BULLETIN

OF THE

COPYRIGHT

•

SOCIETY

•

OF THE U. S. A.

Published at

NEW YORK UNIVERSITY LAW CENTER

VOL. 7, NO. 1 OCTOBER, 1959

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

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

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

GENERAL REVISION STUDIES NOW AVAILABLE

The following studies 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:

SIZE OF THE COPYRIGHT INDUSTRIES (Preliminary Study B) by W. M. Blaisdell

USES OF THE COPYRIGHT NOTICE (Study 17)

A. Commercial Use of the Copyright Notice; by William M. Blaisdell

B. Use of the Copyright Notice by Libraries; by Joseph W. Rogers

MISCELLANEOUS COPYRIGHT PROBLEMS (Study 18)

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 the Copyright Notice; by Caruthers Berger

D. Copyright in Territories and Possessions of the United States; by Borge Varmer

PHOTODUPLICATION OF COPYRIGHTED MATERIAL (Study 19) by Borge Varmer

PROTECTION OF WORKS OF FOREIGN ORIGIN (Study 20) by Arpad Bogsch

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.

CONTENTS

THE BULLETIN of The Copyright Society of the U.S.A. is published 6 times a year by The Society at the Law Center of New York University, 40 Washington Square South, New York 11, New York: Walter J. Derenberg, *President;* Horace S. Manges, Alfred H. Wasserstrom, *Vice-Presidents;* William Klein II, *Treasurer;* Leonard Zissu, *Secretary;* Sigrid H. Pedersen, *Assistant Treasurer;* and Werner Janssen, Jr., *Assistant Secretary.*

Annual subscription: $25.

All communications concerning the contents of THE BULLETIN should be addressed to the Chairman of the Editorial Board, at the Law Center of New York University, 40 Washington Sq. So., New York 11, N. Y.

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

CITE: 7 BULL. CR. SOC. page no., Item .....(1959).

PART I.

ARTICLES

1. THE NINTH ANNUAL SYMPOSIUM ON COPYRIGHT

An Introduction by JOHN SCHULMAN

The articles which follow are papers delivered at the Ninth Annual Symposium on Copyright of the Patent, Trademark and Copyright Section of the American Bar Association. The Symposium, held at the Annual Meeting of the Section in Miami, August 22-28, 1959, continued the program of assisting lawyers from all parts of the country to keep abreast of developments in domestic and international copyright law, and affording to them an opportunity of discussing these developments.

Over the course of years the discussions have covered particular aspects of copyright law, the general development of the copyright system, programs for the revision of the statute, and problems relating to international copyright relationships. Although the topics have varied, the purpose has always been the same. The purpose has been to enable lawyers to serve their clients more effectively and to make the copyright system a better instrument to serve the needs of society.

The law of copyright and literary property is not confined within a set of musty and static rules. It has been required to deal with dynamic facets of our economic and cultural life. Within its purview fall the various rights relating to such works as books, magazines, newspapers, motion pictures, painting, sculpture, plays and other forms of live entertainment, and radio and television programs. The Copyright Act of 1909 was enacted long before the advent or radio, television, talking motion pictures, and many of the other marvels of modern science and technology. Its provisions and the rules of common law relating to literary property have been painstakingly adjusted by the courts and by the legal profession in an effort to make them serve these various developments of the last half century. We all know that a revision of the copyright statute is a crying need — but that is another story.

There is nothing esoteric about the necessity for adequate copyright protection. It has been estimated that the aggregate gross annual product of the industries in the United States which depends upon copyright protection or

which deals with copyrightable matter, exceeds six billions of dollars. That represents a fairly substantial proportion of the total gross product of our country. So, the copyright system affects not only authors, artists and composers but large and small industries as well.

The Ninth Annual Symposium at Miami was devoted in large measure to those facets of copyright law which are of interest to those industries which are not engaged in publishing.

The principal topic discussed was the protection of Industrial Designs. It is a subject of the utmost importance and interest in the United States and throughout the world. There is a general and undeveloped recognition that new rights and remedies must be established in this area to advance the progress of the useful arts.

This phase of the Symposium was organized by Philip Dalsimer of New York, a devoted and tireless crusader for the protection of designs. The individuals who presented the papers represent divergent viewpoints. They were chosen to express these differences, in the firm conviction that in the process of debate understanding and accommodation can best be reached.

Barbara Ringer, of the Copyright Office, whose work is well known to all members of the Copyright Bar, explained and commented upon the Design Bill presently pending in the United States Senate — S. 2075. The bill also has the support of the well known industrial designer, Milton Immermann, an associate of Walter Dorwin Teague. In the opposite corner, equally sincere, able and persuasive, is Harry R. Mayers, Chief Patent Counsel of the General Electric Company.

In addition, Professor Harry G. Henn, of Cornell University, provided a splendid survey of recent developments in the law of copyright. Theodore R. Kupferman, of New York, well known as a practitioner and author, discussed protection of prints and labels used in the sale of merchandise.

As Chairman of the Subsection Committee of the Patent Section of the American Bar Association during the past year, as well as a former officer of The Copyright Society of the U.S.A., I am happy that the papers delivered at the Symposium have found their way to THE BULLETIN for publication. It is the logical medium.

2. CURRENT DEVELOPMENTS IN COPYRIGHT LAW

By HARRY G. HENN

Professor of Law, Cornell Law School

BACKGROUND

Today we are midway between two significant copyright anniversaries. Last March 4th was the 50th anniversary of the present United States Copyright Act;[1] next April 10th will be the 250th anniversary of the first English copyright legislation, the Statute of Anne of 1710.[2]

Rather startling are the similarities between our present Act and the Statute of 1710, especially in the light of comparative copyright legislative developments in other countries and of the technological advances and changes in commercial practices during the past half century.

Like its 250-year old model, our 50-year old statute preserves common law copyright in unpublished works, maintains a registration system for statutory copyright, and affords protection for an original term and possibly a separate, additional renewal term.[3]

---

1. 35 Stat. 1075 (1909), effective July 1, 1909; 17 U.S.C. § 1 et seq. (1958). See "The Copyright Code: Its History and Features", The Publishers' Weekly 19 (July 3, 1909). The codification of July 30, 1947 (61 Stat. 652) did little more than make changes in form, arrangement, and numbering of the sections of the 1909 Act. For annual reviews of copyright law, see Derenberg, "Copyright Law" in the Annual Survey of American Law, 1942-1959.

2. 8 Ann., c. 19 (1710). The expiration of the licensing acts in 1694 had left the printers without adequate remedies. Authors showed conspicuous lack of interest in copyright legislation, since they usually sold their works outright. The date of the Statute of Anne is sometimes erroneously given as 1709 because the journals of Parliament recording the legislative history of the statute were dated 1709 until late March, 1710. Ransom, "The Date of the First Copyright Law", Studies in English, 1940 U. Tex. Pub'n No. 4026, 117-122 (1940).

3. Ransom, The First Copyright Statute (1956), reviewed in 43 A.B.A.J. 151 (1957), 3 Wayne L. Rev. 81 (1956). Among the many striking parallels between the Statute of Anne and the American copyright system as embodied in the United States Constitution and present United States Copyright Act are:

Act of Anne, 1710	*U. S. Constitution and Act of 1909*
Author's rights stated as ancillary to "Encouragement of Learning".	Author's rights stated as ancillary to promoting "the Progress of Science and useful Arts" (U.S. Const. art. 1, § 8).
Reference to Act's "securing" author's rights.	Same (*ibid.*, Act § 10).
Protection limited to 21 or 14 (+14) years "and no longer".	Protection "for limited Times" (*ibid*); 28 (+28) years (Act § 24).

Copyright legislative reform elsewhere in the world, including Great Britain and the Commonwealth of Nations, has substantially departed from the 1710 model.[4] While this should give us pause for thought, the primary magnitude, variety, and complexity of American copyright interests[5] perhaps justifies the unique American system, despite the age of its tradition and the fact that it has long since been repudiated in the land of its origin.

Leaving the English system for the moment and concentrating on our statute, we find a very poorly drafted hodge-podge of provisions, hastily assembled in 1909[6] and revised only in minor respects since then.[7] It stands as a poor example of twentieth century legislative drafting science.

Term of "new" books computed from "Day of the First Publishing".	Term computed from "date of first publication" (Act § 24).
Renewal by author, if "then living".	Renewal by author, "if still living . . ." (Act § 24).
Seizure and destruction of infringing matter.	Same (Act § 101(d).)
One-penny per sheet penalty for infringement.	$1 per copy, etc. statutory damage for infringement (Act §§ 101 (b)).
Registration of title in Stationers' Company Register-book.	Registration of copyright in Copyright Office (Act §§ 12, 13).
Registration of proprietor's consent to printing or reprinting.	Recordation of assignments (Act § 30).
Certificate of entry.	Certificate of registration (Act § 209).
Deposit of 9 copies, "upon the best Paper", subject to fine after demand.	Deposit of 1-2 copies "of the best edition", subject to fine after demand, etc. (Act §§ 12, 13, 14).
Free importation and selling of books in Greek, Latin or any other foreign language "Printed beyond the Seas".	American manufacture requirement (Act § 16).
Costs to prevailing defendant.	Costs to prevailing party (Act § 116).

4. Common law copyright has been abolished by statute in Great Britain, Canada, and other British dominions; most of these countries are also members of the Berne Copyright Union. The American federal system probably accounts in large measure for our retention of perpetual common law copyright in unpublished works under state law, in contrast to federal statutory protection "for limited Times" under U.S. Const. art. I. § 8, cl. 8. Of interest were the recent attempts in England to achieve perpetual copyright for the Gilbert and Sullivan comic operas by parliamentary bill.

5. See Blaisdell, The Size of the Copyright Industries (1959).

6. Tannenbaum, "Practical Problems in Copyright", in 7 Copyright Problems Analyzed 6, 8 (1952). Most of the congressional attention, in connection with the 1909 revision, was directed toward the problem of protecting mechanical recordings of music, eventually resolved by the compulsory license provision of present section 1(e). See H.Rep. No. 2222, 60th Cong., 2d Sess. 4 (1909).

When our statute was enacted in 1909, photography was in its infancy; color photography was unknown; motion pictures were first being developed; sound motion pictures had been an unsuccessful experiment; player pianos and crude gramaphones reproduced, after a fashion, music recorded on rolls, cylinders, or disks; music composers and their publishers relied on the sale of sheet music for any income; performing rights and recording rights had little economic significance, performing rights societies were not yet necessary; "long-play" and "extended-play" records, magnetic wire and tape, "hi-fi" and stereophonic sound reproduction were unknown, as were radio and television with their concomitant "electrical transcriptions", kinescope recordings, sight-and-sound tape, etc. Only by the ingenuity of counsel and judicial flexibility were the old statutory formulations applied to the new media,[8] sometimes but not always in a satisfactory manner.

General Developments

Program for Revision of Our Copyright Statute

Practically unanimous is contemporary opinion that our copyright statute is long overdue for complete revision. As to the particulars of such revision, there is, as one would expect, a considerable variety of views. Whether differing views can be satisfactorily compromised to achieve sufficient support for any draft of revised statute remains to be seen. The coming year should tell.

The revision program launched in 1955, under the auspices of the Copy-

7. See Goldman, The History of U.S.A. Copyright Law Revision 1901-1954 (1954). Of the more substantial changes, the Act of August 24, 1912 (37 Stat. 488) expressly extended copyright to photoplays and motion pictures other than photoplays; the Act of June 3, 1949 (63 Stat. 153) modified the manufacturing clause and related sections; the Act of July 17, 1952 (66 Stat. 752) recognized an exclusive right of public delivery for profit in a non-dramatic literary work; the Act of August 31, 1954 (68 Stat. 1030) modified several sections so far as works claiming protection under the Universal Copyright Convention are concerned. To a copyright system based on visual standards, since complicated by sound, have been added the problems of smell, with the development of Smell-O-Vision ("smellies") and exhibition of the "olfactory epic" entitled "Scent of Mystery" produced by Michael Todd, Jr.

8. See, for example, as to the judicial development of a statutory exclusive motion picture exhibition right, where such right was not expressly mentioned in the 1909 Act, the chapter on "Exhibition Rights in Motion Pictures" in Copyright Office General Revision Study No. 6, "Limitations on Performing Rights," by Borge Varmer (released March 1959) and quotations in footnotes 108, 109, and 111 therein from Edward A. Sargoy, who participated as attorney in the cases discussed; also Mr. Sargoy's appended commentary in said study.

right Office, is now in its final stage.[9] Some 20 revision studies have been published to date;[10] comments thereon have been solicited from a panel of consultants appointed by the Librarian of Congress and other persons and groups interested in copyright; meetings of the panel have been held in Washington, D. C. and New York City. The challenging task of drafting the new statute remains.

International Aspects

Before the current revision program began, efforts were concentrated on putting our international copyright relations in order. These came to fruition with the Universal Copyright Convention, which came into force in 1955 and is now effective among the United States and 30 other nations of the free world.[11] Broadly speaking, the Universal Copyright Convention, known in copyright circles as the "U.C.C.",[12] achieved three results, along practical, psychological, and intellectual lines. Practically speaking, the U.C.C. improved foreign copyright protection for domestic works and domestic protection for foreign works.[13] Psychologically, the U.C.C. created an atmosphere of success for copy-

9. Annual Report of Register of Copyrights, 1957-58.

10. Listed in 1959 Report, A.B.A. Committee on Program for Revision of the Copyright law.

11. Andorra, Argentina, Austria, Cambodia, Chile, Costa Rica, Cuba, Ecuador, France, German Federal Republic, Haiti, Holy See, Iceland, India, Irish Republic, Israel, Italy, Japan, Laos, Liberia, Liechtenstein, Luxembourg, Mexico, Monaco, Pakistan, Portugal, Spain, Switzerland, United Kingdom, and United States. Quaere, as to the Philippines which adhered and then purported to withdraw. Lebanon acceded on July 17, 1959, effective October 17, 1959. Failure of the Soviet Union, with which the United States has no copyright relations, to protect American works, has been a subject of increasing concern. The Authors' League retained Mr. Adlai F. Stevenson to intervene in behalf of its members during his 1958 visit to the Soviet Union. Mr. Norman Cousins in 1959 further pursued the matter without apparent success. Cousins, "Of Rubles and Royalties", 42 Saturday Review 26 (Sept. 5, 1959). Russian nationals can qualify for U.C.C. protection in the United States and other signatory countries through the "back-door" by first publication in a signatory country. [*Ed.* On October 6, 1959, the first of the "Iron Curtain" countries to ratify, Czechoslovakia, did so, effective January 6, 1960. See also ratification by Brazil, reported infra, Item 79.]

12. Not to be confused with the "U.C.C." of commercial law—the Uniform Commercial Code.

13. See Bogsch, Universal Copyright Convention (1958); Universal Copyright Convention Analyzed (1955); Sargoy, "U.C.C. Protection in the United States: The Coming into Effect of the Universal Copyright Convention", 33 N.Y.U.L. Rev. 811 (1958), 5 BULL. CR. SOC. 177 (1958); Derenberg, "The Status of United States Authors and Works First Published in the United States Under the Universal Copyright Convention", 5 BULL. CR. SOC. 206 (1958). The Washington Convention of 1946, signed but never ratified by the United States, has been withdrawn from Senate consideration.

right reform. Intellectually, the U.C.C., as a "bridge" between the American and Berne Union copyright systems, promoted mutual understanding of, and tolerance for, foreign copyright concepts.[14]

Current evidence of this third achievement of the U.C.C. is the recent report of the royal commission on revision of the Canadian copyright statute, with its increased tendency to follow some American statutory copyright concepts.[15] For example, the Canadian report recommended substitution of original term-renewal term for the Berne Union copyright term of author's life plus 50 years; Canadian adherence to the U.C.C.; and non-adherence to the Brussels revision of the Berne Convention. Also recommended was elimination of the Canadian juke box exemption[16] and other changes.[17]

Internationally, other developments are occurring which, while not necessarily directly affecting copyright, relate thereto, notably with respect to so-called "neighboring rights" (or "related rights")[18] and design protection.[19]

14. See the very valuable preliminary comparative copyright studies in the trilingual UNESCO Copyright Bulletin, and the subsequent up-to-date, authoritative compilation, Copyright Laws and Treaties of the World (1956). Dubin, "The Universal Copyright Convention", 42 Calif. L. Rev. 89 (1954); Finkelstein, "The Universal Copyright Convention", 2 Am. J. Comp. L. 98 (1953); Henn, "The Quest for International Copyright Protection", 39 Cornell L. Q. 43 (1953); Schulman, "International Copyright in the United States", 19 Law & Contemp. Prob. 141 (1954); Sherman, "The Universal Copyright Convention: Its Effect on United States Law", 55 Colum. L. Rev. 1137 (1955).

15. Report on Copyright, Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs (1957), discussed in Ringer, "The Canadian Royal Commission's Report on Copyright", 5 BULL CR. SOC. 217 (1958).

16. See Composers, Authors and Publishers Ass'n of Canada, Ltd. v. Siegel Distributing Co., 6 BULL CR. SOC. 262 (Sup. Ct. of Canada, Mar. 25, 1959). An earlier Canadian Supreme Court case finding no juke box exemption in the Canadian statute was reversed by the Privy Council in Vigneux v. Canadian Performing Right Society, Ltd., [1945] 1 All E. R. 432 (P.C.) (Can.). The Royal Commission's recommendation was that the repeal of the Canadian juke box exemption not apply to American works until the repeal of the American juke box exemption. See note 25 infra.

17. Changes in compulsory license royalty rate from two cents per playing surface to rate based on playing time; in industrial design protection; in regulation of performing rights societies. Repeal of the printing clause was recommended, and provisions for the recordation of assignments and licenses were considered useful. The value of continuing to give even presumptive effect to copyright registration was, however, questioned.

18. The terms are translated from the French term "Droits Voisins" which is not particularly descriptive to those unfamiliar with the field; it connotes rights neighboring on or related to copyright, usually of performers, recorders, and broadcasters. See Note, 43 Cornell L. Q. 476 (1958). On February 6, 1959, the American neighboring rights panel held its tenth meeting. In August, 1958, international discussions on the subject, including the Monaco and International Labor Organization drafts,

SPECIFIC DEVELOPMENTS

While these broader copyright developments are progressing, more specific copyright changes are occurring in the United States by congressional enactment, judicial decision, and administrative regulation.

Congressional Enactment

The principal recent statutory change was the enactment of a three-year statute of limitations for civil copyright infringement actions.[20] Prior to such enactment, our copyright statute contained a three-year statute of limitations for criminal copyright infringement actions,[21] but none for civil actions. The result was that the federal court had to apply what it concluded to be the closest analogous statute of limitations of the state in which it was sitting,[22] with the consequence that the period of limitations ranged from one year to ten years depending upon the local state statutes,[23] which, of course, were drafted with no thought to their application to actions for infringement of copyright under federal law.

In recent Congresses, an average of some ten bills relating to copyright have been introduced each session.[24] Probably the two most significant copyright bills in the current session are those to eliminate the juke box exemption, and to make the federal government liable for its infringement of copyright.

---

were conducted in Geneva, with a meeting scheduled for Munich late in the summer of 1959. See also Miller v. Universal Pictures Co., 188 N.Y.S. 2d 386, 121 U.S.P.Q. 475 (Sup. Ct. N.Y. Co. 1959) (upholding claims of Glenn Miller's widow against record company and subsidiary motion picture producer which produced Miller's life story for pirating Miller's recordings and marketing his simulated hit tunes with knowledge of Miller's exclusive contract with another record company).

19. A diplomatic conference on design protection met in Lisbon in October, 1958. An international study group on the subject was formed, and met in Paris in April, 1959. Bogsch, "Report of the Study Group of the International Protection of Applied Art, Designs and Models", 6 BULL. CR. SOC. 216 (1959). In the United States, a National Committee for Effective Design Legislation was formed on May 1, 1958. See note 28 infra.

20. Act of September 7, 1957 (71 Stat. 633), effective one year after enactment; 17 U.S.C. §115(b) (1958). The Patent, Trademark, and Copyright Law Section of the American Bar Association had long recommended such provision.

21. 17 U.S.C. §115 (1952), now 17 U.S.C. §115(a) (1958).

22. Pickford Corp. v. DeLuxe Laboratories, Inc., 169 F. Supp. 118, 120 U.S.P.Q. 521 (S.D. Calif. 1958) (California statute); Maloney v. Stone, 171 F. Supp. 29, 121 U.S.P.Q. 257 (D. Mass. 1959) (Massachusetts statute).

23. Stine, State Statutes of Limitation and Copyright Infringement Actions (1951).

24. See recent Reports, A.B.A. Committee on Copyright Law Revision, for descriptions of such bills.

In a sense, both bills would extend the scope of copyright protection and abrogate anachronistic provisions. Analogous to copyright are bills providing for the registration and protection against unauthorized copying of original ornamental designs of useful articles.

Juke box exemption.—Bills to eliminate the juke box exemption were introduced in both Senate and House.[25] While the two bills differed in material respects, each would make liable for unauthorized public performance of music by juke box the "operator" of the juke box as distinguished from the proprietor of the establishment where the juke box was located. During June, hearings were held on the House bill, at which the American Bar Association was represented and filed a statement recommending the elimination of the juke box exemption as proposed in the House bill.[26]

Liability of United States for copyright infringement.—A bill substituting liability for the present immunity of the federal government for copyright infringement by it, and immunizing governmental personnel from such liability, was again considered and passed by the House on July 20, 1959.[27]

Protection of original ornamental designs of useful articles.—A Senate bill, entitled "The Design Protection Act of 1959", would protect original ornamental designs of useful articles for five years after the design is first made known with the required design notice, so long as the design is registered within six months with a so-called "Administrator". Many details are elaborated in the bill, which specifically provides that it shall not affect the patent law, that the issuance of a design patent terminates any protection under the bill, and that the bill shall not affect common law copyright, trademark, or unfair

25. S. 950, H.R. 5921, 86th Cong., 1st Sess. (1959). For the past several years, the Patent, Trademark, and Copyright Law Section of the American Bar Association has recommended the repeal of the juke box exemption. During the past year, there have been governmental investigations of phases of the juke box industry, and New York State has levied a $25 tax on each juke box within the state (expected yield $500,000). Canada, the only other country with a juke box exemption, is considering its repeal. See note 16 supra.

26. See Hearings on H.R. 5921, 86th Cong., 1st Sess. (1959).

27. H.R. 4059, 86th Cong., 1st Sess. (1959). The bill calls for actions against the government in the Court of Claims, and relates only to infringement in this country of federal statutory copyright. The principle of government liability of copyright infringement has long been approved by the Patent, Trademark, and Copyright Law Section of the American Bar Association. During the year, a controversy arose as to whether Vice Admiral Hyman G. Rickover's public speeches on nuclear power and education were his personal literary property or in the public domain. The issue was whether or not the speeches were part of the admiral's official navy duties. [Ed. The issue has since been resolved in the admiral's favor. Public Affairs Association, Inc. v. Rickover, 123 U.S.P.Q. 252 (D.D.C. 1959).]

competition rights. The bill would also add a new section to the copyright statute to the effect that an ornamental design of a useful article shall not be subject to copyright.[28]

Judicial Decision

Approximately 300 copyright cases are commenced annually in American courts. While in many the principal issue is factual—whether or not there has been substantial copying[29]—a surprisingly large number involve relatively significant issues of statutory construction.

Very few copyright cases today reach the United States Supreme Court; during the past year, certiorari, while petitioned in a few copyright cases, was denied in all of them. Several copyright cases reached the federal courts of appeal, but most were finally determined in the various district courts, the large majority, as usual, in the southern districts of New York and California. In addition, a few common law copyright cases were adjudicated in various state courts.

Among the more recent cases are decisions concerning copyrightable subject matter, copyright notice, registration and deposit, renewal, common law copyright, and phonograph records.

Copyrightable subject matter—A series of cases raised questions as to the copyrightability of various subject matter, in keeping with the emphasis in recent years on copyright as the principal means of protecting such matter.[30]

28. S. 2075. 86th Cong., 1st Sess. (1959). The required design notice is "Protected Design" or "Prot'd Des." or "D" plus year date plus name of proprietor, etc. See H.R. 8873, 85th Cong., 2d Sess. (1958) (Willis Bill). Several of the provisions of S. 2075 parallel a somewhat modernized version of the present copyright statute. See Protection for Designs (National Committee for Effective Design Legislation, 1959); Summary of the Provisions of the O'Mahoney-Wiley-Hart Design Protection Bill (S. 2075, 86th Congress) (National Committee for Effective Design Legislation, 1959); Ringer, "The Case for Design Protection and the O'Mahoney Bill", 7 BULL. CR. SOC. Item 4 (1959); Immermann, "Proposed Protection for Industrial Designs", 7 BULL. CR. SOC. Item 6 (1959); Mayers, "Proposed Legislation for the Protection of Ornamental Design", 7 BULL. CR. SOC. Item 5 (1959). [*Ed.* At the 1959 Annual Meeting of the Patent, Trademark and Copyright Law Section of the American Bar Association, the principle of federal legislation providing for more adequate protection of original, ornamental designs of useful articles was approved, but approval in general of the principles of S. 2075 was withheld.] Fears of subjecting innocent dealers of articles to infringement have been expressed. Under the present copyright law, such liability exists. See Scarves by Vera, Inc. v. United Merchants and Manufacturers, Inc., infra note 42.

29. For a comprehensive discussion of what constitutes infringement of literary works, see Yankwich, J., in Bradbury v. Columbia Broadcasting System, 174 F. Supp. 733, 123 U.S.P.Q. 10 (S.D.Calif. 1959).

Probably the most interesting case in this respect was an action for copyright infringement, design patent infringement, and unfair competition, for copying of a watch design which both carried a copyright notice and had been patented under the design patent provisions of the patent law. The Register of Copyrights had denied copyright registration, and this was alleged as an excuse for not having complied with the registration and deposit requirements of the copyright statute, registration and deposit being normal conditions precedent to commencing a suit for copyright infringement. The Second Circuit held, 2 to 1, that there could be no copyright infringement suit without prior registration.[31] The court wrote three opinions, in one of which Judge Learned Hand left open the question as to the availability of concurrent copyright and design patent protection for the same design.[32]

Fabric designs,[33] designs for earrings,[34] and other jewelry,[35] were held copyrightable, as were a group of insurance forms.[36] Ruled not copyrightable were a star design for a display,[37] and certain advertisements.[38] In a tax refund case, the character, "Francis—the talking mule", was held to be copyright property, and hence when sold not entitled to capital gain treatment.[39]

Copyright notice. — A judicial trend to relax the copyright notice require-

30. Zelnick, "Copyright and Design Protection Against Importation of Piratical Merchandise", 5 BULL. CR. SOC. 261 (1958). See Note, 72 Harv. L. Rev. 1520 (1959).

31. Vacheron & Constantin-Le. Coultre Watches, Inc. v. Benrus Watch Co., 260 F.2d 637, 119 U.S.P.Q. 189 (2d Cir. 1958), noted in 72 Harv. L. Rev. 1167 (1959), 34 N.Y.U.L. Rev. 777 (1959), 107 U. Pa. L. Rev. 1046 (1959).

32. Cf. Copyright Office Rules, §202.10(b), infra note 69.

33. Peter Pan Fabrics, Inc. v. Brenda Fabrics, Inc., 169 F. Supp. 142, 120 U.S.P.Q. 158 (S.D.N.Y. 1959), noted in 34 Notre Dame Law. 457 (1959); Scarves by Vera, Inc. v. United Merchants and Manufacturers, Inc., infra note 42.

34. Boucher v. Du Boyes, Inc., 253 F.2d 948, 117 U.S.P.Q. 156 (2d Cir. 1958), cert. denied, 357 U.S. 936 (1958).

35. Dan Kasoff, Inc. v. Palmer Jewelry Mfg. Co., 171 F. Supp. 603, 120 U.S.P.Q. 445 (S.D.N.Y. 1959).

36. Continental Casualty Co. v. Beardsley, 253 F.2d 702, 117 U.S.P.Q. 1 (2d Cir. 1958), cert. denied, 358 U.S. 816 (1958), noted in 47 Calif. L. Rev. 174 (1959), 27 Geo. Wash. L. Rev. 388 (1959), 18 Md. L. Rev. 351 (1958). Cf. Copyright Office Rules, §202.1(c).

37. Bailie v. Fisher, 258 F.2d 425, 117 U.S.P.Q. 334 (D.C. Cir. 1958).

38. Inter-City Press, Inc. v. Siegfried, 172 F. Supp. 37, 118 U.S.P.Q. 446 (W.D. Mo. 1958), noted in 27 Geo. Wash. L. Rev. 585 (1959). See Kupferman, "Copyright Protection for Prints and Labels", 7 BULL. CR. SOC. Item 3 (1959).

39. Stern v. United States, 164 F. Supp. 847, 118 U.S.P.Q. 474 (E.D. La. 1958). See Kellman, "The Legal Protection of Fictional Characters", 25 Brooklyn L. Rev. 3 (1958).

ments[40] continued during the year. A copyright notice on only one of a pair of earrings was upheld;[41] so also was a copyright notice on the selvage of fabric bearing a copyrighted design despite the removal of the selvage and copyright notice by the manufacturer who made dresses out of the fabric.[42] Other cases were liberal in excusing the omission of the copyright notice from some copies of the work.[43]

Registration and deposit. — The registration and deposit system[44] maintained its stature as the result of two cases.

In one of the cases, involving the watch design previously mentioned,[45] the Second Circuit held, 2 to 1, that no copyright infringement action could be commenced without prior registration, and that the denial of such registration by the Register of Copyrights did not excuse lack of such registration. Where the Register of Copyrights wrongfully denies registration, the court stated that the proper procedure was to bring mandamus proceedings against the Register, secure the registration, and then sue for copyright infringement.[46]

The second case was a mandamus proceeding to compel the Register of Copyrights to accept a display star for registration, in which the court sustained the Register's discretion in denying registration.[47]

Renewal. — The renewal term is a unique feature of the American copyright system.[48] The very ambiguous renewal provisions[49] received further con-

40. See Advisers, Inc. v. Wiesen-Hart, Inc., 238 F.2d 706, 111 U.S.P.Q. 318 (6th Cir. 1956), cert. denied, 353 U.S. 949 (1957).

41. Boucher v. Du Boyes, Inc., supra note 34.

42. Peter Pan Fabrics, Inc. v. Acadia Co., 173 F. Supp. 292, 121 U.S.P.Q. 81 (S.D.N.Y. 1959). See also Scarves by Vera, Inc. v. United Merchants and Manufacturers, Inc., 173 F. Supp. 625, 121 U.S.P.Q. 578 (S.D.N.Y. 1959) (upholding copyright notice on label sewn into side seam).

43. Modern Aids, Inc. v. R. H. Macy & Co., 264 F.2d. 93, 120 U.S.P.Q. 470 (2d Cir. 1959) (omission of copyright notice from advertisement when published in two of several newspapers involved); Christie v. Raddock, 169 F. Supp. 48, 120 U.S.P.Q. 76 (S.D.N.Y. 1959) (alleged lack of copyright notice on doctoral thesis deposited in university library).

44. The number of registration and deposits under the present system is approaching the 10,000,000 mark.

45. See note 3 supra.

46. Clark, C. J., dissenting, contended that a preliminary injunction should be granted during the pendency of the mandamus proceeding.

47. Bailie v. Fisher, supra note 37. See note 72 infra.

48. See note 3, 15 supra.

49. 17 U.S.C. §24 (1958); Brown, "Renewal Rights in Copyright", 28 Cornell L. Q. 460 (1943); Kupferman, "Renewal of Copyright—Section 23 of the Copyright

struction in recent opinions. An administrator *c.t.a.* was allowed to renew like an executor for the benefit of the author's legatees;[50] an executor was held to hold the renewal which he secured free from the deceased author's assignment of this renewal expectancy.[51] Other cases involved the effect of assignments of renewal expectancies not promptly recorded in the Copyright Office.[52]

Common law copyright. — In common law copyright, there were also some noteworthy case law developments. One case added to the present split of authority as to whether the sale of phonograph records constitutes publication of the recorded musical composition, and held that such sale ends common law copyright in the composition.[53] An interesting case involved the deposit of copies of a doctoral thesis, allegedly bearing a copyright notice, in a university library.[54] Another case held that the registration and deposit in the Copyright Office, based on a claim of publication, of a scenario did not end the common law copyright therein if there had in fact been no publication and no valid statutory copyright had been secured therein as a result.[55] Still another case held that common law copyright infringement required conscious copying on the part of the allegedly infringing author.[56]

Phonograph records. — Besides the case, previously mentioned, which held that the sale of phonograph records constituted a divestitive publication of the recorded musical composition,[57] a second case held the seller of pirated records liable for copyright infringement.[58] A third case held that a dramatic composi-

---

Act of 1909", 44 Colum. L. Rev. 712 (1944); Bricker, "Renewal and Extension of Copyright", 29 So. Calif. L. Rev. 23 (1955).

50. Gibran v. National Committee of Gibran, 255 F.2d 121, 117 U.S.P.Q. 218 (2d Cir. 1958), cert. denied, 358 U.S. 828 (1958).

51. Miller Music Corp. v. Charles N. Daniels, Inc., 158 F. Supp. 188, 116 U.S.P.Q. 204 (S.D.N.Y. 1957), noted in 33 N.Y.U.L. Rev. 1027 (1958), aff'd on opinion below, 265 F.2d 925, 121 U.S.P.Q. 204 (2d Cir. 1959) (2-1).

52. Venus Music Corp. v. Mills Music, Inc., 261 F.2d 577, 119 U.S.P.Q. 360 (2d Cir. 1958); Edward B. Marks Music Corp. v. Charles K. Harris Music Pub. Co., 255 F.2d 518, 117 U.S.P.Q. 308 (2d Cir. 1958), cert. denied, 358 U.S. 831 (1958).

53. McIntyre v. Double-A Music Corp., 166 F. Supp. 681, 119 U.S.P.Q. 106 (S.D. Calif. 1958).

54. Christie v. Raddock, supra note 43.

55. Fader v. Twentieth Century-Fox Film Corp., 169 F. Supp. 880, 120 U.S.P.Q. 268 (S.D.N.Y. 1959).

56. Navarra v. M. Witmark & Sons, 17 Misc. 174, 185 N.Y.S.2d 563, 121 U.S.P.Q. 107 (Sup. Ct. N.Y. Co. 1959); cf. DeAcosta v. Brown, 146 F.2d 408, 63 U.S.P.Q. 311 (2d Cir. 1944).

57. McIntyre v. Double-A Music Corp., supra note 53.

58. Harms, Inc. v. F. W. Woolworth Co., 163 F. Supp. 484, 118 U.S.P.Q. 436 (S.D. Calif. 1958).

tion copyrighted prior to the present copyright statute enjoyed, as part of the exclusive rights of presentation, recording rights.[59]

Administrative Regulation

Administratively, the most significant changes resulted from revision of some of the rules of the Copyright Office.[60] These became effective June 18, 1959.[61] Two of the changes involve dicta in the controversial case of *Heim* v. *Universal Pictures Co.*[62] The opinion in the *Heim* case had indicated that a work first published abroad without an American statutory copyright notice did not go into the public domain in the United States if it did not go into the public domain of the country where first published. This dictum is repudiated in the new rule which provides that works first published abroad, other than works eligible for ad interim registration, must bear an adequate copyright notice at the time of their first publication in order to secure American statutory copyright.[63] The Copyright Office based such repudiation on the ground that the enactment by Congress in 1955 of the legislation implementing the U.C.C. disavowed the *Heim* case dictum.[64]

The opinion in the *Heim* case had also indicated that postdating of a copyright notice was not necessarily a fatal defect,[65] as held in a 100-year old lower court case under an earlier copyright statute.[66] This dictum was followed in a new rule which provides that registration will be allowed where the postdating is not more than one year.[67] The basis for this rule, however, was not the *Heim* case dictum, but a more recent Sixth Circuit case upholding a notice postdated by four to five months.[68]

---

59. Beban v. Decca Records, Inc., 169 F. Supp. 829, 121 U.S.P.Q. 168 (S.D. Calif. 1959). See also Lerner v. Club Wander In, Inc., 174 F. Supp. 731, 122 U.S.P.Q. 595 (D.Mass. 1959) (performances of copyrighted musical compositions at private clubhouse held "publicly for profit").

60. Cary, "Proposed New Copyright Office Regulations", 6 BULL. CR. SOC. 213 (1959).

61. 24 Fed. Reg. 4955 (June 18, 1959); 121 U.S.P.Q. II (1959).

62. 154 F.2d 480, 68 U.S.P.Q. 303 (2d Cir. 1946), noted in 22 N.Y.U.L. Rev. 105 (1947).

63. Copyright Office Rules, §202.2(a)(3).

64. Cary, supra note 60, at 213.

65. "Were that question here, we should have to consider whether the statement in Baker v. Taylor . . ., and subsequent cases which cite it apply under the present liberalized Copyright Act."

66. Baker v. Taylor, 2 Fed. Cas. 478, No. 782 (C.C.S.D.N.Y. 1848) (where publisher knew of error before publication and did not bother to correct it).

67. Copyright Office Rules, §202.2(b)(6).

68. Adviser's, Inc. Wiesen-Hart, Inc., supra note 40; Cary, supra note 60, at 214.

Of the other Copyright Office rule changes, perhaps the most interesting is the restatement of the regulation concerning works of art barring concurrent copyright and patent protection.[69]

One customs regulation revision is of copyright interest. It raised the fee for protecting a copyrighted work against the importation of piratical copies from $25 to $75, effective November 18, 1958.[70] The power to exclude from this country infringing copies made abroad can be a very effective weapon on the arsenal of remedies enjoyed by copyright proprietors.[71]

Also of interest at the administrative level are two determinations of the Attorney General. The first was an opinion to the effect that the Register of Copyrights had the authority, but not the duty, to deny registration to works which contain seditious, libelous, obscene or other matter which is either illegal or opposed to public policy.[72] The second was the filing on June 29, 1959 in the federal district court of a proposed order directing ASCAP to carry out the 1950 antitrust decrees against it by requiring changes in distribution among its members of its revenues from its performing rights licenses, in its members' voting, inspection, and arbitration rights, and in its admission requirements.[73]

MISCELLANEOUS DEVELOPMENTS

In closing, brief mention should be made of two miscellaneous developments. One is the increased activity of The Copyright Society of the U.S.A. The Society's five-year provisional charter has now become permanent; its membership and income have increased; and the coverage of its bi-monthly BULLETIN has been substantially expanded.[74] Finally, those interested in the pro-

69. Copyright Office Rules, §202.10(b). See note 32 supra.

70. 23 Fed. Reg. 8055 (Oct. 18, 1958).

71. Zelnick, supra note 30.

72. Op.Att'y Gen., Dec. 18, 1958; 121 U.S.P.Q. 329 (1959); 6 BULL CR. SOC. 242 (1959). [*Ed.* A hearing on the proposed consent decree was held on October 19, 1959 in New York. The decree will be submitted to ASCAP membership for their approval.]

73. Dep't of Justice release, June 29, 1959. Cf. Affiliated Music Enterprises, Inc. v. Sesac, Inc., 160 F. Supp. 865, 117 U.S.P.Q. 263 (S.D.N.Y. 1958), aff'd, 267 F.2d 13, 121 U.S.P.Q. 542 (2d Cir. 1959) (finding no antitrust violation by Sesac in treble damage suit). Canada is contemplating changing its rather elaborate statutory provisions regulating performing rights societies. See note 17 supra. The Mexico Supreme Court, incidentally, has barred the existence of more than one authors' society in the same field.

74. See notes 13, 15, 16, 19, 20, 60, 72 supra.

motion of the teaching of copyright law in American law schools now have available two different sets of teaching materials published during the past year.[75]

CONCLUSION

All of us who are concerned with copyright law hope that at next year's copyright symposium, it will be possible to report substantial progress on our new federal Copyright Act of 1960.

75. Cases and Other Material on the Fundamentals of Patent, Trade-mark and Copyright Law, by Professor E. Ernest Goldstein of the Texas Law School (Foundation Press, Inc. 1959), and Copyright and Unfair Competition, co-edited by Professor Benjamin Kaplan of the Harvard Law School and Professor Ralph S. Brown, Jr. of the Yale Law School (Foundation Press, Inc., 1958).

3. COPYRIGHT PROTECTION FOR COMMERCIAL PRINTS AND LABELS

By THEODORE R. KUPFERMAN*

Effective July 1, 1940[1] a new category was added to the classification of works for registration in the Copyright Office. There was added to the words "Prints or pictorial illustrations" in Section 5(k) of the Copyright Act of 1909[2] the words "including prints or labels used for articles of merchandise."[3]

While new to the Copyright Office in 1940, prints and labels were not new to the statutory law. They were first specifically provided for in 1874 as follows:

> "That in the construction of this act, the words 'Engraving,' 'cut' and 'print' shall be applied only to pictorial illustrations or works connected with the fine arts, and no prints or labels designed to be used for any

* Member of the New York Bar; Chairman, Committee on International Copyright and Trade Mark Relations, Section of International and Comparative Law, American Bar Association; General Attorney, Cinerama Productions Corp.

