subcommittee No. 4 of the Committee on the Judiciary on H.R. 2285, 81st Cong., 1st Sess. 30-37, 48-50 (1939) (statements by John Schuiman and John W. Vandercook for the Authors League of America).
4. *E.g.*, Solberg, *Copyright Law Reform*, 35 *Yale L.J.* 48, 69 (1925) (statement by George Haven Putnam); Hearings before Committee on Patents on General Revision of the Copyright Law, 72nd Cong., 1st Sess. 114 (1932); Hearings before Committee on Patents on H.R. 6990, 71st Cong., 2d Sess. 98 (1930).
5. Briggs, *The Law of International Copyright* 93 (1906); Solberg, *The New Copyright bill*, 15 *Notre Dame Law.* 12, 135-40 (1940); Solberg, *Copyright Reform: Legislation and International Copyright*, 14 *Notre Dame Law.* 343, 357 (1939); Solberg, *Copyright Law Reform*, 35 *Yale L.J.* 48, 69-71 (1925).

Each of these views has a considerable degree of truth. American copyright law, on the whole, is in very bad health—a condition we cannot ignore. If copyright law is unable to satisfy the needs of influential copyright-users and articulate copyright-creators, might it not be that the entire legal structure is inadequate to our requirements? The problem is not without interest. Let us focus upon a single, narrowly limited area which touches relatively few of our citizens. It can be defined by means of a simple question:<sup>6</sup>

What protection is available to American citizens who publish abroad?

## I

The first Congress was quick to exercise its constitutional power "to promote the Progress of Science and useful Arts, by securing for limited times to Authors . . . the exclusive Right to their . . . Writings."<sup>7</sup> It passed the nation's earliest copyright law,<sup>8</sup> providing in section one that "the author and authors of any map, chart, book or books . . . being a citizen or citizens . . . shall have the sole right . . . for the term of fourteen years [to use his or their work]. . . ."<sup>9</sup> The statute embraced all works in any language published within or outside the United States by American citizens. For instance, should an American citizen residing in Paris have published a novel in French, a treatise in German, or a dissertation in Latin, he might have secured American copyright protection merely by complying with the statute's simple registration requirements. The lack of qualifying or limiting language in section one leads to this conclusion, and section five supports it. That section states:

[N]othing in this act shall be construed to extend to prohibit the importation or vending, reprinting or republishing within the United States, of any map, chart, book or books, written, printed, or published by *any person not a citizen* of the United States, in foreign parts or places without the jurisdiction of the United States.<sup>10</sup>

We may infer that to import, vend, etc., a work published abroad by an American citizen but registered under the act was forbidden unless done with his permission, for by registration the citizen had obtained "sole rights." The following table reflects the scope of the protection afforded American citizens by our earliest copyright statute.

6. We shall be concerned in this paper exclusively with the question posed. The manufacturing clause and limits on importation, as such, will be discussed only as they bear on that question.
7. U.S. Const. art. I, § 8, cl. 8.
8. 1 Stat. 124 (1790).
9. Ibid.
10. Id. at 125 (emphasis supplied).

	Entitled to full copyright
Book published* by a citizen	
in America in English	Yes
in America in a language other than English	Yes
abroad in English	Yes
abroad in a language other than English	Yes

\* "Published," as used in this paper, connotes "manufactured."

The next statute to which we must turn our attention is the Chace Act of 1891.<sup>11</sup> Section three of the Act particularly concerns us. It reads:

No person shall be entitled to a copyright unless [he shall deposit copies of the copyrighted work] . . . *Provided*, That in the case of a book . . . the two copies of the same required to be delivered or deposited as above shall be printed from type set within the limits of the United States. . . . During the existence of such copyright the importation into the United States of any book . . . so copyrighted, or any edition or editions thereof, . . . shall be, and it is hereby, prohibited, except in the cases specified [in the Tariff Act of Oct. 1, 1890, 26 Stat. 567, at 604: 1) volumes more than twenty years old; 2) books imported for the Library of Congress; 3) books in languages other than English; 4) two copies of any book imported for the use of an educational society; 5) personal libraries]. *Provided, nevertheless*, That in the case of books in foreign languages, of which only translations in English are copyrighted the prohibition of importation shall apply only to the translation of the same, and the importation of the books in the original language shall be permitted.<sup>12</sup>

Clearly, the Chace Act is the source of that tradition of opacity in legislative draftsmanship so vexingly upheld by subsequent copyright statutes. We must take care to discover just what it is that is provided. First, no one can copyright a work unless he makes the requisite deposit; second, a condition of deposit in the case of a book is that it be manufactured in the United States; third, once copyright is obtained, copies manufactured outside the United States may be barred from the country, with various exceptions including works in foreign tongues; and fourth, if only an English translation is copyrighted, the original version may be freely imported.

11. 26 Stat. 1106 (1891).

12. *Id.* at 1107-08.

Now, what sense can we make of all this? It is apparent that any person may get American copyright protection if his book is manufactured within the United States, whether he be citizen or alien and whether the work is written in English or some other language. A work in a foreign language, however, does not have the safeguard of the importation provision, for under the third exception stated in the Tariff Act, books in languages other than English are permitted entry without limit. Our analysis might end here were it not for the statute's second proviso. By limiting the prohibition of importation to the translation itself where only the translation has been copyrighted and permitting the importation of the copyrighted original version, it implies that were the original version copyrighted it too would be included in the prohibition. There is an inconsistency between the first proviso and the second proviso which no court was ever called upon to resolve.<sup>13</sup> It would not be rash to conclude that Congress, intent upon protecting the domestic printing industry, was unaware of the ramifications of the manufacturing clause upon citizens who write in a foreign language or who publish abroad. The scope of the Chace Act can be summarized as follows:

	Entitled to full copyright
Book published by a citizen	
in America in English	Yes
in America in a language other than English	Yes
abroad in English	No
abroad in a language other than English	No

America's parochialism at the turn of the century and before was as great as it is today.<sup>14</sup> We have observed, for instance, that under the Chace Act a foreign author of works published abroad could get no copyright protection whatsoever in the United States. Congress appears to have been insensible to this unreasonable burden on intellectual commerce until 1904, when the spon-

13. Research has failed to uncover any cases dealing squarely with the issues discussed in this paper. The following are concerned with peripheral matters: *Oliver Ditson Co. v. Littleton*, 67 Fed. 905 (1st Cir. 1895) (music not a 'book' within purview of the manufacturing clause); *Harper & Bros. v. M. A. Donohue & Co.*, 144 Fed. 491 (N.D. Ill. 1905), aff'd, 146 Fed. 1023 (7th Cir. 1906) (importation of book manufactured outside United States); *Hills & Co. v. Hoover*, 136 Fed. 701 (E.D. Pa. 1905) (certain prints not 'lithos' within purview of manufacturing clause). See also *Bentley v. Tibbals*, 223 Fed. 247 (2d Cir. 1915); *Patterson v. J. S. Ogilvie Pub. Co.*, 119 Fed. 451 (S.D.N.Y. 1902).

14. See Dickens, *American Notes* (1842); Trollope, *Domestic Manners of the Americans* (1832).

sors of the Louisiana Purchase Exhibition encountered difficulty in obtaining foreign works to display at the fair. The 58th Congress met the emergency on January 7, 1904, with Public Law 2, entitled "An Act To afford protection to exhibitors of foreign literary, artistic, or musical works at the Louisiana Purchase Exhibition":<sup>15</sup>

[T]he author of any book . . . published abroad prior to November thirtieth, nineteen hundred and four, but not registered for copyright protection in the United States copyright office . . . shall have in the case of any such book . . . intended for exhibition at the Louisiana Purchase Exhibition the sole liberty of printing, reprinting, publishing, copying, and vending the same within the limits of the United States for the term herein provided for upon complying with the provisions of this Act [*viz.*, 1] deposit of one copy in Copyright Office; 2) registration in the "interim copyright record books"; 3) payment of fee of one dollar and fifty cents. The term of protection was two years from the date of deposit, and if an American edition was subsequently printed, the full term ran from that date.]

[E]xcept in so far as this Act authorizes and provides for temporary copyright protection during the period and for the purposes herein provided for, it shall not be construed or held to in any manner affect or repeal any of the provisions of the Revised Statutes relating to copyrights . . .<sup>16</sup>

Here is the first *ad interim* provision in American copyright law. Though Congress intended only to grant temporary protection to works by foreign authors, the terms of the statute apply also to the American author of a work published abroad. Despite the "except" clause, then, the act of 1904 extended copyright as follows:

	Entitled to full copyright	Entitled to <i>ad interim</i> copyright
Book published by a citizen in America in English	Yes	—
in America in a language other than English	Yes	—
abroad in English	No	Yes
abroad in a language other than English	No	Yes

15. 33 Stat. 4 (1904).

16. *Id.* at 4-5.

The beneficence engendered by the centennial of the Louisiana Purchase wore off, and the 1904 act was succeeded on March 3, 1905, by Public Law 465 of the 58th Congress:<sup>17</sup>

Whenever the author or proprietor of a book in a foreign language, which shall be published in a foreign country before the day of publication in this country . . . shall deposit one complete copy of the same . . . in the Library of Congress . . . within thirty days after the first publication of such a book in a foreign country [containing a certain notice] . . . and shall, within twelve months after the first publication of such book in a foreign country . . . deposit two copies of it in the original language or, at his option, of a translation of it in the English language, printed from type set within the limits of the United States, or from plates made therefrom, containing a notice of copyright . . . he and they shall have during the term of twenty-eight years from the date of recording the title of the book or of the English translation of it, as provided for above, the sole liberty of printing, reprinting, publishing, vending, translating, and dramatizing the said book: *Provided*, That this Act shall only apply to a citizen or subject of a foreign State or nation when such foreign State or nation permits to citizens of the United States of America the benefit of copyright on substantially the same basis as to its own citizens.<sup>18</sup>

Here is another fine example of that traditional opacity mentioned earlier. Just what does the Statute mean? It begins clearly enough, stating that the authors of books in a foreign language published abroad can have *ad interim* protection for twelve months, at the end of which time they must publish and register an American edition. Furthermore, it would seem that both foreign and American authors are eligible for protection, for the statute merely refers to "the author or proprietor of a book in a foreign language." It is the proviso which, like all provisos, gives trouble. Does it mean *that ad interim* copyright is available (1) to American authors and (2) to foreign authors whose States grant reciprocal rights to our citizens, or does it mean that *ad interim* copyright is available *only* to foreign authors when reciprocity exists? The language of the statute supplies no answer, nor are there judicial decisions in point.<sup>19</sup> Trembling, we turn to legislative history.

Public Law 165 entered this world on December 14, 1904,<sup>20</sup> reading in part as follows:

Whenever the author or proprietor of a book in a foreign language, which shall be published in a foreign country before the day

17. 33 Stat. 1000 (1905).

18. *Ibid.*

19. See note 13 *supra*.

20. H.R. 6487, 39 Cong. Rec. 286 (1904).

of publication in this country . . . shall, within twelve months after the publication of such book in a foreign country, obtain a copyright for a translation of such book in the English language . . . he . . . shall have . . . [sole rights].<sup>21</sup>

In its original form, the statute would have applied both to native and foreign authors. The House Committee on Patents, however, added a proviso:

That this act shall apply to a citizen or subject of a foreign state or nation, when such foreign state [grants reciprocal rights].<sup>22</sup>

Does the proviso limit the statute to alien authors? Although the comma after "nation" suggests that the answer is yes, no such comma appears in the law as printed in the Statutes-at-Large. We must inquire further.

Representative Currier, Chairman of the Committee on Patents and author of the famous Report No. 2222 of 1909, spoke from the floor of the House:

Mr. Speaker, this bill is unanimously reported from the Committee. It has the approval of the registrar of copyrights, the publishers, and the Typographical Union. It gives to a foreign author of a book the same measure of protection when written in a foreign language as is now afforded to American or British authors.<sup>23</sup>

Assuming that the Representative meant by "American or British authors" American or British authors writing in English and publishing in their respective countries, how did the bill give foreign authors of works in foreign languages the "same measure of protection"? An American author could acquire full copyright by publishing in the United States, and so could a British author.<sup>24</sup> Nobody, however, could get full copyright without publication in the United States. As to *ad interim* copyright, the bill gave it only to works in foreign languages. It was unavailable to works in English.<sup>25</sup> Representative Currier must have nodded: taking the grain of gold in his paragraph of dross, however, we can conclude that the act of 1905 was limited in application to foreign authors writing in foreign languages.<sup>26</sup> Our synopsis, then, would stand as follows:

21. Ibid.

22. Ibid.

23. Ibid.

24. See text following note 12 *supra*.

25. See text at note 33 *infra*.

26. H.R. 6487 was amended by the Senate on Feb. 25, 1905. 39 Cong. Rec. 3389 (1905). These amendments were agreed to by the House on Feb. 28, 1905, 39 Cong. Rec. 3672, and the bill was signed by the President on March 4, 1905. 39 Cong. Rec. 4033.

	Entitled to full copyright	Entitled to <i>ad interim</i> copyright
Book published by a citizen		
in America in English	Yes	—
in America in a language other than English	Yes	—
abroad in English	No	No
abroad in a language other than English	No	No

On March 4, 1909, the President signed Public Law 349, "An Act To amend and consolidate the Acts respecting copyright."<sup>27</sup> Section fifteen was the manufacturing clause:

That of the printed book or periodical specified in section five . . . except original text of a book of foreign origin in a language or languages other than English, the text of all copies accorded protection under this Act, except as below provided, shall be [manufactured in the United States] . . . but they [the manufacturing requirements] shall not apply . . . to books of foreign origin in a language or languages other than English, or to be published abroad in the English language seeking *ad interim* protection under this Act.<sup>28</sup>

Sections twenty-one and twenty-two were the *ad interim* clauses:

Sec. 21. That in the case of a book published abroad in the English language before publication in this country, the deposit in the copyright office, not later than thirty days after its publication abroad, of one complete copy of the foreign edition, with a request for the reservation of the copyright . . . shall secure to the author or proprietor an *ad interim* copyright, which shall have all the force and effect given to copyright by this Act, and shall endure until the expiration of thirty days after such deposit in the copyright office.

Sec. 22. That whenever within the period of such *ad interim* protection an authorized edition of such book shall be published within the United States, in accordance with the manufacturing provisions specified in section 15 of this Act, . . . the copyright shall be extended to endure in such book for the full term elsewhere provided in this Act.<sup>29</sup>

The burden of these sections is that *all* books seeking American copyright protection, whether by citizens or by aliens, in English or in another language,

27. 35 Stat. 1075 (1909).

28. *Id.* at 1078-79.

29. *Id.* at 1080.

are subject to the requirements of the manufacturing clause with only two exceptions: first, books of "foreign origin" in a foreign language, and, second, books published abroad in English seeking *ad interim* copyright. Assuming that "of foreign origin" means "by a citizen of another nation,"<sup>30</sup> the act gave foreign authors writing in languages other than English a substantial advantage. Full copyright protection was unavailable to them without reference to the manufacturing clause (and, concomitantly, *ad interim* copyright was unnecessary). Authors who published abroad in English, on the other hand, were required to produce American editions in order to qualify for full protection. Thus they badly needed *ad interim* protection. It was essential if they were to test the United States market and determine the feasibility of an American edition. (That the sixty-day *ad interim* period may have been too short is another question.) The section is drafted, we note, in terms of "a book published abroad in the English language." There is no restriction as to citizenship of the author; therefore *ad interim* copyright was available to American as well as to foreign citizens publishing works abroad in English.

It is curious that while the *ad interim* protection of the Act of 1905 was available only to works published abroad in a foreign language,<sup>31</sup> the 1909 act gave *ad interim* protection only to works published abroad in English<sup>32</sup> and altogether exempted works in a foreign language by a foreign author from the requirements of the manufacturing clause. The House Report accompanying the act adverted to this shift:

Section 21 gives to authors of books written in the English language an *ad interim* term, which can not in any case endure more than sixty days. By the act approved March 3, 1905, the proprietor of a book published abroad in a foreign language was, under certain conditions, given twelve months after the first publication in such foreign country to deposit copies and comply with the other provisions regarding copyright.

After the passage of the act of 1905 English authors felt that some such rights should be given them. Section 21 was inserted for that purpose.<sup>33</sup>

Domestic printing interests were satisfied with the manufacturing clause;<sup>34</sup>

30. That this is its meaning is by no means certain. See text at notes 50-59 *infra*.

31. See text at note 18 *supra*.

32. See 2 Ladas, *The International Protection of Literary and Artistic Property* 767 (1938).

33. H.R. Rep. No. 2222, 60th Cong., 2d Sess. 13-14 (1909).

34. 28 Ops. Att'y Gen. 265, 268 (1910); "[T]he language of that section [the manufacturing clause], as well as the report of the committee which had the bill in charge, clearly shows that it was inserted solely for the purpose of protecting American labor . . . ."

they felt that works of foreign authorship in foreign languages posed an insignificant commercial threat, and therefore permitted the exclusion of those works from the manufacturing requirements. English authors had the *ad interim* protection they wished. Only the American citizen was forgotten.

	Entitled to full copyright	Entitled to <i>ad interim</i> copyright
Book published by a citizen in America in English	Yes	—
in America in a language other than English	Yes	—
abroad in English	No	Yes
abroad in a language other than English	No	No

Turning now to the act of 1919,<sup>35</sup> which extended the period between foreign publication and *ad interim* deposit from thirty to sixty days, and the term of protection itself from thirty days to four months:

Sec. 21. That in the case of a book first published abroad in the English language on or after the date of the President's proclamation of peace, the deposit in the copyright office, not later than sixty days after its publication abroad, of one complete copy of the foreign edition, with a request for the reservation of the copyright . . . shall secure to the author or proprietor an *ad interim* copyright, which shall have all the force and effect given to copyright by this Act, and shall endure until the expiration of four months after such deposit in the copyright office.<sup>36</sup>

Omitting the insubstantial modifications of 1926,<sup>37</sup> the next major change that concerns us occurred in 1949.<sup>38</sup> Congress felt that the stringent requirements of the manufacturing clause were depriving Americans of the benefit of most of the books published in England. As the Senate Report put it:

[The manufacturing clause] is a bar to the manufacture in the United States of books published abroad in the English language except in the case of works by the most famous authors. Last year over 14,000 books were published in England and yet only 139 books writ-

35. 41 Stat. 368 (1919).

36. *Id.* at 369.

37. 44 Stat. 818 (1926). In 1947, Title 17 of the U.S. Code was enacted into positive law. 61 Stat. 652 (1947).

38. 63 Stat. 153 (1949).

ten in the English language in England and in all other foreign countries were registered in the United States Copyright Office.<sup>39</sup>

Sensing that revision of the manufacturing clause was a political impossibility, Congress turned its attention to the provisions for *ad interim* copyright. First it rewrote the proviso at the end of the manufacturing clause as follows:

*Provided, however,* That said requirements shall not apply . . . to books or periodicals of foreign origin in a language or languages other than English . . . or to copies of books or periodicals, of foreign origin, in the English language, imported into the United States within five years after first publication in a foreign state or nation up to the number of fifteen hundred copies of each such book or periodical . . . if *ad interim* copyright in said work shall have been obtained pursuant to section 22 of this title prior to the importation into the United States of any copy except those permitted by the provisions of section 107 of this title . . .<sup>40</sup>

The *ad interim* clause was altered accordingly:

Ad Interim Protection of Book or Periodical Published Abroad.—In the case of a book or periodical first published abroad in the English language, the deposit in the Copyright Office, not later than six months after its publication abroad, of one complete copy of the foreign edition . . . shall secure to the author or proprietor an *ad interim* copyright therein, which shall have all the force and effect given to copyright by this title, and shall endure until the expiration of five years after the date of first publication abroad.<sup>41</sup>

Congress extended the interval between publication abroad and *ad interim* deposit from sixty days<sup>42</sup> to six months, enlarged the term of protection from four months to five years, and permitted the importation into the United States of up to 1500 copies of a work covered by *ad interim* copyright. In this manner, Congress eased the situation for foreign authors publishing abroad in English: the statutory conditions under which they might test the American market now conformed more closely to business realities, and Americans could reasonably expect to enjoy more domestic editions of English books.

But somehow, what Congress gave the English author it took from the

39. Sen. Rep. No. 375, 81st Cong., 1st Sess. (1949), in U.S. Code Congressional Service, vol. 2, at 1321. Professor Chafee's eloquence is apposite here: "It is hard on these foreigners to be denied protection except at a high discriminatory cost, but it is harder on the rank and file of Americans to lose the happiness which is ours almost for the asking." Chafee, *Reflections on the Law of Copyright: I*, 45 Column. L. Rev. 503, 523 (1945).

40. 63 Stat. at 153.

41. *Id.* at 154.

42. See text at note 35 *supra*.

American. We have seen that under the prior statutory provision an American author publishing abroad in English was eligible for *ad interim* copyright. Under the 1949 act, this protection was substantially destroyed. The American author publishing abroad in English might still fit section twenty-two, which refers merely to "book or periodical first published abroad in the English language." But having obtained *ad interim* copyright, what could he do with it? The provision permitting importation of up to 1500 copies was carefully drafted to exclude him. The phrase "book or periodicals, of foreign origin, in the English language," for all intents and purposes restricted the *ad interim* provision to foreign authors publishing abroad in the English language. American authors in practice were denied the advantages of *ad interim* copyright and subjected to the requirements of the manufacturing clause. This effect of the 1949 act is plain enough, yet the Senate Report accompanying it states:

Nothing in these amendments can possibly prejudice the right of any of our citizens, whether authors, publishers, printers, members of labor organizations, or the general public.<sup>43</sup>

The rights of some of our citizens certainly were prejudiced. Their situation stood as follows.

	Entitled to full copyright	Entitled to <i>ad interim</i> copyright
Book published by a citizen in America in English	Yes	—
in America in a language other than English	Yes	—
abroad in English	No	Yes*
abroad in a language other than English	No	Yes*

\* But of little practical value because of the importation limitations.

Public Law 743,<sup>44</sup> enacted in 1954 to implement the Universal Copyright Convention domestically, made several changes with regard to copyright protection both for citizens and for aliens. The one which concerns us, however, is the qualification of the section sixteen proviso:

*Provided, however,* That said requirements shall not apply . . . to books or periodicals of foreign origin in a language or languages other than English . . . or to copies of books or periodicals first published abroad in the English language, imported into the United States [in compliance with the provisions of the act].<sup>45</sup>

43. Op. cit. supra note 39, at 1322.

44. 68 Stat. 1030 (1954).

45. Id. at 1032.

The limitation of the 1949 act to books in English "of foreign origin"<sup>46</sup> disappeared. Effective *ad interim* protection was available again to American authors publishing abroad in English. American authors publishing abroad in a foreign language, however, remained unprotected. Thus, the law presently stands as follows:

	Entitled to full copyright	Entitled to <i>ad interim</i> copyright
Book published by a citizen in America in English	Yes	—
in America in a language other than English	Yes	—
abroad in English	No	Yes
abroad in a language other than English	No	No

## II

What does our table mean in human terms? It means that an American citizen residing in the United States can get copyright protection for a work in English or in any other language only by complying with the manufacturing clause. It means that an American citizen who publishes a work in English in a foreign country is entitled to *ad interim* protection on the terms set out in the act, and to full protection only upon satisfaction of the requirement of domestic manufacture. And, astonishingly, it means that an American citizen who publishes a work in a language other than English in a foreign country can get *no* protection at all. He is ineligible for *ad interim* copyright because his work is in a foreign language, and for full copyright because he has not satisfied the manufacturing requirements. It is immaterial whether he resides in the United States or abroad. Consider some examples: (1) An American professor of Greek, residing in Massachusetts, writes a monograph for the Sorbonne which is published in French in Paris. He can get no American copyright whatsoever. (2) A Vermont poet, unable to find an American publisher, submits his work to a London publishing firm which puts out a small English edition. The poet can secure *ad interim* copyright, but without an American edition he cannot secure full copyright. (3) An American novelist living in Switzerland writes a novel in German which is published by a Zurich firm. No American copyright, *ad interim* or full, is available to him. If he publishes an English translation in a foreign country subsequent to publication of the original version, he will be unable to get *ad interim* protection, for section twenty-two refers to "a book or periodical *first* published abroad in the English language."<sup>47</sup>

46. See text at note 40 *supra*.

47. 17 U.S.C. § 22 (emphasis supplied).

This is the shocking import of our copyright law. Twenty years ago the Register of Copyrights stated it as follows:

For example, a citizen of the United States living abroad writes a book in a foreign language and has it printed or published abroad with a notice of United States copyright. That this is not a book "of foreign origin" which justifies the Copyright Office in accepting the deposit and making registration has already been indicated . . .<sup>48</sup>

Plainly, the entire question turns on the meaning of the phrase "of foreign origin." We have assumed<sup>49</sup> in our exposition that it means "by a citizen of a foreign nation." How sound is that assumption?

### III

The phrase "of foreign origin" first appears on the statute-books in section fifteen of the act of 1909,<sup>50</sup> excepting such works when written in a foreign language. It has two possible meanings: (1) by a citizen of a foreign nation, or (2) published in a foreign nation. R. R. Bowker, by his own admission<sup>51</sup> the author of this section of the statute, has explained its meaning:

This manufacturing provision requires that every "book" except the original text of a work of foreign origin, *i.e.*, not by an American writer in a language or languages other than English . . . [must comply with the manufacturing clause].<sup>52</sup>

He elaborates as follows:

The effect of these provisions, to cite specific instances, is that an original German text by a non-American author is exempt from the manufacturing provisions, but that a French translation or an English translation is not, and that an original German work by an American author must be manufactured in this country to obtain protection,

48. Bouve, Letter to the Librarian of Congress concerning Certain Aspects of the Copyright Act of March 4, 1909, at 30 (1938).

49. See text at note 30 *supra*.

50. See text at note 28 *supra*.

51. Bowker, *Copyright, Its History and Its Law* 156 (1912).

52. *Id.* at 154. Supporting Bowker's view, see the statement of R. U. Johnson, secretary of the Authors' Copyright League, Original Hearings, vol. 3, p. 56 (1908): "To express clearly at once the significance of this proviso [referring to works 'of foreign origin'], the American Authors Copyright League moves for the abolition of the manufacturing clause as it relates to books in foreign language of foreign origin, not books in foreign languages of American origin. If the governor of Minnesota, for instance, should print in Norwegian his reminiscences, we should not desire to interfere with the publication of that being required in this country by the American typesetters."

and that the American author printing his work in English abroad may claim *ad interim* protection but can obtain no substantial benefit from it. In case a German resident of this country, writes a book in the German language and prints it first in Berlin, he can have no American copyright in the German edition; and if copies of such an edition, without copyright notice, should reach the United States previous to manufacture and publication of the work here, any one would have the right to reprint it, and the work would be practically dedicated to the public, while the copyright notice could not be affixed to such foreign printed edition without violation of the law. If, however, the German work were a translation made by or for the author of a work written in English, the general copyright of the English work would cover the German edition, but the German copies could not then be imported.<sup>53</sup>

As a matter of statutory construction, one might argue that this is the meaning of "foreign origin." At the end of section fifteen, it is provided that the manufacturing requirements shall not apply to "books of foreign origin" in foreign languages and to books "published abroad in the English language."<sup>54</sup> Why should Congress have said "published abroad" as to the second exception if it did not mean something else by "foreign origin" in the first exception? And what can the first exception then mean but a work written by an author of foreign citizenship? The argument is answerable. The "published abroad" language may be explained by reference to section twenty-one.<sup>55</sup> Congress wished to exempt from the manufacturing requirements those works seeking *ad interim* protection, and so, naturally enough, used the language of the *ad interim* section. The argument that Congress meant to distinguish between "foreign origin" and "published abroad" is thus weakened, and we are relegated to Bowker's bare assertion that "foreign citizenship" is what *he* meant when he drafted the provision. The question whether Bowker would have had the last word is permanently open, for no court has ever passed on the matter.<sup>56</sup> In any event, Bowker's position is not strong. If "of foreign origin" in section fifteen of the 1909 act means "by a citizen of a foreign nation," it follows that a work

53. Bowker, *op. cit. supra* note 51, at 155.

54. See text at note 28 *supra*.

55. See text at note 29 *supra*.

56. See note 13 *supra*. Ladas believes that "of foreign origin" means "published in a foreign country." 2 Ladas, *The International Protection of Literary and Artistic Property* 764-65 (1938): "All books in the English language are included in the manufacturing clause of the 1909 act regardless of whether they are made by a citizen or resident of the United States or by an alien resident abroad. There are excluded books in a language other than English by a citizen or resident of the United States or by a citizen of another country. It would appear that the meaning of the term 'of foreign origin' in the section refers to foreign publication rather than to foreign

in German by a citizen of Germany residing in the United States would be exempt from the manufacturing requirements. We have seen that Bowker refused to concede this: "In case a . . . German resident of this country, writes a book in the German language and prints it first in Berlin, he can have no American copyright in the German edition."<sup>57</sup> The Register of Copyrights in 1938 echoed Bowker:

But if nationality is made the test of "foreign origin" it would seem to follow that a foreign resident here who writes a book creates a work of foreign origin and should be able—if that is all there is to the question—to write his book here and send it abroad to be printed and defeat the interests of American printers, binders and typesetters. On such a limited construction he would be in a preferential position over an American author. It is not believed that such was the intention of Congress.<sup>58</sup>

Accordingly, he suggested the following amendment:

A "book of foreign origin" refers to the work of a foreigner not a resident of the United States.<sup>59</sup>

In short, although students of copyright law and the Copyright Office itself have assumed that "of foreign origin" means "by a citizen of a foreign nation," the answer is by no means clear. One wishes that a court had come to grips with the question.

#### IV

On June 16, 1955, the twelfth signatory to the Universal Copyright Convention deposited its articles of ratification with the Director-General of UNESCO,<sup>60</sup> and three months later the UCC became effective.<sup>61</sup> Article III, section 1, of the Convention provides that as to "works protected in accordance

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authorship." But see Treasury Decision (1910), Copyright Office Bulletin No. 17, reprinted in Amdur, *Copyright Law and Practice*, at 626-27 (1936): "These books are Swedish copies, the translation of which was duly authorized by the proprietor of the copyright in the United States . . . . As it appears that the books in question were translated and manufactured in Sweden by a citizen of Sweden, they are, in the opinion of the department, of foreign origin in a language other than English, and are specifically exempted from the manufacturing provision . . . ." It is impossible to tell, however, on which fact the Treasury relied more heavily, that the translator was a Swedish citizen, or that the books were published in Sweden.

57. See text at note 53 *supra*.

58. *Op. cit. supra* note 48, at 9-10.

59. *Id.* at 10.

60. BULL. CR. SOC. 159 (1955). The United States ratified on June 25, 1954. 100 Cong. Rec. 8487-95.

61. For text of the UCC, see 6 U.S. Treaties and Other International Agreements 2731.

with this Convention and first published outside its territory and the author of which is not one of its nationals," a signatory nation's copyright formalities would be met by publication with simplified notice.<sup>62</sup> No mention was made of the need to comply with any manufacturing provision. Section 2 of Article III, however, states:

The provisions of paragraph 1 of this article shall not preclude any Contracting State from requiring formalities or other conditions for the acquisition and enjoyment of copyright in respect of works first published in its territory or works of its nationals wherever published.<sup>63</sup>

It would seem, then, that the United States can continue to require compliance with the manufacturing clause of all its citizens, wherever their works are published and in whatever language. Congress took care to reserve this privilege in the saving clause of Public Law 743:

The provisions of this sub-section [dealing with changes in the copyright statute made necessary by American adherence to the UCC] shall not be extended to works of an author who is a citizen of, or domiciled in the United States of America regardless of place of first publication, or to works first published in the United States.<sup>64</sup>

But is it really so plain that an American citizen residing abroad, for example, in Paris, and who there publishes a work in French, could not get full United States copyright protection without an American edition? Suppose that, as permitted by article II, section 3, of the UCC,<sup>65</sup> France assimilates such an American citizen domiciled in Paris to her own nationals. Could the American citizen, translated now into a French national, claim United States copyright protection by publication in France with the notice required by article III, section 1? The answer is probably no, because section 2 of article III permits the United States to require additional formalities (*e.g.*, compliance with the manufacturing clause) of its own citizens. One might argue in response, however, that this American citizen, according to article II, section 3, is to be treated as a French citizen. Moreover, the permissive clause of article III, section 2, states that "the provisions of paragraph 1 of this article [dealing with simplified notice] shall not preclude" additional formalities, and our hypothetical quasi-French citizen is relying not on paragraph 1 of article III but on paragraph 1 of article II:

62. *Id.* at 2734.

63. *Id.* at 2735.

64. 68 Stat. 1030, at 1031 (1954).

65. 6 U.S. Treaties and Other International Agreements at 2733-34: "For the purpose of this Convention any Contracting State may, by domestic legislation, assimilate to its own nationals any person domiciled in that State."

Published works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to work of its nationals first published in its own territory.<sup>66</sup> ,

Perhaps some day a litigant will rely on the UCC; and though he may not convince a court that it has changed the American law concerning citizens who publish abroad, he may persuade Congress to take on the job.

## V

The Universal Copyright Convention is not the only string to a potential litigant's bow. It is also possible that the provisions of the copyright statute we have discussed are unconstitutional.

The customary remark in this area is to the effect that Congress may impose what conditions it likes on a privilege it is free to grant or deny. The remark can be traced at least as far back as Holmes' statement in 1892 that "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."<sup>67</sup> As applied to copyright law, the argument would be that Congress is free to grant or deny the privilege of copyright; that if it chooses to impose the condition of domestic manufacture on books by American citizens wherever published and in whatever language, it may do so; that if it chooses to grant *ad interim* protection to American citizens who publish works abroad in the English language but not to citizens who publish works abroad in foreign languages, there is none to say nay.

The pat rule that Congress knows no bounds in the conditions it may impose on a privilege is no longer impregnable. The doctrine of unconstitutional conditions has breached it. According to that doctrine, the legislature is limited by the requirements of due process in conditioning the grant of a privilege, *i.e.*, the condition must be reasonable. Thus, it is a privilege to work as a teacher at a municipal college; but for the municipality to discharge a teacher without a hearing merely because he pleads the Fifth Amendment before a congressional investigating committee is an unreasonable condition, violative of the due process clause of the Fourteenth Amendment.<sup>68</sup> Surely Congress is similarly bound by the due process clause of the Fifth Amendment. If works by American citizens published abroad in English are eligible for *ad interim* protection, why should not works in foreign languages also be eligible? If the

66. *Ibid.* Cf. *United Dictionary Co. v. G. & C. Merriam Co.*, 208 U.S. 260, 264 (1908) (Holmes, J.): "Of course, Congress could attach what conditions it saw fit to its grant, but it is unlikely that it would make requirements of personal action beyond the sphere of its control."

67. *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220 (1892).

68. *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956).

printing trades can survive the competition of 1500 copies of the first, they can all the more readily survive the competition of 1500 copies of the second. To this extent the limitation of the *ad interim* provision solely to works in the English language may be void for want of due process. It is an interesting speculation.

## VI

The best hope of those who are fighting for copyright law reform is the gradual enlightenment of our legislators. In all likelihood the plight of American citizens who publish abroad has not been understood by the committees responsible for supervising the copyright statutes. Once it is called to their attention, we may hope that they will move to relieve it. Meanwhile, these should be our objectives: (1) abolition of the manufacturing clause altogether: if that fails, (2) abolition of the manufacturing requirements as to works by American citizens published abroad in any language; and if that fails, (3) extension of *ad interim* copyright to works by American citizens published abroad in foreign languages. When these goals are attained, we will have done much toward guaranteeing to our artists that integrity of the spirit which is a necessary condition of creation.

## PART II.

# LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

### 1. UNITED STATES OF AMERICA AND TERRITORIES

#### 113. U. S. LAWS, STATUTES, ETC.

Copyright law of the United States of America. (Revised to Nov. 1, 1958). Washington, Copyright Office, 1958. 46 p. U. S. Copyright Office Bulletin no. 14.

The pamphlet edition of the copyright law known as Copyright Office Bulletin 14 has been revised to include the following: The amendment to Section 115 of Title 17, U. S. Code, providing for a statute of limitations for civil actions; the addition of notes regarding the applicability of the U. S. copyright law and the Universal Copyright Conven-

tion to Guam; revision of the note concerning Alaska, with reference to the effects of P.L. 85-508 providing for the admission of Alaska into the Union; and other minor revisions in supplementary data. This revised edition of Bulletin 14 may be ordered from the Superintendent of Documents or from the Copyright Office. The price is 25c.

114. U. S. LAWS, STATUTES, ETC.

Gesetz Nr. 85-313 zur Änderung des U. S. Code—Title 17—Copyrights zwecks Festsetzung von Verjährungsfristen für Zivilklagen, vom 7. September 1957. (60 *Blatt für Patent-, Muster- und Zeichenwesen* 283, no. 11, Nov. 1958.)

German translation of P.L. 85-313 which provides for a three-year statute of limitations with respect to civil copyright actions. See 5 BULL. CR. SOC. 15, Item 4 (1957) and 5 BULL. CR. SOC. 295, Item 367 (1958).

115. U. S. COPYRIGHT OFFICE.

Related code provisions; a list of some provisions in the United States Code and the Code of Federal Regulations dealing with or related to copyright (exclusive of 17 U.S.C. and 37 C.F.R. ch. II). McCannon, Marjorie, *comp.* Washington, Copyright Office, 1958. 17 p. Circular no. 86.

116. U. S. COPYRIGHT OFFICE.

"Fair use" of copyrighted works. Washington, Dec. 1958. 1 p. Circular no. 20.

A revised circular explaining in general terms the limitations upon the use of copyrighted materials without obtaining the permission of the copyright owner.

117. U. S. COPYRIGHT OFFICE.

Games. Washington, Nov. 1958. 1 p. Circular no. 17.

A revised circular explaining the extent of copyright protection with respect to games.

118. U. S. COPYRIGHT OFFICE.

Radio and television programs. Washington, U.S. Govt. Print. Off., Nov. 1958. 1 p. Circular no. 57E.

A brief explanation of what is protected by copyright in relation to the copyright registration of radio and television material.

## 2. FOREIGN NATIONS

## 119. FRANCE. INSTITUT NATIONAL DE LA PROPRIÉTÉ INDUSTRIEL.

Dessins et modèles. Guide du déposant. Paris, Imp. Nationale, 1958. 36 p.

A revised guide to the legal requirements for the deposit of two and three dimensional designs which are protected under French laws, including information relating to the international deposit of such designs.

## 120. GREAT BRITAIN. PRIVY COUNCIL.

The Copyright (International Conventions) (Argentina) Order, 1958. Made 28th January, 1958; laid before Parliament 3rd February, 1958; coming into operation 13th February, 1958. London, H. M. Stationery Off., 1958. 2 p. Statutory instruments, 1958, no. 135, copyright.

"This Order applies the main provisions of the Copyright Act, 1956, for the benefit of Argentina, which has acceded to the Universal Copyright Convention."

## 121. GREAT BRITAIN. PRIVY COUNCIL.

Ordonnance de 1957 concernant les conventions internationales en matière de droit d'auteur. (No. 1523, du 23 août 1957.) (71 *Le Droit d'Auteur* 150-155, no. 10, Oct. 1958.)

A French translation of the Order in Council of 1957 which applies the main provisions of the Copyright Act, 1956, with certain qualifications, for the benefit of those countries which are members of the Bern Copyright Union and of those which are parties to the U.C.C. See 5 BULL. CR. SOC. 86, Item 113 (1957).

## 122. GREAT BRITAIN. PRIVY COUNCIL.

Ordonnance de 1958, concernant les conventions internationales en matière de droit d'auteur (Argentine) No. 135, du 28 Janvier. (71 *Le Droit d'Auteur* 161-162, no. 11, Nov. 1958.)

French translation of a British Order in Council. See Item 120, *supra*.

## 123. JAPAN. LAWS, STATUTES, ETC.

Gesetz Nr. 86 Betreffend die Einfügung von Ausnahmebestimmungen in das Urheberrechtsgesetz infolge Inkrafttretens des Welturheberrechtsgesetzabkommens, vom 28. April 1956. (60 *Blatt für Patent-, Muster- und Zeichenwesen* 281-282, no. 11 Nov. 1958.)

German translation from the French version of the Japanese law of April 28, 1956 implementing the U.C.C. which appeared in the April 1958 issue of *Le Droit d'Auteur*. See 5 BULL. CR. SOC. 297, Item 373 (1958).

### PART III.

## CONVENTIONS, TREATIES AND PROCLAMATIONS

#### 124. INDIA REPUBLIC.

Adhésion à la Convention de Berne pour la protection des oeuvres littéraires et artistiques, révisée en dernier lieu à Bruxelles, le 26 juin 1948 (avec effet à partir du 21 octobre 1958). (71 *Le Droit d'Auteur* 149-150, no. 10, Oct. 1958.)

Notification of Sept. 21, 1958 by the Swiss Government to the member countries of the Bern Union of the receipt of a note from the Indian Ambassador at Bern transmitting the instrument of accession by India to the Brussels revision of the Bern Copyright Convention, effective Oct. 21, 1958. The text of the transmittal note, in English, appears at end of the letter of notification.

### PART IV.

## JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY

### A. DECISIONS OF U.S. COURTS

#### 1. Federal Court Decisions

125. *Venus Music Corp. v. Mills Music, Inc.*, 119 U.S.P.Q. 360 (2nd Cir., Nov. 18, 1958). *Affirming* 5 BULL. CR. SOC. 164, Item 220.

Action for infringement of renewal copyright. The song "Mary Lou" was composed in 1926 by Lyman and two others and assigned to Watterson, who obtained copyright registration. In 1931 Watterson assigned

the rights to defendant, and this assignment was recorded. The renewal right was still owned by Lyman in 1936 when he executed an unrecorded assignment of all of his right, title and interest to defendant "forever", for \$200. In 1947 Lyman and his wife executed an instrument, properly recorded, conveying to defendant their right to renewal in "Mary Lou" and five other songs, against a payment of \$500 in advance royalties. In 1942, however, Lyman had assigned to plaintiff's predecessor in interest his renewal rights for \$1 and a promise of royalties. Plaintiff claimed Lyman confirmed this assignment in 1953, but Lyman denied this. The court below found Lyman's 1936 assignment to defendant included the renewal right, and that plaintiff could not claim priority under the recording act. Plaintiff appealed.

*Held*, affirmed.

Plaintiff contended the Court had to find as a matter of law that the 1936 assignment did not include renewal rights. But the Court reasoned that since in 1936 defendant already owned the original copyright, the 1936 assignment could not possibly have been intended to convey it. "Under these circumstances, we cannot say the trial court's finding that the renewal right was what was being bargained for and assigned in 1936 is 'clearly erroneous.'" Nor can plaintiff prevail under the recording statute (17 U.S.C. §30) as a bona fide purchaser for value. Plaintiff had no knowledge of the 1936 assignment when it recorded the 1942 assignment to it, but it did not pay value. The lower court found the \$1 mentioned in the 1942 assignment had never been paid, and even if it had, such nominal consideration would not constitute value under sec. 30; nor was plaintiff's promise to pay royalties to Lyman sufficient. "Recording statutes are designed to protect those who have actually made payment without notice of a prior conveyance."

126. *American Visuals Corp. v. Holland et al.*, 119 U.S.P.Q. 482 (2nd Cir., Dec. 12, 1958). *Affirming* 5 BULL. CR. SOC. 163, Item 219.

Action for copyright infringement and misuse of confidential information. Plaintiff in 1950 created an illustrated cartoon booklet on highway safety for industrial purposes, entitled "Sudden Death". Attempts to sell it in a dummy black-and-white form were unsuccessful. Defendant Holland was employed by plaintiff as a salesman, etc. in 1952, and defendant Schwartz was plaintiff's art director. After Holland left plaintiff's employ he notified former customers he was now in business on his own; one of them asked him to make up a booklet about traffic accidents, and Holland engaged Schwartz to do the art work. The lower court found Schwartz had a copy of plaintiff's booklet in front of him when he did said work. Plaintiff's motion for a preliminary injunction was denied, 126 F.Supp.

513, and the Second Circuit affirmed, 219 F.2d 223. The lower court then granted defendant's motion for summary judgment on the ground that plaintiff's booklet had not been published and the form of the work was not copyrightable. The Second Circuit reversed and remanded, 239 F.2d 740. Thereupon the lower court found copyright infringement and breach of confidential relationship and entered judgment against Holland for \$5,000 damages, \$1,500 counsel fees and costs, and Holland appealed.

*Held*, affirmed.

Even though on the motion for preliminary injunction the lower Court could not find sufficient indication of plagiarism, it was correct in not holding itself bound to find absence of infringement at the trial. Even if the judgment below could not be upheld on the ground of copyright infringement, the Court would affirm on the ground of abuse of confidential relationship, but there was copyright infringement. "Almost every idea and means of expression has been copied in its essence. In such a case it is no defense to claim that the infringing booklet is more attractive and more saleable. If this were a defense, one could pirate the means of expression just before the work is perfected for sale, do a more finished bit of art work, and then claim what has been appropriated and sold is different by virtue of the sale."

127. *Curtis v. United States*, 120 U.S.P.Q. 13 (U.S. Ct. of Claims, Dec. 3, 1958).

Action to recover just compensation for taking property. Plaintiff created and owned a copyrighted syndicated cartoon strip entitled "The Medal of Honor—True Tales of the Nation's Highest Award", published in a series beginning in 1945. He allegedly presented the strip to an advertising firm and to the Treasury Department's savings bond division, with the understanding he would be paid if his idea were used; and without his consent or payment to him, the advertising firm provided a series using his idea for the Treasury Department, to be used in publicizing defense bonds. Both parties moved for summary judgment.

*Held*, summary judgment granted to the Government.

The advertising firm was never authorized to enter into contracts for the Government, and no officer or agent of the Government with such authority had any dealings with plaintiff. In a claim based upon constitutional taking, plaintiff would have to show the Government in fact used his idea and/or material for its bond advertising campaign; but the facts showed no similarity between the advertisements (using photographs) and plaintiff's comic strip. Plaintiff had no property right in the Medal of Honor; the Government had obtained the consent of the recipients in each case. "Furthermore, were we to hold that plaintiff had

a property right which the Government used without consent of plaintiff, his cause of action would be for infringement of his copyright, a tort, for which the Government has not consented to be sued."—No issue of fact existed since plaintiff had merely denied the facts in defendant's affidavit and requested the right to cross-examine; otherwise "any party could defeat a motion for summary judgment merely by filing a counter affidavit denying the allegations contained in the affidavit filed in support of the motion for summary judgment."

128. *Warner Bros. Records, Inc. et al v. Warner Music, Inc.*, 119 U.S.P.Q., 433 (D.C.S.D.N.Y., Nov. 28, 1958).

Action for unfair competition and trademark infringement. In the fall of 1957 it had become generally rumored in the entertainment field that Warner Bros. intended to enter the field of record distribution, and the formation of a company for this purpose was formally announced in February 1958. Defendant, a manufacturer and distributor of records which was incorporated in 1953 under the name "Parliamentary Records, Inc.", changed its name, at a time coincident with said rumors, to "Warner Music, Inc."

*Held*, preliminary injunction granted to plaintiff, conditioned upon furnishing security.

No person connected with defendant had the name Warner, and no credible explanation for its use could be given. The evidence was overwhelming that the name Warner had acquired a secondary meaning, and a substantial likelihood existed of confusion and deception of the public. Plaintiff made out a prima facie case that defendant adopted the Warner name for the purpose of trading upon plaintiff's good will and reputation; furthermore, defendant's records were apparently inferior in quality and plaintiff might be seriously injured by continued distribution of those records under the Warner name.

129. *Peter Pan Fabrics, Inc. et al. v. Brenda Fabrics, Inc.*, 120 U.S.P.Q. 158 (D.C.S.D.N.Y., Jan. 21, 1959).

Action for copyright infringement. Plaintiff claimed copyright on a design printed upon dress fabric, and that defendant sold a printed fabric almost indistinguishable from plaintiff's.

*Held*, preliminary injunction granted but plaintiff to furnish \$10,000 security.

The differences in the designs were only those resulting from free-hand rather than photographic copying. That plaintiff's design was original was not denied, and defendant's must therefore have been copied from

plaintiff's, it being sufficiently intricate as to preclude independent genesis. Plaintiff's design was a proper subject of copyright, both as a work of art and print; "it was described in the application for copyright as a work of art but that does not preclude sustaining its copyrightability on the ground that it is a print". A preliminary injunction was warranted since plaintiff obtained the design at great expense; defendant was underselling plaintiff; plaintiff's business was a style-leader line for customers willing to pay for distinctive patterns, and offering the same patterns at lower prices robs plaintiff's goods of their distinctive appeal. Furthermore, the sales life of a new design is short.

129a. *Strickler v. N.B.C. et al.*, 167 F.Supp. 68 (D.C.S.D. Cal., Centr. Div., Sept. 22, 1958).

Plaintiff, a commander in the U.S. Navy, was a passenger in 1956 on a commercial airliner which was forced to make an emergency landing; the passengers and crew were rescued by the Coast Guard. In 1957 defendant telecast a program over numerous stations mentioning plaintiff's name, identity and experiences. Plaintiff alleged the program portrayed him in the highly personal and private act of praying; showed him out of uniform wearing a Hawaiian shirt; repeatedly showed him smoking while he was a nonsmoker; and did not indicate the valuable assistance he gave in the evacuation of the plane, resulting in humiliation, embarrassment and great mental pain and suffering. The complaint consisted of nonstatutory causes of action for invasion of privacy under the laws of California, Illinois, Florida and Pennsylvania; statutory causes of action for invasion of privacy under the laws of New York and Virginia; and causes of action based on a claimed right to publicity.

*Held*, all causes of action dismissed except invasion of privacy under California law.

The Court decided to follow *Bernstein v. N.B.C.*, 129 F.Supp. 817, aff'd. 232 F.2d 369, *cert.den.* 352 U.S. 945, holding that the cause of action for invasion of privacy should be determined by the law of the jurisdiction where plaintiff sustained the injury, i.e. California, and not also by the laws of other jurisdictions where the program was also telecast. Plaintiff further contended there was a newly recognized right to publicity, expressly recognized in New York and Pennsylvania; but the Court did not wish to "blaze a new trail" to establish such a right in California.

Defendant contended the cause of action for invasion of privacy under California law should also be dismissed. But the question of the offensiveness of the program was one of facts and not of law.

129b. *Christie v. Raddock et al.*, 120 U.S.P.Q. 75 (D.C.S.D.N.Y., Jan. 6, 1959).

Action for copyright infringement. Plaintiff wrote a doctoral dissertation entitled "Empire in Wood: A History of the United Brotherhood of Carpenters and Joiners of America", and in the first half of 1954 deposited three copies at Cornell, all allegedly bearing a copyright notice. In October 1954 the research director of defendant Raddock borrowed the thesis from the library, and throughout defendants' book "Portrait of an American Labor Leader: William L. Hutcheson" extracts from the thesis were liberally included as if original with defendants' book. In February 1955 plaintiff registered the copyright on his thesis, and defendants' book was published late that year. Late in 1955 or early in 1956 plaintiff learned of defendants' book when a copy was sent him for review purposes, but he made no claim of infringement until he testified before a Senate Committee in June 1958 and brought this action in October 1958. Plaintiff's thesis was never distributed, but in March 1956 a revised edition was published by a Cornell school, with a 1956 copyright notice by Cornell University; plaintiff claimed no financial interest in this publication.

*Held*, preliminary injunction denied.

There was no claim defendants were not financially responsible, and no proof of damage requiring a preliminary injunction. The question remained whether plaintiff's claim was so clear that proof of irreparable damage was not needed; but it could not be clear if there was substance to any of the three issues raised by defendant: validity of plaintiff's copyright, estoppel on account of plaintiff's delay and, fundamentally, existence of infringement. The claim of invalidity of copyright was without substance; even if the borrowed copy did not have a copyright notice, this would not invalidate the copyright. But there was an issue of estoppel; this may be irrelevant if defendants were deliberate pirates, and if the Court were trying the facts it would find the borrowed copy did have a copyright notice, but the research director's flat denial raised a substantial issue. There was therefore no need to determine the existence of infringement.