1. Act of July 31, 1939, Sec. 2; 53 Stat. 1142, Chapter 396.
2. 35 Stat. 1075, 17 U.S.C. The Copyright Law became the Copyright Code by Act of July 30, 1947, 61 Stat. 652.
3. See Verney Corp. v. Rose Fabric Converters Corp., 87 F. Supp. 802, 804 (S.D.N.Y. 1949).

other articles of manufacture shall be entered under the copyright law, but may be registered in the Patent Office. And the Commissioner of Patents is hereby charged with the supervision and control of the entry or registry of such prints or labels, in conformity with the regulations provided by law as to copyright of prints, except that there shall be paid for recording the title of any print or label not a trade mark, six dollars, which shall cover the expense of furnishing a copy of the record under the seal of the Commissioner of Patents, to the party entering the same."[4]

This administration by the Patent Office of commercial prints and labels from 1874 to 1940 is stated by Professor Benjamin Kaplan of Harvard Law School and Professor Ralph S. Brown, Jr. of Yale Law School in their new book on "Copyright and Unfair Competition" to be on the basis that they are:

"somewhat akin to trade-marks (though the relationship is remote if not illegitimate)."[5]

Howell's explanation is that the Librarian of Congress had limited quarters in the Capitol Building and to avoid providing space for storage of advertisements "which he regarded as beneath the dignity of literature proper", he was able to get Congress to shunt them off on the Patent Office,[6] although they remained part of the general copyright law.[7]

Supreme Court Justice Holmes in 1903 in sustaining the copyrightability of circus posters stated as follows:

"Again, the act however construed, does not mean that ordinary posters are not good enough to be considered within its scope. The antithesis to 'illustrations or works connected with the fine arts' is not works of little merit or of humble degree, or illustrations addressed to the less educated classses; it is 'prints or labels designed to be used for any other articles of manufacture.' Certainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd and therefore gives them a real use — if use means to increase trade and to help to make money. A picture is none the less a picture and none the less a subject of copyright that it is used for an advertisement. And if pictures may be used to advertise soap, or the theater, or monthly magazines, as they are, they may be used to advertise a circus."[8]

4. Act of June 18, 1874, Chapter 301 Section 3, 18 Stat. 79. For the current language, see 17 U.S.C. Sec. 6, formerly 17 U.S.C. Sec. 64.

5. Book I, Temporary Edition (1958) at p. 223.

6. Howell, The Copyright Law (3rd Ed. 1952) p. 27. See also Federico, Copyrights in the Patent Office (1939) 21 Journal Pat. Off. 911, 915 et seq.

7. Higgins v. Keuffel, 140 U.S. 428 (1891).

8. See Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

Obviously a commercial print or label was still a second class citizen in 1903 as in 1874, but a citizen nonetheless.

It will be noted that in Mr. Justice Holmes' opinion the reference is to "prints or labels designed to be used for any other articles of manufacture". This, of course, is based on the 1874 Act. Now the language is "prints or labels published in connection with the sale or advertisement of articles of merchandise."[9]

Professor Walter Derenberg in 1940, in his excellent article on "Commercial Prints and Labels: A Hybrid in Copyright Law", has well covered the history of the subject,[10] and so I shall now advert to the current problems in the field.

There is a paucity of cases on commercial prints and labels from the copyright point of view. Reference to the Patents Quarterly Index under Copyright, Labels and Prints or under Section 24.25, the appropriate key number, discloses less than a dozen since 1940.

When an action is brought for print or label copyright infringement, it generally is combined with causes of action for trademark infringement and unfair competition. Sometimes the claims may be confused.

In fact, in a case involving a candy wrapper, *Pecheur Lozenge* v. *National Candy Company*,[11] it wasn't until the matter reached the United States Supreme Court that it was realized that the registration was one in copyright but there was no cause of action based on copyright.

The *per curiam* opinion reveals that the Supreme Court, referring to the original exhibits not printed in the record, found that it was a copyright that was involved, and as the complaint could only support a cause of action for unfair competition and common law trademark infringement, the determination of which would depend upon local law, the matter was sent back for further consideration.

When John Schulman, your Moderator, asked me to speak on this subject, his current interest had been aroused by some cheese cake, or to be more specific the case of *Kitchens of Sara Lee, Inc.* v. *Nifty Foods Corp.*[12] He was of counsel to the defendants-appellants in a matter coming out of the United

9. Act of July 31, 1939; 17 U.S.C. Sec. 6.

10. 49 Yale L.J. 1212 (May, 1940). See also his article on "Fringe Rights in Literary and Artistic Property" in "1953 Copyright Problems Analyzed" at p. 226 (Commerce Clearing House).

11. 315 U.S. 666, 53 U.S.P.Q. 11 (1942) coming out of the 3rd Circuit. It is possible to waive the copyright claim and sue in unfair competition; see Swanson Mfg. Co. v. Feinberg-Henry Mfg. Co. 147 F.2d 500, 503, 64 U.S.P.Q. 316, 319 (2d Cir. 1945).

12. 266 F.2d 541, 121 U.S.P.Q. 359 (2d Cir. May 7, 1959).

States District Court for the Western District of New York, which seldom sees a copyright case, into the Court of Appeals for the Second Circuit, where both copyright matters and John Schulman are well known.

Before I discuss that case which at this point is the leading case in the field, I think I might point out that your Chairman Elwin A. Andrus is also acquainted with the print and label problem.

He was counsel for the plaintiff in 1951 in *Northmont Hosiery Corp.* v. *True Mfg. Co.*[13] The action was for both copyright and trademark infringement. The label was the design of an orchid, which flower was on plaintiff's women's hosiery wrapping. The defendant used an orchid in connection with the sale of lingerie.

While Mr. Andrus won his case, it was on the unfair competition ground, and the defendant's labels with the orchid flower trademark design were ordered destroyed. As to the copyright cause of action only, the defendant was successful as there was no proof that the artist creating the defendant's label ever saw the plaintiff's label. However, Mr. Andrus might tell us whether his successful plaintiff was concerned about the theory under which he won his case and destroyed the defendant's labels. Incidentally, we'll consider this case again, so keep it in mind.

Getting back to John Schulman's cheese cake case and the decision of the Court of Appeals for the Second Circuit, the facts were these:

Both Kitchens of Sara Lee, Inc. and Nifty Foods Corporation bake and sell to the public frozen chocolate cake, cream cheese cake, pound cake and coffee cake.

The plaintiff's brand name is "Sara Lee", and the defendant's is "Lady Ilene." Ilene, incidentally, is the first name of the wife of the Nifty Foods general executive officer.[14]

All of the cakes are packaged in similar aluminum foil pans of round, rectangular and octagonal shapes as to which the Court of Appeals states plaintiff had no monopoly.[15] They were all covered by cardboard labels except the coffee cake, which had a cellophane window in the center.

Plaintiff's predecessor had copyrighted and registered a series of labels used on its frozen cakes.

There were features distinguishing the plaintiff's cake labels from defendant's. Plaintiff had a label which was bright red with the brand name "Sara Lee" in bold white letters and between "Sara" and "Lee" was a small drawing of a colonial dame.

Defendant's label was by contrast white with the brand name "Lady Ilene"

13. 100 F.Supp. 909, 91 U.S.P.Q. 3 (E.D. Wisc. 1951).
14. Page 7, Brief for Defendants-Appellants.
15. 266 F.2d at 545, 121 U.S.P.Q. at 362.

in large red letters and between "Lady" and "Ilene" against a yellow background was a large drawing of an attractive woman wearing a crown.

Both plaintiff and defendant had almost identical pictures of the products and the identifying words, which the Court of Appeals thought superfluous, "chocolate cake", "cream cheese cake", or "all butter pound cake", as the case might be. The coffee cake label with the cellophane window had no picture. The remainder of the label had the standard serving instructions, ingredients, weight, etc.

The plaintiff sued for copyright infringement, trademark infringement, unfair competition and unjust enrichment.

The District Court, without a jury,[16] held for the plaintiff on the ground of copyright infringement, unfair competition and violation of New York General Business Law Section 368, the anti-dilution statute.

The District Court found no proof of damage or loss of profits due to infringement but awarded statutory damages of $12,500 and counsel fees of $10,000. The District Court also enjoined the use of labels, slogans or designs simulating plaintiff's or "which tend to dilute the distinctive quality of plaintiff's copyright labels."

Judge Moore's opinion in the Court of Appeals for the Second Circuit is as amusing as it is enlightening. If his style is adopted, the case method at law school may get a new lease on life.

First, he finds that the District Court's conclusion of copying of the pictures on plaintiff's labels (other than the coffee cake label which had no picture) was more than justified.

Second, he considers and comments favorably upon the views expressed in Copyright Office Circular No. 46 (Sept., 1958),

> "The Copyright Office in defining a 'Commercial Print or Label' specifically provides for copyright in 'prints and labels published in connection with the sale or advertisement of articles of merchandise' (17 U.S.C.A. 6). Not every commercial label is copyrightable; it must contain 'an appreciable amount of original text or pictorial material.' The Copyright Office does not regard as sufficient to warrant copyright registration 'familiar symbols or designs, mere variations of typographic ornamentation, lettering or coloring, and mere listings of ingredients or contents.' "[17]

16. 116 U.S.P.Q. 292 (W.D.N.Y. 1957).

17. 266 F.2d at 544, 121 U.S.P.Q. at 361. In addition to Circular 46, other Copyright Office circulars which refer in some way to prints and labels are 46A (April, 1956) 46B (July, 1957) and AI-2 (Feb., 1958). This information supplied through the courtesy of Richard S. MacCarteney, Chief, Reference Division, Copyright Office, The Library of Congress. A previous favorable comment on Circular 46 is found in Verney Corp. v. Rose Fabric Converters Corp. 87 F. Supp. 802, 804 (S.D.N.Y., 1949). See text to note 23 infra, on this case.

This sets forth familiar law.[18]

Third, despite the conclusion that chocolate cake has looked like chocolate cake for generations, he decides that "such obvious copying as here occurred is not to be encouraged." Further, while not of the quality of a Leonardo "Still Life", the cake labels are of "sufficient commercial artistry to entitle them to protection against obvious copying".

Fourth, as before indicated, he decides there may be no relief with respect to the shape of the pans, although there might be as to the colors in a copyright combination sense, but as there was no color copying, no such relief is needed.

Having thus affirmed the copyright determination for the plaintiff, except, of course, for the coffee cake claim inasmuch as on that label a picture was not used, the Court of Appeals considered and reversed the determination on the unfair competition cause of action.

As the defendant used a different name and different colors, unless all frozen cakes had acquired a secondary meaning as originating with plaintiff, the determination here could only be for defendant. The Court indicates that if defendant had used the name "Sara Lou" instead of "Lady Ilene", the result might have been different. As to the anti-dilution determination under New York General Business Law Section 368, without trademark infringement or unfair competition and with only copyright infringement, the underlying prerequisite was lacking.

In retrospect now, would Elwin Andrus' victory have been reversed if his *Northmont Hosiery Corp.* v. *True Mfg. Co.* case had been appealed in the Court of Appeals for the Second Circuit? It is an interesting speculation.

Consideration might be given to several other cases on the general subject.

The most recent case in March of this year is *Rochelle Asparagus Co.* v. *Princeville Canning Co.*[19] This was an action, asking for the usual relief, because of alleged infringement of a label entitled "Rochelle Brand Green Asparagus Spears" by a label entitled "Royal Prince Asparagus Spears" used on cans. Both labels contain an "all-around vignette" of whole aspargus spears. As in the *Sara Lee* case, the colors are different and there are other dissimilarities. While defendant found plaintiff's label attractive, it did order some Southern California asparagus photographed from which it created its own label.

---

18. Print and label cases to this effect are:
Griesedieck Brewery Co. v. Peoples Brewing Co., 56 F.Supp. 600, 63 U.S.P.Q. 74 (D.C. Minn. 1944); Needham v. Becker, 62 U.S.P.Q. 434 (S.D. Ohio, 1944); Superfine Products Inc. v. Denny, 54 F. Supp. 148, 60 U.S.P.Q. 126 (N.D. Georgia, 1943); Bobrecker v. Denebeim, 28 F.Supp. 383, 42 U.S.P.Q. 194 (W.D. Missouri, 1939).

19. 170 F.Supp. 809, 121 U.S.P.Q. 78 (S.D. Ill., 1959).

The plaintiff relied on the lower court decision in the *Sara Lee* case,[20] but that decision was distinguished in our "Asparagus" case because of the finding that the defendant in *Sara Lee* had directed its engraver to copy, and also because much of the material of plaintiff's labels was "fanciful" in *Sara Lee.*

You'll recall that Judge Moore on appeal in *Sara Lee* sustained the copyright charge, although expressing doubt as to whether there was anything fanciful about chocolate cake.

The Court in *Rochelle Asparagus* held for defendant finding no evidence of copying and none of unfair trade or confusion.

In a well considered case decided in 1953, Judge Yankwich, where the label involved was of a girl dancing on a record and it was used as a record label, held for the plaintiff on all the grounds of copyright infringement, trademark infringement and unfair competition.

The Court thought the label fanciful and the reported opinion contains pictures of the labels for comparison.[21]

Those of you who have followed the problems of the dress industry on protecting original designs[22] will be interested in two cases where producers of dress fabric tried to use the print classification for protection.

In 1949 in *Verney Corp.* v. *Rose Fabric Converters*[23] the attempt was not successful, but in 1959 in *Peter Pan Fabrics, Inc.* v. *Brenda Fabrics, Inc.*[24] it was.

In the *Verney* case, plaintiff producer of fabrics for the sale of women's dresses, had registered a design of an abstract reproduction of several chrysanthemums for a textile print in class K on Form KK for a print or label used for an article of merchandise. On a motion for preliminary injunction for copyright infringement against another fabric producer, the Court dismissed the action.

The Court found that this was clearly not a label and as to its status as a print, the Court stated:

> "While the design may have been properly registered as a print for an article of merchandise, plaintiff, by printing it on the fabric from which the dresses are manufactured, uses the design as a part of the article

20. See note 16 supra.

21. Silvers v. Russell, 113 F. Supp. 119, 98 U.S.P.Q. 376 (S.D. Calif., 1953).

22. See Cheney Bros. v. Doris Silk Corp. 35 F.2d 279 (2d Cir., 1929) *cert. denied* 281 U.S. 728; Oleg Cassini Inc. v. Dorene Fashions Corp., 3 App. Div. (2d) 706, 117 U.S.P.Q. 307 (1st Dept. 1957) aff'd without opinion, 4 N.Y. (2d) 826 (1958).

23. 87 F. Supp. 802 (S.D.N.Y., 1949).

24. 169 F. Supp. 142, 120 U.S.P.Q. 158 (S.D.N.Y., 1959). See also Peter Pan Fabrics, Inc. et al v. The Acadia Co., Inc. et al, 121 U.S.P.Q. 87 (S.D.N.Y., 1959).

of merchandise itself. It is obviously not used in connection with a sale or an advertisement of either the fabric or the dresses, but is an attempt by plaintiff to obtain a monopoly of the design in the manufacture of dress fabrics and dresses, to which it is not entitled."[25]

The Court also stated that if there were a proper copyright it would be lost for lack of the proper copyright notice on each copy.

In the *Peter Pan* case, Judge Dimock in a similar situation sustained the copyrightability of a printed dress fabric and granted a preliminary injunction against infringement.

Judge Dimock upheld the copyright under §5 both as a work of art (Class G) and a print (Class K) even though the copyright application stated it was a work of art.

Under §5 an error in classification does not invalidate the copyright.[26]

Now for such other general points as the time will allow.

The application for registration of a claim to copyright in a print or label used for an article of merchandise is for Class K and is Form KK. The Regulations of the Copyright Office suggest that Class A, for books, be used for "Multiple works."[27] You will note from Form KK that the registration fee is $6.00. The usual copyright registration fee is $4.00,[28] but it seems that where merchandise is concerned the fee can be higher, 50% higher to be exact.

In fact this is carried further, pursuant to an Attorney General's opinion, so that a registration of a print or label as a contribution to a periodical carries the $6.00 rate rather than the $4.00 rate for the whole periodical.[29]

The renewal registration fee for a print or label is also $6.00, pursuant to an Attorney General's opinion,[30] although Section 215 of Volume 17 of the United States Code makes no distinctions in setting a fee of $2.00 for copyright renewals.

---

25. 87 F. Supp. at 804.

26. 17 U.S.C. Section 5.

27. Section 202.14 printed in Federal Register of May 2, 1959 pages 3545-49. See also Copyright Office circulars 46A and 46B referred to in Note 17 supra. The Copyright Office Regulations are discussed, in general, in "Proposed New Copyright Office Regulations" by George D. Cary, General Counsel, U.S. Copyright Office, in 6 BULL. CR. SOC., p. 213, Item 237 (June, 1959).

28. 17 U.S.C. §215.

29. 39 Op. Atty. Gen. 498, 46 U.S.P.Q. 572 (Robert H. Jackson, 1940). Of course, there should be a separate copyright notice on the contribution. See Inter-City Press, Inc. v. Siegfried, 118 U.S.P.Q. 446 (W.D. Mo., 1958); note 27 Geo. Wash. L. Rev. 585 (April, 1959).

30. 39 Op. Atty. Gen. 459, 46 U.S.P.Q. 294 (Robert H. Jackson, 1940). See Nicholson, "A Manual of Copyright Procedure" (1945) p. 153.

The Copyright Notice required on a print or label pursuant to Section 19 is "Copyright" or "Copr." or © plus the name of the proprietor. Prints and labels need not when printed separately (as distinguished from a book) carry the year of publication in the notice. Also, because they are classified in Section 5(k),[31] in place of the name of the proprietor the notice may have the © plus "the initials, monogram, mark or symbol of the copyright proprietor,"[32] provided that "the owner's name appears on some accessible part of the copies."[33]

It is, of course, always preferable on all material bearing notice of copyright to use the notice provided for in the Universal Copyright Convention, being ©, the name of the proprietor, and year of publication,[34] as indicated on the first page of this paper.

In conclusion, it should be stated that the copyrightability of a print or label will depend to a great extent upon the originality or fancifulness of the art work or pictures involved,[35] and the determination of the question of infringement will depend on whether there was copying.[36]

Advise your clients to photograph or reproduce their own asparagus or cheese cake fresh from the field or bakery. Avoid getting it second hand.

31. See note 2 supra.
32. 17 U.S.C. Section 19.
33. See "Information concerning copyright in commercial prints and labels" on Form KK referred to in text to note 27 supra.
34. See Universal Copyright Convention Analyzed, edited by Theodore R. Kupferman and Matthew Foner with a Panel of Experts (Federal Legal Publications, 1955).
35. See Burton, "Business Practices in the Copyright Field" in "7 Copyright Problems Analyzed" p. 91-92 (Commerce Clearing House, 1952).
36. See Schulman, "Author's Rights" in "7 Copyright Problems Analyzed" p. 22 (Commerce Clearing House, 1952).

4. THE CASE FOR DESIGN PROTECTION AND THE O'MAHONEY BILL

By BARBARA A. RINGER

Assistant Chief, Examining Division,
U.S. Copyright Office

One hundred seventeen years ago this week a design patent statute was first enacted in the United States. The language of the design patent statute has been tightened and simplified since it originally became effective on August 29, 1842, but its provisions have remained essentially the same over the years. The law provides — as it has from the start — that anyone who has invented a new, original, and ornamental design for an article of manufacture may obtain a patent for his "invention."

In 1842 the industrial revolution was just beginning in America, and design patent protection can be considered one of its by-products. The 1842 law was enacted in response to demands from New England textile interests and other manufacturers whose industries were beginning to employ mass-production techniques. Despite the tremendous growth in industrial mass-production during the nineteenth century, however, the United States remained predominantly an agricultural economy until the twentieth century. For its first fifty or sixty years, the design patent law appeared generally adequate to meet the needs of manufacturers who created their own designs.

Beginning about the turn of the century, however, the situation began to change. Demands for congressional action to afford more effective design protection were accelerated by a number of factors, including the continued growth of mass-production, the increased variety and diversification of products, and the increased importance of design in determining consumer choice. By the time of the first world war, there was considerable agitation for reform of the design patent law and this has continued consistently to the present day.

In the light of these demands for legislative action, it is not difficult to conclude that there is something seriously wrong with the design patent law. Its basic deficiencies have been pointed out countless times:

1) *The requirement of novelty.* For protection under the patent law, a design must be new in the sense that it has never existed before. This standard in turn requires a novelty search, which is costly, time-consuming, and not always very realistic. The expense and delays involved in searching rule out patent protection for most dsigns, since by the time the patent has been granted the design has lost much of its value. In fast-moving, competitive style industries the life of a design may be measured in weeks or even days, so that effective pro-

tection demands fast administrative action. Despite heroic efforts by the Patent Office, this is impossible under the present system. A survey of all design patents issued during fiscal 1959 shows that a lapse of about one year between original filing and issuance is to be expected in the typical case; only about 12 percent of design patents are issued in six months or less, 52 percent take a year or more, and 12 percent take more than two years. About twice as many applications are received as design patents are issued, and the Patent Office now has a backlog of some 8,700 design patent applications pending or awaiting action. This gloomy picture is made even blacker when one considers the questionable value of the search and the usual judicial hostility towards design patents. It should also be borne in mind that the establishment of novelty carries with it a form of monopoly protection that many feel is too broad and is fundamentally inappropriate for designs.

2) *The requirement of "invention."* For a court to uphold the validity of a design patent, the design must be shown to constitute an invention or discovery. For the majority of designs that have been tested in the courts this has proved an impossible standard to meet. While the hostility of judges to design patents seems to have abated somewhat in recent years, the mortality rate is still in the neighborhood of two design patents held invalid to every one validated. All of this is in striking contrast to the generally favorable attitude of the courts toward copyrights, and viewed objectively a design certainly seems closer to the concept of "the writing of an author" than to that of "the discovery of an inventor." To impose on designs the standards of invention required by the patent law appears conceptually and philosophically inappropriate.

Since the design patent law failed to satisfy their needs, the designers and manufacturers turned to Congress, and since 1914 no less than 48 bills for design protection were introduced and 13 legislative hearings on the problem were held. Some of these bills differed in details, but almost all of them provided a limited form of protection on general copyright principles. One bill passed the House in 1930, and an organic copyright bill with a sweeping design provision passed the Senate in 1935, but so far enactment has never resulted from any of these attempts at legislative reform.

There is no need to recount here the detailed history of all this fruitless effort. However, it has taught us some valuable lessons that need to be borne in mind.

1) *Vendors and other secondary users should be exempted.* You would naturally expect the main opposition to bills directed at design piracy to come from certain manufacturers whose business operations included unauthorized copying of designs. The fact is, however, that manufacturers of this character did not come forward to testify directly at the hearings—although, of course, their opposition may have been expressed in other less direct ways. The expressed opposition at the hearings came almost entirely from secondary groups—re-

tailers, dress pattern publishers, motion picture producers, and repair part manufacturers—who feared that a design protection bill would hurt them. Of these by far the most influential, and ultimately persuasive, opposition came from the retail vendors, who argued that unless they were exempted they were likely to be subjected to restraining orders and held liable for damages without any fault of their own. It seems clear that any bill aimed at the design pirate should specifically safeguard the interests of retailers and other groups who might otherwise be caught up in the net of liability.

2) *Straight copyright protection is too broad for designs.* Several of the bills assumed that designs were entitled to the same protection accorded other works under the copyright law, and simply added designs to the subject matter of organic copyright protection. This proved just as inappropriate as lumping designs under the patent laws had been a century before. It is now generally agreed that designs represent a special type of creative work and that they require a special type of protection—more flexible and easier to acquire than design patent, but shorter and more limited than copyright.

3) *Efforts to limit subject matter are fatal.* In an effort to meet the specific demands of certain industries, and more particularly to avoid the opposition of certain other industries, some of the 48 design bills attempted to limit the subject matter of protection. For example, several bills would have covered "textiles, laces, and/or embroidery of any kind." Another bill would have covered:

> ...ladies handbags, ladies pocketbooks, vanities, and other designs applicable to pouch bags, underarm bags, and other ladies' novelty handbags.

As the tides of opposition and support ebbed and flowed, a bill was introduced protecting:

> ...textiles, laces, and embroideries, furniture, toys, novelties, leather goods, containers and cartons, and all types of land, water, and air vehicles.

Later on a series of bills would have protected all designs *except* those for:

> ...products intended to be applied to or embodied in motors, motor cars, motor car accessories, and products employed in the design and manufacture of motors, motor cars, and motor car accessories.

These limitations and exclusions represented the kiss of death for every bill that contained them. They were inevitably recognized as illogical, unfair special legislation that would have presented insuperable administrative and judicial problems.

In addition to their efforts to secure new legislation from Congress, the proponents of effective design protection sought to get some relief from the courts, but they met an equally chilly reception. Judges during the '30's were notably hostile to design patents, and they were just as unwilling to concede protection on the other grounds advanced by plaintiffs, usually unfair com-

petition. The leading case of this period was *Cheney Bros.* v. *Doris Silk Corp.*,[1] in which protection for silk fabric designs was denied on common law theories. Judge Learned Hand's opinion indicated that, in the absence of palming off or some other kind of fraud, the mere misappropriation of a design was not actionable as unfair competition, and that protection on the theory of common law copyright was not available for published designs. Judge Hand acknowledged that this resulted in "an hiatus in completed justice," but asserted that the remedy lay with Congress and not the courts.

During this whole period very little serious thought was given to the protection of designs under the existing copyright law. The court decisions seemed to point the other way, and it was generally assumed that it would take an Act of Congress to bring designs under statutory copyright.

The depression had the doubly ruinous effect of increasing design piracy and intensifying its economic impact. Having made no progress in Congress or the courts, some of the industries most interested in design protection formed organizations to combat piracy by industry self-regulation. The first attempts at concerted action under the NRA Codes never got off the ground, but in the second half of the 1930's the Fashion Originators' Guild and similar organizations, operating through retailer boycotts, were remarkably successful. By expanding their area of operations into low-priced lines, however, the industry organizations overreached themselves, and were held guilty of antitrust violation by the Supreme Court in 1941.[2]

Shortly after the war two new bills to protect textile designs were introduced but with no result. In the general revision of the patent law undertaken in the early 1950's the issue of design protection was deliberately sidestepped, on the assumption that the problems of design protection deserved separate and special treatment. Efforts in the copyright area during this period were concentrated on the development and implementation of the Universal Copyright Convention.

Nevertheless, the apparent lack of design activity during the postwar period turned out to be deceptive. Something of the utmost importance was happening in the early 1950's, although its effects were not immediately seen. A California designer named Rena Stein and her husband brought out a line of lamps, whose bases were statuettes in the form of stylized human figures. These lamps caught the public fancy for some reason and, as is usually the case with a popular item, they were pirated all over the country. What made the case different was that the Steins had copyrighted their lamp base statuettes, and they proceeded to sue for copyright infringement in several federal district courts, with a variety of results. A conflict finally developed between two cir-

1. 35 F.2d 279 (2d Cir. 1929), *cert. denied* 281 U.S. 728 (1930).

2. Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941).

cuits, and the case went to the Supreme Court in 1954. In the landmark decision of *Mazer* v. *Stein*,[3] the Court held the copyrights valid and infringed.

The *Mazer* case is of immense importance to the problem of design protection, not only in what it settled but also in what it implied. The Court held that a copyrightable work of art—in this case a statuette—does not cease to be protected by copyright when it is embodied in, or applied to, a useful article —in this case, a lamp. As long as the design is copyrightable as a work of art, it makes no difference what the designer intended it to be used for, what was in fact done with it industrially or commercially, whether it might have been patented, and what was the extent of its particular aesthetic value.

The implications of the *Mazer* case go a long way beyond statuettes and lamp bases. Since the decision in 1954 we have had a series of decisions upholding the copyrightability of designs for costume jewelry, toys, and most recently textiles. It is difficult to predict where this sudden emergence of copyright in the design area will lead, but one thing is clear: under *Mazer* the potential area of design protection under the existing copyright law is considerably broadened.

The Supreme Court held that the copyrightability of a work of art is not destroyed by its application to a useful article, but it did *not* hold that all industrial designs are copyrightable. The borderline between copyrightable and uncopyrightable designs is extremely difficult to draw, although the Copyright Office Regulations, as recently amended on June 18, 1959 (37 C.F.R. §202.10(c)), make the following attempt:

> If the sole intrinsic function of an article is its utility, the fact that the article is unique and attractively shaped will not qualify it as a work of art. However, if the shape of a utilitarian article incorporates features, such as artistic sculpture, carving, or pictorial representation, which can be identified separately and are capable of existing independently as a work of art, such features will be eligible for registration.

The Copyright Office is encountering serious administrative difficulties in attempting to deal with this problem; two mandamus actions are now pending against the Register of Copyrights, and more can be expected.

While these recent copyright developments have been dramatic and challenging, another speck on the horizon has been emerging which may prove just as important in the long run. This is the concept of unfair competition, which has been greatly broadened in recent years. The *Cheney* case has not been explicitly overruled, but it may no longer represent the law in New York and other states. The trend in the recent cases is exemplified by the well-

3. 347 U.S. 201 (1954).

known 1956 decision in *Dior* v. *Milton*,[4] an action by four Paris high fashion houses alleging the unauthorized exploitation of their designs. Although there were elements of palming off, breach of trust, and limited disclosure on which the case might have turned, the court seemed to base its decision on the broader concept of mere misappropriation, saying (at p. 458):

> To hold that the protection of plaintiff's property is lost at just the point at which the property becomes valuable and needs protection would be tantamount to holding that the property rights are not entitled to protection at all.

As things stand today design piracy represents a serious economic problem for which there are inadequate solutions. The defects and limitations of the archaic design patent law remain unchanged. The existing copyright law has suddenly erupted as a major factor in design protection, although nearly everyone agrees that it is inappropriate for this purpose, in that:

1) Fifty-six years protection is much too long for designs.
2) Ordinary copyright protection is too broad in scope: for example in a recent textile case, a presumably innocent, non-manufacturing retail vendor was held liable for copyright infringment.[5]
3) The formal requirements of the copyright law do not fit the design situation. For example, the notice provisions create innumerable problems, and protection ordinarily is not lost even if there has been no registration in the Copyright Office.
4) Most important is the fact that at its present state of development the copyright law protects only those designs which can be separately identified as "works of art," and excludes many aesthetically superior designs of useful articles. This distinction seems difficult to justify on the grounds of logic or policy.

The standards of the design patent law are too narrow and inflexible, those of the existing copyright law are too broad and vague, and the standards of the misappropriation concept of unfair competition are virtually nonexistent. These conclusions have been borne upon us forcibly in the United States, but they are not ours alone. The design problem is in ferment internationally; in September an international experts meeting will be convened in the Hague to redraft the international arrangement for registration of designs. While there are many different views as to the details of an ideal design statute, there seems to

4. 9 Misc. 2d 425, 155 N.Y.S. 2d 443 (Sup. Ct.), *aff'd mem.*, 2 App. Div. 2d 878, 156 N.Y.S. 2d 996 (1st Dept. 1956).

5. Scarves by Vera, Inc. v. United Merchants and Manufacturers, Inc., 121 U.S.P.Q. 578 (S.D.N.Y. 1959).

be general agreement here and abroad that traditional concepts of patent, copyright, and unfair competition law do not fit the design situation, and that some form of special treatment is necessary.

What is needed here—and it is long overdue—is a well-considered new piece of legislation affording sharply limited but realistic protection for original designs, and tailor-made to meet the contemporary design situation. This is precisely what the pending design bill, which was introduced as S.2075 by Senators O'Mahoney, Wiley, and Hart on May 28, 1959, is intended to accomplish.

1) The bill rests generally on the concept of originality, which in a broad sense can be called the principle of copyright. The bill does not require that the design be either "inventive" or "novel"—the fundamental stumbling blocks of the design patent law.

2) To be protected under the bill a design must be original and ornamental. Originality in this sense means that the designer must have created the design himself, without copying from someone else's work or from a design in the public domain. Staple or commonly known designs are specifically denied protection.

3) Protection under the bill lasts for only five years; this is to be contrasted with the 28 or 56 year terms of protection offered in the copyright law, and the 3½, 7, or 14 year terms provided by design patents.

4) Protection can be obtained only when articles actually embodying the designs are sold or offered to the public. No protection is available under the bill for a design in its drawing board or mock-up stages.

5) Protection for a design under the bill would be lost unless a claim is registered within six months after the design has been made public. As noted above, there is no search for novelty. However, the bill provides an administrative "screening" process, similar to the trademark opposition procedure; the public is given an opportunity to file "objections" to registration on the ground that a design is staple or commonly known.

6) The bill provides for a design notice, and the specific requirements as to form and position are intended to be both flexible and realistic. Omission of the notice would not destroy protection altogether, although it would sharply limit the design owner's legal remedies.

7) Recovery for infringement is generally limited to infringing manufacturers and importers. Vendors and distributors are liable only if they reorder infringing goods after having received written notice of the infringement and refuse to disclose their source. A similar exemption is provided for a secondary manufacturer who innocently incorporates

an infringing article in his own products, and other secondary users are fully exempted.

8) Remedies include injunctions, damages which may be tripled, forfeiture and destruction of infringing articles, costs, and possibly attorney fees.

The O'Mahoney-Wiley-Hart Bill is the product of five years of concerted efforts by the Coordinating Committee on Designs of the National Council of Patent Law Associations, which grew out of the revision of the general patent law in 1952. This group received the assistance of advisers from the Patent and Copyright Offices, and from the interindustry group called the National Committee for Effective Design Legislation. Their aim was to produce a modest, practical piece of legislation which would benefit designers, manufacturers, consumers, and the public alike. I believe their efforts have been successful.

5. PROPOSED LEGISLATION FOR THE PROTECTION OF ORNAMENTAL DESIGN

By HARRY R. MAYERS

General Patent Counsel, General Electric Company

My intended role this afternoon is that of constructive skeptic.

I am skeptical on two grounds of the desirability of ornamental design legislation of the kind represented by S.2075. First, S.2075 would apply to all industries.[1] As to this, I question whether any need has been shown or any demand indicated for new design legislation outside of a very few industries which operate primarily in the decorative arts field. Second, I have even more serious doubt that outside of these specialized industries, and possibly even within them, legislation, such as S.2075, which fails to require a minimum

1. The protection of S.2075 would extend to the ornamental appearance aspects of any "useful article". A "useful article" is an article "having an intrinsic function other than to portray its own appearance or to convey information". These definitions presumably include steam engines and bulldozers as well as jewelry and table ware.

quantum of creativity as a prerequisite to the granting of protection[2] will not cause more harm than benefit. I propose to develop these viewpoints more fully and to indicate some specific suggestions to which they lead me in connection with the proposed legislation.

Because any discussion of design protection requires frequent use of the word "copying", I should like preliminarily to examine this word in order to forestall unjustified emotional repercussions from its use.

Copying is semantically obnoxious, but practically unavoidable. That is to say, while there is an intuitively adverse reaction to the idea of copying, each of us necessarily lives by and with copying every day of his life. Progress in civilization and in our competitive economy depends on it.[3]

If my daughter successfully imitates—that is copies—the gracious manners of an older woman, this is a matter for commendation and not reproach. If a small shopkeeper observes and successfully emulates the merchandising techniques of his chain store rival and thus competes more successfully, this is a matter for congratulation and not rebuke. If I succeed in some measure in reproducing the effective presentation techniques of my predecessors on this program, this is both my good fortune and yours. No unfavorable implications attach. As a general proposition, copying is a legally respectable activity.

If we accept the American Law Institute's Restatement of the Law of Torts as authoritative, we should be impressed by the following quotation from its introductory note on "Imitation of Appearances":

> "The privilege to engage in business and to compete with others implies a privilege to copy or imitate the physical appearance of another's goods. The public interest in competition ordinarily outweighs the interest in securing to a person the rewards of his ingenuity in making his product attractive to purchasers."[4]

Let us not, then, pitch our discussion of the present subject upon the premise that all copying is bad and ought to be prohibited.

Nor can we resolve our problem by broad reference to principles of fairness and ethics. If appeal to fairness and ethics means anything in a con-

2. S.2075 would exclude from protection designs which are "staple or commonly known", "any other design that is in the public domain" (but not if created without actual knowledge of the public domain subject matter), and designs dictated solely by function. None of these limitations requires that the protected design have other than nominal originality or represent anything more than pedestrian modification of that which has gone before.

3. See American Safety Table Co. Inc. v. Schreiber, 122 U.S.P.Q. 29 (2d Cir., June 19, 1959). After discussing the common reaction to copying as "piracy", Judge Medina comments, "But this initial response to the problem has been curbed in deference to the greater public good **** For imitation is the life blood of competition."

4. III Restatement of the Law of Torts 620 (1938).

text such as the present one, it means only a studied conclusion that in the long, long run a proposed course of action promises greater good to society than an incompatible course of action. But this is precisely the question we are trying to decide as to S.2075, so let us not bury our conclusions in our premises by loose use of such words as "unfair" and "unethical".

All this is a ground-clearing preface to discussion of the two uncertainties which I now wish to lay before you as to the wisdom of the particular design legislation which we are asked to consider.

The first of these is whether any justification has really been shown for the creation of a novel form of design protection in industries outside those which pertain to the decorative arts. In particular, what justification or demand has been shown for the creation of new forms of protection in a industry such as the electrical manufacturing industry, whose products extend, for example, from large steam turbines and transformers to refrigerators, toasters, and coffee-makers?

A demand has been shown and I am quite prepared to assume that a need exists for some kind of presently non-existent protection in industries such as the dress goods, textile and jewelry trades—although I must admit that my assumption derives more from ignorance than from knowledge of the internal problems of those trades. On the other hand, I am assured by informed persons concerned with the manufacture of home electric appliances that they recognize no need for protection of their appearance design activity beyond that which now exists and that they are concerned that the creation of new kinds of protection will confer more burdens than benefits upon the appliance industry.

One of the associations which has done much work—and constructive work—to assist the development of design legislation as free from objection as may be and to furnish a focal point for such demand as exists for this kind of legislation is the National Committee for Effective Design Legislation, New York City. The June 1959 bulletin of this association states that the products of its individual manufacturer members include furniture, giftware, lamps and lighting fixtures, kitchenware, motors, toilet articles, interiors, plastics, silverware, clocks and china. All of these, with the exception of motors, rather clearly pertain to the decorative arts industries, and not one, with the possible exception of motors, pertains to an industrial products manufacturing industry such as the electrical industry. As to the inclusion of motors, I do not find in the list of members of the association any company identifiable as a representative spokesman for those who manufacture electrical motors or internal combustion engines.

On the other hand, the National Association of Manufacturers, acting through the National Industrial Council, a group which undertakes to coordinate the activities of several hundred manufacturing associations, last year

instituted a poll to ascertain the views of industry as to the desirability of a copyright type of protection for ornamental industrial designs. The response was disappointingly small in that a total of only 113 company replies were received, but the results nevertheless have some significance as to the apparent position of the non-decorative arts industries. As to those whose opinions were reasonably unequivocal, there were 63 who voted a preference to leave the law as it is, as against only 45 who voted for increased design protection. I do not quote these figures as conclusive evidence of the total position of industry in this matter; I quote them merely as partial confirmation that industry as a whole does not feel a predominant need for new forms of design protection and is inclined to oppose such legislation. Such opposition presumably derives from general satisfaction with the existing freedom of action which industry enjoys to compete vigorously in the field of industrial design, subject only to well understood ground rules established by the patent system and by secondary meaning concepts applied in the law of unfair competition.

I should now like to bring this somewhat abstract presentation down to earth by illustrating the kind of design co-existence which presently operates in the electrical appliance industry and which the members of that industry, from the largest to the smallest, seem to prefer, as far as I can ascertain. I shall do this by showing slides of five contemporary, competitive electric coffee-makers now available in the market place.

I shall ask that the slides, of which there are four, be shown successively, on cue, and I will ask you to note the resemblance as well as the points of difference among the various coffee-makers. Identification of the products does not appear on the slides—each coffee-maker merely bearing an identifying letter. Please note that coffee-maker A appears on each slide along with a second coffee-maker, this being in order that you may have a standard of comparison in mind as you view each product. [There will follow a display of five electric coffee-makers of generically similar appearance.]

Each of these coffee-makers is the product of a well known and well respected manufacturer in the field. Obviously, there was some chronology in the way in which the individual coffee-makers appeared on the market; that is, one appeared first, another second, another third, and so forth. Equally obviously, there has been copying, at least in the broad sense that the latecomrs have received some guidance from the earlier marketed products as to the form which a publicly acceptable coffee-maker ought to display.

I take it, nevertheless, that each designer of one of the coffee-makers shown would assert that his design is original and would expect to be allowed to register it under the proposed new ornamental designs act. I assume moreover that such registration would be forthcoming. Under these circumstances, therefore, the question would arise: who pays what tribute to whom? Presumably, it is

unwillingness to face this question in the terms in which it would be posed under S.2075 which leads the electrical industry, or that part of it with which I am familiar, to challenge the desirability of such legislation.

I must now turn to my second point of skepticism about the proposed legislation. This involves the question of whether it is really in the public interest that any kind of protective franchise should be offered in the field of general industrial design without a requirement of proof of some minimum quantum of creativity as a prerequisite to the granting of protection. It is my guess that, whether or not such a requirement were to appear in the enabling legislation, it would eventually be imposed as a matter of judicial interpretation. This, as you know, was the case with the patent statutes, which in every form prior to the 1952 Act literally required only that the subject matter for which patent was sought be "new and useful". The concept of a further requirement of "invention", as we know it today, did not really become a fixed part of the law until the famous decision of the Supreme Court in *Hotchkiss* v. *Greenwood*[5] in 1850. Since that date, however, a requirement of inventive creativity as a condition of patentability has been an essential feature of our patent system. I predict that in the long run society will demand that a similar requirement be met by any scheme devised for the general protection of ornamental designs. This being the case, I suggest that it would be far better to recognize the need for an appropriate standard in the initial legislation, rather than to provoke the confusion which would ensue upon its omission, later to be overcome by the indirect route of judicial interpretation.

It is of interest that this point is dealt with in the British Designs Act of 1949 by providing that a design shall not be registered if it is the same as a previously registered or published design, or if it differs from such a design only in immaterial details or in features which are variants commonly used in the trade. I am not sure that this is the best possible expression of the matter, but, at least, it recognizes a requirement of differentiation, going beyond bare originality, as a condition to the assurance of protection. The courts may be relied upon to do the rest.

Returning at this point to the subject of the several coffee-makers which have been displayed to you, I must admit that a number of these have been found to be the subject of design patents, issued under the design patent law with which you are familiar. In a sense, therefore, the evil of a governmentally granted franchise with respect to practically indistinguishable designs already exists. However, from the standpoint of one who must advise his clients as to the risk involved in manufacturing still another coffee-maker design, there is the reassurance that comes from knowledge that none of these design patents is likely to be held enforceable unless it shows a substantial advance over those

5. 52 U.S. 248.

which have gone before and thus displays at least the minimum degree of creativity upon which the courts have heretofore insisted in applying the design patent law.[6] It is perhaps unfortunate that this minimum degree of creativity has been called "invention", in analogy to the test applied to mechanical patents, but the same rose by any other name would smell as sweet to a prospective defendant in design litigation. It is the absence of any requirement of substantial creativity as a prerequisite to protection which seems questionable in the presently proposed legislation.

I believe that I have now sufficiently indicated the bases of my skepticism concerning the proposed new ornamental designs bill, and that the time has come to put forward such suggestions as I have for overcoming them.

In the first place, in view of the doubt which exists as to the reality of any demand whatever for a new form of design protection extending across the entire industrial spectrum, it seems logical to propose that the pending bill be limited to those specific industries which claim a need for it. What industries these may be, I am not qualified to indicate, but I should suppose they might include those concerned with the manufacture of textiles, jewelry, decorative surfacing materials, dishes, silverware, and decorative bric-a-brac. Those, either within or outside of the named industries, who disagree with my selections may, of course, speak for themselves.

If a legislative proposal thus limited is sufficiently supported by the designated industries to bring about its passage, it can then be tested in operation on a limited scale without putting all industry at risk as to the uncertainties of its impact. If its success is what its proponents predict, its extension to other industries may be brought about in orderly fashion. As to the practicability of such an approach, it may be noted that this is substantially the history of the growth of our copyright legislation. The Act of 1790 specified maps, charts, and books as objects of protection. This was extended by successive subsequent acts to include historical or other prints, musical compositions, dramatic compositions, photographs, and statuary, and by the Act of 1909 there was added a catch-all clause referring to "all writings of an author", the precise scope of which I will leave to the experts.

Secondly, if a comprehensive Act is to be insisted upon, I would urge building into the Act, as a prerequisite to the grant of substantive rights, the meeting of some minimum standard of creativity. While the final definition of that standard must be left to the courts in view of the obvious impossibility of reducing its entire content to capsule form, I suggest that there be early rather than late recognition of the inevitability of such a standard and that recognition

6. See, for example, A. C. Gilbert Co. v. Shemitz et al. 7 U.S.P.Q. 115 (2d Cir., June 1930) holding invalid for lack of invention a design patent on fruit juice extractors.

take the form of an appropriate reference to it in the statute itself. The language of the British statute affords a starting point for drafting a suitable provision.

I recognize that nothing I have said here today is new—that all possible arguments with respect to ornamental design legislation and dozens of proposals with respect to it were canvassed by Congress in the 1930's.[7] Failure to adopt legislation at that time was apparently because of the substantial balance between those who spoke in favor and those who spoke against it. It is, however, the nature of the problem that it involves fundamental and closely balanced considerations of public policy which inevitably must be re-examined whenever ornamental designs legislation is proposed.[8] That, I take it, is the point of our panel discussion today.

7. See, for example, Senate Committee on Patents, Report and Minority Views to accompany H.R. 11852 (Copyright Registration of Designs, 71st Cong., 3rd Sess., 1931, Senate, Report No. 1627). See also the extensive Hearings on the Sirovich and Vandenberg proposals for design protection held before the Committee on Patents, House of Representatives, 74th Cong., 1st Sess., 1935 (92 pp.).

8. "But with the increasing complexity of society, the public interest tends to become omnipresent, and the problems presented by new demands for justice cease to be simple." Brandeis J. dissenting, in International News Service v. Associated Press, 248 U.S. 215, 262 (1918).

6. PROPOSED PROTECTION FOR INDUSTRIAL DESIGNS

By MILTON IMMERMANN

Partner, Walter Dorwin Teague Associates

It is of interest to note that the title of our discussion refers to "industrial designs." Interesting because law is dependent on words for communication of its meaning. In fact, the legal profession devotes much of its effort to the interpretation of the words and phrasing that constitute law, in order to achieve universal agreement on meaning so that law may be operative.

Perhaps, therefore, the best contribution I can make to this meeting is an explanation of what Industrial Design is, and how an Industrial Designer works as understood by an Industrial Designer associated with an organization that pioneered the field. This may assist you in developing the meaning of the words "industrial design" as used in law for a ready acceptance and understanding, hence appropriate application.

It is a fact that there are many conflicting and erroneous notions as to what Industrial Design is and how the industrial designer functions.

Industrial Design is a profession and the Industrial Designer is a professional. He has formal training, academically or by office practice or both, and he assumes a prominent share of the responsibility for safeguarding the billions of dollars invested by industry and the consumer in the manufacture, marketing and purchase of products of our industrial complex.

His prime technical responsibility is to apply the fundamental principles of design to items of mass or quantity production. To do this effectively:

he must know how the product is made and sometimes assist in the development of materials, equipment and facilities for manufacturing— this requires a knowledge of the engineering sciences;

he must know how the product will be distributed—this requires knowledge of transportation, warehousing and regional characteristics and needs;

he must know how the product will be sold — this requires a knowledge of marketing and sales planning techniques, promotional and advertising tools, packaging for product protection and identification, and the characteristics and architectural design of commercial and retail outlets;

he must know how the product will be used — this requires knowledge of the consumer or end user's physical and social environment and the needs that this product is intended to fulfill.

Despite this broad knowledge and experience he has gained of our industrial and social complex he still remains expert and authoritative only in design but is nevertheless best equipped of all professionals to integrate productively his skill with all the others necessary in our economy. He is the catalyst between producer and end user.

Because of the Industrial Designer's proper concern with the overall view with regard to the products of industry — from inception to final application, and because of his ability to weigh and understand the relative importance of each of the functions that constitute the corporate entity, industry has come to entrust to him the design of all physical properties aimed at public goodwill.

Now this extends the scope of industrial design beyond hard goods items of mass production. It means the design of trademarks, and corporate identification as applied to stationery, office forms, buildings, trucks, water towers, factories, etc.

It means the design of stores, special purpose buildings, regional sales offices, executive offices, business offices, public spaces, gasoline service stations, trade fairs, exhibits, etc.

This profession has grown and kept pace with the growth and development of industry — and why not, since it was spawned on the production line. All the special arts and sciences that existed before industrial design

serve industry too, but we serve *only* industry. And it is this single purposed operating philosophy that has equipped us successfully to fulfill the special needs of industry in architectural design, engineering, product design, package design and graphics.

The growth in population and increased production to meet the needs of a "goods society" results in marketing techniques that emphasize self-service or minimum manpower sales effort at point of purchase.

This means that more standardized products will compete with each other and the manufacturers will be singularly dependent at the point of sale on distinctive visual characteristics of form and identification to reveal the special attributes of their products.

The dollars invested in research and development and tools and dies will be protected by money spent to develop these visual-functional design characteristics. Then more dollars for sales promotion and advertising will be spent to achieve recognition value and to educate the public that these appearance designs and graphic identifications belong to the carefully manufactured attributes of specific products.

This is why we are so vitally concerned about getting maximum patent protection of designs, whether inventive or ornamental, for our clients whose investments can be jeopardized if such patent protection is less than adequate.

I would like to show you a few slides that will reveal case histories from product design concept to patent award. Since this part of my talk is in a sense visual communication at point of sale our first few slides will show some of the scope of an Industrial Designer's work.

#1. *Boeing 707*
Transportation—this is the first American jet transport and the interiors, furnishings and equipment were and are the Industrial Design organization's responsibility.

#2. *Air Force Academy*
The largest single assignment ever entrusted to any Industrial Design organization—the equipping of an academic city of 12,000. The interiors planned and furnished by us cover some 3,500,000 sq. feet of floor space, nearly 80 acres. We designed or selected over 1,700 different kinds of items, numbering hundreds of thousands of units.

#3. *Institutional Products Division,*
General Foods Corporation
Maxwell House Coffee
We developed the brand names, designed the graphic treatment and assisted General Foods staff and suppliers in development of new paper characteristics. The number of brands and sizes were

reduced. A family identity was established for all three brands yet each retained its own distinction.

#4. *Scripto*
Here are three Scripto Co. products. A *Satellite* ball point pen, a pocket lighter and a table lighter. Let us follow these through their development.

#5. *Satellite Ball Point Pen for Scripto*
These are sketches of many design ideas at the start of this project.

#6. *1st Model Dwg.*
This shows a short scoop.

#7. *2nd Model Dwg.*
This shows the development of a longer scoop.

#8. *Final Design Dwg.*
Exploded View.

#9. Final finished rendering.

#10. Here is the *Satellite* Ball Point Pen off the production line.

#11. This is the *Satellite* Design Patent allowed.

#12. *Satellite* in its display box.

#13. *Satellite* box design patent allowed.

#14. 1st model table lighter drawing.

#15. Table lighter off the production line.

#16. Table lighter design patent allowed.

#17. Pocket lighter design patent allowed.

#18. Pocket lighter mechanical patent allowed.

#19. Hough Mfg. Corporation, Hufcor Accordion Door.
Assembly drawing.

#20. Prototype door built in our lab with cover off.

#21. Prototype door with cover on.

#22. Impact tests conducted by us.

#23. Further impact tests.

#24. Production doors installed.
End view of 6 doors and varied tracking.

#25. Mechanical patents allowed on folding doors.

#26. Mechanical patents allowed on door latch and lock.

In my opinion the existing Design Patent law should be strengthened and more adequate protection is necessary for ornamental design as applied to useful articles. I hope in the name of my profession that I leave you with a better understanding of our role in society.

PART II.

LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

1. United States of America and Territories

7. U. S. CONGRESS. HOUSE.

Copyright royalties—personal holding company tax. *Congressional Record,* vol. 105, no. 141 (Aug. 18, 1959), pp. 14846-14847.

Proceedings in the House of Representatives on H.R. 7588 which was reported favorably (H.Rept. No. 915), with slight amendments, by the Committee on Ways and Means. The bill was considered by unanimous consent and passed on August 18th. See Item 12, *infra.*

8. U. S. CONGRESS. HOUSE.

Infringement of copyrights by the United States. *Congressional Record,* vol. 105, no. 121 (July 20, 1959), pp. 12494-12495.

The reading of the bill, H.R. 4059, by the Clerk of the House, on the call of the Consent Calendar, and the statement that "the committee amendments were agreed to, the bill was ordered to be engrossed and read a third time . . . and passed."

9. U. S. CONGRESS. HOUSE.

Patman, Wright. Activities of the Select Committee on Small Business of the House of Representatives during the 1st session of the 86th Congress. *Congressional Record,* vol. 105, no. 162 (Sept. 12, 1959), pp. 17672-17670.

Representative Patman, as chairman of the House Select Committee on Small Business, presents the chairman's report covering the activities of that committee which includes the investigation into ASCAP policies (p. 17679 of the *Record*) conducted by Sub-committee No. 5 under the chairmanship of Representative Roosevelt.

10. U. S. CONGRESS. HOUSE.

Philbin, Philip J. Justice for the songwriters; extension of remarks. *Congressional Record,* vol. 105, no. 153 (Sept. 2, 1959), pp. A7660-A-7661.

Congressman Philbin, under unanimous consent to revise and extend his remarks in the *Record,* includes with approval "a very remarkable article by Walter Winchell entitled 'For All Songwriters, With Love,'" which appeared in the June 18, 1959 issue of the *New York Mirror.* In this article a fervent plea is made for a longer term of copyright protection and the repeal of the jukebox exemption.

11. U. S. CONGRESS. HOUSE. *Committee on the Judiciary.*

Authorizing royalties for musical compositions on coin-operated machines. Hearings before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives, Eighty-sixth Congress, first session, on H.R. 5921, to require jukebox operators to pay royalty fees for the use of the musical property of composers, authors, and copyright owners, June 10, 11, 12, 17 and 18, 1959. Washington, U. S. Govt. Print. Off., 1959. 397 p. (*Its* Serial no. 6) Emanuel E. Celler, chairman, Committee on the Judiciary. Edwin E. Willis, chairman, subcommittee.

12. U. S. CONGRESS. HOUSE. *Committee on Ways and Means.*

Treatment of copyright royalties for purposes of personal holding company tax. Report to accompany H.R. 7588, submitted by Mr. Mills, August 17, 1959. 7 p. (86th Cong., 1st Sess., H.Rept. No. 915).

This report recommends the passage, with slight amendments, of H.R. 7588, a bill amending the Internal Revenue Code to provide that personal holding company income is not to include income from copyright royalties under certain conditions. The bill was passed on August 18th. A somewhat different version (H.R. 8960, 85th Cong., 1st Sess.) was passed by the House on Aug. 16, 1957).

13. U. S. CONGRESS. SENATE.

Dodd, Thomas J. Amendment of Copyright Act of 1909. *Congressional Record,* vol. 105, no. 154 (Sept. 3, 1959), pp. 16365-16366.

Senator Dodd (D. Conn.), in an address before the Senate, traces briefly the history of legislative consideration of bills to repeal the jukebox amendment in recent Congresses, and urges his fellow Members of the Senate to give their attention to "this apparently trivial but significant alienation of property which has been allowed to exist for 50 years, and to restore to their rightful owners the musical property being wrongfully taken from American composers by jukebox operators."

14. U. S. COPYRIGHT OFFICE.

Ad interim copyright. Washington, [U. S. Govt. Print. Off.] June 1959. 2 p. (Cir. 69).

A revised circular defining and explaining ad interim copyright registration accompanied by a reproduction of the relevant provisions of the Copyright Law (17 U.S.C.).

15. U. S. COPYRIGHT OFFICE.

Choreographic works. Washington, [U. S. Govt. Print. Off.] July 1959. 1 p. (Cir. 51).

A completely rewritten and revised circular explaining the registrability of, and extent of protection for, choreographic works.

16. U. S. COPYRIGHT OFFICE.

Information concerning optional deposit. Washington, U. S. Govt. Print. Off., Aug. 1959. 1 p. (Its Cir. 70-A).

17. U. S. COPYRIGHT OFFICE.

Registration of claims without fee. (Foreign works only). Washington [U. S. Govt. Print. Off.] June 1959. 2 p. (Cir. 44A).

A revision of Circular AI 1, with changed numbering, explaining the circumstances under which copyright claims in works by foreign authors may be registered without payment of registration fees.

18. U. S. COPYRIGHT OFFICE.

Regulations of the Copyright Office (in effect as of June 18, 1959). Washington [U. S. Govt. Print. Off.] June 1959. 5 p. (Cir. 96).

The amended *Regulations* as published in the *Federal Register* on June 18, 1959, have been issued by the Copyright Office as Circular 96. See 6 BULL. CR. SOC. 213, Item 237 (1959).

2. Foreign Nations

19. GREAT BRITAIN. BOARD OF TRADE.

Ausführungsverordnung Nr. 866 zum Gesetz über das Urheberrecht betreffend das Verfahren der Abgabenerhebung für Tonträger, vom 17. Mai 1957. (61 *Blatt für Patent-, Muster- und Zeichenwesen* 204-206, no. 6, June 1959.)

German translation of "The Copyright Royalty System (Records) Regulations, 1957." See 5 BULL. CR. SOC. 19, Item 17 (1957).

20. GREAT BRITAIN. BOARD OF TRADE.

Ausführungsverordnung Nr. 867 zum Gesetz über das Urheberrecht betreffend die gewerblichen Muster, vom 17. Mai 1957. (61 *Blatt für Patent,- Muster- und Zeichenwesen* 206, no. 6, June 1959.)

German translation of "The Copyright (Industrial Designs) Rules, 1957." See 5 BULL. CR. SOC. 18, Item 14 (1957).

21. GREAT BRITAIN. BOARD OF TRADE.

Verordnung Nr. 865 zur Durchführung des Urheberrechtsgesetzes betreffend Bekanntmachung der Veröffentlichung, vom 17. Mai 1957. (61 *Blatt für Patent-, Muster- und Zeichenwesen* 204, no. 6, June 1959.)

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

22. IRELAND (EIRE). LAWS, STATUTES, ETC.

Ordonnance de 1959 sur le copyright (Pays étrangers) (N° 50 du 20 mars 1959). (72 *Le Droit d'Auteur* 141-142, no. 8, Aug. 1959.)

French translation of the "Copyright (Foreign Countries) Order, 1959." See 6 BULL. CR. SOC. 294, Item 335 (1959).

23. NEW ZEALAND. COPYRIGHT COMMITTEE.

Report, 1959; presented to the House of Representatives by leave. Wellington, R. E. Owen, Govt. Printer, 1959. 181 p. (H. 46).

For a summary of this report see Item 80, *infra.*

24. SPAIN. LAWS, STATUTES, ETC.

Ordonnance du Ministère de l'éducation nationale accordant un délai extraordinaire pour l'inscription des oeuvres au Registre de la propriété intellectuelle (du 30 juin 1958). (72 *Le Droit d'Auteur* 140-141, no. 8, Aug. 1959.)

French translation of a decree of the Spanish Ministry of National Education of June 30, 1958, whereby a special term is provided, effective until Dec. 31, 1958, for registration, in the General Copyright Registry, of works which had not been registered in the normal manner in accordance with pre-established provisions.

25. SPAIN. LAWS, STATUTES, ETC.

Règlement concernant le dépôt légal d'oeuvres imprimées. (Décret du 23 décembre 1957). (72 *Le Droit d'Auteur* 137-140, no. 8, Aug. 1959.)

French translation of a Spanish decree of Dec. 23, 1957 regulating the legal deposit of printed works upon repealing previous laws and regulations inconsistent therewith.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

26. IRELAND (EIRE).

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 5 juillet 1959). (72 *Le Droit d'Auteur* 119, no. 7, July 1959.)

Notification by the Swiss Government to the member countries of the Berne Union concerning the adherence of Ireland to the Brussels revision of the Berne Convention, effective July 15, 1959. The text of the note from the Irish Legation at Berne to the Swiss Federal Political Department, dated May 4, 1959, transmitting the instrument of accession, is appended.

PART IV.

JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY

The Editorial Board is pleased to announce that Mr. Irving Younger has joined THE BULLETIN Staff as Editor in charge of Part IV, *Judicial Developments in Literary and Artistic Property,* replacing Mr. Imre Rochlitz, who has accepted an appointment in Geneva, Switzerland. Mr. Younger is known to our readers as the author of the prize-winning essay, "Citizens Who Publish Abroad: A Study in the Pathology of American Copyright Law," 6 BULL. CR. SOC. 114, *Item* 112 (1958). He is a member of the New York Bar, associated with the firm of Paul, Weiss, Rifkind, Wharton and Garrison.

A. DECISIONS OF U.S. COURTS

1. Federal Court Decisions

27. *Rose, et al.* v. *Bourne, Inc.,* 176 F. Supp. 605, 123 U.S.P.Q. 29 (D.C.S.D. N.Y. September 15, 1959) (Dimock, J.) (appeal taken, 2d Cir., Sept. 25, 1959).

Action for copyright infringement. Plaintiffs submitted to voluntary dismissal of their claim, without prejudice. Trial proceeded upon defendant's counterclaim for a declaratory judgment that it was the legal owner of the renewal term of the copyright in the song. "That Old Gang of Mine," or was such legal owner subject only to its filing with the Copyright Office an assignment in the names of the plaintiffs. Plaintiffs were, individually or as executor, the composers of the song in question. On April 19, 1923, they executed an instrument by which they purportedly sold their song to defendant. Shortly thereafter, defendant registered the song with the Copyright Office, first as an unpublished, then as a published work. Under the instrument of April 19, 1923, defendant agreed to exploit the song and to pay royalties for certain enumerated uses. These royalties, between 1923 and 1952, amounted to $35,341.51. The first paragraph of the 1923 instrument provided that "the composer hereby sells, assigns, transfers and delivers to the publisher . . . the rights to secure copyrights and extensions and renewals of copyrights . . ." In 1950, one year before the expiration of the original term, and while all the composers were alive, the composers and the publisher each filed appli-

cations for renewal of the copyright in the song both as an unpublished and as a published work. In the former case, the composers were first by several hours; in the latter case, the publisher was first by a day. Plaintiffs now argued that the instrument of April 19, 1923, was not a present assignment of the future right in the renewal expectancy, and that, even if it were, inadequacy of consideration for the assignment and uncontemplated changes in the music industry barred a decision for defendant.

Held, for defendant.

Plaintiffs contended that the language of the instrument constituted a sale of the right to secure a renewal of copyright rather than a sale of the renewal expectancy itself. The Court rejected this distinction:

> "The exercise of the right of an assignee of a copyright to secure a renewal thereof does not require cooperation of the composer. There is no distinction between the assignment of the right to secure a renewal and the assignment of the renewal expectancy itself. The expectancy cannot be reduced to possession except by the exercise of the right to renewal and that right may be exercised by the assignee all by himself.
>
> "During the composer's lifetime and before the final year of the term of the original copyright, the expectancy of the renewal of the copyright is like the interest of one who is entitled to a remainder after a term of years provided he outlives the term. The composer can effectively assign the expectancy. Fisher Music Co. v. Witmark & Sons, 318 U.S. 643. . . .
>
> "Unlike the original copyright, the renewal is created, not by publication with a claim to the copyright, but by registration of an application for renewal in the Copyright Office. Such an application cannot be validly made until the last year of the original term of copyright so that, until that time, no one can have anything more than the 'right to secure' a renewal. It will be recalled that that is exactly what the composers say the original instrument of April 19, 1923 purports to give the publisher. The assignee needs the help of no one to secure the renewal. It is true that the application for the renewal must be made in the name of the author or composer. Nevertheless, the assignment of the expectancy implies a power of attorney in the assignee to make the application in the name of the author or composer. Rossiter v. Vogel, 2d Cir., 134 F. 2d 908."

Although the renewal application must be in the name of the author rather than of the assignee, the renewal nevertheless belongs to the assignee. Thus the fact that plaintiffs were first to register the renewal of the

copyright in the song as an unpublished work does not affect the publisher's claim to the renewed copyright.

The Court felt bound, under *Rossiter* v. *Vogel,* 148 F.2d (2d Cir. 1945), to scrutinize the equities of plaintiffs' assignment of the renewal expectancy to defendant. In doing so, the Court found that the assignment had been supported by adequate consideration in 1923, and that inadequacy of consideration resulting from subsequent events would not render the transaction voidable; that rescission of the assignment at this time, after defendant had paid the composers $35,341.51, was not feasible; and that the composers were guilty of laches. Finally, the Court allowed defendant counsel fees for meeting all of plaintiffs' arguments except that involving the application of *Rossiter* v. *Vogel,* commenting that such allowances are designed as much to penalize the losing party as to compensate the winning party.

28. *Life Music, Inc.* v. *Broadcast Music, Inc., et al.,* 23 F.R.D. 181 (D.C.S.D. N.Y. February 7, 1959) (Dawson, J.).

Action for treble damages under the antitrust laws. Plaintiff alleged a conspiracy among defendants to bar it from the business of licensing performance rights in musical compositions. Plaintiff moved for summary judgment under Rule 56, Federal Rules of Civil Procedure, seeking "a substantial part of the relief demanded in the complaint, including an injunction against licenses issued by BMI and a divestiture of its stock."

Held, motion denied.

The papers before the Court indicated the existence of numerous controverted issues of fact. For this reason alone, the motion must be denied. In addition, as the Court pointed out, "this is an important case involving a substantial industry and the application of the summary judgment rule to such an action is questionable. *United States* v. *Bethlehem Steel Corporation,* D.C.S.D.N.Y. 1958, 157 F.Supp. 877."

(*Ed.* — The Court's citation of *Bethlehem Steel* is particularly interesting. In *Schwartz* v. *Broadcast Music, Inc.* (D.C.S.N.Y., Civ. No. 89-103), an action similar in many respects to the instant case, defendants have moved for summary judgment before Judge Weinfeld, who decided *Bethlehem Steel.* As of the date of this issue, Judge Weinfeld has not handed down his opinion.)

29. *Cortley Fabrics Co.* v. *Slifka, et al.,* 175 F.Supp. 66, 122 U.S.P.Q. 321 (D.C.S.D.N.Y. July 1959) (Dawson, J.).

Action for copyright infringement. Plaintiff was in the business of manufacturing fabrics. It purchased an original design and, with the requi-

site notice of copyright, reproduced it on cloth, registering the resultant product in the Copyright Office as a reproduction of a work of art [17 U.S.C.A. §5(h)]. Defendants copied plaintiff's design on inferior cloth. Plaintiff thereupon applied for a preliminary injunction under Rule 65, Federal Rules of Civil Procedure.

Held, application granted.

Plaintiff made a prima facie showing of copyright validity and infringement, while defendants did not attempt to controvert any of plaintiff's factual allegations. Defendants merely argued questions of law, including the unconstitutionality of the copyright statute, which were patently baseless and unworthy of consideration. The present case was the third within 18 months to charge these defendants with copyright infringement. Defendants apparently made it a practice to pirate copyrighted textile designs, reap a fast profit thereon, and then, when sued, agree to the entry of a consent injunction. In view of this course of conduct, which on its face is the "willful infringement for profit" made a misdemeanor by 17 U.S.C.A. §104, the Court sent a copy of its opinion to the United States Attorney for the Southern District of New York for appropriate action.

30. *Lerner, et al.* v. *Club Wander In, Inc.,* 174 F.Supp. 731, 122 U.S.P.Q. 595 (D.C. Mass. June 16, 1959) (Aldrich, J.).

Action for copyright infringement. Plaintiff owned the copyright on certain songs which defendant concededly played without license from plaintiff. Defendant urged, however, that it was a private club, and that its performance of the songs, in consequence, was not public and for profit within the meaning of 17 U.S.C.A. §1(e). Defendant leased a building in which, on Thursday, Friday and Saturday evenings, it sold drinks and offered entertainment. All other times, the building was closed. In many respects, defendant operated like a private club: its members paid dues of $2 per annum; it made no profit; its principal officer worked without compensation. Although defendant displayed signs reading "Members and Guests," it appeared that any respectable person, whether or not a member or guest of a member, would be permitted to enjoy what defendant had to offer.

Held, for plaintiff.

To reach this decision, the Court had to find that defendant's performance of plaintiff's copyrighted songs met the two requirements of 17 U.S.C.A. §1(e). The performance had, first, to be public, and, second, to be for profit. As to the first requirement, the Court reasoned that, although defendant may well have been a bona fide club, its performances were

nevertheless open to any respectable member of the general public, and thus were "public" within the purview of 17 U.S.C. §1(e). Defendant's possession of a theoretical right to exclude patrons who failed to meet minimal standards of propriety did not negate the fact that defendant's performance of plaintiffs' songs was public. As to the second requirement, the Court succinctly noted that "the performance of copyrighted material in connection with the selling of drinks is a performance for profit." The Court expressly failed to reach the question whether a performance strictly limited to members of a private club is public. Finally plaintiff was awarded statutory damages and an equal amount for all costs, including attorneys' fees.

31. *Settle* v. *Office Appliance Co.,* 122 U.S.P.Q. 123 (D.C.N.D. Ill., E. Div'n June 15, 1959) (Miner, J.).

Action for breach of contract and infringement of common law copyright. Plaintiff, a writer of articles on retail advertising, sold a series of such articles to defendant for publication in defendant's magazine, "Office Appliances." Prior to this time, plaintiff had sold the same articles to various other trade publications, each of which printed some of them without reservation of any rights to plaintiff. In addition, prior to the sale to defendant, plaintiff authorized Fairchild Publications, Inc., to publish a book containing the articles sold to defendant. Fairchild did so, registering the copyright in the book in its own name, and granting plaintiff the right to use the articles in trade publications. Defendant thereafter published plantiff's articles in pamphlet form.

Held, after trial, complaint dismissed.

The agreement between plaintiff and defendant gave defendant the right "not only to publish these articles in its magazine but to reprint these articles in booklet form for use in its own field, namely, in the promotion of sales and subscriptons to defendant's magazine and for distribution in the field in which defendant's magazine circulates, namely, the field of office appliances, equipment and supplies." Thus defendant was not liable to plaintiff for breach of contract.

The publication of plaintiff's articles, with plaintiff's permission, by other trade magazines and by Fairchild prior to the agreement between plaintiff and defendant extinguished any common law copyright which plaintiff may have retained in the material. Thus the defendant was not liable to plaintiff for breach of common law copyright.

32. *Bradbury* v. *Columbia Broadcasting System, Inc., et al.,* 174 F.Supp. 733 (D.C.S.D. Cal., Centr. Div'n June 15, 1959) (Yankwich, J.).

Action for copyright infringement. Plaintiff charged that defendants' television play, "A Sound of Different Drummers," infringed his copyrighted novels, "The Fireman" and "Fahrenheit 451."

Held, after trial, for defendants.

Plaintiff failed to prove defendants' access to his novels. Moreover, defendants had appropriated no protected aspect of plaintiff's novels. While certain elements in both plaintiff's and defendants' works—such as theme, and particular stock situations — were similar, such elements merely constitute the "idea" of a work, and are not subject to copyright protection. Only the "expression" of a work is protected by copyright, and defendants here had copied none of the "expression" of plaintiff's novels. Defendants were awarded costs, but not attorneys' fees.

33. *Miller Music Corp.* v. *Charles N. Daniels, Inc.,* 265 F.2d 925, 121 U.S. P.Q. 204 (2d Cir. June 8, 1959), *certiorari granted* 123 U.S.P.Q. ii, Oct. 12, 1959.

34. *Affiliated Music Enterprises, Inc. v. Sesac, Inc.,* 267 F.2d. 13, 121 U.S.P.Q. 542 (2d Cir. June 8, 1959), *certiorari* denied 123 U.S.P.Q. ii, Oct. 12, 1959.

2. State Court Decisions

35. *Stone* v. *Goodson, et al.,* 188 N.Y.S.2d 660 (Sup. Ct., N.Y. Co. March 11, 1959) (Aurelio, J.).

Action for compensation for use by defendants of plaintiff's idea for a television program promoting merchandise with a fixed or standard retail price. In 1953, plaintiff submitted his scheme to defendants, who agreed in writing to pay him certain sums if they used the idea. In 1956, defendants purchased the right to use plaintiff's title, "The Price is Right," and immediately thereafter produced a program designed to promote merchandise with a fixed or standard retail price. Plaintiff moved for summary judgment.

Held, motion granted.

"Defendants did not purchase by the November 1, 1956 writing the right to use the central idea except upon payment therefor. There was no obligation to use any material having anything to do with the idea of a standard or fixed retail price. Any program having the title 'The Price is

'Right' but having no relation to it could have been used. But the program used not only supports the title but embodies the central idea of plaintiff's submission." Any differences between plaintiff's plan and defendants' program, moreover, were insubstantial.

36. *Vidor* v. *Serlin, et al.,* 7 A.D. 2d 978, 184 N.Y.S. 2d 482 (2d Dep't March 24, 1959) (per curiam).

Action for a declaratory judgment that plaintiff Vidor was exclusive owner of motion picture rights to books by defendant Mrs. Nijinsky about her husband. Defendant Serlin cross-claimed against Mrs. Nijinsky. The Supreme Court entered judgment for plaintiff.

Held, on appeal, judgment modified, and, as modified, affirmed.

Serlin's cross-complaint against Mrs. Nijinsky must be dismissed because the record does not establish that she had assigned or ratified the assignment of the rights in question. In any event, whatever rights Serlin or his assignor might have acquired were lost as a result of the assignor's breach of managerial obligations under the purported agreement with Mrs. Nijinsky.

37. *Tumey* v. *Little, et al.,* 186 N.Y.S.2d 94 (Sup. Ct., Nassau Co. April 7, 1959) (Meyer, J.).

Action by architect to recover compensation for defendants' use of architect's plans to build four homes in addition to the house which architect had been retained to design. Plaintiff's evidence showed that he had prepared the plans, delivered blueprints thereof to one of the defendants without any specific reservation of rights, and had filed the plans with the building department. Defendant moved for judgment.

Held, motion granted.

"Plaintiff's claim is foreclosed by *Wright* v. *Eisle,* 86 App. Div. 356, 83 N.Y.S. 887, in which the Second Department upheld dismissal of plaintiff's complaint in just such a case as this on the ground that the filing of an architect's plans with the building department constitutes a publication terminating such common law copyright as he may have had, and that the property in the plans was in any event in the client for whom they were prepared rather than the architect. . . ." The agreement reserving the architect's property in the plans, moreover, must be express or necessarily implied from the conduct of the parties. As an alternative ground for its decision, the Court stated that plaintiff had not shown any connection between Leonard Little, the defendant who had retained him, and Robert Little, the defendant who had used plaintiff's plans to build the four additional houses.

PART V.

BIBLIOGRAPHY

A. BOOKS AND TREATISES

1. United States Publications

38. AMERICAN BAR ASSOCIATION. *Section of Patent, Trademark and Copyright Law.* 1959 committee reports to be presented at the annual meeting to be held August 22-27, 1959, Miami Beach, Florida. Chicago, American Bar Center [1959] 171 p.

Among the reports are included those of the Copyright Division committees dealing with the following subjects: copyright law revision, international copyright relations and conventions, Copyright Office affairs, program for revision of the copyright law, program for protection of industrial designs, related rights, and authors.

39. GOLDSTEIN, E. ERNEST. Cases and materials on patent, trademark and copyright law. Brooklyn, Foundation Press, 1959. 762 p. (University casebook series.)

A two-volume mimeographed edition of this casebook was issued in 1957 under a slightly different title. See 5 BULL. CR. SOC. 366, Item 477 (1958).

40. MIDDLETON, GEORGE. The Dramatists Guild. What it is and does . . . How it happened and why. The Dramatists Guild of the Authors League of America. New York, June 1959. 28 p.

This fascinating and well documented presentation of the story of the Guild has been brought up-to-date.

41. VARMER, BORGE. Photoduplication of copyrighted material by libraries; a study prepared for the United States Copyright Office . . . with Comments and views submitted to the Copyright Office. Washington, Sept. 1959. 32, 10 p. (*General revision of the copyright law, study no.* 19.)

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

2. Foreign Publications

(a) In French

42. VERGNAUD, PHILIPPE. Les contrats conclus entre peintres et marchands de tableaux. Bordeaux, Rousseau Frères Imprimeurs, 1958. 217 p.

A treatise on the laws and regulations governing contracts between painters and art dealers in France.

(b) In German

43. WEDLER, RUDOLF. Fotorecht (Rechtsfragen der Fotografie) 3. erweiterte Aufl. Halle, Fotokino Verlag [1958] 200 p.

The third edition of a handbook on laws and regulations concerning photography in the German Democratic Republic (East Germany) for the amateur and professional photographer, including a chapter on copyright in photographic works.

(c) In Spanish

44. MIRANDA OLVERA, ERNESTINA. Los dereches de autor dentro de nuestro regimen jurídico. [Mexico] 1958. 64 p. Tesis (licenciatura en derecho)—Universidad Nacional Autónoma de México.

A dissertation on copyright law under the Mexican legal system with the following chapter topics: 1. Explanation of the concept of copyright law. 2. The legal nature of copyright. 3. Antecedents of copyright law in France, England, and Spain. 4. Mexican legislation. 5. International conventions.

B. LAW REVIEW ARTICLES

1. United States

45. CASTLE, RICHARD N. Manufacturer's liability for unauthorized use of a nonpatentable design. (32 *Southern California Law Review* 299-306, no. 3, spring 1959.)

A note on *Trenton Industries* v. *A. E. Peterson Mfg. Co.*, 165 F.Supp. 523 (S.D.Cal. 1958).

46. COHEN, SAUL. Justice Holmes and copyright law. (32 *Southern California Law Review* 263-279, no. 3, spring 1959.)

The author prefaces this analysis of Holmes' copyright opinions as follows: "Although Holmes wrote no ringing dissents in copyright cases, and it is not in his copyright opinions that we find his most often quoted phrases, his copyright opinions do reflect his keen mind, his characteristic style, and his political philosophy."

47. DWAN, RALPH H. Splitting of ordinary income from patents and copyrights. (45 *American Bar Association Journal* 513-515, no. 5, May 1959.)

A discussion of cases bearing upon the possibilities and pitfalls of splitting of ordinary income from patents and copyrights for purposes of avoiding the higher bracket taxes on ordinary income of individuals.

A condensation of this article appears in 9 *The Monthly Digest of Tax Articles* 7-11, no. 9 (June 1959).

48. EPSTEIN, WILLIAM H. Copyrights—infringement—registration as a prerequisite for bringing an infringement suit. (27 *The George Washington Law Review* 740-743, no. 5, June 1959.).

A case note on *Vacheron & Constantin-Le Coultre Watches, Inc.* v. *Benrus Watch Co.*, 260 F.2d 637, 6 BULL. CR. SOC. 81, Item 83 (2d Cir. 1958).

2. Foreign

(a) Dutch

49. HIRSCH-BALLIN, E. D. Maken en vervaardigen; over ontaardingsverschijnselen in het recht van de scheppende mens. Amsterdam, Scheltema & Holkema [1959] 23 p. Rede—Amsterdam (aanvaarding van het ambt van bijzonder hooglerarr) 1959.

An address delivered on the occasion of the speaker's acceptance of a professorship at the University of Amsterdam. The speaker distinguishes between "creating and manufacturing," criticizes the tendencies of Netherlands jurisprudence toward the development of a "quasi-copyright" of phonograph record manufacturers under the theory of neighboring rights, and upholds the right to protection, as creators, of the performing artist, the reader of literature, and the translator.

(b) English

50. BUSSMAN, KURT. The legal problems of films and television. (*E.B.U. Review* 24-31, no. 56B, July 1959.).

A discussion of problems of copyrights, neighboring rights, and unfair competition "that emerge from the coexistence of the two media [motion pictures and television]" in the German Federal Republic.

(c) French

51. BOLLA, GÉRARD. Oeuvres des arts appliqués et dessins ou modèles industriels: vers une solution internationale nouvelle. (*Revue Internationale du Droit d'Auteur* 54-91, no. 24, July 1959.).

"The object of this article is to give a survey of the purely legal questions set at present by the international protection of works of the applied arts and industrial designs or models and of the solutions envisaged by the Study Group of applied arts convoked at Unesco House under the auspices of the Unions of Berne and of Paris and of the Intergovernmental Committee of the Geneva Convention." In French, English, and Spanish. See 6 BULL. CR. SOC. 216, 238 (1959).

52. KLAVER, FRANCA. La protection des dessins et des modèles d'aprés la legislation sur la propriété industrielle. (30 *Il Diritto di Autore* 154-163, no. 1, Jan.-Mar. 1959.)