129c. *Gaye v. Gillis d.b.a. Allied Investigators*. 119 U.S.P.Q. 292 (D.C. Mass., Oct. 21, 1958).

Action for copyright infringement, unfair competition and breach of contract. Plaintiff conducted a commercial collection service under the name "Commercial Investigators", selling to business men booklets of coupons, each coupon entitling them to plaintiff's services on one delinquent account. In 1947 plaintiff and defendant signed a contract pursuant to which defendant was to work as plaintiff's salesman. In 1949 defendant set up his own business along similar lines, terminated his con-

tract and used coupon books similar to those of plaintiff.

*Held*, for defendant, with costs and \$1,000 attorney's fees.

Plaintiff first claimed that his copyright on his coupon book had been infringed. But the court stated: "A copyright does not cover an idea or a system of doing business but only the particular mode of expression of the idea or method of doing business and hence, while the copyrighted description of the idea may not be slavishly copied, the copyright is not infringed by an expression of the idea which is substantially similar where such similarity is necessary because the idea or system being described is the same. . . . Here there was no slavish copying of plaintiff's coupon book."

Plaintiff further claimed that defendant had violated a provision of his employment contract preventing him from competing within three years after its termination. But this provision appeared only on plaintiff's and not on defendant's copy of the contract, and from various circumstances the Court concluded that this clause did not appear on the contract when signed by defendant. Neither could plaintiff prevail on the basis of unfair competition. There was no evidence that defendant made use of confidential information acquired as plaintiff's employee. The instances where defendant sold coupon books to customers to whom he had formerly sold plaintiff's books were too few to show deliberate intent to take over plaintiff's customers, and there was no evidence that defendant ever tried to pass off his services as those of plaintiff or that any of defendant's customers believed he was dealing with plaintiff rather than with defendant as an independent businessman.

## 2. State Court Decisions

130. *Gantz v. Hercules Publishing Corp. et al.*, 120 U.S.P.Q. 203 (N.Y.S.Ct., Queens Co., Jan. 21, 1959).

Action based on invasion of right to fruits of literary property, unfair competition and interference with valuable contract rights. Plaintiff created a comic strip entitled "Melvin the Monster" and sold it to Famous Funnies Publications in Dec. 1954; the strip appeared only in the July 1955 issue, with which the magazine ceased publication, and all rights reverted to plaintiff. In 1956 defendant started publishing a comics magazine entitled "Melvin the Monster".

*Held*, complaint dismissed on the merits, without costs.

Plaintiff never offered his comic strip to anyone after its single publication; thus there was no unfair competition with any simultaneous publication of the title, character or format created by plaintiff. Nor was

there any interference with plaintiff's contractual rights. Plaintiff further contended that defendant invaded his right to the fruits of his creative activity because publication of the title and comic strip character in Famous Funnies was limited. But the Court disagreed, even though as early as March 1956 the editor of "Melvin the Monster" knew plaintiff had created such character; the publication was general, no secondary meaning had been acquired by the character, and there was no copyright or trademark protection.

## PART V.

# BIBLIOGRAPHY

## A. BOOKS AND TREATISES

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The twelfth in a series of studies issued by the Copyright Office to interested persons, with invitations to submit statements of their views.

132. CARY, GEORGE D. Joint ownership of copyrights; a study prepared for the United States Copyright Office by George D. Cary [with the assistance of John W. Coleman] . . . with Comments and views submitted to the Copyright Office. Washington, Copyright Office, Dec. 1958. 40, 9, 13 p. (*General revision of the copyright law, study no. 13.*)

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following main topics: contract and combination, unfair competition and other doctrines beyond copyright, and international aspects of copyright.

134. RENAULD, JEAN G. Concrete music, electronic music, and copyright. (Translated from *Inter-Auteur*, no. 131, 2d trimestre 1958, at 42-47.) New York, Copyright Society of the U.S.A., Oct. 1958. Various pagings.

Issued by the Copyright Society to its sustaining members and subscribers. Appended at end are copies of the Humphrey Bill, S. 4317 (introduced Aug. 1958) to extend copyright provisions of Title 17 to musical compositions produced without the use of a conventional system of notation, and of the Senator's remarks thereon as reproduced in the *Congressional Record*.

## 2. Foreign Publications

### (a) In Czech

135. MIKLOS, FRANTISEK. Nakladatel'ská zmluva v praxi. [Vyd. 1.] Bratislava, Práca; vydavateľ'stvo ROH, 1957. 211 p. (Praktické príručky Práce, zväzok 2).

A treatise on Czech copyright law with special reference to contracts between authors and publishers.

### (b) In English

136. ABRAHAMS, GERALD. The Law for writers and journalists. London, Herbert Jenkins, Ltd., 1958. 215 p.

A lively presentation of the British law as it affects authors, journalists, and all concerned with the written word. The author, who has written in the past on the law for laymen ("Law Affecting Police and Public," "Law Relating to Hire Purchase," "The Legal Mind," "According to the Evidence"), here gives a picture of the many statutes, some 52, which may affect a writer's position in court. Chapter headings include "Freedom of Speech"; "Privacy and Publicity"; "Falsehoods and the Law"; "Copyright"; "Defamation"; "Criminal Libel" and other "crimes of the pen". Fully indexed, with a Table of Statutes ranging from the Bill of Rights to the Wireless Telegraphy Act.

## (c) In German

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A dissertation on the legal status of performing rights societies in West Germany under provisions of the anti-trust laws, including some comparisons with the United States.
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139. PRADO NUNEZ, ANTONIO. El derecho de interprete en el sistema mexicano de los derechos de autor. México, 1958. 189 p. Tesis profesional—Universidad Nacional Autónoma de México.  
A dissertation on "The right of the performing artist in the Mexican system of copyright law."

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## 1. United States

140. COPYRIGHT—renewal right—effect of assignment before accrual where right accrues to executor. (33 *New York University Law Review* 1027-1033, no. 7, Nov. 1958.)  
A case note on *Miller Music Corp. v. Charles N. Daniels, Inc.*, 158 F.Supp. 188 (S.D.N.Y. 1957). See 5 BULL. CR. SOC. 162, Item 218 (1957).
141. HEMPEL, WILLIAM J. Extralegal censorship of literature [by William J. Hempel and Patrick M. Wall]. (33 *New York University Law Review* 989-1026, no. 7, Nov. 1958.) Appendices (pp. 1011-1026): I: Publications disapproved for youth by the National Office for Decent Literature. II. Communities in which reading material available to the public has been or is determined to some extent by public officials. III. Partial list of pocket books banned by the police in Detroit, Michigan, 1950 to 1955.

This analysis concludes "that existing law is adequate to protect all interests in the case of extralegal censorship by public officials," but that legislation is needed to protect against private group censorship, especially when it is implemented by boycott.

142. JABCZYNSKI, NORMAN E. The duration of copyright. (36 *University of Detroit Law Journal* 66-77, no. 1, Oct. 1958.)

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## 2. FOREIGN

### (a) English

144. BERTSTRÖM, SVANTE. Civil and criminal liability at Swedish law for wrongful acts committed in broadcast and televised programs. (*E.B.U. Review*, no. 51B, 21-26, Oct. 1958.)

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A review of recent publications on neighboring rights by Adolf Streuli, Wenzel Goldbaum, Wilhelm Peter, and Philipp Möhring.

## (b) French

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147. LIMPERG, TH. Le "droit de modèle" au Pays-Bas. (*Revue International du Droit d'Auteur* 26-55, no. 21, Oct. 1958.)

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A survey of recent legislative and judicial developments in West Germany involving copyright and related subjects such as publishing, motion pictures, and neighboring rights.

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## 2. England

159. National Library of science and technology gets under way. (*The Book-seller*, no. 2757, pp. 1624-1628, Oct. 25, 1958).

An article on the progress being made, and the problems encountered by the British Government Department of Industrial and Scientific Research in the formation of the National Lending Library of Science and Technology. Special attention is given to copyright and economic problems involved in arranging for the translation into English, and publication of important Soviet scientific and technical literature.

## NEWS BRIEFS

## 160. BOOK PUBLISHERS' COPYRIGHT SEMINAR.

Some 76 representatives of New York, Boston, and Chicago book publishing houses and Messrs. MacCarteney, Kaminstein, and Fillion, representing the Copyright Office, participated in a seminar on procedural and operating copyright problems in the auditorium of the Donnell Branch of the New York Public Library on December 8, 1958. The representatives of the publishers were chiefly the members of their staffs with operational responsibility for copyright matters. Mr. Dan Lacy, managing director of the American Book Publishers' Council, which arranged the session, acted as moderator.

The meeting opened with a resumé of the historical background of the Copyright Office, and continued with a description of its organization, duties, and functions today, with emphasis on the services of the Reference Division to the public.

There followed a discussion of the problems arising in the Examining Division in connection with the filing of applications for registration, and a talk on the operation of Customs Regulations as they affect the importation of books under the Universal Copyright Convention.

There was a lengthy question and answer period dealing with the application of the UCC to notice, registration, the manufacturing clause, importation, and searching.

## 161. BOOK PUBLISHERS AND BROADCASTERS MEET.

Arthur Fisher, Register of Copyrights, and A. A. Goldman, Chief of Research, Copyright Office, met with representatives of the book publishers in New York on December 17, and with representatives of network broadcasters on December 18, 1958. About 15 persons attended the former meeting, and eight the latter. Various problems of interest to each of these groups in connection with the general revision of the law were discussed.

## 162. MEETING OF THE NATIONAL COMMITTEE FOR EFFECTIVE DESIGN LEGISLATION.

A meeting of the National Committee for Effective Design Legislation, held at the Willard Hotel, Washington, D. C. on December 3, 1958, was attended by approximately seventy people. The Committee, which began operations on July 1, with Alan Latman, formerly Special Advisor to the Copyright Office as Executive Secretary, and Arthur M.

Klurfeld, Executive Director of the Textile Fabrics Association as Temporary Chairman, is interested in securing protection, through new federal legislation, against the copying of original designs.

A number of industries from various parts of the country, dealing in products ranging from furniture and fountain pens to fashions, were represented at the meeting. The three principal speakers at the meeting were Judge Giles S. Rich, of the United States Court of Customs and Patent Appeals, and Chairman of the Coordinating Committee of the National Council of Patent Law Associations, who explained the origin of the Willis Design Bill (H.R. 8873, 85th Congress); Arthur Fisher, Register of Copyrights, who described the growing interest in design protection at the International level; and John Pyle, industrial designer, who demonstrated with slides the problems of copying in the field of industrial design.

163. VICE ADMIRAL RICKOVER'S COPYRIGHT CLAIMS IN HIS SPEECHES.

According to *The New York Times* of February 12, 1959, a Navy patent expert, A. V. Helvestine, of the Office of Naval Research, expressed the opinion in a letter to M. B. Schnapper, executive director of the Public Affairs Press, that Vice Admiral Hyman G. Rickover and other Government officials could copyright speeches, "provided they were not delivered under official orders or as part of their official duties."

Mr. Schnapper has brought suit in Federal District Court, Washington, D.C., challenging the legality of Admiral Rickover's action in seeking exclusive rights to a December 11th speech and to twenty-two other speeches he has delivered in the last four years.

Commenting on the suit, Mr. Helvestine told Mr. Schnapper that it contends "no government official or employee has the right under any circumstances ever to acquire proprietary rights to his original written or spoken material." The Navy patent lawyer continued, "No theory could be more detrimental to the recruitment or retention of competent personnel."



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### *In Memoriam*

**Louis E. Swarts 1891-1959**

The Copyright Bar has suffered an irreplaceable loss in the death of Louis E. Swarts. Mr. Swarts had been engaged in the practice of law since 1906, and took a prominent part in the activities of our profession. He was for many years a member of the Patent, Trademark and Copyright Section of the American Bar Association, and served with honor and distinction on a number of committees.

When, in 1952, the Subsection on Copyright Law was formed, Louis Swarts was appointed and served as its first chairman. He was one of the founders of The Copyright Society of the U.S.A. and a member of its first Board of Trustees.

At the time of his death, Louis Swarts was beyond doubt the Dean of the Copyright Bar in the United States. His spirit and the inspiration we derived from him will long remain alive and vibrant.

John Schulman



## PART I.

## ARTICLES

## 164. CREATION, COPYRIGHT AND THE CONSTITUTIONAL CLAUSE.

By JOSEPH TAUBMAN

*Introduction*

In January, 1959, an emergency conference was held to save the faltering road shows of the legitimate theatre from extinction. The press<sup>1</sup> reported that this was due to soaring costs, steady deterioration of railroad transportation, and the lack of suitable shows, among other reasons. One cannot but wonder what impact the Shubert Theatres antitrust consent decree<sup>2</sup> had on the plight of the roadshow when, in Boston alone, two downtown legitimate theatres were converted to roadshows—of motion pictures, and a third, to an art theatre—of motion pictures, leaving Shubert with only a single showcase in the "try-out capital."<sup>3</sup>

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1. New York Times, January 21, 23, 1959, reported a three-day convention ending Jan. 22, 1959, sponsored by the Theatre Guild, American Theatre Society, and Council of the Living Theatre. Stories in Variety Nov. 26 and Dec. 10, 1958 referred to ever-worsening conditions on the road.
2. United States v. Shubert, Civil Action No. 56-72, Consent decree entered in the District Court for the Southern District of New York, February 17, 1956, reported CCH Trade Reg. Rep. (1956 Trade Cas.), p. 68,272.
3. The Majestic Theatre was taken over by Ben Sack and converted into a first run and roadshow motion picture theatre, renamed the Saxon. Later he took over the Plymouth as another first run and roadshow theatre and renamed it the Gary. The Copley, in the Back Bay district, is now a first run "art" motion picture theatre operated by him as the Capri Theatre. Shows ordinarily open in Boston, New Haven, and Philadelphia before beginning their run in New York. Each of these cities would undoubtedly vie for the title of "tryout capital."

At the end of 1958, emergency conferences were also held among motion picture exhibitors. These resulted in the formation of the American Congress of Exhibitors.<sup>4</sup> With respect to the plight of motion pictures, one did not have to wonder. In the same year, the Department of Justice had turned down efforts to modify the antitrust decree by a formerly affiliated exhibitor. It is therefore still prohibited by decree in *U.S. v. Paramount* from production and distribution of motion pictures with preemptive rights to exhibit in its own theatres.<sup>5</sup>

Currently, too, the Department of Justice is being criticized for not moving rapidly enough to seek a more stringent modification of the 1950 ASCAP antitrust consent decree.<sup>6</sup>

Finally, in a period when the performing arts are on the eve of constructing new halls for concert, opera, dance, and theatre in Lincoln Square in New York, in what may be the forerunner of a new era of growth and construction by private groups with federal and local aid,<sup>7</sup> the courts may be moving in the direction of weakening the rule of reason in motion pictures in favor of a virtual *per se* doctrine of uniformity.<sup>8</sup>

4. Late in 1958, Spyros Skouras summoned a meeting of exhibitors to consider measures for salvation of theatrical motion pictures. Although called by the President of Twentieth-Century Fox, the conference resulted in formation of an overall exhibitor organization, the American Congress of Exhibition, with Si Fabian as its head.
5. In March, 1958, the Department of Justice rejected the request of National Theatres, the circuit divorced from Twentieth-Century Fox, to engage in production, prohibited by decree from doing so in *United States v. Paramount* after hearings held Oct. 4, 1957. A three-man Expediting Court handed down its decision against the eight motion picture distributors June 11, 1946, 66 F. Supp. 323 (S.D.N.Y. 1946). A decree was entered Dec. 31, 1946. The Supreme Court, by and large, affirmed, 334 U.S. 131 (1948), but remanded for further proceedings with respect to monopolization, divorce and divestiture. On remand, an opinion finding monopolization and calling for divorce and divestiture of the affiliated circuits was filed, July 25, 1949, 85 F.Supp. 881 (S.D.N.Y. 1949). Consent decrees were entered into in the meantime by RKO Nov. 8, 1948, and Paramount, March 3, 1949. Decrees as to the remaining majors, i.e. theatre-owning defendants, Loew's, Warner's, and Fox, were filed Feb. 8, 1950 and by the three minor defendants, Columbia, United Artists, and Universal, on the same day. Fox entered into a consent judgment in 1951.
6. Consent decree in Civ. 13-95, *United States v. American Society of Composers, Authors and Publishers*, was entered in the District Court for the Southern District of New York on March 4, 1941. It was amended on March 14, 1950.
7. The means of accomplishment of this are complex. But by a tie-in with subsidized housing and New York City condemnation proceedings, the developers of the project are able to acquire the land at a lower cost than by private acquisition. Actual construction costs are being financed privately.
8. *Paradise v. Fox West Coast*. (9th Cir., Sept. 10, 1958); *Basle Theatres, Inc. v. Warner Bros.* (D.Ct. W. Dist, Pa. Oct. 27, 1958); *Rubenstein v. Columbia*, (D. Minn. Jan. 27, 1949).

In short, the impact of antitrust law on sectors of our economy dealing with copyrighted matter is profound. The Shubert consent decree attempted to sunder the integrated operation of theatre ownership and operation, booking, and production of plays. Motion pictures, too, are literary and artistic property which have been the *res* of the growth of an industry and its integration, and antitrust divorcement and divestiture.<sup>9</sup> Music, popular and classical, also the subject of copyright, has felt the impact of the antitrust laws.<sup>10</sup> One of the first cases involving copyright under the antitrust laws involved the resale of books.<sup>11</sup> Last, but far from least, some of the earlier battles of antitrust copyright are being re-enacted in the area of television.<sup>12</sup>

We propose to examine why and how intellection-creation-copyright has attained the unenviable role of dunce in the corner of trade regulation and whether this is in fact compatible with the brave new world of arts and letters that is emerging simultaneously.

### *1. The Constitutional Clause*

Perhaps the cause of this can be traced to a marriage and a comma. In 1789, the Constitution of the United States was adopted, including Article I, Section 8, Clause 8, which provided power in 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;"<sup>13</sup> By this clause, patent and copyright were combined in the holy matrimony of judicial contemplation. Moreover, whatever true love there was in the marriage was marred by the only comma in the clause. According to Justice Douglas, "The copyright law, like the patent statutes, makes the reward to the owner a sec-

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9. Motion pictures may be copyrighted under Section 5(1) Motion Picture Photoplays, and Section 5 (m), Motion Pictures other than photoplays. 17 U.S.C. Sec. 5.
  10. Note 6, *supra*. Also, consent decree in Civ. 459, *United States v. Broadcast Music, Inc.* (D. Wisc., filed Feb. 3, 1941), modified May 9, 1941; and consent decrees in Civ. 104-165, *United States v. Columbia Artists Management, Inc., Community Concerts, Inc., National Concert and Artists Corp. and Civic Concerts Service, Inc.*, entered in the District Court for the Southern District of New York Oct. 20, 1955.
  11. *Straus v. American Publishers' Association*, 231 U.S. 222 (1913).
  12. The United States brought separate actions, alleging violation of the Sherman Act by "block-booking" licensing of feature films to television, in 1957; *United States v. Loew's, Inc.*, Civ. 119-24 (S.D.N.Y.) (*re* MGM features); *United States v. C & C Super Corp.*, Civ. 119-284; (S.D.N.Y.) (*re* RKO features); *United States v. Screen Gems*, Civ. 119-285 (S.D.N.Y.) (*re* Columbia features); *United States v. National Telefilm Associates, Inc.*, Civ. 119-287 (S.D.N.Y.) (*re* Fox features); *United States v. Associated Artists Productions, Inc.*, Civ. 119-286 (S.D.N.Y.) (*re* Warners features).
  13. Section 8 enumerates the powers granted to Congress.

ondary consideration.<sup>14</sup> He quotes Chief Justice Hughes with approval to the effect that "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefit derived by the public from the labors of authors."<sup>15</sup> Indeed, Justice Black has gone so far as to refer to the copyright grant as a privilege.<sup>16</sup>

Bowker adverts to this, too, and to the decision of the House of Lords in ruling in 1774 that the Statute of Anne had substituted a new and lesser right rather than given additional sanction to an existing right. "Literary and like property to this extent lost the character of copy-right and became the subject of copy-privilege depending on legal enactment for the security of the private owner."<sup>17</sup> In his opinion, the Constitution takes the same point of view.

It is therefore not surprising for Justice Douglas to be troubled about the nature of copyright in *Mazer v. Stein* where he questioned whether the term, writings, in the Constitutional clause was broad enough to sanction copyright of statuettes intended for lamp bases in quantity.<sup>18</sup> To say with Copinger and Skone James that "Copyright is, in fact, only a negative right to prevent the appropriations of an author by another"<sup>19</sup> is to add very little conceptually. Once the problem of the nature of copyright is surmounted, we are, to a large extent, out of copyright law. Bowker has said "Business relations, founded on copyright, are chiefly those between author and publisher. These relations involve questions, not so much of copyright law in its self, as of the law of contract and other statutory and common law provisions."<sup>20</sup> One can extend his view to state that business relations founded on copyright of all kinds are based to a great extent on contract, about which the Copyright Code is silent. According to Katz, the copyright ". . . statute gives protection to the work, and only indirectly to the individual."<sup>21</sup> It follows in such a view that "A copyright is a 'property right',"<sup>22</sup> which is amenable to the ordinary rules of contract.

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14. *United States v. Paramount*, 334 U.S. 131, 158 (1948).

15. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 167 (1932), quoted in *United States v. Paramount*, p. 158.

16. *Watson v. Buck*, 313 U.S. 387, 404 (1941).

17. Bowker, *Copyright Its History and Its Law* 7 (1912).

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

19. Copinger and Skone James, *Law of Copyright* 2 (8th Ed. 1948).

20. Bowker, *supra*, note 17 at p. 430.

21. Katz, *The Doctrine of Moral Right and American Copyright Law: A Proposal*, Fourth Copyright Law Symposium 79, 89 (1952).

22. Bergstrom, *The Businessman Deals with Copyright*. Third Copyright Law Symposium 249, 251 (1940).

Bergstrom has concluded, "The Copyright Act itself is a restraint upon trade, since it allows the author, composer or proprietor a temporary monopoly on his work."<sup>23</sup>

Section 1 of the Sherman Act, however, forbids contracts, combinations and conspiracies in restraint of trade.<sup>24</sup> Section 2 thereof prohibits monopolization, attempts to monopolize and combining or conspiring to monopolize.<sup>25</sup>

The coincidence of the catalytic nature of contract to render copyright amenable to commerce; business organization involving these contracts and industrial combinations; the monopoly of the copyright grant and the condemnation of unreasonable restraints of trade and monopolies by the Sherman Act have brought the contrast of anti-monopoly trade regulations and monopoly copyright grant into sharp focus.

But the foundation of the life of the copyright in the business world nevertheless remains the copyright. What is a copyright? Ladas has been compelled to admit, "There has been no thorough-going juristic analysis of copyright in England or in the United States on the basis of present-day understanding of legal rights and interests in terms of modern juristic legal interpretations."<sup>26</sup> Chafee reflected that ". . . the philosophy of the subject has been somewhat submerged in the statutes and case-law because of the pressure of practical problems of narrow scope which demanded immediate attention."<sup>27</sup>

Perhaps the prevailing notion was best expressed by Justice Reed in *Mazer v. Stein*, "Congress may after publication protect by copyright any writing of an author. Its statute creates the copyright. It did not exist at common law even though he had a property right in an unpublished work."<sup>28</sup>

This interpretation can be traced to the Supreme Court in 1834 when in *Wheaton v. Peters* it ruled that "Congress, then, by this act, instead of sanctioning an existing right, as contended for, created it."<sup>29</sup> Therefore the copy could not revert to common law protection at the end of the statutory term.

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23. *Id.* at p. 285.

24. 26 Stat. 209, (1890), Section 1; 15 U.S.C. Section 1, as amended; 50 Stat. 693 (1937).

25. 26 Stat. 209 (1890), Section 2; 15 U.S.C. Section 2.

26. 1 Ladas, *The International Protection of Literary and Artistic Property* 4 (1938).

27. Chafee, *Reflections on the Law of Copyright*, 45 Col. L. Rev. 503, 719 (1945) at p. 503.

28. 347 U.S. 201, 214 (1954).

29. 8 Peters 591, 660-1 (1834).

*Wheaton v. Peters*, in turn, relied on the vote of the House of Lords in *Donaldson v. Becket*<sup>30</sup> in 1774 which, by a six to five vote, had overruled the decision of the judges below in the same case, *sub nomine*, *Millar v. Taylor*, in 1769.<sup>31</sup>

*Millar v. Taylor* involved the question of whether or not there was a common law copyright in Thompson's book of poems, "The Seasons", to prevent copying after the end of the statutory terms as provided by the Statute of Anne.<sup>32</sup> This statute granted a copyright to authors for a term of fourteen years with a right of renewal for a like term. Finkelstein contends that, "When the concept of copyright was first established, authorship was not yet recognized as one of the professions," and that the Statute of Anne recognized authors as such.<sup>33</sup>

At any rate, when the court considered the problem in 1769, it regarded the question as of great importance, transcending the immediate problem at issue, and the judges expostulated at length about the underlying principles.

According to Justice Aston, "It is a personal incorporeal property . . . though the sentiments and doctrine may be called *ideal*, yet when the same are communicated to the sight and understanding of every man, by the medium of printing, the work becomes a distinguishable subject of property and not merely destitute of corporeal qualities."<sup>34</sup> Printing, in his view, was the method of publication of the contents. "Publication therefore is the necessary act, and only means, to render this confessed property useful to mankind, and profitable to the owner; in this they are jointly concerned."<sup>35</sup>

Justice Yates, on the other hand, opposed the view that the copyright was eternal. "It would be strange indeed, if the very act of publication can be deemed the commencement of private property."<sup>36</sup> He contended that by publication, the work is laid open like a highway. He also drew upon the analogy of wild animals on the doctrine of *ferae naturae*.

He considered it a right of first publication. "Ideas 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 let fly: for, till he thinks proper to emancipate

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30. 1 Eng. Rep. 837; 4 Burr. 2408 (1774).

31. 4 Burr. 2303 (1769).

32. 8 Anne c. 19 (1710).

33. Finkelstein, *The Copyright Law—A Reappraisal*, 104 U. Pa. L. Rev. 1025, 1037 (1956).

34. *Millar v. Taylor*, 4 Burr. 2303, 2341 (1769).

35. *Idem.* at p. 2341.

36. *Ibid.* at p. 2358.

them, they are under his dominion."<sup>37</sup> Finally, in a remarkable bit of frankness, he concluded, "Improvement in learning was no part of the thoughts or attention of our ancestors."<sup>38</sup> This was first sanctioned by the legislature in the Statute of Anne.

Lord Mansfield, however, revealed an interest in the status of the author in asking when does property, real or personal, commence. His concern about the author seemed to reflect the notion that copyright is a right of personality, in the course of opposing the notion that the statute creates the right. As for the author, "He is no more the master of the use of his own name. He has no controul over the correctness of his own work. He cannot prevent additions. He can not retract errors. He can not amend or correct a faulty edition."<sup>39</sup>

It is to be noted that *Millar v. Taylor* was decided in 1769 and reversed in *Donaldson v. Beckett* in 1774. By July 4, 1776, the thirteen colonies were in revolution and had declared their independence. The Continental Congress had recommended and twelve of the thirteen states had passed copyright laws. The Constitution, containing the present provision, was adopted in 1789. Congress followed this up with the first copyright act of 1790 granting protection to maps, charts, and books.<sup>40</sup>

It is unfortunate that committee proceedings were conducted secretly and the clause approved without debate,<sup>41</sup> for the clause was not construed by the Supreme Court until forty-five years later in *Wheaton v. Peters*.<sup>42</sup>

Two generations later, the Supreme Court, which had just witnessed South Carolina's effort at nullification of federal supremacy, may have felt that affirmation of natural right of copyright at common law might have lent aid and comfort to the advocates of secession and nullification.<sup>43</sup> The "Age of Jackson" had

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37. *Ibid.* at p. 2378.

38. *Ibid.* at p. 2387.

39. *Ibid.* at p. 2397.

40. Act of May 31, 1790, c. 15, 1 Stat. 124; See, Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 *Geo. L.J.* 109 (1929).

41. Note: Copyright—Study of the Term "Writings" in the Copyright Clause of the Constitution, 31 *N.Y.U.L.Rev.* 1263, 1266 (1956). This is an excellent comprehensive work on the subject.

42. 8 *Peters* 591 (1834).

43. In 1829-1833, South Carolina took the position that a state may defy a federal law which it believes is null and unconstitutional. In 1832, its legislature called a convention which passed an "Ordinance of Nullification" Its governer was authorized to call out the militia and early in 1833, summoned 10,000 citizens. President Jackson issued a Proclamation to the People of South Carolina in December, 1832 denying the principle of nullification and declaring disunion by armed force treason. Henry Clay effected a compromise and the crisis ended. See, Agar, *The Price of Union* 262-267 (1950).

ample precedent in English doctrine since *Donaldson v. Beckett* had overruled *Millar v. Taylor* before 1776. Moreover, the view of the majority that the copyright was created by statute avoided the logical shortcoming of the common law theory. Copyright in perpetuity was impractical of protection and was a restraint which, after the death of the author and his heirs, had no reasonable relation to his benefit or his family's. By contrast, statutory copyright provided a system of administration with a measure of certainty, reward to the author and dedication thereafter to the public.<sup>44</sup>

Nevertheless, it is submitted that the Constitutional Fathers, in adopting the constitutional clause, were not in accord with the majority view of *Wharton v. Peters*.

It seems unlikely that the men who drew upon Locke<sup>45</sup> and the Enlightenment<sup>46</sup> to rebel from the Crown in the name of natural rights felt otherwise, in 1789, than they did in 1776. Indeed, the Declaration of Independence and the Constitution were framed by men who had a vast respect for learning. The Constitutional clause granting the copyright could scarcely have been "a secondary consideration" to men of letters like Madison and Jefferson. The clause setting up the purpose, "To promote the progress of Science and the Useful Arts" could not have been intended as paramount to the remainder, "by securing for limited Times to Authors and Inventors exclusive Right to their respective Writings and Discoveries." The first part was teleological, being one of the powers granted to Congress under Article 1, Section 8 of the Constitution. The balance of the clause sets forth how the purpose is to be achieved. In its formulation, it resembles Justice Aston's remark in *Millar v. Taylor* in 1769 when he stated that publication renders the property ". . . useful to mankind, and profitable to the owner: *in this, they are jointly concerned.*"<sup>47</sup>

Madison adopted this view in the *Federalist* when he wrote, "The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals."<sup>48</sup> If Madison was referring to *Millar v. Taylor*, decided in 1769, it is incredible that he would not know of its reversal by *Donaldson v. Beckett*

44. See Guinan, Duration of Copyright, General Revision of the Copyright Law, Study No. 3 (1957).

45. Locke, Two Treatises of Civil Government (Everyman's Library Ed. 1949).

46. See 2 Webster and Wolf, History of Civilization (1947), Chapter VI, Intellectual Enlightenment, pp. 129-152.

47. Emphasis added. 4 Burr. 2303, 2341 (1769).

48. The *Federalist*, No. 43, at 278 (Modern Library Ed. 1937).

in 1774.<sup>49</sup> Therefore, one must conclude that the intent at the time was to reject the *Donaldson* decision and stand behind the original natural right view of *Millar v. Taylor*. Madison's view expresses a harmony between purpose and method that is characteristic of the age of reason.

In a most perceptive footnote, Stocking and Watkins state, "A common mistake is to associate the constitutional authorization to promote the progress of 'Science' with the grant of patents to 'Inventors'. *But the branch of knowledge now called science was in the eighteenth century termed natural philosophy. As the men who drafted the Constitution used the term, 'Science' embraced all knowledge.* If the eighth paragraph of Section 8, Article 1, had been divided into two paragraphs, instead of covering both copyrights and patents in a single paragraph, these would have read: 8a. To promote the Progress of Science, by securing for limited Times to Authors the exclusive Right to their Writings. 8b. To promote the Progress of useful Arts, by securing for limited Times to Inventors the exclusive Right to their Discoveries."<sup>50</sup>

If Stocking and Watkins are correct, then their paraphrase goes far to explain that the harmony Madison referred to was explicit in the Constitutional clause itself.

Otherwise, one is struck by a grammatical imbalance. The framers link authors to writings and inventors to discoveries by use of the word "respective." Did they intend to stop there? Justice Burton, in dissenting in *U.S. v. Line Material Co.*, sets forth Article, 1, Section 8, Clause 8 as follows: "The Congress shall have Power . . . to promote the Progress of Science and useful Arts, *by securing for limited Times to Authors and Inventors the exclusive right to their respective writings and Discoveries.*"<sup>51</sup>

Stocking and Watkins remark about this, "Mr. Justice Burton makes a comparable division but limits it, unfortunately, to the instrumental phrase beginning 'by securing . . .'. No reason is suggested, and in fact none exists, for not carrying the same division through the substantive clause itself, as in paraphrase of this section (8a and 8b) above."<sup>52</sup>

Unfortunately, Stocking and Watkins use the phrase "substantive clause" to describe the "To promote the Progress of Science and the Useful Arts." It tends to confuse the structure of the entire clause with legal terminology.

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49. See Copyright, A Study of the Term "Writings" in the Copyright Clause of the Constitution, *supra*, note 41, at p. 1267, note 38.

50. Stocking and Watkins, *Monopoly and Free Enterprise* (1951), footnote at p. 447, intended to refer to the patent clause of the Constitution.

51. *United States v. Line Material Co.*, 333 U.S. 287 (1948), dissent of Mr. Justice Burton, pp. 321-363, at p. 332.

52. Stocking and Watkins, *supra*, note 50, footnote at p. 447. Emphasis added.

The word, substantive, is a term of art in law. If the first clause be substantive and the qualifying clause describes the method of carrying it out, then the second clause must be adjective or procedural. It follows from such a view that the substantive clause must take precedence over the other. Copyright benefits to authors become secondary to public welfare.<sup>53</sup>

Justice Burton may not have carried through his division to the entire clause because he may have felt it unnecessary to his exposition. Perhaps he may have been of the opinion that science was a generic term encompassing invention. In modern parlance, it would be almost a truism to state that discoveries of inventions are protected for a limited time because they promote the progress of science.

On the other hand, Justice Burton did not have to go far to connect the term "useful arts" to inventions. Immediately after quoting the constitutional clause, he quotes the section of the patent statute, which reads in part: "Any person who has invented or discovered any new and *useful art*, machine, manufacture, or any composition of matter, or any useful improvements thereof . . ." <sup>54</sup> On the following page, he sets forth in part, Section 1 of the Patent Act of 1790 which grants a patent to persons who ". . . have invented or discovered any *useful art*, manufacture, engine, machine, or device, or any improvements therein not before known or used . . ." <sup>55</sup> Two pages later in a footnote, there is a quotation from Thomas Jefferson by the Commissioner of Patents at the 1939 T.N.E.C. hearings, "*In the arts, and especially in the mechanical arts, many ingenious improvements are made in consequence of the patent right.*" <sup>56</sup> Madison refers to "useful inventions", too, in the *Federalist*.<sup>57</sup> Nowhere is there a reference to the term 'science' with reference to patents in this context, either in the present act or in the first act or as referred to by Jefferson and Madison.

With respect to the clause granting the patent right, no harm was done. If science did not in so many words cover the grant, the repeated references to useful arts were sufficient. Division or no division, reference to the entire purpose of the clause or only part of it made no difference.

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53. I.e., the view expressed by Justice Douglas in *United States v. Paramount*, note 14, *supra*.

54. R.S. Section 4886, as amended, 46 Stat. 376, 53 Stat. 1212, 35 U.S.C. Section 31, *United States v. Line Material Co.*, note 51, *supra*, at p. 333.

55. 1 Stat. 109-110, as quoted in footnote 11 at p. 333.

56. *Id.* at pp. 334-335. Emphasis added.

57. Note 48, *supra*.

## II. Copyright Legislation

But the copyright grant has suffered from an unintended involution of terms of the first clause. The first Copyright Act of 1790 was limited to maps, charts and books.<sup>58</sup> The inclusion of maps and charts satisfied the promotion of the progress of science in both senses, i.e., science as knowledge in the broad sense and science in its current sense which Stocking and Watkins equate to eighteenth century "natural philosophy". In terms of coverage of literary and artistic property, the first copyright act did not purport to cover anything resembling the useful arts. It was not until 1802 that prints were protected,<sup>59</sup> despite the fact that England had protected prints as early as 1735.<sup>60</sup> Photographs were added by the Act of 1865.<sup>61</sup> Works of fine art were enumerated in the Act of 1870.<sup>62</sup> Motion pictures were added as a separate category by the Act of 1912,<sup>63</sup> although they had been previously classifiable as photographs.<sup>64</sup> With respect to photography and motion pictures, at least, protection was granted by Congress to the specific media after they had proven their utility and commercial value, i.e., as useful arts. Indeed, on what basis are works of fine art copyrightable, assuming they are writings? An oil painting does not promote the progress of science in any real sense. Moreover, according to one court, "The beautiful and the development of a love of the beautiful and of the artistic sense and taste is as much necessary to a well-rounded life as are the useful things. A like comment applies to our national life. It is well, therefore, to encourage the production of works of art."<sup>65</sup> Fine art, in that case, a statuette used as a candleholder, was contrasted by the court to "useful things". The Supreme Court went even further in *Mazer v. Stein*, stating, "The dichotomy of protection for the aesthetic is not utility and beauty but art for the copyright . . ."<sup>66</sup> If there is any doubt that the frame of reference is to the phrase "useful arts", we need only turn to Justice Holmes in holding a circus poster copyrightable.<sup>67</sup> He said, "The Constitution does not limit the useful to that

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58. Act of May 31, 1790, c. 15, 1 Stat. 124.

59. Act of April 29, 1802, c. 36, 2 Stat. 171.

60. 8 Geo. 2, c. 13 (1735).

61. Act of March 3, 1865, c. 123, 13 Stat. 540.

62. Act of July 8, 1870, c. 230, 16 Stat. 198.

63. Act of Aug. 24, 1912, c. 356, 37 Stat. 488.

64. *American Mutoscope & Biograph Co. v. Edison Mfg. Co.*, 137 Fed. 262 (D.N.J. 1905); *Edison v. Lubin*, 122 Fed. 240 (3rd Cir. 1903).

65. *Pellegrini v. Allegrini*, 2 F. 2nd 610, (E.D.Pa. 1924).

66. 347 U.S. 201, 218 (1954).

67. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

which satisfies immediate bodily needs . . ."<sup>68</sup> Moreover, ". . . a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright."<sup>69</sup> The standards for evaluation, then, have been the judgment of copyrightability by use of the phrase "useful arts" as a yardstick. The term has been taken at face value, in contemporary times, to measure copyrightability against this expression. Yet in interpreting the phrase broadly, the courts fall back on the notion of promoting progress by means of these arts. In that sense, the public is benefited. In short, the phrase is used in its broadest sense of promoting the culture or cultivation of the nation.

If this be so, then why the restricted scope of the first copyright act? One theory presented recently is as follows, "There seems to be no logical reason for the framers to have excluded paintings unless extensive copying of paintings was not possible at that time and they thought that common-law copyright offered sufficient protection."<sup>70</sup> But this view fails to explain why the art of the engraver was not given protection until 1802,<sup>71</sup> even though the English statute of 1735<sup>72</sup> was ample precedent. Prints, presumably, were easier to copy in 1790 than paintings.

Moreover, an examination of Section 5 of the present copyright act reveals that works included in subsections (a-i) inclusive and (k) could have been copyrighted in 1790.<sup>73</sup> Of the now enumerated classes of Section 5, only (j), photographs, and (i) and (m), motion pictures, were unknown in

68. *Id.* at p. 249.

69. *Id.* at p. 250.

70. Note, Copyright, Study of the Term "Writings" in the Copyright Clause of the Constitution, *supra*, note 41, at p. 1297.

71. Act of April 29, 1802, c. 36, 2 Stat. 171.

72. 8 Geo. 2, c. 13 (1735).

73. 17 U.S.C. Sec. 5,

"(a) Books, including composite and cyclopaedic works, directories, gazeteers, and other compilations;

(b) Periodicals, including newspapers;

(c) Lectures, sermons, addresses, prepared for oral delivery;

(d) Dramatic or dramatico-musical compositions;

(e) Musical compositions;

(f) Maps;

(g) Works of art; models or designs for works of art;

(h) Reproductions of a work of art;

(i) Drawings or plastic works of a scientific or technical nature;

(k) Prints and pictorial illustrations."

1790.<sup>74</sup> Books, (a), periodicals, (b), lectures and sermons, (c), dramatic compositions, (d), musical compositions, (e), maps, (f), works of art, (g), reproductions of works of art, (h), technical drawings, (i), and prints, (k), were all known arts in 1790.<sup>75</sup> America did not have to look abroad for a tradition of sermons. It had Cotton Mather and others as early as the seventeenth century.<sup>76</sup>

As for music, the age of Mozart, Haydn, and Handel was one of brilliance in concert and operatic composition. The present revival of interest in Vivaldi, Corelli, and others is revealing anew the scope and depth of the musical contributions of this period. Surely Congress was aware of these things in 1789 and 1790!

Then why the restricted first Copyright Act?<sup>77</sup> The first statute was rudimentary compared to what Congress might have done. The reasons probably lay in the state of the nation at the time. America was born and conceived in revolution. From 1776 to 1783 it was engaged in a long and bitter war for its very survival. The Continental Congress was concerned with bringing order out of chaos. The Constitutional Convention was not legislating; it was framing a charter for the future. In short, our government commenced operating in its present form in the few months between ratification of the Constitution and enactment of the first Copyright Act.<sup>78</sup> Congress was concerned with the immediate problems: basic protection for authors in books in the traditions of its English heritage, and protection for maps and charts as an aid in exploration to open up the frontier. Perhaps this was foremost at the time as a matter of immediacy and economic expediency. In short, the constitutional clause "To promote the Progress of Science and the Useful Arts" was planned for tomorrow, but Congress legislated for today. Subsequent legislation was also pragmatic. As the copyright laws were revised, periodically, new arts were added which had achieved a broad foundation in terms of the cultural life of the nation. Musical composition may have flourished in Europe in the eighteenth century, but probably was insignificant in America in 1790. By

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74. Photography was developed in the 1840's and 1850's.

75. These were, in fact, well established by then, most of these media going back centuries, some millennia.

76. See 1 Parrington, *Main Currents in American Thought* (1930), Chapter II, *The Mather Dynasty*, pp. 98-117.

77. Act of May 31, 1790, c. 15, 1 Stat. 124, was limited to maps, charts and books.

78. The Constitution was adopted in 1789; the first Congress met for its first session that year and commenced its second session in January, 1790. Agar, *supra*, note 43, pp. 61, 69; Bowers, *Jefferson and Hamilton* 1-25, (1925).

1831, enough of America was settled and stable, with an opportunity to devote itself to music, so that Congress could legislate meaningfully for the protection of musical composition.

At any rate, Congress did not hesitate to draw on the clause, "To promote the progress of Science" in passing the first Copyright Act. To that extent, Stocking and Watkins are correct.

Yet, as Congress legislated in later periods, it drew on the clause, "To promote the Progress . . . of the useful Arts". Therefore, any symmetry that may have been intended in terms of the Stocking and Watkins paraphrase was lost in the later period by an involution of terms. It is noteworthy that the involution accompanied the accretion of the copyright. In *Millar v. Taylor*, Judge Aston referred to copyright as "the author's sole right of printing and publishing."<sup>79</sup> The Copyright Act of 1790 was scarcely different in granting the exclusive copyright for maps, charts, and books. Successive acts increased the coverage of the copyright to cover a multitude of things: prints, musical compositions, dramatic compositions, photographs, works of art, and motion pictures.<sup>81</sup> In addition, the scope of the things covered was broadened to include translations, abridgements, reproductions, and public performance for profit, among others.<sup>82</sup> This is why the copyright has been designated as a bundle of rights.<sup>83</sup> Juristically, this is probably the dominant view in American copyright law.<sup>84</sup>

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79. 4 Burr 2303, 2346 (1769).

80. Note 77, *supra*.

81. Notes 58-59, 61-63 *supra*.

82. Amdur, *Copyright Law and Practice* 203-207 (1936); Warner, *Radio and Television Rights*, Chapter III, *The Subject Matter of Copyright Protection* (1953), pp. 40-91.

83. Henn, *The Compulsory License Provisions of the United States Copyright Law, General Revision of the Copyright Law, Study No. 1* (1957), at page one refers to copyright as a "bundle of exclusive rights". In his article, "Magazine Rights"—A Division of Indivisible Copyright, 40 *Corn. L.Q.* 411, 416 (1955) he writes, "Thus, from a single right applicable to books, copyright grew into an aggregation of several rights covering many types of intellectual creations reduced to concrete form."

84. Kaminstein, *Divisibility of Copyrights, General Revision of the Copyright Law, Study No. 4* (1958), at p. 3. "Copyright was no longer a single right, but had become an aggregation or bundle of rights, which might conveniently be referred to as 'copyright' but was in reality, many copyrights." He refers to the enumeration of rights in Section. 1 of the Act of 1909.

### III. *Contract and Copyright*

Implicit in this notion is the premise that copyright is a genus and each of the rights is a species. Yet, historically, copyright was species book, which, in the Statute of Anne and the Copyright Act of 1790, was virtually coincident with genus, copyright. The copyright was then primarily one right, the exclusive right to copy books, i.e., printed matter. Either one had the right or one did not. A transfer of the whole was an assignment; anything less was a license. The indivisibility of copyright as a theoretical premise was consistent with the transfer of a single right.<sup>85</sup> However, as the rights proliferated, the theory was strained. The growth of the uses of literary and artistic property stretched the theory of indivisibility of copyright to the breaking point.<sup>86</sup> Conceptual jiu-jitsu by means of grants, reservations and similar fancy footwork have attenuated the theory.<sup>87</sup> In some areas, as in taxation, less reliance has been placed on make-believe and fictions have been replaced by treatment of a transaction involving less than entire copyright as a sale rather than a license.<sup>88</sup>

But the elimination of indivisibility does not, in and of itself, give us the taxonomy of the species in the bundle of rights. For example, a synchronization right is not referred to in the copyright code. Nor is there any reference to the use to the rights in new media, e.g., television rights, kinescope rights, taping rights. Nor does the code refer to the language used by the trade, as it were, to refer to "small performing rights" and "grand performing rights."<sup>89</sup> Where

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85. Warner, *supra*, note 82, Section 53, *Indivisibility of Copyright*, pp. 130-137.

86. In taxation, for example, I.R.B. Rev. Rul. 54-409 (1954) modifying I.T. 2735, XII-2 Cum. Bull. 131 (1933), modified the prior ruling of the Internal Revenue Service to replace the rule of indivisibility of copyright by a market place concept so that a grant of less than the copyright for a sum certain, which is exclusive and for the life of the copyright, is considered a sale of property and not a license. Indivisibility has been defined by Henn as the sum of all authorial rights; Henn, *supra*, note 83, 40 *Corn. L.Q.* 411 at pp. 417-418. In this sense, the bundle of rights is not inconsistent with indivisibility.

87. See the enumeration by Henn, *supra*, note 83, 40 *Corn. L.Q.* 411, 424-425 of the main types of grant to a periodical publisher of material authored by another.

88. Note 86, *supra*, *Herwig v. United States*, 105 F. Supp. 384 (1952).

89. Warner, *supra*, note 82, at p. 6, refers to a "grand" performing right as a performance of a dramatico-musical work in the manner originally contemplated by the author. A "small" performing right is a rendition of a single number from such a work. Since non-dramatic or small performing rights are assigned by authors and composers to the performing rights societies, problems of definition arise as to "how many swallows make a summer", i.e., how much of a presentation of one or more songs from a show, in costume, changes the rendition from a non-dramatic to a dramatic performance? As for rights in new media, see, Kupferman, *Rights in New Media*, 19 *Law and Cont. Probs.* 172 (1954).

do the various rights in the bundle come from and how are they to be classified? The real school of jurisprudence classifies them along the lines of the trade, as they are used in practice, much as negligence cases are referred to as sidewalk cases, bathtub cases, or automobile cases.<sup>90</sup> It is submitted that the juristic basis of the copyright may be found in the nature of the creative process itself and that the starting point for analysis of the business nature of the copyright is here.

Section 5 of the Copyright Act is much more than a classification scheme for registration. It serves to delimit and describe the specific rights set forth in Section 1. The enumeration of rights in Section 1 acts inductively to define the nature and scope of the copyright. Conceptually, it sets forth the bounds of the grant.<sup>91</sup> If Section 4 came after Section 5 and not before, one could argue persuasively that it was enacted largely as an *ejusdem generis* clause, so that the generality referred to for copyright was in the nature of the specific matters enumerated.<sup>92</sup> Even so, the practices of the Copyright Office cannot be ignored. If it refuses to register something, such as records, under Section 5, then the scope of Section 4 is effectively limited.<sup>93</sup>

Sections 1 and 5, however, dramatically illustrate the relationship of the copyright to the creative process. Section 1 enumerates the different types of protection granted to the copyright proprietor. The latter, however, is not necessarily the author or creator. Nevertheless, without a creator there can be no literary and artistic property. The origin of the copyright is in an author. But immediately upon creation, the status of author is transformed to that of proprietor. It is as owner that the author can assign the copyright or license one or more of the bundle of rights. It is as proprietor that the creator's widow, children, heirs or estate can transfer this property. It is as proprietor that any assignee takes.

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90. Warren, *Negligence in the New York Courts* (2d Ed. 1956); Vol. 4—Places; (2d Ed. 1958); Vol. 5, *Instrumentalities*, actually classifies negligence cases by such categories.

91. Before enumerating each subdivision, the section, 17 U.S.C. Sec. 5 reads: ". . . *the application for specification shall specify to which of the following classes the work in which copyright belongs.*" (Emphasis added.)

92. *Ejusdem generis*, 1 Bouvier's Law Dictionary (Rawle's 3rd Rev., 8th Ed., 1914). "In the constitution of laws, wills and other instruments, general words following an enumeration of specific things are usually restricted to things of the same kind (*ejusdem generis*) as those specifically enumerated."

93. Ringer, *The Unauthorized Duplication of Sound Recordings*, General Revision of the Copyright Law, Study No. 5, 1957, pp. 2-7; *White-Smith Music Corp. v. Apollo Co.*, 209 U.S. 1, 17 (1908) which held that musical tones reproduced on a player piano music roll were not a copy since they were perceived by the ear and not the eye.

But what does an assignee or licensee of a right get? It is submitted that, juristically speaking, they may be acquiring a *power to create*. “. . . A power is one’s affirmative ‘control’ over a given legal relation as against another,”<sup>94</sup> and “. . . any person who can produce by his acts changes in legal relations has a legal power or powers.”<sup>95</sup> The rights granted by the Copyright Act may signify which affirmative claims can be asserted against another.<sup>96</sup> A license of the copyright proprietor may be a privilege to do something in freedom from the claim of the holder of the right.<sup>97</sup>

But the right or license of a particular right may be much more. A right of translation given to a particular person may be a grant of the power to create something new. For example, if Shakespeare were given the right to translate Pushkin, the poetry would be an expression of Pushkin’s ideas in a formation of words created by the Bard of Stratford-on-Avon.

A grant of motion picture rights in a novel is a grant of the power to create a visual portrayal of the author’s words in cinematographic form. The fact that the motion picture may itself be copyrighted testifies to the changes wrought in the creation by this power. By and large, then, transformation rights are powers to create.<sup>98</sup> In the main, contract is the means whereby the power to create arises.

This can be illustrated by the relationship of author and publisher. Offhand, one would say that this is ridiculous. Even Chafee was compelled to defend the publisher against a not uncommon contention that the rewards of successful publication are greater for the publisher than the author. Chafee pointed out that since copyright is another form of property, why pick on the owner of intellectual property as compared to other forms of property!<sup>99</sup> He argues that publishing assumes the risk of many failures among a few successes so that in the long run, the publisher’s compensation is equalized.<sup>100</sup>

Implicit in this argument is the notion that the author is the sole creator whose work has been appropriated to commerce. This view is a rationalization in answer to such protestations.