A brief, comparative analysis of laws other than copyright relating to the protection of designs and models in the following countries: Federal Republic of Germany, Brazil, Spain, United States, France, India, Italy, Japan, Mexico, United Kingdom, and Switzerland.

53. LUND, TORBEN. Lettre du Danemark. (72 *Le Droit d'Auteur* 142-148, no. 8, Aug. 1959.)

A survey of legislative and judicial developments concerning copyright in Denmark during the last decade.

54. MALAPLATE, LÉON. Les sociétés d'auteurs au Japon et Mexique. (*Inter-Auteurs* 46-54, no. 135, 2. trimestre 1959.)

Extracts from a report by Mr. Malaplate, director-general of the French performing rights society, S.A.C.E.M., on JASRAC and S.A.C.M., the Japanese and Mexican performing rights societies, respectively. The report resulted from trips by Mr. Malaplate to Japan and Mexico to survey the copyright situation in those countries.

55. MASOUYÉ, CLAUDE. Vers une prolongation de la da dureé générale de protection. (*Revue Internationale du Droit d'Auteur* 92-117, no. 24, July 1959.)

After a discussion of resolutions recently adopted by CISAC and the Italian Society of Authors and Publishers in favor of uniform, longer terms of protection of literary and artistic works for European countries, a case is made for legislative efforts in this direction.

56. PALAGYI, ROBERT. Lettre de Hongrie. (72 *Le Droit d'Auteur* 122-132, no. 7, July 1959.)

A survey of developments in Hungarian copyright legislation and jurisprudence since 1956.

57. TOURNIER, JEAN LOUP. Nouvelles d'Amérique du Nord. (*Revue Internationale du Droit d'Auteur* 118-139, no. 24, July 1959.)

"News from North America"; comments in French and English, on: a Canadian Supreme Court decision of March 25, 1959 (*Composers, Authors and Publishers Association of Canada, Ltd.* v. *Siegel Distributing Co., Ltd.*), 6 BULL. CR. SOC. 262, Item 277, involving public performances by means of coin-operated machines connected to a central record player, *Shapiro, Bernstein & Co.* v. *Remington Records, Inc.*, 265 F.2d 263, 6 BULL. CR. SOC. 251, Item 264 (2d Cir. 1959); *Edward B. Marks Music Corp.* v. *Charles K. Harris Music Pub. Co.*, 255 F.2d 518, 5 BULL. CR. SOC. 300, Item 379 (2d Cir. 1958); the O'Mahoney and Celler juke-box bills; and the Copyright Office *general revision study* no. 4 (Divisibility of copyrights, by A. L. Kaminstein).

58. VILBOIS, JEAN. Aspects de la nouvelle loi indienne (Copyright Act 1957). (*Revue Internationale du Droit d'Auteur* 2-53, no. 24, July 1959.)

An analysis, in French, English, and Spanish, of the Indian Copyright Act of 1957 with particular attention to "the international aspects of the problems it seeks to solve."

(d) German

59. ELSAESSER, MARTIN. Die Rechte der ausübenden Künstler und ihre Übertragung. (61 *Gewerblicher Rechtsschutz und Urheberrecht* 312-316, no. 7, July 1959.)

A discussion of the rights of the performing artist in sound recordings of his performances under section 2, paragraph 2 of the German

statute concerning copyright in literary and musical works, and the transferability of such rights, with particular reference to an article by Alfred Baum appearing in 61 GRUR 69 (1959). See 6 BULL. CR. SOC. 273, Item 303 (1959).

60. GOLDBAUM, WENZEL. Rechtsstellung des fiktiven Bearbeiters. (*GEMA-Nachrichten* 4-9, no. 43, Apr. 1959.)

A critique of the concept of the protection of phonograph records under the German copyright law with particular reference to sect. 2, par. 2, which specifies the conditions under which the performing artist or the person making a recording is to be considered the adapter of the literary or musical work recorded.

61. HAENSEL, CARL. Stellungnahme zu vorstehendem Gutachten von Prof. Heinrich Hubmann. (*GEMA-Nachrichten* 22-52, no. 43, Apr. 1959.)

A critique of Prof. Hubmann's legal opinion in which the writer disagrees with the professor's findings. See Item 62, *infra.*

62. HUBMANN, HEINRICH. Gutachten über die Frage, ob die in §1c), e) und i) des GEMA-Berechtigungsvertrages erwähnten Wiedergabearten von dramatisch-musikalischen Werken unter den Begriff "grosses Recht" fallen. (*GEMA-Nachtrichten* 10-22, no. 43, Apr. 1959).

A legal opinion on the question whether the kinds of performance rights in dramatico-musical works, mentioned in section 1(c), (e), and (i) of the GEMA licensing contract, are "grand" or "small" rights, with a finding in favor of the latter.

63. KRAUSE, GUNTER B. Der Schutz der Fernsehsendung und ihres Titels. (61 *Gewerblicher Rechtsschutz und Urheberrecht* 346-359, no. 8, Aug. 1959.)

An analysis of the protection of the television broadcast and its title under laws of copyright and unfair competition in the German Federal Republic (West Germany).

64. PFUHL, E. Das Urheber- und Verlagsrecht in der Sowjetzone. *Juristische Rundschau* 211-215, Jahrgang 1959, Heft 6 (June).

A discussion of copyright and publishing law in the Soviet Zone (East Germany).

65. PLAGE, WILHELM. U.S.A. — Copyright — Merkblatt. (2. Nachtrag) (*GEMA Nachrichten* 7-8, no. 44, July 1959.)

This article, third in a series of "information sheets" concerning U. S. copyright matters of interest to German authors and publishers, explains recently revised Copyright Office Circulars 67 (Poems and Song Lyrics) and 35 B (Notice of Use).

66. RUBINSTEIN, STANLEY J. War Hans Sachs lax? *GEMA Nachrichten* 13-15. no. 44 (July 1959.)

German translation of an article on the import of decisions in three English cases dealing with parodies which appeared in 227 L.T. 47. See 6 BULL. CR. SOC. 209, Item 219 (1959).

(e) Italian

67. MARIOTTI, PAOLO. L'opera collettiva nel diritto di autore. (30 *Il Diritto di Autore* 17-63, no. 1, Jan.-Mar. 1959.)

An abridgment of the author's thesis (University of Rome, 1957-58) on the subject of "the collective work in the copyright law," the first part being devoted to Italy, and the second to France, Great Britain, and the United States.

68. RONGA, GIULIO. L'evoluzione della protezione internationale dell'arte applicata e dei disegni e modelli nelle Convenzioni di Berna e di Parigi. (30 *Il Diritto di Autore* 1-16, no. 1, Jan.-Mar. 1959.)

"The evolution of the international protection of applied art and of designs and models in the Conventions of Berne and Paris," and the possible results of future efforts.

69. ROSCIONI, MARCELLO. La Conferenza diplomatica di Lisbona per la revisione della Convenzione di Unione di Parigi (6-31 ottobre 1958.) (30 *Il Diritto di Autore* 101-126, no. 1, Jan.-Mar. 1959.)

A summary, by the head of the Italian Patent Office in Rome, of the most important decisions made at the Lisbon Conference for the Revision of the Paris Convention, Oct. 1958.

(f) Swedish

70. BERNITZ, ULF. Om dubbelupplåtelse av uppförandderätt. (28 *NIR* 39-48, no. 1, 1959.)

An examination of the legal problems arising in Sweden when a copyright owner licenses exclusive performing rights in his work to two or more persons.

71. JARNEVALL, WEINE. Om reklamalsters rättsskydd. (28 *NIR* 17-38, no. 1, 1959.)

A comment on the legal protection of advertising in Sweden under laws of copyright, trademarks, and unfair competition as well as under new draft copyright and trademark laws.

C. ARTICLES PERTAINING TO COPYRIGHT FROM TRADE MAGAZINES

1. United States

72. COUSINS, NORMAN. Of rubles and royalties. (42 *Saturday Review* 26-28, 39-40, no. 36, Sept. 5, 1959.)

An editorial "in the nature of a report" on an assignment given Cousins, when he recently visited the Soviet Union, by Governor Adlai Stevenson to follow-up Stevenson's "inconclusive" meetings with Russian officials on the subject of the payment of royalties to American authors.

73. Lawyers back beefing up design laws. (31 *Home Furnishings Daily* 67, no. 167, Aug. 25, 1959.)

An article on a panel discussion of the proposed O'Mahoney-Wiley-Hart design bill (S. 2075, 86th Cong.) by a commttee of the American Bar Association at its annual meeting in Miami. "Approval in principle" of the bill was indicated in a resolution adopted by the committee.

74. Mex piracy of Yank scripts seen ending. (216 Variety 11, no. 1, Sept. 2, 1959.)

An article on a legal action brought recently in Mexico by Garson Kanin for alleged infringement of his play, "Born Yesterday" by a Mexican film. The court action is described as the "first attempt by a writer to obtain legal redress against the Mexican pirates."

75. GIBSON, JOHN R. Trader Khruschev: he'll push trade hard in talks with Ike but responses will be cool. (154 *The Wall Street Journal* 1, 14, Eastern ed., no. 58, Sept. 21, 1959.)

Among the subjects mentioned for discussion are patents and copyrights. The article indicates that "Washington has higher hopes for Russian action on copyrights than on patents," since "royalty payments for copyrights would cost the Soviets less than patent payments."

76. Juke org 'not in position' to okay Celler plan for performance coin. (216 *Variety* 63, no. 1, Sept. 2, 1959.)

An article about a meeting in Washington, D. C., on Sept. 1, 1959, during which Representative Celler discussed with parties in the jukebox royalty dispute "his compromise plan to set up a trusteeship for distribution of jukebox performance coin to writers and publishers." The article reports that Mr. Celler scheduled a follow-up meeting next January after George Miller, president of Music Operators of America, stated he was not in a position to commit his membership to the payment of royalties "at this time."

77. Reds reject Conan Doyle heirs' plea. (82 *Washington Post and Times Herald* A 5, no. 256, Aug. 18, 1959.)

A brief item on the rejection on Aug. 17, by the Soviet Supreme Court, of the appeal of Harold J. Berman, an expert on Soviet law at Harvard Law School, who was seeking, as attorney for the Doyle estate, cash royalties for Russian publication of the Sherlock Holmes detective stories on the theory of unjust enrichment.

Ed. Note: THE BULLETIN in its December 1959 issue will carry an article by Professor Harold J. Berman of Harvard Law School on his experiences before the Russian Supreme Court on behalf of the Conan Doyle heirs.

78. Welcome, Government interference. (119 *Interiors* 67, no. 1, Aug. 1959.)

Two current instances are given of Government participation in the field of interest of *Interiors*: the text of a proclamation, signed June 15, 1959, by the Mayor of New York City, designating the week of Sept. 20th through 26th, 1959, as interior design week in New York City, and an item on the O'Mahoney-Wiley-Hart design bill (S. 2075, 86th Cong.).

NEWS BRIEFS

79. New Adherences to the Universal Copyright Convention

The Copyright Division of UNESCO has announced that on Tuesday, October 6, 1959, Czechoslovakia deposited its instrument of accession to the Universal Copyright Convention and Protocols 2 and 3 thereto, effective January 6, 1960.

Brazil, the thirty-fourth country to join the Contracting States of the Convention, deposited its instrument of ratification to the Convention and Protocols 1, 2 and 3 thereto, on October 13, 1959.

80. New Zealand Copyright Committee Report

After nearly 2 years of inquiry, the Copyright Committee appointed by the New Zealand Government to study legislation on the subject of copyright, has submitted its *Report*. This 175-page document, dated May 29, 1959, but only recently released, deals with all phases of the New Zealand copyright law and includes the Committee's recommendations with respect to revision of the law and the reasons therefor.

The Report gives evidence that consideration has been given to U. S. copyright legislation, its governing principles and its importance in relation to New Zealand's literary development. In general, the Report is framed around the basic principle that New Zealand is a user country, not a producing country, when it comes to literary works. Accordingly, the Report recommends non-ratification of the Brussels revision of the Berne Convention, but urges adherence to the Universal Copyright Convention because of the shorter copyright term provided by the latter and the fact that the U. S. is a member country.

Subject to certain special provisions, the Report recommends generally a term of copyright of 56 years from the date of publication (the maximum protection under the U. S. Law) or until the death of the author, whichever period is the longer. Unpublished works would be given 56 years from the death of the author, provided the work has not been publicly performed or broadcast, or records of the work offered for sale. In any of these events, the recommendation is for 56 years after the first of these acts or 25 years after the death of the author, whichever is the later. Sound recordings are to be protected for 40 years from the date of publication. For cinematograph films the proposal is likewise 40 years from publication.

Other salient features of the Report include a recommendation that the system of optional registration be dropped because of the infrequency of use of the Copyright Office records; a recommendation that, generally, the "fair dealing" provisions follow those of the U. K. law of 1956; a provision for a copyright tribunal which should have the same jurisdiction as the Performing Rights Tribunal under the U. K. Act. The Report recommends a close study of Neighboring Rights and the treatment of artistic designs, regardless of use, under the copyright law, if they are artistic works.

The members of the Committee were: the Honorable D. J. Dalglish, Judge of the Compensation Court of New Zealand, Chairman; N. Butcher, until recently Ass't Secretary, Dept. of Justice, which administers the Copyright Office; I. A. Gordon, Professor of English, Victoria University of Wellington; J. W. Miles, LL. D., formerly Ass't Commissioner of Patents.

[Richard S. MacCarteney]

81. INTERNATIONAL CONFEDERATION OF AUTHOR'S AND COMPOSERS' SOCIETIES (C.I.S.A.C.)

The Confederal Council of C.I.S.A.C. at a meeting in Paris in April 1959 passed the following resolution:

"Recalling their resolution passed at the Congress of Knokke-le-Zoute concerning the duration of protection of intellectual works and the wish with regard to same, to wit that the periods of protection be rendered as far as possible uniform in European countries and aligned on the longest period of protection;

"Rejoice at the initiative of the Italian Government aiming at realizing this wish of the authors by a proposal presented before the European Council, in order to establish between the European countries, a uniform period of protection of copyright, aligned on the longest duration, and more precisely up to eighty years after the death of the author.

"The Confederal Council keenly hopes that all the countries of which the Societies belong to the Confederation will take the initiative of presenting and of having passed by their respective Parliaments this legitimate prolongation."—Cf. *Le Droit d'Auteur,* vol. 72, no. 7 (July 1959), pp. 133-134; *Revue Internationale du Droit d'Auteur,* no. 24 (July 1959), p. 102.

82. CALDWELL AND MITCHELL COLLECT RUSSIAN ROYALTIES

According to an *Associated Press* despatch to the *New York Times* on November 1, 1959, Erskine Caldwell, the novelist, announced in Moscow that "he had collected some royalties on his works published in the Soviet Union, but only enough to pay the expenses of his visit here." Caldwell and his wife spent a week in Moscow as guests of Soviet writers, librarians and teachers.

The same story in the *Times* mentioned that in June, 1959, Mitchell Wilson, a science fiction writer, disclosed that he had received $15,100 in royalties from the Soviet Union.

83. SURPLUS 1908-09 CONGRESSIONAL HEARINGS ON COPYRIGHT

The Copyright Office announces that it has on hand a surplus stock of the 1906-08 *Congressional Hearings* which it will send to libraries or copyright lawyers upon request to R. G. Plumb, Head, Information and Publications Section, Copyright Office, Washington 25, D. C. This stock is limited and requests should be sent in promptly.

84. AMERICAN BAR ASSOCIATION ANNUAL MEETING

Arthur Fisher, Register of Copyrights, addressed the 82d Annual Meeting of the American Bar Association in Miami Beach, August 24-28, 1959. Mr. Fisher spoke on "Current Copyright Trends" at the first general session of the Section on Patent, Trademark and Copyright Law, on August 24th. His address covered a wide range of topics including registration fees, the juke box bill, the *Vacheron* case, the Copyright Office Regulations, general revision of the law, and the design problem.

The general session at which Mr. Fisher spoke was marked by a spirited debate on a resolution concerning design protection. An amendment that would have required novelty as a prerequisite of design protection was voted down, and a resolution approving "in principle federal legislation providing for more adequate protection of original, ornamental designs of useful articles" was adopted.

Copyright Society of the U.S.A.
c/o Fred B. Rothman & Co.
57 Leuning Street
South Hackensack, N. J.

Return and Forwarding
Postage Guaranteed

Form 3547 Requested

BULLETIN

OF THE

COPYRIGHT

©

SOCIETY

©

OF THE U. S. A.

Published at

NEW YORK UNIVERSITY LAW CENTER

VOL. 7, NO. 2 DECEMBER, 1959

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

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

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

CONTENTS

THE BULLETIN of The Copyright Society of the U.S.A. is published 6 times a year by The Society at the Law Center of New York University, 40 Washington Square South, New York 11, New York: Walter J. Derenberg, *President;* Horace S. Manges, Alfred H. Wasserstrom, *Vice-Presidents;* William Klein II, *Treasurer;* Leonard Zissu, *Secretary;* Sigrid H. Pedersen, *Assistant Treasurer;* and Werner Janssen, Jr., *Assistant Secretary.*

Annual subscription: $25.

All communications concerning the contents of THE BULLETIN should be addressed to the Chairman of the Editorial Board, at the Law Center of New York University, 40 Washington Sq. So., New York 11, N. Y.

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

CITE: 7 BULL. CR. SOC. page no., Item .....(1959).

PART I.

ARTICLES

85. RIGHTS OF FOREIGN AUTHORS UNDER SOVIET LAW

By HAROLD J. BERMAN*

The following is a slightly condensed English translation of the oral argument presented by the author in Russian to the Supreme Court of the RSFSR in Moscow, August 17, 1959, in behalf of The Sir Arthur Conan Doyle Estates against four Soviet state publishing houses and the Ministry of Culture of the USSR. It should be stressed that this is a presentation of the plaintiff's case under Soviet law. Some explanatory footnotes are added.

May it please the court:

This is an interlocutory appeal from the decision of the Moscow City Court of November 15, 1958, dismissing the suit of The Sir Arthur Conan Doyle Estates against the Ministry of Culture of the USSR and four Soviet state publishing houses—the Foreign Languages Publishing House, the State Literary Publishing House (Goslitizdat), the Children's Publishing House (Detgiz), and the Geographical State Publishing House (Geografizdat). In dismissing the suit without a hearing, Judge B. M. Kalabin of the Moscow City Court gave the plaintiff permission to appeal to the Supreme Court of the RSFSR.[1] On August 14, 1959, the Moscow City Court granted the plaintiff a waiver of time require-

* Professor of Law, Harvard Law School; Research Associate and Member of the Executive Committee of the Russian Research Center, Harvard University.

1. Soviet civil procedure requires a preliminary examination of the pleadings by a single judge to determine whether the suit should be "accepted" or "rejected." The parties have no right to be heard in this preliminary procedure. The court may reject the suit if the complaint fails to disclose any rights of the plaintiff. The plaintiff may appeal from such a dismissal.

   The Moscow City Court sits as a court of appeal from decisions of the People's Courts in Moscow, but may at its discretion take more important cases in first instance. Appeal lies from its decision to the Supreme Court of the RSFSR (Russian Soviet Federated Socialist Republic, the largest of the fifteen "union republics" of the USSR). The proceedings in the RSFSR Supreme Court in the instant case are described *infra* note 10.

ments for appeal.[2] Copies of the complaint, of the decree of the court, and of a short statement of the plaintiff's grounds for appeal were sent to this Court and to the defendants.

Before stating the reasons why the decision dismissing the complaint should be reversed, I should like to express my gratification to this Court for its willingness to hear my presentation of the plaintiff's argument. I believe that this is the first time that a lawyer from a "capitalist" country, to use Soviet terminology, has appeared in a Soviet court (other than the Foreign Trade and Maritime Arbitration Commissions), or that a plaintiff from such a country has brought suit in a Soviet court. Soviet legislation is generous in its recognition of the procedural rights of foreigners, and it is gratifying that in this case both the Moscow City Court and this Court have been liberal in enforcing that legislation. The recognition of the equal rights of foreigners by the courts of the various countries of the world is surely one of the basic conditions of the peaceful coexistence of states. I trust that this Court will be as correct in protecting the substantive rights of the plaintiff as it has been in protecting his procedural rights.

At the same time I must ask the Court to recognize that I am at a certain disadvantage in having to present the case without the aid of a Soviet lawyer. The President of the Foreign Law Division of the Moscow College of Advocates agreed in May 1957 to assist as counsel, but he informed me in September 1958, after I had prepared the complaint, that he was withdrawing from the case because he considered it "hopeless." Since the Foreign Law Division is specially designated to represent foreigners who have claims in Soviet courts, the plaintiff considers it "hopeless" to seek other Soviet counsel.[3]

I should like to add that the plaintiff is not bringing this suit because he thinks he can win it. He does not know whether he can win it or not. But he believes in the "struggle for law"—to use the phrase of the great 19th century German jurist von Jhering—win or lose. As von Jhering showed, when each man struggles to secure his rights through legal procedures, the law itself is advanced, and often claims which seem hopeless at first ultimately become recognized as just and well-founded. It is because the plaintiff believes that his claim

2. See *New York Times,* August 15, 1959, p. 3, col. 7. A personal appearance is required for such a motion, with opportunity for the respondents to defend.

3. The failure to secure the aid of Soviet counsel left open the question whether non-Soviet counsel could appear to file the complaint and argue the case. The right to appear as counsel in a judicial proceeding is limited by Soviet law to members of Soviet "colleges of advocates" and certain others, *and* to anyone whom the court in its discretion permits to appear in such capacity. The President of the Moscow City Court in effect admitted the author to practice by permitting him to file the complaint; also the decree of the court expressly granted to plaintiff's counsel, by name, the right to appeal.

is just and well-founded that he is bringing this suit. But because of the absence of Soviet counsel, and because it is the first time that I have appeared in a Soviet court, I must ask the Court's indulgence for any breach of the rules of Soviet procedure — and also for any breach of the rules of the Russian language. Indeed, I can truly say that "I fear the tongue more than the knife." If at times some of my arguments are not clear, I hope that you will interrupt me so that I may explain them. If I have difficulty expressing in Russian my answers to your questions, I hope that you will permit me to rely on an interpreter and will excuse the delay caused thereby.

1. *The facts of the case.*—On September 24, 1958, as counsel for Adrian Conan Doyle, the son of Sir Arthur Conan Doyle and the trustee of the Sir Arthur Conan Doyle Estates, I presented a complaint to the President of the Moscow City Court, Judge L. Gromov, a copy of which was served also on each of the defendants. A copy of the complaint has also been filed with this Court. The complaint stated that the Ministry of Culture and the defendant publishing houses had received prior to May 1, 1957, 13,555,850 rubles from the publication of the works of Sir Arthur Conan Doyle,[4] and asked that the court order them to restore 15 per cent of that sum, namely, 2,033,347 rubles, to the Sir Arthur Conan Doyle Estates as unjust enrichment under Article 399 of the Civil Code of the RSFSR. The complaint also asked that the court order the Ministry of Culture of the USSR to provide the plaintiff with data concerning the number of copies of works of Sir Arthur Conan Doyle published in the USSR since May 1, 1957, and the amount of money received from the sale thereof, and to order the defendants to pay 15 per cent of any such receipts to the Sir Arthur Conan Doyle Estates.

I should like to call to the attention of the court certain facts which appear in the complaint concerning the publication of Sir Arthur Conan Doyle's works.[5] In 1955 the State Literary Publishing House published and sold 525,000 copies of *The Hound of the Baskervilles* at 2 rubles 50 kopeks per copy, thereby receiving over 1,300,000 rubles. In 1956 the Foreign Languages Publishing House published and sold 500,000 copies of *The Blue Carbuncle and Other Stories*

4. This figure as well as the data presented in the next paragraph were obtained by consulting the card catalogue of the Lenin Library in Moscow. Conveniently, the card for each book contains a statement of the number of copies published and the price per copy. The complaint alleges, in effect, that all published copies were sold —a reasonable assumption in this case, in view of the extraordinary popularity of Conan Doyle's works among Russians and the continual publication of new editions of the same titles. The complaint also assumes—erroneously—that the publisher received the retail price. In this and some other particulars the complaint would have required amendment if the defendants had seen fit to answer other than by way of demurrer.

5. See *supra* note 4.

in English, at 2 rubles 25 kopeks per copy, thereby receiving 1,125,000 rubles. In 1956 the Children's Publishing House published and sold 300,000 copies of *Memoirs of Sherlock Holmes* at 12 rubles per copy, thereby receiving 3,600,000 rubles. In 1956 and the first four months of 1957 the Geographical State Publishing House published and sold two editions of *Lost World,* totalling 300,000 copies, and 150,000 of *The Maracot Deep,* with total receipts of over 1,350,000 rubles. These are a few of the many similar items listed in the complaint.

Furthermore, large editions of various works of Sir Arthur Conan Doyle have been published in the latter part of 1957 and in 1958 and 1959, about which the plaintiff has been unable to obtain detailed information but which he believes will comprise well over a million copies, with total receipts of some 12 million rubles from their sale, making a grand total to date of almost five million copies and receipts of some 25 million rubles. . . .

Not one kopek of these vast sums has ever been paid either Sir Arthur Conan Doyle during his lifetime or to his heirs after his death. Soviet state publishing houses have retained all of the money derived from the sale of these works, without paying the author anything, and the extra amount which they have thus been able to pocket has gone into bonuses for their managerial personnel, cars, buildings, and other perquisites.[6]

2. *The theory of the complaint.*—The complaint makes it plain that it is *not* the contention of the plaintiff that the defendants violated any rights under Soviet law in publishing Conan Doyle's works. The plaintiff recognizes that Soviet copyright law clearly provides that Soviet publishers may reproduce foreign works without the permission of their authors. Nor is it the contention of the plaintiff that he is entitled to royalties under the complex system of royalty payments established by Soviet copyright law. The complaint makes it plain that it *is* the contention of the plaintiff that Soviet copyright law is entirely irrelevant to this suit, and that the Soviet civil codes, and particularly Article 399 of the RSFSR Civil Code, require the State publishing houses which have received profits from the publication of foreign works to restore a portion of their profits to the foreign author or his successors.

3. *The decree of the lower court.*—In dismissing the complaint without hearing argument, Judge Kalabin of the Moscow City Court apparently considered the plaintiff's contention so absurd that he did not even bother to reply to it, other than to state that foreign authors are not protected by Soviet

6. The point is overstated. Some of the money undoubtedly went into the state treasury. Soviet state enterprises normally operate on a "business" basis, and a certain percentage of profits is distributed in the form of bonuses, improvements, investment, *etc.* It being impossible for the plaintiff to trace the receipts from the sale of Conan Doyle's works, he left it to the trial to determine if possible, by discovery procedure, the exact amounts retained by the defendants. Cf. *supra* note 4.

copyright law—which was recognized in the complaint itself—and that "reference in the complaint to Article 399 of the RSFSR Civil Code is unfounded."

4. *The relief sought in this appeal.*—The plaintiff, I submit, is at the very least entitled to know *why* "reference in the complaint to Article 399 of the RSFSR Civil Code is unfounded," if such is in fact the Soviet law. He is entitled to know what authority or what reason, if any, stands in the way of his claim. He is entitled, in other words, to a hearing on the merits—a hearing in which his arguments can be pitted against the defendants' argument—and to a reasoned judicial opinion. He therefore peitions this Court to reverse the dismissal of the complaint and to return the case to the Moscow City Court for a hearing. In addition, he urges this Court to hold that the Moscow City Court erred in stating that Article 399 of the RSFSR Civil Code is not applicable to this suit.

5. *The plaintiff's arguments.*—In the absence of any argument by the defendants and of any stated reasons or stated authority for the court's dismissal of the complaint, the plaintiff is compelled to give a comprehensive argument, to construct the argument from the ground up, so to speak. . . .

We contend, *first,* that foreigners are entitled to equal rights with Soviet citizens under Soviet civil law, in the absence of special laws restricting the rights of foreigners.

The plaintiff in this case, The Sir Arthur Conan Doyle Estates, is recognized as a legal personality under the law of England, where it is domiciled. Its nationality is British. It appears as a foreigner in this Court. But it seeks protection of its rights under Soviet civil law, and particularly under Article 399 of the Soviet Civil Code. In seeking such protection, it relies upon the Soviet legal principle that foreigners are entitled to equal rights with Soviet citizens under Soviet civil law, in the absence of special laws restricting the rights of foreigners.

Soviet civil law is generous to foreigners. The Law of October 31, 1922, Enacting the Civil Code of the RSFSR, Article 8, provides: "The rights of citizens of foreign states with which the RSFSR has entered into an agreement are regulated by such agreement. Insofar as the rights of foreigners are not provided for by agreements with their respective governments or by special laws, the right of foreigners to free movement on the territory of the RSFSR, choice of a profession, the opening or acquisition of commercial or industrial enterprises, and the acquisition of property rights in buildings or land, may be limited by decree of the proper central organs of the government of the RSFSR in agreement with the People's Commisariat of Foreign Affairs." Soviet jurists have uniformly interpreted this provision narrowly, concluding that in the absence of an international agreement—and I should mention that there is no international agreement on this question between the Soviet

Union and Great Britain—governmental organs do not have the authority to restrict the rights of aliens except with respect to the matters specifically mentioned: right of free movement, right to do business, and right to have interests in buildings and land. Thus a leading writer on Soviet conflict of laws, Professor L. A. Lunts, in his book *Mezhdunarodnoe Chastnoe Pravo* (International Private Law), published in Moscow in 1949, states at page 316: "In principle a citizen of a foreign state enjoys with us the same civil rights as a citizen of the USSR." In Volume II of *Iuridicheskii Slovar'* (Legal Encyclopedia), published in Moscow in 1956 under the chief editorship of P. I. Kudriavtsev, Deputy Procurator General of the USSR, it is stated at page 329: "Foreigners have the same civil rights as Soviet citizens, with certain insignificant limitations expressly indicated by statute."

There is no Soviet statute or decree restricting the right of a foreigner, under Article 399 of the Civil Code of the RSFSR, to obtain restitution of money which Soviet state enterprises have unjustly received at his expense. Nor does the fact that the foreigner is an author deprive him of his rights under Article 399, for there is no Soviet statute or decree which provides that foreign authors are limited in their rights under Article 399.

Secondly, we contend that Soviet copyright law, although it denies to foreign authors the right to control publication of their works in the Soviet Union or to receive the benefits of the system of royalties which it establishes, does not exclude foreign authors from the protection of Soviet civil law altogether, and in particular it does not exclude them from the protection of Article 399 of the Civil Code of the RSFSR.

The plaintiff does not claim any rights under the Principles of Copyright Law of the USSR enacted May 16, 1928, by the Central Executive Committee and the Council of People's Commissars of the USSR, or under any other provisions of Soviet copyright law, but he does claim that Soviet copyright law is entirely inapplicable to this suit.

In dismissing the plaintiff's suit, Judge B. M. Kalabin of the Moscow City Court, in his decree of November 15, 1958, stated that the plaintiff has no right to compensation because Article 2 of the Principles of Copyright Law of the USSR recognizes the right of authorship of works published abroad only if there is a special agreement between the USSR and the foreign state where the works are published, and such an agreement does not exist between the USSR and Great Britain.[7] It is respectfully submitted that Judge Kalabin missed the entire point of the plaintiff's suit. The plaintiff is not seeking to have his right of authorship recognized.

7. Article 2 states: "Copyright in a work which has been published abroad or which is situated abroad in the form of a manuscript, outline or in other objective form, shall be recognized only when there is a special agreement of the USSR with the

The purpose of the exclusion of foreigners from the protection of Soviet copyright law, the purpose of refusing recognition of their rights of authorship, is to prevent them from controlling the publication of their works in the Soviet Union. It is understandable that the Soviet state, taking the view that it does of its relationship to foreign states, should not wish its publishers to be limited in their right to reproduce foreign work. But it is contrary to the spirit of Soviet law that foreign toilers, including foreign authors, should be deprived of a portion of the profits earned as a result of their toil by Soviet publishers. This would be exploitation.

The plaintiff does not contend in this suit that the defendants violated his copyright by publishing the works of Sir Arthur Conan Doyle. He recognizes that Soviet law expressly permits them to publish these works. He only asks that this Court recognize that the words of the Soviet jurist V. I. Serebrovskii, "it is obvious that the creative activity of an author has the character of toil," are true of non-Soviet as well as Soviet authors, and that "to each according to his work" is a constitutional principle of Soviet law applicable not only to Soviet citizens but also to foreigners who by their toil contribute to the material welfare of Soviet state enterprises.

Nor does the plaintiff contend that he is entitled to royalties under Soviet copyright law. The complex system of royalties established by Soviet copyright law is adapted to publishing conditions in the Soviet Union; it is adapted to the payment of Soviet authors, not of foreign authors. It is perhaps for this reason, too, that foreign authors are excluded from the protection of Soviet copyright law.

Soviet copyright law establishes a system of royalties based on the length of the book and the type of book which the author produces. Moreover, the author is paid his royalties on each copy sold—and sometimes on each copy printed—regardless of whether the publishing house suffers a net loss. . . . Such a system of royalties is an incentive to Soviet authors to write, and a way of placing the responsibility on the Soviet publishing house to determine the size of editions at its own economic risk. The plaintiff does not claim a right to compensation on such a basis.

---

particular state and only within the limits established by such agreement." Article 3 qualifies Article 2 to the extent of protecting Soviet authors of works published or situated in the territory of a foreign state. Article 1 establishes the author's copyright of works published or situated in the territory of the USSR, whether or not the author is a Soviet citizen. All these articles are short and badly drafted. The English word "copyright" is used in this translation of the argument interchangeably with "right of authorship." The Russian term is *avtorskoe pravo,* literally "author-right." Its meaning is summarized *infra,* p. 74.

Because Article 2 of the Principles of Copyright Law of the USSR excludes foreign authors from compensation on the basis of the system of royalties established in that law, it does not follow, however, that it excludes foreign authors from compensation on any basis whatsoever.

The principles applicable to payment of foreign authors must be found outside Soviet copyright law. That is the essential meaning and intent of Article 2 of the Principles of Copyright Law of the USSR.

Soviet jurists list the basic components of copyright as follows: 1) the right to be known as the author of the work in question; 2) the right to publish it; 3) the right to reproduce and distribute it; 4) the right not to have it altered; and 5) the right to royalties for its use under the system of compensation established by the copyright law. See V. I. Serebrovskii, *Voprosy sovetskogo avtorskogo prava.* (Questions of Soviet Copyright Law), 1956, p. 108. The plaintiff in this case seeks protection of none of these rights. He contends rather that Article 2 of the Principles of Copyright Law of the USSR, which excludes him from any of these rights, does not exclude him from other rights which are not components of Soviet copyright law—and in particular, does not exclude him from the right to restitution of sums of money by which Soviet publishing houses have been unjustly enriched at the expense of the creative activity, the toil, of Sir Arthur Conan Doyle.

Our *third* contention is that under the principle of unjust enrichment as stated in Article 399 of the Civil Code of the RSFSR, a Soviet state publishing house which has received income from the publication of a foreign work without compensating the author is obligated to restore to the author the surplus which it has received by virtue of the fact that the foreign work falls outside the protection of Soviet copyright law.

Article 399 states: "One who has been enriched at the expense of another without sufficient justification established by law or by contract is obligated to restore that which has been unjustifiably received. The obligation of restitution also arises when the justification for the enrichment subsequently disappears."

The principle embodied in Article 399 is familiar in one form or another to all civilized legal systems. It has its origin in the *condictio indebiti* and the *negotiorum gestio* of Roman law. It was given further development in the Canon Law of the 12th century and thereafter. It has entered into the legal systems of the various nations of the West. Cf. A. E. Semenova, *Obiazatel'stva, voznikaiushchie vsledstvie neosnovatel'nogo obogashcheniia, i obiazatel'stva, voznikaiushchie iz prichineniia vreda* (Obligations Arising from Unjust Enrichment and Obligations Arising from Injury) (Moscow, 1928), p. 5; J. P. Dawson, *Unjust Enrichment* (Boston, 1951). Although it was not adopted explicitly in the prerevolutionary Russian civil codes, it was nevertheless introduced in the decisions of the Ruling Senate, Cf. G. F. Shershenevich, *Uchebnik russkogo*

grazhdanskogo prava (Textbook of Russian Civil Law) (Moscow, 1914), vol. 2, p. 255-256. After the establishment of the Soviet state, when Lenin called upon Soviet jurists to draft a new civil code, they adopted a broad formulation of Article 818 of the German Civil Code but omitting many of the qualifications added in the German law. Indeed, Article 399 of the Civil Code of the RSFSR, dating from 1922, has been criticized by Soviet jurists on the ground that it is *too* broad. Cf. P. I. Stuchka, *Kurs sovetskogo grazhdanskogo prava* (Course in Soviet Civil Law) (Moscow, 1931), vol. 3, p. 163-164. Despite criticism of the breadth of Article 399, as well as of some of its terminology, Article 399 remains in force, and Soviet jurists have never suggested that the principle which it embodies be abandoned.

What is that principle? It is not easy to define in general terms. Some of its concrete applications, as stated by Soviet courts and Soviet jurists, are the following: If a seller of goods by mistake presents a bill for more than the price agreed upon, and the purchaser pays the bill, the seller is obligated to restore to the purchaser the excess of the amount paid over the amount stipulated in the contract. Cf. Fleishits, *Obiazatel'stva iz prichineniia vreda i iz neosnovatel'nogo obogashcheniia* (Obligations Arising from Injury and from Unjust Enrichment) (Moscow, 1951), p. 211. Similarly, if a state enterprise innocently uses more than its share of a supply of coal which is stored for the use of itself and others, or if a tenant in an apartment house innocently uses more than his share of communal services provided for the joint use of several tenants, restitution must be made by the party thus enriched to the others at whose expense the enrichment was derived. *Ibid.* If a person voluntarily incurs expenses in saving the property of another from fire, the person whose property is thus saved has an obligation under Soviet law to make restitution to the rescuer. Cf. F. Vol'fson, *Uchebnik grazhdanskogo prava* (Textbook of Civil Law) (Moscow, 1927), p. 109. To cite another example of unjust enrichment from Soviet legal literature: "B, not being in contractual relations with the owner of G's house and not having other justifications therefor, occupied a room in G's house and lived in it during G's absence. B saved the payment for the room, and G lost the payment of rent which he could have received, if he had let the room by contract." I. F. Mikolenko and P. E. Orlovskii, eds., *Grazhdanskoe Pravo, Chast' II* (Civil Law, Part II) (Moscow, 1938), p. 377.

The principle underlying these and other similar cases is "one of considerable complexity," as the author of the last-quoted example puts it, "since the law [Article 399] defines in a broad manner the conditions in which [obligations from unjust enrichment] arise." *Ibid.* He states three such conditions: "(1) enrichment of one person, (2) at the expense of another, (3) without sufficient justification established by law or by contract." There is no doubt, in the present case, that the first two conditions are present. According to the same Soviet textbook, "Enrichment takes place if the person enriched saved

property which he normally should have lost or spent." *Ibid.* In the present case, the defendants saved money which they normally would have spent in the form of royalties to Soviet authors. To quote the same source once more, the enrichment is at the expense of another if "the disadvantage [of the other consists] either in the reduction of his property or in the non-receipt of an advantage which he ought to have received in the ordinary course of things." *Ibid.* In the present case, Sir Arthur Conan Doyle and the plaintiff, as his successor, ought in the ordinary course of things to have received compensation for the creative labor which went into the composition of the books which the defendants published.

A Soviet lawbook states: "Like any other toiler, an author in the USSR has the right to compensation in connection with the labor expended by him. But . . . unlike the payment of workers or employees, who receive compensation for live labor, the author of a literary-artistic or any other kind of production receives compensation for the use of the result of his labor, or the materialization of his labor (the production created by him). S. N. Bratus, ed., *Sovetskoe Grazhdanskoe Pravo* (Soviet Civil Law) (Moscow, 1951), vol. II, p. 336. If the plaintiff is correct in his contention that foreign toilers have equal rights with Soviet toilers under Soviet law, in the absence of special legislation to the contrary, and that consequently the obligations of Soviet state enterprises to foreign toilers are the same as their obligations to Soviet toilers (again, in the absence of special legislation to the contrary), then there can be no doubt that the defendants in the present case have received an advantage, and the plaintiff a disadvantage, which normally they ought not, under Soviet law, to have received.

The only remaining question, therefore, is whether the advantage which the defendants received was "without sufficient justification established by law" (since admittedly there was no contract between them). I believe that question has been answered by showing that Article 2 of the Principles of Copyright Law of the USSR—which is the only legislation dealing with the rights of foreign authors—excludes foreign works from the protection of the Soviet copyright law, but does not exclude foreign authors from the protection of the Soviet civil law generally, and particularly Article 399 of the RSFSR Civil Code.

In the words of E. A. Fleishits, *supra,* p. 215, "Judicial and arbitral practice consider it a sufficient justification of enrichment of one person at the expense of another if the enrichment conforms to an injunction of law or of an administrative act, or to the terms of a contract or of a unilateral transaction. . . . In the absence of an injunction of a law, of an administrative act, or of a transaction, establishing such obligation of one party or such authority of the other, the enrichment is unjustifiable." In the present case there is no law, administrative act, contract or other transaction which authorizes the defendants to retain the benefits which they have received at the expense of the plaintiff.

It may be argued, however, that there is no "enrichment at the expense of another" in this case because "normally" Soviet publishers do not spend money in compensation of foreign authors of works published outside the Soviet Union. I should like to give two separate answers to this. In the first place, the question is not whether Soviet publishers normally pay foreign authors but whether Soviet publishers normally *should* pay foreign authors. They *should,* if foreign toilers (including authors) are equally protected with Soviet toilers under Soviet law.

In the second place, Soviet publishers *do* pay foreign authors. I shall mention a few instances of which I happen to know. In the 1930's payment was received from Soviet publishers of their works by the non-Soviet writers Waldo Frank, Langston Hughes, and Upton Sinclair. On June 14, 1956, Lillian Hellman received $10,000 from Soviet publishers. Mitchell Wilson has received and is receiving payment by Soviet publishers of his work. Recently the journalist Art Buchwald was paid by a Soviet publisher for one of his articles which it had previously translated and published. Many Western physicists have been paid by Soviet publishers for works translated and printed in the Soviet Union. Writers of adventure stories and of science fiction have also received payments. In 1956 Ethel Voynich, then 91 years old, received payment from Soviet publishers of her novel. "The Gadfly," first published in 1897 and re-published in the Soviet Union in large editions in recent years. An American professor received 18,000 rubles in 1958 from a Soviet publisher of his book, "Underwater Explosions." The list could be greatly expanded.

Indeed, Soviet publishers have expressly recognized the right of foreign authors to payment for Soviet publications of their works. Thus Pavel Chuvikov, Director of the Foreign Languages Publishing House, one of the defendants in this case, stated in 1955: "Any foreign author whose work we reprint will be paid on his demand at the rate of 900 rubles per author's sheet. This is exactly the same as for Soviet writers whose works we reproduce. It is the equivalent of 60 percent of the 1500 rubles per author's sheet paid here for original works. We will pay in rubles or in the author's own currency, depending on his wish." Quoted in the *New York Times,* September 15, 1955.

How can the payments which have been made by Soviet publishing houses to foreign authors, and the offer of payment by Mr. Chuvikov, be explained? I submit that the only proper explanation is the recognition by Soviet publishing houses, by the Ministry of Culture of the USSR, and inferentially by the Soviet state, of a moral obligation to pay. This moral obligation is embodied in Article 399 of the Civil Code of the RSFSR. The content of the moral obligation is the duty to restore benefits which have been contributed by another where there is no provision of contract or of legislation stating that the benefits may be retained. Without Article 399 there would be no legal justification for the payments which have been made by Soviet publishers to foreign authors and

such payments would be unauthorized and *ultra vires*. But to pay some foreign authors and not others is not only unwarranted discrimination but essentially exploitation.

The principle of unjust enrichment is a moral concept. The breadth of Article 399 testifies to the difficulty of reducing this moral concept to precise limits. When dealing with obligations arising from breach of contract and obligations arising from injury to person or property, legislators can define the conditions under which such obligations arise with relatively more precision than they can when dealing with obligations arising from unjust enrichment. Not every retention of benefits received at the expense of another is unjust. On the other hand, Soviet jurists, in giving examples of the application of Article 399 to judicial practice, recognize that these examples do not exhaust the principle of Article 399. Admittedly, the present suit is the first in which a Soviet court has been asked to extend Article 399 to benefits received by Soviet publishers at the expense of foreign authors. It is urged that the same principle is applicable in this suit, however, as is applicable to the suit of the owner of a house against one who has occupied a room in it without his permission. The owner is entitled to the fair rental value of the room. Let us assume further that the occupier was under the mistaken impression that the room was available without charge—nevertheless, under Article 399 the owner is entitled to its fair rental value, that is, to an amount equivalent to the benefit which the occupier received at the hands of the owner.

Before concluding this part of the plaintiff's argument, I should like to offer an explanation of the principle of unjust enrichment in Marxist terms. As Soviet writers on the subject have pointed out, the word "enrichment" is connected with relationships based on private property. In his work *Kapital,* Karl Marx wrote that "the capitalist is enriched . . . in proportion to the quantity of another's labor power which he extorts..." Marx, *Kapital,* vol. 1, p. 599. In this sense, "enrichment" is said to be unjustifiable in all cases under Soviet law. Such enrichment is in fact exploitation. Soviet writers therefore propose to substitute for the word "enrichment", in Article 399 of the RSFSR Civil Code, the word "acquisition," or "receipt of property." Such a change in terminology would make it clear that an "unjustifiable acquisition" at the expense of another is in fact exploitation of that other—and hence there is a duty to restore what is unjustifiably acquired.

Whether couched in terms of unjust enrichment or unjust acquisition, Article 399 is directed against the retention of benefits which have been conferred by another, where neither contract nor legislation provide that such benefits may be retained. The duty of restitution is basically a duty to avoid exploitation. There can be no doubt that Soviet publishers are being enriched, in the very sense that Marx used that term, to the extent that they are extorting the labor of foreign authors. Indeed, it is hard to find a clearer illustration of

surplus value in the Marxian sense. Article 399 forbids such exploitation — just as the Principles of Copyright Law of the USSR forbid exploitation of Soviet authors.

The plaintiff contends, *fourthly,* that the proper measure of recovery is the amount which the defendants would have been required to pay under a contract with the author, or with his successors, for the publication of his works, that is, 15 per cent of the proceeds of their sale.

The basic principle of recovery under Article 399 is the restitution of benefits received by the defendant. How are these benefits to be measured? Several alternatives present themselves. It may be argued that the amount of the defendants' enrichment should be measured by the royalties which they would have paid if the works of Sir Arthur Conan Doyle were first published in the Soviet Union and hence were protected by the Principles of Copyright Law of the USSR. We consider that this is not a proper measure of recovery since we believe that Article 2 of the Principles was included in part to avoid the necessity of paying foreign authors royalties under the same system as Soviet authors. Furthermore, as we have indicated, we are seeking compensation measured by restitution of benefits received by the defendants, not compensation measured by the length of the works published, their genre and the number of copies printed.

A second alternative measure of recovery would be the difference between the gross receipts from the sales of the books, on the one hand, and on the other hand, the costs of publication, including the costs of printing and distributing the books as well as the costs of translation and the normal publishers' profit.

In urging the court to apply what is in effect a contractual measure of recovery the plaintiff is applying the principle suggested earlier of a fair rental value. The plaintiff normally charges 15 per cent of the proceeds of sales for the use of his property rights in the works of Sir Arthur Conan Doyle. Although under Soviet copyright law state publishing houses may publish the works of a foreign author without his permission, and hence without a contract, if the plaintiff is right in his contention that they cannot, under Article 399, in justice retain the benefits of such publication without compensation, it would be proper for them to enter into a contract in which the parties could agree upon how the duty to restore those benefits should be measured.

Having failed to offer the plaintiff such a contract, the defendants should be required to accept the normal contract terms which the plaintiff usually makes with publishers of his works in other countries.

At the very least, the question of the measure of recovery is not one which should be decided against the plaintiff on an appeal from a dismissal of the complaint but is one which should be determined on the basis of a trial on the merits.

Finally, we contend that issues not raised expressly in the complaint are matters of defense and the plaintiff should have an opportunity to present argument on these issues at a trial of the merits, rather than in an interlocutory appeal from a dismissal of the complaint.

Anticipating that this Court may wish to give instructions to the trial court with respect to three such issues, the plaintiff asks permission to indicate very briefly his position regarding them. These three issues are 1) the question of an author's rights arising from translation of his works, 2) the question of the bearing of the statute of limitations on some of the claims presented by the plaintiff, and 3) the question of the rights of heirs to succeed to the rights of a decedent.

[At this point the presiding judge of the three-judge court interrupted to say that he agreed with the plaintiff that the complaint was not subject to dismissal on any of the three issues stated. In the colloquy which followed, the presiding judge stated that the fact that Sir Arthur Conan Doyle was dead should not influence the result in the case upon remand, if remand were granted. He stated further that the rights of Sir Arthur Conan Doyle Estates to succeed to any rights of Sir Arthur under Article 399 would be governed by English law.][8]

In conclusion let me say that the plaintiff recognizes that in addition to the legal issues involved in this case there are important moral and political issues arising from the absence of a copyright agreement between the Soviet Union and other countries. There have been many indications in recent years that the Soviet Government is concerned about the situation which exists because foreign authors are not protected under Soviet copyright law, and that many Soviet writers and officials would like to "regularize" this situation by some means. The plaintiff urges not only the court but also the defendants, and especially the Ministry of Culture, to consider the wisdom of a solution in the terms presented by the plaintiff in this case. It may be that the time is not ripe for a copyright agreement which will give foreign authors the right to prevent or otherwise control publication of their works by Soviet publishers. It may be that the economic burden of paying royalties for the approximately one billion foreign

8. This eliminated what was perhaps the most difficult part of the plaintiff's case. Under English law the rights of an heir in the literary estate of an author extend for 50 years after his death. Since Sir Arthur died in 1930, his heirs may therefore exercise the copyright in his works until 1980. Under Soviet law, the authorship rights of an heir extend for 15 years. To permit the plaintiff to inherit Sir Arthur's right of restitution under Article 399 during the life of the English copyright would therefore put him in a better position than heirs of a Soviet author. The plaintiff was prepared to argue that this stems from the absence of any Soviet copyright law applicable to foreigners and, further, that the 15 year limitation under Soviet law is related to the Soviet heir's control over the publication of the deceased author's works.

works which have been published in the Soviet Union since 1917 would be too great. But Soviet law offers an alternative to copyright and to royalties in the form of a broad principle of unjust enrichment, under which the right to copy is preserved, the foreign author is paid not royalties but a percentage of net profits, and in proper cases the statute of limitations may be applied to cut off old claims.[9] However this case may be decided, I urge the defendants to consider the favorable impact upon world opinion as well as the inherent justice of a decision on their part to pay foreign authors and their successors a percentage of net receipts from current sales of their works.[10]

9. If the Soviet Ministry of Culture—to which all Soviet state publishing houses are subordinate—decided to pay foreign authors four or five percent of net profits from sales of their works in the Soviet Union, on a current basis, the total cost to it would probably be no more than 30 or 40 million rubles a year, and perhaps less. (At the tourist rate of exchange, a ruble is valued at 10 cents.) A solution in some such terms as these is, at the present time, more realistic than a solution in terms of copyright, since it is doubtful that the Soviet leaders would be willing to link Soviet publication policies to the permission of foreign authors. Also an international agreement whereby Americans would be denied the right to reproduce Soviet writings without their authors' permission would have serious disadvantages for us. It may be that the Ministry of Culture will one day itself "invent" the theory on which the plaintiff's case was argued. It is interesting that in September 1959 the Soviet author Mikhail Sholokhov stated in Washington, D.C., that his government is considering a "literary convention" with the United States. *New York Times,* Oct. 26, 1959, p. 1, col. 6. In 1958 Adlai Stevenson represented a large number of American authors and publishers in proposing to the Soviet Ministry of Culture a reciprocal payments agreement between the Ministry and American publishers. See *New York Times,* Sept. 13, 1958, p. 13, col. 6.

10. After the plaintiff's argument the presiding judge asked a few questions. He then turned to a woman sitting opposite plaintiff's counsel, who was a lawyer from the office of the Procuracy (Attorney General) of the RSFSR, and asked if she had any questions to ask. She asked one question. The court then announced that it had not considered it necessary to ask the defendants to appear, but that if any representatives of the defendants were present and wished to speak, they could now do so. No one did so. The court then asked the representative of the Procuracy if she had an opinion to express on the case. She spoke for a few minutes. The court then retired and in about 45 minutes returned to read a very short opinion which summarized the facts of the case, noted the plaintiff's principal contentions, stated that the reliance on Article 399 was an attempt to evade Article 2 of the 1928 copyright law, and affirmed the decree of the Moscow City Court dismissing the suit.

    No appeal lies from this decision. A discretionary review "by way of supervision" (*v poriadke nadzora*) by the Supreme Court of the USSR may be obtained only on motion of the President of that court or the Procurator General of the USSR. There seemed to be no point in the plaintiff's requesting such a motion.

86. CONFERENCE OF EXPERTS PREPARATORY TO THE REVISION OF THE HAGUE ARRANGEMENT ON THE INTERNATIONAL REGISTRATION OF DESIGNS

In recent issues of this BULLETIN (Vol. 6, No. 1, pages 27 and 29; Vol. 6, No. 2, pages 76 to 78; Vol. 6, No. 5, pages 216 to 225), we reported on studies and meetings conducted with the objective of improving the international protection of designs. One of the most important phases of this international program consists in an attempt to revise The Hague Arrangement—in existence since the 1925 revision conference of the International (Paris) Union for the Protection of Industrial Property—in a way which would not only modernize it in accordance with the needs of our time, but which could also permit adherence by such important non-members as the United States, the United Kingdom, Italy, or Japan. As a preparatory step in the direction of the revision of The Hague Arrangement, a conference of experts was held in The Netherlands from September 18 to October 8, 1959. Most countries sent experts who were specialists in industrial property and copyright law. Those from the United States were: Mr. Arthur Fisher, Register of Copyrights, Chairman of the U. S. Delegation; Mr. P. J. Federico, Examiner in Chief, Patent Office; Dr. Arpad Bogsch, Legal Advisor, Copyright Office; Mr. W. Dunham, First Secretary of the U. S. Embassy at The Hague. Representative Roland V. Libonati, member of the Subcommittee on Patents, Trademarks and Copyrights of the House Judiciary Committee, accompanied by Mr. C. F. Brickfield, Counsel for the same Committee, participated in the Conference as Congressional observers. The draft arrangement, draft protocol and the explanatory statement accompanying them, as adopted by the Conference, are reprinted hereafter. It is expected that these documents, together with draft regulations, will be officially communicated to the governments some time early next year, at which time the U. S. Government will seek the comments of all interested private groups in the United States.

DRAFT ARRANGEMENT

ARTICLE 1

(1) The Contracting States constitute a Separate Union for the International Deposit of Designs.

(2) States members of the International Union for the Protection of Industrial Property may become party to this Arrangement.

ARTICLE 2

Nationals of a Contracting State and persons who, without being nationals of a Contracting State, are domiciled or have a real and effective industrial or commercial establishment in a Contracting State, may deposit and apply for registration of their designs in the International Bureau for the Protection of Industrial Property.

ARTICLE 3

(1) Applications for international registration may be filed with the International Bureau: (a) directly, or (b) through the intermediary of the national office of a Contracting State if the rules applicable in that State so permit.

(2) The domestic law of any Contracting State may require that persons under its jurisdiction file their applications for international registration through the intermediary of its national office.

(3) The application for registration shall be accompanied by one or more photographs or other graphic representations of the design. Within the limits established by the Regulations, the application may be accompanied by a description of the characteristics of the design. In addition to representations, the applicant may deposit, within the limits specified by the Regulations, copies or models of the article incorporating the design.

(4) Under the conditions and within the limits established in the Regulations, a single application may include several designs.

(5) If the applicant wishes to claim the priority provided for in Article 6, he shall do so in his application indicating the country, the date, and the number of the national deposit on which his claim is based. He may file supporting documents.

ARTICLE 4

(1) The International Bureau shall register in the International Design Register the depositor's application for registration.

(2) The date of the international registration shall be the date on which the International Bureau receives the application in due form, the fee, and the photograph or photographs or other graphic representations of the design; and if the International Bureau receives them on different dates, the last of these dates.

(3) The International Bureau shall publish all necessary information concerning the registrations as provided by the Regulations. Such information shall include reproductions of the design, and any description, and the country, the date and the number of the national deposit on which the priority claim, if any, is

based. The reproductions will be printed in black and white, unless the applicant requests reproduction in color.

(4) On request of the applicant, the International Bureau shall defer publication for the period requested by the applicant, which period may not exceed six months from the date of the receipt of the application by the International Bureau. Any time during this six-month period, the applicant may withdraw his application or ask for publication.

(5) Except during the period of deferred publication referred to in paragraph (4) above, the applications, the documents and objects that accompanied them, and the registers, shall be open to inspection by the public.

ARTICLE 5

(1) Registration in the International Register shall have the same effect in each Contracting State as if deposit had been effected in, and, subject to paragraph (3) below, as if registration certificate or design patent had been issued from, the competent national office of such State.

(2) Any Contracting State may provide by its domestic law that international registration will have no effect in the territory of that State if the applicant is a national of, or is domiciled or has a real and effective industrial or commercial establishment in, that State, and the application originates in that State.

(3) If, according to a law of a Contracting State, the issuance of a certificate of registration or of a design patent is preceded by an administrative examination, then the international registration will be effective in such State unless, within six months from the date of receipt by the national office of the information referred to in Article 3, paragraph (2), such office shall have notified the International Bureau of its provisional or final decision according to which the design does not meet the requirements of the law. Any interested party may request that the date on which the national office received such information be made known to him.

(4) In cases where the protection granted by a national law is available only if an article incorporating the design is offered to the public, the effects of international registration may be denied under such law if the offering to the public of the article did not take place within six months from the international registration. An article incorporating the design is offered to the public if, in any country, party or not to this Arrangement, the article is publicly exhibited, offered for sale or sold to the public, or when it is freely offered to the public.

ARTICLE 6

If the application for international registration was preceded within six months by an application or several applications in one or more Contracting States, and

priority is claimed in the application for international registration, the priority date shall be that of the earliest national application.

ARTICLE 7

(1) The international registration shall be valid for a first period of five years.

(2) Any registration may be renewed for periods of five years each, by application filed during the last year of the period about to expire.

ARTICLE 8

The International Bureau shall, upon application by an interested party, register and publish changes affecting, in one or more countries, some or all the proprietary rights in a design.

ARTICLE 9

(1) No Contracting State may, as a condition of recognition of the right to protection, require that the product incorporating the design bear an indication or mention of the deposit of the design.

(2) If, according to the domestic law of a Contracting State, the availability of certain remedies is conditional upon the appearance of a notice on the article incorporating the design, then such State shall consider such condition fulfilled if all authorized copies of the article offered to the public, or a tag attached to such copies while they are in commerce, bear the international design notice.

(3) The international design notice shall consist of the symbol ® accompanied either (a) by the number of the year in which protection commenced and the name of the owner of the right or a sign by which he can be identified, or, (b) by the number under which the design was internationally registered.

ARTICLE 10

(1) Each Contracting State shall, during the continuance of the international registration, grant the same term of protection to designs registered in the International Bureau as it does to designs deposited in that State.

(2) Notwithstanding paragraph (1) above, any Contracting State may, by a provision of its domestic law, reduce the protection resulting from international registration under the present Arrangement to the minimum terms provided for in paragraph (3) below.

(3) The term of protection granted by a Contracting State shall not be less than:

(a) ten years from the date of the international registration if, during the fifth year, renewal has been applied for in the International Bureau;

(b) five years from the date of the international registration in the absence of renewal.

ARTICLE 11

(1) There is hereby established an International Design Committee consisting of representatives of all Contracting States.

(2) The Committee shall have the following duties and powers:

(a) to amend the Regulations by a majority of four fifths of such of its members who are present and do not abstain in the vote, and,

(b) to study and give advice on questions concerning the application, operation, and possible revision, of this Arrangement, and concerning any other question relating to the international protection of designs.

(3) The Committee shall be called in conference by the Director of the International Bureau, with the agreement of the Swiss Government, or upon request of one third of the Contracting States.

ARTICLE 12

The Regulations shall govern the procedures concerning the implementation of this Arrangement and particularly:

(a) the data to be supplied in the application;

(b) the amount and method of payment of the fees for registration, reproduction in color, renewal, and of the fees that the Bureau shall collect for furnishing ordinary or certified copies and other information; the amount and method of refund of fees in case of withdrawal of deposits before publication;

(c) the number, size, and other characteristics of the photographs or other graphic representations of the design to be deposited; the limits within which copies or models of the article incorporating the design are accepted for deposit; the number of designs that may be included in the same application and other conditions and special fees for multiple deposits;

(d) the procedure by which an applicant may send his applications through the intermediary of a national office;

(e) the procedure by which supplementary fees will be collected for the examination referred to in Article 5, paragraph 3;

(f) the methods of publication and distribution; the number of copies of the publications which shall be given free of charge to the national offices, and the number of copies which shall be sold at a reduced price to such offices;

(g) the disposal of material relative to registrations which have not been renewed.

ARTICLE 13

(1) The Regulations may be amended either by the Committee as provided in Article 11, paragraph (2a), or by a written procedure as provided in paragraph (2), below.

(2) In case of written procedure, amendments will be proposed by the Director of the International Bureau in notes addressed by the Swiss Government to the government of each Contracting State, and they will be considered as adopted if, within a year from their communication, no Contracting State communicates an objection to the Swiss Government.

ARTICLE 14

The provisions of this Arrangement shall not prevent the claiming of the application of possible wider protection resulting from the domestic law of a Contracting State, nor do they affect in any way the protection which is granted to works of art or works of applied art by international copyright treaties or conventions.

ARTICLE 15

(1) This Arrangement shall be deposited with the Government of .... and shall be open for signature by any State referred to in Article 1, paragraph (2), for a period of six months after that date.

(2) States referred to in Article 1, paragraph (2), and which have not signed this Arrangement, may accede thereto.

(3) Instruments of ratification and accession shall be deposited with the Government of .....

ARTICLE 16

(1) Each Contracting State undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Arrangement.

(2) At the time a Contracting State deposits its instrument of ratification or accession, it must be in a position under its domestic law to give effect to the terms of this Arrangement.

ARTICLE 17

(1) This Arrangement shall enter into force three months after the date on which at least ten instruments of ratification or accession have been deposited,

provided that at least three of these instruments were deposited by States not party to the Arrangement concerning the International Deposit of Industrial Designs and Models signed at The Hague on November 6, 1925, and revised at London on June 2, 1934.

(2) Subsequent ratifications and accessions shall become effective three months after the date of the deposit of the instrument of ratification or accession.

ARTICLE 18

Any Contracting State may, at the time of deposit of its instrument of ratification or accession, or at any time thereafter, declare by notification addressed to the Government of ..... that this Arrangement shall apply to all or any of the territories for the relations of which it is responsible; and this Arrangement shall thereupon apply to the territories named in such a notification after the expiration of the term of three months from the receipt of the notification by the Government of .....

ARTICLE 19

(1) Any Contracting State may denounce, by notification addressed to the Government of ....., this Arrangement in its own name or on behalf of all or any of the territories as to which a notification has been given under Article 18. Such notification shall take effect one year after its receipt by the Government of .....

(2) Denunciation shall not relieve any Contracting State of its obligations under this Arrangement in respect to designs registered in the International Bureau before the effective date of the denunciation.

ARTICLE 20

(1) This Arrangement shall be submitted to periodical revision with a view to the introduction of amendments designed to improve the system of the Separate Union.

(2) For this purpose conferences shall be held successively in one of the Contracting States between the delegates of such States.

(3) Conferences of revision shall be called on the request of the International Design Committee or of not less than half of the Contracting States.

ARTICLE 21

(1) Two or more Contracting States may at any time notify the Swiss Government:

(a) that a common administration will be substituted for the national administration of each of them, or

(b) that the group of their respective territories shall be considered as a single country for the purposes of the application of this Arrangement in whole or in part.

(2) This notification shall take effect six months after the date of the communication which shall be made by the Swiss Government to the other Contracting States.

ARTICLE 22

(1) Signature and ratification of, or accession to, the present Arrangement by a State party to the Arrangement on the International Deposit of Industrial Designs and Models, signed at The Hague on November 6, 1925, and revised at London on June 2, 1934, shall be considered as including signature and ratification of, or accession to, the Protocol annexed to the present Arrangement, unless such State makes, at the time of signing or ratifying or acceding to this Arrangement, an express declaration to the contrary effect.

(2) Any State party to the present Arrangement not party to the Arrangement on the International Deposit of Industrial Designs and Models, signed at The Hague on November 6, 1925, and revised at London on June 2, 1934, may at at any time become party to the Protocol annexed to the present Arrangement. Such State may limit, by a declaration made at the time of signing or ratifying or acceding to the Protocol, its acceptance to paragraph (2a), or to paragraph (2b), of the Protocol. Articles 13, 14 (2), 15, and 16 of the present Arrangement shall apply by analogy.

DRAFT PROTOCOL

States parties to this Protocol have agreed as follows:

(1) The provisions of this Protocol apply to designs deposited with the International Bureau by nationals of States parties to this Protocol and persons who, without being nationals of such States, are domiciled in or have a real and effective industrial or commercial establishment in such States.

(2) In respect to designs referred to in paragraph (1) above:

(a) The term of protection granted by States parties to this Protocol shall not be less than fifteen years from the date of the international registration if, during the fifth year, an application for renewal has been filed with the International Bureau.

(b) The availability of remedies shall in no case be made conditional upon the appearance of any notice on the articles incorporating the design or on a tag attached to such articles.

EXPLANATORY STATEMENT

Introduction

1. The attached draft treaty is the work of an international conference of experts which was convened by the Government of the Netherlands and held at The Hague from September 28 to October 8, 1959.

2. Experts from the following countries participated in the Conference: Austria, Belgium, Czechoslovakia, Denmark, France, the Federal Republic of Germany, the Holy See, Italy, Luxemburg, the Netherlands, Spain, Sweden, Switzerland, Turkey, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. Representatives of international organizations participated in the discussions. A list of participants is attached to the present Statement.

3. The Conference was presided over by Mr. C. J. de Haan, President of the Netherlands Patent Office, Director of the Netherlands Office of Industrial Property, and Head of the Netherlands Delegation to the Conference.

4. The so-called Hague Arrangement on the International Deposit of Industrial Designs and Models was concluded in 1925 and revised in 1934. Its present members are: Belgium, Egypt, France, the Federal Republic of Germany, Indonesia, Liechtenstein, Monaco, Morocco, the Netherlands, Spain, Switzerland, Tunisia and Viet Nam.

5. The revision of the Hague Arrangement was on the agenda of the last conference of revision of the International (Paris) Union for the Protection of Industrial Property held at Lisbon in 1958. However, that conference did not effectuate the revision of the said instrument. Several delegations at Lisbon expressed the view that it would be of the utmost importance to introduce fundamental modifications in the Arrangement (and no such modifications had been proposed by the International Bureau to the States members of the Paris Union), and that the revision of this instrument should be prepared with great care in order, on the one hand, to prevent its denunciation by some of the States now parties to it, and, on the other hand, to lead to a considerable increase in its membership which is rather limited at the present time. Consequently, the Lisbon Conference decided to postpone revision and assigned this task to a diplomatic conference which would be convened, for this purpose alone, not later than in 1960. The Netherlands Government accepted responsibility for acting as host to the diplomatic conference.

6. Pursuant to another decision of the Lisbon conference and to resolutions of the Intergovernmental Copyright Committee and the Permanent Committee of the International (Berne) Union for the Protection of Literary and Artistic Works, a special Study Group on the International Protection of Works

of Applied Art and Designs convened, at Paris in April 1959, under the sponsorship of the United International Bureaux of the Paris and Berne Unions, and of the United Nations Educational, Scientific and Cultural Organization (UNESCO). The Study Group, attended by experts coming from 21 countries, discussed many questions relevant to the revision of the Hague Arrangement. The conclusions of the Paris meeting were published in XII UNESCO Copyright Bulletin 11, the May issue of *La Propriété Industrielle,* the June issue of *Le Droit d'Auteur,* and the July issue of the Industrial Property Quarterly, all of 1959.

7. The present Conference was convened in order to prepare the work of the diplomatic conference. The traditional procedure in the Paris and Berne Union revision conferences is that the host country and the International Bureau prepare jointly the draft text to be submitted to the governments. In the present case, a first draft was prepared by the Netherlands Government, assisted by the other governments of Benelux and the International Bureau, but, in view of the delicate nature of the subject matter and the importance of the amendments envisaged, the Netherlands Government considered it desirable to consult experts of several countries and it is to this end that it convened the present conference. The draft prepared by the Benelux countries and the International Bureau and the report of the Paris Group were communicated several months in advance to the participants who included experts coming not only from countries parties to the present Arrangement but also from countries which are not members but which show an interest in possibly adhering to an appropriately revised text.

8. The experts were of the opinion that a more effective protection of designs was more important than ever before; that designs played a decisive part in the marketing of goods of all kinds; that the international value of good design was constantly increasing; and that the unauthorized copying or unlawful imitation of designs was equally detrimental to the designer, the industrialist, and the public which was frequently misled by imitations.

9. The main objective of the present Conference was to draw up a draft which would make the Arrangement acceptable to a substantially larger number of countries than at present. Consequently, the experts tried to simplify the text of the Arrangement, to make clearer the meaning of some of its provisions, and to make it more efficient so that it should satisfy the needs of our time.

Comments On Certain Provisions

10. The Draft provides that the Arrangement is open to members of the Paris Union (art. 1, par. 2). However, the Governments are invited to examine the possibility of permitting also adherence by countries non-members of the Paris Union as there may be countries prepared to protect designs without, at the same time, being prepared to accept the patent and trademark provisions of

the General Convention of the Paris Union. Such opening of the Arrangement might increase the number of countries where protection could be obtained.

11. The Draft provides for the possibility of submitting applications for international registration through the intermediary of a national office (art. 3, par. 1). This provision should make it easier for the applicant to avail himself of the possibility of international registration.[1]

12. The Draft provides that the pictures of the designs shall be published by the International Bureau (art. 4, par. 3).[2] This provision was accepted subject to further clarification as to the costs of such publication. The Working Group which will prepare the Draft Regulations is invited not only to examine these costs and to recommend fees corresponding to these costs, but also to explore and report on the relative costs of a system under which the International Bureau would distribute copies of the applications and pictures to the national office of each Contracting Country.

13. Some experts suggested that an applicant should be able to name countries in which he does not desire that his international registration produce effects, but the proposal was rejected by the great majority of the Conference.[3] However, the Working Group which will prepare the Draft Regulations was invited to examine whether the proposal may lead to the reduction of the International registration fees or the avoidance of supplementary fees, if any, in case of examination for novelty by national offices (see art. 5, par. 3 of the Draft).[4]

14. In connection with Article 6 of the Draft, some experts expressed the opinion that the Article's effects may be too limited and that it should speak of applications made in any country or in any member country of the Paris Union rather than, as the present Draft does, of applications made in the States party

1. The Austrian experts asked that the following provision be inserted in the Arrangement:
"The Administration of the State of the applicant shall have the faculty to fix, as it likes, and to collect for itself from the applicant a fee for the transmittal of registration and renewal applications to the International Bureau."
The other experts were of the opinion that this was true without saying.

2. The Draft also provides for deferred publication (Art. 4, par. 4). In this connection, the expert of Czechoslovakia stated that he opposed the principle of any kind of secret deposit and suggested that the possibility of deferred publication not be included in the revised Arrangement.

3. The expert of Czechoslovakia proposed that it be left to the applicant to specify, in his application, the countries in which he desired that his design be protected.

4. The Danish and Swedish experts expressed the opinion that "if small countries, like the Scandinavian ones, should be able to adhere to the proposed new Hague Arrangement, it seems indispensable that the fees, payable at the International Bureau, should cover also the costs of each national office in connection with the handling of the international applications, since in case of a national pre-examination, these national costs might be considerable".

to the Arrangement. Another opinion expressed in connection with this article was that, unlike the Convention of the Paris Union, it did not regulate in sufficient detail the various conditions of the right of priority.

15. The Draft provides that in the international design notice the symbol © may be accompanied either by a date and name, etc., or by the number of the international registration (Art. 9, par. 3). It was understood that the choice between the two possibilities lie with the person who lawfully applies the notice on the article or the tag attached thereto.

16. The Draft provides for a minimum duration of five plus five years (Art. 10, par. 2). This provision should be read together with the draft Protocol which provides for a minimum duration of five plus ten years.[5]

17. Article 11 of the Draft provides for the establishment of a Committee of which all States parties to the Arrangement are members. The Governments are invited to examine the desirability of allowing that Committee to elect, from among its members, and with a periodical rotation of membership, a council of some 8 or 10 or 12 members, which would have the task of assisting the International Bureau in preparing the work of the full Committee.

18. The Draft contains an enumeration of the subjects to be governed by the Regulations (Art. 12). This enumeration should be considered as merely tentative, a more precise enumeration being possible only after the Working Group for the drafting of the Regulations has submitted its draft.

19. The Draft provides for a mechanism for the amendment of the Regulations (art. 13)[6] but not for the establishment of the initial Regulations because the Conference was of the opinion that the initial text of the Regulations should be established by the same diplomatic conference which will adopt the text of the revised Arrangement itself.

20. The present Arrangement provides that, as a rule, it has a retroactive effect (Art. 22, par. 2), although it allows countries to exclude such effect by an express declaration (Art. 22, par. 3). The Draft does not contain a comparable provision and its silence should be interpreted as meaning that it has no retroactive effect.

---

5. The Italian expert requested that it be noted that he would prefer a minimum of five years, and the U.S. experts called attention to proposed legislation in their country which would provide for a duration of five years.

6. One of the proposed methods of amending the Regulations would be by a qualified majority of the Committee (Art. 11, par. 2a). The Austrian experts asked that their following reservation be noted:
"In view of the fact that the Regulations would contain provisions on the amount of the registration fees and other matters which, in Austria, can only be regulated by law, the proposed method might create constitutional difficulties in Austria. The Austrian experts reserve the right to come back on the question after careful study and consultation with their government services dealing with constitutional law."

21. The present text of the Arrangement provides that countries which ratified both the 1925 and the 1934 texts remain bound by the earlier text in their relations with countries having ratified only the earlier text (Art. 23, par. 3). The question of whether a corresponding provision should appear in the revised text has been left open by the experts. The answer to this question depends on whether the revised text will be so different from the present text that a country could not simultaneously apply both texts (the old text in its relations to some countries, the new text in its relations to others). The proposed Protocol may have a bearing on this too. But since one shall have to know first exactly what the new text and Protocol will contain in their final form, it would have been premature to make any recommendation on this point.

Concluding Observations

22. The Conference recognized the great practical importance of the fees payable for international registration. The fees must be as low as possible, because only if the fees are low, will the possibilities offered by the Arrangement be used in practice. The fees should be so calculated that, without producing any profit, the design registration service of the International Bureau should be self-supporting. The Working Group on Regulations is invited to examine whether this calculation is possible with any degree of accuracy. The results of this examination may have some bearing also on the need of adopting a principle similar to that reflected by Article 8 of the present Regulations.

23. The Conference was of the opinion that Governments will be able to make fully considered comments on the Draft Arrangement only if they have before them an estimate of the fees and costs and a complete draft of the Regulations. It is therefore recommended that the Draft Arrangement be submitted to the Governments together with draft Regulations to be prepared by the Government of the Netherlands in cooperation with the Director of the International Bureau and a Working Group of experts to be named by the Chairman of the Conference.

24. It was understood throughout the discussions of the Conference that the experts did not necessarily express the final views of their Governments which will have an opportunity of officially communicating their comments when they receive, through official channels, the text of the Draft Arrangement and Draft Regulations.

25. This Statement as well as the Draft Arrangement were adopted by the Conference of Experts on October 8, 1959.

PART II.

LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

1. UNITED STATES OF AMERICA AND TERRITORIES

87. NEW MEXICO. LAWS, STATUTES, ETC.

An Act relating to copyrights and public performing rights in musical compositions and dramatic musical compositions, and providing penalties. [Approved April 1, 1959] 2 p. (New Mexico. Regular Session. Chapter 220, Laws 1959. Senate Bill No. 243.)

This act, which may be cited as the "Protection of Copyrights Act," provides, *inter alia,* for the filing, by performing rights societies doing business in New Mexico, of lists of the copyrighted musical works of all their members, in the office of the secretary of state, and of supplementary lists of additions and deletions every three months. It also provides for the filing of each performing rights contract or license but "without disclosing the rate of payment of any license."

88. U. S. CONGRESS. HOUSE.

Celler, Emanuel. Activities of the Committee on the Judiciary, 86th Congress, 1st Session. (*Congressional Record,* vol. 105, no. 167, Sept. 30, 1959, pp. A8464-A8469.)

In his report to the Congress, Mr. Celler refers to the "exhaustive hearings" on the jukebox bill, H.R. 5921, and indicates that Subcommittee No. 3 which conducted the hearings "plans to give further study to this legislation before taking action in the matter." Reference is also made to the committee approval of the Government infringement bill, H.R. 4059.

89. U. S. CONGRESS. SENATE.

Humphrey, Hubert H. Statement by Senator Humphrey on S. 950, the so-called jukebox bill; extension of remarks. (*Congressional Record,* vol. 105, no. 168, Oct. 2, 1959, pp. A8557, A8558.)

Under unanimous consent, Senator Humphrey's statement appears in the Appendix of the *Record* in which he comments on the status of the jukebox bill and indicates his firm belief "that the Senate should remove the jukebox exemption."

90. U. S. COPYRIGHT OFFICE.

Assignments and related documents. Washington, U. S. Govt. Print. Off. Oct. 1959. 2 p. (*Its* Cir. 10.)

A completely revised circular explaining the recordation of transfers of copyright executed both in the U. S. and abroad, the form of copyright notice which may appear on a work published after its transfer has been effected, and the recording fees for such transfers. The texts of the relevant sections of the Copyright Law (Title 17, secs. 27-32) appear on the verso of the circular.

2. FOREIGN NATIONS

91. BELGIUM. LAWS, STATUTES, ETC.

Legge del 22 marzo 1886 sul diritto d'autore, modificata con legge 5 marzo 1921 e con legge 11 marzo 1958. (30 *Il Diritto di Autore* 332-338, no. 2, Apr.-June 1959.)

Italian translation of the Belgian Copyright Law of 1886 as amended by the laws of March 5, 1921 and March 11, 1958.

92. BULGARIA. LAWS, STATUTES, ETC.

Gesetz über das Urheberrecht, vom 12. November 1951, mit den Anderungen des Gesetzes vom 10. Juli 1956. (Iswestija Nr. 92 vom 16. November 1951, Nr. 10 vom 1. Februar 1952 und Nr. 55 vom 10. Juli 1956) Ins Deutsche übertragen von Anselm Glücksmann unter Mitarbeit von Lucien Avramov. (28 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 316-324, no. 5/6, Aug. 1, 1959.)

German translation of the Bulgarian Copyright Law of Nov. 12, 1951 as amended by the Law of July 10, 1956.

93. FRANCE. LAWS, STATUTES, ETC.

Legge istitutiva di un limite ai sequestri in materia di diritto di autore. (n. 57803 del 19 luglio 1957) (30 *Il Diritto di Autore* 338, no. 2, Apr.-June 1959.)

Italian translation of a French law of July 19, 1957 concerning the attachment of sums due to authors, composers, artists, and their heirs. See 5 BULL. CR. SOC. 86, Item 111 (1957).

94. GERMANY. FEDERAL REPUBLIC, 1949- . LAWS, STATUTES, ETC.

Entwürfe des Bundesministeriums zur Urheberrechtsreform. Köln, Verlag Bundesanzeiger [1959]. 277 p.

A new draft copyright law issued by the German Federal Ministry of Justice and superseding the draft law issued by the same authority in 1954. As with the previous draft, the new one is published together with an extensive report which deals first with overall principles and then analyzes each draft provision.

95. GREAT BRITAIN. LORD HIGH CHANCELLOR.

The Performing Right Tribunal (Amendment) Rules, 1959. Made 2nd July, 1959; laid before Parliament 9th July, 1959; coming into operation 13th July, 1959. London, H.M. Stationery Off., 1959. 3, [1] p. (*Statutory instruments,* 1959, no. 1170: *copyright.*)

"These Rules prescribe certain minor amendments in the procedure to be followed before the Performing Right Tribunal. Rule 8 will enable the Chairman to give directions at an early stage of the proceedings on the lines of summons for directions which is familiar in civil proceedings in the courts." See 5 BULL. CR. SOC. 20, Item 19 (1957).

96. GREAT BRITAIN. LORD HIGH CHANCELLOR.

Reglement (Amendement) du Tribunal du droit de représentation et d'execution. N^0 1170, du 2 juillet 1959. (72 *Le Droit d'Auteur* 160-161, no. 9, Sept. 1959.)