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94. Hohfeld, *Fundamental Legal Conceptions* (1927); Walter Wheeler Cook’s introduction at p. 9. Interestingly enough, Cook leads into his analysis of powers by reference to powers of appointment in real property.

95. *Id.* at p. 7.

96. *Id.* at pp. 6-7.

97. *Id.* at pp. 6-7.

98. Warner, *supra*, note 82, Chapter XI *The Right of Transformation*, at pp. 283-300.

99. Chafee, *supra*, note 27, at pp. 508-511.

100. *Ibid.* at pp. 509-510.

Let us examine the nature of the creative process to ascertain what in fact happens. Various theories were posited in *Millar v. Taylor*.<sup>101</sup> Basically there was accord in that it consisted of reducing ideas to a written form.

Perhaps this is an understatement. Creation may be the evocation of thoughts in many drafts. Revision may follow revision. Common law copyright remains for the unpublished versions; statutory copyright protects the work which is published.<sup>102</sup> Lord Mansfield alluded to possible loss of control of the author over his work, to amend, delete, or revise if there were no common law copyright. The role of editor and publisher might have been examined as well. Creation is like a tape-recording of thinking. Images may be changed or erased at will.

Even with respect to a single right, the publisher may suggest changes, edit, revise, or delete. He may suggest a new or revised arrangement, index, preface, or other changes of a substantial nature. The grant of the right to publish carries implicitly many of these powers unless otherwise stipulated by the author and publisher. In a limited sense, the publisher is given a power to create with respect to the author's work.

If this be so, then creation may be said to be a social process. More than the writing of a sole author may be involved. Contract, then, with respect to copyright assumes a special importance with respect to literary and artistic property. Contract is the chief mechanism for turning the copyright to value by grant of the power to create. Such contracts invest the holder of the power with some of the rights of personality previously held by the author. Perhaps the dispute as to the "moral right" has been misdirected. Some authors have lamented the lack of a theory of "droit d'auteur"<sup>103</sup> upon a grant by the author to a publisher, for example. Perhaps some of these rights have been transferred to others as part of the power to create. The approach might well be to determine

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101. Notes 34-39, *supra*.

102. Strauss, Protection of Unpublished Works, General Revision of the Copyright Law, Study No. 7, (1958). 17 U.S.C. Sec. 2 reserves common law protection to unpublished works except that 17 U.S.C. Sec. 12 permits voluntary registration of unpublished works of which copies are not reproduced for sale.

103. Katz, *supra*, note 21, at pp. 89, 119; cf., Strauss, The Moral Right of the Author, 4 Am. J. of Comp. L. 506, 538 (1955), "There is a considerable body of precedent in the American decisions to afford our courts ample foundations in the common law for the protection of personal rights of authors to the same extent that such protection is given abroad under the doctrine of moral right."

which rights of personality should be reserved to the author consonant with his having established a power to create in others.<sup>104</sup>

Drone refers to four theories concerning the nature of copyright. How does this view fit into his classification? According to Drone, copyright is:

1. A species of property founded in natural law which is not lost by publication nor taken away by publication; or
2. An exclusive right before publication; or
3. A right not lost by publication but destroyed by statute; or
4. A monopoly of limited duration, created and wholly regulated by the legislature.<sup>105</sup>

The Supreme Court has long taken the view that it is an artificial right.<sup>106</sup> Perhaps it can maintain this view without serious opposition so long as the authors are protected by statute. Indeed, Congress has done just that, without interruption from 1790 to date, expanding, rather than contracting, copyright protection and coverage.<sup>107</sup> This means that the theory of copyright monopoly as a creation of the legislature has never been seriously tested. Suppose Congress were to repeal the Copyright Code<sup>108</sup> It is submitted that this would be unconstitutional, not only for the reason that the constitutional grant of the copyright is co-ordinate with the promotion of science and the useful arts, but because it would violate the first and fifth amendments. It would abridge freedom of speech and the press if no man could make an utterance or a writing which he could not call his own because immediately upon publication it could be copied. Freedom of speech and press import a right of recognition of authorship. It would also constitute a denial of life, liberty and property if a man's creations were denied value by fiat.

Therefore, the copyright must be something other than a grant by legislative grace.

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104. The apparent increase of "bio-autobiography" of late seems to highlight the problem of identification of the author. Prominent persons may "write" an autobiography, the actual writing of which is done mainly by a prominent ghost-writer. The scope of this practice and the variations on the practice are discussed by David Dempsey, in the New York Times, Book Review Section 7, Feb. 1, 1959, p. 4, in an article entitled, "It's Often Not So Much the Byline as the Spirit Behind it".

105. Drone, *The Law of Copyright and Playright* 2 (1879).

106. *Wheaton v. Peters*, 8 Peters 591, 660-1 (1834); *Bobbs-Merrill v. Straus*, 210 U.S. 339, 346 (1908); *United States v. Paramount*, 334 U.S. 131, 158 (1948).

107. Henn, *supra*, note 83.

108. The very supposition is a *reductio ad absurdum* in the light of the adherence of the United States to the Universal Copyright Convention after a long history of non-adherence to the Berne and Rome Conventions. See, *Universal Copyright Convention Analyzed*, edited by Kupferman and Foner (1955).

Actually, numbers 2 and 3 are variations of number 4 of Drone's classification. The statute grants the copyright with respect to published works and preserves the common law exclusive right of publication in unpublished works.<sup>109</sup> The statute also renders nugatory publication of a work without notice of copyright. Whether the statute itself destroys the common law right or causes it to be lost by publication without notice, is a matter of semantics. Cause and effect are the same in either event.

We are left, then, with Drone's first proposition with respect to which Drone concludes, "Literary property, like all property, has its origin in natural law, and not in legislation; it is therefore, a natural and not an artificial right."<sup>110</sup> Drone draws upon the notion of pre-occupancy to explain the origin of property, for pre-occupancy is first possession. Property in his view is derived from labor since what a man produces is his.<sup>111</sup>

Drone therefore concluded that literary property is perpetual at common law. Somehow the notion of perpetuity strikes one as the reef of this theory. It presupposes that judge-made law could not articulate a term of ownership based on something less than perpetuity. The notion of prescription at common law, for example, has been analogized to the statutory term of twenty years whereby adverse possession ripens into a good title.<sup>112</sup> Then why could not have the common law developed a rule of dedication to the public after a discernible period? Why can't the common law, for example, adopt rules to define the term of common law copyright? The welfare of the author and his family would not be particularly relevant to a period later than fifty years after creation, or fifty years after death or some such term.

What the copyright owner has, in a positive sense, is the power to create. A purchaser for value of the literary property or a remote descendant given such power in perpetuity may withhold the work and fail to exercise the power to bring it forth. For example, under present notions, if a national hero had written an autobiography which was unpublished at his death, under present

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109. Note 102, *supra*.

110. Drone, *supra*, note 105, at p. 26.

111. *Ibid.* at p. 3. See, Drone's opening Chapter, "The Origin and Nature of Literary Property".

112. *Scallon v. Manhattan Railway Co.*, 185 N.Y. 359, 363; 78 N.E. 284, 285 (1906), "Adverse possession and prescription are closely related. The one is regulated by statute and the other by common law, which has adopted twenty years as the prescriptive period from analogy to the Statute of Limitations."

law, it might be lost to society in perpetuity.<sup>113</sup> Common law copyright, like statutory copyright, was conceived to foster creation—not suppress it.

As Justice Thompson wrote in his dissent in *Wheaton v. Peters*, "Whether literary property is *sui generis*, or under whatever denomination of rights it may be classed, it seems to have been founded upon the same principle of general utility to society, which is the basis of all other moral rights and obligations."<sup>114</sup>

Justice Thompson, even in dissenting, equivocated about characterizing the copyright as *sui generis*. Katz, however, opined, almost a century and a quarter later, unequivocally that the common law was lax in protecting interests of personality.<sup>115</sup> Yet, according to Stevenson, writing in 1955, ". . . French writers take the view that the right is *sui generis*, existing independently of the pecuniary rights of the creator. In Germany, Austria and Italy, however, the moral right is simply a part of a single copyright composed of pecuniary and personal rights."<sup>116</sup>

Where does the United States stand? Katz bemoans Chafee's preference to tackle pecuniary rights until we have put the pecuniary rights in order.<sup>117</sup> Katz laments that we have neglected the author's interest of personality which is part of his creation. He defines the moral right as the compound of all the personal rights of the author.<sup>118</sup> On the other hand, Brandeis and Warren at the turn of the century, considered rights in literary property as an extension of the rights of privacy of the individual, i.e., of his rights of personality.<sup>119</sup>

113. Chafee, *supra*, note 27, at p. 726, "The letters of James McNeil Whistler are lost to the world because his crabbed niece would not allow his chosen biographers to print them. Suppose that the manuscript of a new poem by Poe should be discovered tomorrow. His descendants could keep it hidden if they so desired, and according to judicial *dicta* they could do so forever."

114. 8 Peters 591, 671 (1834).

115. Katz, *supra*, note 21, at p. 117.

116. Stevenson, *Moral Right and the Common Law: A Proposal*, Sixth Copyright Law Symposium 89, 108 (1955); See Strauss, *supra*, note 103, at pp. 501-518; Tournier, *The French Law of March 11, 1957 on Literary Property and Artistic Property*, 6 Bull. Cr. Soc. 1 (1958).

117. Katz, *supra*, note 21, at p. 117. Chafee, *op. cit. supra*, note 27, at p. 72, wrote, "For the time being, we had better concentrate our energies on the pecuniary aspects of copyright. We have enough trouble there. After we get the issues of dollars and cents, we can go on to moral rights."

118. Katz, *supra*, note 21, at p. 101.

119. Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 200-205 (1890), reproduced in Hofstadter, *The Development of the Right of Privacy in New York* (1954) at 55, 62-67. They conclude with respect thereto at p. 205 (67), ". . . that the protection afforded to thoughts, sentiments and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone."

Ladas, however, adopts the approach of a jurisprudence of interests. He takes a pragmatic approach to weigh the various interests involved. He prefers to consider the problem in terms of ". . . interests recognized and delimited for the purpose of securing them by law rather than in the sense of legal rights by which these interests are secured."<sup>120</sup> That copyright notions have responded to the ebb and tide of a jurisprudence of interests is evidenced by the recent studies of the Copyright Office.<sup>121</sup> Not only has the history of copyright legislation of the last half century or more been one of the respective efforts of various interests of creators as purveyors of literary property, e.g., song writers, publishers, record manufacturers, but even the studies themselves reflect a pragmatic approach in terms of effects of present problems and proposed reforms on the respective interests involved.

Nevertheless, Ebenstein regrets the lack of a workable, unifying concept of copyright. However, he comes closer than some of the others in indicating the social nature of the creative process by defining copyright. ". . . as the qualified control which the law gives an author over the means by which the original literal and mental content of his work may be communicated to the minds of others."<sup>122</sup>

Perhaps Spring's phrase, although used in another context, comes closer when he writes that copyrights originate from a fluid concept.<sup>123</sup> There is a flow from creation to property to creation. The author begets literary and artistic property. We would be blind to the history of the last half century if we shut our eyes to usages and transactions of copyrighted matter as part of the fabric of commerce. Indeed, in most instances, the creator could not achieve any rewards of a pecuniary nature intended by the constitutional grant if the copyright were not transposed to items in commerce. But that does not necessarily mean that such property may not have such characteristics of its own as to qualify it for treatment of a special nature. Different rules have developed for real property, as compared to personal property, because land and chattels had different characteristics, i.e., properties as property.<sup>124</sup>

120. Ladas, *supra*, note 26, at p. 10.

121. Guinan, *supra*, note 44; Henn, *supra*, note 83; Kaminstein, *supra*, note 84; Ringer, *supra*, note 93; Strauss, *supra*, note 102. The other studies of this fine series also contain letters and comments on the respective studies from various members of a panel of experts.

122. Rothenberg, *Copyright Law Basic and Related Materials*, Introduction by Morris Ebenstein XXIII-IV (1956).

123. Spring, *Risks and Rights* 75 (1952).

124. Property, 73 C.J.S. 135 (1951), Section 7, Real Property, at pp. 157-170; Section 8, Personal Property, at pp. 170-174; Section 10, Distinction between Real and Personal Property at p. 179, "Ordinarily the nature of the thing itself determines the distinction between real and personal property . . ."

In the last analysis, all law is conceptual anyway, because it originates in the mind and is communicated to other minds. In this respect, the law of copyright is *sui generis* because it has its own properties, properties which arise from the nature of the creative process, properties which arise from the nature of the legal relationships arising out of and concerning them.

In a primary sense, contract performs this function. Contract is a branch of the law of obligations. Two or more parties agree to be bound by their mutual promises in a bilateral agreement, or one or more may promise to do something in a unilateral agreement in exchange for a completed act of another.<sup>125</sup>

Whatever the nature of the bargain, it changes the relationship of the parties with respect to intellectual creation. An author creates property. He assigns the work to a publisher. The grant takes place as an assignment by a proprietor. But some acts may be necessary as author to render the work unto property, e.g., warranties of creation, grant of right to register the copyright if unpublished, grant of renewal rights, etc. As proprietor, the assignee may have to create further, based upon the grant of the author, in order to obtain the rewards of ownership of the property. So a motion picture producer will acquire rights to do a book or play in order to make a picture.<sup>126</sup> A music publisher may engage a lyricist to compose verses to a musical composition it has acquired by assignment of copyright in order to create a new copyrighted song.<sup>127</sup> The process of synthesis of new creation from existing literary property by means of contract is the same where the author creates new forms by collaboration. In that event, the author negotiates with another as copyright owner of his own work.<sup>128</sup>

Creation is fluid and social, even though it originates in the mind. Creation is done by individuals and not by legal fictions. It is unfortunate, in a sense, that group creation has been abstracted into corporate creation. By a fiction, an employee for hire is demoted from creator to servant for which the

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125.1 Williston on Contracts (Rev. Ed., Williston & Thompson), Chapter I, Definition of Terms, pp. 1-24 (1936).

126. See, Lindey, Motion Picture Agreements Annotated, Section 1, Agreements for the Purchase and Sale of Motion Picture Rights, pp. 3-120 (1947). Varmer, Works Made for Hire and On Commission, General Revision of the Copyright Law, Study No. 11, (1958) sets forth the significance of authorship as distinct from first ownership at page 2.

127. Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 221 F. 2d 569, modified on rehearing, 223 F. 2d 252 (2d Cir. 1955), reversing 115 F. Supp. 754 (S.D.N.Y. 1953); Taubman, Joint Authorship and Co-Ownership in American Copyright Law, 31 N.Y.U.L. Rev. 1246, 1247-1251 (1956).

128. For example, where a novelist collaborates with a screen writer to write a screen play; playwright with an adapter to write a musical comedy.

legal entity employing him is given the name of author.<sup>129</sup> The Copyright Code sanctions it.<sup>130</sup> Conceptually, it arises from the notion of dominion and control, and responsibility for the work by the employer. It also has a basis in the fact that often, as in a newspaper story, the final product may be a group creation. No single person did it. The process of editing and revision made the authorship indistinguishable. The employer assumes responsibility for it to the public and so takes the rights as well as risks of authorship. Thus group creation, not by a group mind<sup>131</sup> but by collaboration on a composite work,<sup>132</sup> creates the basis for authorship by an abstraction which is not even animate. Historically, the corporation consisted of groups of persons.<sup>133</sup> Therefore the equation permitted the conception of corporate authorship.

#### *IV. Copyrights and Patents*

But if copyright is a form of property, and corporations may be deemed creators of such property, then perhaps copyright is a branch of industrial property. This is more than a theoretical postulate. Fox has written, "The law of copyright is a branch of the law of industrial property within which term is included the law relating to patents, trade marks and industrial designs."<sup>134</sup> In a later work, Fox refers to ". . . industrial and intellectual property as property which originates in production and the theory that every man is entitled to the fruits of his own labor."<sup>135</sup> Fox uses the term intellectual here in the conjunctive sense. Genus industrial property includes species intellectual property as well as species industrial property.

The kinship of copyright to trade marks and industrial designs is perhaps more remote in this country. Trade marks are not copyrightable<sup>136</sup> and have been separately accorded protection.<sup>137</sup> Industrial design protection has floated back and forth between the Patent Office and the Copyright Office.<sup>138</sup> But the

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129. Varmer, *supra*, note 126.

130. 17 U.S.C. Sec. 26.

131. Cf. Maitland's *Gierke, Political Theories of the Middle Ages* (1900). Translation and Introduction by Maitland at p. XXVI.

132. 17 U.S.C. Sec. 3.

133. Taubman, *The Joint Venture and Tax Classification* 44-50, 115-135 (1957).

134. Fox, *The Canadian Law of Copyright* 3 (1944).

135. Fox, *Monopolies and Patents* 4 (1947).

136. *Trade-Mark Cases*, 100 U.S. 82 (1879).

137. Act of July 5, 1946, c. 540, 60 Stat. 427, 15 U.S.C., Sec. 1051 et seq., *The Lanham Trade Mark Act*.

138. Amdur, *supra*, note 82; Chapt. V, *Prints and Labels*, at pp. 165-191; Warner, *supra*, note 82, Sec. 31K, pp. 67-72.

kinship of copyright to patent, regardless of English history, has its origins in the constitutional grant of authors and inventors for a limited time in their respective writings and discoveries.<sup>139</sup> According to Finkelstein, ". . . the laws safeguarding rights in *literary* property were, at an early date, confused with concepts relating to *industrial* property—a handicap that has not yet been overcome."<sup>140</sup>

Yet the Supreme Court had recognized important differences between copyrights and patents. In 1884, in *Burrow-Giles Lithographic Company v. Sarony*, it wrote, "Our copyright system has no such provision for previous examination by a proper tribunal as to the originality of the book, map, or other matter offered for copyright."<sup>141</sup> On the other hand, the Supreme Court pointed out in *Motion Picture Patents Co. v. Universal* in 1917, "The scope of every patent is limited to the invention described in the claims contained in it, read in the light of the specifications."<sup>142</sup>

Conceptually, there are numerous differences between our copyright and patent systems. The patent system provides for a single term of seventeen years with no right of renewal; the copyright term runs for twenty-eight years with a like renewal term.<sup>143</sup> As the court stated in *Mazer v. Stein*, "Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of an idea—not the idea itself."<sup>144</sup> The patent grant is good against all who make the same claims thereafter. The copyright protects against the copy; independent creation of the same matter without copying does not infringe the protected work.<sup>145</sup> An invention might be exploited in secrecy. The Patent Act was intended to benefit the public by removing the necessity for secret exploitation of an invention by means of the monopoly of the patent grant.<sup>146</sup> Secrecy of the copyright and exploitation thereof are a contradiction in terms. An author can only profit from his work by making it public.

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139. Constitution of the United States, Art. 1, Sec. 8, Cl. 8.

140. Finkelstein, *supra*, note 33, at p. 1036.

141. 111 U.S. 53, 59 (1884).

142. 243 U.S. 502, 510 (1917).

143. Patent term: 35 U.S.C., Sec. 154; Copyright term: 17 U.S.C., Sec. 24.

144. 347 U.S. 201, 217 (1954).

145. Chafee, *supra*, note 27, at p. 513, ". . . there must be copying to constitute infringement. The defendant must have had access to the copyrighted work, and is immune if he happened to achieve a similar literary or artistic conception in isolation. The law as to patents is altogether different. There the monopoly has a much shorter life, so that no such solicitude for the encouragement of independent creation is thought necessary."

146. *United States v. Line Material Co.*, 333 U.S. 287 (1947), Burton, J. dissent at p. 329, "The royal patent served to encourage the inventor to disclose his invention."

The catalogue of differences between copyright and patent has scarcely been developed. However, the *Motion Picture Patents* case is important for other reasons as well. The Supreme Court also pointed out that one had to distinguish rights created by patent law and ". . . rights which he may create for himself by private contract which, however, are subject to the rules of general as distinguished from patent law."<sup>147</sup>

The Court had under consideration the question of a tie-in of a patented article with a non-patented article—film. The Court expressly overruled the *Dick* decision of 1911<sup>148</sup> and referred to the passage of Section 3 of the Clayton Act.<sup>149</sup>

Section 3 was passed to reach transactions which had not fully ripened into Sherman Act violations. It was intended to check restraints involving exclusive dealings and tie-in arrangements in their incipency.

The *Motion Picture Patents* case is significant in this respect because one of the questions before the Supreme Court involved the tie-in of the patents to copyrighted matter—film. Moreover, the case specifically ties patent and copyright principles in antitrust law. Prior thereto, in 1908, in *Bobbs-Merrill v. Straus*, the Supreme Court had stated, ". . . there are differences between the patent and copyright statutes in the extent of the protection granted them."<sup>150</sup> In that case, the court held that a book publisher, who had sold a copyrighted article without restriction, parted with all right to control the sale of it.<sup>151</sup> Except for the Miller-Tydings amendment to Section 1 of the Sherman Act and

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147. *Motion Picture Patents Co. v. Universal*, 243 U.S. 502, 514 (1917).

148. *Henry v. A. B. Dick Co.*, 224 U.S. 1 (1911).

149. Sec. 3. "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." October 15, 1914, Chapt. 323, Sec. 3, 38 Stat. 731; 15 U.S. Code Sec. 14.

150. 210 U.S. 339 (1908).

151. *Id.* at 350.

the fair trading of books as provided by local law, this has remained the law.<sup>152</sup> But the Supreme Court held, in 1926 in *U.S. v. General Electric*, that a patentee, in case of a license to manufacture under the patent, could validly set the resale price of his licensee.<sup>153</sup> In *U.S. v. Line Material Co.*, the Supreme Court split four to four and thereby failed to overrule this case, although it held that the system of cross-licensing between Line Material and Southern constituted a form of price-fixing which was illegal.<sup>154</sup> However attenuated and weakened the *General Electric* doctrine has become, on its facts, it still represents the law.<sup>155</sup>

When R. H. Macy's fight against the book publishers' and booksellers' refusal to sell because of price-cutting again reached the Supreme Court in 1913, it discounted the patent and copyright difference, stating, ". . . it cannot be successfully contended that the monopoly of a copyright is in this respect any more extensive than that secured under the patent law. No more than the patent statute was the copyright act intended to authorize agreements in unlawful restraint of trade and tending to monopoly, in violation of the Sherman Act."<sup>156</sup>

What was merely an argument based upon analogy in *Straus v. American Publishers Association* became a concrete tie in *Motion Picture Patents* between the patented invention and copyrighted matter—film.<sup>157</sup>

Subsequent decisions involving Section 3 as well as patents merely reinforced the rule that a tie of patented articles violated the antitrust laws.<sup>158</sup> When the problem arose with respect to copyright, the courts almost automatically followed the patent rule. In *Interstate Circuit v. U.S.*,<sup>159</sup> appellants attempted to rely on *U.S. v. General Electric*<sup>160</sup> and the earlier decision of *Bement v. Na-*

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152. Miller-Tydings Act of 1937, 50 Stat. 693, 15 U.S.C. Sec. 1, amended Section 1 of the Sherman Act, 26 Stat. 209 (1890), to except contracts prescribing minimum prices for resale when lawful under local law. But see, *Schwegmann Brothers v. Calvert*, 341 U.S. 384 (1951), which held that fair trading could not bind non-signers.

153. *United States v. General Electric Co.*, 272 U.S. 476 (1926).

154. 333 U.S. 287 (1947).

155. Justice Reed indicated, at p. 304, that there was no majority to overrule *General Electric* nor a majority to re-affirm it.

156. *Straus v. American Publishers Association*, 231 U.S. 222, 234 (1913).

157. *Motion Picture Patents Co. v. Universal*, 243 U.S. 502 (1917).

158. E.g., *United States v. United Shoe Machinery Co.*, 258 U.S. 451 (1922); *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346 (1922); *International Business Machines Co. v. United States*, 298 U.S. 131 (1936).

159. 306 U.S. 208 (1939).

160. 272 U.S. 476 (1926).

*tional Harrow*.<sup>161</sup> The Supreme Court in 1939 rejected this contention, stating, "That the parallel is not complete is obvious. Because a patentee has power to control the price at which his licensee may sell the patented article, it does not follow that the owner of a copyright can dictate that other pictures may not be shown with the licensed film or the admission price which shall be paid for an entertainment which includes features other than the feature licensed."<sup>162</sup>

Later, in 1946, the three-man Expediting Court in *U.S. v. Paramount* declared "block-booking" of films illegal. That is, a distributor could not compel an exhibitor to accept one or more films in order to obtain a license for another.<sup>163</sup> The court set forth the patent rule that a patentee granting a license, on consideration of use of unpatented material furnished by it, cannot restrain a third party as a contributory infringer for selling like materials to the licensee for like use. The court then applied the same rule to the copyright tie to uncopyrighted matter and extended it to the tie of one copyrighted motion picture to another, because by so doing, the copyright owner has extended his monopoly beyond the grant by requiring his licensee to pay additional consideration.

The court rejected the argument that at common law an owner of chattels could condition the sale of chattels to another unless the purchaser took a greater quantity. The court felt that its application to patents or copyrights had been left open in *Motion Picture Patents* and other cases.<sup>164</sup> It declined to follow *F.T.C. v. Paramount Famous-Lasky Corp.* wherein the Second Circuit had sustained block-booking,<sup>165</sup> citing various patent cases and *Interstate*.<sup>166</sup> The tie of copyrights was distinguished from a sale of chattels ". . . because it extends a monopoly which the owner of the chattels is not assumed to have."<sup>167</sup> On appeal, the Supreme Court in 1948 approved the restriction of the District Court ". . . in reliance on the principle which forbids the owners of a patent to condition its use on the purchase or use of patented or unpatented materials."<sup>168</sup> It was in this context that the Supreme Court stated that, "The copyright law, like the patent statute, makes reward to the owner a secondary consideration."<sup>169</sup> A tie of a low quality film with a high one tends to equalize rather than differen-

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161. *E. Bement & Sons v. National Harrow Co.*, 186 U.S. 70 (1902).

162. Note 159, *supra*, at p. 228.

163. 66 F. Supp. 323, 348 (1946).

164. *Id.* 348-350.

165. 57 F. 2d 152 (2d Cir. 1932).

166. Note 163, *supra*, at pp. 349-350.

167. *Id.* at p. 349.

168. 334 U.S. 131, 157 citing, *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 459 (1940); *Morton Salt v. Suppiger*, 314 U.S. 488, 491 (1942), *Mercoid v. Mid-Continent Investment Corp.*, 320 U.S. 661, 665 (1944).

169. 334 U.S. 131, at p. 158.

iate the reward. Even a tie of films of equal quality serves to emphasize the appeal of another in whole or in part. "Each does not stand on an equal footing . . ."170

### V. Contract, Copyright, and Antitrust

Thus the Supreme Court, in the end, rationalized the copyright grant as secondary to the public welfare by declaring that literary and artistic property was not to be treated as fungibles. The reward to the creator should be measured by the product of his creative genius.<sup>171</sup> The copyrighted work, then, is unique. It cannot be packaged so that one cannot be taken without another, although it may be offered in groups.<sup>172</sup>

This rationalization is quite illuminating. The Supreme Court did not have to explain. It went further than the Expediting Court rationale that the monopoly grant is only so much which the tie enlarges. The Supreme Court, in the end, was compelled to recognize, perhaps in spite of its theory that reward to the author was secondary, that the copyright was *sui generis*. Otherwise, the Supreme Court might have referred to Section 3 of the Clayton Act which expressly prohibits the exclusion of purchases of a competitor and which is interpreted to prohibit tie-ins arising in the course of a contract, lease, or sale of goods. That is, a seller cannot tie in a contract, lease, or sale of other products where the effect is to lessen competition.

The Supreme Court, on the other hand, had indicated that the transaction between distributor and exhibitor of motion pictures constitutes *a mere license*.<sup>173</sup> In a number of subsequent antitrust cases, allegations of Robinson-Patman Act violations were ordered stricken from the complaint because that Act applies to a contract or sale of goods.<sup>174</sup> A license for the use of a motion

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170. Id. at p. 158. Emphasis added.

171. Id. at p. 159.

172. Id. at p. 159.

173. Id. at p. 141: "No film is sold to an exhibitor in the distribution of motion pictures. The right to exhibit under copyright is licensed."

174. County Theatre Co. v. Paramount, 146 F. Supp. 933 (1956); Kearuth Theatres Corp. v. Paramount, (S.D.N.Y., Civ. 108-387) (1956); CCH Trade Reg. Cas., p. 68, 574; Hillside v. Warner Bros. (S.D.N.Y., Civ. 50-183) (Nov. 4, 1953); United States v. United Shoe Machinery Co., 264 Fed. 138, 165 (E.D., Mo. 1920) aff'd, 258 U.S. 451 (1922), Cf; Vitagraph v. Perelman, 95 F 2d 142 (3d Cir. 1938).

picture is not covered. No title passes.<sup>175</sup> The licensee returns the motion picture print after the use thereof. Does it follow, therefore, that Section 3 does not apply to copyrights? The Section has been applied to patented matter repeatedly, but the writer has been able to find only one case pertaining to copyright.

In *Cardinal Films v. Republic*,<sup>176</sup> Cardinal and Republic entered into a license agreement with respect to the distribution of a number of 16mm. films by Cardinal on television which had been produced by Republic. Cardinal also agreed to acquire its prints from Republic, the copyright owner. Cardinal thereafter brought an antitrust suit alleging violation of the Sherman Act and Section 3 of the Clayton Act. The Court rejected the argument of an illegal tie-in because any other laboratory attempting to process the films would be an infringer of Republic's copyrights. The Sherman Act was not violated since the scope of the monopoly was not enlarged. The Court rejected the Section 3 argument, stating, "It follows that the licensor may properly condition the right of his licensee to purchase from the licensor the services necessary to bring the licensed use to fruition. The provision of the licensing agreement requiring plaintiffs to order all prints exclusively from the defendants is not within the 'tie-in' prohibition of the Clayton Act."<sup>177</sup>

It is to be noted that the tie is of prints. The opinion does not show which party would retain title to the physical prints at the expiration of the agreement. Section 27 of the Copyright Act provides that the copyright is separate and distinct from the physical matter to which it attaches.<sup>178</sup> A transfer of title in the physical property does not convey the copyright unless an assignment of copyright is intended.<sup>179</sup> Presumably title in the prints was in Cardinal during the license term, regardless of any restrictions upon the use of the prints at the expiration of the term. It would appear, therefore, that the Court applied Section 3 because the tied property involved a contract for the sale of goods.

Query, would Section 3 apply if the tied product were also copyrights, as in *U.S. v. Paramount*? One would think not, no more so than the Robinson-

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175. *United States v. Paramount*, 66 F. Supp. 323, 340 (1946), dismissed the contention that the defendants came within the Miller-Tydings exception to Section 1 of the Sherman Act, (1937), 50 Stat. 693, 15 U.S.C. Sec. 1, by stating, "The amendment pertains, however, only to 'contracts or agreements prescribing minimum prices for the resale of a commodity', and the undisputed evidence is that distributors merely grant licenses to the exhibitors for exhibition of their films and that title to none of their films at any time passes to the exhibitors."

176. 148 F. Supp. 156 (S.D.N.Y., 1957).

177. *Id.* at p. 158.

178. 17 U.S.C. Sec. 27.

179. 17 U.S.C. Secs. 28, 30. Sec. 28 provides that copyrights may be assigned in writing. Sec. 30 provides that it must be recorded in the Copyright Office within three months of domestic and six months of foreign execution of the assignment.

Patman Act. A tie of a mere license to another is not a contract, lease, or sale of goods, wares, merchandise, machinery, supplies, or other commodities.<sup>180</sup>

Immediately one is impressed with an important distinction. Contracts involving patents are, in the main, subject to coverage by Section 3 of the Act, whereas contracts involving licensing of copyright may not be. It is noteworthy, in this respect, that no reference is made to Section 3 in the ASCAP cases involving blanket licensing of copyrighted music.<sup>181</sup>

It is submitted that the effect of this difference has been to throw the copyright cases involving licenses into the purview of the Sherman Act and to take many of the patent cases out of the Sherman Act arena into that of the Clayton Act. Ostensibly that is to the advantage of copyright since the Clayton Act was intended to cover certain acts in their incipiency and to apply more liberal tests of liability.<sup>182</sup> The virtual exclusion of copyright from Section 3 may be an implicit recognition that contracts of copyright must be somehow different from contracts of other property, just as the Supreme Court somehow acknowledged artistic and literary property to be *sui generis*. Nevertheless, the throwback to the Sherman Act had the effect of a bear-hug because the copyright contract was linked with conspiracy notions of the Sherman Act.

Section 3 was passed in 1914 as a part of the Clayton Act. It was designed to reach exclusive dealing or tie-in contracts which tended to lessen competition in their incipiency.<sup>183</sup> It was intended to reach agreements without the necessity of an exhaustive industry analysis to determine whether or not the agreement actually unreasonably restrained trade. If the contract *tended* to lessen competition, the test of the statute had been met.<sup>184</sup>

Perhaps Section 3 was enacted because the historical antecedents of the Sherman Act "contract in restraint of trade" were somewhat different species. At common law, the notion of contracts in restraint of trade arose from unduly

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180. Notes 149, 174-175, *supra*.

181. Alden-Rochelle v. ASCAP, 80 F. Supp. 888 (S.D.N.Y., 1948), per Leibell, J.; M. Witmark & Sons v. Jansen, 80 F.Supp. 843 (D. Minn. 1948), per Nordbye, J.; Cohn, Music, Radio Broadcasters and the Sherman Act, 29 Geo. L. J. 407, 428-434 (1941).

182. McLaren, Exclusive Dealing arrangements, Conference on the Antitrust Laws and the Attorney General's Committee Report 151, 154 (1955). ". . . the Clayton Act is designed to catch restraints in their incipiency."

183. Notes 149, 182, *supra*.

184. Standard Oil Company of California v. United States, 337 U.S. 293, 297 (1949), ". . . Section 3 of the Clayton Act was directed to prohibit specific practices even though not covered by the broad terms of the Sherman Act."

keeping a man out of a trade or business so that he could not earn a living.<sup>185</sup> A man selling a business might covenant not to compete for a number of years. The covenant initiated and formalized the restraint. If it was ancillary to the sale of the business, it was valid. On the other hand, a restraint, so broad as to be disproportionate to the matter ostensibly protected, was not an ancillary but a direct restraint of trade. Whether or not the covenant was ancillary depended on whether or not the restraint was reasonably related to the object afforded protection. A man selling a retail trade or business in a small town, giving a covenant not to compete in all the realm, virtually excluded himself from earning a living.<sup>186</sup> Such a restraint did not bear a reasonable relation to the object to be protected and so was unreasonable.

But a sale of a trade or business might represent a phase of horizontal integration. The era of consolidation and industrial concentration was also the era of vertical integration. If there was not a coalescence of power by integration, then the various phases of production and distribution might bear a relationship of supplier and customer. The contracts involved were those of buying and selling. Even an integrated operation at some point requires an extraneous outlet, be it the consuming public or the retailer. In the shifting market of sales, terms might reflect the respective power of the parties involved. A huge combine manufacturing among a small circle of competitors might be able to determine the nature of the agreement, be it exclusive contract, long-term requirement contract, tie-in, or otherwise. A large retailer consumer, such as a department store, might command a similar position vis-à-vis many small producers. On the other hand, there might be buying and selling among industrial complexes including powerful buyers, powerful sellers, small producers, and small retailers.

It is submitted that Section 3 of the Clayton Act was enacted because the contractual notions of restraint of trade which were embodied in Section 1 of the Sherman Act were inadequate to cope with the facts of buying and selling of the twentieth century. Section 3, by its very terms, attempted to fill the gap. It moved away from the test of ancillaries of the days of the artisan into the market of present-day trade and commerce. In this respect, the Robinson-Patman

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185. Joyce, *A Treatise on Monopolies and Unlawful Combinations and Restraints* 36 (1911), "The contract in restraint of trade, which originally fell under the condemnation of the common law, was one whereby a party bound himself not to follow some particular occupation, trade, calling, or profession, or to engage in some particular business for a period within a particular territory."

186. 5 *Williston on Contracts* (Rev. Ed., Williston and Thompson), Chapt. XLVIII, *Illegal Bargains: Contracts in Restraint of Trade* at pp. 4553-4699 (1937).

Act of 1936 represents a further extension of legal classification of trade regulation from facts of the market place.<sup>187</sup> To consider "price discrimination" purely in terms of ancillaries would be somewhat archaic.

The net result with respect to copyright was to take it out of the purview of Section 3 and the Robinson-Patman Act to the extent the transactions were by license agreement. To a great extent, performing rights in literary and artistic property are licensed, and not sold. Therefore, for all practical purposes, liability is to be determined by the tests of the Sherman Act and not by Section 3 of the Clayton Act or the Robinson-Patman Act.

But the Sherman Act is like a hall of mirrors in an amusement park. The facts reflected cease to appear simple. The terms, contract, combination and conspiracy seem to be concave, convex, and concave and convex all at one and the same time.

As Thornton has stated, "In a way, and to a considerable extent, these three phrases are so interlaced that it is practically, in many instances, impossible to place the particular thing condemned under any one of them; for a 'contract' in a way is a 'combination' and may involve a 'conspiracy'; while a 'combination' may be created without embracing the elements of a 'contract' but may embrace the elements of a 'conspiracy'."<sup>188</sup> Handler has expressed the view that in the construction of the Sherman Act and at common law, the drawing of fine distinctions between these phrases was of little practical importance in determining the name to be applied to the restraints.<sup>189</sup>

The terms, however, constitute separate and distinct categories which the courts must and do use to denominate who did what and how. In *Crescent Amusement*, the Supreme Court spoke of the combination of exhibitors whose action constituted a "conspiracy".<sup>190</sup> In *Paramount*, ". . . Each discriminatory contract constituted a conspiracy between licensor and licensee."<sup>191</sup>

In *Alden-Rochelle v. ASCAP*, the court held invalid the licensing to motion picture exhibitors by ASCAP of performing rights in copyrighted songs, assigned by ASCAP members, where synchronization rights had been separately licensed to the motion picture producers, because the 'combination' added to

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187. Sec. 2, Clayton Act, Chap. 323, Sec. 2, 38 Stat. 730; 15 U.S.C. Sec. 13, Amended June 19, 1936, Chap. 592, Sec. 1, 49 Stat. 1526, 15 U.S.C. Sec. 13.

188. Thornton, *Combinations in Restraint of Trade* 324 (1928); Walker, *History of the Sherman Law* 48 (1910) paraphrases Section 1 of the Sherman Act to read, "Every combination in restraint of trade . . . because the word 'combination' covers all forms and varieties of 'contract' and all kinds and all conditions of 'conspiracy'."

189. Handler, "An Anti-Trust Dictionary", *Contract, Combination or Conspiracy*, 38 *American Bar Association Section on Anti-Trust* (1953).

190. *United States v. Crescent Amusement Co.*, 323 U.S. 173, 183 (1944).

191. *United States v. Paramount*, 63 F. Supp. 323, 352 (1946).

the monopoly of each copyright in violation of the principle of the patent cases involving tying clauses and this had all the evils of 'block-booking'. According to the Court, "The producers and ASCAP's members thus combine the monopoly of the copyright of the motion picture with the copyright of the musical compositions, which constitute an unlawful extension of the statutory monopoly of each and violates the anti-trust laws as a combination in restraint of trade."<sup>192</sup> It is the 'combination' of the members of ASCAP which negotiated the blanket license agreements with the motion picture exhibitor. Therefore, the blanket licenses were held to violate the Sherman Act.

The use of the terms, above, indicates that the terms, contract, combination, and conspiracy are used as a bridge. Being words of broad meaning anyway, they are used as connecting terms in many senses. Judge Leibell refers to a combination of musical copyrights in *Alden-Rochelle*, as well as to a combination of musical copyrights and motion-picture copyrights.<sup>193</sup>

Kales has written, "Exclusive contracts of sale and purchase between business units are in reality a method of combination. The legality of such exclusive arrangements really depends upon the principles which govern the validity of combinations by merger or purchases."<sup>194</sup> *A fortiori*, the same would be true of tied products.

The use of antitrust terminology as labels for determination of liability has reached the point where the courts have rejected an antitrust defense to failure to pay film rental under a license agreement because the anti-trust restraints, if any, were "collateral" to the valid contract."<sup>195</sup>

It is precisely by extending the meaning of the terms and then applying them in their enlarged signification that the terms assume a mechanical form unintended by their original usage.

Consider the test adumbrated by the Supreme Court in *Times-Picayune*. A tying agreement violates Section 3 if a supplier ". . . enjoys a monopolistic position in the market for the tying product, or if a substantial volume of commerce in the 'tied' product is restrained . . ."<sup>196</sup> By definition, a copyright is a

192. *Alden-Rochelle v. ASCAP*, 80 F. Supp. 888, 894 (S.D.N.Y., 1948).

193. *Id.* at p. 894.

194. Kales, *Contracts and Combinations in Restraint of Trade* 23 (1918).

195. *Loew's v. Somerville Drive-In Theatre*, Superior Court of New Jersey, Appellate Division, A-700-57, decided February 18, 1959, holding that the alleged illegality by way of antitrust was "collateral" to the contracts in suit and so did not render the contracts unenforceable. See also, *Kelly v. Kosuga*, 3 L.Ed. 2d 475, decided Feb. 24, 1959 to the same effect.

196. *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 608-609 (1953); cf. *Insto-Gas Corp.*, F.T.C. Dkt. 5851 (Oct. 6, 1954); Seitz, *Exclusive Dealing Arrangements in Buyer-Seller Relationships*, Trade Regulation Series #3, Symposium on the House Counsel and the Attorney General's Committee Report 131, 144 (1956).

monopoly. Add to this Justice Frankfurter's dictum in *Standard Stations*. "Tying agreements serve hardly any purpose beyond the suppression of competition."<sup>197</sup> On top of this, the notion of conspiracy has sharply restricted the area of association. Concerted action is virtually outlawed as collusive and conspiratorial. Even parallel action must be explained. Otherwise, conscious parallelism may provide an inference of conspiracy. Although the Supreme Court warned in *Theatre Enterprises*<sup>198</sup> that conscious parallelism has not replaced conspiracy as a test, further inroads may produce a rule that the continued existence of like practices, without more, may be evidence of conspiracy even though the practices are reasonable.<sup>199</sup>

It is in this context that literary and artistic property continues to be subject to trade regulation. That license agreements of films, for example, are not subject to Section 3 or the Robinson Patman Act may be no favor to copyright in view of the mechanistic application of the Sherman Act.

Chafee has said, "Copyright is the Cinderella of the law."<sup>200</sup> To many it may seem to have captured the derivative glamor of the underlying arts and letters. As far as antitrust law is concerned, copyright may be Sleeping Beauty at the beginning of her long hibernation. The Attorney General's National Committee to Study the Antitrust Laws devoted an entire chapter to patent antitrust problems.<sup>201</sup> In it, there is a three sentence reference to *U.S. v. Paramount* and that, by way of analogy.<sup>202</sup> There is virtually no independent reference to copyright antitrust problems in the entire report. When one considers the large percentage of all antitrust litigation in motion pictures alone, which followed the *Paramount* decision, one must consider it a startling omission.<sup>203</sup>

Thus, the unfortunate marriage of patents and copyright has had many unforeseen consequences, including the antitrust effects. Cooperative action involv-

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197. *Standard Oil Co. of California v. United States*, 337 U.S. 293, 305-306 (1949).

198. *Theatre Enterprises, Inc. v. Paramount*, 346 U.S. 537, 541 (1954).

199. Note 8, *supra*; Cf., Judge Yankwich, in *Fanchon & Marco v. Paramount*, 100 F. Supp. 84 (S.D. Cal. 1951), "In order to allow recovery we must be satisfied from the record that the restrictions which the defendants have imposed on the plaintiff are the result of a concert of action and are unreasonable."

200. Chafee, *supra*, note 27 at p. 503.

201. Report of the Attorney General's National Committee to Study the Antitrust Laws, Chap. V, Patent-Antitrust Problems, at pp. 223-260 (1955); Cf. Schwartz, *The Complete Dissenting Opinion of Prof. Louis B. Schwartz*, 1 *Anti-Trust Bull.* 37, 59-63 (1955). See also, Handler, *An Examination of the Chapter on Patent Anti-Trust Problems in Attorney General's Committee Report*, 1 *Anti-Trust Bull.* 157 (1955).

202. Attorney General's Report, *supra*, note 201, at p. 239.

203. Comment, *Anti-trust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 *Yale L.J.* 1010, 1043 (1952).

ing copyrights runs the risk of being called a conspiracy, subjecting the defendants to treble damages and attorneys' fees.<sup>204</sup> Packaging of copyrights becomes a risky business because it may be labelled a combination or block-booking, or a tie-in contract. Form is exalted over substance. Even where the ASCAP 1941 consent decree provided that licensees must be permitted to take a "per piece"<sup>205</sup> license rather than a "blanket license", the Court, in *Alden-Rochelle*, was compelled to admit, "Not a single theatre ever requested a 'per piece' license from ASCAP."<sup>206</sup> The restriction of copyright by analogy to tie-ins may not be apposite. For example, packaging of copyrights may take the form of selling a program. A conductor of a symphony orchestra normally selects his programs. He decides which separately copyrighted compositions shall be presented to the public together. A book club may offer, without charge, copyrighted books on condition that a member obligate himself to purchase a certain number of books per annum.<sup>207</sup> The test with respect to films should not necessarily be the tie of individual pictures, just as the test should not be the tie of individual copyrights. An encyclopedia may and usually does have a separate copyright on each volume. Yet the publisher may sell the entire set as a package. It is doubtful whether the Encyclopedia Britannica, for example, would be in business for long if the sale of the set were held to constitute "block-booking". Magazines are composite works in which a single notice of copyright protects the issue even though the individual articles may not be copyrighted.<sup>208</sup> Subscription is a form of tie-in. It is doubtful whether a publisher would have to provide individual issues if he sold only by subscription on an annual basis. A

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204. 38 Stat. 731 (1914), 15 U.S.C., Sec. 15 (1952), Sec. 4 of the Clayton Act.

205. ". . . Ascaph was compelled to make its music available on a per piece basis, if so desired by the consumer.", Warner, *supra*, note 82, Sec. 135a, The 1941 Consent Decree, pp. 381-385, at p. 385; See also, Rothenberg, Copyright and Public Performance of Music (1954).

206. *Alden-Rochelle v. ASCAP*, 80 F. Supp. 888, 893 (1948); See, Shull, Collecting Collectively: Ascaph's Perennial Dilemma, 7th Copyright Law Symposium 35 (1956); Goodman, Comment, Music Copyright Associations and the Antitrust Laws, 25 Ind. L.J. 168 (1950). Warner states, *supra*, note 82, Chap. XIII, The Music Industry—The Ascaph Story, pp. 323-455, at p. 451, "It is believed that the Alden-Rochelle litigation was a camouflaged attack against Ascaph but aimed primarily against the motion picture producers." That is, exhibitors sued to prevent collection by Ascaph of license fees based on the number of seats in each theatre because, among other reasons, the major distributors of motion pictures were interested in Ascaph through subsidiary or affiliated music publishing firms.

207. Federal Trade Commission release, Dec. 3, 1953. Prior thereto it had prohibited the use of the word "free" if any conditions were attached. Under the present rule, conditions are permissible if clearly and conspicuously disclosed and there is no increase in the ordinary and usual price, reduction in quantity, quality, or size.

208. 17 U.S.C., Sec. 3.

series of concerts or plays may be sold by subscription. Indeed, a box seat at the opera or a concert is ordinarily not offered for sale until a substantial interval after the offer of the entire box has elapsed. Similar illustrations can be multiplied. It is submitted that film, for example, should not be subjected to a more rigorous standard than other literary and artistic property. Indeed, the standard for judgment for copyright should not be any mechanical application of rules of patent law. The test should be the minimal reasonable economic requirements of the seller and the purchaser of the copyright package. If the television year is broken up into seasons and the industry transacts its business in terms of such multiples of thirteen, why shouldn't the producers and distributors safely produce and license multiples of thirteen half-hour shows, hour shows, or features without being guilty of block-booking?<sup>209</sup> Why shouldn't a distributor be able to license an entire evening's program, as a package, just as a live program of music, theatre, or variety may be packaged?

### *Conclusion*

It is submitted that the approach to arts and letters should not be limited to the use of eighteenth century notions of competition. In terms of the realities of the twentieth century, it may be unwise, unworkable and unrealistic. Perhaps the time has arrived to re-evaluate the nature of artistic and literary property, the benefits to the public, and the rewards to the creator flowing therefrom.

Somewhere in entertainment is art. So, too, among the myriad works protected by copyright is the best of our culture in arts and letters.

Perhaps the way to best promote the progress of arts and letters in modern times is to acknowledge the Constitutional sanction by the elevation of this purpose to its rightful place in our society. A Department of the Arts (and Letters) may be a long stride forward. Perhaps the Copyright Office should be an integral part of such a Department. For the copyright is more than the derivative glamor of the underlying work. The protection afforded by the copyright assumes value mostly through contract. By compact the creative process is rewarded. Sometimes the consideration is the transfer of the power to create with respect to what the author has created so that others may transplant or transform his work in the same or other media. Contract presupposes a social process which includes forms of business organization. The emphasis on business problems and organization in entertainment has brought a reaction by means of the *laissez faire* principles of trade regulation. The antitrust laws were enacted to restore the market to competitive conditions. The copyright proprietor has had to stand in

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209. Note 12, *supra*.

the Sherman Act line-up, waiting to be identified as a tortfeasor and criminal. The ethical and legal values of such identification may be questionable. The writer has been asked wherefor does literary and artistic property differ from iron and steel, or oil? The question seems to contain its own answer. The dispensation to works of art and letters should be in terms of their importance to us. If they are created differently, enjoyed differently, and carry an intrinsic value to each of us not readily reducible to a commodity status, then we should treat them as such. They should be accorded treatment which is *sui generis* in their own frame of reference. That is the portent of the Lincoln Square Center for the Performing Arts. Congress, even now, is considering special treatment of sports.<sup>210</sup> Why not for literary and artistic property?

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210. The Supreme Court declined to overrule *Federal Baseball Club. v. National League*, 259 U.S. 200 (1922) in *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1955). It left it to Congress to legislate with respect to the anomaly that other sports were subject to the antitrust laws, e.g., football, *Radovich v. National Football League*, 348 U.S. 236 (1955) and boxing, *United States v. International Boxing Club*, 348 U.S. 236 (1955). The impact of a final decision after appeal on a particular sport will follow presently in boxing. *International Boxing Club v. United States*, 3 L.Ed. 2d 270, decided January 12, 1959, because Section 5(b) of the Clayton Act permits the tolling of the statute of limitations against the same defendant in favor of private plaintiffs during the pendency of the government suit and Section 5(a) thereof permits the government judgment or decree to be introduced as *prima facie* evidence against this defendant where it would have constituted an estoppel between the government and the defendant. 38 Stat. 731 (1914), 15 U.S.C. Sec. 16 as amended 69 Stat. 283 (1955).

## PART II.

**LEGISLATIVE AND ADMINISTRATIVE  
DEVELOPMENTS**

## 1. UNITED STATES OF AMERICA AND TERRITORIES

## 165. U. S. CONGRESS. HOUSE.

H.R. 148. A bill to amend the Internal Revenue Code of 1954 with respect to the treatment of copyright royalties for purposes of the personal holding company tax. Introduced by Mr. Keogh on Jan. 7, 1959, and referred to the Committee on Ways and Means. 3 p. (86th Cong., 1st Sess.)

A reintroduction of H.R. 8419 of the 85th Congress, as it was passed by the House, with amendment, on Aug. 19, 1957. The bill proposes to treat copyright royalties substantially like mineral, oil, or gas royalties in determining whether a corporation is a personal holding company in taxable years beginning after Dec. 31, 1956.

## 166. U. S. CONGRESS. HOUSE.

H.R. 4059. A bill to amend title 28 of the United States Code relating to actions for infringements of copyrights by the United States. Introduced by Mr. Celler on Feb. 4, 1959, and referred to the Committee on the Judiciary. 3 p. (86th Cong., 1st Sess.)

A reintroduction of H.R. 8419 of the 85th Congress, as it was passed by the House on May 19, 1958. The bill is designed to provide for government liability for copyright infringement by the United States or its agencies with such liability to be determined in a Court of Claims action. The only change from the House-passed version is that the effective-date is changed from Dec. 31, 1958 to "hereafter."

## 167. U. S. CONGRESS. SENATE.

S. 744. A bill to amend the Trading With the Enemy Act, as amended, and the War Claims Act of 1948, as amended. Introduced by Mr. Young, of North Dakota, on Jan. 28, 1959, and referred to the Committee on the Judiciary. 44 p. (86th Cong., 1st Sess.)

Somewhat similar to H.R. 5647 and S. 1302 of the 85th Congress. See 4 BULL. CR. SOC. 132, Item 313 (1957).

## 168. U.S. CONGRESS. SENATE.

S. 950. A bill to amend section 1(e) of title 17 of the United States Code with regard to the rendition of musical compositions on coin-operated machines. Introduced by Mr. O'Mahoney (for himself, Mr. Kefauver, Mr. Langer, Mr. Humphrey, and Mr. Morse) on Feb. 5, 1959, and referred to the Committee on the Judiciary. 3 p. (86th Cong., 1st Sess.)

A juke-box bill identical with S. 1870 which was introduced by Senator O'Mahoney on April 12, 1957, in the 85th Congress.

## 169. U. S. COPYRIGHT OFFICE.

How to determine whether a work is copyrighted. Washington, Feb. 1959. 1 p. Circular no. 22.

This revised circular, which is primarily concerned with the search functions of the Copyright Office, explains the significance of the copyright notice, term of protection, information needed for a search of the Copyright Office records, and the fees for searches conducted by the Office.

## 170. U. S. COPYRIGHT OFFICE.

Sixty-first annual report of the Register of Copyrights for the fiscal year ending June 30, 1958. Washington, 1958. 16 p.

"A reprint from the Annual report of the Librarian of Congress for the fiscal year ending June 30, 1958."

In addition to a narrative report on copyright developments during the fiscal year, the report includes statistical charts on registrations, deposits, and fees, and a map of the world showing coverage of the U.C.C. as of June 30, 1958.

## 2. FOREIGN NATIONS

## 171. CANADA. ROYAL COMMISSION ON PATENTS, COPYRIGHT, TRADE MARKS AND INDUSTRIAL DESIGNS.

Report on industrial designs. Ottawa, E. Cloutier, Queen's printer, 1958. 90 p.

This report by the Commission appointed in 1954 to study legislative problems in the area of intellectual and industrial property recommends new design protection legislation which would "follow the form, while departing in many respects from the substance, of United Kingdom legislation."

## 172. GREAT BRITAIN. BOARD OF TRADE.

Règlement de 1957 concernant le droit d'auteur (Bibliothèques) N° 868, du 17 mai 1957. (71 *Le Droit d'Auteur* 177-179, no. 12 Dec. 1958.)

French translation of the regulations prescribing the classes of libraries entitled to exemptions with regard to making copies of copyrighted works for the purpose of research or private study or for the purpose of supplying other libraries. See 5 BULL. CR. SOC. 18, Item 15 (1957).

## 173. GREAT BRITAIN. CUSTOMS AND EXCISE DEPT.

Règlement de 1957 concernant le droit d'auteur (Douanes) N° 875, du 20 mai 1957. (71 *Le Droit d'Auteur* 179-181, no. 12 Dec. 1958.)

French translation of copyright customs regulations prescribing the form in which notices by or on behalf of the copyright owner of a published literary, dramatic, or musical work are to be given for the purpose of having copies made abroad treated as prohibited goods. See 5 BULL. CR. SOC. 20, Item 18 (1957).

## 174. GREAT BRITAIN. LAWS, STATUTES, ETC.

Copyright Act, 1956 (4 & 5 Eliz. 2 ch. 74) Vom 5. November 1956. (60 *Blatt für Patent-, Muster- und Zeichenwesen*, 263-281, no. 11, 1958; 308-328, no. 12, Dec. 1958.)

German translation of the Act.

## 175. GREAT BRITAIN. LORD HIGH CHANCELLOR.

Règlement de 1957 du Tribunal du droit de représentation et d'exécution (The Performing Right Tribunal Rules, 1957) N° 924, du Mai 1957. (72 *Le Droit d'Auteur* 4-7, no. 1, Jan. 1959; 18-20, no. 2, Feb. 1959.)

French translation of the rules prescribing the procedure to be followed in proceedings before the Performing Right Tribunal.

## 176. GREAT BRITAIN. PRIVY COUNCIL.

Ordonnance de 1958 concernant les conventions internationales en matière de droit d'auteur (Argentine) N° 135, du 28 janvier 1958. (71 *Le Droit d'Auteur* 161-162, no. 11, Nov. 1958.)

French translation of the Order in Council applying the main provisions of the Copyright Act, 1956, for the benefit of Argentina. See 6 BULL. CR. SOC. 134, Item 122 (1959).

## 177. INDIA REPUBLIC. LAWS, STATUTES, ETC.

Legge sul diritto di autore n. 14 del 4 giugno 1957. (Copyright Act 1957). (14 (new ser.) *Bolletino dell'Ufficio della Proprietà, Letteraria, Artistica e Scientifica* 257-292, no. 3 Mar. 1958.)

Italian translation of the Indian Copyright Act, 1957, prepared from the French text which appeared serially in the Oct.-Dec. 1957 issues of *Le Droit d'Auteur*.

## 178. INDIA REPUBLIC. LAWS, STATUTES, ETC.

Règlements et ordonnances sur le droit d'auteur (du 21 janvier 1958). (72 *Le Droit d'Auteur* 20-25, no. 2, Feb. 1959.)

French translation of the Indian Statutory Rules and Orders of Jan. 21, 1958 issued under the Copyright Act, 1957. See 5 BULL. CR. SOC. 224, Item 273 (1958).

## 179. KOREA REPUBLIC. LAWS, STATUTES, ETC.

Loi n° 432, sur le droit d'auteur (promulguée le 28 janvier 1947). (*Inter-Auteurs* 102-110, no. 132 3. trimestre. 1958.)

French translation, with some modifications, of the official English version of the Korean Copyright Law of 1957 which was established under the auspices of the Minister of Education of the Korean Republic.

## 180. YUGOSLAVIA. LAWS, STATUTES, ETC.

Zakon o autorskom pravu; sa objasnjenjima. Beograd, Savremena administracija, 1958. 96 p. (Biblioteka "Novo zakonodavstvo"). Editor's name, Votjislav Spaić, at head of title.

An article-by-article commentary on the new Yugoslav copyright law.

## PART III.

**CONVENTIONS, TREATIES AND  
PROCLAMATIONS**

181. INTERNATIONAL COPYRIGHT UNION. État au 1<sup>er</sup> janvier 1959. (72 *Le Droit d'Auteur* 1-4, no. 1 Jan. 1959.)

The annual report of the Bern Bureau listing member countries and showing the revisions of the Convention ratified by each, together with their reservations, as of Jan. 1, 1959.

182. UNITED STATES. DEPARTMENT OF STATE.

Treaties in force; a list of treaties and other international agreements of the United States in force on January 1, 1959. Compiled by the Treaty Affairs Staff, Office of the Legal Adviser, Dept. of State. Washington, U. S. Govt. Print. Off., 1959. 270 p. (U. S. Dept. of State, Publication 6762).

The list, first issued in 1955, is arranged in two parts, followed by an appendix. Part 1 includes bilateral treaties and other agreements listed by country or other political entity, with subject subdivisions. Part 2 includes multilateral treaties and other agreements, arranged under subject, together with a list of the states which have become parties to each agreement.

In the appendix is given an annotated list of those countries with which the United States has established copyright relations by virtue of Presidential proclamations, treaties and conventions. Copyright treaties and conventions in force Jan. 1, 1959 are also included in the main sections under appropriate country or subject headings.

## PART IV.

**JUDICIAL DEVELOPMENTS IN LITERARY  
AND ARTISTIC PROPERTY**

## A. DECISIONS OF U.S. COURTS

## 1. Federal Court Decisions

183. *George Beban II v. Decca Records, Inc. et al.*, 169 F. Supp. 829 (S.D. Cal., C.D., Jan. 28, 1959).

Action for copyright infringement. The Court found that plaintiff was the owner of the renewal under the 1909 Copyright Act of a copyright first obtained in June 1909 on a dramatic work entitled "The Sign of the Rose", and that defendants infringed this copyright in their 1956 musical recording entitled "Little Rosa". Defendants moved to set aside the findings of fact, conclusions of law and an interim order of reference, and to dismiss the complaint, on the ground that the 1909 Act did not become effective until July 1, 1909, that prior thereto dramatic works were not protected against reproduction by a mechanical means, and that renewal of the copyright under the 1909 Act did not give plaintiff the benefits of the terms of that Act.

*Held*, motion denied.

Even assuming, without deciding, that the renewal under the 1909 Act of a copyright previously secured did not enjoy the benefits of the 1909 Act, the Court could not find validity in defendants' reliance on *White-Smith Music Co. v. Apollo Co.*, 209 U.S. 1 (1907) since that case involved musical and not dramatic compositions. The Court reviewed the prior Copyright Acts and found that the one in effect prior to the 1909 Act gave the proprietor of a dramatic composition not only the right to publicly perform it but also the right of "representing it or *causing* it to be performed or *represented by others.*"

184. *The Pickford Corp. v. De Luxe Laboratories, Inc. et al.*, 169 F.Supp. 118 (S.D. Cal., C.D., Dec. 15, 1958).

Action for copyright infringement, injunction and conversion in connection with a motion picture entitled "Tonight or Never". Defendant De Luxe did not show the picture nor participate in showing it, and had

no knowledge of performances. But defendant, Motion Pictures for Television, without plaintiff's consent, repeatedly exhibited it on television between April 1 and December 31, 1952.

*Held*, action for conversion dismissed, and injunction and \$3,000 damages granted as to defendant, Motion Pictures for Television.

The defense of statute of limitations had not been raised in the answer, but the issue was tried by the, at least, implied consent of all parties, and the Court allowed an amendment to conform the answer to the proof. Neither defendant was guilty of conversion, since De Luxe did not exhibit the picture, and "where one takes a literary property and exhibits it, as Motion Pictures for Television did here, such does not constitute conversion although it does amount to a tort, which is barred by California C.C.P. 339(1) within two years"; and the instant action was started more than two years after April 1, 1952, the first infringing exhibition of the picture.

But there was copyright infringement by Motion Pictures for Television. The only evidence of its "profits" was that it lost over \$4,500 in connection with the picture distribution. Plaintiff's evidence concerning damages had no probative value, and its expert testified as to the picture's value without ever having seen it. Defendant's expert testified the value at the time of the infringing exhibitions was between \$2,000 and \$3,000; "the evidence showed that one of the reasons why the picture did not have greater value was that it had a series of scenes in which a male gigolo appeared to be carrying on an affair with an older woman, and that the female consummated an illicit sexual union with the male star, and spent the night with him, and for that reason a lot of stations would object to projecting such a picture by television into the homes of viewers, which would reduce its saleability and value." It did not matter whether each showing of the picture was a separate infringement: "the sum of the parts (separate showings) cannot exceed the whole." On the other hand, the remaining value of the picture was negligible, and the Court felt justified in finding that the damage to plaintiff was the total value of the picture.

185. *Dorchester Music Corp. v. N.B.C. et al.*, 120 U.S.P.Q. 429 (S.D. Cal., C.D., Feb. 20, 1959.)

Action for copyright infringement. Plaintiff, a member of ASCAP, was the owner of a song with lyrics entitled "Rendezvous" and copyrighted in 1953. Defendant Trinity Music Inc., a member of defendant BMI, copyrighted its song "I Dreamed" in 1956, and the song was broadcast repeatedly by defendants N.B.C., A.B.C. and C.B.S. The Court

found that the melody of defendant's song was substantially the same as plaintiff's, etc., and granted damages, an injunction and attorney's fees to plaintiff. Thereupon the Court granted defendants' motion to reopen on the narrow issue of whether defendants had such license from ASCAP as to permit them to perform the alleged infringement of plaintiff's composition.

*Held*, original decision adhered to.

Defendants' first point, that ASCAP rather than plaintiff was the proper party in interest, had been conclusively disposed of against defendants' contention by two cited decisions. The second contention, i.e. that by plaintiff's agreement with ASCAP and ASCAP's agreements with defendants, defendants were licensed to perform plaintiff's composition, was also of no avail. "There is nothing to defendants' point in that respect as ASCAP was the agent of plaintiff, and ASCAP could not license or authorize defendants or any of them to commit a tort."

186. *Dan Kasoff, Inc. v. Palmer Jewelry Mfg. Co., Inc. et al.*, 120 U.S.P.Q. 445 (S.D.N.Y., Jan. 14, 1959).

Action for copyright infringement. Plaintiff, the owner of several copyrights on costume jewelry, alleged that defendant Palmer manufactured and sold copies of said jewelry, and the other defendant wholesaled these copies.

*Held*, Plaintiff granted \$3,000 statutory damages and \$1,500 attorneys fees against defendant Palmer, and \$1,500 plus \$750 attorney's fees against the other defendant.

The metal parts of plaintiff's designs were used to make new rubber molds which formed the base for castings from which the infringing jewelry was made; "the copying was deliberate, complete, and for the purpose of getting sales that otherwise would have inured to Plaintiff's benefit". The substitution of artificial pearls in a bracelet by Palmer for stones in plaintiff's similar bracelet was also an infringement.

Defendants' argument that a corporation could not obtain a copyright under the statute because it could not be an "author" was dismissed fifty years ago. Nor did the designs fall into the public domain because plaintiff sold some of the jewelry several months before registering copyright claims; the jewelry bore plaintiff's registered trademark "Florenza" and an encircled "C", and tardiness bars the bringing of an action only until copies have been deposited and the work registered.

Defendants' further contentions that the designs were not original with plaintiff had no basis in fact, and it is now established that a copyright may be obtained for an original design of costume jewelry as a

work of art. "The fact that the design may be used in manufacturing cheap jewelry, described by defendant as 'junk' jewelry, does not deprive an original design of the benefits of a copyright."

An important issue were damages. Defendant Palmer's records were insufficient to base any proof of profits on. As to the other defendant, there was proof of some large purchases of the infringing jewelry from Palmer, but these may not have been all of such purchases. Proof was insufficient as to plaintiff's actual damages, "complaints made to plaintiff by its customers concerning defendants' competition, an absence of expected reorders from plaintiff's customers, and the testimony of plaintiff's Secretary-Treasurer on the general effect of defendant's infringement on plaintiff's business do not furnish proof of damages that may be figured in dollars and cents." This was then a case for the exercise of proper judicial discretion in fixing statutory damages, pursuant to the principles set forth in *Woolworth v. Contemporary Arts*, 344 U.S. 228.

187. *Fader et al. v. 20th Century-Fox Film Corp. et al.*, 169 F.Supp. 880 (S.D.N.Y., Jan. 23, 1959).

Action for copyright infringement. Plaintiffs alleged they were the "statutory copyright owners" of the motion picture scenario "My Hero", which was "reduced to typewritten form and copyrighted with the United States Copyright Office"; that the scenario was submitted to defendants in manuscript form, and that defendants plagiarized the plot and story in their motion picture "The Lieutenant Wore Pants". They also alleged diversity jurisdiction. Defendants moved to dismiss, on the ground that the statutory copyright was invalid since it was a "book" which was never published as required by 17 U.S.C. §§10, 11 and 13.

*Held*, motion denied.

Even assuming defendants' theory was correct, plaintiffs' common law copyright remained unimpaired. "It cannot be said that the filing of plaintiffs' manuscript with the Copyright Office, the issuance of a certificate of registration and the allegation in the complaint that plaintiffs are statutory copyright owners, constitute an irrevocable abandonment of the common law copyright or operates to extinguish it in the event that the registration is invalid for failure to comply with the requirements of the Copyright Law. . . . Congress has not provided that one who seeks to obtain the benefits of statutory protection must surrender his common law copyright if statutory protection is not afforded him."

188. *Remington Research, Inc. v. Modern Aids, Inc.*, 170 F.Supp. 7 (S.D.N.Y., Feb. 12, 1959).

Action for declaratory judgment that plaintiff did not violate defendant's copyright or that defendant's copyright is invalid. Counterclaim for copyright infringement. Plaintiff and defendant each produce and distribute a concave contoured electric vibrator of great similarity. Both prepared copyrighted advertisements to be published by their respective sales outlets. Defendant wrote to various customers of plaintiffs', claiming plaintiff's advertisement infringed its copyright, threatening legal action unless the ad was no longer used, and adding a postscript as follows: "The enclosed copy of the court injunction may be of interest to you." The injunction actually enclosed was one obtained by defendant *pendente lite* against R. H. Macy & Co. Plaintiff moved to have defendant restrained from sending these letters to plaintiff's customers, and defendant moved to enjoin plaintiff from advertising and selling plaintiff's vibrator altogether.

*Held*, plaintiff's motion granted to the extent of the postscript; defendant's motion denied.

It is not an actionable wrong to assert in good faith that one intends to enforce one's legal rights, even if one is mistaken as to what these rights are. But in the postscript of its letters defendant sought to create the impression that the injunction *pendente lite* against R. H. Macy & Co., contrary to the facts, involved plaintiff's advertisement.

Defendant in support of its motion contended that its vibrator had acquired a secondary meaning, but could show no supporting evidence. The fact of similarity between the two products does not show actionable unfair competition, absent a patent or other statutory protection; this made it unnecessary to determine whether concave contouring was a functional or nonfunctional feature. Finally, while the two advertisements had some similarity, the Court was not persuaded that plaintiff copied defendant's.

## 2. State Court Decisions

189. *Janet M. Reback a/k/a Taylor Caldwell et al. v. Story Productions, Inc. et al.*, 181 N.Y.S. 2nd 980 (S.Ct. N.Y.Co., Dec. 12, 1958).

Action for breach of contract. Plaintiffs granted defendants the exclusive motion picture, television and radio rights in Taylor Caldwell's writings. Defendants were to pay specified percentages of receipts, and actually paid in advance \$100,000 as a minimum guarantee. Plaintiffs alleged that defendants failed to produce or cause to produce motion

pictures, and to sell television and radio rights. Defendants denied the agreement imposed any such obligations on them, and counterclaimed, alleging that plaintiffs knew there were no such obligations and this action tended to make it virtually impossible to produce a motion picture or sell television or radio rights.

*Held*, plaintiffs' motion to dismiss denied as to the defense and granted as to the counterclaim.

Even though the agreement did not expressly require defendants to produce a motion picture, etc., "it was instinct with an obligation on the part of defendant to do more than merely pay the minimum guarantee. . . ." But it was necessary to decide whether this implied obligation was to produce a motion picture, etc., or only to use defendants' best efforts to do so. The agreement being ambiguous, parol evidence could be introduced at the trial; but the defense could not be stricken in this motion.

Defendants attempted to uphold their counterclaim as stating a prime facie tort action. An essential ingredient of such a cause of action is the intention of the person sued to harm his adversary; it would thus be necessary to assume that the allegation that plaintiff knew there was no obligation was true. "This is, however, an allegation relating to what is really plaintiffs' alleged knowledge of a conclusion of law whose correctness is far from clear and can only be resolved after a trial and, possibly, after the appellate courts have spoken."

190. *Loew's Inc. et al. v. Somerville Drive-In Theatre Corp.*, (Sup. Ct.N.J., App. Div., Feb. 18, 1959).

Action by distributors of motion pictures against theater for balance of license fees allegedly due. In addition to denying liability, defendant claimed that plaintiffs could not recover because the license agreements were illegal, being in violation of the Sherman Act; it alleged that the "run" and "clearance" provisions in license agreements were legal only if reasonable, and that any run in its theater based on "clearance" in favor of any other theater, contrary to defendant's request, was unreasonable. Defendant also claimed that plaintiffs' refusal to license pictures to defendant without a "clearance" was the result of a conspiracy to impose on defendant a uniform system of "runs" and "clearances" which it was obliged to accept in order to obtain films, thus being an unreasonable restraint on interstate commerce. The lower Court granted plaintiffs' motion to dismiss the illegality defense, and defendant appealed.

*Held*, affirmed.

Plaintiffs claimed that since the "clearance" provisions were only

in contracts with exhibitors other than defendant, and no exhibitor has a right to priority of a run, there could be no inherent illegality in the instant contract. The Court found that "the fact that clearance appears in one document rather than another cannot reasonably or logically be considered material"; however, "only where the distributor conspires to act jointly, either with other distributors or with one or more exhibitors, to impose a subsequent run upon an unwilling exhibitor under conditions deemed to be unreasonable as a matter of law, does the Sherman Act come into operation."

The Court then considered defendant's contention that plaintiffs conspired to set unreasonable "runs" and "clearances", to defendant's detriment. Defendant conceded that if the contract sued upon was merely collateral to the alleged conspiracy, and the alleged illegality not inherent in the contract, this defense would not be available. The Court, after carefully analyzing the applicable federal law (even though under state law the result would be the same), concluded that the contract was collateral to the alleged conspiracy; defendant had not agreed by this contract to commit any illegal act in furtherance of the alleged conspiracy.

## B. DECISIONS OF FOREIGN COURTS

### 1. Mexico

191. *Supreme National Court of Justice, 2nd Chamber, Judgment 672-1957 (Inter-Auteurs, no. 132, 2e trimestre, 111, 1958).*

Action by Mexican Society of Authors and Composers against Copyright Department which had refused to register plaintiff in its Registry—"S.A.C.M.", a performing rights society, already having been registered—basing its refusal on the ground that there could be only one registered society in the same specialty.

*Held*, plaintiff had no cause of action.

In the Court's opinion, there was a fundamental reason for the Copyright Department's refusal; "this reason is that, in accordance with the provisions of the Federal Copyright Law [of Jan. 14, 1948], only one authors' society should exist in each field. In fact, Article 66 of the aforesaid Federal Copyright Law establishes that authors' societies are in the public interest when constituted in accordance with this law and for the purposes provided therein. . . . The clear intent of the legislator is evident, that there should be only one society of authors in each field; otherwise there would be no reason to declare them to be in the public

interest. The authors could not otherwise unite and be able to present a united front to national and foreign users. Furthermore, they could not conclude agreements with foreign societies of authors in their particular field, since no one would be the national representative, and the multiplication of representative organizations would lead to uncertainty of the users with regard to obtaining rights, and may even discourage authors only recently established, to the detriment of the majority of authors." Nor could the Court find the existence of an illegal monopoly, "since this exists only when essential consumers' goods are involved or acts or procedures tending to prevent free competition in production, industry, commerce or public service, i.e. activities with a profit motive,— a concept substantially different from that of remuneration of labor, even if intellectual, scientific or artistic labor."

## PART V.

# BIBLIOGRAPHY

## A. BOOKS AND TREATISES

### 1. United States Publications

192. COPYRIGHT LAW SYMPOSIUM NO. 9. New York, Columbia University Press, 1958. 212 p. (Nathan Burkan Memorial Competition, sponsored by American Society of Composers, Authors and Publishers, 1956).

*Contents.* — Foreword, by John Biggs, Jr., W. H. Hastie, and S. E. Sobeloff. — Introduction, by Herman Finkelstein. — National award essays: Burlesque as copyright infringement, by Arthur Rossett. The effect of the Universal Copyright Convention on other international conventions and arrangements, by G. T. McConnell. — Honorable mention: Freebooters in fashions; the need for a copyright in textile and garment designs, by S. J. Young. — Publication in the law of copyright, by R. W. Roberts. Use of the expert in literary piracy, a proposal, by Edward Silber. — Rules governing the competition. — Law schools contributing papers to previous copyright law symposia.

The prize essays are analyzed separately *infra*.

193. KAPLAN, BENJAMIN. The registration of copyright; a study prepared for the United States Copyright Office . . . with Comments and views submitted to the Copyright Office. Washington, August 1958. 85, 17, 21 p. (*General revision of the copyright law, study no. 14*).

The fourteenth in a series of studies issued by the Copyright Office to interested persons, with invitations to submit statements of their views.

194. LATMAN, ALAN. The recordation of copyright assignments and licenses, a study prepared for the United States Copyright Office by Alan Latman assisted by Lorna G. Margolis and Marcia Kaplan, with Comments and views submitted to the Copyright Office. Washington, Copyright Office, Feb. 1959. 23, 6, 11 p. (*General revision of the copyright law, study no. 15*).

The fifteenth in a series of studies issued by the Copyright Office to interested persons, with invitations to submit statements of their views.

- 194a. OPPENHEIM, S. CHESTERFIELD. The judicial process in unfair competition law; a perspective and a focus. (2 *The Patent, Trademark, and Copyright Journal of Research and Education* pp. 130.) Conference suppl. (1958).

Professor Oppenheim favors "primary reliance upon traditional Anglo-American lawmaking by judicial decision as against legislation in adjudicating unfair competition issues in adversary proceedings between private parties," although he does not oppose further study of proposals for a federal law of unfair competition applicable to private suits or for a uniform state unfair competition statute.

## 2. Foreign Publications

### (a) In English

195. ABRAHAMS, GERALD. The law for writers and journalists. London, H. Jenkins (1958). 224 p.

"A synoptic survey" of British law including chapters on freedom of speech, privacy and publicity, falsehood and the law, copyright, defamation, criminal libel and other crimes of the pen, contempt of court and of Parliament, the writer as contractor, etc.

### (b) In French

196. LYON-CAEN, G. Rapport . . . sur les questions relatives au droit d'auteur en matière de cinématographie. (*Comité permanent de l'union inter-*

*nationale pour la protection des œuvres littéraires et artistiques, 7th session, Point VII of the provisional agenda, Document No. 6, Geneva, Aug. 18-23, 1958.)*

A report by Prof. Lyon-Caen on questions concerning copyright in the motion picture field, submitted to the Permanent Committee of the International Union for the Protection of Literary and Artistic Works at its last session. While reserving its opinion on certain questions studied in the report, the Committee recommended to the International Bureau for the Protection of Literary and Artistic Works, also in Geneva, to request the major international organizations interested in this subject to report their comments.

(c) In German

197. SCHRAMM, CARL. Die schöpferische Leistung. Berlin, C. Heymann (1957). 266 p.

A basic study of the legal philosophy underlying the protection of intellectual works with particular reference to designs.

B. LAW REVIEW ARTICLES

1. United States

198. BERNSTEIN, ALAN H. Pendent unfair competition jurisdiction in patent, trademark, and copyright cases. (2 *The Patent, Trademark, and Copyright Journal of Research and Education*, 418-434, no. 3, Sept. 1958.)

The writer concludes, "The application of federal law to a pendent claim of unfair competition and the application of state law to the very same claim of unfair competition where federal jurisdiction is instead based on diversity of citizenship presents an anomaly . . . It would seem that a federal law of unfair competition . . . would be a method of attaining uniformity in the adjudication of unfair competition claims without incurring the dilemma of 'checkerboard' practices."

199. CHAPMAN, C. EDWIN, JR. Copyright infringement—transcribed music piped over telephone wires. (10 *Mercer Law Review*, 203-204, no. 1, fall 1958.)

A case note on *Harms, Inc. v. Sansom House Enterprises, Inc.*, 162 F.Supp. 129 (E.D. Pa. 1958). See 5 BULL. CR. SOC. 303, Item 382 (1958).

200. COOPER, W. AUSTIN. The right of privacy in news photographs. (44 *Virginia Law Review* 1303-1317, no. 8, Dec. 1958.)

This note concludes that the "extension of the right of privacy to include protection against the act of drawing unwarranted attention directly to a person would be merely recognizing at the back door what is not yet recognized at the front—the tort of intentional infliction of mental harm."

201. COPYRIGHT ACT—mechanical reproduction sections—record pirate and his distributor within compulsory licensing provisions. (13 *Rutgers Law Review* 365-370, no. 2, winter 1958.)

A case note on the appellate decision in the *Goody* case, 248 F.2d 260 (2d Cir. 1957). See 5 BULL. CR. SOC. 21, Item 22 (1957).

202. COPYRIGHTS—INFRINGEMENT. (18 *Maryland Law Review* 351-352, no. 4, fall 1958.)

A case note on the appellate decision in *Continental Casualty Co. v. Beardsley*, 253 F.2d 702 (2d Cir. 1958). See 5 BULL. CR. SOC. 229, Item 285 (1958).

203. GOLDMAN, ABE A. Revision of the Copyright Code. (51 *Law Library Journal* 395-401, no. 4, Nov. 1958.)

An address delivered by the Chief of Research of the Copyright Office on July 2, 1958 at the Fifth General Session of the 51st Annual Meeting of the American Association of Law Libraries held in Washington. Mr. Goldman outlines the background of the present law and the Copyright Office revision program, and concludes by pointing out some of the major problems, of possible interest to librarians, that need to be considered in the revision program.

204. KAPLAN, BENJAMIN. Further remarks on compensation for ideas in California. (46 *California Law Review* 699-714, no. 5, Dec. 1958.)

A critical comment on the California Supreme Court decision in *Desny v. Wilder*, 46 Cal. 2d 715, 299 P. 2d 257 (1956). See 4 BULL. CR. SOC. 10, Item 16 (1956).

205. KAPLAN, BENJAMIN. Revision of the copyright law. (52 *Law Library Journal* 3-10, no. 1, Feb. 1959.)

"A reconstruction of remarks made to the Law Librarians of New England at a conference of the New England Library Association held at Swampscott, Mass., on Oct. 18, 1958." Professor Kaplan discusses some

of the problems relevant to a general revision of the copyright law and urges that American librarians should "not confine their attention to copyright measures affecting their day-to-day work," but should concern themselves "with copyright on a broader front."

206. KELLMAN, LEON. The legal protection of fictional characters. (25 *Brooklyn Law Review* 3-19, no. 1, Dec. 1958.)

A case is ably made for more effective protection of fictional characters especially as it may affect characters portrayed in series on television.

207. MAYER, MICHAEL F. Motion picture title searches. (4 *The Practical Lawyer* 64-72, no. 6, Oct. 1958.)

A discussion of the "practical approaches which are necessary for the lawyer seeking to give his client advice on film title and rights."

208. MCCONNELL, G. T. The effect of the Universal Copyright Convention on other international conventions and arrangements. *Copyright Law Symposium*, no. 9 (1958), pp. 32-75.

One of two essays awarded first prize in the 1956 Nathan Burkan Memorial Competition, this paper "is a detailed discussion of the many problems which may arise in applying the various provisions of the Universal Copyright Convention in areas of the world where its parent—the Berne Convention—is also in force."

209. RIDER, PRISCILLA L. Choice of remedies for the unauthorized use of the name or likeness. (36 *The Phi Delta Delta* 3-9, no. 3, June 1958.)

This "paper was adapted from a term paper at U.S.C. in Unfair Competition . . . June, 1958."

210. ROBERTS, RICHARD W. Publication in the law of copyright. *Copyright Law Symposium*, no. 9 (1958), pp. 111-148.

This paper, awarded honorable mention in the 1956 Nathan Burkan Memorial Composition, "presents a thorough study of the crucial 'publication' issue which arises so often in copyright cases."

211. ROSSETT, ARTHUR. Burlesque as copyright infringement. *Copyright Law Symposium*, no. 9 (1958), pp. 1-31.

One of two essays awarded first place in the 1956 Nathan Burkan Memorial Competition, this paper "points up . . . the policy decision which a court must make when faced with the conflicting interests of one presenting a parody and the author of the copyrighted work which is the subject of the parody."

212. SILBER, EDWARD. Use of the expert in literary piracy, a proposal. *Copyright Law Symposium*, no. 9 (1958), pp. 149-174.

This paper, awarded honorable mention in the 1956 Nathan Burkan Memorial Competition, "is a critical study of the 'ordinary observer' test which the courts use in determining the existence of copyright infringement."

213. WEHRINGER, CAMERON K. Dress designs: time protection and copyrights. (40 *Journal of the Patent Office Society* 816-828, no. 11, Nov. 1958.)

"This short paper seeks to show the protection that is available to dress designers, and a possible, perhaps even probable avenue of protection."

214. YOUNG, STUART JAY. Freebooters in fashions: the need for a copyright in textile and garment designs. *Copyright Law Symposium*, no. 9 (1958), pp. 76-110.

This paper, awarded honorable mention in the 1946 Nathan Burkan Memorial Competition "points up . . . the unique problem faced by the creators of short-lived fashions in seeking protection from design piracy."

215. YOUNGER, IRVING. Citizens who publish abroad; a study in the pathology of American copyright law. (44 *Cornell Law Quarterly* 215-231, no. 2, winter 1959.)

This article on the protection available to American citizens who publish abroad was awarded first prize at New York University Law School in the Nathan Burkan Memorial Competition for 1958.

## 2. FOREIGN

### (a) English

216. DESIGNS REGISTRATION AND THE EUROPEAN FREE TRADE AREA. (108 *The Law Journal* 707-708, no. 4841, Nov. 7, 1958.)

A brief summary of the U.K. Registered Designs Act and of the legal provisions of other countries where the British industrialist may want to use his design.

217. GUÉRITAT, JACQUES. Television and commercial films. (52(B) *E.B.U. Review* 26-28, 32, Dec. 1958.)

A discussion of rights in connection with the television use of

commercial films (*i.e.* "films produced for the purposes of public exhibition in cinemas") with particular reference to a standard contract drawn up by the European Broadcasting Union (E.B.U.) and the French Society of Dramatic Authors and Composers (S.A.C.D.) for dealings between authors and television organizations. The E.B.U. and S.A.C.D. "have undertaken to revise the standard contract every two years, and thus to keep . . . abreast of technical developments and to incorporate the lessons learned in everyday application of the agreements."

218. KILGOUR, D. G. Canadian copyright law—Royal Commission Report—fundamental changes recommended. (36 *The Canadian Bar Review* 569-579, no. 4, Dec. 1958.)

A critical analysis of a few of the "major and more controversial recommendations" of the Canadian Royal Commission in its *Report on copyright* (Ottawa, 1957).

219. RUBINSTEIN, STANLEY. Was Hans Sachs lax? (227 *The Law Times* 47-48, no. 6041, Jan. 23, 1959.)

A discussion of the import of decisions in three English cases dealing with parodies which "may be taken as indicative of our national reluctance to interfere with an Englishman's right to poke fun at people who may be in danger of taking themselves a little too seriously." Talk about "the English sense of humour" is contrasted with "the American absence of humour (British brand, be it understood)" in the light of the decisions in the *Gaslight* case. Mr. Rubinstein prefaces his discussion with a fanciful analysis of the legal justification, in Wagner's *Die Meistersinger*, for Beckmesser's acquisition from Hans Sachs of Walter's *Preislied* and his ridiculous rendering of it at the festival.

(b) French

220. BOLLA, GERARD. Universal Copyright Convention: an analysis and a commentary, par Arpad Bogsch. (72 *Le Droit d'Auteur* 36, no. 2, Feb. 1959.)

A review of Dr. Bogsch's commentary on the U.C.C. (R. R. Bowker Co., 1958).

221. CASTELAIN, RAOUL. Nouvelles sonorités musicales et droit d'auteur. (22 *Revue Internationale du Droit d'Auteur* 4-17, Jan. 1959.)

An article, in French, English, and Spanish, defining "concrete" and "electronic" music and discussing whether the usual rules of copyright are applicable to these "new musical sonorities."

222. HENRION, MARCEL. La loi coréenne de 1957 sur le droit d'auteur. (133 *Inter-Auteurs* 132-138, 4. trimestre 1958.)  
A brief analysis of the Korean Copyright Law of 1957 which is described as being profoundly influenced by Western attitudes.
223. KLAVER, FRANCA. Questions relatives à la piste sonore du film. (22 *Revue Internationale du Droit d'Auteur* 18-64, Jan. 1959.)  
A discussion, in French, English, and Spanish of "problems concerning the film sound track," and of possible solutions to these problems.
224. LEIFS, JON. Dixième anniversaire de la fondation de la société islandaise STEF. (133 *Inter-Auteurs* 127-131, 4. trimestre 1958.)  
The Icelandic composer, Jón Leifs, president of the Icelandic performing rights society, STEF, surveys briefly the historical evolution of the society on the occasion of the tenth anniversary of its founding.
225. MASOUYÉ, CLAUDE. Le droit d'auteur en Amérique du Sud. (21 *Revue Internationale du Droit d'Auteur* 56-97, Oct. 1958; 64-93, Jan. 1959.)  
"Copyright in South America"; a survey, in French, English, and Spanish, of the recent "legislative evolution" in Venezuela, Peru, Chile, and Brazil.
226. PLAISANT, ROBERT. Les lois nouvelles sur le droit d'auteur et leurs tendances essentielles. (71 *Le Droit d'Auteur* 166-170, no. 11, Nov. 1958; 181-184, no. 12, Dec. 1948.)  
A comparative study of new copyright laws and "their essential tendencies."
227. SANCTIS, VALERIO DE. Lettre d'Italie. (71 *Le Droit d'Auteur* 186-191, no. 12, Dec. 1958.)  
A survey of recent legislative and judicial developments in Italian copyright and related laws and of the recent work of the Italian Permanent Consultative Council on Copyright.
228. TOURNIER, JEAN-LOUP. Nouvelles du Canada; à propos de la réforme de la loi de 1921. (22 *Revue Internationale du Droit d'Auteur* 94-121, Jan. 1959.)  
A critical commentary, in French and English, on the Canadian Royal Commission "report on copyright" (Ottawa, 1957).

229. ULMER, EUGEN. Lettre d'Allemagne. (71 *Le Droit d'Auteur* 171-176, no. 11, Nov. 1958.)

A survey of recent legislative and judicial developments in West German copyright law and related subjects such as publishing and motion picture law and neighboring rights.

230. VAUNOIS, LOUIS. Lettre de France. (72 *Le Droit d'Auteur* 30-36, no. 2, Feb. 1959.)

A survey of recent French court decisions concerning copyright.

### C. ARTICLES PERTAINING TO COPYRIGHT FROM TRADE MAGAZINES

#### 1. United States

231. FRYKLUND, RICHARD. Navy says federal officials may copyright speeches. (107 *The Evening Star* (Washington, D.C.) A-8, no. 42, Feb. 11, 1959.)

An article on an action filed by the Public Affairs Press in the D. C. District Court on Jan. 16, 1959, against Admiral Hyman G. Rickover seeking a judgment from the court to the effect that the Admiral may not place copyright restrictions on his public speeches.

232. HALL, MILDRED. 'Joint ownership' copyright studied. (71 *The Billboard* 8, 50, no. 2, Jan. 12, 1959.)

A summary of the Cary study on "Joint ownership of copyrights."

#### 2. England

233. Design protection in the proposed European Free Trade Area. *Design (London)*, no. 116 (Aug. 1958), pp. 54-56.

This article describes the procedure for obtaining legal protection for British designs in the countries of the proposed Free Trade Area and relates this to the requirements of the individual countries.

### NEWS BRIEFS

234. NATIONAL COMMITTEE FOR EFFECTIVE DESIGN LEGISLATION.

At a meeting in New York City on February 6, the Committee elected the following officers: George Lucas, Jr., president of L. E. Carpenter Co., manufacturers of vinyl plastic, Chairman; Forest Wilson,

of the Industrial Designers' Institute, and Dr. D. J. DePree of Herman Miller Furniture Co., Vice Chairmen, and O. E. Cumings, Jr., of Onéida Ltd., silver manufacturers, Treasurer. Alan Latman continues to be Executive Secretary of the group.

235. NEIGHBORING RIGHTS PANEL.

The panel met in New York on February 6, under the chairmanship of Arthur Fisher, Register of Copyrights. Some twenty-five people from author, performer, broadcaster, record producer, and other interests attended. Both the possible need for domestic legislative measures and the international developments of the last three years were discussed. Mr. Rodriguez, of the State Department, summarized recent international developments, and Mr. Kaminstein, Chief of the Copyright Office Examining Division, presented the substantive domestic legal problems.

This was the tenth meeting of the panel, which was organized in 1955. It was probably the best attended of the meetings with the most thorough exploration of the issues.

236. FIFTH ANNUAL PROGRAM ON LEGAL ASPECTS OF THE ENTERTAINMENT INDUSTRY.

An international group of authorities on motion picture law meet May 9, in this Lecture Series, at Founders Hall, University of Southern California School of Law, co-sponsored by the Beverly Hills Bar Association and the University of Southern California. Professor Victor S. Netterville, Director, expected some three hundred attorneys, producers, directors, and agency executives to attend the all-day series of talks, the general subject being "American Motion Picture Production in Foreign Countries." Economic and legal aspects of foreign film production will be considered. Co-Chairmen Edward Rubin, of the Beverly Hills Bar Association, and Professor Netterville announce the following panel of speakers: from London, W. P. Robinson, Solicitor, "Production in England"; from Rome, Gianni Manca, attorney, "Production in Italy"; from the United States: Leon Kaplan, member, Beverly Hills Bar Association, "Problems Facing American Producers Abroad"; Lawrence Irell and Arthur Manella, members, Beverly Hills Bar Association, "Tax Problems of Foreign Production"; Ed Erkel, head of Columbia Pictures legal department, "Problems of Major Studios in Connection with Motion Picture Production Abroad".



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**GENERAL REVISION STUDIES  
NOS. 14, 15 AND 16 NOW AVAILABLE**

**THE REGISTRATION OF COPYRIGHT** by Professor Benjamin Kaplan of the Harvard Law School (Study No. 14), **THE RECORDATION OF COPYRIGHT ASSIGNMENTS AND LICENSES** by Alan Latman, formerly Special Adviser to the Copyright Office, assisted by Lorna G. Margolis and Marcia Kaplan of the Copyright Office (Study No. 15), and **LIMITATIONS ON PERFORMING RIGHTS** by Borge Varmer, Attorney-Advisor, Copyright Office (Study No. 16), prepared by the Copyright Office under a Congressional authorization, looking toward a general revision of the Copyright Law (Title 17, U.S.C.), are now ready for distribution.

Copies of the studies, to which are attached the comments and views of the consultants, may be secured by sending a request addressed to R. G. Plumb, Head, Information and Publications Section, Copyright Office, Washington 25, D. C.

Persons and groups concerned with these problems are invited to submit their comments to the Copyright Office.

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## PART I.

## ARTICLES

## 237. PROPOSED NEW COPYRIGHT OFFICE REGULATIONS

By GEORGE D. CARY<sup>1</sup>

On May 2, 1959, there was published in the *Federal Register* at pages 3545-49, some proposed changes in the Regulations of the Copyright Office. These are not final, since it was indicated therein that any person interested could file comments or objections thereto within 30 days of that date, with the Register of Copyrights. Subsequent to the receipt of any comments, consideration will be given thereto, and the final regulations will be published in the *Federal Register*. The following is intended as a brief summary of the objectives intended to be reached by the proposed changes.

By and large the preponderant number of changes are intended to assist the administrative processing of applications in the Office. Another group were merely formal and technical in nature. Only three of the changes dealt with matters of policy, and since these are the most important, consideration will first be given to them.

Section 202.2(a)(3) is intended to make clear that the Office no longer considers the dictum in the case of *Heim v. Universal Pictures*, 154 F.2d 480 (2d Cir. 1946) as controlling its action. It will be recalled that in that case, Judge Frank considered that a work published outside of the United States did not have to contain the notice of copyright specified by the U. S. copyright law. Based upon this dictum, the Office has for a number of years made registration of such cases, which were relatively few in number. However, a review of the problem has resulted in the conclusion that the subsequent enactment of the so-called "U.C.C. amendments" to the copyright law (68 Stat. 1030) in effect amounted to a Congressional expression, contrary to the dictum, that foreign works, in order to obtain the benefit of the U. S. copyright law, must, at the time of first publication, contain the form of notice provided for in the U.C.C. and in Section 9 (c) of title 17, as amended.

A second policy change concerns the matter of postdated notices. Existing regulations reflect the holdings of several cases, of rather ancient vintage, that a post-dated notice of copyright is in effect an attempt to claim a longer period of protection than provided by law and renders the copyright void. The

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1. General Counsel, U. S. Copyright Office.

proposed regulation dealing with this problem, section 202.2(b)(6), continues to state the general principle, but indicates that if the notice is post-dated no more than one year, registration may be considered under the rule of doubt. This doubt arises in part from the recent case of *Advisers, Inc. v. Wiesen-Hart, Inc.*, 238 F.2d 706 (6th Cir. 1956), *cert. denied* 353 U. S. 949 (1957). The district court in that action held that it was bound by the older post-dated notice cases and granted a motion for summary judgment on the ground that plaintiff's copyright was unenforceable. The Court of Appeals considered that the district court was correct if the older cases were still valid, but it reversed on the ground that in view of the copyright protection for 56 years, a period of four or five months would be an immaterial variance without consequence to the public, and also because "useless technicalities are not to be allowed to cut down the benefits conferred." The court invited the Supreme Court to review its determination, but certiorari was denied. Due to the unclear status of the problem, the Office considers that where the variance in the post-dated year date is no more than one year, it may not in all cases be clearly justified in denying registration on this ground alone.

A final policy change reflected in the proposed regulations in section 201.2(b) concerns the strengthening of the right of public access to the public records of the Copyright Office. The existing regulations authorize inspection of completed records "In connection with matters directly relating to copyrights and the rights of an author or proprietor in copyrighted property." The proposed change is intended to make the inspection and copying of such records a matter of right, subject only to the condition that the work of the Office is not interfered with and the limitation against copying of names and addresses for the purpose of compiling mailing lists.

The existing regulations do not permit access to the correspondence relating to pending and rejected applications. Proposed section 201.2(c)(2)(i) is intended to continue to indicate that these types of records are not open to public inspection as a matter of right. However, section 201.2(c)(2)(ii) provides a procedure for obtaining an inspection of such files by all persons properly and directly concerned. Where the required permission is granted, and subsequently copies of the correspondence are desired, section 201.2(c)(2)(iii) provides that copies are obtainable under the procedures and conditions set forth in section 201.2(d).

Section 201.2(c)(3), while not new policy, has as its purpose the affirmative statement of the types of material which are not considered to be "records" which are open to public inspection. These are the usual housekeeping files, and matters relating to policy, including the work product of an attorney, as well as security files. Government agencies generally do not permit public access to such materials.

The foregoing constitutes the main substantive policy changes proposed. Before discussing the remaining proposed changes, it should be mentioned that a portion of the existing work-of-art regulation concerning three-dimensional works has given the Office some cause for concern because of its wording, so the proposed amendment of section 202.10(c) merely attempts to restate the same thought in more appropriate terms. The first sentence of the existing paragraph is deleted as not possessing substantive merit. The last sentence is expanded to delineate the concept that a portion of a unique and attractively shaped work may be eligible for copyright protection if it can be separately identified and is capable of existing independently as a work of art.

Most of the other proposed modifications have for their purpose the expedition of the administrative processing of copyright claims in the Copyright Office. These are set forth seriatim:

(1) Section 201.6 requires remittance from foreign countries to be made either by International Money Order or by bank draft payable and immediately negotiable in the United States for the full amount of the fee required.

(2) Section 202.3 (b) (1) is modified by the addition of a sentence setting forth the right of the Office to refuse to accept illegible application forms. A similar proposal concerns paragraph (b) (5) of the same section, which provides that the information requested by the application shall be given in the spaces provided and not on additional slips of paper attached to or included with the application.

(3) Section 202.12(a) is merely intended to emphasize that Class I does not cover every work "of a scientific or technical character," but is limited to drawings and plastic works.

(4) The proposed changes in section 202.16 are based upon the experience of the Office that frequently when a remitter exercised the option of submitting photographs in lieu of the actual deposit, only one set of photographs was included. One of the objectives of the change is to make it clear that in most cases duplicate photographs must be included. In addition, the proposed section sets a limit of 5 x 7 inches as the smallest size of photographs acceptable. This was done in order to discourage the submission of snapshot size prints which are unsuitable for the filing procedures of the Office. However, since it is difficult to secure accurate enlargements of some small works, e.g., an ear-ring, the proposed section permits submission of a photograph containing an image of the same size as the actual object, or, if the claimant prefers, a larger image. Conversely, if an object were quite large and a reduced size photograph was submitted, the photographic image must be at least four inches in its largest dimension.

(5) The proposed amendment in section 202.18 merely indicates that notices of use must be filed on Form U, but that there is no special form provided for the recording of notices of intention to use.

The remaining proposed changes are purely formal and technical in nature. Such are the changes proposed in sections 201.2(a), 201.3, 201.8, 202.3(c), 202.4(a), and 202.4(b), most of which changes are sufficiently indicated in the "comments" in the Federal Register. Due to a printer's error in that publication, technical changes are indicated in sections 201.5 and 202.3(a). Actually those portions of the regulations are unchanged.

In summary, the primary purpose of the proposed changes in the existing Copyright Office regulations is to reflect a few basic policy changes with regard to the *Heim* case, to the matter of post-dated notices, and the problem of public access to records of the Office. In addition to a few formal or technical changes, the proposed regulations contain a number of administrative requirements which it is believed will assist in expediting the action taken on applications received in the Office.

## 238. REPORT OF THE STUDY GROUP OF THE INTERNATIONAL PROTECTION OF APPLIED ART, DESIGNS AND MODELS

(*Paris, April 20-23, 1959*)

By DR. ARPAD BOGSCH<sup>1</sup>

The International Study Group on the Protection of Works of Applied Art and Designs (hereafter, the Study Group) was constituted pursuant to recommendations adopted by the Intergovernmental Copyright Committee (hereafter, I.G.C.C.), and the Permanent Committee of the International Union for the Protection of Literary and Artistic Works (hereafter, Berne Union) at their sessions in August 1958 at Geneva, and by the International Union for the Protection of Industrial Property (hereafter, Paris Union) at its Lisbon revision conference in October 1958. The meeting was convened by the Director of the International United Bureaux of the Berne and Paris Unions and — on behalf of the Chairman of the I.G.C.C. — by the Director-General of the United Nations Educational, Scientific and Cultural Organization (hereafter, Unesco), and was held in Paris on April 20, 21, 22 and 23, 1959.

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1. Rapporteur General of the International Study Group.

The members of the Study Group came from twenty-one countries.<sup>2</sup> They were designated by their governments but acted in their personal capacity of experts without committing their governments and without necessarily expressing the official views of their governments.

The representatives of eight international non-governmental organizations also participated in the debates.

At the first meeting, Messrs. C. J. de Haan (Netherlands) and Henry Puget (France) were elected co-chairmen. Both are experts in the fields of industrial property law and of copyright law; but the first is generally more known for his work in the industrial property field, whereas the second is generally more known for his work in the copyright field; by making them co-chairmen of equal standing, the Study Group wished to express the perfect equality with which it approached the two fields. The meetings were chaired alternately by the two co-chairmen.

Professor Seve Ljungman (Sweden) was elected vice-chairman and Dr. Arpad Bogsch (United States of America) rapporteur general.

The Secretariat of the meeting was ably furnished by the Secretariat of Unesco represented by Mr. Juan O. Diaz Lewis, Head of the Copyright Division, Messrs. Gerard Bolla and T. Ilosvay and Miss F. Klaver, and by the United International Bureaux, represented by Messrs. Ross Woodley and Guilio Ronga. Mr. Gerard Bolla and the latter two acted as secretaries of the meeting.

The participants were welcomed by Mr. Jean Thomas, Assistant Director-General of Unesco, in the name of Mr. Vittorino Veronese, Director-General of Unesco, and by Mr. Charles Magnin, Vice-Director of the United Bureaux, in the name of Mr. Jacques Secretan, Director of the United Bureaux, who attended personally the closing meeting. Both stressed the importance of co-operation between the international organizations involved and greeted the meeting as a new proof of such co-operation.

The meeting was opened by Mr. William Wallace (United Kingdom), Vice-President of the I.G.C.C. and the Permanent Committee, in the absence of Mr. Plinio Bolla, Chairman of the two Committees. He recalled the history of the co-operation between the three organizations leading to the meeting of the Study Group. He stressed the significance of the meeting as being a co-operative effort of the organs of the two great international conventions on copyright and the Paris Union on industrial property, and as the first international meeting exclusively devoted to the subject of works of applied art and designs, which hitherto had a somewhat secondary rôle in the copyright and industrial property conferences.