French translation of the Performing Right Tribunal (Amendment) Rules, 1959. See Item 95, *supra.*

97. GREAT BRITAIN. PRIVY COUNCIL.

The Copyright (Isle of Man) Order, 1959. Made 13th May 1959; laid before Parliament 21st May 1959; coming into operation 31st May 1959. London, H. M. Stationery Off., 1959. 4, [2] p. (*Statutory instruments,* 1959, no. 861: *copyright.*)

"This Order extends the Copyright Act, 1956, to the Isle of Man with a number of minor modifications and with the exception of a few provisions that are inapplicable.

"The Order also extends the Orders in Council mentioned in the Second Schedule. As a result, works originating in certain foreign countries and works produced by certain international organisations will enjoy protection in the Isle of Man similar to that they at present enjoy in the United Kingdom."

98. GREAT BRITAIN. PRIVY COUNCIL.

Ordonnance de 1959 sur le droit d'auteur (Ile de Man) (N° 861, du 13 mai 1959) (72 *Le Droit d'Auteur* 169-172, no. 10, Oct. 1959.)

French translation of "The Copyright (Isle of Man) Order, 1959." See Item 97, *supra.*

99. GREECE. LAWS, STATUTES, ETC.

Avant-projet de loi sur la propriété littéraire et artistique (droit d'auteur) et les contrats d'édition. Athens, 1959. 22 p. (multilith.)

French translation of the Greek draft law on copyright and publishing contracts of 1940 presented for its consideration to the 48th Congress of the International Literary and Artistic Association, meeting in Athens, Sept. 14-19, 1959.

100. INDIA REPUBLIC. LAWS, STATUTES, ETC.

Gesetz No. 14 über das Urheberrecht, vom 4 Juni 1957. (61 *Blatt für Patent-, Muster- und Zeichenwesen* 265-280, no. 8/9, Aug./Sept. 1959.)

German translation of the Indian Copyright Law of June 4, 1957.

101. POLAND. LAWS, STATUTES, ETC.

Legislation of Poland. Laws, Decrees, Orders, Ordinances. COPYRIGHT LAW. Polish Institute of International Affairs, Warsaw, 1959. Vol. 5. 155 p. Foreword by Edward Drabienko.

Our attention has been called to this publication *in English* by the Polish Institute of International Affairs at Warsaw. It will be recalled that Poland is a member of the International Union for the Protection of Literary and Artistic Works (Berne, 1886), but that it has not ratified the amendments of the Brussels Conference of 1948. The foreword reviews Poland's contributions to the international protection of copyright, as well as its national laws which date back to 1494 covering the early "printing privileges". The Polish Copyright Law of July 10, 1952 is included, as well as all pertinent orders, resolutions and ordinances passed in recent years including the Order of the Council of Ministers of June 11, 1955, concerning the determination of remuneration and the principles of concluding agreements for the publication of books on literary, scientific and vocational subjects; the "ZAIKS" (Association of Authors, Composers and Publishers) Schedule for reproductions of photographs of October 6, 1950; the resolutions of the Praesidium and Council of Ministers, concerning broadcasting, recording on tape, remuneration for composers, creative and artistic workers, etc., and the Law of February 4, 1949 on earned income tax.

102. YUGOSLAVIA. LAWS, STATUTES, ETC.

Legge sul diritto d'autore del 28 agosto 1957. (30 *Il Diritto di Autore* 273-290, no. 2, Apr.-June 1959.)

Translation from the French text of the Yugoslav Copyright Law of 1957 which was published in *Inter-Auteurs,* no. 129, 4. trimestre 1957.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

103. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION. *Copyright Division.*

Universal Copyright Convention: state of ratifications and accessions as at 15 May 1959. (12 *UNESCO Copyright Bulletin* 3-8, no. 1, 1959.)

In English, French and Spanish.

104. STUDY GROUP ON THE INTERNATIONAL PROTECTION OF WORKS OF APPLIED ART, DESIGNS AND MODELS.

Report of Dr. Arpad Bogsch, rapporteur-general of the meeting at Paris, 20 to 23 April, 1959. (12 *UNESCO Copyright Bulletin* 11-25, 87-102, 165-180, no. 1, 1959.)

In English, French and Spanish. The English text appeared in 6 BULL. CR. SOC. 216, Item 238 (1959).

PART IV.

JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY

A. DECISIONS OF U.S. COURTS

1. Federal Court Decisions

105. *International Silver Co.* v. *Julie Pomerantz, Inc.* 123 U.S.P.Q. 108 (2d Cir. Oct. 7, 1959) (Hincks, J.).

Action for infringement of design patent on a spoon. Plaintiff introduced evidence of the design's commercial success, as well as expert testimony on the validity of the patent. The trial court entered judgment for plaintiff, and defendant appealed.

Held, affirmed.

The Court noted that, to be valid, a design patent must be the product of invention, and not merely novel, ornamental, or pleasing. With regard to the particular patent before it, the Court stated: "Assuming, as we must, that the prior art patents in evidence, which the defendant has culled from the vast prior art, illustrate the general level of skill and design in this field, . . . we think the judge below did not err in his conclusion that the design in suit was not only novel, original and of genuine artistic merit, but also so striking and so arresting in the effect produced as to attest the presence of a creative skill surpassing that of a routineer. . . . For this conclusion it is not necessary to rely either on expert testimony or on the commercial success of the printed design. However, both these factors impress us, as apparently they did the judge below, as having at least some confirmatory weight."

(*Ed.*—Judge Swan (concurring) said: "In recent years this court has sustained few design patents. Were I sitting alone, I should be disposed to hold that the design of the patent in suit does not differ sufficiently from the prior art—particularly Patent Des. No. 167,490 to Van Koert and Patent Des. No. 172,006 to Conroy et al. — to establish that 'invention' was required to create it. But what is 'invention' in a design is a matter upon which one can seldom reasonably hold a dogmatic opinion. My brothers are satisfied that the patent in suit is valid. While not free from doubt, I am willing to concur in their judgment.")

106. *Noble* v. *Columbia Broadcasting System,* 270 F.2d 938, 123 U.S.P.Q. 64 (D.C. Cir. Oct. 1, 1959) (Fahy, J.).

Action for an injunction. Plaintiff gave to one of defendant's stations his idea for a program consisting of an unrehearsed courtroom drama, using real lawyers and judges, with the audience acting as jury. Such a program was produced locally by the station under the title, "Letter of the Law," for a period of 13 weeks, and was then abandoned. Thereafter, on a nation-wide basis, defendant produced a generally similar program under the title, "The Verdict is Yours." Defendant's motion for summary judgment was granted, and plaintiff appealed.

Held, affirmed.

Plaintiff's idea lacked the essential element of novelty which would entitle him to injunctive or compensatory relief. No question of statutory or common law copyright was involved.

107. *Vance* v. *American Society of Composers, Authors and Publishers, et al.,* 123 U.S.P.Q. 296 (8th Cir. Oct. 26, 1959) (Woodrough, J.).

Action for copyright infringement. For several years, plaintiff had been seeking to establish, through actions in various courts, that defendants had appropriated certain songs which plaintiff alleged he had composed. The trial court granted defendants' motion to dismiss for failure to state a claim, and plaintiff appealed.

Held, affirmed.

Plaintiff, a layman, had drawn his own complaint: it did fail to state a claim upon which relief could be granted. Moreover, the venue of the action was incorrect; and, although this issue had not been passed upon by the trial court, plaintiff's action was barred by the three-year statute of limitations, 17 U.S.C.A. §115(b).

108. *Harris* v. *Fawcett Publications, Inc. et al.,* 123 U.S.P.Q. 318, 176 F. Supp. 390 (S.D.N.Y. Aug. 21, 1959) (Herlands, J.).

Action for copyright infringement. Plaintiff was the author of a serialized story about Elizabeth Taylor, the motion picture actress, published in "Look." Defendant Fawcett published a story on the same subject in its magazine, "Motion Picture." Fawcett had purchased its story from Friedman, a free-lance writer in the field, who was named as a defendant in this action but not served. Plaintiff moved for summary judgment on the ground that a comparison of its story with that published by defendant showed copying as a matter of law. Defendant introduced an affidavit by Friedman which set forth the various persons and sources which Friedman had consulted in writing his story.

Held, motion for summary judgment denied.

The court found that Friedman's affidavit presented a factual issue as to whether he and plaintiff had consulted common sources in writing their respective stories, and remarked upon the policy of caution which applies to summary judgment in plagiarism suits, noting that the fact that "likelihood of copying may be 'very strong' is not sufficient for the granting of summary judgment, for the plaintiff has the burden of 'conclusively' demonstrating defendant's copying by proving that 'the similarities' are 'overwhelming and pervasive.'"

109. *Holt Howard Associates, Inc.* v. *Goldman, et al.,* 123 U.S.P.Q. 325 (S.D.N.Y. Oct. 16, 1959) (Sugarman, J.).

Action for copyright infringement of plaintiff's sculptured ceramic container. Defendants, who had been importing a similar article, moved for summary judgment and for an order enjoining plaintiff from interfering with defendants' importation of the accused article.

Held, motion for summary judgment denied; motion for an injunction granted.

Defendants urged that plaintiff's ceramic container had been sold without proper notice of copyright prior to registration. This raises factual issues which preclude summary judgment. But defendant did make a strong enough showing of imminent damage and probable success at trial to warrant the granting of injunctive relief.

110. *Public Affairs Associates, Inc.* v. *Rickover,* 123 U.S.P.Q. 252 (D.D.C. Oct. 23, 1959) (Holtzoff, J.).

Action for a declaratory judgment. Plaintiff, a publisher, urged that defendant, a government official, had no property right in speeches delivered by him on subjects of public concern and prepared with some use of government facilities. Between October 20, 1955 and December 1, 1958, defendant had distributed a limited number of mimeographed copies of speeches made during that period, none of which bore the requisite notice of copyright. After December 1, 1958, all copies distributed bore such notice.

Held, after trial, for defendant.

Works created by a government employee as part of his official duties have no copyright protection, 17 U.S.C.A. §8, while works unconnected with official activities are the property of the author. The instant case falls between these two categories. Defendant's speeches arose out of or related to his official duties, but their making was entirely a private activity of de-

fendant. The Court reasoned as follows: "Every Government officer or employee naturally owes the utmost loyalty to his employer. He is under a legal and moral obligation to use his best endeavors in the performance of his functions and to utilize all of his abilities, knowledge and experience to that end. On the other hand, no one sells or mortgages all the products of his brain to his employer by the mere fact of employment. The officer or employee still remains a free agent. His intellectual products are his own, and do not automatically become the property of the Government. The circumstance that the ideas for the literary product may have been gained in whole or in part as a result or in the course of the performance of his official duties, does not affect the situation." With regard to distribution of copies of defendant's speeches, without notice of copyright, prior to December 1, 1958, the Court held that, since the distribution was of a limited number of copies at the meetings at which the speeches were made, there was no dedication to the public.

111. *United States* v. *Wells,* 123 U.S.P.Q. 65, 176 F. Supp. 630 (S.D. Tex. Sept. 28, 1959) (Ingraham, J.).

Criminal prosecution for violation of 17 U.S.C.A. §104. Defendant was accused of unauthorizedly selling aerial survey maps copyrighted by one Tobin. Tobin was in the business of selling these maps to customers, each of whom received a license to reproduce the map for his own use and for such periods as he saw fit. The prosecution introduced no evidence to show that the maps defendant was charged with selling might not have been printed by one of Tobin's customers, or that Tobin retained title to these maps at all times. The verdict was guilty, and the defendant moved for acquittal.

Held, motion granted.

The question was whether the defendant had infringed Tobin's copyright within the purview of §104. The court first noted that "whenever the copyright proprietor parts with title to a particular copy, the incident of his statutory monopoly having been exhausted by the exercise of the power of sale, is extinguished; the ordinary incidents of alienation belonging alike to all property attach to the material object in the hands of the new owner; and that copy is no longer under the copyright law insofar as the purchaser's right is concerned." Tobin's grant of a license to his customers was deemed analogous to the transfer to them of title to the particular maps. It followed that, had a customer reproduced the maps which defendant was charged with selling, the customer might be liable to Tobin for breach of contract, but neither the customer nor defendant would be liable to Tobin for copyright infringement. Since the prosecution failed to negate this possibility, the conviction could not stand.

2. State Court Decisions

112. *Grove Press, Inc.* v. *New American Library of World Literature, Inc.*, 190 N.Y.S.2d 553 (Sup. Ct., N.Y. Co. Aug. 6, 1959) (Amsterdam, J.).

Action for an injunction to restrain unfair competition. Plaintiff was the publisher of the unexpurgated version of "Lady Chatterley's Lover." Defendant was the publisher of a paperback version of the novel bearing the notation, "A Complete Reprint of the Authorized American Edition." Plaintiff urged that defendant was deceiving the public into thinking that defendant's version was the "complete and original work," while actually it was not. Plaintiff moved for a temporary injunction.

Held, motion denied.

The Court reasoned as follows: "The defendant's edition has not newly arisen as a competitor upon the scene, with its attendant facts and circumstances newly created by plaintiff's valiant contest to present to the public the original work. It had and it has a long-vested right of which it cannot be ousted merely because plaintiff has acquired or has exploited the advantages of distribution of the complete original work. Whether defendant's edition is what it is represented to be, must be determined at the trial. That it is not, is certainly not now established to any degree." In addition, the Court noted that plaintiff had made no showing of irreparable or unascertainable damage.

113. *Miller, et al.* v. *Premier Albums, Inc., et al., Variety,* Oct. 27, 1959, p. 43 (Sup. Ct., N.Y. Co. 1959).

Action for an injunction. Defendants had marketed a record entitled "In the Glenn Miller Mood," bearing a picture of Glenn Miller on the jacket. The performance, however, was by the Fred Sateriale Orchestra. This fact was revealed only on the record label itself. Plaintiffs (the Miller estate and the recording company authorized to sell Miller records) effectuated a settlement with defendants whereby defendants were barred from selling such records unless the name of the actual performer appeared more prominently than that of Miller. The settlement was signed by a Justice, thus making it an order of the court.

114. *Clevenger* v. *Baker, Voorhis & Co., et al.*, 123 U.S.P.Q. 421 (Sup. Ct. N.Y. Co. Nov. 18, 1959) (Markowitz, J.).

Action for damages. Plaintiff alleged that defendants used his name without his permission on the 1959 edition of "Clevenger's Annual Prac-

tice of New York." Defendants moved to dismiss the complaint for legal insufficiency.

Held, motion denied.

Plaintiff has alleged a violation of New York Civil Rights Law §50. The past dealings of the parties establish no estoppel.

Ed. Note: The following cases are listed but not digested inasmuch as they are only peripherally relevant to copyright law.

115. *Lawlor* v. *National Screen Service Corp.,* 270 F.2d 146 (3rd Cir. Aug. 27, 1959) (Staley, J.) (dismissal of private antitrust action affirmed; Court notes that copyright owner has "a limited monopoly as regards his copyrighted material. . . .").

116. *Arnold Productions, Inc.* v. *Favorite Films Corp., et al.,* 123 U.S.P.Q. 383, 176 F. Supp. 862 (S.D.N.Y. Sept. 29, 1959) (Murphy, J.) (complaint dismissed, except as to an accounting, in action for breach of contract to exhibit certain films on television).

117. *Gauvreau, et al.* v. *Warner Bros. Pictures, Inc., et al.,* 123 U.S.P.Q. 401 (S.D.N.Y. May 21 and Sept. 23, 1958) (Dimock, J.) (service of process in copyright infringement action set aside because defendant was not "found," within the meaning of jurisdictional statute, in district in which service was made).

PART V.

BIBLIOGRAPHY

A. BOOKS AND TREATISES

1. United States Publications

118. BERLE, ALF KEYSER. Inventions, patents and their management, by Alf K. Berle and L. Sprague de Camp. Princeton, N. J., D. Van Nostrand [1959] 602 p. "Based on . . . [the authors'] Inventions and their management."

"This book is intended to serve inventors—engineers, technicians, scientists, managers, and laymen—as a guide to the inventive, legal, and

commercial procedure involved in developing an idea into a profitable product," and includes chapters on "The protection of ideas" and "Copyright."

119. BOGSCH, ARPAD. Protection of works of foreign origin; a study prepared for the United States Copyright Office . . . with Comments and views submitted to the Copyright Office. Washington, Copyright Office, June 1959. 20, 11 p. (*General revision of the copyright law, study no.* 20.)

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

120. RUNGE, KURT. Copyrights or neighboring rights? (With particular reference to group works) [New York] Copyright Society of the U. S. A., Oct. 1959. 22 p. (multilith) Translated by Waldo H. Moore from *Gewerblicher Rechtschutz und Urheberrecht,* Feb. 1959, pp. 75-80.

Issued by the Copyright Society to its sustaining members and subscribers. See 6 BULL. CR. SOC. 276, Item 316 (1959).

2. Foreign Publications

121. ASSOCIATION SUISSE POUR LA PROTECTION DU DROIT D'AUTEUR. Le développement de la protection des dessins et modèles sur le plan international rapport . . . par M. H. R. Leuenberger. [Athens, 1959.]

Report of the Swiss Association for Copyright Protection on the development of international protection of designs and models made to the 48th Congress of the International Literary and Artistic Association, meeting in Athens, Sept. 14-19, 1959.

122. ASSOCIATION JURIDIQUE FRANÇAISE POUR LA PROTECTION DU DROIT D'AUTEUR. *Commission du cinèma, de la radiodiffusion et de la télévision.* Rapport présenté par Raoul Castelain au nom de la Commission. Paris, July 1959, 8 p. (*multilith*).

A report of the Motion Picture, Radio and Television Committee of the French Legal Association for Copyright Protection presented to the 48th Congress of the International Literary and Artistic Association, meeting in Athens, Sept. 14-19, 1959. The report contains the Committee's observations concerning Professor Lyon-Caen's report on copyright questions in the field of cinematography which was written for the Permanent Committee of the Berne Union and published in the first number (April 1959) of the *Bulletin Trimestriel* of the Bureau international de l'Edition mécanique, Paris (B.I.E.M.)

123. ASSOCIATION LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE. Observations sur le rapport de Monsieur le Professeur Lyon-Caen sur les questions relatives au droit d'auteur en matière de cinématographie. [Athens, 1959] 8 p. (*multilith*).

Observations of the International Literary and Artistic Association on the report of Professor Lyon-Caen on copyright questions in cinematography. The observations were made at the request of the Berne Union and presented to the 48th Congress of the association, meeting in Athens, Sept. 14-19, 1959.

124. BERGSTRÖM, SVANTE. Quelques problèmes actuels du droit d'auteur en matière de radiodiffusion dans le domaine international. [Athens, 1959] 14 p. (*multilith*). At head of title: Association littéraire et artistique internationale, Congrès d'Athènes, 14-19 septembre 1959.

A report on "some current copyright problems in the field of broadcasting on an international level" made to the 48th Congress of the International Literary and Artistic Association, meeting in Athens, Sept. 14-19, 1959.

125. DESBOIS, HENRI. Observations relatives à l'avant-projet de loi grecque sur la propriété littéraire et artistique. [Athens, 1959] 16 p. (*multilith*). At head of title: Association littéraire et artistique internationale, Congrès d'Athènes, 14-19 septembre 1959.

Observations on the Greek draft copyright law made to the 48th Congress of the International Literary and Artistic Association, meeting in Athens, Sept. 14-19, 1959.

126. HESSER, TORWALD. Mémoire sur le rapport du Professeur G. Lyon-Caen du 21 juillet 1958, sur les questions relatives au droit d'auteur en matiére de cinematographie, présenté au nom du Groupe suédois. [Athens, 1959] 6 p. (*multilith*). At head of title: Association littéraire et artistique internationale, Congrès d'Athènes, 14-19 septembre 1959.

Comments on Professor Lyon-Caen's report of July 21, 1958 on copyright questions in cinematography, presented on behalf of the Swedish Section of the International Literary and Artistic Association to its 48th Congress, meeting in Athens, Sept. 14-19, 1959.

127. IOANNOU, TASSOS. Rapport sur la révision de la legislation hellénique relative à la propriété littéraire et artistique. [Athens, 1959] 22 p. (*multilith*). At head of title: Association littéraire et artistique.

A report on the revision of the Greek copyright law presented by the

president of the Greek section of the International Literary and Artistic Association at its 48th Congress held in Athens, Sept. 14-19, 1959, with invitations to listeners to submit observations and suggestions on the Greek draft copyright law.

128. MASOUYÉ, CLAUDE. Droit d'auteur et droit fiscal; rapport général. [Paris, Aug. 25, 1959] 9 p. (*multilith*). At head of title: Association littéraire et artistique internationale, Congrès d'Athènes, septembre 1959.

A report on tax aspects of copyrights presented to the 48th Congress of the International Literary and Artistic Association, meeting in Athens, Sept. 14-19, 1959.

129. PALÁGYI, RÓBERT. A magyar szerzöi jog zsebbönyve. Második, átdolgozott és bövitett kiadás. Budapest, Közgazdasági és Jogi Könyvkiadó, 1959. 304 p.

This up-to-date analysis and commentary of the Hungarian copyright law is a revised and enlarged edition of a work first published in 1957. It includes the full texts of laws, decrees and supreme court decisions pertaining to copyright, and Hungarian translations of The Universal Copyright and other international conventions.

130. PLAISANT, ROBERT. Rapport sur la protection internationale des oeuvres [des] arts appliques et des dessins et modèles. [Athens, 1959] 11 p. (*multilith*). At head of title: Association littéraire et artistique internationale, Congrès d'Athènes, 14-19 septembre 1959.

A report on the international protection of works of applied art, designs and models made to the 48th Congress of the International Literary and Artistic Association, meeting in Athens, Sept. 14-19, 1959.

131. REIMER, DIETRICH.

Rapport général sur les questions relatives au droit d'auteur en matière de cinématographie. [Athens, 1959] 12 p. (*multilith*). At head of title: Association littéraire ét artistique internationale, Congrès d'Athènes, 14-19 septembre 1959.

A paper on copyright questions in cinematography presented to the 48th Congress of the International Literary and Artistic Association, meeting in Athens, Sept. 14-19, 1959.

132. SANCTIS, VALERIO DE. Droit d'auteur et droits dits "voisins"; une mise au point. [Athens, 1959] 14 p. (*multilith*). At head of title: Association littéraire et artistique internationale Congrès d' Athènes, 14-19 septembre 1959.

A paper on the subject of neighboring rights presented to the 48th Congress of the International Literary and Artistic Association, meeting in Athens, Sept. 14-19, 1959.

133. SMOLDERS, THEODORE. Le projet de loi Bénélux sur les dessins et modèles industriels; rapport présenté par Theodore Smolders et W. L. Haardt. [Athens, 1959] 8 p. (*multilith*). At head of title: Association littéraire et artistique internationale.

A report on the Benelux draft law with respect to industrial designs and models made to the 48th Congress of the International Literary and Artistic Association, meeting in Athens, Sept. 14-19, 1959.

134. TROLLER, ALOIS. Jurisprudenz auf dem Holzwege; noch ein Beitrag zu den "sogenannten Nachbarrechten" oder dem "Leistungsschutz" der ausübenden Künstler, der Hersteller von Tonträgern und des Rundfunks. Berlin, F. Vahlen [1959] 100 p. (Internationale Gesellschaft für Urheberrecht. Schriftenreihe, Bd. 13).

A historical analysis of efforts toward achieving legal protection of neighboring rights which the author feels are at an impasse, and an attempt to find solutions.

B. LAW REVIEW ARTICLES

1. United States

135. AMERICAN PATENT LAW ASSOCIATION. Bulletin. Sept. 1959. Washington [1959] pp. 258-339.

Among the reports included in this issue are those of the standing committee on copyrights and the Trademark and Copyright Subcommittee of the special committee on antitrust. The committee on copyrights approved the jukebox bill (H.R. 5921, 86th Cong., 1st sess.), called attention to the Copyright Office general revision program and made brief mention of the conference held in Washington on May 19, 1959, to investigate copyright problems affecting communication of educational and

scientific information. The antitrust subcommittee gave its views on the antitrust aspects of trademarks and copyrights which it summarized as follows:

"We are unanimous in our view that the antitrust laws should not single out a certain species of property as a target, particularly where that species of property is already accorded the status of a lawful franchise either by statute or under the common law."

136. CASSER, DONALD G. Trade regulation: legal protection of commercial design. (*Wisconsin Law Review* 652-666, no. 4, July, 1959.)

"The purpose of this comment [is] to examine each of the legal sources of design protection with the emphasis on marking out their limitations and, in addition, to submit a method of analysis for the assessment of present and future design protection legislation."

137. INABNIT, LINZA B. The unwarranted tax discrimination against creators of copyrighted works and literary, musical, or artistic compositions or similar properties. (47 *Kentucky Law Journal* 529-545, no. 4, summer 1959.)

"This note has been submitted as a contribution to the Twenty-first Annual Nathan Burkan Memorial Competition."

138. PERSONAL LETTERS: IN NEED OF A LAW OF THEIR OWN. (44 *Iowa Law Review* 705-715, no. 4, summer 1959.)

An analysis of the common-law rights of the author and the recipient of private letters and an examination of the problems connected therewith.

139. STOVALL, JAMES T., JR. Torts—invasion of privacy—multiple causes of action. (11 *Alabama Law Review* 374-379, no. 2, spring 1959.)

A note on *Strickler v. National Broadcasting Co.*, 167 F.Supp. 68, 6 BULL. CR. SOC. 139, Item 129a (S.D. Cal. 1958).

2. Foreign

(a) English

140. EUROPEAN BROADCASTING UNION. E.B.U. memorandum on article 14 of the Berne Convention. (*E.B.U. Review*, no. 57 B, Sept. 1959, pp. 26-30.)

Observations of the E.B.U., made at the invitation of the Director of

the International Bureau of the Berne Union, on copyright questions in the field of cinematography raised in Professor Lyon-Caen's report on that subject written for the Permanent Committee of the Berne Union and published in the first number (April 1959) of the *Bulletin Trimestriel* of the Bureau International de l'Edition mécanique, Paris (B.I.E.M.). Both the Lyon-Caen report and the E.B.U. observations were written with the object of rejuvenating and adapting article 14 of the Berne Convention "to the facts of modern life."

141. GRANT, T. ST. J. Letter from the Federation of Rhodesia and Nyasaland. (4 *Industrial Property Quarterly* 17-26, no. 4, Oct. 1959.)

A survey of legislative activities in the new Federation relating to industrial property rights, including projected copyright and designs legislation.

142. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION. *Secretariat.* Statutory and case law concerning the protection of works of applied art, designs and models. (12 *UNESCO Copyright Bulletin* 27-84, 103-162, 181-241, no. 1, 1959.)

A study, in English, French and Spanish, covering the twelve member states of the Intergovernmental Copyright Committee, (I.G.C.C.). The study improves and supplements, "on the basis of suggestions made by several specialists of these states," a similar study (IGC/III/II) which was submitted by the Secretariat of UNESCO to the I.G.C.C. at its third session (Geneva, August 1958).

(b) French

143. ASSOCIATION LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE. *Congrès d'Athènes, Sept.* 1959. Rapport sur le 48e Congrès (Athènes, 14-19 septembre 1959) (72 *Le Droit d'Auteur* 176-179, no. 10, Oct. 1959.)

Report of the 48th Congress of the International Literary and Artistic Association (A.L.A.I.) held in Athens, Sept. 14-19, 1959. The report includes approved resolutions on revision of the Greek law, works of applied art, designs and models, cinematography and radio broadcasting, neighboring rights, and the tax status of authors; and a "voeu" on extension of duration of protection after death of the author.

144. BOURSIGOT, HENRI. A propos de l'affaire Bonnard: droit moral et communauté conjugale. (28 *Archiv für Urheber-, Film-, und Theaterrecht* 129-134, no. 3/4, July 1, 1959.)

A comment on the *Bonnard* decision which was handed down on Feb. 18, 1959 by the Court of Appeals of Orleans to which the case had been remanded by the French Supreme Court. The case involves the question whether the unpublished work of a painter becomes community property or remains outside of its scope on the basis of the author's moral right.

145. SANCTIS, VALERIO DE. Lettre d'Italie. (72 *Le Droit d'Auteur* 161-168, no. 9, Sept. 1959.)

A survey of recent legislative and judicial copyright developments in Italy.

146. VAUNOIS, LOUIS. L'évolution de la jurisprudence sur le droit moral en France. (72 *Le Droit d'Auteur* 172-176, no. 10, Oct. 1959.)

"The evolution of jurisprudence on the moral right in France"; an analysis of five recent French court decisions.

(c) German

147. DITTRICH, ROBERT. Der Schutz der veröffentlichen Entscheidung nach österreichischem Urheberrecht. (14 *Oesterreichische Juristen-Zeitung* 342-344, no. 13, June 26, 1959.)

A discussion of the protection, under the Austrian copyright law, of court decisions appearing in professional publications in edited form.

148. HAENSEL, CARL. Aufführung, Vortrag, Rundfunk-Weitergabe. (28 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 1-31, 149-190, no. 1/2, June 1, 1959, no. 3/4 July 1, 1959.)

A commentary on the author's performing rights, under the laws of the German Federal Republic, in connection with the presentation of his works on the stage, screen, radio or television, or in the concert or lecture hall.

149. PALÁGYI, ROBERT. Urheberrecht und eheliche Gütergemeinschaft in Ungarn. (28 *Archiv für Urheber-, Film-, Funk und Theaterrecht* 299-315, no. 5/6, Aug. 1, 1959.)

A discussion of copyright and community property in Hungary.

150. STUDY GROUP ON THE INTERNATIONAL PROTECTION OF WORKS OF APPLIED ART, DESIGNS AND MODELS. Bericht von Dr. Arpad Bogsch,

General-berichterstatter (angenommen von der Studiengruppe) (*Gewerblicher Rechtsschutz und Urheberrecht, Auslands- und internationaler Teil* 389-392, no. 7, July 1959.)

German translation of the reports of the Study Group. See 6 BULL. CR. SOC. 216, Item 238 (1959).

151. TROLLER, ALOIS. Bedenken zum Urheberpersönlichkeitsrecht. (28 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 257, no. 5/6, Aug. 1, 1959.)

A penetrating critique of the moral right concept in copyright laws.

152. ULMER, EUGEN. Die Empfehlungen der Studiengruppe für den internationalen Schutz von Werken der angewandten Kunst und von Mustern und Modellen. (*Gewerblicher Rechtsschutz und Urheberrecht, Auslands- und internationaler Teil,* no. 7 (July 1959), pp. 373-378.

A comment and analysis of the recommendations of the Study Group on the International Protection of Applied Art, Designs and Models. See 6 BULL. CR. SOC. 216, Item 238 (1959).

(d) Italian

153. GIANNINI, AMEDEO. Di alcune questioni del diritto di autore. (30 *Il Diritto di Autore* 189-228, no. 2, Apr.-June 1959.)

A discussion of the following five questions on copyright and related subjects under Italian laws: 1. The protection of the "external" aspects of a work, such as the binding, typography, etc. 2. The right to reply to a broadcast. 3. The rights involved in the transfer of copies of a work. 4. The rights in a work made for hire or by commission. 5. The right to reproduce printed interviews and press conferences.

(e) Spanish

154. MOUCHET, CARLOS. Protección de las obras literarias y artísticas en la Argentina. (Relaciones internacionales en la materia). (96 *La Ley* 1-4, Oct. 3, 1959.)

A discussion of the current status of copyright protection in the Argentine Republic with special reference to international relations.

C. ARTICLES PERTAINING TO COPYRIGHT FROM TRADE MAGAZINES

1. United States

155. DIAMOND, SIDNEY A.

Misconceptions about Copyright Infringement. (30 *Advertising Age* 78, Aug. 17, 1959.)

Understanding the Right of Privacy. (30 *Advertising Age* 9, Oct. 12, 1959.)

Two of Mr. Diamond's informative articles on the copyright law written especially for the advertising profession.

156. New copyr't study would clarify reciprocal system. (71 *The Billboard* 4, 11, no. 40, Oct. 5, 1959.)

A brief summary of the Copyright Office general revision study no. 20 (Protection of works of foreign origin, by Arpad Bogsch) and of some of the comments and views submitted thereto. See Item 119, *supra.*

157. LEWIS, JAY. International copyright: clumsy; present study strives for better ways to extend protection on reciprocity basis. (216 *Variety* 82, no. 6, Oct. 7, 1959.)

A brief summary of the Copyright Office general revision study no. 20 (Protection of works of foreign origin, by Arpad Bogsch) and of some of the comments and views submitted thereto. See Item 119, *supra.*

158. MACCARTENEY, RICHARD S.

The 1959 copyright code. 50 years after. (176 *Publishers' Weekly* 11-14, no. 19, Nov. 9, 1959.)

A historical sketch of the events leading to the enactment of the 1909 Act, the basic copyright law now in effect, written by the Chief of the Reference Division of the Copyright Office on occasion of the golden anniversary of the Act. A list of the studies that have been made so far as a preliminary to a general revision of the 1909 Act, under the auspices of the Copyright Office, is appended at the end of the article.

159. MUMA, JUDY. Design piracy bill backers clarify provisions in L.A. (31 *Home Furnishings Daily* 1, 10, no. 190, Sept. 28, 1959; 1, 10, no. 191, Sept. 29, 1959; 4, no. 192, Sept. 30, 1959.)

A three-part article on a recent meeting in Los Angeles, attended by 115 guests in "the home furnishings mart," during which Alan Latman, executive secretary and counsel of the National Committee for Effective Design Legislation, Peter Price, patent attorney, associated with the Furniture Manufacturers Association, Grand Rapids, and John Pile of George Nelson & Co., New York, clarified the provisions of the O'Mahoney-Wiley-Hart design protection bill, S. 2075.

2. England

160. GRIGSON, HENRY.

Poems, authologies and copyright. (58 *The Times Literary Supplement* 561, no. 3,005, Oct. 2, 1959.)

In a letter to the editor the writer complains about the cost of copyright materials which "make it impossible to include in most anthologies anything but a small proportion of poems." He suggests "that poets should always retain the anthology rights of their poems and that they should as a rule, and on request, allow the free use of their poems in anthologies."

NEWS BRIEFS

161. ESTABLISHMENT OF COOPERATIVE RELATIONS BETWEEN THE ORGANIZATION OF AMERICAN STATES (O. A. S.) AND THE UNITED INTERNATIONAL BUREAUX.

The O. A. S. and the United International Bureaux for the Protection of Industrial, Literary and Artistic Property, through an exchange of notes between Mr. José A. Mora, Secretary General of the O. A. S. and Mr. Jacques Secretan, Director of the United International Bureaux, have concluded a cooperative arrangement based on the following points:

a) Exchange of studies, information, and documents of common interest in the field of industrial, literary, and artistic property; and

b) Reciprocal attendance, in accordance with the decisions or regulations which the competent organ or organization may adopt, at those meetings dealing with international aspects of industrial, literary, and artistic property, of common interest, in order that the

respective representatives may follow the course of the activities and discussions and inform themselves regarding the work and the decisions of the aforesaid meetings.

Cf. 72 *Le Droit d'Auteur* 153-154, no. 9, Sept. 1959.)

162. SURPLUS CONGRESSIONAL HEARINGS ON COPYRIGHT

The Copyright Office has on hand copies of the March 26-28, 1908 Hearings; copies of the December 7-11, 1906 Hearings and several hundred copies of the Arguments of June 6-9, 1906, preliminary to the enactment of the Act of 1909. Copies of these documents may be had upon request to R. G. Plumb, Head, Information and Publications Section, Copyright Office, Washington 25, D. C. The stock is limited and requests should be sent in promptly.

Copyright Society of the U.S.A.
c/o Fred B. Rothman & Co.
57 Leuning Street
South Hackensack, N. J.

Return and Forwarding
Postage ***Guaranteed***

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

Form 3547 Requested

BULLETIN

OF THE

COPYRIGHT

•

SOCIETY

•

OF THE U. S. A.

Published at

NEW YORK UNIVERSITY LAW CENTER

VOL. 7, NO. 3 FEBRUARY, 1960

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

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

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

REGISTER CALLS FOR SUBMISSION OF REVISION PROBLEMS AND VIEWS BY APRIL 15, 1960

February 17, 1960

To All Persons Concerned with Copyright Law Revision:

Pursuant to an authorization by Congress, the Copyright Office of the Library of Congress, with the aid of an advisory panel of specialists in the field, has conducted a program of studies of the copyright law (Title 17 of the United States Code) with a view to comprehensive revision of that law.

The studies have been designed to review the background of the various problems involved and to analyze the issues and alternative possibilities for their solution. With a few exceptions these studies have now been completed and preliminary copies made available to interested persons. The studies will soon be printed by the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary in the form of committee prints to be available at a nominal price from the Superintendent of Documents, U. S. Government Printing Office.

These studies, together with the views submitted by interested persons, will afford a basis for formulating recommendations to the Congress for revision of the present law.

All persons interested are invited to present to the Copyright Office, written statements of their views on any problems that they wish to have considered in a revision of the law. Such statements should be sent to my attention or that of Abe A. Goldman, Chief of Research, The Copyright Office, Library of Congress, Washington 25, D. C., not later than April 15, 1960.

Sincerely yours,

Arthur Fisher

Register of Copyrights

GENERAL REVISION STUDY NOW AVAILABLE

The following study prepared by the Copyright Office under a Congressional authorization, looking toward a general revision of the Copyright Law (Title 17, U.S.C.), is now ready for distribution:

COPYRIGHT IN CERTAIN WORKS (Study No. 21)

A. Copyright in Architectural Works
by William S. Strauss

B. Copyright in Choreographic Works
by Borge Varmer

C. Copyright in Government Publications
by Caruthers Berger

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.

CONTENTS

THE BULLETIN of The Copyright Society of the U.S.A. is published 6 times a year by The Society at the Law Center of New York University, 40 Washington Square South, New York 11, New York: Walter J. Derenberg, *President;* Horace S. Manges, Alfred H. Wasserstrom, *Vice-Presidents;* William Klein II, *Treasurer;* Leonard Zissu, *Secretary;* Sigrid H. Pedersen, *Assistant Treasurer;* and Werner Janssen, Jr., *Assistant Secretary.*

Annual subscription: $25.

All communications concerning the contents of THE BULLETIN should be addressed to the Chairman of the Editorial Board, at the Law Center of New York University, 40 Washington Sq. So., New York 11, N. Y.

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

CITE: 7 BULL. CR. SOC. page no., Item .....(1960).

PART I.

ARTICLES

163. SECOND JOINT MEETING OF UNESCO INTERGOVERNMENTAL COPYRIGHT COMMITTEE AND BERNE PERMANENT COMMITTEE OCTOBER 12-17, 1959 AT MUNICH.

The Intergovernmental Copyright Committee and the Permanent Committee of the International (Berne) Union for the Protection of Literary and Artistic Works held their fourth and eighth session, respectively, from October 12 to 17, 1959, in Munich, Germany.

The I.G.C.C. was established by the Universal Copyright Convention in 1952, the Permanent Committee by the 1948 revision conference of the Berne Union at Brussels. Both committees deal with questions relevant to the development of international copyright protection and prepare the revisions of the Universal and Berne Conventions, respectively.

It was in 1958 that the two committees held *joint* meetings for the first time. The historical significance in the world of international copyright of this fact was noted in a previous article (6 BULL. CR. SOC. 26 (1958.)). The experiment was repeated in Munich, with equal success. Six questions (there were four last year) were discussed in joint meetings by the two committees.

The principal purposes of the yearly meeting of these two committees are: stock taking of the events of the intervening year, directing the work plans of the Secretariats (that is, of UNESCO and the Berne Bureau), and outlining future procedures. The meetings are well attended (in Munich there were 100 official participants with 32 countries represented) and the time (5 or 6 days) is really too short to discuss profoundly questions of substantive law or to arrive at even tentative solutions to such questions. This work must be left to rapporteurs, ad hoc committees or other interim conferences. But by arranging for such meetings and preparatory work, selecting their topics and exact terms of reference, and suggesting to the Secretariats how to prepare them, the two committees exercise an important regulatory function inspired by considerations of the public interest, as understood by the governments of the member countries.

In Munich, questions concerning the possible revision of the Berne-Brussels Convention and the U.C.C. appeared, for the first time, on the agendas of both committees. The Swedish Government which, in Brussels in 1948, reserved the right of being the host of the next revision conference of the Berne Union,

announced that it intends to convene the revision conference in 1965 in Stockholm. It would appear that certain questions connected with rights in motion pictures are among the most important that are likely to interest the Stockholm Conference. In this connection, the Permanent Committee decided to organize a committee of experts to explore possible solutions. It is anticipated that the I.G.C.C. will cooperate in that committee which will probably not meet before 1961.