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2. Argentina, Belgium, Brazil, Bulgaria, Chile, Czechoslovakia, Denmark, Dominican Republic, Finland, France, Germany, Holy See, India, Italy, Japan, The Netherlands, Spain, Sweden, Switzerland, United Kingdom, and United States of America. Cf. 6 *BULL. CR. SOC.* 26 and 76.

Later in the meeting, Mr. Marcel Boutet (France), who was rapporteur of the Design Committee of the Lisbon Conference, retraced the deliberations at the Lisbon Conference of the Paris Union, in matters of design protection.<sup>3</sup> Stated in simple terms, the purpose of the meeting was to study possible means of improving and rendering more effective the international protection of the creators of designs and works of applied art.

Discussions started with a *tour d'horizon* of present protection and present plans for its improvement on the national level, particularly in the Benelux countries, Italy, the Scandinavian countries, the United Kingdom and the United States of America. This proved to be a useful introduction to the understanding of each others' problems and to the clarification of terminology, somewhat vague and far from being uniform in the different countries of the world.

It was agreed that the discussions related to the subject matter that includes designs and works of applied art.

It was generally agreed that a *sui generis* protection for the subject matter, the minimum scope of which is indicated later in this report, was desirable. This, however, does not mean that countries which wish to do so may not give the same subject matter, in certain cases, protection both under the copyright law and the *sui generis* design law. Some experts expressed clear preference for a strict delimitation of the subject matters susceptible of copyright protection from the subject matters susceptible of design protection. They were of the opinion that it is helpful to the public to know whether a given subject matter falls under the design law only since if it does, copying will become free sooner. But other experts, particularly Professor Eugen Ulmer (Federal Republic of Germany) and Mrs. Julie Olsen and M. W. Wenické (Denmark) felt that the so-called double protection did not involve appreciable practical difficulties and has the advantage of giving the cumulative benefits of both laws in some cases.

In view of these conflicting views, and particularly on the suggestion of the French experts, it was held that the choice between single protection (either copyright or design) and double protection (both copyright and design) must be left at the option of each country. Thus, each country should be able to maintain a régime under which copyright and *sui generis* design protections are mutually exclusive, or, if it so wishes, it should be able to maintain a system of cumulative protection.

As to the *sui generis* design protection, the experts discussed the question whether it should be based on what Mr. W. Wallace (United Kingdom) called

3. Mr. G. Finnis (France), rapporteur general of the Lisbon Conference, has recalled that the task of the Study Group, according to the terms of that Conference, consisted in a better coordination between the provisions of the industrial property and copyright conventions in order to insure more effective international protection of works of applied art and designs.

"the copyright approach" or on what he called "the patent (or industrial property) approach". Under both approaches, as particularly pointed out by Mr. P. J. Federico (United States of America), originality is required in the sense that the design was created by the head and hand of its author, without copying a pre-existent work of another person. Under the patent approach, in addition to being original, the design must be also new or novel, that is, it must be different from anything else that existed before it, with or without territorial or time limits in looking for pre-existing designs.

"Originality" in some countries means novelty in the sense that the later design represents a striking advance over existing designs. Taken in this sense, the concept of originality is akin to the concept of inventiveness or unobviousness. Without marking any preference for either interpretation, but in order to simplify the discussions, this special kind of originality (inventiveness) is treated as novelty for the purposes of this report.

The Study Group was unanimous in recognizing the practical difficulties that a requirement of novelty frequently entails. Most experts were of the opinion that a *sui generis* design protection should be based on the copyright approach, rather than the patent approach; others, however, and among them particularly Professor G. H. C. Bodenhausen (Netherlands) were of the contrary opinion. But whatever were the preferences in principle, it was recognized that each country should be free to maintain or adopt the requirement of novelty. More is said about this question in a later paragraph.

After this preliminary exchange of views on some of the basic principles of protection, the Study Group directed its attention to the questions of international protection itself, in the following order: (1) minimum scope of the subject matter, (2) the requirement of novelty, (3) minimum rights, (4) minimum term of protection, and (5) formalities.

#### *Minimum scope of the subject matter of protection.*

Subject to the understandings stated below, the Study Group held that what each country should agree to protect, as a minimum, are:

"articles having a useful purpose in so far as their ornamental form or aspect is concerned."

("les objets ayant un but utilitaire pour autant que leur forme ou leur aspect aient ont un caractère ornemental").

Messrs. G. Talamo Atenolfi and M. Roscioni (Italy) disagreed with the above phrasing and their proposal is discussed in a later paragraph.

The Study Group agreed that the above text should be understood as having the following meaning:

(a) The protection that each country grants may be by virtue of the copyright legislation, or the design legislation, or industrial property legislation, or another law, or several of them.

(b) The quoted text is not an all-inclusive or exclusive definition. Things not mentioned in the text may be protected by any country. It is a designation of the minimum subject matter. Any national law may embrace into its protection more. But no country can refuse protection to the subject matter covered by the text.

(c) In particular, each country may protect the plans for the said articles. But no country has to protect such plans as designs. Of course, the protection of such plans may be obligatory under the copyright laws, for example, as artistic paintings or artistic drawings or, as among others, in the Italian law, engineering drawings.

(d) No country would be compelled to protect the shape or pattern of articles in so far as that shape or pattern is dictated solely by the useful function the article is intended to perform.

(e) "Form" is intended to refer to the three-dimensional elements, whereas "aspect" also to the two-dimensional elements of the article.

(f) "Ornamental" is used in its broadest sense and refers to all elements of the article itself which are intended to be pleasing to the eye.

(g) The possible requirement of novelty and other possible prerequisites of protection are discussed later separately.

According to the proposal of the Italian experts what each country should agree to protect are:

"the form and (or) the configuration of objects which present an aesthetic character and a useful purpose"

("la forme et (ou) la configuration d'objets qui présentent un caractère esthétique et un but utilitaire.")

It has been explained by the Italian experts that they prefer their text because it emphasizes that the subject matters of protection are certain characteristics of the article rather than an article having certain characteristics. On the other hand, the majority proposal, as explained in particular by Mr. C. J. De Haan, intends to emphasize that although protection may start earlier, the obligation of protection, under the minimum text, starts only when the design exists in an article. The Italian proposal is not at variance with this latter intent.

#### *The requirement of novelty.*

Some countries require that designs be novel for being protectible under the sui generis laws or patent laws. In view of this fact, it was agreed by the Study Group that it would probably be unrealistic to hope for a viable international agreement prohibiting the requirement of novelty.

The incidences of a novelty requirement, with or without administrative examination for novelty, will be discussed later in this report in connection with the questions of international deposit.

*Minimum Rights.*

It was unanimously agreed that protection should, as a minimum, entail protection against copying, that is, the unauthorized making of articles similar to the protected articles. In this sense, the publication of the picture of a protected article in a newspaper is not copying.

Of course, every country would be free to grant protection against acts other than copying. Thus, for example, any country would be free to prohibit the unauthorized publication of the picture of a protected article in a book or newspaper; or its showing on television; or its filming, or the sale or importation of infringing copies by another person than the copyist. But no country would be obliged to enact such prohibition as a matter of design protection.

*Minimum Term of Protection.*

After an exchange of views of the desiderata of the creators and the industries, particularly among Messrs. G. H. C. Bodenhausen (Netherlands), G. Finnis (France), P. Dalsimer (Adviser, U.S.A.), and E. Matter (Switzerland), the great majority of the Study Group expressed the opinion that protection should last at least ten years (possibly consisting of two parts, that is, renewal for five years after the first five years elapse); but one expert would have preferred a minimum of five years, whereas another, a minimum of more than ten years. The question of the starting point of the term of protection was discussed but no concrete conclusions resulted.

*Formalities.**(a) Deposit and Registration and their effects.*

The Study Group was unanimous in holding that, in the envisaged framework, a system of international deposit and registration was desirable and that it should be maintained by the United Bureaux.

The Study Group agreed that the effect of the international deposit and registration should be that it makes separate deposits and registrations in each foreign country unnecessary. Naturally, an applicant, if he prefers, may deposit in individual countries in addition to or without effecting the international deposit.

Forwarding the applications to the International Bureaux by the registration office of the applicant's country of origin was mentioned as a possibility in addition to direct application by the applicant to the International Bureaux.

The Study Group was unanimous in holding that whereas international deposit should make local deposits in foreign countries unnecessary and would result in presumptions in favour of the applicant, other requirements of the domestic law, such as the requirement of originality, and, under some laws, that

of novelty, may have to be still met. In order to reduce the uncertainty of eligibility for protection under laws providing for preliminary examination for novelty, the Study Group suggested the following solution: a country having such a law should, within a relatively short time, for example, 6 months from the publication of the international registration, notify the International Bureaux if, after examination, it finds that the design does not appear to be novel. Such a communication would serve as a warning that the design in that country is probably not eligible for protection; whether it is, would, of course, be still subject to administrative appeal procedures or court determination.

In countries like Italy where novelty is required, although not examined administratively, the design, even if deposited internationally, will not be protected if novelty were missing. But, of course, if internationally deposited, the lack of local deposit would be no ground for refusing protection by a foreign country.

Some experts suggested that, in a country where protection starts not on the date of filing the application or some other date, but on the date of the issuance of the certificate of registration, protection could start on that date; such national certificate would, however, be issued or refused on the basis of the international deposit and no separate application would have to be made to the domestic registration office of such foreign country.

#### *(b) Sealed and Open Deposits.*

Several experts declared that it was wholly unlikely that their laws would recognize the effects of an international deposit if made under seal ("secret deposit"). Others, particularly Professor Eugen Ulmer (Germany), stressed the importance of maintaining sealed deposits because if a deposit is permitted and is made before the first sale of the articles, not only copying but also the appropriation of a novel style trend is conceivable and must be prevented.

As a compromise, it was suggested that two international registers be maintained, one for open deposits, and another for sealed deposits. The first would be effective between all countries, the latter between those which, in their domestic laws, know the system of sealed deposits.

#### *(c) Publication of Registrations.*

It was suggested that in the case of open deposits, the registrations, accompanied by the pictures of the design, be published. It was unanimously agreed by the Study Group that the International Bureaux should give such publicity to the registrations as will sufficiently inform the foreign governments and the general public of the deposits made.

(d) *Registration Fees.*

There was general agreement that the fixing of the fees of the international registration was an important matter, involving the financial interests of the applicants, the national governments and the International Bureaux. Messrs. François Hepp, Jacques Duchemin and Rudolf Blum, representing, respectively, the International Chamber of Commerce, the International Literary and Artistic Association, and the International Association for the Protection of Industrial Property, emphasized the importance for creators, commerce and industry of keeping the fees on a reasonably low level. It was agreed on the suggestion of Mr. G. Finniss (France) that the fees should be so limited that they cover only the expenses of the International Bureaux connected with the international registration service.

It was also suggested that each applicant should be able to name those foreign countries in which he desires the international deposit to have effect, and that the amount of the fees should depend also on the number of the countries so designated. Also, that the international registration should be on a basis of several renewals, and for each renewal a new fee should be collected, and that renewals should be possible as long as there is protection for the registered design in the country having the longest term of protection. Finally, that the number of designs included in a multiple deposit should be reasonably limited.

(e) *Notice.*

The Conventions of the Paris Union provide in effect that the marking of the articles by a notice or otherwise cannot be made a condition of recognition of the right to protection for designs. This provision, however, does not exclude the right of each country to make the granting of certain remedies dependent on the presence of a notice. As a matter of fact, some twenty countries today provide for notices on the articles.

Since the form of these notices varies from country to country and since it is essential that foreigners have at their disposal the full arsenal of remedies for effective protection, the Study Group unanimously agreed that consideration should be given to providing for an optional design notice, for example a "d" in a circle, and either a year date and the name of the claimant, or the international registration number. Articles bearing such a notice would have all the remedies even if they do not bear the notices prescribed by the domestic laws of the foreign countries.

Mr. P. Poirier (Belgium) emphasized in this respect that it would be preferable if all remedies were available irrespective of the presence of a notice on the articles.

The last question discussed by the Study Group related to the *locus* of the provision which might result if their recommendations on principles were, at a later stage, to become treaty provisions.

In this respect, and subject to a reservation of the French experts which appears in Annex B, the Study Group, as expressed particularly by Messrs. De Haan, Morf, Ulmer, Wallace and Bogsch, agreed that, in principle, it is preferable not to multiply the number of the existing international instruments and that, consequently, it was desirable that any provisions on which agreement will be possible should preferably become amendments to the Hague Arrangement on the International Deposit of Industrial Designs and Models. It was recognized, of course, that if the amendments were along the lines of the principles envisaged by the present Study Group, the nature itself of that Arrangement would change, as it would no longer be an instrument on the international deposit of industrial designs only, but also an instrument dealing with the substantive law side of the protection of the ornamental elements of useful articles. Consequently, adherence to the instrument would no longer be limited to countries members of the Paris Union. In any case, the task of international registration should remain the sole duty of the International Bureaux.

Lastly, it appeared to be evident that all suggestions on the *locus* of the provisions are necessarily tentative until the results of the preparatory committee for the diplomatic conference, and the diplomatic conference itself, to be convened by the Dutch Government and the International Bureau for the revision of the Hague Arrangement, are known.

The Study Group recommends that its report be sent to the governments of the countries members of the Paris or Berne Union or parties to the Universal Copyright Convention, to the Permanent Committee of the Berne Union, the Consultative Committee of the Paris Union, and the Intergovernmental Copyright Committee.

## ANNEX B

### *Statements made by the French and Italian Experts:*

#### *(a) Statements made by the French Experts.*

"The French Experts believe it necessary to make the following statement and reservation on the following points:

"They are of the opinion that the Study Group was unable to completely fulfill the task assigned to it by the joint resolutions and which was directed particularly toward insuring coordination between the provisions of the three Conventions;

"They are of the opinion that it is not desirable simply to incorporate the provisions concerning the proposed protection into the Hague Arrangement and that it would be preferable that a new convention taking into account the

questions raised by the application of the three existing Conventions and separate from the instruments dealing exclusively with industrial property be later envisaged;

"They remark that in their opinion the recommendations contained in the report do in no respect determine the sense in which the Hague Arrangement might be revised by governmental delegates."

*(b) Statement made by the Italian Experts.*

"The Italian Experts, as far as they are concerned and taking into account the reservations made by the French Experts, express, with respect to the present discussions as from now and subject to further consideration, such reservations which might be suggested by the present state of the Italian legislation and case law."

239. THE ELEVENTH CONFERENCE OF THE INTER-AMERICAN  
BAR ASSOCIATION

*(Miami, April 10-19, 1959)*

*Foreword*

At a meeting of the Inter-American Bar Association held in Miami, Florida, from April 10-19, 1959, the Section on Intellectual and Industrial Property of Committee V on Civil Law, under the Chairmanship of William E. Anderson of Chicago, adopted the following Resolutions, which Resolutions were in turn adopted by the Council of the Inter-American Bar Association:

RESOLUTIONS

1. *Resolved:* (a) That the Eleventh Conference of the Inter-American Bar Association reaffirms the previous recommendations of the Ninth and Tenth Conferences for the establishment and maintenance of a service within or outside of this Association to make readily available the current laws of all member states relating to the protection of Industrial and Intellectual property; and (b) that a copy of this Resolution be transmitted to the Organization of American States for appropriate action.

2. *Resolved:* The Eleventh Conference of the Inter-American Bar Association recommends that the organizations which comprise the Association promote the study in their countries of protection of so-called "neighboring" or "related" rights with a view to determining the extent to which such protection

may be established, compatible with the common law and the law of copyrights, as to the existing practices in matters such as interpretation, recording and broadcasting (audio and video) of literary and artistic works.

3. *Resolved:* (a) That the Eleventh Conference of the Inter-American Bar Association ratifies the Association's previous recommendation of adherence to the Universal Copyright Convention by the nations of the Americas not now members of that Convention; (b) That such nations amend their domestic law to the extent necessary to permit such adherence; and (c) That the Secretary-General of the Association communicate this resolution to the Organization of American States.

4. *Resolved:* (a) That consideration be given by the countries represented in the Inter-American Bar Association to the various problems arising out of acts of unjust enrichment and unfair competition in connection with intellectual and industrial property for which no adequate relief is provided by present domestic law; and (b) That this resolution be forwarded to the Organization of American States with a view to considering the subject in any future Inter-American Bar conference.

5. *Resolved:* (a) That the respective countries represented in the Inter-American Bar Association which have not already done so give consideration to elimination of the requirement for legalization and authentication of documents required in connection with applications for and renewals of patents, trademarks, and copyrights; and (b) That a copy of this resolution be submitted to the Organization of American States for appropriate action.

## 240: THE UNIVERSAL COPYRIGHT CONVENTION ANALYZED FROM THE INTER-AMERICAN POINT OF VIEW

By THEODORE R. KUPFERMAN<sup>1</sup>

*Editor's Note:* In connection with the consideration of the foregoing Resolutions, Mr. Kupferman, as Chairman of the discussion on "Interpretation of the Universal Copyright Convention and the Effects on Inter-American Economic Relations", presented the following paper:

The Universal Copyright Convention (sometimes herein referred to as U.C.C.) was formulated in final form and adopted at Geneva, Switzerland, on September 6, 1952. Fifty countries were represented by some 97 delegates at Geneva, and 36 countries signed the Convention at the time and four more within the next four months. From the Western Hemisphere there were 14 signatories being Argentina, Brazil, Canada, Chile, Cuba, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Peru, El Salvador, United States and Uruguay. It will be noted that I include Canada, for this purpose, in the group, although further references to the Americas will exclude Canada.

The United States has never been a party to an international agreement covering copyright such, e.g. as the Berne Convention, although it had been a party to certain bilateral and multilateral arrangements. Brazil is the only American nation which is a member of the Berne Union. Haiti had been a member from 1887 until March, 1943 when it withdrew.

Certain changes were required in the United States Copyright law, 17 U.S. Code, to make adherence by it to the Universal Copyright Convention possible. The revision was passed by the U. S. Congress and approved on August 31, 1954 as Public Law 743 of the 83rd Congress (Chapter 1161-2d Session, H.R. 6616). However, Section 4 of Public Law 743 specifically provided it would take effect "upon the coming into force of the Universal Copyright Convention in the United States of America."

President Eisenhower on November 5, 1954 signed the instrument of ratification of the Convention after approval by the United States Senate. The Convention became effective on September 16, 1955 when the requisite twelve countries had ratified it.

Of these twelve, Chile, Costa Rica, Haiti and the United States were from the Americas.

1. Mr. Kupferman, a member of the New York Bar, is Chairman of the Committee on International Copyright and Trade Mark Relations of the Section of International and Comparative Law of the American Bar Association, General Attorney for Cinema Production Corp., and former President of the Federal Bar Association of New York, New Jersey and Connecticut.

Since the adoption of the Convention in 1952, 31 nations have ratified it.<sup>2</sup> In addition to the four already mentioned, from the Americas, these include Argentina, Cuba, Ecuador and Mexico.

There were only two multipartite copyright conventions ratified by the United States prior to the U.C.C., and they both concerned only countries of the Western Hemisphere. The first was the Mexico City Convention of 1902 adhered to also by Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua. This Convention required registration and deposit of copies of the work in the countries in which protection is desired, which formalities are accomplished through submission of sufficient copies to the Copyright Office of the author's own country.

The second was the Buenos Aires Convention of 1910 (Fourth International Conference of American States) which was ratified by all of the American countries except Cuba, El Salvador and Venezuela. Mexico ratified it only as recently as January 5, 1953, but did not deposit the instrument of ratification. The Buenos Aires Convention accords automatic protection in all countries party to the Convention without compliance with formalities if the work contains a statement reserving the property right. This is the derivation of the statement in many copyright notices of "All rights reserved."

The United States signed but never ratified the Washington Convention of 1946 and it was not a party to three other Pan-American Conventions, 1889 Montevideo Convention, 1906 Rio de Janeiro, and 1928 Havana revision of the Buenos Aires 1910 Convention. The Montevideo Convention of 1889, which is now outdated, allowed adherence by all nations, subject to acceptance by signatory nations. The other five Conventions are restricted to the United States and Latin America.<sup>3</sup>

The Buenos Aires Convention is considered unsatisfactory for complete Americas protection because it has been held in the United States not to cover mechanical reproduction rights<sup>4</sup> and recordings are today an important factor in the industrial economy. Also, the status of translation rights is not clear and protection for unpublished works is questionable.

The U.C.C. has a number of provisions of special interest to the American Republics.

2. The Philippines on November 14, 1955, one day prior to the effective date of its accession, notified UNESCO in Paris that the instrument of accession was withdrawn.
3. "Interrelation between the Universal Copyright Convention and the Pan-American Copyright Conventions" by Harry G. Henn, at p.128 in *Universal Copyright Convention Analyzed*, edited by Theodore R. Kupferman and Matthew Foner with a Panel of Experts (Federal Legal Publications, 1955).
4. *Todamerica Musica v. RCA*, 171 F(2d) 369 (2d Cir. 1948). The specific situation in this case involving Brazil has now been covered by the Presidential Proclamation of April 2, 1957. See Federal Register, Vol. 22, No. 67, April 6, 1957 page 2305.

1) In order to agree upon the most suitable method of harmonizing their own copyright system, created by Pan American Conventions, with the universal system being proposed, the American republics held a meeting of Copyright Experts at the Pan American Union in 1952. At that meeting the American experts formulated a clause for the purpose and submitted it for study to the American Governments, this clause later becoming Article XVIII of the U.C.C. It reads as follows:

"This Convention shall not abrogate multilateral or bilateral copyright conventions or arrangements that are or may be in effect exclusively between two or more American Republics. In the event of any difference either between the provisions of such existing conventions or arrangements and the provisions of this Convention, or between the provisions of this Convention and those of any new convention or arrangement which may be formulated between two or more American Republics after this Convention comes into force, the convention or arrangement most recently formulated shall prevail between the parties thereto. Rights in works acquired in any Contracting State under existing conventions or arrangements before the date this Convention comes into force in such State shall not be affected."

2) As to languages, Article XVI of the Convention provides:

"1. This Convention shall be established in English, French and Spanish. The three texts shall be signed and shall be equally authoritative.

2. Official texts of this Convention shall be established in German, Italian and Portuguese."

3) Pursuant to Article XI, an Intergovernmental Committee of twelve States is established to study "problems concerning the application and operation" of the U.C.C. and other international copyright problems, prepare for periodic revision, and "inform the Contracting States as to its activities."

With the due regard for "fair geographical representation" required by Article XI(2), a Resolution was passed in conjunction with the Convention naming for limited terms Argentina, Brazil, Mexico, and the United States to this Committee. The last session of the Intergovernmental Copyright Committee, its third, was held at Geneva, Switzerland, in August, 1958, in conjunction with the meeting of the Berne Copyright Union's 7th Session. The second session was held in Washington, D. C. in October, 1957.

As to substantive provisions, the basic purpose of the U.C.C. is to harmonize the existing national copyright laws on a simplified basis.

Each country, upon the coming into force of the Convention, must accord to authors or owners of foreign works of U.C.C. origin, protection similar to that accorded its own nationals.

In addition, to be sure that granting to the author of a foreign work the local national treatment has some substantive meaning, there are certain minima set forth which must be included in the local law.

The minima are a) exclusive translation rights for at least seven years, Art. V; b) minimum general protection; c) minimum duration of copyright, Art. IV; d) protection for unpublished works, Art. II; e) and protection without formalities except the requirement of the U.C.C. form of copyright notice.

The U.C.C. is a compromise between the two almost diametrically opposed theories of copyright set forth in the Pan-American and Berne Union copyright systems.

The European concept gives broad protection to an author and his heirs automatically upon creation of the work without formalities. In the Americas, compliance with prescribed formalities is generally required. In fact, Argentina and the United States while joining the U.C.C. and accepting the less restrictive practice for works of non-national origin, have for their own nationals retained the more complex requirements.<sup>5</sup>

It is thus possible to amend the domestic law as required by the U.C.C. Art. X to give effect to the terms of the Convention, while retaining the original local approach for nationals.

Participation in the Convention will not only significantly improve the protection accorded to the private interests of Western Hemisphere nationals abroad and in the Western Hemisphere, but will make a substantial contribution to the general relations of the Inter-American countries with the other countries of the free world.

Adherence to the Convention is desirable from the viewpoint of both creators and users of literary and musical property in the Western Hemisphere so that reciprocal protection may be obtained. Especially for Latin-American music, which has world value, is U.C.C. protection of great economic significance.

It is no longer problematical as to which countries will join the Convention and grant U.C.C. protection. The most advanced cultural countries in the world are now members.

Of the original signatories at Geneva to the U.C.C. on September 6, 1952, there are still 7 members of the Organization of American States that have not yet ratified the Convention, being Brazil, Guatemala, Honduras, Nicaragua, Peru, El Salvador and Uruguay, while two which were not original signatories have ratified the Convention, being Costa Rica and Ecuador.

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5. "Ratification by Argentina of the Universal Copyright Convention and its Effect on Internal Argentine Law", by Eduardo F. Mendilaharsu, *La Ley*, Buenos Aires, March 16, 1958, and distributed to sustaining members of The Copyright Society of the U.S.A. in English, June, 1958.

Until all of the adherents of the Buenos Aires Convention ratify the Universal Copyright Convention to protect works in the Americas, qualification should be had under both Conventions with the proper minimum U.C.C. Copyright notice:© with name of copyright proprietor and the year of securing copyright, and the Buenos Aires "All rights reserved".

## 241. CURRENT STATE OF INTERNATIONAL COPYRIGHT CONVENTIONS FOR AMERICANS

By STANLEY ROTHENBERG

The membership of the Universal Copyright Convention,<sup>1</sup> which became effective September 16, 1955, is as follows (Copyright Office Circular No. 37, Annex A, November 1958):

<i>Country</i>	<i>Effective Date</i>	<i>Country</i>	<i>Effective Date</i>
Andorra .....	September 16, 1955	Italy .....	January 24, 1957
Argentina .....	February 13, 1958	Japan .....	April 28, 1956
Austria .....	July 2, 1957	Laos .....	September 16, 1955
Cambodia .....	September 16, 1955	Liberia .....	July 27, 1956
Chile .....	September 16, 1955	Liechtenstein .....	January 22, 1959
Costa Rica .....	September 16, 1955	Luxembourg .....	October 15, 1955
Cuba .....	June 18, 1957	Mexico .....	May 12, 1957
Ecuador .....	June 5, 1957	Monaco .....	September 16, 1955
France .....	January 14, 1956	Pakistan .....	September 16, 1955
German Federal		*Philippines .....	November 19, 1955
Republic .....	September 16, 1955	Portugal .....	December 25, 1956
Haiti .....	September 16, 1955	Spain .....	September 16, 1955
Holy See .....	October 5, 1955	Switzerland .....	March 30, 1956
Iceland .....	December 18, 1956	United Kingdom of Great	
India .....	January 21, 1958	Britain and Northern	
Irish Republic .....	January 20, 1959	Ireland .....	September 27, 1957
Israel .....	September 16, 1955	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 with-*

1. For the text of the Convention and comments thereon, see Rothenberg, Copyright Law; Basic & Related Materials (New York, 1956).

*drawal 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.*

In order for a national of the United States, one of the above-listed member states, to secure copyright protection for his published works in each other member state,<sup>2</sup> it is sufficient that "from the time of the first publication all the copies of the work published with the authority of the author or other copyright proprietor bear the symbol © accompanied by the name of the copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of copyright."<sup>3</sup>

A publication in the United States with the foregoing notice of copyright,<sup>4</sup> if properly located on the work,<sup>5</sup> will also secure United States copyright for the United States national.<sup>6</sup>

It is the practice in many American industries engaged in the production and distribution of copyrightable works (e.g., motion pictures, books, music), to arrange for a "simultaneous publication" in Canada or Great Britain when first publication of a work takes place in the United States. The purpose of this foreign publication is to secure copyright protection in member states of the Berne Union.

The Union consists of the states which have adhered to the various ver-

2. Article II (1.). Published works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory.
3. Article III (1.); Paragraph 2 provides: The provisions of paragraph 1 of this article shall not preclude any Contracting State from requiring formalities or other conditions for the acquisition and enjoyment of copyright in respect of works first published in its territory or works of its nationals wherever published.
4. Title 17, United States Code, §19.
5. Title 17, United States Code, §20: The notice of copyright shall be applied, in the case of a book or other printed publication, upon its title page or the page immediately following, or if a periodical either upon the title page or upon the first page of text of each separate number or under the title heading, or if a musical work either upon its title page or the first page of music. One notice of copyright in each volume or in each number of a newspaper or periodical published shall suffice.
6. If the publication takes place outside of the United States and the work is a printed book or periodical in the English language, the United States national must observe the requirements of Sections 22 and 23 (Ad interim protection) of the Copyright Act, i.e., Title 17 United States Code, in order to secure United States copyright. If the printed book or periodical is not in the English language, the first publication abroad may not serve as the basis for United States copyright for a United States national, irrespective of copyright notice or ad interim registration.

sions of the Berne Convention. Phrases such as "members of the Berne Convention" are loose expressions since the Convention consists of several texts and each Union state is only bound to grant protection to works of (and entitled to receive protection for its works from) the states which are parties to the same text (or texts).<sup>7</sup> For example, since Canada is not a party to the 1948 Brussels Revision, works which seek Berne protection as a result of Canadian publication (thereby being deemed Canadian works)<sup>8</sup> will secure protection in the member states which are a party to the Rome Revision of 1928 and pursuant to said text. Fortunately, virtually all the members of the Union have adhered to the Rome Revision. The exception (other than the Philippines and Turkey) is a member of the 1908 Berlin text so that protection is secured therein pursuant to said text in view of Canada's adherence to the earlier texts in addition to its accession to the Rome Revision.<sup>9</sup> Protection is not secured, however, in the Philippines and Turkey because they have only adhered to the 1948 Brussels Revision to which Canada has not yet acceded. In the light of the accession of Great Britain to each text of the Berne Convention maximum Berne Union protection will be secured by virtue of publication simultaneously in Britain.<sup>10</sup>

Due to the adherence of considerably more states to the 1948 Rome Revision than to the 1948 Brussels Revision simultaneous publication should be directed to compliance with the earlier text. Thus the Brussels provision that "A work shall be considered as having been published simultaneously in

7. Article 27 (1) of the 1948 Brussels Revision of the Berne Convention provides: This Convention shall replace, in relations between the Countries of the Union, the Convention of Berne of the 9th September 1886, and the subsequent revisions thereof. The instruments previously in force shall continue to be applicable in relations with Countries which do not ratify this Convention.
8. Article 6, paragraph 1 and 2, of the 1928 Rome Revision provide: (1) Authors not within the jurisdiction of any one of the countries of the Union, who publish their works for the first time in one of the Union countries, enjoy in such Union country the same rights as native authors, and in the other countries of the Union the rights accorded by the present Convention. (2) Nevertheless, when a country outside of the Union does not protect in an adequate manner the works of authors within the jurisdiction of one of the countries of the Union, this latter Union country may restrict the protection for the works of authors who are, at the time of the first publication of such works, within the jurisdiction of the non-union country and are not actually domiciled in one of the countries of the Union.
9. The country adhering to the 1908 Berlin Revision and not to either of the later texts is Thailand (Siam).
10. For the list of adherents to the Rome and Brussels texts, see below, and for the adherents to the various texts of the Convention, see *Le Droit d'Auteur*, January, 1958; *Le Droit d'Auteur*, January 1953; Ladas, *The International Protection of Literary and Artistic Property*, vol. I, pp. 121-122 (New York, 1938).

several Countries which has been published in two or more Countries within thirty days of its first publication" should only be relied upon where circumstances simply do not allow publication in the Berne country on the same day as it is taking place outside the Union.

The adherents, and their date of accession, to the 1928 version of the Convention are as follows:

Australia .....	Jan. 18, 1935	Lebanon .....	Dec. 24, 1933
Austria .....	July 1, 1936	Liechtenstein .....	Aug. 30, 1931
Belgium .....	Oct. 7, 1934	Luxembourg .....	Feb. 4, 1932
Brazil .....	June 1, 1933	Monaco .....	June 9, 1933
Bulgaria .....	Aug. 1, 1931	Morocco .....	Nov. 25, 1934
Canada .....	Aug. 1, 1931	Netherlands .....	Aug. 1, 1931
Czechoslovakia .....	Nov. 30, 1936	New Zealand .....	July 4, 1947
Denmark .....	Sept. 16, 1933	Norway .....	Aug. 1, 1931
Eire .....	June 11, 1935	Pakistan .....	July 5, 1948
Finland .....	Aug. 1, 1931	Poland .....	Nov. 21, 1935
France .....	Dec. 22, 1933	Portugal .....	July 29, 1937
Germany .....	Oct. 21, 1933	Roumania .....	Aug. 6, 1936
Great Britain .....	Aug. 1, 1931	Spain .....	April 23, 1933
Greece .....	Feb. 25, 1932	Sweden .....	Aug. 1, 1931
Hungary .....	Aug. 1, 1931	Switzerland .....	Aug. 1, 1931
Iceland .....	Sept. 7, 1947	Syria .....	Dec. 24, 1933
India .....	Aug. 1, 1931	Tunisia .....	Dec. 22, 1933
Indonesia .....	Oct. 1, 1931	Union of South	
Israel .....	March 24, 1950	Africa .....	May 27, 1935
Italy .....	Aug. 1, 1931	Vatican City .....	Sept. 12, 1935
Japan .....	Aug. 1, 1931	Yugoslavia .....	Aug. 1, 1931

Although the "simultaneous publication" should comply with the Rome definition to insure securing maximum territorial protection, the use of Great Britain for said purpose will not only add Turkey and the Philippines to the above list but the protection secured in the member countries of the Brussels Revision will be broader than if the copyright therein were to be measured by the terms of the Rome Revision, as would be the case with a Canadian publication.<sup>11</sup> In other words, those countries which are adherents to both the Rome and Brussels texts will grant protection pursuant to the later Revision to an American work published simultaneously in Great Britain.

11. Substantial differences between the Rome and Brussels Revisions are noted in Rothenberg, *supra* note 1, 438-54.

The adherents, and their date of accession, to the 1948 version of the Convention are as follows:

Austria .....	Oct. 14, 1953	Morocco .....	May 22, 1952
Belgium .....	Aug. 1, 1951	Philippines .....	Aug. 1, 1951
Brazil .....	June 9, 1952	Portugal .....	Aug. 1, 1951
France .....	Aug. 1, 1951	Spain .....	Aug. 1, 1951
Great Britain .....	Dec. 15, 1957	Switzerland .....	Jan. 2, 1956
Greece .....	Jan. 6, 1957	Tunisia .....	May 22, 1952
India .....	Oct. 21, 1958	Turkey .....	Jan. 1, 1952
Israel .....	Aug. 1, 1951	Union of South	
Italy .....	July 12, 1953	Africa .....	Aug. 1, 1951
Liechtenstein .....	Aug. 1, 1951	Vatican City .....	Aug. 1, 1951
Luxembourg .....	Aug. 1, 1951	Yugoslavia .....	Aug. 1, 1951
Monaco .....	Aug. 1, 1951		

If the "simultaneous publication" does not comply with the Rome requirement but only with the 30-day provision of the Brussels text or takes place in the Philippines or Turkey (which are not parties to the earlier texts) then Berne protection will be available in the 22 Brussels nations listed above instead of in the 41 Rome nations enumerated previously and Siam, the Philippines and Turkey.

This brings us to the question: since Universal Copyright Convention protection can be obtained simultaneously with United States copyright by virtue of the alternative U.C.C. copyright notice permitted under the Copyright Act, how important is it to continue the above mentioned practice of "simultaneous publication" under the Berne Convention? That is to say, how many Berne Union countries are not adherents to the Universal Copyright Convention?

The Berne countries which do not adhere to the U.C.C. are as follows:

Australia	Greece	Poland
Belgium	Hungary	Roumania
Brazil	Indonesia	Siam
Bulgaria	Lebanon	Sweden
Canada	Morocco	Syria
Czechoslovakia	Netherlands	Tunisia
Denmark	New Zealand	Turkey
Finland	Norway	Union of South Africa
German Democratic	Philippines <sup>12</sup>	Yugoslavia
Republic (East Germany)		

12. See asterisk at the beginning of this article.

It thus becomes apparent that twenty-seven nations are not concerned with a U.C.C. publication but are covered by a "simultaneous publication" in Great Britain.<sup>13</sup> Although several of the twenty-seven are behind the "Iron Curtain", many on the list are important sources of income for American works.

The foregoing raises the additional question: Is the "simultaneous publication" in Great Britain sufficient? That is to say, how many U.C.C. countries (other than the United States) are not adherents to Berne?

The U.C.C. countries which do not adhere to one of the texts of the Berne Convention are as follows:

Andorra	Chile	Ecuador	Liberia
Argentina	Costa Rica	Haiti	Mexico
Cambodia	Cuba	Laos	Philippines <sup>14</sup>

From the foregoing it might appear that not very much is lost by failure to use the U.C.C. copyright notice, since several of the above-listed twelve countries are members with the United States in the Buenos Aires Convention. This view would overlook, however, the fact that much greater copyright security is obtained when an American can claim protection in Berne countries by virtue of U.C.C. (i.e., direct treaty obligation to the United States), rather than through the fiction of claiming rights in a Canadian or British work and being subject to varying definitions of "simultaneous publication". Thus the measure of importance of the U.C.C. copyright is more accurately reflected in the list of nations which are adherents to *both* conventions. Said countries are:

Austria	Israel	Pakistan
Eire	Italy	Portugal
France	Japan	Spain
German Federal Republic	Liechtenstein	Switzerland
Iceland	Luxembourg	Great Britain
India	Monaco	Vatican City

In sum, in view of the distinct gain from coming within the protection of the Universal Copyright Convention and the Rome and Brussels Revisions of the Berne Convention (in addition to United States copyright), it is suggested that the work be "simultaneously published" in Great Britain (or another Brussels adherent other than Turkey and the Philippines) and that it bear the copyright notice prescribed by the Universal Copyright Convention, located on the work as required by the United States Copyright Act. In addi-

13. Incidentally, it should be noted that although Great Britain is continually referred to herein as the place of "simultaneous publication," for purposes of maximum Berne protection it may occur as effectively in any of the other members of the Brussels Revision except the Philippines and Turkey.

14. See asterisk at the beginning of this article.

tion, by adding the phrase, "All rights reserved," there will be compliance with the notice provision of the Buenos Aires Convention and an additional group of foreign copyrights will be obtained, five of which are covered by the Universal Copyright Convention, as noted above.<sup>15</sup> The members of the Convention, which are Latin American countries except for the United States, are as follows:

Argentina	Dominican Republic	Nicaragua
Bolivia	Ecuador	Panama
Brazil	Guatemala	Paraguay
Chile	Haiti	Peru
Colombia	Honduras	United States
Costa Rica		Uruguay

15. For the text of the Buenos Aires Convention, see Rothenberg, *supra*, note 1, 469-73.

242.

## 'GHOST' WRITING

By EDMUND SKONE JAMES

*Editor's Note:* Reprinted from LXIX *The Author* 74-5 (No. 3, Spring 1959), with the kind permission of Mr. Skone James and the publishers, The Society of Authors, London.

A common type of 'ghost' writing was referred to by Mr. Justice Harman in the recent case of *Housden v. Marshall*.<sup>1</sup> "This kind of case", he said, "arises either as a result of something emanating from the famous, as for instance, Lord Haig, the soldier, and Steve Donoghue, the jockey; or from the infamous, such as William Cooper Hobbs (blackmail, forgery and arson). Either category can produce money, particularly, I think, from the Sunday newspapers, because the public likes to read at its ease before the fireside sensational reminiscences of either of these two categories of persons. They are not usually, in fact, strictly speaking, reminiscences of these persons at all; they are written by what are called 'ghost' writers. The celebrated or notorious character communicates this or that to the 'ghost' and may, as here, allow his signature to be used to give an air of reality to an otherwise bald and unconvincing narrative."

1. 1959 Weekly Law Reports 1.

'Ghost' writing is not of course confined to writers of reminiscences but includes all writers of articles for which another gets the credit, usually because that other's name is appended to the work. The most important considerations, in such circumstances, are to determine whether there is any copyright and, if so, in whom it is vested.

For there to be any copyright, there must be a work that is, in the case of literary works, something written: there is no copyright in ideas, only in their expression. Thus in the case of 'ghost' writing, if, for instance, a celebrity merely retails his reminiscences to another who then produces an article therefrom, the celebrity has no copyright, never having written anything. If however, the celebrity decided to write his reminiscences himself and used a shorthand writer to take down such reminiscences word for word, the shorthand writer then transcribed them, and the celebrity had them published, the celebrity would be the owner of the copyright in the reminiscences and not the shorthand writer, who would merely have performed the task of an amanuensis.

The case of *Housden v. Marshall* was concerned with reminiscences of the jockey Brian Marshall, which he had agreed to sell to Kensley Newspapers Ltd. for publication in four articles under his name with the right to use a facsimile of his signature. By the agreement he agreed to make available to a nominee of the Company reminiscences of his life and experiences of the turf, and to provide photographs and press cuttings. He also granted the Company the first British serial rights in those reminiscences. The articles were in fact written by a professional journalist under Marshall's name, and not by Marshall himself. It follows, therefore, that Marshall never had any copyright in the reminiscences.

It might be argued that Marshall had copyright in his signature, but this is unlikely since it has been held that there is no copyright in, for instance, titles of books, on the ground that a title is normally too short to be a sufficient subject matter in which copyright can subsist. However, it should be noted that even though a celebrity may have no copyright in his signature, to affix his name to an article of which he is not the author in such a way as to imply that he is the author, without his permission, is an offence in the nature of passing off under Section 43 of the Copyright Act, 1956. A similar offence might be committed if a signed article were altered a great deal by an editor or journalist under the editor's direction without the signatory's permission (see *Joseph v. National Magazine Company Limited, The Author*, 1958, LXIX, No. 1 at 21).

Turning now to the question as to the person in whom the copyright, if any, is vested, in the case of *Housden v. Marshall* the grant of serial rights could have no effect in respect of the reminiscences, since Marshall had neither written his reminiscences nor was he to write them. If, however, the celebrity merely retails his reminiscences to another who writes articles based on them,

that other is entitled to the copyright therein unless he is in the employment of a newspaper under a contract of service and writes the articles for the purposes of publication in the newspaper; in such a case the newspaper publication rights will vest in the newspaper.

It should be noted that in writing reminiscences a 'ghost' writer can only safely use copyright material such as letters and diaries or notes written by the celebrity if he has the consent of the owner of the copyright in such material. Further, though two writers may prepare a similar story, if writing on the same subject, such as the life of a celebrity, although one may not be an infringement of the copyright in the other, care must be taken that no risk is run of proceedings for "passing off" by the use, for instance, of a similar title. (See *Associated Newspapers Ltd. v. Kemsley Newspapers Ltd. and Others, The Author*, 1955, LXV No. 4 at 89.)

## PART II.

# LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

### 1. UNITED STATES OF AMERICA AND TERRITORIES

#### 243. U. S. CONGRESS. HOUSE.

H.R. 5636. A bill to amend the War Claims Act of 1948, as amended, and the Trading With the Enemy Act, as amended, and to provide for the payment of certain American war damage claims. Introduced by Mr. Wainwright on March 12, 1959, and referred to the Committee on Interstate and Foreign Commerce. 34 p. (86th Cong., 1st Sess.).

Somewhat similar to H.R. 1372 of the instant Congress, and to many bills introduced in previous years.

## 244. U. S. CONGRESS. HOUSE.

H.R. 5921. 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, March 23, 1959, and referred to the Committee on the Judiciary. 2 p. (86th Cong., 1st Sess.).

Another "juke box" bill, the text of which is identical with that of S. 1870 as it was introduced by Senator O'Mahoney in the 85th Congress on April 12, 1957, but without the amendments which appeared in the reported version on August 15, 1957. (See 4 BULL. CR. SOC. 161, Item 387 (1957)).

## 245. U. S. CONGRESS. HOUSE.

H.R. 6894. A bill to amend the Trading With the Enemy Act, as amended. (Introduced by Mr. Harris, May 5, 1959, and referred to the Committee on Interstate and Foreign Commerce.) 7 p. (86th Cong., 1st Sess.).

This bill proposes a divestment of the Government's title to vested copyrights, trademarks and unexpired contract interests involving copyrights and trademarks, presently administered by the Office of Alien Property. The transfer of all vested motion picture film prints to the Library of Congress for retention or disposition by the Library as it sees fit is also authorized.

The bill differs from previously introduced divestment measures in that it is concerned for the most part with copyrights and trademarks.

## 246. U. S. CONGRESS. HOUSE.

Harris, Oren. A bill to amend the Trading With the Enemy Act dealing with copyrights, trademark properties, and motion-picture films; extension of remarks. *Congressional Record*, vol. 105, no. 72 (May 6, 1959), pp. A3774-A3775.

Extension of remarks of Congressman Harris with respect to his introduction of H.R. 6894 (see Item 245, *supra*) including the texts of a letter dated April 13, 1959, from the Attorney General addressed to the Speaker of the House requesting introduction of this legislation, and of an explanatory memorandum of the bill prepared by the Department of Justice.

## 247. U. S. CONGRESS. HOUSE.

H.J.Res. 301. Joint resolution providing for printing copies of "Cannon's Procedure in the House of Representatives". (Introduced by

Mr. Jones of Missouri on March 11, 1959, and referred to the Committee on House Administration.) 2 p. (86th Cong., 1st Sess.).

Provides for the printing of 1,500 copies of "Cannon's Procedure in the House of Representatives" and "notwithstanding any provision of the copyright laws and regulations with respect to publications in the public domain . . . [it] shall be subject to copyright by the author thereof."

This resolution, which was passed and became law on May 4, 1959 (P.L. 86-17), has been introduced and passed periodically in previous Congresses. See Item 250, *infra*.

248. U. S. CONGRESS. SENATE.

S. 1357. A bill to extend the copyright provisions of title 17 of the United States Code to musical compositions produced without the use of a conventional system of notations. Introduced by Mr. Humphrey, March 10 (legislative day, March 9), 1959, and referred to the Committee on the Judiciary. 2 p. (86th Cong., 1st Sess.).

Identical with S. 4317 which was introduced by Senator Humphrey in the 85th Congress on August 20, 1958. See 6 BULL. CR. SOC. 31, Item 4 (1958).

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

Patents, trademarks, and copyrights: report of the Committee on the Judiciary . . . made by its Subcommittee on Patents, Trademarks, and Copyrights pursuant to S.Res. 236, Eighty-fifth Congress, Second Session, as extended, March 9, 1959.—Ordered to be printed. Washington, Govt. Print. Off., 1959. 28 p. (86th Congress, 1st Session, S.Rept. No. 97).

The first part of this report, which is devoted to a review of the subcommittee's work during the past year, includes items on the consideration by the staff of the effect of the copyright law on the free dissemination of scientific information and on the jukebox bill and other copyright bills under consideration by the sub-committee.

250. U. S. LAWS; STATUTES, ETC.

Public Law 86-17, 86th Congress, H.J.Res. 301, May 4, 1959. Joint resolution providing for printing copies of "Cannon's Procedure in the House of Representatives." [Washington] GPO [1959]. 1 p. (73 Stat. 20).

See Item 247, *supra*.

## 251. THE OPINION OF THE ATTORNEY GENERAL

*(Examination and Registration of Illegal Content.)*

In the autumn of 1957, the Register of Copyrights, with the approval of the Librarian of Congress, determined to discontinue the practice of examining works submitted for registration other than on the grounds set forth in the statute. Specifically, this had reference to works which, while meeting all the statutory requirements for copyright, might be denied copyright protection by the courts because of their illegal (including obscene) content. At that time, a statement was issued that an Opinion of the Attorney General was being sought, through the White House, as to the powers and duties of the Register in this matter.

On May 8, 1959, Attorney General Rogers released for publication and distribution his opinion on the question as to whether the Register of Copyrights has the power and, if so, the duty to deny registration of a claim to copyright in a work, otherwise the subject of copyright, which he concludes would not be afforded statutory copyright protection by the courts because of its illegal (including obscene) content.

In essence, the opinion is that the Register has the authority, but not the duty, to deny registration to such works. In addition, the Register may, at his discretion, refer to the appropriate authorities material which comes to his attention in the course of his duties as containing evidence of a violation of law. The opinion affirms it is the right of all citizens to communicate such evidence to the authorities directly concerned, citing *In re Quarles & Butler*, 158 U.S. 532, 535-536.

In view of this Opinion of the Attorney General, the Copyright Office is continuing the policy of examining only under the copyright law. —G.D.C.

*The Opinion:*

December 18, 1958

The President,  
The White House

My dear Mr. President:

This is in response to your request for my opinion as to whether the Register of Copyrights has the power and, if so, the duty to deny registration of a claim to copyright in a work, otherwise the subject of copyright, which he concludes would not be afforded statutory copyright protection by the courts because it contains seditious, libellous, obscene or overt matter which would either be illegal or opposed to public policy. The problem may arise in numerous contexts. A work may, for example, violate penal statutes forbidding certain uses or the imitation of official, military or other protected emblems, insignia and

similar identifying material.<sup>1</sup> However, I understand the problem arises principally in connection with works having a content considered to be obscene.

The Register's authority to deny registration of a claim to copyright in the circumstances envisaged is not clear, but I do not conclude that he is without such power. However, I do conclude that the Copyright Law, Title 17 of the United States Code (61 Stat. 652), imposes no duty upon him to deny registration of such claims. If it is decided that the Copyright Office is not equipped to undertake the administrative task involved in a policy of attempting to deny registration of claims to copyright in works of the type here involved or that as a matter of policy it should not, it is not legally required to undertake that task.

## I

Article I, section 8, clause 8, of the Constitution confers upon Congress power:

"To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries; \* \* \*."

In the exercise of this power, Congress has provided that a statutory copyright may be obtained merely by publication of a work with notice of copyright as provided in the law (17 U.S.C. 10, 19, 20). In addition, section 11 of the Copyright Law provides that a person entitled to a copyright may:

"\* \* \* obtain 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."

Sections 13 and 14 of the act provide for the deposit in the Copyright Office of copies of a work after publication, and section 12 provides for deposit in connection with works not reproduced for sale. Section 208 requires the Register to make an entry of such deposits in the record books of the Copyright Office. Section 209 states that "[i]n the case of each entry the person recorded as the claimant of the copyright shall be entitled to a certificate of registration under seal of the copyright office, \* \* \*." The section provides that the certificate is to contain the name and address of the claimant, the name of the author when the records show it, the title of the work for which copyright is claimed, the date of deposit of copies, the date of publication if the work has been reproduced for sale or publicly distributed, and similar information. The section further provides that:

1. See, e.g., 4 U.S.C. 3 (use of the flag for advertising purposes), 18 U.S.C. 475 (imitating obligations or securities of the United States), 18 U.S.C. 701 (unauthorized manufacture, sale or possession of likenesses of official badges or identification cards), 18 U.S.C. 706 (Red Cross Emblem).

"The Register of Copyrights shall prepare a printed form for the said certificate, \* \* \*, which certificate, sealed with the seal of the copyright office, shall, upon payment of the prescribed fee, be given to any person making application for the same. Said certificate shall be admitted in any court as prima facie evidence of the facts stated therein. \* \* \*."

In addition, section 13 provides that "[n]o 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."

It may, therefore, be seen that neither deposit of copies nor registration of a claim are necessary to obtain a copyright. Publication with notice of copyright is sufficient. *Washington Publishing Co. v. Pearson*, 306 U.S. 30, 37. Similarly, the issuance of a certificate by the Register does not preclude the courts from refusing to recognize the validity of a claim to copyright. *Taylor Instrument Companies v. Frawley-Brost Co.*, 139 F. 2d 98 (C.A. 7, 1943). Accordingly, the Register neither issues nor denies copyrights. He merely issues certificates of registration of a claim to copyright. However, such certificates are of substantial value since, under section 13, no action or proceeding may be maintained for infringement until the provisions of the law with respect to the deposit of copies and registration have been complied with. While a copyright may exist without compliance with the requirements of deposit and registration, the maintenance of a proceeding to enforce the rights conferred by the copyright is contingent upon meeting those requirements.<sup>2</sup> Since section 209 makes the certificate admissible in any court as prima facie evidence of the facts stated therein, it provides evidence of compliance necessary when a copyright owner wishes to maintain an action for the judicial vindication of the rights conferred upon him. *Washington Publishing Co. v. Pearson*, supra, at p. 40.

## II

Section 4 of the Copyright Law provides that the "works for which copyright may be secured under this title shall include all the writings of an author." Section 5 enumerates thirteen different classes of the various literary, dramatic, musical and artistic forms which the writings of an author may take and requires that the application for registration "specify to which class the work

2. See the differing opinions of Judges Hand and Clark in *Vacheron Watches, Inc. v. Benrus Watch Co., Inc.*, 119 USPQ 189 (C.A. 2, 1959), and the cases there cited, with respect to the question whether, for the purposes of maintaining a copyright infringement suit, the requirement of registration is met when an owner attempts to register a claim to copyright and the Register refuses registration.

in which a copyright is claimed belongs." The classes include books, periodicals, musical compositions, works of art, motion pictures, etc.<sup>3</sup> In addition, section 207 of the Copyright Act authorizes the Register, subject to the approval of the Librarian of Congress, "to make rules and regulations for the registration of claims to copyright."

The Copyright Law does not expressly bar from copyright works which contain content which is or might be illegal. It could be contended, therefore, that assuming such a work is a "writing of an author" within the meaning of section 4, that it falls within one of the classes enumerated in section 5 and that the copyright owner has complied with the formal requirements of the law for registration, then the Register, as specified by section 11, "shall issue to him the certificates provided for in section 209." In *Bouva v. Twentieth Century-Fox Film Corporation*, 122 F. (2d) 51, 55 (C.A.D.C., 1941), the court stated that the Register has "no power to refuse registration of a claim of copyright which has been already secured by publication and notice; if the claim is based upon material which is actually the subject of copyright."

This contention, however, would brush aside a number of relevant considerations. It has been generally accepted for years that seditious, libellous, obscene or immoral works are not entitled to copyright. Drone, "A Treatise on the Law of Property in Intellectual Productions" (1879), pp. 181-187; Howell, "The Copyright Law" (1952 ed.), p. 46. Judicial authority to support this view exists; none has been found to the contrary. While the basis for the conclusion is not spelled out in the opinions with either precision or uniformity, copyright protection has been denied in a number of cases at least in part because of the obscene or immoral content of the work involved. *Martimetti v. Maguire*, 16 Fed. Case 920 (Case No. 9, 173, C.C.N.D. Cal., 1867); *Broder v. Zeno Mauvais Music Co.*, 88 Fed. 74 (C.C.N.D. Cal., 1898); *Barnes v. Miner*, 122 Fed. 480 (S.D.N.Y., 1903); *Bullard v. Esper*, 72 F. Supp. 548, 549 (N.D. Tex., 1947). In *Hoffman v. Le Traunik*, 209 Fed. 375, 377 (N.D.N.Y., 1913), it was stated that for a work to be entitled to copyright it must be "original, meritorious, and free from illegality or immorality."

Thus, there exists long-standing authority for the view that material which is determined to be obscene, seditious or of similar content is not "the subject of copyright." Such material would therefore not be within the rule of the *Twentieth Century-Fox Film* case. This would follow from the court's statement in that case that "the Register may properly refuse to accept for deposit and registration objects not entitled to protection under the law." 122 F.2d at 53. This view was followed in *Bailie v. Fisher*, 258 F.2d 425

3. Section 5 also provides that the enumeration therein of classes of works "shall not be held to limit the subject matter of copyright as defined in section 4," i.e., shall not limit the meaning of the phrase, "all the writings of an author."

(C.A.D.C., 1958). To the same effect is *Brown Instrument Co. v. Warner*, 161 F.2d 910, certiorari denied 332 U.S. 801. Therefore, support can be provided for the view that if a work is determined, pursuant to such standards and procedures as may be required, to be unentitled to copyright protection, registration of a claim to copyright with respect to it need not be granted.

It might be contended that cases such as *Bailie* and *Brown Instrument Co.*, in which the Register's refusal to issue a certificate was upheld, deal only with material which does not fall under sections 4 and 5 at all. The problem here relates to material which admittedly comes under those sections, but which might ultimately be held by the courts to be, nevertheless, unentitled to copyright protection because of their content. Such an argument would involve the view that whatever the equity powers of the courts<sup>4</sup> to refuse to afford copyright protection is in those circumstances, the statute has not vested the same power in the Register.

However, the view can be taken that, to the contrary, the authority conferred upon the Register by section 207 "to make rules and regulations for the registration of claims to copyright," confers precisely such power. In the *Twentieth Century-Fox Film Corporation* case, the court stated that the rule-making power "must contemplate the exercise of some discretion, not only in the making, but in the administration of rules," and "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." 122 F.2d at p. 53. The *Bailie* case also recognized the existence of such discretion. 258 F.2d at p. 426. The extent of that discretion has not been defined judicially and the legislative history of the Copyright Law is unenlightening in this respect. Further, while it does not appear to be the current practice for the Register to deny registration on the ground of illegality, the power to do so has been asserted and apparently exercised in the past. Annual Report of the Register of Copyrights, 1941, pp. 29-30.

### III

Any attempt by the Register to adopt a policy of denying registration of claims to copyright in the circumstances here under consideration would involve problems which, while not necessarily insurmountable, could be substantial. For example, in the case of obscenity, reaching a satisfactory definition of what is obscene is complex. *Roth v. United States*, 354 U.S. 476. It is further complicated by holdings to the effect that the question whether material is obscene

4. In fact, some of the opinions bearing on the question appear to be based upon an exercise of equity discretion rather than upon copyright law. *Bullard v. Esper*, supra; *Richardson v. Miller*, 20 Fed. Case 722 (Case No. 11, 791, C.C.D. Mass. 1877); see also *Stone & McCarrick Inc. v. Dugan Piano Co.*, 220 Fed. 837 (C.A. 5, 1915).

may depend upon the audience which it is likely to reach, *United States v. 31 Photographs, Etc.*, 156 F. Supp. 350, 354-355 (S.D.N.Y., 1957), and that the standard as to whether a work is so immoral as to be denied copyright protection may vary from time to time. *Simenton v. Gordon*, 12 F.2d 116, 124 (S.D.N.Y., 1925). Further, in connection with Post Office action against allegedly obscene publications, the requirements of due process or of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001, et seq.) have been held to necessitate hearings. *Walker v. Popenoe*, 149 F.2d 511, 513-514 (C.A.D.C., 1945); *Door v. Donaldson*, 195 F.2d 764 (C.A.D.C., 1951); *Sunshine Book Co. v. Summerfield*, 249 F.2d 114, 119, reversed 355 U.S. 372. See also *Wong Yang Sung v. McGrath*, 339 U.S. 333; *Cates v. Haderlein*, 342 U.S. 804.

It can be contended that a refusal to grant a certificate of registration does not constitute a prior restraint and differs from the problem involved in Post Office cases. However, I cannot predict with confidence that the courts will ultimately hold that the Copyright Office may, without a hearing or at least some informal opportunity to be heard, deny registration in the circumstances here involved. At the very least, a policy of refusing to grant certificates for works which meet the express statutory requirement set forth in the Copyright Act could impose a substantial burden upon the Copyright Office to examine with the utmost care works for which certificates of registration are requested. The Register has advised me that the facilities of the office make intensive screening of works presented practically impossible. It has a staff of some thirty-five examiners which receives more than 1,000 applications daily. Therefore examination of any more than the question whether the works involved meet the specific statutory requirements of the Act may be regarded as not feasible administratively. In addition, for policy reasons it may not be thought appropriate for the Register to undertake to be a conservator of public morals.

The emphasis by the Court in the *Twentieth Century-Fox Film* case upon the "wide range of selection within which discretion must be exercised by the Register in determining what it has no power to accept," 122 F.2d at p. 53, appears to me necessarily to involve the corollary discretion to determine to accept for registration works which the courts may ultimately decide to deprive of copyright protection for reasons of public policy. As noted above, the issuance of a certificate for a work does not preclude the courts from subsequently refusing to recognize the validity of the claim to copyright. *Taylor Instrument Companies v. Frawley-Brost Co.*, 139 F.2d 98 (C.A. 7, 1948). And, of course, the statute nowhere requires the Register to refuse to accept such works for registration. For these reasons, I am of the opinion that the discretion conferred upon the Register by the Copyright Law leaves him free to decide not to attempt to refuse or deny registration of claims to copyright in works of the nature here discussed.

This conclusion does not, of course, mean that the Register should not refer to the appropriate authorities material which comes to his attention in the course of his duties as containing evidence of a violation of law. On the contrary, it is the right of all citizens to communicate such evidence to the authorities directly concerned. *In re Quarles and Butler*, 158 U.S. 532, 535-536.

Respectfully,

WILLIAM P. ROGERS  
*Attorney General*

252. U. S. COPYRIGHT OFFICE.

The copyright notice. Washington, Mar. 1959. 2 p. (Circular no. 3E.)

A revised circular explaining the notice requirements under Title 17 and the U.C.C.

253. U. S. COPYRIGHT OFFICE.

New versions and reprints. Washington, Apr. 1959. 1 p. (Circular no. 35B.)

A revised circular explaining the extent of statutory protection in, and notice requirements for new versions (compilations, abridgments, adaptations, etc.) and reprints.

## 2. FOREIGN NATIONS

254. GREAT BRITAIN. PRIVY COUNCIL.

The Copyright Act, 1956 (Transitional Extension) Order, 1959. Made 19th January, 1959; laid before Parliament 23rd January, 1959; coming into operation 26th January, 1959. [London, H. M. Stationery Off., 1959]. [2] p. (Statutory instruments, 1959, no. 103: copyright).

"This Order provides that the repeal of the Copyright Act, 1911, as part of the law of any country in the Commonwealth (which may be occasioned, for example, by the extension by Order in Council of the provisions of the Copyright Act, 1956, to that country or by the enactment of local legislation similar to that Act) shall not affect the protection enjoyed in respect of works originating in that country in other countries where the Act of 1911 continues to be law.

"This Order does not affect copyright in the United Kingdom."

## 255. GREAT BRITAIN. PRIVY COUNCIL.

The Copyright (International Conventions) (Amendment No. 2) Order, 1958. Made 19th December, 1958; laid before Parliament 30th December, 1958; coming into operation 1st January, 1959. [London, H. M. Stationery Off., 1958]. [2] p. (Statutory instruments, 1958, no. 2184: Copyright).

"This Order further varies the Copyright (International Conventions) Order, 1957.

"There is only one substantial change. The Principal Order protected sound recordings of Italian origin only against copying; in future they will also be protected against

(i) public performance, and

(ii) broadcasting.

They will thus enjoy full copyright as defined in section 12(5) of the Copyright Act, 1956.

"The accession of India to the 'Brussels Convention' of the Berne Copyright Union and the ratification by the Republic of Ireland of, and the accession of Liechtenstein to, the Universal Copyright Convention are also formally recorded."

## 256. GREAT BRITAIN. PRIVY COUNCIL.

The Copyright (International Organisations) (Amendment) Order, 1958. Made 25th June, 1958; laid before Parliament 1st July, 1958; coming into operation 7th July, 1958. [London] H. M. Stationery Off., 1958. [1] p. (Statutory instruments, 1958, no. 1052: copyright).

"By virtue of this Order copyright is conferred on original works made or published by or on behalf of the Baghdad Pact Organisation and the Western European Union which would not otherwise enjoy copyright."

## 257. GREAT BRITAIN. PRIVY COUNCIL.

Ordonnance de 1958 sur le droit d'auteur (Organisations internationales) (Amendement) (N° 1052, du 25 juin 1958). (72 *Le Droit d'Auteur* 57-58, no. 4, Apr. 1959.)

French translation of "The Copyright (International Organisations) (Amendment) Order, 1958." See Item 256, *supra*.

## 258. GREAT BRITAIN. PRIVY COUNCIL.

Ordonnance de 1958 sur le droit d'auteur (Conventions internationales) (Amendement n° 2) (N° 2184, du 19 décembre 1958). (72 *Le Droit d'Auteur* 59-60, no. 4, Apr. 1959.)

French translation of "The Copyright (International Conventions) (Amendment No. 2) Order, 1958." See Item 255, *supra*.

## 259. GREAT BRITAIN. PRIVY COUNCIL.

Ordonnance de 1958 sur le droit d'auteur (Conventions internationales) (Amendement) (N° 1254, du 30 juillet 1958). (72 *Le Droit d'Auteur* 58-59, no. 4, Apr. 1959.)

French translation of "The Copyright (International Conventions) (Amendment) Order, 1958." See 6 BULL. CR. SOC. 34, Item 12 (1958).

## 260. GREAT BRITAIN. PRIVY COUNCIL.

Ordonnance de 1959 concernant la loi de 1956 sur le droit d'auteur (extension transitoire) (N° 103, du 19 janvier 1959). (72 *Le Droit d'Auteur* 60-61, no. 4, Apr. 1959.)

French translation of "The Copyright Act, 1956 (Transitional Extension) Order, 1959." See Item 254, *supra*.

## 261. IRELAND (EIRE). LAWS, STATUTES, ETC.

Loi (amendement) concernant la protection de la propriété industrielle et commerciale. (Du 23 juillet 1958). (72 *Le Droit d'Auteur* 39-40, no. 3, Mar. 1959.)

French translation of an amendatory law of July 23, 1958, effective Oct. 1, 1958, under the provisions of which, the Irish copyright law, as regards translation rights, is brought into line with Irish obligations under the Bern Copyright Convention. See 6 BULL. CR. SOC. 34, Item 13 (1958).

## PART III.

**CONVENTIONS, TREATIES AND  
PROCLAMATIONS**

## 262. INTERGOVERNMENTAL COPYRIGHT COMMITTEE.

(Final documents of the) Intergovernmental Copyright Committee: Third Session, Geneva, 18-23 August 1958. (11 *UNESCO Copyright Bulletin* 161-318, No. 2, 1958.)

*Contents:* Records. A. Report. B. Resolutions. C. List of participants. Summary Records.

In English, French and Spanish.

263. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION. *Copyright Division.*

Universal Copyright Convention: State of ratifications and accessions as at 15 November 1958. (11 *UNESCO Copyright Bulletin* 155-160, No. 2, 1958.)

In English, French and Spanish.

## PART IV.

**JUDICIAL DEVELOPMENTS IN LITERARY AND  
ARTISTIC PROPERTY**

## A. DECISIONS OF U. S. COURTS

## 1. Federal Court Decisions

264. *Shapiro, Bernstein & Co. et al. v. Remington Records, Inc. et al.*, 121 U.S.P.Q. 109 (2nd Cir., Apr. 3, 1959.)

Action for copyright infringement by reproducing on records plaintiff's copyrighted musical compositions without giving statutory notice and without payment of royalties. The lower court entered a summary judgment finding defendants liable. Upon a Special Master's report, the lower court ordered defendants to pay royalties, treble punitive damages,

\$1,000 attorneys' fees for each of the four plaintiffs, and \$4,200 costs. Defendants appealed from the award of treble damages, attorneys' fees and costs, and also from the finding that they failed to give statutory notice. Plaintiffs appealed from a lower court ruling approving the Master's striking of expert testimony as to the number of records manufactured by defendants.

*Held*, defendants' appeal dismissed in toto and plaintiffs' appeal allowed.

Defendants never produced a recording until it was already established among the "top ten"; it had to have a crash program to get the largest possible volume into the market while the song's popularity was at its peak. After the first shipment they manufactured fewer records, to meet additional demands. Yet, after much delay, defendants produced at the trial figures only as to those manufactured subsequent to the first shipments. Thereupon plaintiffs adduced expert testimony, estimating conservatively that 30,000 copies of each record must have been cut prior to the first shipments. The lower court struck this testimony and reluctantly awarded damages only on the production subsequent to the first shipments. The Court of Appeals for the Second Circuit held, however, that the statute imposes an obligation to keep production records, to fulfill the duty of making sworn monthly reports to the copyright owner upon request; that defendants frustrated the proof of the amount of the liability, either by failing to disclose facts reasonably known to them or by failing to keep accurate production records; and that in these circumstances the expert testimony should have been admitted. In remanding the case to the lower court, the Court added: "The Court may presume the strongest case against him who, by his conscious, deliberate act has seemingly made accurate, direct proof of the true facts impossible. We will not permit commercial piracy to produce illegal gains immune from recovery. While the law cannot prevent all sin and wrongdoing it can take some of the profit out of it."

265. *Modern Aids, Inc. v. R. H. Macy & Co., Inc.*, 264 F.2d 93 (2nd Cir., Mar. 3, 1959).

Action based on copyright infringement and unfair competition. The district court enjoined defendant from infringing plaintiff's copyrighted advertisement of a mechanical massage machine, and from selling any machine "substantially similar" to that exhibited by the court; defendant appealed.

*Held*, order of injunction in part affirmed and in part reversed.

As to the copyright, the order was plainly right. The infringement

consisted of an obvious copy of the chief picture and several substantial parts of the script of plaintiff's ad. The only defense was that plaintiff's ad appeared in two papers without the copyright notice, but defendant failed to show the absence of the notice was plaintiff's fault.

However, the record did not support enjoining defendant from advertising or selling any machine similar to plaintiff's. Plaintiff had no patent, and defendant was free to imitate plaintiff's machine as closely as it chose; there was no evidence the buying public had come to believe every machine made after plaintiff's model was his product, and had in any degree relied upon the source rather than the performance of the machine. Even then, however, the relief could go no further than to require defendant to make plain to buyers that plaintiff was not the source of the machine.

266. *Miller Music Corp. v. Charles N. Daniels, Inc.*, 121 U.S.P.Q. 204 (2nd Cir., Apr. 23, 1959).

Action for injunction, partial assignment of renewal copyright, damages and accounting, based on copyright infringement. Plaintiff claimed to be the owner of a partial interest in the renewal copyright on the song "Moonlight and Roses"; Ben Black, co-author of the song, assigned his renewal right to plaintiff and died prior to the last year of the original copyright term. However, Black's executor obtained the renewal certificate and distributed it, pursuant to a California probate court decree, to Black's residuary legatees, who in turn assigned all their rights to defendant who already admittedly owned the renewal right of the other co-author; defendant counterclaimed for substantially the same relief as requested by plaintiff, plus delivery of all infringing copies, plates, etc. The district court, 158 F.Supp.188, 5 BULL. CR. SOC. p. 162, Item 218 (1958), granted defendant's motion for summary judgment, and plaintiff appealed.

*Held*, affirmed on the written opinion of the court below; Washington, J., dissenting.

The court below held the case had to be decided under 17 U.S.C. §24; "[I]t remains to be determined whether an assignee acquires a vested interest in the renewal rights or merely an interest contingent on the author's survival until commencement of the twenty-eighth year of the original term when his renewal rights first accrue." Plaintiff conceded that such an assignment without survival would be void as against the author's widow, children or next of kin, but contended that the executor stands in the shoes of his testator and must carry out the testator's agreements. But the lower court disagreed because the statute does not

differentiate between rights it vests in the widow and children, the executor and the next of kin, and all rights under the Copyright Act are created solely by it and have no existence apart from it. "If it be argued that it is incongruous to allow an author who has no widow or children to defeat his prior assignee by executing a will, the terms of which are in derogation of the assignment, the remedy lies with Congress which passed the statutes and not with the courts."

In the opinion of Circuit Judge Washington, dissenting, to allow the author to defeat his assignee under these circumstances was not only incongruous but also without legal justification. In addition, the will was silent as to the renewal right, and the author may even have assumed that his prior assignment would be honored by his executor.

267. *Stern et al. v. U.S.*, 120 U.S.P.Q. 511 (5th Cir., Feb. 18, 1959).

In this case, the decision of the lower court was affirmed by the Court of Appeals for the Fifth Circuit in a per curiam decision. The Court unanimously stated that it agreed with "the views ably expressed by the district court in its opinion reported in 164 F.Supp. 847." See 6 BULL. CR. SOC. 39, Item 22 (1958).

268. *Schultz v. Holmes et al.*, 264 F.2d 942 (9th Cir., Mar. 30, 1959).

Action for copyright infringement. Plaintiff wrote the lyrics and music for a composition and its later revision, which were copyrighted in 1941 and 1949, respectively; both versions were given limited performances but were never successful. Defendant Holmes also wrote lyrics and music to a composition and revision, copyrighted in 1950 and 1952, respectively, both of which were performed and published. Plaintiff claimed the music of Holmes' compositions infringed hers. Holmes was dead when this action was brought, and she tried to prove access by common peculiarities of the music. The district court found access had not been proven, there was lack of similarity, and the average listener would find no similarity in whole or in part. Plaintiff appealed.

*Held*, affirmed.

As far as the written evidence was concerned, the Court could not conclude the trial court findings were clearly erroneous. In addition, the evidence showed there were many vocal or instrumental demonstrations during the trial; "there was singing, humming and dancing . . . There was also piano playing and the plucking of a violin". Thus, even if the written evidence had raised a question as to the correctness of the findings, the Court would not feel free to overturn findings based not only on that evidence but also on the accompanying demonstrations.

269. *Maloney v. Stone et al.*, 171 F. Supp. 29 (D. Mass., Jan. 16, 1959).

Action based on copyright infringement, filed Aug. 8, 1957. One of the defendants, Anderson, printer of the allegedly infringing item, by June 7, 1955 had stopped all manufacture, turned over all materials to the other defendants and terminated its contract with them.

*Held*, summary judgment dismissing plaintiff's claim against the printer granted.

The sole issue was whether the claim was barred. In the copyright field, Congress "has chosen not to prescribe a national standard but to accept as the period of limitation or laches the local state law prescribed by the state — here Massachusetts — where the cause of action is brought." Massachusetts has a two-year statute for "actions of tort"; but since an action for copyright infringement damages in that state is not an action at law but in equity, this action was not absolutely controlled by said statute. It was, however, unnecessary to decide whether the federal or Massachusetts rules of equity, both uncodified, applied, since the conclusion as to period of laches would be the same. Both rules would recognize that although this was a suit within the equity jurisdiction, the action sounded in tort. If brought within the District of Massachusetts, to be timely it must be brought within two years after defendant has directly or by an agent or associate invaded plaintiff's interests. ". . . In the case at bar, as in virtually all infringement cases, the nexus between the owner of the copyright and the printer of infringing copies arises when the infringements are produced. The moment Anderson printed he became liable to plaintiff. It was then he invaded plaintiff's rights. After Anderson delivered the copies to . . . [the other defendants] Anderson did no more directly or indirectly, as principal or agent. To hold Anderson liable for what his independent customers do would be a socially preposterous and commercially disastrous doctrine."

270. *Peter Pan Fabrics, Inc. et al. v. The Acadia Co., Inc. et al.*, 121 U.S.P.Q. 87 (S.D.N.Y., Mar. 23, 1959).

Motion by plaintiff for preliminary injunction based on infringement of copyrighted fabric designs. Plaintiff Peter Pan was the registered owner of all textile designs utilized by plaintiff Glass, its parent corporation, which was a "style leader" converter maintaining a design department and sending representatives throughout the style centers of the world to produce new and fashionable textiles. Defendants allegedly copied two of these copyrighted designs and undersold plaintiffs.

*Held*, motion granted, plaintiff to furnish \$5,000 security to each defendant.

Defendants argued that neither plaintiff had the requisite standing to bring this action, claiming that Glass had no interest in the copyrights, and that in view of Glass's all-inclusive activities, no room was left for Peter Pan. But the court found the argument specious: Peter Pan was *prima facie* the copyright holder, and it was also proper to join Glass as a party plaintiff. Furthermore, the issue had not been raised by cross-motion or pleading. Equally baseless were defendant Weiner's assertions it had nothing to do with the accused fabrics which had been sold by Weiner's successor, Regency. The proof showed Weiner was substantially connected with the infringing transactions, and any transfer to Regency was, for purposes of this motion, merely a bookkeeping transaction within the Weiner corporate family; and even if it was Regency that made the sale, Weiner may still be liable as a "contributory infringer".

The designs reflected creative originality and a substantial degree of skill, labor and independent judgment, even though based on Byzantine and Greek motifs and artifacts, and were copyrightable; the evidence compelled findings that they were copied by defendants.

The defendants placed chief reliance on claiming plaintiffs' designs did not bear a sufficient copyright notice, arguing that (1) the infringement was innocent, (2) the copyrights were invalid because absence of notice on the finished garments proved plaintiffs had not affixed the notice to their designs, and (3) even if validly obtained, the copyrights were lost because the dress manufacturers invariably remove copyright notices from the fabrics. But "innocent infringement" would not bar an injunction, and the plaintiff's allegation of *prima facie* compliance with the statute was supported not only by the copyright certificates but also by plaintiffs' and defendants' exhibits. The third point was one of novel impression. The court refused to take judicial notice of an alleged custom that selvage is invariably removed from the fabric by the manufacturer; the fabrics when leaving plaintiffs' hands contained the copyright notice, and plaintiffs could not be charged with knowledge that the notice on the selvage will be removed or concealed by the dress manufacturer. But even if plaintiffs could be charged with such knowledge, their right would be protected. "Accordingly, where the copyrighted work is a repetitive design, imprinted on a sheet or continuous strip or roll of material, and when the notice is imprinted at least once for every repeat of the design on the edge of such material, the copyrightee, having done all that is reasonably within his power to imprint the notice on the material without marring the appearance of his work, has satisfied the notice requirements of section 10. Any subsequent removal, destruction or obliteration of the notice by others may serve to mitigate the relief awarded against an 'innocent' infringer, without resulting in a loss forever of the rights given by the copyright."

271. *Hesse et al. v. Brunner et al.*, 172 F.Supp.284 (S.D.N.Y., Mar. 31, 1959).

Action for injunction and damages based on unfair competition. Plaintiffs manufactured and sold photographs of biblical subjects which, when illuminated from behind, could be seen three-dimensionally. Defendants manufactured and sold copies thereof, except that the three-dimensional effect was largely lost.

*Held*, plaintiffs' motion for summary judgment denied, but the answers will be stricken unless defendants serve answers to interrogatories within ten days.

The first ground of the motion was that defendants misled the public, causing them to purchase defendants' products in the belief plaintiffs were the actual source. There was, however, no attempt to prove such misrepresentation, and plaintiffs also failed to prove secondary meaning; moreover, defendants should be allowed to negate a claim of secondary meaning.

The second ground was misappropriation for defendants' commercial advantage of a right equitably belonging to plaintiffs, under *International News Service v. Associated Press*, 248 U.S. 215. But plaintiffs did not contend they had a proprietary right in their process of making the pictures, and they failed to obtain copyright protection even though it was available. "The Federal Copyright Act is the full measure of protection to be given copyrightable material. The states through their legislatures or courts cannot add or subtract from that protection."

272. *Rose et al. v. Bourne, Inc.*, 121 U.S.P.Q. 260 (S.D.N.Y., Apr. 22, 1959).

Action by assignors of copyright for infringement, on the theory that the assignment conveyed only the original term and the assignors renewed the copyright for their own benefit; counterclaim for judgment declaring defendant was legal or beneficial owner of the renewal, with direction to plaintiffs specifically to perform the assignment. At the trial plaintiffs stated the action was a test case as to the effect of the particular form of assignment here involved. After the court had indicated a disposition to hold that the assignment conveyed the right of renewal, plaintiffs urged equitable considerations. Defendant then withdrew its counterclaim in order to eliminate its prayer for specific performance as a basis for importing equitable considerations into the case. As the trial proceeded, the court indicated adherence to its prior inclination, equitable considerations not being relevant; but it also indicated that since this was a test case, it would take testimony for possible appellate review. Before the testimony of the first witness was concluded, plaintiffs asked for leave to dismiss without prejudice. The court denied this motion and

indicated it would resume the trial at a later date. In the meantime, plaintiffs moved for dismissal with prejudice, and defendant asked the court to make findings.

*Held*, dismissed without prejudice and without findings; counterclaim restored.

Dismissal with prejudice, even without findings, would bar a later action, but without findings the determination of issues will not be effective, by collateral estoppel, in other causes of action. However, the court felt it had no power to make findings since the parties did not agree on them. "A plaintiff, by moving in the midst of trial for a dismissal with prejudice, does not ipso facto empower the court to base findings of fact upon the pleadings, dispositions, pretrial proceedings and evidence so far given."

However, defendant withdrew its counterclaim on plaintiffs' representation that this was a test case, and was justified in assuming that even without its counterclaim, the case would proceed to a determination of the question of ownership of the renewal right. "Now that the ground for that assumption is withdrawn, defendant's consequent withdrawal of its counterclaim may be withdrawn."

But it did not seem wise to the court to direct a with-prejudice dismissal. "By trying out its counterclaim defendant can get its desired determination of the ownership of the renewal rights on the merits supported by findings. A with-prejudice dismissal of the complaint would raise the question whether defendant on assertion of the counterclaim was entitled to anything more than a finding that the with-prejudice dismissal had determined that the renewal rights were vested in defendant".

273. *Rochelle Asparagus Co. v. Princeville Canning Co.*, 170 F.Supp. 809 (S.D. Ill., No. Div., Mar. 6, 1959).

Action for injunction and damages based on copyright infringement and unfair competition. Plaintiff owned a copyrighted label entitled "Rochelle Brand Green Asparagus Spears", used in the marketing of its canned asparagus, and alleged that defendant infringed this copyright by using a label entitled "Royal Prince Asparagus Spears" on its asparagus cans.

The two labels were of similar size and had an "all-over background" of essentially whole asparagus spears; but in other respects they are dissimilar. The evidence was undisputed that defendant had an agency photograph actual asparagus spears rather than copy plaintiff's label; there was nothing unique in plaintiff's presentation of a fence of asparagus spears; and no presumption of copying was required from defendant's

prior notice of plaintiff's label. Even though the alleged infringer may get his idea from a copyrighted work, there is no infringement unless the copyrighted work itself had been copied, especially where the allegedly infringing material is limited to a picture of a common vegetable, used as a label for cans of that vegetable.

There was also no proof of confusion or unfair trade practices. The evidence of confusion consisted merely of testimony of one shopper who bought without looking and another who bought through the medium of her five-year old son.

## 2. State Court Decisions

274. *Navara v. M. Witmark & Sons et al.*, 185 N.Y.S. 2d 563 (N.Y.S.Ct., Sp. Term, N.Y.Co., Mar. 26, 1959).

Motion by plaintiff to reargue motion to set aside verdict for defendants and for a new trial, in action based on common law copyright infringement. In 1949 plaintiff wrote a musical composition entitled "Enchanted Melody," and in 1950 defendant Washington upon plaintiff's request wrote lyrics for it. Plaintiff, having been unable to sell the song, Washington in 1951 released all his rights to plaintiff. In 1953 defendant Wayne produced a motion picture entitled "The High and the Mighty", and in 1954 contracted with defendants Tiomkin and Washington to write the music and lyrics, respectively, for a song of the same name; the song was copyrighted and defendant Witmark published it. Plaintiff alleged the melody of his song was copied. Tiomkin denied access to plaintiff's song, but plaintiff alleged that, in view of the prior close cooperation between Tiomkin and Washington on the songs, it was reasonable to conclude that Washington is some way imparted plaintiff's melody to Tiomkin, and that Tiomkin thereafter, consciously or unconsciously, copied it.

*Held*, motion granted but original determination adhered to.

Plaintiff challenged the jury verdict on the ground that the court committed reversible error in answering two inquiries by the jury during its deliberation. To the first inquiry, were defendants guilty whether there was known or unconscious borrowing or stealing of plaintiff's composition, the court answered that there had to be "conscious substantial copying". Notwithstanding numerous non-New York cases cited by plaintiff, the court was of the firm opinion that under New York law, in order to hold a person accused guilty of actually infringing another's musical composition, the proof must show that it was done with *animus furandi*.

The second inquiry was a request to define what the court meant by

"conscious copying" and "conscious substantial copying". The court had answered as follows: "By 'conscious copying' I mean that Tiomkin being aware of plaintiff's melody proceeded, wilfully and intentionally to imitate and copy it and adopt it as his own. By 'substantial copying' I mean a considerable, large, important, essential and material part of plaintiff's melody." Plaintiff claimed the instructions as to substantial copying was clearly erroneous. But the answer to the jury inquiry had to be considered in the context of previous instructions on the main charge, i.e.: "Whether or not there is substantial similarity, you may apply what is referred to as a recognized test, to wit, is the resemblance noticeable, to the average ear or hearer." Thus the jury could have found "substantial copying" because the melody fitted in with any one of the five adjectives the court used in its reply.

275. *Fugate v. Greenberg*, 121 U.S.P.Q. 201 (N.Y.S.Ct., Sp.Term, N.Y.Co., Apr. 8, 1959).

Action by author for damages of over \$5,000 for breach of contract against publisher, who counterclaimed \$4,000 for legal fees, costs and disbursements in defending itself in two criminal actions. Defendant obtained the exclusive world-wide rights to plaintiff's books, "Quatrefoil" and "Derricks". Defendant admittedly retained royalties accrued to plaintiff on these books, claiming it had a right under the contract to indemnify itself for expenses incurred in the criminal actions which concerned "Quatrefoil" and two books by other authors. On the first indictment a nolle prosee was entered; on the second indictment, defendant pleaded guilty by knowingly depositing obscene books and advertising in the mails and paid a fine of \$3,000. This indictment was then dismissed as to two of its corporate officers who agreed to cease publishing the book. Defendant ceased selling "Derricks" as well, but did not return the rights to plaintiff; it sold them to a third party.

*Held*, for plaintiff; counterclaim dismissed.

In the contract the author guaranteed that the books contained no libelous, lewd or unlawful matter, and that he will hold defendant harmless against any such claim; in another part of the contract, he authorized defendant to deduct from accrued royalties certain production expenses. In interpreting the contract strictly against defendant whose form had been used, the court found defendant could not offset the legal expenses since the conditions under which expenses could be offset were spelled out. Moreover, the contract did not entitle defendant to indemnify itself for defending criminal charges brought because of "its own intentional and felonious conduct"; the indictment did not charge unlawful matter

was contained in "Quatrefoil", it merely charged defendant for its own independent act of sending the book and obscene advertising matter through the mails. To indemnify defendant for its own unlawful acts would also violate established state policy. But even if defendant were entitled to indemnification, it failed to establish its loss, if any.

Another cause of action was based on defendant's sale of the rights to "Derricks" to a third party. Under the contract with plaintiff, defendant had to give plaintiff notice with an opportunity to buy all rights at a reasonable price. This it failed to do, and the court awarded plaintiff damages in the amount of his former royalties per copy times the number of copies sold by the third party.

276. *Edgar Rice Burroughs, Inc. v. Commodore Productions and Artists, Inc.*, 334 P.2d 922 (D.C. of App., 2nd Dist., Div. 1, Cal., Jan. 30, 1959).

Action for declaratory relief, with counterclaim for alleged overpayment. Plaintiff by contract granted defendant the right to use material featuring Tarzan "in live and/or transcribed radio broadcasts", plaintiff retaining the right to cancel if during any six months period defendant failed to broadcast at least one program "released over three or more stations simultaneously". Plaintiff tried to terminate the contract under this provision and also because of defendant's dealings with a Canadian company, relating to Canadian broadcasts, alleging defendant had not fully accounted for its profits therefrom, and because the contract was void for lack of consideration. Defendant counterclaimed for royalties paid on moneys it allegedly failed to deduct through mistake as deductible costs. The trial court denied plaintiff any relief and awarded \$1,215.75 to defendant. Plaintiff appealed.

*Held*, affirmed except that award to defendant was reversed.

Plaintiff's main contention was that the contract required network broadcasts which defendant never obtained; on this there was conflicting testimony, including that of experts, and the court could not reject the trial court's contrary conclusion.

As to the alleged lack of consideration, there was a presumption of consideration under state law which plaintiff failed to overcome, and also there was part performance by defendant.

Plaintiff further claimed defendant breached the contract by delegating to a Canadian company some of its duties, these being personal and non-delegable, and also defendant by reason of this delegation failed to remit to plaintiff the amounts due to him under the contract. But the only restriction on defendant's use of Tarzan was that he should be the main character, should not be treated humorously or ridiculously, and should

not be maimed or killed; and defendant could not sell the program in Canada without an agent. Nor was there an assignment or delegation to the Canadian company; plaintiff was told of the arrangement and accepted its share of the profits therefrom. The Canadian company received 40% of the receipts from Canadian stations, but since plaintiff acquiesced, he was not entitled to receive royalties on that portion.

However, defendant's counterclaim was barred by a three-year statute of limitations which started running at the time of the overpayment even though not discovered until later, since it had the means of information, i.e. its books, available at the time it made the payment.

## B. DECISIONS OF FOREIGN COURTS

### 1. Canada

277. *Composers, Authors and Publishers Association of Canada, Ltd. v. Siegel Distributing Co., Ltd. et al.*, not yet reported (S.Ct. of Can., Mar. 25, 1959):

Action for declaration that plaintiff owned the rights of public performance in Canada of certain musical compositions, that defendants had infringed these rights, an injunction and accounting of profits. Defendants performed these compositions from records on a turntable in the basement and on numerous loudspeakers in the dining room of a restaurant. The whole operation was activated by the insertion of coins by customers, the revenue being divided between the owner of the installation and the restaurant. The lower court held for defendants, and plaintiff appealed.

*Held*, plaintiff's appeal dismissed; Cartwright and Fauteux, JJ., dissenting.

Rand, J. (*the majority opinion*):

The question here is narrow but not free from difficulty. It arises out of a situation with the following features. A musical programme is given in about 30 booths of a restaurant by means of two speakers affixed to a table in each by which electric impulses produced by and carried to them by wires from an ordinary primary gramophone mechanism set up in the basement of the building are converted into sound; the entire system through a further device is set in motion by the deposit of a coin in a box in each booth and selection of records is made by means of pressing a button opposite the name of the composition desired from lists set out to the number of over 100 on panels in each booth. The sound vol-

ume is under a central control by an employee of the restaurant at a desk on the main floor. The record selector device, so operated, is, in the basement, integrated with the impulse producer mechanism. The records are held in a revolving circular frame and as that selected reaches a certain point it is moved to engage a spindle on a vertical turn table where contact with it is made by a stylus or needle. The multiple distribution of the electric impulses begins at a point beyond the basic apparatus and an amplifier from which they are carried on the wires to the speakers. The playing of a record takes place through all the speakers at the same time and is not controllable at the individual booths. In the ordinary gramophone corresponding wires are led to a speaker installed with the primary apparatus within, say, a cabinet, and the distribution to the booths and the speakers simply divides that stream of impulses into many streams by means of extended wires. That product, the impulses, can be so carried to any number of speakers desired; even within a cabinet there may be several, the combined effect of which is intended more faithfully to reproduce the total sound that was recorded on the disc. The question is this: can the music given out by these speakers severally or in their entirety be described as a performance by means of a gramophone?

Some further features of the mechanical organization are to be mentioned. The entire apparatus is owned by the respondent company; it is maintained in the restaurant premises under the terms of a so-called lease from the individual respondent owners of the restaurant of space sufficient for its installation. It remains under the general control of the owner and operation is effected by the patrons. The records with the selector panels are chosen, owned and furnished by the company. The electricity is supplied by the restaurant owners. The installation of wires and speakers to the booths is one that is properly called "custom-made", that is, accommodated to the particular premises. The revenue from the users is divided equally between the owner and the restaurant keepers.

If, instead of being carried to all of these speakers, the impulses had been led only to a speaker installed in a cabinet, that is, in fixed and rigid relation to the primary apparatus, it is not disputed that the entirety would be a gramophone notwithstanding the incorporation in that unity of similar starting, selecting and volume-controlling devices. It is argued, however, that the system in its entirety is the means by which the performance is accomplished, and that, as it is impossible to describe it as a gramophone, the exoneration from the payment of fees for the performance of copyrighted music given by s. 50, subs. (7) of the *Copyright Act*, R.S.C. (1952) c. 32 is inapplicable. That subsection reads:

(7) In respect of public performances by means of any radio receiving set or gramophone in any place other than a theatre that is ordinarily

and regularly used for entertainments to which an admission charge is made, no fees, charges or royalties shall be collectable from the owner or user of the radio receiving set or gramophone, but the Copyright Appeal Board shall, so far as possible, provide for the collection in advance from radio broadcasting stations or gramophone manufacturers, as the case may be, of fees, charges and royalties appropriate to the new conditions produced by the provisions of this subsection and shall fix the amount of the same; in so doing the Board shall take into account all expenses of collection and other outlays, if any, saved or savable by, for or on behalf of the owner of the copyright or performing right concerned or his agents, in consequence of the provisions of this subsection.

The contention is that that language can be satisfied only by a single compact machine or instrument made up as the earliest phonographs were, or within a cabinet, as most of the present day machines are marketed.

From such a primary and basic productive unit, an entirety with an identity which, from the beginning, has been preserved, within its own immediate, integrated and single structure containing the entire mechanism for receiving, converting and making audible what has been written on a record, extensions in distribution can go from one speaker separated by a few feet from the primary mechanism in the same room to speakers throughout a building or by possibility, a continent. Commencing with an admitted gramophone and passing to the next stage of an ordinary cabinet with its speaker in a separate unit sold with and the two treated by the trade as a single instrument, at what point in the further extensions of the impulses by means of wires and speakers are we to say that within the meaning of the subsection a gramophone has ceased to be the means of producing the performance: that, instead, the original means has become a system of music distribution or of record-playing devices which cannot be said to be a gramophone means?

I cannot accept the view that the word as used in the statute is limited to a single cabinet or equivalent embodiment with all the parts held together in a single compact unit. To take the example already given, the speaker set up separately in the same room as a complementary unit of an entirety and sold as one, how can that difference of a few feet of wire render what was a gramophone when rigidly fixed in all parts to be that no longer? On the other hand, there may be such a division of production, control and function in generating, distributing and producing the ultimate expression in sound, through severance in the stages in electric impulses and in air waves that we at once see the total system to be divisible into, first, the creation of potential sound in electrical form as a

commodity and secondly, its sale and purchase for utilization by conversion into actual sound by owners of speaking devices. That was the nature of the organization in *Associated Broadcasting Company Limited v. Composers, Authors and Publishers Association of Canada*, (1954) 3 A.E.R. 708. There the primary generation and the distribution of electric product over wires of an independent telephone company was under one control, and its utilization by purchasers who consumed the energy by the process of speakers under another.

Equally I cannot see that the multiplication of speakers or sound outlets produced from and fed by one primary apparatus, the entirety being under a single operational control within the premises in which the performance is given, removes the performance from being one by means of a gramophone.

In the restaurant here there would have been no objection if any number of separate single unit gramophones had been placed around the booths to furnish music to the guests: the operation of each would have been a performance by means of a gramophone. They could have been synchronized to the same music and all of them switched on or off by the same act. Together their sound effects would be in a substantial unison and musical harmony, and the whole would be one generalized performance. In a scientific sense the product of each speaker is no doubt uniquely its own, and in that sense also there is a time difference, infinitesimal though it may be, in reaching the ears of a hearer; but, as the evidence shows, for practical purposes there was in this case no conflict in the sound vibrations within the ordinary range of hearing creating musical confusion and what was heard, though primarily that in the booth of the particular listener, was a composite product.

The essence of what the statute contemplates and its purpose are important here. It contemplates the use of gramophones for an object which, apart perhaps from a free or charitable entertainment, is subsidiary or incidental to a different main object for which there is at a particular time and place some degree of public, with the entire music instrumentalities within the premises and in their productive action under a unified arrangement, operation and control: a self-contained establishment. The object is not to promote the sale of gramophones and if a dozen of them, whether coordinated or not, can be placed at different points in the restaurant, I think it would defeat the purpose of the statute if their basic productive means could not be combined into one to supply the existing speakers or their equivalents: if that is so, we are in the situation presented here.

A great deal of emphasis was placed on the fact of the severed selectors, including the placement of the record on the turn table and the

engagement with it of the stylus. But an examination of the functions involved shows this to be neutral to the determinative matter. In the first phonographs with a cylindrical record the operation and production of sound assumed certain acts to be done by the person making use of them: he had to wind up by hand the spring that furnished the power to rotate the cylinder, to place the record on the cylinder, and to move or press the button or switch that would put the machine in action. But these external human acts were not part of the action of a gramophone; they were anterior to its functioning; they were acts to be done in order that the invented instrument and the copyrighted record could be brought under an operation which produced a music or other sound result. The particular means by which the corresponding acts here were done were likewise collateral or subordinate accidentals. When the power shifted from hand or spring to electricity the machine did not cease to be a phonograph, nor when the record was changed from a cylinder form to that of a disc, nor when the change of record shifted from the hand to the mechanical action of an arm, nor when the starting mechanism evolved to the means of dropping a penny in a slot activating a mechanical shaft to bring about the same action. In all these auxiliary changes the essential phonograph remained and under its original name. This points up the fact that such a name connotes certain constitutive physical members co-ordinated in action with certain forces to produce an entirety of desired effect; and the changes in means that serve collateral or preparatory functions do not affect or involve the essence of the constituted device. Similarly with the volume control; its centralization furnishes an external act to be performed by one person affecting all speakers collectively instead of being affected severally by an individual for each speaker. Nothing in that touches any integral feature of the gramophone instrumentality itself.

Finally it should be emphasized that the question is not precisely, is the entire installation a gramophone? That was the form in which the appellants' case in *Associated Broadcasting Company* case was presented and considered, and the Committee had no difficulty in concluding that the link of the Bell Telephone Company's participation was sufficient in itself to negative the submission. The question is rather whether the particular performance, the thing aimed at, provided by the proprietor, is by means of a gramophone. There is a real if somewhat elusive difference between them: the latter tends slightly to the adjectival meaning of the word gramophone; is the music gramphonic? Whether we take the case as being a performance by each speaker or a single performance in a merged product, the significance to the question is the same. When, then, a patron in such a booth deposits a dime and selects a musical number to be

played, in the presence of the management, control and self-containment specified, it may properly be said that the music produced is a public performance by means of a gramophone. That being so, under the subsection no fees are payable.

The appeal should, therefore, be dismissed with costs.

Cartwright, J. (Fauteux, J. concurring) *dissented* on the ground, *inter alia*, that "the totality of component parts with which we are concerned is not a gramophone in the popular or commercial meaning of that word and that consequently the performance of the musical works referred to in the evidence was a performance not by means of a gramophone but by some means of an entirety, not embraced within the meaning of that word, one of the component parts of which was a gramophone. It follows from this that the respondents are not entitled to the exoneration from the payment of fees given by s.50(7) of the *Copyright Act*."

## 2. England

278. *Loew's Incorporated v. Emile Littler, et al.*, (1958) 2 Weekly Law Reports 787 (Chancery Div. Oct. 25, 1957). See also, 67 *The Author* 48, et seq. (1957) and 68 *The Author* 3 (1958).

Action for copyright infringement and declaratory judgment that plaintiff owns the exclusive English language stage rights in "The Merry Widow" in the United Kingdom; counterclaim by the author's legal representatives for a declaratory judgment to the contrary. In 1905, the composer, Franz Lehár, and the librettists, Victor Leon and Leo Stein, transferred to Felix Bloch Erben, Berlin, the exclusive right to exploit and "place" "The Merry Widow" for performance anywhere and in any language, in return for certain royalties; this agreement was to be construed under German law. Felix Bloch Erben, in turn, assigned to George Edwardes the exclusive right to perform the work in English in the United Kingdom, and the parties agreed that English law applied to this agreement. Edwardes died in 1915, his executors assigned his rights and, after several assignments, plaintiff was the present assignee. The authors accepted royalties from various successive assignees and seemed to acquiesce in these assignments, but after their deaths their legal representatives took the position that Edwardes' rights had not been transferable.

*Held*, for defendants.

The experts on German law on behalf of both parties agreed that the original assignment to Felix Bloch Erben could not be reassigned *in toto*, and that it created a commission agency which put Erben under

a duty to exploit the play and to do what was reasonable to carry out that duty. Plaintiff's expert thought a reassignment which passed to the new assignee a transferable right was reasonable and indeed carried out the very purpose of the original assignment to Erben, but the Court decided that Edwardes received no more than a personal interest terminable at his death; his supposed successors were only temporary licensees, and the authors were not bound to recognize plaintiff, who had not been selected by Erben, as permanent proprietors of the performing rights. If plaintiff were to succeed it could presumably pass on the performing rights to a whole series of successors, some of whom might be more interested in suppressing the play than in promoting its success.

## PART V.

# BIBLIOGRAPHY

## A. BOOKS AND TREATISES

### I. United States Publications

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A pamphlet outlining the problem and effect of design piracy and describing the important steps recently taken to secure design protection legislation. The present case and statutory law is characterized as ineffective.

280. USES OF THE COPYRIGHT NOTICE: A. Commercial use of the copyright notice, by William M. Blaisdell. B. Use of the copyright notice by libraries, by Joseph W. Rogers. With Comments and views submitted to the Copyright Office. Washington, Copyright Office, Apr. 1959. 41, 25, 14 p. (*General revision of the copyright law, study no. 17*).

The seventeenth in a series of studies issued by the Copyright Office to interested persons, with invitations to submit statements of their views.

281. VARMER, BORGE. Limitations on performing rights, a study prepared for the U. S. Copyright Office, with Comments and views submitted to the Copyright Office. Washington, Copyright Office, Mar. 1959. 20 p. (*General revision of the copyright law, study no. 16*).

The sixteenth in a series of studies issued by the Copyright Office to interested persons, with invitations to submit statements of their views.

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## 2. Foreign Publications

### (a) In Danish

282. **DANSK SELSKAB FOR OPHAVSRET.** Ophavestretlige perspektiver, foredrag og diskussioner i Dansk selskab for ophavsret, 1954-58. Redigeret af Torben Lund og Niels Alkil. Kobenhavn, Dansk videnskabs forlag, 1958. 203 p.

A compilation, entitled "Copyright perspectives," of lectures and discussions at the Danish Copyright Society, 1954-58, covering the following topics: (1) Current copyright problems in Denmark; (2) Tape recorders in relation to copyright; (3) The artist and copyright; (4) The protection of performing artists against unlawful appropriation of their performances; (5) Is the protection of photographs subjected to a rational system? (6) Protection of useful art under Danish law; (7) The relationship between author and publisher; (8) The rights of performing artists under the new Swedish draft law; (9) The moral rights of deceased artists; (10) The right of a person in photographs of himself; (11) Copyright in motion pictures; and (12) Limitations on free use of public domain works.

### (b) In French

283. **HEPP, FRANÇOIS.** Radiodiffusion, télévision et droit d'auteur. Paris, Éditions Internationales, 1958. 190 p.

Essays and addresses on French copyright law with special reference to radio broadcasting and television. The appendices include the text of the French copyright law of 1957 and the decrees regulating its application.

### (c) In German

284. **RINTELEN, MAX.** Urheberrecht und Urhebervertragsrecht nach österreichischem, deutschem und schweizerischem Recht. Wien, Springer, 1958. 496 p. (Rechts- und Staatswissenschaften, 17).

A comprehensive, comparative study of copyright and the relationship between authors and publishers according to Austrian, German, and Swiss law. Performing, broadcasting, and motion picture rights are also treated.

## B. LAW REVIEW ARTICLES

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 A comment on the Chancery Division and Court of Appeal decisions in the English case of *Loew's Inc. v. Littler et al.* involving the right to perform "The Merry Widow" operetta publicly in the English language in Great Britain. See Item 278 supra.
286. COPYRIGHTS—INFRINGEMENT—ISSUANCE OF CERTIFICATE OF REGISTRATION IS CONDITION PRECEDENT TO SUIT. (72 *Harvard Law Review* 1167-1170, no. 6, Apr. 1959.)  
 A case note on *Vacheron & Constantine-Le Coultre Watches, Inc. v. Benrus Co.*, 260 F.2d 637 (2d Cir. 1958), 6 BULL. CR. SOC. 81, Item 83 (1958).
287. ERGO, RICHARD W. ASCAP and the antitrust laws: the story of a reasonable compromise. (1959 *Duke Law Journal* 258-277, no. 2, spring.)  
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288. KALODNER, HOWARD I. The relation between federal and state protection of literary and artistic property, by Howard I. Kalodner and Verne W. Vance, Jr. (72 *Harvard Law Review* 1079-1128, no. 6, Apr. 1959.)  
 "In analyzing the varying claims of the state and federal governments in the protection of literary and artistic works, the authors are critical of the judicial failure to establish guides for the extent of federal protection and pre-emption in this area. They conclude that the interaction of the copyright clause, the Copyright Act, and the supremacy clause produces workable boundaries of permissible protection."
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 A case note on the appellate decision in *Continental Casualty Co. v. Beardsley*, 253 F.2d 702 (2d Cir. 1958). See 5 BULL. CR. SOC. 229, Item 285 (1958).