In respect to neighboring rights, the committees were informed of the intention of UNESCO, the International Labor Organization, and the Berne Bureau to convene jointly, probably in April 1960, a committee of experts which will endeavor to produce a new draft convention or protocol. It is interesting to note in this connection that in one important segment of neighboring rights — the protection of rights of broadcasters in their telecasts — the Council of Europe now sponsors a regional program. This might result within the next few months in the adoption by some members of the Council of Europe of a limited convention in this field.

Mr. Arthur Fisher, Register of Copyrights, represented the United States on the I.G.C.C.

The resolutions of the two Committees on these and other subjects are reprinted hereafter.

RESOLUTIONS

A. INTERGOVERNMENTAL COPYRIGHT COMMITTEE

Resolution No. 28 (IV) on Criminal proceedings in case of copyright infringements

The Intergovernmental Copyright Committee,

Invites its Secretariat to prepare, in collaboration with the Bureau of the International Union for the Protection of Literary and Artistic Works, a summary of statutory provisions for resort to criminal proceedings or the use of other forms of assistance by Governments, for the more effective protection of the rights of owners of copyright, and to report on this question to the next joint session of the Intergovernmental Copyright Committee and the Permanent Committee of the International Union for the Protection of Literary and Artistic Works together with any useful comments and suggestions.

Resolution No. 29 (IV) on "Neighboring" Rights

The Intergovernmental Copyright Committee,

Takes note with satisfaction that the United International Bureaux, UNESCO and the International Labour Organisation have reached a new accord on the procedure to be followed in preparing an international Convention,

Interprets that accord in the sense that the discussions of the experts will be on the basis of the existing Geneva and Monaco drafts but will not be limited thereto.

Resolution No. 30 (IV) on the Protection of television broadcasts

The Intergovernmental Copyright Committee,

Having heard a report on the work done under the auspices of the Council of Europe with a view to the protection of television broadcasts,

Noting that such protection is already envisaged, in the two draft international instruments relating to "neighbouring" rights,

Anxious to ensure co-ordination of the activities undertaken in this field by intergovernmental organisations so that protection envisaged on a regional basis will not hamper the development of work of universal scope,

Expresses the hope that the Arrangement envisaged on a European basis will be restricted in regard to its purpose, duration and territorial applicability, and will remain effective only until the entry into force of an instrument of universal scope.

Resolution No. 31 (IV) on Designs and Applied Arts

The Intergovernmental Copyright Committee,

Having taken cognizance of the draft Arrangement concerning the International Deposit of Designs and of the Explanatory Statement adopted at the Conference of Experts convened in The Hague by the Government of the Netherlands (September-October 1959);

Notes especially Article 14 of that Draft relating to artistic works and to works of applied art protected by international copyright treaties,

Expresses its satisfaction with the work undertaken since the last session of the Committee, under the sponsorship of the International Union for the Protection of Industrial Property, the International Union for the Protection of Literary and Artistic Works, and UNESCO,

And takes note, with satisfaction, of the procedure envisaged by the Government of the Netherlands for the consideration of the said arrangement, in its revised form, by a diplomatic conference.

Resolution No. 32 on Rights in cinematographic works

The Intergovernmental Copyright Committee,

Having taken cognizance of the reports submitted by its Secretariat and by the Bureau of the International Union for the Protection of Literary and Artistic Works, and of the comments by international non-governmental organizations,

Invites its Secretariat to prepare, in cooperation with the International Bureau, a working document analysing the problems of copyright and certain other related rights in connection with cinematographic works, this working document being intended for consideration by the next joint session of the Intergovernmental Copyright Committee and the Permanent Committee of the International Union for the Protection of Literary and Artistic Works, and also for a committee of experts which is to examine such problems, the report of which will be submitted to the Intergovernmental Copyright Committee.

Resolution No. 33 (IV) on Cooperation between UNESCO and the International Bureaux in matters of publications

The Intergovernmental Copyright Committee,

Expresses again the hope that the French version of "Copyright Laws and Treaties of the World" will be published as soon as possible by UNESCO and the Bureau of the International Union for the Protection of Literary and Attistic Works;

Expresses the wish that the publication of a collection of the laws and treaties dealing with the protection of works of applied art and designs be commenced at the earliest possible date by or with the cooperation of the United International Bureaux of the International Union for the Protection of Industrial Property and of the International Union for the Protection of Literary and Artistic Works, and UNESCO;

Recommends that UNESCO and the Bureau of the International Union study and report to the next joint session of the Intergovernmental Copyright Committee and the Permanent Committee on the possibilities of coordinating their publications, including cooperation in making available the contents of *Le Droit d'Auteur* in other languages than French, and particularly in English.

Resolution No. 34 (IV) on the Protection of works of certain intergovernmental organizations

The Intergovernmental Copyright Committee,

Notes that the International Conventions for the Protection of Literary and Artistic Works (Berne Conventions) and the Universal Copyright Convention protect works first published in countries parties to these conventions irrespective of the authors' nationality.

Notes that any intergovernmental organization may acquire copyright by contract in countries where the national law does not itself vest the copyright in them as employers.

Considering however that express provisions in international copyright conventions granting protection to works first published by intergovernmental organizations may have usefulness.

Recommends that the possibility of adding the names of other intergovernmental organizations to those mentioned in the present Protocol to the Universal Copyright Convention be considered in connection with the next revision of said instrument.

Resolution No. 35 (IV) on the Place of the Fifth Regular Session of the Intergovernmental Copyright Committee

The Intergovernmental Copyright Committee,

Having noted with thanks the invitation extended by the Government of the United Kingdom,

Expresses the wish that the Secretariat make all necessary arrangements with the United Kingdom Government to convene the next regular session in the United Kingdom in 1960.

B. BERNE PERMANENT COMMITTEE[1]

Resolution No. 1 concerning the extension of the term of protection after the author's death

The Permanent Committee of the International Union for the Protection of Literary and Artistic Works,

Having taken cognizance of the note of the International Bureau concerning the extension of the term of protection after the author's death, in certain countries,

Considering that there is no necessity to take a decision at the present time on the substance of this question which might well be of interest to all the countries of the Union,

Invites the International Bureau to make an inquiry in all the countries of the Union in order to establish whether they are considering an extension of that term and possibly to report on the solutions which might be adopted, for instance a separate Union or a special Protocol.

Resolution No. 2 concerning the composition and the conditions governing the working of the Permanent Committee

The Permanent Committee of the International Union for the Protection of Literary and Artistic Works,

Until such times as the Diplomatic Conference of Stockholm establishes the rules concerning the composition and the conditions governing the working of the Permanent Committee, decides that the draft rules examined at the first reading on 23 August 1958 will be used as a "modus vivendi" until the above-

1. English text as adopted by the Committee.

mentioned Conference takes place, as far as the practical working methods of the Committee are concerned, in its present composition.

Resolution No. 3 concerning "neighbouring" rights

The Permanent Committee of the International Union for the Protection of Literary and Artistic Works,

Takes note with satisfaction that the United International Bureaux, UNESCO and the International Labour Organisation have reached a new accord on the procedure to be followed in preparing a single international Convention and interprets that accord in the sense that

the discussions of the experts will be on the basis of the existing Geneva and Monaco drafts but will not be limited thereto.

Resolution No. 4 relating to the protection of the emissions of television broadcasters

The Permanent Committee of the International Union for the Protection of Literary and Artistic Works,

Having heard a report on the work done under the auspices of the Council of Europe with a view to the protection of television broadcasts,

Noting that such protection is already envisaged, in the two draft international instruments relating to "neighbouring" rights,

Anxious to ensure co-ordination of the activities undertaken in this field by intergovernmental organisations so that protection envisaged on a regional basis will not hamper the development of work of universal scope,

Expresses the hope that the Arrangement envisaged on a European basis will be restricted in regard to its purpose, duration and territorial applicability, and will remain effective only until the entry into force of an instrument of universal scope.

Resolution No. 5 relating to the proposal of India

The Permanent Committee of the International Union for the Protection of Literary and Artistic Works,

Invites the International Bureau to prepare, in collaboration with the Secretariat of Unesco a summary of statutory provisions for resort to criminal proceedings or the use of other forms of assistance by Governments, for the more effective protection of the rights of owners of copyright, and to report on this question to the next joint session of the Permanent Committee and of the Intergovernmental Copyright Committee together with any useful comments and suggestions.

Resolution No. 6 concerning the designs and models and the applied arts

The Permanent Committee of the International Union for the Protection of Literary and Artistic Works,

Having taken cognizance of the draft Arrangement concerning the International Deposit of designs and models and of the Explanatory Statement adopted at the Conference of Experts convened in The Hague by the Government of the Netherlands (September October 1959);

Notes especially Article 14 of that Draft relating to artistic works and to works of applied art protected by international copyright treaties,

Expresses its satisfaction with the work undertaken since the last session of the Committee, under the sponsorship of the International Union for the Protection of Industrial Property, the International Union for the Protection of Literary and Artistic Works, and UNESCO,

And takes note, with satisfaction, of the procedure envisaged by the Government of the Netherlands for the consideration of the said arrangement, in its revised form, by a diplomatic conference.

Resolution No. 7 concerning questions relating to cinematographic copyright

The Permanent Committee of the International Union for the Protection of Literary and Artistic Works,

Having taken cognizance of the reports submitted by the International Bureau and by the Secretariat of Unesco and of the comments of international non-governmental organizations,

Invites the International Bureau to prepare, in cooperation with the Secretariat of Unesco, a working document analysing the problems of copyright and certain other related rights in connection with cinematographic works; this working document is intended for consideration by the Permanent Committee and the Intergovernmental Copyright Committee at their next joint session and also for a committee of experts which is to examine such problems, whose report will be presented to the Permanent Committee for its consideration in due course, prior to the next conference for the revision of the Convention of the International Union for the Protection of Literary and Artistic Works.

Resolution No. 8 on Cooperation between the International Bureaux and Unesco in matters of publications

The Permanent Committee of the International Union for the Protection of Literary and Artistic Works,

Expresses again the hope that the French version of "Copyright Laws and Treaties of the World" will be published as soon as possible by the Bureau of the International Union for the Protection of Literary and Artistic Works and Unesco,

Expresses the wish that the publication of a collection of the laws and treaties dealing with the protection of works of applied art and designs be commenced at the earliest possible date by or with the cooperation of the United International Bureaux of the International Union for the Protection of Industrial Property and of the International Union for the Protection of Literary and Artistic Works, and UNESCO;

Recommends that the Bureau of the International Union and Unesco study and report to the next joint session of the Permanent Committee and of the Intergovernmental Committee on the possibilities of coordinating their publications, including cooperation in making available the contents of *Le Droit d'Auteur* in other languages than French, and particularly in English.

Resolution No. 9 concerning the protection of works of certain intergovernmental organizations

The Permanent Committee of the International Union for the Protection of Literary and Artistic Works,

Notes that the International Conventions for the Protection of Literary and Artistic Works (Berne Convention) and the Universal Copyright Convention protect works first published in countries parties to these conventions irrespective of the authors' nationality,

Notes that any intergovernmental organization may acquire copyright by contract in countries where the national law does not itself vest the copyright in them as employers, but considering that express provisions in international copyright conventions granting protection to works first published by intergovernmental organizations may have value,

Recommends consideration of the possibility of attaching a special Protocol in this connection to the Convention of the Berne Union.

Resolution No. 10 concerning the renewal of the Permanent Committee

The Permanent Committee of the International Union for the Protection of Literary and Artistic Works,

Having taken cognizance of the resignations of the representatives of the Netherlands and Czechoslovakia and of the declarations made by them, with regard to Article 4 of the provisional Rules of procedure of the Committee, recommending that the countries which might succeed them be Belgium and Rumania respectively,

Considering that Canada had resigned during the Vth Session of the Permanent Committee at Lugano, in 1954, and considering that this resignation may now be accepted,

Decides to admit as members of the Committee Belgium and Roumania in lieu and in place of the Netherlands and Czechoslovakia respectively,

Invites the President to write to the Government of Canada in order to inform it that its resignation could now be accepted, whilst reserving the decision concerning the succession of that State.

164. THE 48th CONGRESS OF THE INTERNATIONAL LITERARY AND ARTISTIC ASSOCIATION AT ATHENS IN SEPTEMBER 1959.

The International Literary and Artistic Association is doubtless the oldest international society concerned with improving the protection of copyright on the international plane. The Association was founded more than eighty years ago in Paris, under the chairmanship of Victor Hugo. Its members are mainly lawyers specializing in questions of copyright law.

ALAI prides itself on having sponsored the first informal meetings which, in 1886, led to the official diplomatic conference at which the International Union for the Protection of Literary and Artistic Works, the Berne Union, was founded.

Whereas in the beginning ALAI's membership was mainly French and national groups existed in only a few countries near France, today there are active and strong national groups in a dozen or more countries. There is no national group in the United States, although the Association has several individual members in this country.

Perhaps the principal manifestation of the activity of the Association consists in its "Congresses," which meet roughly every second year. The Congresses provide an opportunity for dispassionate, scholarly, and free exchange of views between the members of the Association. The meetings have no official character, but many Governments follow with interest the recommendations adopted by them.

The most recent of these Congresses, the forty-eighth, was held at the invitation of the Greek National Group of ALAI, in Athens in September 1959. The agenda included many of those questions which presently occupy the governments on the official level: protection of works of applied art and designs, the status of motion pictures and other sound-and-visual fixations, neighboring rights, double taxation, legislative reforms in different countries, the protection of the author's rights in connection with sound and television broadcasting, and an Italian proposal concerning the adoption of a uniform term of protection by some European countries.

Of the several resolutions adopted by the Athens Congress, we reproduce here those concerning applied arts (designs) and neighboring rights.

RESOLUTIONS

1. Resolution on Works of Applied Art, Designs and Models

Considering that is desirable that creators enjoy in the greatest number of countries effective protection for works of applied art, designs and models,

The International Literary and Artistic Association, in its Congress at Athens from September 14 to 19, 1959,

I. Is of the opinion,

that, in the immediate future as far as designs and models are concerned — according to the various meanings given these terms in the different countries — it is desirable that the Hague Arrangement be revised in a way that will permit a greater number of countries to adhere thereto,

is particularly of the opinion:

a. that is is desirable to simplify as much as possible the international procedure of deposit and registration within the framework of the said Arrangement;

b. that this procedure should cost as little as possible and should be organized in a way which makes fraud difficult;

c. that the question of minimum duration should be carefully studied;

d. that the same applies to the question concerning the date on which the effects of international deposit start and that this date should be fixed in a way which avoids any risk of undue appropriation by third parties;

II. Furthermore, is of the opinion

a. that the protection resulting from international deposit should not prejudice the protection which may be claimed or accorded in other ways; but that the Conference of Experts of The Hague should take into account Art. 2, par. 5, *in fine,* of the Convention of the Berne Union;

b. that, in order to allow certain countries non-signatories of the Paris Convention to adhere to The Hague Arrangement without, at the same time, joining said Convention, it would be opportune to study the conditions under which this could be done.

2. Resolution on the so-called Neighboring Rights

The International Literary and Artistic Association, in its Congress at Athens from September 14 to 19, 1959,

Having heard the report of Mr. Valerio de Sanctis on the present state of the problems connected with the plan of establishing an international convention concerning the rights of performing artists, record manufacturers, and broadcasting organizations, and especially on the plan of convening a new committee of experts,

Calls the attention of the intergovernmental organizations sponsoring the establishment of this international agreement, to the resolutions adopted in August 1958 at Geneva by the Permanent Committee of the Berne Union and the Intergovernmental Copyright Committee concerning the participation in the committee of experts, with full right to intervene in the discussions, of representatives of interested international non-governmental organizations;

Expresses the wish, in view of the present state of the procedure, that the experts be allowed to examine in their entirety the problems which will be submitted to their consideration, without being bound by any limitations, and particularly by texts which already exist.

165. CZECHOSLOVAKIAN COPYRIGHT LAW

A Survey

By ADOLPH C. PETERKA*

Czechoslovakia joined the Universal Copyright Convention[1] on October 6, 1959, effective January 6, 1960,[2] and thus became the first of the so-called People's Democracies to do so. It is therefore of interest to survey Czechoslovakian copyright law and to examine the factors that may have prompted the People's Government to take this step.

* Mr. Adolph C. Peterka, a Doctor of Laws and Political Sciences, Charles University, Prague, Czechoslovakia (1933) and Bachelor of Law, New York University (1956), is a former judge of the civil and commercial courts of Prague and now a member of the New York Bar. His review of copyright law in Czechoslovakia is particularly timely in view of the fact that that country, the first behind the Iron Curtain to do so, joined the Universal Copyright Convention and Protocols 2 and 3 thereto, effective January 6, 1960.

1. Prepared within UNESCO, concluded in Geneva, Switzerland, on September 6, 1952, effective September 16, 1955; authentic text, UNESCO Copyright Bulletin. Vol. V, No. 3-4.

2. UNESCO, Circular Letter series CL 1389; announcement of Czechoslovak Ministry of Foreign Affairs, dated Dec. 29, 1959, published Jan. 29, 1960, No. 2 Coil.

The main factor in Czechoslovakia's decision appears to be historical. Czechoslovakia is a country in which protection of copyright derives not only from statutory provisions but also from the deeply-rooted desire of the population for such protection.

As early as the eighteenth century, we find in the Bohemian countries scattered statutes providing for copyright. The first general copyright protection was granted in the Civil Code of the year 1811,[3] which gave authors the exclusive right to permit dissemination of their works. This right extended to literary and musical works, maps, and topographical sketches. A system of copyright protection was granted in 1846 by a specific decree of the Emperor; in 1895, the decree was superseded by statute.[4]

The independent Republic of Czechoslovakia, which was established after the First World War, provided in its basic law for the maintenance of copyright protection under the hitherto applicable provisions.[5] In 1921, Czechoslovakia joined the Berne Convention for the Protection of Literary and Artistic Works, and in 1926 enacted a statute by which it brought its copyright regulations into accord with the principles of the Convention.[6] In 1936, when Czechoslovakia joined the Rome Revision of this Convention,[7] it adopted a revised version of the 1926 statute.[8] This remained unchanged until December 31, 1953, when a new law was enacted, to become effective on January 1, 1954.[9]

The dramatic events of 1945 and 1948, radically changing the political and social structures of Czechoslovakia, as well as new technical developments in the dissemination of literary and artistic works, motivated the Czechoslovakian Government to enact the 1953 statute. Since the other so-called People's Democracies experienced similar changes in their political and social structures, copyright regulations enacted in recent years in these countries show certain common traits.[10] In Czechoslovakia, however, the legislator could look to old traditions and draw upon sources peculiar to Czechoslovakian copyright law. Thus, although the 1953 statute recognizes that the contents and purposes of any literary, scientific, or artistic work must conform to the socialistic principles of the regime, it nevertheless follows the principle that the author's copyright

3. Law of June 1, 1811, Sec. 1164 et seq., No. 946 Coll.
4. Decree of the Emperor of October 19, 1846, No. 992 Coll. which was superseded by the Law of December 26, 1895, No. 197 Coll.
5. Law of October 28, 1918, No. 11 Coll.
6. Law of November 24, 1926, No. 218 Coll.
7. Law of November 30, 1936, No. 286 Coll.
8. Law of April 24, 1936, No. 120 Coll.
9. Law of December 31, 1953, No. 115 Coll. (hereinafter cited as 1953 statute).
10. E.G. Rumania: Decree of February 16, 1951, No. 19 Coll.; Bulgaria: Law of November 12, 1951, No. 545 Coll.; Poland: Law of July 10, 1952, No. 234 Coll.

should be limited only to the extent necessary to preserve the interests of society in the cultural mission of his work. Thus, once his work is published, the copyright interests of the author himself are to be protected. This is expressed in the preamble to the 1953 statute:

> "The purpose of the copyright law is to regulate the relationships which arise in connection with the creation of literary, scientific and artistic works, in order
>
> to safeguard the protection of the interests of the authors of such works and to enhance the creative ingenuity for the benefit of the people and the improvement of its cultural standing
>
> at the same time to guarantee that widest segments of the working population may benefit from the results of the creative efforts of authors and
>
> that thus their works become an effective medium in the construction of a socialist society."

Since the author is assured protection of his interests, both in the preamble and in specific provisions of the 1953 statute,[11] there was no obstacle to Czechoslovakia's joining the Universal Copyright Convention.[12]

Other facts which persuaded Czechoslovakia to adhere to the U.C.C. can be deduced from an analysis of the Convention published in the legal periodical "Právník," edited by the Czechoslovakian Academy of Sciences.[13] This appears to be the only article published to date in Czechoslovakia on the subject.

According to "Právník," the principle of national treatment expressed in Article II of the Universal Copyright Convention was a significant factor in Czechoslovakia's decision. Under this principle, the Convention does not impose any concrete obligations on its members, but leaves the regulation of copyright to the legislatures of its signatories. It requires from the signatories only observance of the basic contractual obligation to grant to foreign authors protection equal to that granted to their own nationals.

Indeed, there are only a few provisions of the Universal Copyright Convention which impose concrete obligations upon its members. Article III specifies certain formalities upon which the protection of copyright is conditioned in member countries. All that is necessary for such protection is that "from the

11. 1953 statute, Sections 61-69.
12. For a comprehensive study of the 1953 statute see Knap: "Das neue Urheberrechtsgesetz der Tschechoslowakei", in Archiv fuer Urheber—Film—Funk und Theaterrecht, Vol. 21/1956, pp. 269-306.
    For critical observations on the 1953 statute, see Vilbos: "La nouvelle legislation tchechoslovaque", Revue international du droit d'auteur, Vol. VII/1955, pp. 23-67.
13. Milde: "Na okraj 'Vseobecne umluvy o autorskem pravu, Pravnik, Vol. XCVI/1957, pp. 549-557.

time of the first publication all the copies of the work published under 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." Although the Czechoslovakian statute of 1953 is based upon the principle of automatic copyright protection,[14] the formalities imposed by the U.C.C. appeared to the Czechoslovakian Government to be of small significance in light of the protection already granted by the 1953 statute.[15] Moreover, such indication of claim of copyright accompanied by a statement of the year of first publication has become almost a standard practice in Czechoslovakia, even in the absence of any legal or contractual requirement.

By joining the U.C.C., Czechoslovakia has considerably improved her position vis-a-vis the United States. Hitherto, under the Reciprocity Act of 1927,[16] and the U.S. Copyright Act of 1909,[17] it had been insufficient, for protection of a Czechoslovakian work in the United States, merely to indicate the reservation of copyright and the year of first publication. It also had been necessary to deposit a copy of the work, accompanied by appropriate registration forms, with the Register of Copyrights, the applicant then receiving a certificate of compliance. This was a considerable burden upon Czechoslovakian authors seeking protection of their works in the United States. Now, it will be enough merely to publish with the correct notice.

Similarly, Article XV of the Universal Copyright Convention, providing for the settlement of disputes between contracting parties as to the interpretation or application of the Convention by the International Court, was not considered an obstacle to Czechoslovakia's adherence. Such disputes can arise only as to proprietary rights of authors, and appeals to the International Court are envisaged only as ultimate remedies. It appears unlikely that there would

14. Section 14 of the 1953 statute provides:
"The copyright to a work is created by the verbal expression of the work or whenever the work is expressed in a manuscript, a draft, a sketch or in any other form."

15. In compliance with the Berne Convention, section 65 of the 1953 statute protects the proprietary rights of authors for the duration of their life and the proprietary rights of their heirs for a period of fifty years after the death of the author.
Article IV(2) of the Universal Copyright Convention requires a minimum period of twenty-five years for copyright protection after the death of the author.
It is solely in relation to the United States of America and certain other countries of the Western hemisphere which compute the duration of copyright protection not from the death of the author but from the time of first publication that the indication of the year of first publication is relevant.

16. Decree of April 27, 1927, No. 50 Coll.

17. 35 Stat. 1075 (1909) as amended.

ever be a suit so important as to warrant a signatory's resort to this ultimate remedy in order to enforce diplomatic protection of the proprietary rights of its subject.[18]

Since the substantive provisions of the Universal Copyright Convention did not prevent Czechoslovakia from becoming a signatory, Article XX of the Convention, forbidding any reservations, was no obstacle. This is true despite the fact that Czechoslovakia did not participate in the drafting of the Convention.

In Article X of the U.C.C., the signatories undertake to "adopt in accordance with their constitution such measures as are necessary to insure the application of this Convention." Czechoslovakia does not contemplate any legislative enactment, in response to Article X, which would amend its present statutory provisions in the field of copyright law. Only the duration of the protection of proprietary rights of authors of film and photographic works, and of official institutions and organizations to the contents of topical compilations and periodicals edited by them, will have to be extended from ten to twenty-five years.[19]

In brief, the present status of Czechoslovakian copyright law, in its international aspect, is as follows:

The statute of 1953 preserves the nationality principle as to works of Czechoslovakian citizens. Such works are protected no matter where they are published.[20]

The principle of territoriality applies to works published for the first time in Czechoslovakia. Such works by foreign authors are thus protected whether or not there is reciprocity or an applicable treaty.[21]

The principle of reciprocity or of protection under applicable treaties applies as to works by foreign authors published or disseminated abroad.[22]

It is of interest to note that the consent of the author to publication of his work in Czechoslovakia after it has been published abroad can be replaced,

18. This opinion was also expressed by the Committee of Experts, including its Chairman, which drafted the Universal Copyright Convention. See Escarra, Reflexion sur la protection internationale du droit d'auteur, Bulletin du droit d'auteur, Vol. II, No. 4, pp. 3 et seq.

19. Section 66 of the 1953 statute provides that compilations and periodicals edited by official institutions and organizations are protected for a period of ten years after their publication. Section 69 makes similar provision for film and photographic works.

20. Section 61 (1) of the 1953 statute.

21. Section 61 (2) of the 1953 statute.

22. Section 61 (3) of the 1953 statute.

under certain circumstances, by a direction to that effect issued by the Czechoslovakian Ministry of Culture. This provision, however, applies only to authors who are Czechoslovakian citizens.[23]

In its domestic aspect, Czechoslovakian copyright law is part and parcel of the new Czechoslovakian legal structure. Like other civil rights, it is guaranteed by the Czechoslovakian Constitution. Nobody is permitted to misuse copyright to the detriment of society.[24] Under the Czechoslovakian Constitution,[25] cultural assets are subject to state protection, for the state must care for the preservation and improvement of the cultural life of the working population. To endanger the performance of this duty by the state is a criminal act.[26]

That the state effectively carries out its role as "protector" of all cultural activity in Czechoslovakia can be seen from recent enactments in the field. A 1949 statute regulated the publication and circulation of nonperiodical literature.[27] Publishing was put under the control of the Central Publishing Council, with an annual publication plan to be worked out by the Ministry of Information and Public Education. The rights of private persons to publish non-periodical literature were abolished; and certain specified corporate bodies were granted the right to publish in the future.

A 1950 statute prohibited the publication of periodicals by private business.[28] The right to publish periodicals is available only to political parties of the so-called National Front, to governmental authorities, to united trade organizations, to economic and social organizations, and to the highest authorities in the field of physical culture. The 1950 statute also provided for a special license to be issued by the Ministry of Information and Public Education permitting the establishment of a publishing house. In addition, the statute brought into being the Union of Czechoslovakian Journalists. For a newspaperman, membership in this union is compulsory, but only those newspapermen who take an active part in the reconstruction of socialism in the Czechoslovakian Republic may be admitted.[29]

23. Section 22 of the 1953 statute provides for such replacement of the consent of the author by a decree of the Ministry of Culture when the obtaining of the consent of the author is not feasible or when the author unreasonably refuses to give his consent.

24. Czechoslovak Civil Code of October 25, 1950, Law No. 141 Coll., Sections 1-3.

25. Law of May 9, 1948, No. 150 Coll., Section 19(2).

26. Penal Law of 1950, No. 88 Coll.

27. Law of March 24, 1949, No. 94 Coll.

28. Law of December 20, 1950, No. 184 Coll.

29. Decree of the Czechoslovak Ministry of Information and Public Education of March 13, 1951, No. 21 Coll.

In 1953, the Czechoslovakian Theatrical and Literary Agency, Ltd., was established.[30] This agency has the exclusive right to transfer copyright in literary works to and from foreign countries.

30. Proclamation of the Czechoslovak Ministry of Information and Public Education of January 16, 1953, No. 29 Coll.

166. COPYRIGHT CONSIDERATIONS IN PURCHASING MOTION PICTURES FOR TELEVISION DISTRIBUTION

By STANLEY ROTHENBERG

Author's Note: This article is derived from a talk delivered on January 26, 1960 at a copyright committee forum (entitled, "Standard Forms in the Television Industry") of the Federal Bar Association of New York, New Jersey and Connecticut.

This discussion will be confined to some of the aspects of copyright law which should be considered when purchasing for television distribution a feature-length motion picture originally made for and distributed in motion picture theatres. The purchaser intends to rent or lease exhibition prints of the motion picture to television stations situated throughout the United States. In order for the purchaser (who we will sometimes call the "distributor") to rent the motion picture to a television station in a particular city he must generally be able to deliver the right to telecast exclusively from that city. In fact, the standard form rental agreement between distributors and television stations provides for such exclusivity.

Therefore, the first requirement of the distributor is the acquisition by him of exclusive television exhibition rights in the motion picture. Even though the seller has possession or control of the negative prints and materials which go into the making of exhibition or release prints and has possession of all exhibition prints which have been made he still cannot, on that basis alone, deliver exclusive television exhibition rights. Exclusive exhibition rights in a motion picture depend on the copyright in the motion picture. If a copyright has not been obtained in the motion picture or if the seller does not possess the copyright (assuming one exists) neither he nor his transferee will have adequate control over exhibition by others of release prints legally acquired and they may even not be able to exhibit those prints which they possess.

For example, if the motion picture is being sold by a laboratory which foreclosed its statutory lien on materials in its possession, it can only be certain

of its ownership of the physical material. Thus, a distributor who purchases the negative and positive prints may be confronted with the possibility that somewhere along the line of distribution duplicate prints will be made, the exhibition of which he may not be able to prevent; he also faces the possibility that the copyright owner will restrain him and his television station licensees from exhibiting the motion picture, and even from striking release prints from the negative materials.

See *Independent Film Distributors, Ltd. v. Chesapeake Industries, Inc.,* 250 F. 2d 951 (2d Cir., 1958) and the lower court opinion in 148 F. Supp. 611 (SDNY, 1957); *Republic Pictures Corp. v. Security-First National Bank of Los Angeles,* 197 F. 2d 767 (9th Cir., 1952).

The *Independent Film Distributors* case deals with the question, among others, of a lien imposed on a motion picture copyright, and the foreclosure thereof, under New York law. The *Republic Pictures* case treats the issue of federal jurisdiction (in the absence of diversity of citizenship) over foreclosure of a mortgage on a copyright even though there may be no remedy available in the state courts. Thus, in the ninth circuit case we find a party with a right and without a remedy and in the New York case a remedy accompanied by a doubtful right.

One of the lessons to be learned from the foregoing cases is that the distributor should conduct or cause to be conducted a search of the Copyright Office records to ascertain whether any claims adverse to the seller are a matter of public record. Section 30 of the Copyright Act provides that:

> Every assignment of copyright shall be recorded in the copyright office within three calendar months after its execution in the United States or within six months after its execution without the limits of the United States, in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded.

It will be observed that the phrase, "whose assignment," in the last half dozen words of the section, relates to the phrase, "subsequent purchaser or mortgagee." Thus, it is reasonable to interpret the opening words, "Every assignment," to mean, "Every assignment and mortgagee." Although I have participated in many "motion pictures for television" transactions I do not recall any instances where purchasers have deposited the purchase price in escrow pending the expiration of the three or six months in order to safeguard against recent assignments or mortgages. Obviously, however, where one is dealing with a questionable character prudence dictates such precaution.

Reference should be made to two cases which have treated licenses as falling within the recording requirements of section 30. They are: *Photo-Drama Motion Picture Co. v. Social Uplift Film Corp.,* 213 Fed. 374 (SDNY, 1914)

aff'd 220 Fed. 448 (2d Cir.) and *Macloon v. Vitagraph, Inc.*, 30 F. 2d 634 (2d Cir., 1929). Thus, even though the distributor may be purchasing only television exhibition rights or all rights for a term of years, so that it is technically a license and not an assignment, the license should be recorded in the Copyright Office as protection against a subsequent bona fide purchaser or mortgagee without notice. Since the financial terms of the transaction are usually confidential it is customary for the seller to give the purchaser a so-called "short form assignment" for recordation.

Often, the motion pictures being sold for television exhibition were produced by the major Hollywood studios. Some of the agreements by which they sold these motion pictures and the copyrights thereof contain a clause prohibiting the televising of the film until after all reference to the studio is removed from the screen credits including mention in the copyright notice. If the notice is removed it should be replaced with another one. The date must remain the same. The only change which is absolutely necessary is the substitution of the name of the new copyright proprietor. However, the motion picture should not be distributed or televised until after the assignment of copyright from the studio to the new proprietor has been recorded. Although the language of article 32 of the Copyright Act does not appear to be mandatory, *Group Publishers v. Winchell,* 86 F. Supp. 573 (SDNY, 1949) interpreted the section to mean that substitution in the notice before recording the assignment causes a forfeiture of the copyright.

When the distributor is paying a large sum of money for a motion picture he may not wish to be confronted with, for example, a live or filmed television show based on the literary property underlying the motion picture. Therefore it is desirable to examine the agreements by which the literary property was acquired for filming. If the seller has acquired rights additional to that of making the motion picture in question the purchaser should seek to have them included in the sale or, at the least, a restriction should be placed on their exercise for a reasonable period plus a "right of first refusal" upon the expiration of the restriction. Consequently, the search of the Copyright Office records should also extend to the literary property serving as the basis for the motion picture. In any event the literary purchase agreement must be examined because the proprietor may have conveyed to the motion picture producer only the right of theatrical exhibition. Or the grant of the television right may have been conditioned upon payment of an additional consideration. Or the right to assign the motion picture rights in the literary property may have been subject to the assumption by the assignee of the obligation of television payments.

Similar considerations apply to the other creative personnel whose efforts are embodied in the motion picture. They can convey their performers' rights

subject to further payments, be they deferred percentage participations or payments contingent upon distribution of the motion picture on television.

In sum, it can be stated that the absence of copyright litigation in connection with the production and theatrical distribution of a feature-length motion picture is no basis for disregarding copyright law when counseling a purchaser of such property for television distribution.

PART II.

LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

1. UNITED STATES OF AMERICA AND TERRITORIES

167. THE PRESIDENT.

Executive I, 86th Cong., 1st Sess., Message from the President transmitting the Agreement on the Importation of Educational, Scientific, and Cultural Materials (for the advice and consent of the Senate). 15 p.

This Message contains the text of a memorandum, dated July 6, 1959, from Robert Murphy, Acting Secretary of State, to the President, the following language of which may interest the copyright bar:

"Although the United States participated actively in the drafting of this agreement, and voted for its adoption by the General Conference of the United Nations Educational, Scientific, and Cultural Organization at its fifth session in Florence in July 1950, the United States had deferred submission of the agreement to the Senate until the effect of the U.S. ratification of the Universal Copyright Convention (6 U.S. Treaties and Other International Agreements 2731) became known, since the implementation of that Convention also affects the importation of published materials.

"The Universal Copyright Convention requires, in effect, that works coming within the terms of that Convention, that is works of nationals of other parties to the convention or first published in territory of such other parties, be exempted from certain formalities, including the 'local manufacturing clause' of the U.S. copyright law. This so-called manufacturing clause is essentially a quota on the number of copies of any English language book manufactured abroad which may be imported into

the United States if copyright is claimed here. There was some concern that modification of the 'manufacturing clause' to the extent necessary to permit effect to be given to the Universal Copyright Convention might cause injury to the U.S. book-manufacturing industry. Since the agreement on the importation of educational, scientific, and cultural materials would require the elimination of rates of duty on books and periodicals, it was not considered appropriate to seek ratification of the two agreements simultaneously. Accordingly, only the Universal Copyright Convention was submitted for approval in 1954, and it was decided that the present agreement would not be signed or submitted to the Senate until it could be ascertained what effect the implementation of the Universal Copyright Convention would have on the U.S. book-manufacturing industry.

"Due to the unanticipated delay in the ratification of the Universal Copyright Convention by English-speaking countries of principal importance in the book-manufacturing field, it has not been possible until recently to gather data on the effect of the change in the U.S. 'local manufacturing clause.' From import information obtained to date it would appear that the increase in English language imports under the Universal Copyright Convention is not significant in relation to the total volume of domestic production, and is in fact so small that it could very well represent a normal year-to-year variation rather than a result of the change in the manufacturing clause."

2. FOREIGN NATIONS

168. JAPAN. LAWS, STATUTES, ETC.

The Law for Designs of Export Goods [Law No. 106 of April 6, 1959]; the Design Law [Law No. 125 of April 13, 1959]; the Design Law Enforcement Law [Law No. 126 of April 13, 1959]; the Law Concerning the Coordination of Related Laws and Ordinances following the coming into force of the Patent Law, etc. [Law No. 129 of April 13, 1959] Together with cross-references for the Patent Law and the 1959 Annual Report of the Patent Office. Tokyo, Trade Bulletin Corporation [1959]. 162 p. (The New industrial property code series of Japan, vol. 2.)

The texts of new industrial property laws of Japan, effective April 1, 1960. [Note: Laws No. 106 and 125 are summarized briefly in the *Bulletin* of the American Patent Law Association, Nov.-Dec. 1959, p. 446.]

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

169. CEYLON.

Déclaration de continuité à la Convention de Berne pour la protection des oeuvres littéraires et artistiques, révisée à Rome le 2 juin 1928 (sans interruption à partir du 1er octobre 1931). (72 *Le Droit d'Auteur* 205-206, no. 12, Dec. 1959.)

Notification, dated Nov. 23, 1959, by the Swiss Government to the Berne Union member states, of receipt of a letter from the Prime Minister of Ceylon forwarding that country's instrument of accession, as an independent state, to the Rome revision of the Berne Convention, in effect continuing her accession effective from Oct. 31, 1931 when she was a British colony.

170. GERMANY. DEMOCRATIC REPUBLIC. 1949— .

Bekanntmachung über die Wiederanwendung multilateral internationaler Ubereinkommen, vom 16. April 1959. (61 *Blatt für Patent-, Muster-und Zeichenwesen* 315, no. 11, Nov. 1959.)

Notification, by the East German Minister of Foreign Affairs, of the reapplication of the German Democratic Republic to the Rome revision of the Berne Convention, effective from August 29, 1955, the Montevideo Convention of January 11, 1889 concerning the protection of works of literature and art and the supplementary protocol thereto of Feb. 13, 1889, effective from Dec. 10, 1957, and the Convention concerning International Exhibitions of November 22, 1928, effective from February 23, 1958.

171. INTERGOVERNMENTAL COPYRIGHT COMMITTEE.

3d session, Geneva, 1958.

[Actes du] Comité intergouvernemental, troisième session (Genéve, 18-23 août 1958). (72 *Le Droit d'Auteur* 196-201, no. 11, Nov. 1959.)

Records of the third session of the I.G.C.C., held jointly with the 7th session of the Permanent Committee of the Berne Union at Geneva, August 18-23, 1958, including the French and English texts of the resolution approved by the I.G.C.C.

172. INTERGOVERNMENTAL COPYRIGHT COMMITTEE.
4th session, Munich, 1959.

[Actes du] Comité intergouvernemental, quatrième session (Munich, 12-17 octobre 1959). (72 *Le Droit d'Auteur* 212-216, no. 12, Dec. 1959.)

Records of the 4th session of the I.G.C.C. held jointly with the 8th session of the Permanent Committee of the Berne Union at Munich, October 12-17, 1959, including the French and English texts of the resolutions approved by the I.G.C.C.

173. INTERNATIONAL BUREAU FOR THE PROTECTION OF INDUSTRIAL PROPERTY.

International conference of experts for the preparation of a draft text for the revision of the Arrangement of the Hague concerning the International Deposit of Designs, the Hague, Netherlands, 1959. Den Haag, Octrooiraad [1959]. 15 p. (typescript) Contents: 1) Draft Arrangement and Protocol; 2) Explanatory statement; 3) List of participants.

174. INTERNATIONAL BUREAU FOR THE PROTECTION OF INDUSTRIAL PROPERTY.

Réunion du Comité d'experts chargé de preparer la révision de l'Arrangement de la Haye concernant le dépôt international des dessins on modèles (La Haye, 28 septembre-8 octobre 1959). (75 *La Propriété Industrielle* 213-219, no. 11, Nov. 1959.)

French text of the records of the international conference of experts for the preparation of a draft text for the revision of the Arrangement of the Hague concerning the International Deposit of Designs. See Item 173, *supra.*

175. INTERNATIONAL COPYRIGHT UNION. *Permanent Committee. 7th, Geneva,* 1958.

[Actes de la] Septième session du Comité permanent de l'Union internationale pour la protection des oeuvres littéraires et artistiques (Genève, 18-23 août 1958). (72 *Le Droit d'Auteur* 188-196, no. 11, Nov. 1959.)