290. PRICE, ROBERT. Monetary remedies under the United States Copyright Code. (27 *Fordham Law Review* 555-578, no. 4, winter, 1958-59.)

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291. WESTON, GLEN E. Studies on general revision of the copyright laws. (27 *The George Washington University Law Review* 409-413, no. 3, Jan. 1959.)

Brief reviews of the first thirteen general revision studies issued by the Copyright Office.

## 2. FOREIGN

### (a) English

292. BOGSCH, ARPAD. Designs and models. (4 *Industrial Property Quarterly* 3-19, no. 2, Apr. 1959.)

*Contents.*—Pt. 1. Toward a more effective protection of designs in the United States of America.—Pt. 2. Toward better international design protection.

The first part deals with current efforts in the United States to secure more effective design legislation. The inadequacies of the present design patent and copyright laws are pointed out and the principal provisions of the Willis Bill are reviewed in detail. The second part reviews current movements, described as unprecedented in scope and intensity, toward more effective design protection on national and international levels and discusses a number of basic questions which must be considered with respect to international protection.

293. COPYRIGHT, ROYALTIES AND TAX. (103 *The Solicitors' Journal* 121-123, no. 7, Feb. 13, 1959.) Signed: K.B.E.

A discussion of the principle "now confirmed in *Carson v. Cheyney's Executor* (1958) 3 W.L.R. 740 . . . that the royalties of authors, like other income assessed on the 'receipts' basis, are not taxable after the discontinuance of the business or profession."

294. PHELAN, ANDREW. Copyright and the architect. (109 *The Law Journal*, 118-119, [n.s.], no. 4856, Feb. 20, 1959.)

A brief discussion of the development of copyright protection in Great Britain for the artistic character or design embodied in a building.

295. THE RIGHT OF PRIVACY. (75 *The Scottish Law Review* 1-4, no. 889, Jan. 1959.)

In a brief discussion the writer concludes "that while there is, so far as known, no Scottish case in which the right to recover damages for breach of privacy has been judicially affirmed," there are numerous American and Commonwealth precedents for recognition by Scottish courts of the validity of such a claim if one were brought in appropriate circumstances.

296. TOTH, JANOS. Remedies for infringement of intellectual rights. (4 *Industrial Property Quarterly* 43-56, no. 2, Apr. 1959.)

A comparative study of infringement remedies with particular reference to temporary injunctions. "Draft rules for the international unification of temporary measures" are suggested in order to make remedies more effective and to "serve as a basis for other procedural reforms and for the establishment of international courts for intellectual rights, which is the ultimate and legitimate goal in this field."

297. ULMER, EUGEN. The protection of television broadcasts against showing in cinemas. (53 *E.B.U. Review* 35-39, Feb. 1959.)

An adaptation of "a legal opinion which . . . [Professor Ulmer] wrote in the light of internal German law" on the legality of the screening of television broadcasts in theaters without the consent of the broadcasting organization.

(b) French

298. ABEL, PAUL. Lettre de Grande-Bretagne. (72 *Le Droit d'Auteur* 46-55, no. 3, Mar. 1959.)

Recent legislative and judicial developments in British copyright law; an account of recent activities of the Performing Right Society; summaries of articles appearing in recent issues of "The Author" on joint recommendations of the Publishers Association and the Authors Society with respect to "fair dealing," progress of the Obscene Publications Bill, copyright protection, under the U.C.C., for literary works by British books in Russia, and Mr. Stanley Rubinstein's suggestion for the legal protection of ideas; British publishing production in 1957 according to "The Book-seller"; and brief mention of recent books by British authors, or of British interest, on copyright and related subjects.

299. BOGSCH, ARPAD. Vers une meilleure protection internationale des dessins et modèles. (75 *La Propriete Industrielle* 57-60, no. 3, Mar. 1959.)

French translation of part 2 of the author's "Designs and models" which appeared in 4 *Industrial Property Quarterly* 3-19, no. 2, Apr. 1959.) See Item 292, *supra*.

300. BOGSCH, ARPAD. Vers une protection plus efficace des dessins aux États-Unis d'Amérique. (75 *La Propriété Industrielle* 53-56, no. 3, Mar. 1959.)

French translation of part 1 of the author's "Designs and models" which appeared in 4 *Industrial Property Quarterly* 3-19, no. 2, Apr. 1959.) See Item 292, *supra*.

301. DESBOIS, HENRI. La loi irlandaise du 23 juillet 1958 or le droit de traduction. (72 *Le Droit d'Auteur* 70, no. 4, Apr. 1959.)

A brief analysis of the Irish Industrial and Commercial Property (Protection) (Amendment) Act, 1958, which was enacted for the purpose of bringing the Irish copyright law, as regards translation rights, into line with Irish obligations under the Bern Copyright Convention. See 6 BULL. CR. SOC. 34, Item 13 (1958).

302. RADOJKOVIC, ZIVAN. Evolution de la législation yougoslave sur le droit d'auteur; à propos de la nouvelle loi du 10 juillet 1957 (publiée le 28 août et entrée en vigueur le 28 novembre 1957). (72 *Le Droit d'Auteur* 66-70, no. 4, Apr. 1959.)

A study of the special features of the Yugoslav copyright law of 1957 by comparison with the provisions of the Bern Convention and of the two preceding Yugoslav copyright laws of 1929 and 1946.

(c) German

303. BAUM, ALFRED. Kann das Recht aus §2 Abs. 2 LUG unbeschränkt und auch für erst in Zukunft herzustellende mechanische Vorrichtungen auf Dritte übertragen werden? (*Gewerblicher Rechtsschutz und Urheberrecht* 69-75, no. 2, Feb. 1959.)

A discussion of the question whether recording rights, as provided for in section 2, paragraph 2 of the German statute concerning copyright in literary and musical works, may be assigned without limitation including the right to recordings to be made in the future.

304. BOGSCH, ÁRPAD. Urheberrechts- und Musterschutz in den Vereinigten Staaten. (*Gewerblicher Rechtsschutz und Urheberrecht, Auslands- und internationaler Teil* 2-9, no. 1, Jan. 1959.)

An analysis of the protection of designs under the U. S. Copyright and patent laws and international conventions, with a discussion of the principles and major provisions of the Willis design protection bill (H.R. 8873, 85th Cong.)

305. BORSENEREIN DES DEUTSCHEN BUCHHÄNDELS. Rahmenabkommen über die Herstellung von fotomechanischen Vervielfältigungen (Fotokopien, Mikrokopien in gewerblichen Unternehmen zum innerbetrieblichen Gebrauch, zwischen dem Börsenverein des Deutschen Buchhandels . . . und dem Bundesverband der Deutschen Industrie . . . (61 *Gewerblicher Rechtsschutz und Urheberrecht* 20-21, no. 1, Jan. 1959.)

The text of an agreement, dated June 14, 1958, between the Association of German Publishers and the Association of German Industry with respect to the photocopying of articles from periodicals, drawn up as the result of a German Supreme Court decision of June 24, 1955 to the effect that unauthorized photocopying of copyrighted material by an industrial concern is in no case "multiplication for personal use" under the German copyright law.

306. BONASI-BENUCCI, EDUARDO. Der Schutz der industriellen Formgebung in Italien. (*Gewerblicher Rechtsschutz und Urheberrecht, Auslands und Internationaler Teil* 18-19, no. 1, Jan. 1959.)

A brief explanation of the difference in design protection under the Italian copyright and design laws.

307. CROON, C. Der Schutz von Geschmacksmustern in Holland, von C. Croon und K. Sanders. (*Gewerblicher Rechtsschutz und Urheberrecht, Auslands- und internationaler Teil* 271-276, no. 6, June 1958.)

An analysis of the principles of a Dutch draft law for the protection of industrial designs, with a description of an agreement made by manufacturers' groups in Holland to prevent design piracy in view of the lack of effective legal protection.

308. HAERTEL, KURT. Muster und Modelle. (*Gewerblicher Rechtsschutz und Urheberrecht, Auslands- und internationaler Teil* 99-104, no. 2, Feb. 1959.)

"Die Lissaboner Konferenz, E." A report, by a member of the German

delegation at the Lisbon Conference for the Revision of the Paris Industrial Property Convention (October 1958), of the results of the conference discussions on international design protection.

309. HENSSLER, EBERHARD. Die industrielle Formgestaltung im Spiegel des Rechts. (13 *Der Betriebs-Berater* 529-534, no. 15, May 30, 1958.)

A discussion of design protection in West Germany under the law for protection of designs and models (Geschmacksmustergesetz), the copyright law for works of art, and the law against unfair competition. A proposal is made to combine the principles of the "Geschmacksmustergesetz" with those of the copyright law for works of art, thus eliminating the requirement of "relative novelty" under the former and reducing the term of protection under the latter.

310. HENSSLER, EBERHARD. Rechtsschutz der industriellen Formgebung in Deutschland. (*Gewerblicher Rechtsschutz und Urheberrecht, Auslands- und internationaler Teil* 13-18, no. 1, Jan. 1959.)

A comparative analysis of design protection in West Germany under the designs and models protection law, the copyright law for works of art, and the law against unfair competition. The most important, recent cases are discussed in order to show the need for reform within the framework of copyright law revision.

311. OVERATH, JOHANNES. Urheber und Interpret in der Musik. (*GEMA Nachrichten* 4-6, no. 42, Mar. 1959.)

A philosophic discussion of the respective contributions of the composer and the interpretive artist to a musical work, with the conclusions that only the composer is the creative artist and as such the proper subject for copyright protection and that the rights of the interpretive artist should be protected by labor laws.

312. PLAISANT, ROBERT. Der Schutz von Werken der angewandten Kunst im französischen Recht. (*Gewerblicher Rechtsschutz und Urheberrecht, Auslands- und internationaler Teil* 9-13, no. 1, Jan. 1959.)

A discussion of design protection under the French copyright, designs and models, and dress designs laws. The theory of the unity of art is rejected as unrealistic for designs and models and a reform of the law on designs and models to provide a short term of protection with a minimum of formalities is suggested.

313. PLAISANT, ROBERT. Das Verhältnis von patent-, geschmacksmuster- und wettbewerbsrechtlichem Schutz für Gegenstände der industriellen Formgebung in Frankreich. (*Gewerblicher Rechtsschutz und Urheberrecht, Auslands- und internationaler Teil* 269-271, no. 6, June 1958.)

A brief, comparative analysis of the protection of works of applied art in France under patent, designs and models, and unfair competition laws in the light of the legislative principle that protection for inventions should not be given under either the designs and models or the copyright laws.

314. RAUSCHER AUF WEEG, HANS HUGO VON. Das Musterrecht in den Vereinigten Staaten und der Gesetzentwurf von 23. Juli 1957. (*Gewerblicher Rechtsschutz und Urheberrecht, Auslands- und internationaler Teil* 277-286, no. 6, June 1958.)

An historical survey of design protection in the United States under copyright and patent principles, an analysis of the differences between them and an extensive discussion of the principle features of the Willis design protection bill.

315. REICHEL, WERNER. Das Gruppenwerk in Urheberrecht. (61 *Gewerblicher Rechtsschutz und Urheberrecht* 172-176, no. 4, Apr. 1959.)

A discussion of the problems of the "group work" and the work made for hire which the writer indicates have not been dealt with in the present West German draft copyright law and which he believes will not be adequately covered in a future revision of the draft law.

316. RUNGE, KURT. Urheberrechts- oder Leistungsschutz? (unter besonderer Berücksichtigung des Gruppenwerks). (61 *Gewerblicher Rechtsschutz und Urheberrecht* 75-80, no. 2, Feb. 1959.)

"Copyright or neighboring rights? (with special reference to works produced by groups)." Dr. Runge, in connection with the revision of the West German copyright law, expresses the opinion that instead of creating, for the protection of intellectual works, a series of neighboring rights laws outside the framework of copyright, the scope of copyright protection should be expanded to include the manifold exploitation possibilities occasioned by modern technical developments.

317. ULMER, EUGEN. Der Schutz der industriellen Formgebung (Vorbemerkung). (*Gewerblicher Rechtsschutz und Urheberrecht, Auslands- und internationaler Teil* 1-2, no. 1, Jan 1959.)

An article on the protection of works of applied art, designs and models written as an introduction to lectures delivered by Dr. Arpad Bogisch, Professor Robert Plaisant, Dr. Eberhard Henssler, and Dr. Eduardo Bonasi-Benucci at the September 1958 conference of the Society for Comparative Law, Committee on Industrial Property and Copyright in Freiburg, the texts of which appear immediately following the Ulmer article. See Items 304, 312, 310, 306, *supra*.

(d) Italian

318. BONASI-BENUCCI, EDUARDO. Forma del prodotto e sua tutela. (*7 Rivista di Diritto Industriale* 426-451, no. 4, Oct.-Dec. 1958.)

After a discussion of criteria for the protection of the "form of a product," a comparative study is made of the legal protection of works of applied art, and the criteria therefor, in Germany, France, United States, Great Britain, and Italy. In connection with recent legislation and reform efforts, mention is made of the Universal Copyright Convention and the Willis Bill. In conclusion, proposals for legislative reform are made among which are recommendations for a separate law for the protection of art when applied to industry, voluntary deposit, and a limited term of protection.

319. GIANNINI, AMEDEO. Protezione minima del diritto d'autore. (*7 Rivista di Diritto Industriale* 392-425, no. 4, Oct.-Dec. 1958., pt. 1.)

An extensive discussion of the minimum standards of protection obtainable under the Universal Copyright Convention.

## (e) Swedish

320. BERGSTROM, BJORN. Beräkning av skadestand vid brott mot 1919 ars lag om rat till litterara och musikaliska verk samt enligt förslaget till ny lag om upphovsmannarätt. (27 *NIR* 180-199, no. 4, 1958.)

A study of the damage provisions of the Swedish copyright law, including an analysis of leading court decisions in which they have been applied. The writer feels that the minimum damage provisions of the law (about \$3.00) is inadequate and prefers the omission of such a provision as is the case in the new Swedish draft copyright law.

321. HEIDING, STURE. Förvanskning av äldre litterära och konstnärliga verk. (27 *NIR* 218-221, no. 4, 1958.)

A critical comment on sec. 51 of the new Swedish draft copyright law, under which the courts, after the death of an author, but not limited by the term of protection, may enjoin distorted reproductions of literary and artistic works. The writer is of the opinion that this proposed provision is too drastic, and that sufficient safeguards exist in the form of pressure by cultural organizations and public opinion, without the need for legislation in this area.



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## SUPPLEMENT TO BIBLIOGRAPHY ON DESIGN PROTECTION

In view of the current and increasing interest in more adequate design protection both here and abroad, the Copyright Office has recently completed a 160-page supplement to its 1955 *Bibliography on Design Protection* by Barbara A. Ringer. The supplement was compiled by William Strauss, Borge Varmer, and Caruthers G. Berger, under the editorial supervision of William Strauss and Barbara A. Ringer.

The 1955 bibliography listed and summarized some 264 books, articles, and documents dealing with the problems of securing effective legal protection for designs. The first part of the 1959 supplement lists and abstracts an additional 127 works published on design protection during the last few years, including a number of the more recent foreign-language materials on the subject.

The second part of the supplement lists and summarizes the 48 design protection bills introduced in Congress between 1914 and 1959. Complete information concerning the introduction of each bill, its contents, and the action taken on it, is included in this 28-page section.

The third part of the supplement, entitled "Court Decisions on Designs," is divided into four sections: "Copyright Cases," "Common Law Cases," "Trade Association Attempts to Prevent Design Piracy," and "Design Patent Cases." This 89-page part lists, summarizes, and indexes 111 U.S. cases on design protection covering a period from 1872 to 1959.

Copies of the 1955 *Bibliography on Design Protection* and the 1959 *Supplement* are available free of charge from the Copyright Office. Requests should be addressed to:

R. G. Plumb  
Head, Information and Publications Section  
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## PART I.

## ARTICLES

322. A PROPOSAL FOR EFFECTIVE DESIGN LEGISLATION:  
S. 2075 EXAMINED

By ALAN LATMAN\*

On May 28, 1959, a significant development took place in the recent drive for new federal legislation protecting the appearance of useful articles. Senators O'Mahoney, Wiley and Hart joined on that date in putting S. 2075 into the Congressional "hopper." That these three senators are all members of the Senate Judiciary Subcommittee on Patents, Trademarks and Copyrights and Senator O'Mahoney its chairman, is perhaps particularly noteworthy. The background of this design protection proposal and an analysis of its more important provisions are the subject of this article.

*Background of S. 2075*

The need for a new statute dealing specifically and effectively with the ornamental features of industrial designs has long been recognized by many members of the copyright and patent bars. The ineffectiveness of the design patent in many industries, as well as the limited operative area of the copyright law and inappropriateness of its provisions have often been noted (e.g., 5 BULL. CR. SOC. 139, Item 205(1958)). When the patent bar, through the National Council of Patent Law Associations, succeeded in the codification of the patent law in 1952, they expressly reserved ornamental designs for substantive treatment later. A year afterwards, a Coordinating Committee on Designs was appointed and Giles S. Rich, now an associate judge of the United States Court of Customs and Patent Appeals, became its chairman.

The Coordinating Committee, which was broadened to include advisers from industry and the interested Government agencies, engaged in four years of study, discussion, drafting and redrafting which culminated in H.R. 8873 introduced in the Eighty-Fifth Congress by Rep. Willis. The remarks of Congressman Willis upon introduction of H.R. 8873 made it clear that the bill was being offered at that time for the purposes of study, suggestion and comment on the part of interested groups. (103 *Cong. Rec.* 12504-12505, July 23, 1957).

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\* Member of the New York and District of Columbia Bars and Counsel, National Committee for Effective Design Legislation, New York.

The months following the introduction of the Willis Bill saw a considerable amount of attention being given to the problem of design protection and to the bill in particular. Bar associations, trade associations, designer groups, individual manufacturers and others considered the Willis Bill and a number expressed approval of its principles. A sustained effort, aided by a newly-formed industry group called the National Committee for Effective Design Legislation, was made to assemble and analyze comments and suggestions for ways to improve upon H.R. 8873. Enriched with a number of such suggested amendments, the O'Mahoney-Wiley-Hart Bill was presented to the Eighty-Sixth Congress.

### *Designs Protected and the Standard of Protectibility*

The scope of S. 2075 is determined by several key definitions in Sections 1 and 2. These provisions indicate, in the first instance, that the "design" to be protected relates to (1) the appearance (2) of a useful article. Thus the utility of the article, while a touchstone to coverage, is not what is being protected. In fact, Section 2 denies protection even to the appearance of an article if such appearance "is dictated solely by the function or purpose of the article embodying the design." And a "useful article" is defined as an "article normally having an intrinsic function other than to portray its own appearance or to convey information." (Section 1).

This definition of a "useful article" may be tested several ways. It would, for example, seem to exclude a map, since the intrinsic function of a map is to convey information. An oil painting on canvas presumably has no function other than "to portray its own appearance." These works would look to the copyright law for protection. But could not the canvas or a framed etching be used as a tray? An affirmative answer, it appears, would not change the status of these works under the bill since use as a tray would not be the *intrinsic* function of the painting or etching. Finally, a goblet, no longer used as such but merely on display, would seem to remain a "useful article" since it *normally* would have an intrinsic function related to drinking in addition to its appeal to the eye.

The draftsmen of S. 2075 seem to have met a difficult problem reasonably well. The problem is the demarcation between works appropriately the subject matter of copyright and those which should be covered by the new design legislation. The intention of the author, number of copies, and aesthetic value of the work have been avoided as demonstrably unreliable standards. Most important, as to many troublesome areas of industrial and commercial creativity, there no longer would remain the impossible task of determining what is a "work of art." Substituted is the inquiry as to utility which, while by no means a simple one, seems much more appropriate and workable.

In examining the standards of creativity required for protection and the scope of such protection (which extends to copying and not independent duplication), it seems clear that the bill, while offering a *sui generis* type of legal protection, borrows more philosophically from the copyright law than it does from the patent law. To qualify for protection, a design need merely be original in the sense of having been created without copying from the work of another or from the public domain. It need not be "novel" to the world nor rise to the dignity of an "invention," the familiar requirements of the patent law.

After providing in Section 1 that "original" designs may be protected, the bill attempts to delineate this concept in Sections 2 and 3 with much greater detail than either the copyright law or the Willis Bill. First, it is apparently recognized that certain designs are so standard and common as to belie any assertion that they were created by a claimant without copying. The most ready example of such a lack of minimal creativity is perhaps the five-pointed star held non-copyrightable in *Bailie and Fiddler v. Fisher*, 258 F.2d 425 (D.C. Cir. 1958). Section 2(a) of the bill attempts to codify this recognized *de minimis* doctrine.

Section 2 also provides that protection is not available for any design in the public domain. This is recognized by members of the copyright bar as a parallel to Section 8 of the copyright law. If it went no further, however, as was the case in the Willis Bill, the subsection could be the source of some confusion. This is due to the lack of certainty that the judicial gloss placed on Section 8 of the copyright law would be adopted as to this particular section. The construction of Section 8, uniformly illustrated through Judge Learned Hand's reference to the *Ode on a Grecian Urn* in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936), is to the effect that copyright is available to one who miraculously reproduces the Ode without ever having seen Keats' creation. But in a field where under some statutory schemes, a novelty requirement precludes protection of works created independently but nevertheless similar to public domain material, more explicit language would seem warranted. Accordingly, Section 2(b) contains a proviso indicating that mere similarity to a design in the public domain will not automatically preclude protection. For a similar reason, Section 3 of the bill, while patterned generally after the "new matter" portion of Section 7 of the copyright law, studiously avoids use of the term "new."

#### *Commencement of Protection, Duration and Notice*

Among the significant differences between the Willis Bill and the O'Mahoney-Wiley-Hart Bill are the provisions determining when protection commences and when it terminates. Under the Willis Bill, protection could commence at the earlier of two points: (1) when the design was "made known"

(a practical concept defined to cover all forms of dissemination without reliance on technical copyright "publication"); (2) when the claim to protection was voluntarily registered. In the course of the widespread study of the provisions of the Willis Bill, the view was often expressed that this scheme raised a number of problems. Permitting registration of the designs shortly after they left the drawing board, it was urged, might result in the registration of thousands of designs never actually used, but capable of serious harassment to manufacturers. This was considered to be the case even though a full-scale model or mock-up was required before registration. It was also recognized that common law protection, while uneven and imperfect, was nevertheless available to protect designs prior to general disclosure and that the real legal vacuum permitting design piracy existed with respect to designs already in the process of marketing. Accordingly the provision summarized above was changed in Section 4 of the new bill to commence protection *only* (1) upon the making known of the design (2) as embodied in the actual article.

The Willis Bill provided for a five-year term with a renewal term of five years. The renewal provision involved no reversionary interest nor other features of copyright renewal but merely an extension of term by the proprietor. The view was widely expressed that a possible ten year term went far beyond the needs of most segments of industry and that the question of duration, as most others, should be resolved in a favor of a more moderate legislative proposal. Accordingly, S. 2075 provides for a single term of five years. (Section 5).

The new bill provides for a notice to be marked on a design whenever it is made known in an article, but does not make omission of notice result in complete loss of protection. Section 7 provides that such omission does sharply limit the remedies available against unauthorized users along somewhat the same lines as Section 21 of the copyright law which covers accidental omission of notice from a particular copy or copies.

The requirements as to the form and position of the notice are quite flexible; a noticeable echo of Article III, 1, of the Universal Copyright Convention is found in Section 6(b) of the new bill. This subsection also contains examples of reasonable locations for the notice in the case of repetitive or continuous designs on sheet-like materials, while Section 6(c) excuses a proprietor who has complied with the notice provisions from any effects by reason of the obliteration of the notice by others.

### *Registration*

While notice under the design bill is thus a more flexible matter than is the case under the copyright law, the reverse is true with respect to registration. Under the bill, an application for registration must be filed within six months after the design is made known or protection is lost. The new bill specifies the

procedure for screening applications for registration in considerably more detail than did the Willis Bill. In the course of this procedure, the public is afforded an opportunity to call the attention of the Administrator (who is to be designated by the President) to the fact that the design is staple or commonly known. This provision attempts to provide an escape valve against abuse of this new type of protection without unduly delaying registration.

The procedure spelled out in Section 12 is as follows: if the Administrator determines that a design is not subject to protection, he is to notify the applicant who may then request reconsideration. The Administrator is to publish pictorial representations of designs which, on their face, he deems registrable, and to register claims to such designs thirty days thereafter unless, after receiving sworn objection that the design is staple or commonly known, he determines that the design is not protectible.

While protection commences immediately upon the public exhibition, distribution, sale, or offering of an article embodying the design, the certificate of registration is, under Section 20, a prerequisite for suit for infringement; the certificate is also, under Section 13, *prima facie* evidence of the facts it contains. Recoveries could presumably be had for infringements occurring after the making known of an article embodying the design but before registration had issued or had even been applied for.

### *Infringement*

Basically, infringement consists of copying a protected design and incorporating it in a useful article, for business purposes, without permission. To constitute infringement an article must embody a *copy* of a protected design. Accordingly, the article need not be an identical replica, but it must borrow more than the general idea, theme or trend reflected by the protected design. Publishing or exhibiting a picture of a design cannot constitute infringement.

Unauthorized manufacture of an article embodying the protected design does not result in infringement in all cases. There is no liability if such article was created without actual knowledge of the protected design since only *copying* is prohibited. Likewise, a manufacturer who acquires an infringing article in the ordinary course of business and incorporates it into his goods is not generally liable. And no infringement exists where the only features copied are those dictated by the utilitarian function of the article or those which are in the public domain.

Importation, as well as manufacture, of an infringing article is generally infringement. However, merely selling an infringing article constitutes infringement only under the most limited circumstances. If the seller had no significant role in the manufacture, he will be liable only if he refuses to disclose his source and reorders after written notice of the protected design.

It will be noted that these provisions, contained in Section 8 of the bill, attempt to avoid some of the pitfalls of earlier design proposals. Neither retailers, motion picture producers, nor periodical publishers need fear unjustifiable liability under the bill which seems to take full account of their particular problems.

Two textual changes from the Willis Bill may be mentioned. The Willis Bill used the phrase "copies or imitates" in setting forth the proscribed conduct. The word "imitates" was presumably used to make it clear that identical reproduction was not required to show infringement. It was suggested, however, that the word "imitates" might be construed as extending liability beyond copying into the area of independent duplication and that the word "copies" has never been limited to the production of an exact replica. This reasoning was adopted and the words "or imitates" deleted from Section 8 of the new bill.

A somewhat similar situation existed with respect to the provision in Section 9 of the Willis Bill to the effect that "an article embodying only features of the protected design which . . . are features characteristic of recognized style trend, is not an infringing article." This provision, not without ingenuity of drafting, apparently attempted to set forth the familiar copyright doctrine that only the expression of an idea and not the idea itself is protectible. In other words, a designer of a "Scandinavian Modern" chair should be able to claim rights only to his particular embodiment of this style and should *not* be able to prevent others from working within this general trend. While there seems to be universal accord as to this result, there was considerable doubt that the language quoted above was needed to achieve it and some feeling that the language was unclear and might produce unintended results.

#### *Relation of Design Bill to Patent and Copyright Laws*

The new protection proposed under the design bill would not affect the availability of design patents to those inventions which qualify. Because of the broader scope of patent protection, however, it was provided that design protection under the bill would terminate as soon as a design patent issued.

The interrelation of design protection and copyright is more complex. Since the same basic standard, that of originality, could qualify a work under both statutory schemes, there is much to support an attempt to avoid overlapping. Overlapping is a serious problem since so many designs can begin life as sketches, drawings or models. As indicated above, the basic dividing line selected was utility. In other words, a premise of the new bill is that designs of useful articles are more appropriately protected under a tailor-made design law than under the copyright law. It would seem difficult to justify, under this premise, a difference in treatment between designs first copyrighted as draw-

ings or works of sculpture and other designs. The draftsmen of H.R. 8873 as well as S. 2075 apparently considered equal treatment more equitable and workable.

The attempt to integrate the design bill with the copyright law seems to operate as follows:

1. The bill does not affect whatever rights may have been acquired under the copyright statute before the bill becomes law.

2. After the effective date of the new law, designs of useful articles (including those of the type which have been accepted for copyright registration) will be ineligible for copyright and must seek protection under the new law.

3. "Works of art" (artistic works other than designs of *useful* articles) remain eligible for copyright protection.

4. If a work of art is copyrighted after the effective date of the new law, and the proprietor does *not* embody it as a design of a *useful* article, or authorize others to do so, he would continue to have whatever copyright protection he has under present law.

5. If a work of art is copyrighted after the effective date of the new law, and the proprietor later embodies the work in a design of a useful article, the nature and extent of his protection against useful applications of his work by others is determined by the design bill rather than by the copyright law. Accordingly:

a) The proprietor must comply with the proposed law to enjoy protection of his design against any *useful* applications by others.

b) At the expiration of the 5-year design term, he no longer has any exclusive right to the design under the design and copyright laws; his trademark and unfair competition rights may, however, be significant, particularly where the design has acquired secondary meaning prior to the commencement of design protection.

c) In any event, he continues to enjoy full 28- or 56-year protection against unauthorized appropriation of the work in any non-useful application (e.g., use as a drawing or in a motion picture).

### *Miscellaneous*

The amounts of the fees to be paid for registration, recordation of assignments, and similar items have not yet been inserted in the bill. And, as indicated earlier, the place of administration of such act is to be designated by the President. This could, of course, be the Copyright Office, the Patent Office, some other existing agency or a new agency.

The remedies under the bill include injunction, damages which the court may treble, forfeiture of infringing articles, plates, molds, etc., costs and attorney fees. Moreover, there are penalties for false marking and fraudulently obtaining or preventing registration. Section 9, unlike the copyright law, requires an affidavit as to originality and as to other elements of the entitlement to protection of an applicant for registration.

The bill is to take effect one year after its enactment and will not protect designs made known within the meaning of the bill prior to such effective date. Common law rights in designs not so made known, trademark rights and the right to be protected against unfair competition are expressly saved by the bill.

### *Conclusion*

It is apparent to almost all who have given thought to the question of design protection that it represents a challenge to the legislative draftsman. And yet the plea for a legislative solution of the confusing, inequitable and ineffectual state of the present law has been continuous. The draftsmen of S. 2075 have not solved all of the problems since they were faced with the need for a delicate balance of interests which defies the drafting of a perfect piece of legislation in this area. It seems clear, however, that they have taken full account of the need for legislation which protects, but neither unduly nor unfairly. It would seem that S. 2075 represents notable progress toward moderate and yet effective and equitable design legislation.

### 323. DESIGN PROTECTION IN GREAT BRITAIN

According to the *Monthly Report* (June 1959) of the British Trade Marks Patents and Designs Foundation, the matter of design protection in Great Britain continues to be a matter of concern, even after the passage of the Designs Bill. The British Report states:

#### *Appointment of a Departmental Committee of Enquiry*

In reply to a question in the House of Commons on 14th May Mr. J. Rogers, Parliamentary Secretary to the Board of Trade, announced that the President of the Board of Trade had appointed a Committee to review the law relating to the protection of industrial designs. The following are the chairman and members:

Chairman: Kenneth Johnson, a leading member of the Bar, with an extensive practice in patent, design and trade mark matters.

Members: L. D. Britain, Director of Britains Limited and a member of the Council of the British Toy Manufacturers Federation; H. G. Bouly, President

of the Chartered Institute of Patent Agents; G. Grant, Comptroller General of Patents, Designs and Trade Marks; T. Gray Hill, Director of Thomas G. Hill & Co. Ltd., and Chairman of a Committee of the Manchester Chamber of Commerce on industrial designs; F. W. Lawe, General Manager of Harrods Limited; A. D. Russell Clarke, Barrister at Law and author of the standard text book "Copyright and Industrial Designs"; Elkan Simons, Director of Simons Bros. (London) Ltd., and chairman of the Jewellery Design and Research Centre.

The Committee's Terms of Reference are:

"To consider and report whether any, and if so what, changes are desirable in the law relating to the protection of industrial designs. In framing their recommendations the Committee should include consideration of the desirability of enabling United Kingdom designs to receive cheap and effective protection in other countries on the basis of reciprocity."

The *Board of Trade Journal* for 22nd May observed that it is the first occasion on which a Departmental Committee has considered the subject of design protection alone. Designs have previously been considered in conjunction with either Patents or Copyright.

#### 324. TOWARD A MORE SYSTEMATIC APPROACH TO THE PROTECTION OF ART APPLIED TO INDUSTRY

*Editor's Note:* The following article, which appeared in *Diritto di Autore* (January-March 1957, pp. 27-32), was condensed and translated from the Italian by Evelyn Dunne with the permission of the Editors of that publication.

The conference to study the protection of art applied to industry, held at Milan in November, 1955 at the invitation of the International League Against Unfair Competition and with the support of SIAE<sup>1</sup>, expressed a wish for a more efficacious protection for the activities of artisans and in various industrial fields. In particular, the Conference sought revision at national level by the competent authorities of the provisions for the protection of models and industrial designs contained in the [Italian] Decree of August 25, 1940, No. 1411, in order to separate the protection of these works from models of pure utility, and to coordinate these provisions with the [Italian] Copyright Law of April 22, 1941, No. 633, in the sense of defining more clearly the field of application of the two kinds of rights.

This was in line with the recommendations of the preceding meeting for the protection of industrial art in Milan in 1940, which was only partly fol-

1. Società Italiana degli Autori ed Editori, Rome.

lowed in the Decree of August 25, 1940, and counsel for SIAE suggested that a suitable committee be formed to draw up a Draft Law. The Committee, under the chairmanship of Dr. Filippo Pasquera, of the Court of Appeals, after a study of doctrine, jurisprudence and legislation of other countries, produced a Draft to be presented to the competent government agencies by SIAE for eventual amalgamation by the Commission appointed by the Italian Ministry of Industry and Commerce in January, 1956, with other proposals in the field of industrial art.

The Committee followed the course suggested by the Conference, above all in tackling the problem of the "dissociability" of the work of art from the industrial product. This was essential for the determination of the fields of protection of copyright and of the law protecting models. A distinction has been made between the material and conceptual divisibility of the work of art from the industrial product. Recently the Supreme Court decided that dissociability should be understood in the conceptual and not the material sense, because of the impossibility of producing the work without the material elements with which it must be connected. The Court also found designs intended to embellish industrial products without autonomous value and hence not to be considered works apart from the product itself. The Committee's opinion was analogous, completing the interpretation of Article 2 of the Law ("... are included in this protection ... works ... even though applied to industry, provided their artistic value is separable from the industrial character of the product with which they are associated"), and excluding from the protection provided in the Draft works not separable from the product as artistic creations or suitable for copyright protection. This seems useful, because it is difficult to interpret Article 2 of the 1940 law as to the "artistic value" of the work or the "industrial character" of the product.

The Committee, in defining the notion of ornamental models or designs, placed the accent on requirements regarding "originality" in the form and the "destination" of the model or design to beautify the product.

The uncertainty of the confines between works of art applied to industry — if the required quality of divisibility exists, under copyright — and the models and industrial designs protected in the Draft, and at present protected under the Decree of 1940, brings up that problem of cumulative protection, variously resolved in foreign laws. Cumulative protection, in the sense that both kinds of protection might be invoked, should seemingly be excluded in principle. The Law of 1940 declares that works protected by that law are not protected by copyright. On the other hand, it does not appear equitable to refuse the more extensive protection of copyright to works which because of their artistic individuality can be considered intellectual works, but which are none the less registered as industrial models. The Committee kept this in mind

without, however, neglecting the legitimate interests of third parties who use a registered model for products other than that specified in the registration, or who use it after the term has lapsed, and provided a right to the use of the model in the form of a legal license.

The Committee also considered the question of the author's right to register the model originally, except in employee for hire cases, the declarative rather than constitutional character of the registration and the term of the patent, the question of single registrations of series of models and the necessity for the series to be homogeneous, and the application of the future law to patents already in existence.

The Committee did not deal with the question of servile imitations of artistic products applied to industry, as these cases would be suitably dealt with under the discipline of unfair competition.

The Conference desired that at the international level, in addition to provisions in multilateral conventions, bilateral conventions be concluded between Italy and other countries with provisions for the protection of the works in question. It was suggested that arrangements be made with France in particular for an easy system of deposit, especially in the case of works of seasonal value.

An outline of an accord between Italy and France has been proposed and presented to the interested groups for comment. It is intended solely to facilitate formalities of deposit.

Wider protection is also sought under existing multilateral conventions.

Protection under multilateral and bilateral agreements, in view of the changes in the European market, and the influence of these changes on national laws should be as uniform as possible for the works under discussion which indisputably belong in the sphere of artistic creation, but which are at the same time important factors in the activities of competitive industry.

325.

### "ALFRED'S CAKES"

*Editor's Note:* The article reprinted below was published in the August 3, 1959 issue of the Library of Congress "LC Information Bulletin." It deals with a matter on which the Copyright Office believes there is still considerable misapprehension on the part of copyright lawyers as well as librarians.

"Fact is seldom as compelling as fiction," wrote Margaret Armstrong in her biography of Fanny Kemble; "Alfred's cakes, Washington's cherry-tree and Clarence's butt of Malmsey are imperishable stuff." Certainly this comment is true of the widespread and apparently indestructible belief, voiced frequently by Americans touring LC's halls, that the Library of Congress "has every book that has ever been printed."

If anyone knew—and no one really does—exactly how many books had “ever been printed” in the world, the concept of such a Gargantuan collection would send the imagination reeling and staggering. LC currently has, among its 38 million items, more than 11 million volumes and pamphlets; even with a policy of selective acquisition, which LC has reported repeatedly, the collections consume some 250 miles of book-shelves in the two buildings. The thought of acquiring, cataloguing, shelving, and serving in a single institution even one copy of every book ever printed in every country of the world conjures up in the mind visions of endless, labyrinthine bookstacks with card catalogs of inconceivable size—to say nothing of other problems implied in such an operation.

When the folklore is denied, however, the true believer will only retreat to the contention that LC “has every book that has ever been copyrighted.” (Indeed, it is perhaps from a misconception of the copyright law of the United States that the original folklore springs.) When it is pointed out that even this more limited statement is not true (for many books copyrighted abroad have not been copyrighted in the United States), the tourist will sometimes make one more retreat: “every book copyrighted in the United States.” The next negative answer—that the Library of Congress does not necessarily keep in its collections a copy of every book deposited with a copyright claim—is apt to bring on suspicion of the speaker’s veracity or disillusion and sudden loss of interest. And no wonder: the world’s flood of current publishing alone is difficult for the human mind to encompass; even librarians and book publishers find its scope, as reflected in the available statistics and estimates, a challenge to the imagination.

Perhaps it is not surprising, then, that *Antiquarian Bookman*, reporting in its July 20 issue (p. 110) on the panel discussion held on “Copyright Law Revision and Libraries” during the recent conference of the American Library Association, should include such a passage as this (*italics added*): “. . . Rutherford D. Rogers (LC) *startled* most of audience by *admitting* that LC has had for some time policy of selective acquisition, and takes only half of titles placed on deposit at Copyright Office. (Remainder is given away, foreign exchange, etc.).”

It may be that the audience was startled; that *AB* considered the statement an “admission” is more startling to LC—despite the folklore. Even before the general revision of the copyright law in 1909, the Library of Congress was not able to absorb into its permanent collections all materials deposited with copyright claims; as early as 1904, Librarian of Congress Herbert Putnam had pointed out the impossibility of LC’s retaining every item deposited, and the copyright law of 1909 took cognizance of growing space-problems by giving authority to the Librarian of Congress to choose one or both copies of any deposit for the Library’s collections and by giving authority to the Librarian of

Congress and the Register of Copyrights jointly to dispose, by various means, of copyright deposits not required for use by the Library. The facts and figures about the number of copyright deposits transferred to the collections of the Library have been frequently reported by LC since 1909, notably in the Librarian's annual reports.

What Chief Assistant Librarian Rogers reported at the ALA's panel discussion was the fact, namely, that since 1870 approximately 10 million works, in 1 or 2 copies each, have been deposited with copyright claims, and about half have gone into LC's collections. (These works are not books alone; they include, notably, periodicals, music, maps, prints, photographs, and motion pictures, among other copyrightable material.) The Copyright Office, a department of the Library of Congress, generally retains unpublished works throughout the term of copyright, and it retains for a time most other works that are not transferred to other departments of the Library. Deposits that are transferred to other departments of the Library may in turn be transferred to the Department of Agriculture Library (which serves as the national agricultural library), to the National Library of Medicine, or to other Federal libraries in the District of Columbia. A number of deposits—mostly duplicates, *i.e.*, the "second copies" of works for which LC has retained only one copy for its collections—are used for foreign exchange. Some deposits, notably such ephemera as advertising leaflets, are disposed of as provided by the copyright law. The great majority of new books published commercially in the United States, however, go into LC's collections. (*H. A. Hilker.*)

## PART II.

# LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

### 1. UNITED STATES OF AMERICA AND TERRITORIES

#### 326. U. S. CONGRESS. HOUSE.

H.R. 7588. A bill to amend the Internal Revenue Code of 1954 with respect to the treatment of copyright royalties for purposes of the personal holding company tax. Introduced by Mr. Keogh on June 5, 1959, and referred to the Committee on Ways and Means. 5 p. (86th Cong., 1st Sess.)

A revised version of H.R. 148 which was also introduced by Representative Keogh earlier in the same session. [See 6 BULL. CR. SOC. 191, Item 165 (1959)]. Among the changes proposed in the new bill are (1) raising the allowable personal holding company income from 5 to 10 per cent; (2) extending the corporate rate to royalties from copyrights which are protected by the laws of any country with which the United States maintains copyright relations "by virtue of any international treaty, convention or agreement"; and (3) changing the applicable date from taxable years beginning after Dec. 31, 1956 to Dec. 31, 1958.

327. U. S. CONGRESS. HOUSE. *Committee on the Judiciary.*

Infringement of copyrights by the United States. Report to accompany H.R. 4059, submitted by Mr. Willis, July 1, 1959. [Washington, U. S. Govt. Print. Off., 1959]. 14 p. (86th Cong., 1st Sess., H. Rept. No. 624).

A report favoring passage by the House of H.R. 4059 with addition of amendments recommended by the State Department providing "that the provisions of this bill shall have no effect on any claim for copyright infringement against the U. S. Government arising in a foreign country." See 6 BULL. CR. SOC. 191, Item 166 (1959).

328. U. S. CONGRESS. SENATE.

S. 2075. 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. O'Mahoney (for himself, Mr. Wiley, and Mr. Hart) on May 28, 1959 and referred to the Committee on the Judiciary.) 22 p. (86th Cong., 1st Sess.)

This bill is based upon, and is similar to the Willis design protection bill (H.R. 8873) of the 85th Congress, but has been revised to some extent in language and content. Among the more important changes are: (1) the requirement that a design be both published and embodied in an article before becoming eligible for protection, (2) the reduction of the duration of protection to a single five-year term, and (3) a new provision on administrative examination, which would permit the filing of "objections" to registration. See Item 322 *supra* for an analysis of this new bill.

## 329. U. S. COPYRIGHT OFFICE.

[C.F.R.] Title 37—Patents, trade-marks, and copyrights; chapter II—Copyright Office, Library of Congress: pt. 201—General provisions. pt. 202—Registration of claims to copyright. *Federal Register*, vol. 24, no. 119 (June 18, 1959), pp. 4955-4959.

The Copyright Office Regulations have been amended to make certain technical corrections, to clarify the language of existing regulations, and to add statements of new policy with regard to the registration of claims to copyright. The new regulations became effective upon publication in the *Federal Register* i.e., on June 18, 1959.

The new Regulations have also now become available in Circular 96 (June 1959), obtainable from the Copyright Office. For an explanation of changes made, see Cary, *Proposed New Copyright Office Regulations*, 6 BULL. CR. SOC. 213, Item 237 (June 1959).

## 330. ROOSEVELT, JAMES.

Department of Justice and ASCAP reach agreement on amended decree; extension of remarks. (*Congressional Record*, vol. 105, no. 107, June 26, 1959, pp. A5527, A5528.)

Remarks on the proposed amended consent decree, the culmination of lengthy negotiations between the Department of Justice and ASCAP, that was presented to Judge Ryan of the U. S. District Court for the Southern District of New York on June 19, 1959, and which the judge was holding under advisement.

## 331. MOORE, ARCH A., JR.

American Society of Composers, Authors, and Publishers—Department of Justice announces the filing of a proposed amended order in the U. S. District Court in New York City; extension of remarks. (*Congressional Record*, vol. 105, no. 111, July 2, 1959, pp. A5747-A5748.)

Congressman Moore commends the Antitrust Division of the Department of Justice for its work on the proposed amended decree and includes the text of the release of Attorney General William P. Rogers of June 29, 1959 which summarizes its provisions. See also Item 330, *supra*.

## 2. FOREIGN NATIONS

## 332. FRANCE. LAWS, STATUTES, ETC.

Ordonnance relative à la radiodiffusion-télévision française. (N° 59-273, du 4 février 1959). (72 *Le Droit d'Auteur* 86-87, no. 5, May 1959.)

Article 4 of this ordinance promulgating a charter for the French broadcasting organization (RTF) prohibits the unauthorized retransmission, by wire or wireless, and the recording or the reproduction, in any form whatsoever, of all or part of an RTF broadcast for the purpose of public performance, whether free or for consideration. The prohibition is made subject to the same limitations as those contained in the French Copyright Law of 1957. Brief comments on this article appear in the *E.B.U. Review*, no. 54B (Apr. 1959), pp. 42-43.

## 333. GHANA. ATTORNEY-GENERAL'S DEPT.

A discussion paper on patent, copyright and allied aspects of commercial law. Issued by the Ministry of Justice and Local Government. Accra, Printed by the Govt. Printer, 1959. 15 p.

"The purpose of this paper is to review the existing situation in the fields of patents, trade marks, industrial designs and copyright under the relevant laws of Ghana" looking toward a revision of these laws.

## 334. GREAT BRITAIN. LAWS, STATUTES, ETC.

Loi de 1958 sur la protection des artistes interprètes ou exécutants d'oeuvres dramatiques et musicales. (Du 23 juillet 1958). (72 *Le Droit d'Auteur* 97-99, no. 6, June 1959.)

French translation of the Dramatic and Musical Performers' Protection Act, 1958. See 6 BULL. CR. SOC. 33, Item 11 (1958).

## 335. IRELAND (EIRE). LAWS, STATUTES, ETC.

Copyright (Foreign Countries) Order, 1959. [Dublin, Stationery Off., 1959]. 8 p. (S.I. No. 50 of 1959.)

"This Order extends the benefit of Part VI of the Industrial and Commercial Property (Protection) Acts 1927 to 1958, which relates to copyright, to the countries of the Berne Union and the Universal Copyright Convention, as listed in the first schedule. It provides that works first published in any of these countries and the published works of subjects or citizens of these countries shall be protected as if they were works

first published in the State. Unpublished works of authors who are subjects or citizens of, or resident in, these countries shall be protected as if the authors were subjects or citizens of the State, or resident in it.

"The Order applies to works first published in countries of the Universal Copyright Convention on or after 20th January, 1959. Works of subjects or citizens of these countries or of countries of the Berne Union, which are first published outside the scheduled countries on or after the same date, are similarly protected. The Order does not apply to a work first published in a Berne Union Country before that country became a member of the Union.

"Article 6 provides that copyright acquired by records under the Order does not include the sole right of public performance, if such right does not subsist in them in the country in which they were made.

"All previous Orders made under this part of the Acts are revoked, without prejudice to any copyright subsisting in works by reason of such orders."

336. PHILIPPINES (REPUBLIC). CONGRESS. HOUSE OF REPRESENTATIVES.  
*Committee on Commerce and Industry.*

Committee report no. 1855, submitted . . . on May 5, 1959; H. No. 1502 [An Act to require the printing and/or binding of books within the limits of the Philippines in order that copyright protection be given to them, amending for this purpose certain sections of Act numbered three thousand one hundred thirty-four, otherwise known as the "Copyright Law".]

A favorable report urging "early approval" by the House of a bill proposing a manufacturing clause as a condition for copyright protection of works in English and Spanish as well as in the Philippine national language and the various Philippine local dialects.

## PART III.

**CONVENTIONS, TREATIES AND  
PROCLAMATIONS**

## 337. INDONESIA.

Dénonciation de la Convention de Berne pour la protection des oeuvres littéraires et artistiques, révisé à Rome le 2 juin 1928 (avec effet à partir du 19 février 1960). Notification du Gouvernement suisse aux Gouvernements des pays unionistes, du 7 avril 1959). (72 *Le Droit d'Auteur* 79-80, no. 5, May 1959.)

Notification by the Swiss Government, dated April 7, 1959, to member states of the Berne Union of its receipt of a note of February 19, 1959 from the Indonesian ambassador at Berne which expresses the desire of the Indonesian Government to withdraw as a member of the Berne Convention effective under the terms of the Convention one year after notification to the Swiss Government, *i.e.*, February 19, 1960. The text of the Indonesian note, in French, appears at end of the Swiss communication.

## PART IV.

**JUDICIAL DEVELOPMENTS IN LITERARY  
AND ARTISTIC PROPERTY**

## A. DECISIONS OF U. S. COURTS

## 1. Federal Court Decisions

338. *Affiliated Music Enterprises, Inc. v. Sesac, Inc.*, 267 F.2d 13 (2nd Cir., June 8, 1959).

Action for violation of anti-trust laws; counterclaim for unfair competition. Defendant Sesac (in addition to the larger ASCAP and BMI) was one of the three major licensing organizations for music performance rights; plaintiff AME sought to enter the performing rights

field by acquiring rights which it intended to exploit not by direct licensing to users, as did Sesac, ASCAP and BMI, but by exclusive licensing to one of these three organizations. Half of AME's stock was owned by the Aberbach brothers, owners of a large music publishing firm, and the other half by Jadassohn, a former officer of Sesac. The complaint alleged Sesac monopolized the market for the acquisition of performance rights of gospel music, and purposely drove AME out of the industry to maintain its monopoly and restrain competition; also, that Sesac's pooling of its performance rights and its practice of granting broadcasters only conglomerate licenses, covering all rights it owns, was unlawful. Sesac counterclaimed for unfair competition, alleging Jadassohn used trade secrets acquired during his employment with Sesac. The lower court, 5 BULL. CR. SOC. Item 383 (1958), 160 F.Supp.865, 117 U.S.P.Q. 263 (S.D.N.Y. 1958), dismissed both the complaint and counterclaim, and both parties appealed.

*Held*, affirmed.

The evidence showed not restraint of trade but "only a noteworthy competitive struggle between two giants in the performing rights industry"; there was ample support for the finding below that AME was the alter ego of the Aberbach brothers' substantial publishing house, which was in turn closely affiliated with BMI (which financed this litigation). "There is complete absence of any showing that Sesac has that power over price to exclude a competitor which is the essence of the violations charged." AME had canvassed 17 publishers under contract with Sesac and had persuaded 15 of them to sign up with AME; later, all but one returned to Sesac. This temporary AME success suggested that the publishers did not feel permanently tied to Sesac, and Sesac ultimately thwarted AME's efforts not by force of existing contracts or economic coercion but by salesmanship and outbidding; furthermore, AME was able to retain the largest of the 15 publishers, by offering more favorable terms than to the others. Also, the record lacked evidence as to Sesac's position in the market which it allegedly had monopolized. Sesac's pooling of the performance rights and offering broadcasters only conglomerate licenses had no relevance to this litigation; "we express no opinion as to whether in a suit by the Government or some other private plaintiff they may be held lawful or unlawful".

As to the counterclaim, Jadassohn did make use of his knowledge of Sesac's methods, and Poklitar, Jadassohn's successor at Sesac, kept AME informed of Sesac's efforts to forestall AME's publisher raid. But none of the information Jadassohn carried away with him was in the nature of a trade secret; "a policy of effective competition favors broad knowledge

throughout the industry of the terms and systems of allocation of royalties to publishers followed by the performance rights organizations"; and Sesac showed no damages from Poklitar's activities.

339. *Kitchens of Sara Lee, Inc. v. Nifty Foods Corp. et al.*, 266 F.2d 541 (2nd Cir., May 7, 1959).

Action for copyright and trademark infringement, unfair competition and unjust enrichment. Both plaintiff and defendant were in the business of baking and selling various frozen cakes. The lower court, 5 BULL. CR. SOC., Item 291 (1958), 116 U.S.P.Q. 292 (W.D.N.Y. 1957), found for plaintiff as to copyright infringement, unfair competition and violation of Sec. 368(c)(3) of the New York General Business Law, and awarded it \$12,500 statutory damages, \$10,000 attorney's fees and costs. Defendant appealed.

*Held*, copyright infringement limited to illustrations of cakes, and finding of unfair competition and violation of New York General Business Law reversed; remanded for reassessment of damages and attorney's fees.

Plaintiff's copyrighted pictorial representations on its labels and was entitled to protection thereon, but not on the circular, rectangular and octagonal shapes of the cake pans, the serving directions or the ingredients.

As to unfair competition, there was no similarity between the name "Sara Lee" used by plaintiff and "Lady Ilene" used by defendant on their respective products. The color backgrounds were different; the drawings between the words did not resemble each other, and the only similarity was in the shape of the cake pans, the types of cakes and the cake pictures on the cover. There was no likelihood of confusion and no proof of secondary meaning.

As to the charge under the New York General Business Law, the underlying prerequisites of trademark infringement or unfair competition were lacking.

340. *Gauvreau et al. v. United States Pictures, Inc.*, 121 U.S.P.Q. 541 (2nd Cir., June 4, 1959).

Action for copyright infringement and unfair competition against a producer of motion pictures, its president and a movie distributor, in connection with a picture entitled "The Court Martial of Billy Mitchell". The lower court quashed service against the producer, holding it was not suable in the district, and plaintiffs appealed.

*Held*, appeal dismissed.

The complaint set forth combined action by the three defendants to bring the picture to the public; plaintiffs had but a single claim, not to be broken up into separate parts for the purpose of immediate appeal as to one defendant only. Cases quashing service against a single defendant and thus terminating the entire case were not in point.

341. *Leo Feist, Inc. et al. v. The Lew Tendler Tavern, Inc. et al.*, 267 F.2d 494 (3rd Cir., June 5, 1959).

Action for copyright infringement. The lower court, 5 BULL. CR. SOC., Item 382 (1958), 160 F.Supp. 865, 117 U.S.P.Q. 272 (E.D.Pa. 1958), found that four musical compositions were publicly performed for profit in defendant Tavern, without permission by the copyright owners. The Tavern subscribed to defendant Muse-Art, a service transmitting music played on records to its patrons by private telephone wire, and the customers could turn the music on or off at will. Defendants appealed from a holding of copyright infringement.

*Held*, affirmed.

Muse-Art did not broadcast the music directly to the public, but it did send it to the Tavern for the purpose of having it played to the Tavern's customers, at the Tavern's wish. "Rendition of a musical composition under these circumstances is a public performance for profit by Muse-Art as well as Tendler [Tavern]."

Point was made that proof lacked that on the night in question the music may have come not from Muse-Art but from a radio. However, there was no evidence the Tavern had musical facilities other than Muse-Art, and there was testimony that there were no pauses for commercials as found on radio programs. Also, there was no evidence of alleged violation of anti-trust laws.

342. *Unistrut Corp. et al. v. Power et al.*, 121 U.S.P.Q. 381 (D.C.Mass., Dec. 18, 1958).

Action for copyright, patent and trademark infringement, unfair competition and breach of contract. Plaintiff was the manufacturer of the "Unistrut" metal framing system, and defendant had been the exclusive New England distributor. In 1952 plaintiff changed the contract to non-exclusive distributorship, and in 1952 defendant cancelled the contract and established his own manufacturing and distributing organizations, for a similar product called "Power-Strut".

*Held*, in part for plaintiff and in part for defendant.

As to the charge of unfair competition, even before cancelling the contract defendant persuaded four other "Unistrut" distributors to join him, by offering them higher discounts. Defendant prepared a catalog containing pictures of "Unistrut" installations without identifying them as such, listing "Unistrut" equivalent part numbers in addition to his own parts, the parts were very similar, etc. Even parts numbers were assimilated from "Unistrut" numbers, and defendant continued for years a telephone directory listing as Unistrut distributor. Under Massachusetts law, passing off the goods of another, with the result of deceiving the public, is sufficient for unfair competition.

On the patent cause of actions the Court found that one patent was infringed, but even though defendant admitted he had for a time used the second patent, the latter had been invalidated by publication and use more than one year prior to the patent application.

As to copyright infringement, general illustrations in defendant's catalogs had been copied from plaintiff's. But as to one of plaintiff's catalogs, even though defendant copied from it, the Court held for defendant since some material had been added to this catalog of plaintiff's after the deposit of copies with the Copyright Office; thus the Copyright Office did not have the required two complete copies. Actual damages could not be proven, and plaintiff was therefore entitled to \$1 for each infringing copy.

There was no trademark infringement in defendant's use of "Power-Strut"; the word "strut" in plaintiff's trademark "Unistrut" is a generic term, and the two marks were clearly distinguishable.

In violation of the contract defendant admittedly continued, after its cancellation, to use "Unistrut" in the corporate name, advertising and telephone listing, and the contract was supported by consideration and enforceable. Thus defendant was guilty of breach of contract.

343. *Southern Music Publishing Co., Inc. v. C. & C. Films, Inc.*, 171 F.Supp. 832 (D.C.S.D.N.Y., March 26, 1959).

Action arising under the Copyright law, for declaratory judgment. The complaint alleged that plaintiff owns a musical composition, that defendant falsely represents to prospective users that through plaintiff's authorization it had the right to use and authorize the use of recordings of the song in a motion picture, and to make duplicate recordings for television broadcasts. Defendant moved for dismissal for lack of jurisdiction and failure to state a cause of action.

*Held*, complaint dismissed, with leave to amend the complaint.

Defendant asserted the Court had jurisdiction (in the absence of diversity of citizenship) only in instances of actual infringement; but "the Courts have repeatedly held that an action to enjoin a threatened infringement of the rights of a copyright owner is one arising under the Copyright Law of the United States". However, even viewing the complaint liberally, it did not sufficiently set forth a charge threatening copyright infringement. "One may assert a right yet undertake no step or move to enforce it. Until some action or conduct based upon the asserted right is threatened, there is no enforceable claim for relief under the Copyright Act", even though the complaint in its present form may allege "slander of title", "disparagement" or some other common law action based on false claims.

344. *Scarves by Vera, Inc. v. United Merchants and Manufacturers, Inc., et al.*, 173 F.2d 625 (D.C.S.D.N.Y., June 1959).

Action for copyright infringement and unfair competition against a manufacturer and a retailer. Plaintiff had copyrighted three blouse fabric designs, and alleged defendant manufacturer copied them and defendant retailer sold the copies. Plaintiff also alleged a cause of action against the retailer only, for unfair competition. Plaintiff moved for a preliminary injunction, and defendant retailer cross-moved for dismissal of the cause of action against it individually.

*Held*, motion granted; cross-motion denied.

Defendants did not argue that a design printed on blouse fabric was not copyrightable, nor that the designs were not validly copyrighted. On the issue of copying, while denied by defendants, the court did not have "even a lingering doubt". But defendant urged the copyright notice was inadequate; plaintiff had appended it by means of a woven label bearing the name "Vera" and "c" in a circle, sewed into a side seam immediately adjacent to the bottom opening of the garment; there was also a cardboard tag with the same legend. The court found that the tag did not meet statutory requirement, but the label did; "the fact that it is sewed into a side seam rather than on the neck or some more obvious place is not reasonably to be available to a copier as a basis for arguing that he was entrapped". Plaintiff's full name did not appear on the label, but "Vera" was the dominant part of its name, was a trademark registered by plaintiff in New York State, and plaintiff was recognized under that name throughout the industry. Defendants further urged that the notice had not been affixed to each copy of the designs; plaintiff's blouses bore two separate imprints of the designs, one on the front and one on the back of the blouse, and only one label. But if, as in a cited case, "each

pair of earrings is to be considered a unit, then certainly a single blouse with two designs must be similarly considered". Finally, defendants claimed that plaintiff had dedicated two of the designs by publication without copyright notice on dish towels and "do-it-yourself blouse kits". Plaintiff countered that the towels were sold by a different company, but conceded that a few of the kits may have gone out, by accident or mistake, without the copyright notice. The court found no evidence that plaintiff was at fault for this absence, and defendants had the burden of proof.

Plaintiff made a prima facie case that the copyrights were valid and infringed by defendants; a detailed showing of irreparable damage was not necessary for a preliminary injunction; and there was an adequate showing of such damage.

The cause of action against the retailer alone alleged that it had adopted trademarks confusingly similar to plaintiff's, thus infringing and committing unfair competition. The court stated it did not have pendent jurisdiction since "there must be substantial overlapping or intertwining in the course of proof", and this would not be the case here. But there was jurisdiction under Section 43(a) of the Lanham Act. Defendant urged this section should be limited to claims of unfair competition independent of trademark infringement and being based on some different kind of false description or designation of goods; but the court said that "the broad terminology of the statute is without ambiguity and I see no justification for reading in an exception". The theory of the claim was that defendant's trademarks constituted a false designation of origin and a false description in violation of the Lanham Act.

345. *Manning et al. v. Miller Music et al.*, 174 F.Supp. 192 (D.C.S.D.N.Y., June 10, 1959).

Action for copyright infringement. Plaintiffs alleged that they were the composers of "Morningside of the Mountain"; that Music Publishers Holding Corp. (not a party to this action) acquired the copyright while acting for defendant Remick Music Corp. (against which no remedy was sought) and assigned it to the latter; that the copyright was infringed by the other defendants' song "A Certain Smile"; and that plaintiffs had signed with Remick the "1947 Revised Popular Songwriters Contract" used by the American Guild of Authors and Composers. This agreement provided that Remick could sue infringers, but if it failed to do so, plaintiffs could bring an action after a 30-day notice to Remick. Plaintiffs alleged they had given this notice, to no avail.

*Held*, motion by all corporate defendants except Remick to dismiss complaint for failure to state cause of action and plaintiffs not being the real parties in interest, denied.

Plaintiffs urged they had equitable title to the copyright, but their agreement with Remick did not declare an express trust; however, there is a fiduciary relationship between an author and his publisher, and "it is this fiduciary relationship, imposing equitable obligations upon the publisher beyond those ordinarily imposed by law upon those dealing fully at arm's length, which gives the plaintiffs standing to sue here"; when a fiduciary refuses to sue a third party for the benefit of his cestui, the cestui may bring a bill in equity against his fiduciary in which the third party may be joined as defendant. "The plaintiffs here are entitled to participate in all proceeds from *all* forms of exploitation. If they are denied the right to compel the proprietor (Remick) to assert causes of action for their benefit, their reserved rights of participation will be gravely impaired and their reserved rights of statutory renewal compromised."

346. *Stone Manufacturing Co. et al. v. Moldcast Products, Inc. et al.*, 173 F.Supp. 289 (D.C.N.J., May 15, 1959).

Action for infringement of design patents, copyright infringement and unfair competition. Plaintiff owned design patents on outdoor lighting fixtures to hold sealed beams, with exterior circular ribbing instead of a plain surface, and charged defendant infringed these patents and copied plaintiff's copyrighted catalog.

*Held*, injunction granted to plaintiff.

The Court found substantial copying of the design patents, and that their only functional feature was a minimal amount of heat dissipation, not enough to defeat their validity.

As to copyright, defendant admitted access to plaintiff's catalog before and during production of its own, and "on the whole there is very definite appropriation, whether conscious or unconscious, of the plaintiff's catalogue format and contents, carried so far as to indicate adoption of word for word descriptive writing."

As to unfair competition, the inference was unavoidable that defendant enhanced its economic standing by copying and capitalized on plaintiff's ingenuity and enterprise. It was irrelevant whether this was done maliciously, and "secondary meaning" of plaintiff's products did also not have to be established since both the New Jersey Courts and the Third

Circuit are in accord that likelihood of confusion is the test; there was an indication of actual confusion. But the evidence of injury at this time was slight, not warranting an accounting.

347. *Bourne, Inc. et al. v. Romero et al.*, 23 F.R.D. 292 (D.C.E.D.La., N.Orl. Div., Feb. 3, 1959).

Action for copyright infringement. Plaintiffs, the copyright owners of three songs, alleged that defendants in their night club gave public performances of plaintiffs' songs without authorization. Defendants in their answer denied most allegations, generally for lack of sufficient information, but admitted generally that musical performances are given in their club for profit. Upon request, defendants admitted through counsel all essential allegations except that the three songs were actually performed on the stated date; counsel then withdrew, and defendants remained unrepresented. Thereupon plaintiffs sent registered mail notices to take defendants' depositions, but defendants refused to accept the letters. After being served by subpoenas, defendants appeared but refused to be sworn in and failed to produce records requested in discovery.

*Held*, plaintiffs' motion to strike answers and strike response to request for admissions, and for default judgment, granted, with injunction, \$250 minimum damages on each cause of action and \$500 attorney's fees.

It was not even necessary to serve subpoenas, a notice alone would have sufficed. The only question remaining in dispute at the time the depositions were scheduled was whether plaintiffs' songs were played in defendants' club, and it was on this point that plaintiffs wished to examine defendants. Also, plaintiffs submitted affidavits by two witnesses with intensive musical training who had made contemporaneous written records of the compositions performed.

348. *J. Walter Cobb, Jr., d/b/a Cobbwood Plastics Co. v. Southern Plaswood Corp.*, 171 F.Supp. 691 (D.C.W.D. Ark., Texarkana Div., Apr. 2, 1959).

Action to recover royalties allegedly due under a contract, and other relief. Defendant was the producer of a particle board (wood-waste products). Plaintiff, who had invented a similar process, continued his study of the use of wood-waste products, and in 1956 thought he had conceived of a market for a dinette set manufactured from waste-wood. He suggested defendant's particle board could be used, and conferences and correspondence ensued with defendant. Defendant started production, and plaintiff received a commission on all dinette sets sold by him. But plaintiff claimed he was entitled to a royalty on all sales.

*Held*, for defendant.

The court stated that the sole issue was whether there had been a contract for royalties, and if so, whether the Statute of Frauds barred an action on it; it found there was no contract, and in any case an action would be barred. Plaintiff alleged no other theory of recovery, but the briefs did, and the court therefore noted that plaintiff could have no claim to any other remedy; there was no confidential relationship between the parties, and there was no novelty in the "idea" offered by plaintiff, the defendant's plant manager having previously seen samples of wood-waste dinette sets at another plant.

## 2. State Court Decisions

349. *Miller v. Universal Pictures Co., Inc., et al.*, 121 U.S.P.Q. 475 (S.Ct. N.Y., Sp. and Trial Term, Part XV, May 1959).

Action by Glenn Miller's widow and executrix for accounting of profits. Miller had granted R.C.A. the exclusive right to use his name and likeness in producing advertising and selling records, and plaintiff had renewed this contract. Plaintiff and defendant Universal then entered into a contract for a motion picture based on Miller's life, the soundtrack to duplicate as closely as possible Miller's arrangements and his orchestra's performance. Defendant Decca owned and controlled Universal, and both knew of plaintiff's contract with R.C.A., but issued an album of the soundtrack with a large publicity campaign calling the records "exact duplications of some of the most famous Glenn Miller hits", etc., and made substantial profits.

*Held*, for plaintiff.

Defendants urged that the Decca album was primarily intended as a medium for exploiting the picture, as authorized by plaintiff's contract with Universal, but this was contrary to the evidence; "that claim is shown to be a pretense whereby Decca obtained or took from its wholly owned subsidiary, Universal, a most valuable product available otherwise solely

through R.C.A. records". Plaintiff had authorized use of musical material only for exploiting the picture, and could in any case not have granted the right to issue albums of the simulated Glenn Miller records in view of her contract with R.C.A.; yet Universal granted Decca the recording rights, and Decca admitted in an affidavit that its primary purpose in releasing the album was to make a profit for itself. While it may seem appropriate, the court stated, to limit plaintiff to a recovery of the royalties from defendants on the same basis as royalties from R.C.A., the damages might well be extended to the profits derived by Decca from its sale of the album; "there must come a time when 'the morals of the market place' should approximate those standards measured in terms of common honesty."

350. *Teich d/b/a Tower Industries v. General Mills, Inc.*, 121 U.S.P.Q. 639 (Cal.D.C. of App., 2nd Distr., Div. Two, May 29, 1959).

Action for breach of contract. Plaintiff sued upon an alleged contract under which defendant was to pay him the reasonable value of an idea submitted in concrete form, a gadget to be used by defendant as a premium. A jury awarded plaintiff \$35,000, but the court below granted judgment to defendant notwithstanding the verdict. Plaintiff appealed.

*Held*, affirmed.

If there was any substantial evidence before the Court below in support of plaintiff's case, it should not have granted judgment notwithstanding the verdict. There could have been an inference of copying and use of plaintiff's idea, but defendant conclusively proved independent development of the gadget (which in any case was not new) and independent sale to it. This was a complete defense, even though the gadget actually used was similar to the one presented by plaintiff.

## PART V.

**BIBLIOGRAPHY**

## A. BOOKS AND TREATISES

## 1. United States Publications

351. BLAISDELL, W. M. Size of the copyright industries; a study prepared for the United States Copyright Office. Washington, Copyright Office, May 1959. 63 p. (*General revision of the copyright law, preliminary study B*).

"The present study was prepared . . . [as part of the Copyright Office general revision program] to present background economic data concerning (1) the various industries in the United States that utilize copyrightable materials and (2) the revenues of creators of such materials."

352. DERENBERG, WALTER J. Copyright law. New York, New York University School of Law, c1959. pp. 237-255. "Reprinted from 1958 Annual Survey of American Law."

The 1958 annual survey of legislative and judicial copyright developments both within the United States and internationally.

353. GUEST, RONALD A. P. Policies of the United Kingdom Government respecting the division of rights between Government departments and their contractors in the area of research and development. [Washington, 1959] 15 p. (multilith).

An address delivered by the Patents Adviser, British Joint Services Mission, at the Briefing Conference on Patents, Copyrights and Trade-marks, sponsored by the Federal Bar Association and the Bureau of National Affairs, Washington, D. C., May 18-19, 1959. Mr. Guest sums up his paper as follows:

"The United Kingdom Government endeavors to divide the rights arising out of research and development contracts in a manner which is fair to the contractor, but retaining to the Government the necessary freedom of action with regard to supply for Government purposes. These rights are detailed in the contract itself and cover —

- (1) Patents and registered designs.
- (2) Design rights arising out of the development of articles.
- (3) Government use of drawings.
- (4) Copyright in reports, etc."

354. MISCELLANEOUS COPYRIGHT PROBLEMS. Washington, Copyright Office, June 1959. 4 pts. in 1 v. (*General revision of the copyright law, study no. 18, A-D*).

CONTENTS.—A. Remedies other than damages for copyright infringement, by William S. Strauss.—B. Authority of the Register of Copyrights to reject applications for registration, by Caruthers Berger.—C. False use of copyright notice, by Caruthers Berger.—D. Copyright in territories and possessions of the United States, by Borge Varmer.

The eighteenth in a series of studies issued by the Copyright Office to interested persons, with invitations to submit statements of their views.

355. NATIONAL COMMITTEE FOR EFFECTIVE DESIGN LEGISLATION. Summary of the provisions of the O'Mahoney-Wiley-Hart design protection bill (S. 2075, 86th Congress) New York [1959]. 8 p.

See Items 322 and 328, *supra*.

356. U. S. COPYRIGHT OFFICE. Supplement to Bibliography on design protection, compiled by William Strauss, Borge Varmer, and Caruthers G. Berger, under the editorial supervision of William Strauss and Barbara A. Ringer. Washington, June 1, 1959. 160 p. (multilith).

"In view of the current and increasing interest in more adequate design protection both here and abroad, it has been considered advisable to expand Miss Ringer's bibliography [issued in 1955] and bring it up to date. The first part of this *addendum* takes cognizance of international developments including significant recent writings in foreign languages. The second part, which was compiled by Mr. Borge Varmer, lists prior legislative proposals for design protection. The third part, which is the work of Mrs. Caruthers G. Berger, contains digests of significant court decisions on design protection under the copyright and patent laws and under common law theories such as unfair competition."

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## 2. Foreign Publications

### (a) In English

#### 357. AUSTRALIAN FEDERATION OF COMMERCIAL BROADCASTING STATIONS.

Submissions presented to the Copyright Law Review Committee by Australian commercial broadcasters (radio and television stations). [Sydney] 12th March, 1959. 42 p.

A review of Australian copyright legislation with recommendations for its revision.

### (b) In French

#### 358. HEPP, FRANÇOIS. Radiodiffusion, Television et Droit d'Auteur. Paris, Les Editions Internationales, 1958. 190 p.

This short work consists of eight chapters devoted to various copyright problems which particularly arise in broadcasting and television. Most of these chapters are reprints of separate articles which recently appeared in leading European copyright periodicals.

The first gives its name to the book itself. After a brief historical development of copyright law, the author emphasizes that the law is faced today with new means of communication in radio and television where recently developed electronic devices play an important role. The question is one of adapting traditional principles to a new situation, such as the recording of a performance and broadcasting the recording or repeating the recording later several times on the air. Mr. Hepp examines and describes the work of the various authors' organizations such as SACEM and SDRM which deal with these problems in practice, and shows that these organizations deserve the cooperation of the "users" of literary and artistic works. In the following chapters, the author deals with problems of a general nature, such as the definition of the concept of "literary and artistic work" and the concept of "art", and with some practical questions, such as the status of temporary recordings ("*enregistrements éphémères*") for broadcasting purposes, the international treatment of the right to translate under the Universal Copyright Convention, and the rights of performing artists.

With respect to this latter subject, the author's observations are particularly interesting since they reflect the position of many outstanding copyright experts who have expressed serious doubt as to the desirability

of treating performing artists' rights as related to copyright. According to Mr. Hepp, nothing but confusion and difficulties would result from the recognition of these so-called "neighboring rights". These rights should be recognized on the domestic as well as on the international level and regulated in the light of contractual principles since the problem is one of adequate compensation of performing artists for their work in view of the new uses of such work created by modern science. Recordings, for instance, result in a lessening of opportunity of employment for many artists and this economic loss should be set off in form of some other contractual arrangement for compensation. But the author points out that since performing artists are not actually creators, it would be erroneous to invest them with rights similar or "neighboring" to copyright. Whether or not the reader may agree with the author's views, his essays present a clear and thorough analysis of some of today's most difficult and controversial questions of copyright law.

*Hubert Secretan*

359. STOYANOVITCH, K. *Le droit d'auteur dans les rapports entre la France et les pays socialistes*. Préf. de M. Henri Desbois. Paris, Librairie générale de droit et de jurisprudence, 1959. 337 p.

"Copyright in the relations between France and the socialist countries"; an analysis of the national laws and regulations of the Iron Curtain countries and of the conventional obligations, if any, of each and how these obligations are satisfied. The texts of the Rome and Brussels revisions of the Bern Convention and of the respective copyright laws of each of the countries treated appear at end.

(c) In German

360. DELP, LUDWIG. *Kleines Praktikum für Urheber- und Verlagsrecht*. Stuttgart, C. E. Poeschel, 1958. 111 p. (Werkstatt des Buches).

A practical handbook on the rights of authors and publishers in the German Federal Republic with special reference to publishing contracts, including the protection of German works abroad and the copyright relationships between the Republic and other countries. Fair use and photocopying are also discussed.

361. DÖNGES, EMIL. Geschmacksmusteranmeldung leichtgemacht. Bad Wörishofen, H. Holzmann, 1959. 79 p.

A popular manual explaining the subject matter and methods of design registration and deposit in the German Federal Republic and under the arrangement of The Hague. A brief chapter is devoted to infringement and remedies under the Criminal and Civil Codes. The latter part of the manual contains texts of German laws and international conventions pertaining to designs and models.

362. HUBMANN, HEINRICH. Urheber- und Verlagsrecht; ein Studienbuch. München, C. H. Beck, 1959. 271 p. (Kurzlehrbücher für das juristische Studium).

A textbook on German copyright law organized under the following chapter headings: 1. Foundations. 2. The work. 3. Proprietorship. 4. Subject matter of copyright. 5. Limitations on copyright. 6. Legal transactions involving copyrights. 7. Exploitation of the work. 8. Neighboring rights. 9. Infringements and remedies.

363. TROLLER, ALOIS. Immaterialgueterrecht (The Law of Intangible Property). Basle and Stuttgart, Verlag Helbing & Lichtenhahn, 1959. 595 p.

According to Professor Troller's preface, this is the first volume of a second edition of his work on the same subject published in 1948. (There is no indication of the contents of the second volume.) Both works bear almost identical subtitles which indicate that they treat of the law of patents, trademarks, copyrights, designs and unfair competition. Apart from this subtitle, there is great difference in the two works. The first edition of Troller's book was a concise textbook, equally useful to the practitioner and to the law student. This second edition is a monumental study of legal philosophy, meticulously documented and intended primarily for scholars and students with some background and experience in this branch of the law.

The author modestly states that his present aim was a presentation of the Swiss law on patents, copyrights and related subjects, and that a comparative analysis of the laws of other countries was more or less incidental. But Professor Troller goes far beyond making such a limited study; he weaves a brilliant picture of the principles on which protection of intangible property rests in his and other countries, and his analysis goes to the root of many problems which have been the subject of numerous international meetings and on which the experts rarely agree. A careful study of this book may well help to eliminate a number of basic misunderstandings and disagreements in these fields.

The book is divided into three main parts. The first part contains a general discussion of patents, copyrights and unfair competition including the history of legal developments in these fields in Switzerland and internationally, and analyses of the principles on which rights in intangible property are granted (p. 5-41). The second part treats substantive rights in intangible property, subdivided into rights in inventions, trademarks, literary, musical and artistic works and designs (p. 145-512). The third part is concerned with formalities as a basis of protection (p. 515-576). Although the second and third parts of the book deal primarily with the Swiss law, the contents of the first part and the great wealth of international reference material throughout the book make it an invaluable part of the library of any lawyer concerned with the problems of intangible property rights.

*William Strauss*

364. SCHULZE, ERICH. Kulturabgabe und Kulturfonds. Berlin, F. Vahlen, 1959. 156 p.

A study of the theory and the social and cultural aspects of the "domaine public payant", followed by a comparative summary of the pertinent national and international laws including current legislative activities in this area.

(d) In Italian

365. SANCTIS, VALERIO DE. Artisti esecutori. Autore (diritto di): disciplina del diritto di autore; diritti connessi. Milano, A. Giuffrè, 1959. p. 173-182, 378-443.

"Enciclopedia del diritto, estratto dal terzo e quarto volume."

A reprint of the author's contributions, which appeared in vols. 3 and 4 of the Italian "Encyclopedia of the Law," on rights of performing artists, copyright, and neighboring rights.

## B. LAW REVIEW ARTICLES

## 1. United States

366. ACCOUNTABILITY AMONG CO-OWNERS OF STATUTORY COPYRIGHT. (72 *Harvard Law Review* 1550-1566, no. 8, June 1959.)

An analysis of the legal principles "defining the rights of co-owners to deal unilaterally with a copyright and their obligations to account to other co-owners" as developed in American court decisions.

367. ALLEYNE, REGINALD H., JR. Accounting for profits and statutory alternatives in copyright infringement suits. (5 *Howard Law Journal* 92-104, no. 1, Jan. 1959.)

"The problems encountered by a party seeking a recovery of an infringer's profits and the cognate problems which arise when alternative remedies are resorted to under the 'in lieu' clause of the statute, constitute the subject matter of this note."

368. COPYRIGHT—action for infringement—requirements of registration and copyrightability under "works of art" category. (34 *New York University Law Review* 777-783, no. 4, Apr. 1959.)

A case note on the appellate decision in *Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co.*, 260 F.2d 637, 6 BULL. CR. SOC. 81, Item 83 (2d Cir. 1958).

369. COPYRIGHT: issuance of certificate of copyright held condition precedent to infringement action. (107 *University of Pennsylvania Law Review* 1046-1053, no. 7, May 1959.)

A case note on the appellate decision in *Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co.*, 260 F.2d 637, 6 BULL. CR. SOC. 81, Item 83 (2d Cir. 1958).

370. COPYRIGHTS—right of administrator c.t.a. to renew and extend copyrights. (28 *Fordham Law Review* 159-161, no. 1, spring 1959.)

A case note on *Gibran v. National Committee of Gibran*, 255 F.2d 121, 5 BULL. CR. SOC. 301, Item 380 (2d Cir.), cert. den., 358 U.S. 828 (1958).

371. DAVIS, FREDERICK. What do we mean by "right to privacy"? (4 *South Dakota Law Review* 1-24, spring 1959.)

"After tracing the evolution of the right to privacy in American and English law, Professor Davis contrasts it to related rights and suggests that however useful in the sociological sense, as a jural concept it conceals more than it explains. He goes on to point out that the main difficulty arises from the essentially derivative nature of the interest in privacy which makes the right to privacy itself a mere distillate of other more meaningful and explicit causes of action."

372. DIXON, DAVID M. Parody and burlesque—fair use or copyright infringement? (12 *Vanderbilt Law Review* 459-481, no. 2, Mar. 1959.)

An extensive note on the *Gaslight* case with the conclusion that parody and burlesque "as recognized forms of artistic effort . . . must not be allowed to wither away upon the basis of judicial principles to which they were unfairly subjected."

373. FINKELSTEIN, HERMAN. Public performance rights in music. (9 *The Decalogue Journal* 6-8, no. 4, June-July 1959.)

An address, delivered "some months ago, at the Covenant Club, under the auspices of the Decalogue Forum committee," and devoted in large part to ASCAP.

374. GAFFORD, GERALD ALEXANDER. Substantial borrowing v. fair use; or, Spoof with caution. (30 *Mississippi Law Journal* 175-184, no. 2 Mar. 1959.)

A comment on the *Gaslight* case which "was the prize-winning paper in the 1958 Nathan Burkan Memorial Competition at the University of Mississippi.

375. HOLLANDER, SAMUEL M. The right of renewal: confusion's masterpiece, by Samuel M. Hollander and Milton Diamond. (64 *Commercial Law Journal* 96-98, no. 4, Apr. 1959.)

A note on *De Sylva v. Ballentine*, 351 U.S. 570, 4 BULL. CR. SOC. 3, Item 10 (1956).

376. HUNT, CECIL M. Copyright: copyright protection for "blank forms." (47 *California Law Review* 174-180, no. 1, Mar. 1959.)

A case note on *Continental Casualty Co. v. Beardsley*, 253 F.2d 702, 5 BULL. CR. SOC. 229, Item 285 (2d Cir. 1958).

377. KAVADAS, THOMAS, JR. Copyright—dress designs—design printed on dress fabric is proper subject of copyright. (34 *Notre Dame Lawyer* 457-460, no. 3, May 1959.)

A case note on *Peter Pan Fabrics, Inc. v. Brenda Fabrics, Inc.*, 169 F.Supp. 142, 6 BULL. CR. SOC. 138, Item 129 (S.D.N.Y. 1959).

378. KLEEMAN, W. WARREN. Copyright—advertisement—publisher's right in advertisements appearing in copyrighted newspaper. (27 *The George Washington Law Review* 585-588, no. 4, Apr. 1959.)

A case note on *Inter-City Press, Inc. v. Siegfried*, 118 U.S.P.Q. 446, 6 BULL. CR. SOC. 36, Item 19 (W.D. Mo. 1958).

379. MCCLAREN, SAMUEL L. Copyright: burlesque and the doctrine of fair use. (12 *Oklahoma Law Review* 276-287, no. 2, May 1959.)

"It is the author's opinion that . . . [the Supreme Court decision in the *Jack Benny* case, 356 U.S. 43 (1958)] by its lack of binding precedent tended further to confuse an unsettled area of copyright law. Therefore, it is beneficial to reconsider this area of copyright law to determine guides for similar future problems."

380. MONTA, RUDOLF. The concept of "copyright" versus the "droit d'auteur." (32 *Southern California Law Review* 177-186, no. 2, winter 1959.)

A comparative analysis of the Anglo-Saxon and French concepts of copyright. The writer expresses confidence that in proceeding with revisions of the U. S. copyright law, "we will avoid the pitfalls and not try to bring into our Copyright system doctrines which are foreign to us and which would create only both legal and economic chaos," and concludes with a list of recommendations indicative of what he considers to be the "highlights of such revisions."

381. NETTERVILLE, VICTOR S. Piracy and privilege in literary titles, by Victor S. Netterville and Barry L. Hirsch. (32 *Southern California Law Review*, 101-157, no. 2, winter 1959.)

A comprehensive, historical and analytical review of literary title cases with the conclusion that the decisions indicate "that, absent unfair competition, in the usual meaning of that term—confusion of the public—courts are not prone to protect literary titles," but "appear to be willing to treat literary titles as a proper subject matter for contract."

382. PAUL, ROBERT. A reappraisal of the manufacturing clause of the Copyright Act in the light of its history and the Universal Copyright Convention. (13 *University of Miami Law Review* 304-319, no. 3, spring 1959.)

The writer concludes, "The Copyright Office could do no greater service to the Copyright Act than to actively urge complete repeal of the manufacturing clause."

383. PROTECTION FOR THE ARTISTIC ASPECTS OF ARTICLES OF UTILITY. (72 *Harvard Law Review* 1520-1536, no. 8, June 1959.)

"This note will examine the protection which can be found for designs for articles of utility under existing law, and will assess the problems confronting any legislative effort to grant more extensive protection for such designs."

384. RIESENFELD, STEFAN A. Compulsory licenses and United States industrial and artistic property law. (47 *California Law Review* 51-63, no. 1, Mar. 1959.)

The compulsory licenses to which patents and copyrights might be subjected are discussed separately with the conclusions that "compulsory licenses for the benefit of private competitors are not favored by the traditions of American statute law except as sanctions for the violations of the anti-trust laws," and that "the main hope for relief against abuses of the patent or copyright systems rests, as usual, with the courts."

385. SKULINA, THOMAS R. Renewal rights, a statutory anachronism. (10 *Western Reserve Law Review* 263-275, no. 2, Mar. 1959.)

This article traces the history of renewal rights, their present place in the law and the numerous legal difficulties they involve, and suggests a revision of the present law.

386. SOLUM, CONRAD R., JR. Design patents and copyrights: the present inadequate state of the law. (32 *Southern California Law Review* 188-198, no. 2, winter 1959.)

"The purpose of this article is to provide a comparison of all material differences existing today between design patents on the one hand and copyrights on the other . . . The discussion . . . [is] generally limited to consideration of subject matter which may or may not be both patentable and copyrightable, with the objective in mind to determine the more advisable protection and alternatives available."

387. TANNENBAUM, SAMUEL W. Copyright law: titles in the entertainment field. (45 *American Bar Association Journal* 459-462, 527-528, no. 5, May 1959.)

First appeared in *New York Law Journal*, Sept. 24-26, 1958 and later reprinted in 6 BULL. CR. SOC. 64, Item 72 (1958) under title: Uses of titles for copyrighted and public domain works.

## 2. FOREIGN

### (a) English

388. BAUM, ALFRED. Assignment of performers' rights at German law; the position regarding rights in future mechanical contrivances. (*E.B.U. Review*, no. 54 B, Apr. 1959, pp. 35-41.)

The subject of this study is stated by the writer as being concerned with the following question, "Can the right deriving from Section 2 (2) of the Copyright Act be assigned away without restriction and even in respect of mechanical contrivances yet to be made?"

389. EUROVISION AND ITS LEGAL PROBLEMS. (*E.B.U. Review*, no. 55 B, June 1959, pp. 24-29.)

A review of some of the legal problems that beset the people in charge of Eurovision programs and an outline of the manner of treatment of these problems grouped under the following main headings: (1) copyright; (2) ancillary rights; and (3) other rights.

390. SANTBRINK, J. VAN. Copyrights relating to diffusion services according to Netherlands law; remarks on the judgment of the Netherlands Supreme Court of 27 June 1958 (NJ 1958 No. 405) in the Kingdom of the Netherlands (PTT) v. BUMA. (*E.B.U. Review*, no. 55 B, June 1959, pp. 20-24.)

A critical comment on a decision holding that a relay, over a wire broadcasting system, of programs that were simultaneously being broadcast over the air, required a license from BUMA, the Netherlands performing right society.

## (b) French

391. DERENBERG, WALTER J. Lettre des Etats-Unis d'Amérique. (72 *Le Droit d'Auteur* 99-108, no. 6, June 1959.)

A survey of recent legislative and judicial activities in the field of copyright in the United States.

392. DESBOIS, HENRI. Une péripétie dans l'évolution du problème des "droits voisins." (23 *Revue Internationale du Droit d'Auteur* 4-31, Apr. 1959.)

A penetrating analysis, in French, English, and Spanish, of the basic conflicts between the I.L.O. and Monaco draft international conventions on neighboring rights, in which is pointed out the importance of the amendments recommended by Georges Straschnov, Svante Bergström and Paolo Greco in their collaborative work on the international protection of neighboring rights (Brussels, 1958). See 6 BULL. CR. SOC. 42, Item 30 (1958).

393. HAUERT, ROGER. Contrôle et limites du droit moral de l'artiste. (*Revue Internationale du Droit d'Auteur*, no. 23, Apr. 1959, pp. 50-61.)

An analysis, in French, English and Spanish of French case law on the problem of the control and limits of the moral right of the artist both during his lifetime and after his death.

394. MISERACHS, ANTONIO. Incidence, sur le plan international, du droit espagnol concernant la publication des oeuvres complètes d'un auteur. (72 *Le Droit d'Auteur* 87-91, no. 5, May 1959.)

An analysis of the legal effect of the Bern and Universal Copyright Conventions on article 30, paragraph 1 of the Spanish Copyright Law which provides that "the author or translator of scientific, literary or artistic works shall be entitled to publish all or part of them in a collection even when he has partly alienated them."

395. TOURNIER, ALPHONSE. L'arrangement européen sur la circulation des films de télévision. (*Revue Internationale du Droit d'Auteur*, no. 23, Apr. 1959, pp. 32-49.)

A clarification and defining, in French, English and Spanish, of the object of an European arrangement concerning the circulation of television films signed in Paris on Dec. 15, 1958 by a certain number of member states of the Council of Europe.

## (c) German

396. BREITHAUPT, WALTER. Wie geht der Urheberrachtsschutz für Bauentwürfe? (12 *Neue Juristische Wochenschrift* 324-326, no. 8, Feb. 20, 1959.)

A criticism of a decision of the Supreme Court of the German Federal Republic, handed down on March 29, 1957, holding in effect that a person who commissions an architect to draw up plans for a building is guilty of copyright infringement where he uses the services of a person other than the architect for the construction of the building in the absence of an express agreement giving him that right.

397. BRUGGER, GUSTAV. Kartellrechtliche Beurteilung von Urheberrechtsgesellschaften. (9 *Wirtschaft und Wettbewerb* 159-169, no. 3, Mar. 1959; 244-254, no. 4, Apr. 1959.)

An analysis of the conditions under which societies concerned with exploitation of copyrights may be regarded as cartels or as monopolies in the German Federal Republic, and of the provisions of the law against restraint of trade (GWB), enacted in 1957, applicable to contracts between such societies and authors, users, and other societies.

398. CIGOJ, STÔJAN. Des Recht des ausübenden Künstlers in Jugosalwien. (27 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 12-37, no. 1/2, Feb. 1, 1959.)

An analysis of an announcement, issued on May 6, 1953 by the Yugoslav "Federal Executive Council," regulating the fees of artists for the mechanical recording of their performances of literary and musical works, the reproduction of the recordings, and the manner in which the fees may be claimed, with comments on court decisions interpreting the provisions of the announcement.

399. GAMM, OTTO FRIEDRICH *Freiherr* VON. Die Urheberbenennung in Rechtsprechung und Praxis. (12 *Neue Juristische Wochenschrift* 318-320, no. 8, Feb. 20, 1959.)

A discussion of the right of an author, under German law, to be named in connection with his work, with particular reference to motion pictures, periodicals, advertising, and industrial designs.

400. GLASER, HUGO. Urheberrecht des Architekten. (27 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 37-38, no. 1/2, Feb. 1, 1959.)

A brief note on a West German Supreme Court decision of March 29, 1957 holding in effect that the transfer by an architect of the right to use his plans for the construction of a building does not include, in the absence of other agreement, the transfer of his copyright in the plans.

401. HARTLIEB, HORST VON. Persönlichkeitsschutz und Filmfreiheit. (27 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 145-168, no. 3/4, Apr. 1, 1959.)

An analysis of the conflict between artistic freedom in film production and the protection of the right of privacy in the German Federal Republic with a discussion of two draft laws proposed in 1955 and 1958, respectively, for solutions of the problem.

402. MEDIGER, HARALD. Gedanken über Zweckmäßigkeit und rechtliche Möglichkeiten einer Urhebernachfolgegebühr. (61 *Gewerblicher Rechtsschutz und Urheberrecht* 269-272, no. 6, June 1959.)

A discussion as to whether a "droit de suite" is expedient and a proper subject for copyright legislation.

403. MÜNZER, GEORG. Gedanken zur Gestaltung eines sozialistischen Urheberrechts. (*Erfindungs und Vorschlagswesen*, Ausg. C., no. 2, Feb. 1959, pp. 35-40.)

"Thoughts on the shaping of a socialist copyright." A case is made for the replacement of various old laws concerning copyright still in force in the German Democratic Republic (East Germany) by a new uniform law, based on socialistic principles, which will protect the rights of authors in all fields of the arts. Some of the problems posed by the existing laws are examined and solutions suggested which include proposals for a clear definition of the object and extent of copyright protection and the integration of personal with property rights of the author.

404. SCHÄFFER, FRITZ. Film und Persönlichkeitsschutz. (27 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 129-144, no. 3/4, Apr. 1, 1959.)

A discussion of the protection, in the German Federal Republic, against the unauthorized depiction of a person in motion pictures either by his photograph in a documentary film or newsreel or by an actor in a feature film, in the light of recent German Supreme Court decisions recognizing, contrary to earlier decisions, a "general right of personality."

## (d) Italian

405. ARE, MARIO. Validità del concetto di bene immateriale. (29 *Il Diritto di Autore* 353-380, no. 3, July-Sept. 1958.)

A study of the "validity of the concept of incorporeal ownership," with reference to intellectual property.

C. ARTICLES PERTAINING TO COPYRIGHT  
FROM TRADE MAGAZINES

## 1. United States

406. Copyright Implications in the British Printing Strike (176 Publishers' Weekly 39, no. 5, August 3, 1959.)

The question whether copyright is jeopardized if the American publisher goes ahead with publication of his edition without waiting for the British publisher to issue his edition is answered in the negative by authorities consulted by *PW*.

407. CORNELL, JOANN. 'No-man's land' cited in design. (31 *Home Furnishings Daily* 13-14, no. 46, Mar. 9, 1959.)

A summary of an address delivered by Sol B. Wiezer, Washington, D. C., patent attorney at a recent meeting of the Lamp Manufacturers Anti-Design Piracy Committee in New York City. Mr. Wiezer "clarified the differences between mechanical patents, design patents and copyrights as they apply to the lamp industry in particular," and advised the members attending the meeting of the advantages of an association of lamp manufacturers in which each member agrees not to copy the other's designs without permission.

408. DIAMOND, SIDNEY A. Fabric Design Piracy Halted as Infringement of Copyright. (*Advertising Age*, May 18, 1959, p. 109.)

Mr. Diamond discusses the efforts of Peter Pan Fabrics to protect its designs.

409. FRANKEL, MAX. Where piracy pays. (*The New York Times*, vol. 108, no. 37010, May 24, 1959, sec. 2, pp. 1, 3.)

An article on literary piracy in Russia with reference to recent news received by Alan Jay Lerner and Frederick Loewe "that some Russians were ready to steal their glorious 'My Fair Lady.'"

410. Grove Sues NAL for Deceiving With Its "Chatterley" Edition, (176 *Publishers' Weekly* 38, no. 5, August 3, 1959.)

In the interim period before the government's appeal will be heard in October, various publishers rush to issue "unexpurgated" versions of "Lady Chatterley's Lover". *PW* surveys this activity, the suit begun by Grove and the warning issued by the New American Library.

411. Industries dependent on copyright top all but autos and railroads. (214 *Variety* 2, no. 13, May 27, 1959.)

A summary of the Blaisdell study recently issued as preliminary study B of the Copyright Office general revision studies. See item 351, *supra*.

412. JAMES, MARION. [Review of] Universal Copyright Convention: an analysis and commentary, by Arpad Bogsch. (29 *The Library Quarterly* 143-145, no. 2, Apr. 1959.)

413. Legal snag looms for automated material. (84 *Chemical Week* 103-106, no. 10, Mar. 7, 1959.)

A brief discussion of the question whether the researcher's unauthorized use of copyrighted material for the extraction of scientific data to be "filed" in automatic machines for recovery constitutes copyright infringement. "That possibility—and what to do about preventing it—will come in for heated discussion at next month's meeting of the National Science Foundation's Scientific Information Council in Washington."

414. LEWIS, JAY. 'Public rights' in copyright? (214 *Variety* 140, no. 7, Apr. 15, 1959.)

A brief summary of the Varmer study, "Limitations on performing rights," and of the comments thereon, sixteenth of a series of general revision studies issued by the Copyright Office.

415. LOWENS, IRVING. Copyright and Andrew Law. (53 *The Papers of the Bibliographical Society of America* 150-159, 2nd quarter, 1959.)

A historical sketch of early American copyright, State and Federal, with particular reference to musical publications registered by the Connecticut singing master, Andrew Law. Tables are given listing Law's State and Federal copyrights as well as his publications deposited in the Office of the Secretary of State.

416. MAASS, EMIL W. Founder of copyright: Martin Luther. (214 *Variety* 17, 19, no. 3, Mar. 18, 1959.)

A brief article summarizing some "historic data" on the evolution of copyright protection.

417. PILPEL, HARRIET F. "But Can You Do That?" (175 *Publishers' Weekly* 55, no. 5, Feb. 2, 1959.) "Censorship About to be Re-Revisited" (*Application of Kingsley International Pictures Corp. v. Regents of the University of the State of New York*); "Publishing Contracts Can Give Birth to Tax Solutions" (*Gann v. Com'r. of Internal Revenue*), 31 Tax Court No. 23 (Oct. 27, 1958); "The Copyright Office and the Wrist Watch" (*Vacheron & Constantin-Le Coultre Watches Inc. v. Benrus Watch Co., Inc.*).

418. PILPEL, HARRIET F. "But Can You Do That?" (175 *Publishers' Weekly* 48, no. 8, Feb. 23, 1959.) "How Far Is Too Far Where Parodies Are Concerned?" (a discussion of the results of the "Gaslight" case); "The Governor of New York Said 'No'" (*Burtman v. Silberglitt*, New York Sup. Ct. (N.Y.Co. Oct. 23, 1958), involving "art model" magazines and extradition of defendant); "Distributors' Stake in the Contents of Magazines" (*People of the State of New York v. Richmond County News, Inc.*, 179 N.Y.Supp.2d 76 (Oct. 15, 1958), another magazine case involving "men's candids"); "The Defendant Won the Battles But the Plaintiff Won the War" (*American Visuals Corp. v. Holland*).

419. PILPEL, HARRIET F. "But Can You Do That?" (175 *Publishers' Weekly* 24, no. 13, Mar. 30, 1959.) "A Warning to Those Who Sign Releases" (*Russell v. Marboro Books et al.*; Sup. Ct., N.Y., Sp. Term, Part III, decided Jan. 12, 1959); "This Decision Makes Clear It's a Small World" (*Attorney-General v. Simpson*, District Court, Dublin, Ireland, June 9, 1958, censorship action re "The Rose Tattoo" in Ireland); "What Are the Damages? How Can They Be Proved?" (*Reback v. Story Productions, Inc.*).

420. PILPEL, HARRIET F. "But Can You Do That?" (175 *Publishers' Weekly* 20, no. 17, April 27, 1959.) "Renewal of Copyrights Can Be Troublesome" (*Venus Music Corp. v. Mills Music, Inc.*); "But Record You Must" (*Vidor v. Serlin et al.*); "Look What Happened to Melvin the Monster" (*Gantz v. Hercules Pub. Corp.*).

### 2. England

421. SOCIETY OF AUTHORS. Copyright and the periodicals. (69 *The Author* 78, no. 3, spring 1959.)

A brief item on the problem of the form of copyright notice necessary to protect the contents of British periodicals in the U.C.C. countries and particularly in the United States.

### 3. India

422. KRISHNAMURTI, T. S. What is copyright? (2 *The Book News, the Monthly Journal of the Book Industry Council of South India* 15-16, no. 12, Dec. 1958.)

A brief explanation of "the rights comprising copyright in India."

### 3. Japan

423. NODA, MINORU. Japanese record makers, European copyright holders feud. (*The Mainichi* (Tokyo), no. 12915 (Feb. 13, 1959), p. 7.)

An article on disputes over music royalties between Japanese record makers and two European performing rights organizations: One dispute involves the Japan Phonograph & Record Association and the Bureau Internationale de l'Édition Mécanique (BIEM), and the other is between the Japanese Society of Rights of Authors and Composers (JASRAC) and the Société d'Auteurs, Compositeurs et Editeurs de Musique (SACEM).

## NEWS BRIEFS

424. NEW ADHERENCE TO THE UNIVERSAL COPYRIGHT CONVENTION.

The Copyright Division of UNESCO has announced that on Friday, July 17, 1959, the Republic of Lebanon deposited its instrument of accession to the Universal Copyright Convention and Protocols 1, 2, and 3, thereto, effective October 17, 1959, thus bringing the number of Contracting States to 32.

## 425. ASCAP NATHAN BURKAN COPYRIGHT PRIZES ANNOUNCED.

National prizes of \$500 each were won by Samuel E. Olevson, Harvard University Law School, and Roger Needham, University of Michigan Law School, for the papers submitted in the Nathan Burkan Memorial Competitions. The competition, now in its twenty-first year, is sponsored annually by the American Society of Composers, Authors and Publishers in memory of the Society's first General Counsel. The papers will be published this Fall by Columbia University Press.

Chief Justice Frank R. Kenison of the New Hampshire Supreme Court and Judge Alfred P. Murrah, of the United States Court of Appeals for the Tenth Circuit, chose Mr. Olevson's paper as the best of the 37 submitted in the 1957 Competition while Mr. Needham's paper was chosen from among the 47 submitted in the 1958 Competition.

In addition to these national prize papers the judges selected four other papers from each of the Competitions as worthy of Honorable Mention.

The four papers winning honorable mention in the 1957 Competition are:

*The Scholar and the Copyright Law* by John L. Wilson of the University of Michigan Law School; *The Juke Box Exemption* by Eugene Mooney of the University of Arkansas Law School; *Relationship Between Copyright and Unfair Competition Principles* by Martin Leach-Cross Feldman of Tulane Law School; *Contributions to Periodicals: As Seen Through The Eyes of the Author* by Dino Joseph Caterini of New York University Law School.

The honorable mention papers for the 1958 Competition are:

*Problems in the Transfer of Interests in a Copyright* by Arthur Miller of Harvard Law School; *Related Rights and American Copyright Law: Compatible or Incompatible* by L. Lee Phillips of Cornell Law School; *News: Public Right v. Property Right* by Dr. William F. Swindler of the University of Nebraska Law School; and *Copyright Publication: The Sale and Distribution of Phonograph Records* by Peter H. Morrison of Columbia University Law School.

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