Records of the 7th session of the Berne Union Permanent Committee, held jointly with the 3d session of the Intergovernmental Copy-

right Committee at Geneva, August 18-23, 1958, including the French and English texts of the resolutions approved by the Permanent Committee.

176. INTERNATIONAL COPYRIGHT UNION. *Permanent Committee. 8th, Munich,* 1959.

[Actes de la] Huitième session du Comité permanent de l'Union international pour la protection des oeuvres littéraires et artistiques (Munich, 12-17 octobre 1959). (72 *Droit d'Auteur* 206-212, no. 12, Dec. 1959.)

Records of the 8th session of the Permanent Committee of the Berne Union held jointly with the 4th session of the Intergovernmental Copyright Committee at Munich, October 12-17, 1959, including the French and English texts of the resolutions approved by the Permanent Committee.

PART IV.

JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY

A. DECISIONS OF U. S. COURTS

1. Federal Court Decisions

177. *Church* v. *Bobbs-Merrill Co.,* 123 U.S.P.Q. 517, 272 F.2d 212 (7th Cir. Dec. 2, 1959) (Castle, J.).

Action for breach of contract. On January 18, 1951, plaintiff had assigned to defendant all publication rights in an unpublished book entitled "Mary Meade's Magic Cookery." Plaintiff promised to deliver the completed manuscript before January 2, 1953, and defendant agreed to publish same, although the contract fixed no publication date. Plaintiff failed to meet the deadline for delivery of the manuscript, but, by agreement of the parties, the deadline was extended from time to time. At last, in 1957, plaintiff delivered the manuscript to defendant. Defendant was unwilling to publish it, and, at plaintiff's request, returned it to her. In

August 1957, plaintiff advised defendant that if defendant did not publish the manuscript, plaintiff would present it to some other publisher for consideration. Defendant moved for summary judgment.

Held, motion granted.

The Court found that mutual rescission of the 1951 contract was implied in the conduct of the parties. In addition, the Court noted that, since plaintiff had asked for the return of her manuscript in 1957, she was estopped to assert defendant's breach of the contract to publish.

178. *Alva Studios, Inc.* v. *Winninger, d/b/a Wynn's Warehouse, et al.,* 123 U.S.P.Q. 487, 177 F. Supp. 265 (S.D.N.Y. Oct. 16, 1959) (Ryan, J.).

Action for copyright infringement. Plaintiff was in the business of making three-dimensional reproductions of works of art under the authority of the museums owning such works. Defendant was in the business of making and selling decorative accessories. Plaintiff created a small-scale reproduction of Rodin's "Hand of God," which it marketed with the appropriate copyright notice. Defendant thereafter made and marketed a reproduction of the same statue. Charging infringement of its reproduction, plaintiff moved for a temporary injunction.

Held, motion granted.

The Court first noted that, although the original Rodin sculpture was in the public domain, plaintiff's reproduction exhibited sufficient originality to warrant copyright protection. "It is in the successful accomplishment of this reduction in size that plaintiff claims, with apparent support, that the originality and validity of the copyright of his work rests." As to infringement, the Court commented that, where both works are based upon originals in the public domain, more than mere similarity will be required. "One work does not violate the copyright in another simply because there is a similarity between the two, if the similarity between the two results from the fact that both deal with the same subject or have the same source. . . . But, the availability to a defendant of other 'common sources' is not a defense to an action for copyright infringement if the defendant actually copied the plaintiff's work. . . . Here there is convincing credible evidence to establish actual copying."

179. *Schwartz, et al.* v. *Broadcast Music, Inc., et al.,* 124 U.S.P.Q. 34 (S.D.N.Y. Dec. 7, 1959) (Weinfeld, J.).

Treble-damage action under the antitrust laws. Plaintiffs were 33 songwriter members of ASCAP. Defendants included Broadcast Music, Inc. (a music-licensing organization), the leading radio and television

networks, certain subsidiary recording and publishing companies, and some of their officers and directors. In essence, plaintiffs charged that defendants conspired to dominate and control the market for the use and exploitation of musical compositions, especially the rights to public performance for profit, to establish and maintain a monopoly of the market in musical compositions, and to restrain trade and commerce therein. Defendants moved for full or partial summary judgment on the ground that plaintiffs had no standing to maintain this action.

Held, motion granted in part and denied in part.

"The issue here falls within a very narrow compass — whether the alleged antitrust conduct of the defendants has injured the plaintiffs in their business or property within the meaning of the antitrust statute so as to give them standing to maintain this action for treble damages . . . The defendants' position broadly stated is that the pre-trial record demonstrates that the plaintiffs have so divested themselves to others — ASCAP and music publishers — of rights in their compositions, that they retained no 'business or property' susceptible of direct injury within the meaning of the statute; that the conspiracy to restrict compositions written by the plaintiffs, if it injures anyone, directly injures ASCAP and the publishers, and injury, if any, to plaintiffs is indirect, remote and incidental, for which recovery is not permitted under the act. . . . The burden of the defendants' challenge to the plaintiffs' standing to sue centers about the separate dispositions by plaintiffs of (1) printing, publishing, and mechanical reproduction rights, sometimes referred to hereafter as the publishing and recording rights, and (2) the nondramatic public performance rights for profit, hereafter referred to as the public performance rights. The claims which center about these rights may be considered separately. To support their position, the defendants note that the complaint alleges, and the pre-trial record establishes, that plaintiffs' and other writers' compositions are marketed through (1) the printing and sale of sheet music, (2) the licensing of recordings on phonograph records and other mechanical reproductions, and (3) the licensing of public performance rights. Accordingly, the defendants argue that since the plaintiffs have granted, for commercial exploitation, their public performance rights to ASCAP and their recording and publishing rights to the publishers, from whom they receive payments therefor, any injury to plaintiffs is indirect and secondary; that the conspiracy, if it injures anyone directly, injures ASCAP and the music publishers; that the right to sue for damages for such direct injuries is with them and not with the plaintiffs. . . . No purpose is served in attempting to define the precise jural nature of ASCAP whether 'co-operative society', 'agent', 'conduit', or

'middle-man', as plaintiffs variously contend or, as the defendants contend, 'a corporate-like entity' or an association whose entire membership has a 'joint and common interest' in this action similar to the members of a partnership. Theoretical concepts must give way to reality. The stubborn facts are that the plaintiffs under the Articles of Association by which they are bound have executed agreements which unequivocally transfer to ASCAP a nonexclusive right to license public performance for profit of their compositions; that it is ASCAP, and ASCAP alone, which has marketed and licensed the 7,000 songs written by plaintiffs; that it was not the plaintiffs but ASCAP which negotiated the prices and terms of the licenses; that it was not the plaintiffs but ASCAP which prosecuted claims of infringement of plaintiffs' compositions. It is ASCAP and not its licensees from which the plaintiffs and their fellow members receive royalties. It is ASCAP which determines how much each composer shall receive. The amount distributable to a plaintiff of his share of the fund is beyond his control. Thus, even were it accepted that ASCAP is a 'co-operative society' which renders services exclusively in the interests of its members, this would 'not remove its activities from the sphere of business.' Its business nature is not affected by its nonprofit character. . . . The conclusion is compelled that in practice and in fact it is ASCAP which was and is engaged in the business of licensing plaintiffs' compositions for public performance; that for that purpose plaintiffs have so divested themselves of their public performance rights to ASCAP that any injury resulting from the conspiracy was primarily and directly upon ASCAP; that injury, if any, sustained by the plaintiffs is secondary and remote. . . . Upon all the foregoing, the Court holds that with respect to the nondramatic public performance rights, the plaintiffs are without standing to sue. . . . *The publishing and recording rights and the publishers.* The plaintiffs have entered into agreements with 300 music publishers who are also members of ASCAP. Under these they have transferred to the publishers their unpublished original compositions with the right to secure copyright therein and all rights thereunder, subject to the performance rights granted to ASCAP. . . . [Plaintiffs] charge that music publishers with whom they had contracts were induced by subsidies, restrictive covenants, incentive payments and other devices including payment of salaries of publishers' employees, to refrain from publishing and exploiting plaintiffs' songs; that recording companies were induced by various methods not to record plaintiffs' songs; that these activities were all for the purpose of suppressing plaintiffs' musical compositions altogether or to discriminate in favor of BMI songs. Plaintiffs further allege that some publishers, who were ASCAP houses, organized BMI

companies and although in theory functioning separately, in fact, because of special concessions granted by BMI to the publishers, refrained from promoting non-BMI music or curtailed its exploitation. . . . This branch of the conspiracy appears, upon the facts alleged, to be directed not against the publishers but rather against the songwriters. A conspiracy may have more than one objective and its force directed against one or more intended victims. The target area of the conspiracy was broad enough to include plaintiffs insofar as the publication and recording rights are concerned. Upon the facts alleged, the publishers were not damaged since they received compensating payments from the defendants; the only persons damaged were the songwriters. The wrongful acts had a direct impact on the composers who were injured thereby and not upon the publishers who were made whole. The bounties granted to the publishers removed them from the target area of the defendants' attack and placed plaintiffs directly in the line of fire. . . . Under all the circumstances presented, plaintiffs have set forth enough to support their claim of direct injury due to the acts and conduct charged against the defendants so as to entitle them to maintain this claim. Accordingly, this aspect of the defendants' motion is denied. *Plaintiffs' 1200 songs as to which no publisher contracts are in effect.* There remains for final consideration the defendants' contention with respect to the 1,200 songs as to which no publisher contracts are in effect. These constitute works of which the respective plaintiffs were either a registered proprietor of statutory copyright, a holder of legal title to common law copyright, or are compositions in which a publisher's right has terminated because of cancellation of the contract. The interest of plaintiffs therein was susceptible to damage by the charged conspiracy. Here the plaintiffs claim that the publishing and recording market was entirely foreclosed to them by reason of defendants' action. . . . Accordingly, the defendants' motion likewise is denied with respect to the 1,200 songs."

180. *Barton Candy Corp.* v. *Tell Chocolate Novelties Corp., et al.,* 123 U.S.P.Q. 425, 178 F. Supp. 577 (E.D.N.Y. Nov. 18, 1959) (Bartels, J.).

Action for copyright infringement and unfair competition. Plaintiff created a cardboard container for chocolate bars, each container bearing a picture of Santa Claus and various other Christmas symbols, along with appropriate notice of copyright. The container was registered with the Copyright Office as a print or label (Class K). One year after plaintiff put its package on the market, defendant marketed a container and a chocolate bar which plaintiff claimed respectively infringed its copyright and constituted unfair competition.

Held, after trial, for defendants.

The Court compared the containers created by plaintiff and defendant, and found "that the defendant's container represents a totally different expression, adaptation and arrangement, both in design and color, of the Santa Claus idea and Christmas motif than that depicted on the plaintiff's container." The Santa Claus figure, moreover, is in the public domain. As to the charge of unfair competition with regard to the chocolate bar, the Court found that each party's candies were sufficiently different to warrant dismissal of the claim.

181. *Hayden* v. *Chalfant Press, Inc., et al.,* 123 U.S.P.Q. 475, 177 F. Supp. 303 (S.D. Calif., Centr. Div'n Sept. 30, 1959) (Yankwich, J.).

Action for copyright infringement. Plaintiff, a cartographer, charged defendants with infringing his copyrighted "outing" maps of portions of northern California.

Held, after trial, for defendants.

Plaintiff here could produce no evidence of direct copying; instead, he relied upon evidence of common errors. But defendants apparently copied their maps, with authority, from maps produced by the Automobile Club of Southern California, which maps had been circulated with Automobile Club copyright notice at least as early as 1940. Plaintiff had never claimed the Automobile Club's maps infringed his, and thus he was held estopped to maintain this action. Moreover, the Court found that the Automobile Club maps were independently produced by the Club. The Court's discussion of the use of place-names on copyrighted maps is of particular interest: "[Plaintiff], as a witness, made much of the fact that he had given names to certain unnamed places: lakes, creeks, trails, hills or peaks. One gathered the impression that by giving them names, he thought that he acquired the exclusive right of having maps with such names on them. But this is not the law. For by giving the names [plaintiff] granted to everyone the right to having the names used, so that field crews or sportsmen coming into the field later would know, either through markings or signs or through the mouths of settlers or packers in the district, that the peaks, lakes and creeks, trails and roads and other physical configurations of the terrain had been 'christened' and were, henceforth, to be known by such names."

182. *McIntyre* v. *Double-A Music Corp., et al.,* 124 U.S.P.Q. 27 (S.D. Calif., Centr. Div'n Nov. 24, 1959) (Solomon, J.).

Plaintiff moves for a new trial. Earlier, plaintiff had sued defendants for common law copyright infringement and for unfair competition in

connection with an arrangement of a popular song. Judgment had been for defendants on the ground that (1) plaintiff's arrangement showed no originality, and (2) plaintiff's arrangement had been recorded, and thus dedicated to the public.

Held, motion denied.

The Court adhered to its earlier determination that plaintiff's work evinced insufficient originality to warrant copyright protection.

2. State Court Decisions

183. *Kapplow* v. *Abelard Schuman, Ltd., et al.,* 124 U.S.P.Q. 58, 193 N.Y.S.2d 931 (Sup. Ct., N.Y. Co. Dec. 23, 1959) (Baer, J.).

Action for an injunction and damages. Plaintiff and the defendant co-author had collaborated on a book entitled "Captions Courageous," published in October 1958. In September 1959, defendant co-author, through defendant publisher, individually published a similar book entitled "More Captions Courageous." Plaintiff's action as against the publisher was dismissed, but continued as against defendant co-author.

Held, after trial, for plaintiff.

The Court found that, although plaintiff had refused to work on the second book with defendant co-author, plaintiff had not waived his rights to any property he may have had in the first book, nor did he agree that the second book might be nearly identical to the first. The Court therefore directed that the royalty arrangement applicable to the first book apply as well to the second book.

184. *Smith* v. *Paul, et al.,* 123 U.S.P.Q. 463 (Calif. Dist. Ct. of Appeal, 1st Dist., Div'n One Oct. 27, 1959) (Bray, J.).

Action for common-law copyright infringement. Plaintiff was a designer of homes. He had produced certain architectural plans for defendants who had used them once and paid plaintiff. Defendants were now using the plans to build additional homes, and without further compensation to plaintiff. Defendants urged that plaintiff had lost whatever common-law copyright he may have had in the plans by filing them with the local building department for approval, such filing constituting publication. After trial, judgment was for defendants, and plaintiff appealed.

Held, reversed.

The Court first referred to California Civil Code §980 as embracing common-law copyright, and held that architectural designs were subject to such protection. Although plaintiff had indeed filed his plans in order

to get a building permit, the Court remarked that this evinced no intent to dedicate the plans to the public, and thus did not result in loss of common-law copyright protection. In addition, the fact that the plans had earlier been used in the erection of a home did not constitute a publication of the plans. "A complete structure is no more a copy than the exhibition of any uncopyrighted moving picture film, the performance of an uncopyrighted radio script, or the broadcast of an uncopyrighted radio script, all of which acts have been held not to dedicate the contents to the public. . . . the noun 'copy' ordinarily and as used in the copyright cases signifies a tangible object that is a reproduction of the original work.... Here the architect limited the use of his plans both as to the persons allowed to use the work. . . . and to the use to which such persons might make of the work (the construction of one house). This limitation as to persons and use has been held to be the test of limited publication."

PART V.

BIBLIOGRAPHY

A. BOOKS AND TREATISES

1. United States Publications

185. COPYRIGHT LAW SYMPOSIUM NO. 10. New York, Columbia University Press, 1959. 479 p. Nathan Burkan Memorial Competition, sponsored by the American Society of Composers, Authors and Publishers, 1957-58.

The prize essays are analyzed separately *infra.*

2. Foreign Publications

186. GOLDBAUM, WENZEL. Lateinamerikas urheberrechtliche Gesetzgebung; eine rechtsvergleichende Darstellung. Baden-Baden, Verlag für angewandte Wissenschaften, 1959. 101 p. (Schriftenreihe der UFITA, Heft 12).

A comparative study of the copyright laws of the Latin American republics with some reference to their international copyright relations.

187. GOURIOU, RENÉ. La photographie et le droit d'auteur; études de droit comparé. Paris, Librairie générale de droit et de jurisprudence, 1959. 200 p.

A comparative treatise on copyright protection of photography with special reference to the French Copyright Law of 1957.

188. TROLLER, ALOIS. Ist der immaterialgüterrechtliche "numerus clausus" der Rechtsobjekte gerecht? Basel, Helbing & Lichtenhahn, 1959. Pp. 769-786.

"Sonderabzug aus Ius et Lex, Festgabe für Max Gutzwiller."

A philosophical discussion of the question whether the protection of certain intellectual ideas and scientific discoveries which are not protected by copyright, patent or other laws is a proper subject matter for legislation.

B. LAW REVIEW ARTICLES

1. United States

189. CATERINI, DINO JOSEPH. Contributions to periodicals. *Copyright Law Symposium* No. 10, 1959, pp. 321-386.

This paper, winner of honorable mention in the 1957 Competition, "focuses on the desirability of contributors to periodicals obtaining separate copyrights to their contributions."

190. FELDMAN, MARTIN LEACH-CROSS. The relationship between copyright and unfair competition principles. *Copyright Law Symposium* No. 10, 1959, pp. 266-284.

This paper, winner of honorable mention in the 1958 Competition, points out the complexities that result from the overlapping of principles between copyright and unfair competition and to arrive at a workable solution.

191. JACKSON, ROY V. Industrial designs in Canada: the Royal Commission Report. (41 *Journal of the Patent Office Society* 681-689, no. 10, Oct. 1959.)

A critique of the Royal Commission *Report on industrial designs* issued in 1958. See 6 BULL. CR. SOC. 192, Item 171 (1959).

192. MILLER, ARTHUR R. Problems in the transfer of interests in a copyright. *Copyright Law Symposium* No. 10. 1959, pp. 131-193.

This paper, winner of honorable mention in the 1958 Competition, "will appraise the extent to which the present statutory transfer system has kept pace with the proliferation of marketable elements in a copyrighted work and has delineated the rights and duties of the transacting parties and provided the purchaser with a method for assuring that he has acquired a valid title."

193. MOONEY, EUGENE. The jukebox exemption. *Copyright Law Symposium* No. 10, 1959, pp. 194-218.

This paper, winner of honorable mention in the 1957 Competition, points out the inequities of the jukebox exemption which is described as an anachronism.

194. MORRISON, PETER H. Copyright publication: the sale and distribution of phonograph records. *Copyright Law Symposium* No. 10, 1959, pp. 387-421.

This paper, winner of honorable mention in the 1958 Competition, analyzes the important case law on the question whether the sale and distribution of phonograph records constitute publication of the composition recorded.

195. NEEDHAM, ROGER. Tape recording, photocopying, and fair use. *Copyright Law Symposium* No. 10, 1959, pp. 75-103.

This paper, which received the national award in the 1958 Competition, presents "a very useful analysis of the factors which American courts have considered in applying the doctrine of fair use to copyright infringement cases in such relatively new media as tape recording and photocopying."

196. NONPATENTABLE AND NONCOPYRIGHTABLE TRADE VALUES: *private rights and the public interest.* (59 *Columbia Law Review* 902-937, no. 6, June 1959.)

An examination into the present state of the law regarding unauthorized appropriations of industrial designs, renditions and recordings of musical compositions, and "commercially valuable aggregations of technological know-how." An assessment is made of the possible alternative modes of treatment where it appears that the law is not adequate to the

needs of both originators and the public and consideration is given to the question "whether any limitations are imposed on the available alternatives by virtue of the copyright clause of the Constitution or by preemptive federal legislation."

197. OLEVSON, SAMUEL A. English experience with registration and deposit. Copyright Law Symposium No. 10, 1959, pp. 1-74.

This paper, which was the national award winner in the 1957 Competition, "is a scholarly dissertation on the development of English law governing registration and deposit of copyrighted works . . . [and] graphically illustrates the role which diverse groups have played in the English development of this phase of copyright law."

198. PHILLIPS, L. LEE. Related rights and American copyright law: compatible or incompatible? *Copyright Law Symposium* No. 10, 1959, pp. 219-265.

This paper, winner of honorable mention in the 1958 Competition, compares "the recommendations and provisions of various international conferences and conventions with American law on protection of performers, recorders, and broadcasters."

199. STATE REGULATION OF RADIO AND TELEVISION. (73 *Harvard Law Review* 386-405, no. 2, 1959.)

A note on State "rules, both statutory and decisional, which supplement, complement, and, on occasion, conflict with federal control." Choice of law and avoidance of multiplicity of actions in connection with defamation and right of privacy suits and the problem of conflicting treatment of multistate infringement of performers' rights are discussed briefly.

200. SWINDLER, WILLIAM F. News: public right v. property right. *Copyright Law Symposium* No. 10, 1959, pp. 285-320.

This paper, winner of honorable mention in the 1958 Competition, "has undertaken to summarize and compare Anglo-American practices with reference to news copyright, the practices of selected civil law jurisdictions, and the provisions which have been worked out in international law and legislation to date."

201. WILSON, JOHN L. The scholar and the Copyright Law. *Copyright Law Symposium* No. 10, 1959, pp. 104-130.

This paper, which was awarded honorable mention in the 1957 Competition, "includes both discussion of the pitfalls which may face writers on scholarly subjects and practical sugestions on how these pitfalls may be avoided."

2. Foreign

(a) English

202. GERMANY. FEDERAL REPUBLIC. New draft bills on copyright. (*E.B.U. Review,* no. 58 B, Nov. 1959, pp. 37-38.)

A summary of those provisions in the newly revised German draft bills relating to copyright "that have a bearing on broadcasting in one way or another."

203. GIANNINI, AMEDEO. The protection of sporting events. (*E.B.U. Review* 27-31, no. 58 B, Nov. 1959.)

The writer demonstrates that there is no legal basis for the protection of sporting events in Italy either under principles of copyright or neighboring rights. "If, however, it should be considered necessary to adopt special legislation for the protection of sporting events in Italy either under principles of copyright or Neighboring rights, naturally within the limits of the practical possibilities of affording such protection, the problem must be considered entirely *de jure condendo,* and hence *ex novo,* with some invention that will reasonably take its place in the system of Italian law."

204. MENTHA, BÉNIGNE. Recent contributions to the doctrine of ancillary rights. (*E.B.U. Review* 32-36, no. 58 B, Nov. 1959.)

A review of eight contributions issued in a series of monographs by the Internationale Gesellschaft für Urheberrecht (International Copyright Society) with the conclusion that "all these differing opinions and studies give one reasons to hope that in theory a doctrine will emerge and that in practice some legislative solution will be developed, the first bearing the seal of truth and the second that of efficiency with justice."

(b) French

205. BERGSTROM, SVANTE. Problèmes actuels en matière de radio-diffusion dans le domaine international. (*Revue Internationale du Droit d'Auteur* 120-158, no. 25, Oct. 1959.)

"This article [in French, English and Spanish] will concentrate on three closely connected questions, to wit, the limitations made on the author's exclusive right regarding broadcasting, as provided by paragraph 1 of article 11 *bis* of the Berne Convention, by paragraph 2 (compulsory licence) etc., and paragraph 3 (ephemeral recordings) of the same article, also by paragraph 10 *bis* (radiophonic reporting)."

206. CIAMPI, ANTONIO. Durée du droit d'auteur et intégration européenne. (*Inter-Auteurs* 94-96, no. 136, 3. trimestre 1959.)

The director general of the Italian Society of Authors and Publishers (S.I.A.E.) favors a recent proposal submitted by the S.I.A.E. to the Council of Europe that its member states establish a uniform term of copyright protection, specifically up to eighty years after the death of the author.

207. LYON-CAEN, GÉRARD. Le cinéma dans la Convention de Berne. (72 *Le Droit d'Auteur* 217-225, no. 12, Dec. 1959.)

A report on copyright questions in the field of cinematography written with the objective of revising article 14 of the Berne Convention and submitted to the 7th session of the Permanent Committee of the Berne Union, Geneva, August 1958.

208. LYON-CAEN, GÉRARD. Le faux artistique. (*Revue Internationale du Droit d'Auteur* 2-45, no. 25, Oct. 1959.)

A discussion, in French, English and Spanish, of the legal protection against art forgery in France, organized under the following captions: 1. Definition and classification of the different hypotheses included under the appellation of art forgery. 2. Art forgery from the point of view of copyright. 3. Art forgery according to the general criminal law.

209. MATTHYSSENS, JEAN. Sanction de la lésion dans les contrats relatifs aux droits d'auteur. (*Revue Internationale du Droit d'Auteur* 72-119, no. 25, Oct. 1959.)

An analysis, in French, English and Spanish, of article 37 of the

French Copyright Law of 1957 which sets forth the conditions under which an author may demand a revision of the price conditions of a contract for exploitation of his work. The article concludes with a brief study of similar provisions in laws of several other countries.

210. PLAISANT, ROBERT. Le droit d'auteur, le microfilm et la photocopie éléments de droit comparé. (72 *Le Droit d'Auteur* 183-188, no. 11, Nov. 1959.)

A comparative, analytical summary of legislation relating to the microfilming and photocopying of copyrighted works.

211. TOURNIER, ALPHONSE. La technique au service des oeuvres de l'esprit. (*Revue Internationale du Droit d'Auteur* 46-71, no. 25, Oct. 1959.)

A theoretical discussion, in French, English and Spanish, of the question whether the technique (*i.e.*, printing, photography, phonograph recording, cinematography, and radio and television broadcasting) "over and above its role of broadcaster of intellectual works, can also contribute to their realization by a creative contribution, when it is not simply mechanical, but scientific, and is called light technique, sound technique, light and sound technique combined." The article concludes that "the protection merited by the products of technique, even associated with the author, must . . . not be sought in a field that remains the prerogative of intellectual works," but "by granting it if need be rights parallel to those of the author, those rights called 'neighboring'."

212. SANCTIS, VITTORIO M.DE. La legislazione sulla televisione in alcuni paesi europei e negli Stati Uniti. (1 *Rassegna Parlamentare* 18-29, no. 8-9, Aug.-Sept. 1959.)

A brief, conparative summary of laws and regulations concerning television broadcasting in Italy, France, German Federal Republic, Great Britain, and the United States.

C. ARTICLES PERTAINING TO COPYRIGHT FROM TRADE MAGAZINES

213. Copyright restrictions and the needs of scholarship. (176 *Publishers' Weekly* 38, no. 20, Nov. 16, 1959.)

An editorial about a recent informal meeting, in Washington, D. C., of representatives of several fields of science, to discuss problems in securing rights to copy copyrighted materials required for research and possible solutions thereto including the establishment of a central permissions clearing house for scholarly material.

214. Rickover copyright of speeches upheld. (92 *Editor & Publisher* 43, no. 44, Oct. 31, 1959.)

An article on the decision in the *Rickover* case and on statements by M. B. Schnapper, director of Public Affairs Press and Admiral Rickover in regard thereto.

NEWS BRIEF

215. U.K.: DATES ON BOOKS.

A question was put before the House of Lords recently by Lord Barnby, "To ask her Majesty's Government if they will consider measures requiring the year of publication to be made clearly distinguishable in all books printed and/or published in the United Kingdom."

Postmaster General Lord Mills replied in effect that making the date a condition of copyright was precluded by the Berne Convention and that "the requirement could only be imposed by legislation making the omission an offence, which would in the view of her Majesty's Government be unreasonable." Lord Mills pointed out, however, that publishers who wished to secure copyright in those countries, including the United States, which were members of the Universal Copyright Convention and not of Berne, were obliged to put the year of first publication on copies of their books. — *The Bookseller,* no. 2815 (Dec. 5, 1959), pp. 1115-1116.

A Condensed "Copyright Guide"

The Society is joined, as a sponsor, in the publishing of "A Copyright Guide" by Harriet F. Pilpel and Morton Goldberg prepared as an up-to-date, question-and-answer manual for all who have everyday operations involving copyright details and practice. The price of the book is $2.00, R. R. Bowker Co., 62 West 45th St., New York 36. To Members of the Society $1.50 (cash) postpaid.

The Society also joined in sponsorship with the Bowker Co. in 1958 in the publishing of the "Universal Copyright Convention" by Dr. Arpad Bogsch of the Copyright Office. Price $12.00.

Copyright Society of the U.S.A.
c/o Fred B. Rothman & Co.
57 Leuning Street
South Hackensack, N. J.

Return and Forwarding
Postage Guaranteed

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

Form 3547 Requested

BULLETIN

OF THE

COPYRIGHT

SOCIETY

OF THE U. S. A.

Published at

NEW YORK UNIVERSITY LAW CENTER

VOL. 7, NO. 4 APRIL, 1960

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

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

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

COPYRIGHT LAW REVISION STUDIES

Prepared for the Sub-Committee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Eighty-sixth Congress, First Session, pursuant to S. Res. 53

Studies 1-4

1. History of U.S.A. Copyright Law Revision From 1901 to 1954
2. Size of the Copyright Industries
3. The Meaning of "Writings" in the Copyright Clause of the Constitution
4. The Moral Right of the Author

The first two studies presented in this "Committee Print" were supervised, prepared, and in preliminary form distributed by the Copyright Office as "Preliminary Study A" and "Preliminary Study B" respectively. "The Meaning of 'Writings' in the Copyright Clause of the Constitution" was prepared by staff members of the New York University Law Review under the guidance of Professor Walter J. Derenberg and published in Volume 31, No. 7 of that Review on pages 1263-1312. "The Moral Right of the Author" by William Strauss was published on pages 506-538 in the American Journal of Comparative Law, Autumn 1955, Volume 4, No. 4.

Copies of this first "Committee Print" may be secured from the Superintendent of Documents, U. S. Government Printing Office, Washington 25, D. C. for the sum of 40¢.

CONTENTS

THE BULLETIN of The Copyright Society of the U.S.A. is published 6 times a year by The Society at the Law Center of New York University, 40 Washington Square South, New York 11, New York: Walter J. Derenberg, *President;* Horace S. Manges, Alfred H. Wasserstrom, *Vice-Presidents;* William Klein II, *Treasurer;* Leonard Zissu, *Secretary;* Sigrid H. Pedersen, *Assistant Treasurer;* and Werner Janssen, Jr., *Assistant Secretary.*

Annual subscription: $25.

All communications concerning the contents of THE BULLETIN should be addressed to the Chairman of the Editorial Board, at the Law Center of New York University, 40 Washington Sq. So., New York 11, N. Y.

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

CITE: 7 BULL. CR. SOC. page no., Item .....(1960).

PART I.

ARTICLES

216. GOVERNOR STEVENSON'S MISSION TO SECURE PAYMENT TO AMERICAN AUTHORS AND PLAYWRIGHTS FOR USE OF THEIR WORKS IN THE SOVIET UNION

By JOSEPH S. ISEMAN*

Editor's Note: This article is the outline of an address made by Mr. Iseman to the American Foreign Law Association on November 30, 1959. The Society wishes to express its thanks to Mr. Iseman and to the American Foreign Law Association for permission to print this outline in the BULLETIN.

1. *Background*

Neither the Soviet Union nor its predecessor governments have ever entered into any international agreement to protect rights of authors or playwrights in foreign countries. Thus there is no legal requirement that American authors or playwrights receive royalties for publication or performance of their works in the Soviet Union, nor that Soviet authors and playwrights receive compensation for such use in the United States. On both sides, however, there has been a history of payments which were either made gratuitously or pursuant to contracts entered into voluntarily between authors and publishers. The same situation applies, in general, as between the Soviet Union and all Western European Countries.

In the Soviet Union, all publishing houses are divisions of the government and the question of payment is apparently one of governmental policy. Payments to American authors have been sporadic and unpredictable. Sometimes the recipients have been sympathetic to Communism, but often not; sometimes the recipients have been famous scientists, in other cases they have been unknowns; some payments have been made on demand but others have come "out of the blue"; the payments have sometimes been in rubles and sometimes in dollars. While the Soviet authorities have issued statements that American authors could receive Soviet royalties at a specified rate simply by demanding them, these statements often have not been honored in practice.

* Member of the New York Bar, and member of the firm of Paul, Weiss, Rifkind, Wharton and Garrison, of which Governor Stevenson is also a partner.

Most Russian authors recently published in the United States have been compensated under contracts. However, as between the two countries, there is a very severe problem of disparity of use of each other's writers' works. Very few Russian authors are known or published in the United States, but American authors are hugely popular in the Soviet Union. In fact, between 1917 and 1958, a total of 77,000,000 copies of 2,700 books by over 200 American authors were printed in the Soviet Union.

Any attempt to negotiate a royalty agreement between the two countries runs into the difficulty that their economics of publishing have completely different bases. The Soviets, for example, find it very hard to believe that the United States Government has no control over publishing rates and practices. The methods of compensating authors also are quite different. In the United States royalties are based on sales, and the royalty rate is the result of a business negotiation between author and publisher. Soviet authors receive benefits from a fund set aside out of the profits of the state publishing houses, and also receive a rate of compensation for each work they do, which is fixed precisely by law and is based upon the length, type and purported quality of the work. The formula for payment of original works is carried over to translations of Soviet authors' works from any of the Russian minority languages into Russian. In such cases the author gets 60% of the fee which would be paid for an original work of the same length, type and quality. In the dramatic field, although the system is very complex, it appears in general that the playwright receives a very small statutory percentage of the gross box office receipts.

Another difference is that the concept of proprietorship by the publisher is important in American publishing. In the textbook field, for example, the publisher is ordinarily granted full control over the licensing of foreign language editions. This introduces a third party whose rights are unknown under Russian law.

2. *The Retainer and The Brief*

During the post-war years several unsuccessful attempts have been made, principally by American publishers, to establish copyright relationships with the Soviet Union. The Authors League of America, which has been concerned for many years about Russian pirating of American works, felt that part of the lack of success in previous negotiations was attributable to the fact that the Russians were not dealing directly with the creators of literary works. Certain developments in the late 1950's (an apparent increase in the number of unpredictable payments made to American authors, the thaw in the cold war and the signature of an American-Soviet cultural exchange agreement) led the Authors League to believe that a direct negotiation in behalf of American writers might prove more successful.

In 1958, the League approached Gov. Stevenson to see if he would open negotiations with the Russian authorities in behalf of League members, and other interested writers, whose works had been published or performed in the Soviet Union. Powers of attorney were obtained by the League running from approximately 80 such writers to Gov. Stevenson. A brief was submitted in advance to the appropriate Soviet authorities. This brief opened by pointing out that the purposes of Gov. Stevenson's mission were both (1) to present a compensation claim for the past appropriations of the works of American writers, and (2) to propose procedures for making regular royalty payments in the future. The brief then admitted the absence of any legal framework for negotiations but stressed the moral aspects of depriving American writers of compensation and requested that there be extended to the international field in this case certain basic principles of Soviet law, which are codified in Soviet statutes. These include laws (1) prohibiting unjust enrichment; (2) precluding discrimination against any person on ground of nationality; (3) providing that no useful labor shall go uncompensated, and (4) requiring payment of fair compensation when any property is expropriated by the Soviet government.

The solution which the brief proposed was that American writers should be compensated for works published or performed in the USSR as if they were Soviet authors whose works had been written originally in a Soviet minority language and then were being translated into Russian. This would mean the same standards as to length and quality would be used as would be applied to Soviet works, and that 60% of the sum payable for an original work under this formula would then be paid to the American writer. The brief requested that American writers be compensated on this basis, but in dollars, for all uses of their works back to 1917. There was annexed to the brief a detailed statement of the known past publications and performances in the Soviet Union of the works of the writers who had given powers of attorney to Gov. Stevenson. Because sufficient data to compute the royalties owing for these past uses was not available in the United States, the brief requested the Soviet authorities to make this computation.

The brief also proposed a solution for the future which included specific procedures for interchange of information as to all works by foreign writers published or performed in the respective countries, for the furnishing of copies of all published works, and for the rendering of royalty statements to foreign writers at regular intervals. The statutory translation rate would apply to American works published in the USSR; the rates set out in negotiated contracts would apply to Russian works published in the U.S.A. Each writer receiving a royalty statement would then elect whether to receive his royalty payments in rubles or in dollars.

The brief then stressed the advantages which would flow to the Soviets

from making such an arrangement. These would include improvement of the Soviet public image abroad, particularly among intellectuals, and increases in the number of Soviet works published or performed in the United States. The brief was accompanied by letters from a number of American publishers stating not only that they would be willing to pay royalties to Soviet writers but also that they would be more inclined to publish Soviet works if payment were made to American writers for their works used in the Soviet Union. The brief also noted that other Eastern European countries, although not legally required to pay royalties to American writers, were in fact making such payments.

3. *The Negotiations in Moscow, and Subsequent Events*

Gov. Stevenson was duly received by the officials of the Soviet Ministry of Culture but the discussions were very disappointing. The Soviet officials took the view that the only important goal was to secure the widest possible circulation of cultural ideas, and that all private interests, such as compensation of writers, should be subordinated to this. It was evident that the Soviet writers and officials were piqued by the relatively small use of Soviet literary works in the United States. Gov. Stevenson's attempts to present his position were repeatedly met by general statements as to the need for increasing the circulation of books, and by other irrelevancies. After many hours of discussions, the Minister of Culture ended the sessions by delegating responsibility for the matter to a junior official, with instructions to study it.

After the breakup of the negotiation meetings, Gov. Stevenson issued a press release accusing the Soviet authorities of wishing to continue the exploitation of defenseless foreign writers. While Gov. Stevenson was still in Moscow, he was approached by the head of the Moscow Writers' Guild who implied that royalty arrangements might be still negotiated if the slate could be wiped clean of past obligations and a new start made for the future. On the basis of these remarks, several new proposals were made to the Soviet government. One suggested a somewhat more recent date — 1946 or 1953 — for the commencement of accruals of royalty payments. Another suggested that, in view of the Soviet shortage of foreign exchange, the Soviet Union (rather than each American writer) should determine in each case whether payments would be made in dollars or in rubles (it being hoped that a procedure could then be developed under which rubles placed to writers' credits could then be sold by them to American tourists and businessmen requiring rubles). These approaches have uniformly resulted in evasive replies or no replies at all.

Meanwhile the situation continues much as before. Some American authors from time to time receive royalty payments, on an utterly unpredictable basis. It is of interest that one American text writer recently received $2,800 in dollars in immediate answer to his request to the Soviet publishing authorities.

He attributes his success to his statement to them that his primary interest was to have his book published in the Soviet Union, and that royalties were only his secondary interest.

4. *Possible Explanations of Soviet Attitude*

There are several possible theories as to the reason for the lack of success to date. Probably the likeliest theory is that the Soviet Union does not want to pay royalties because this might imply a recognition of the validity of foreign copyrights — and hence a recognition of the right of the foreign copyright proprietor to control (or even prevent) the publication of his work in the U.S.S.R. Another theory is that the general foreign exchange shortage so dominates Soviet thinking that it would not even accept a solution involving only ruble payments. A third is the possible fear that if the Soviet Union recognizes the rights of foreign writers, it may, by analogy, become obliged to compensate American inventors for patents which are being infringed. A fourth is that the Soviet writers oppose any dilution of the profits of publishing houses, which form the basis of their general benefit fund. Payment of royalties to American writers would mean a substantial reduction in these profits.

It must be recognized, however, that much of the difficulty may well be in the emotional area — that Russian authors and cultural authorities are rankled because (a) the most prominent Russian contemporary writers are not published in the United States, and (b) American writers refuse to regard the mere fact of recognition in the Soviet Union as a sufficient reward, but keep on asking for compensation.

Despite these difficulties, many observers on both sides of the Iron Curtain regard a royalty pact of some sort as inevitable. If the present atmosphere of "thaw" can continue in United States-Soviet relations, it seems possible that in time some fair and mutual basis of compensation will be worked out.

217. DON'T MAIM OUR COPYRIGHTS!

By FRANKLIN WALDHEIM*

Editor's Note: The author, while in favor of the new Design Law (S. 2075), expresses disagreement with that part of the O'Malley Bill which would provide that, after embodying the work of art in a design of a useful article, the 56-years protection of the Copyright Law would be replaced by the 5-year term. See Latman, "A Proposal for Effective Design Legislation: S. 2075 Examined," 6 BULL. CR. SOC. Item 322, Page 279 at page 282 et seq. (1959). Mr. Waldheim favors the recently introduced Talmadge and Flynt Bills (S. 2852, item 224, *infra,* and H.R. 9870, item 220, *infra,* respectively), which would leave the original copyright protection intact even after embodiment of the design in a useful article of manufacture.

Much has been said in recent years about the need for legislation protecting the designs of useful articles. This interest has culminated in a bill (S. 2075) new pending in Congress. It affords to the creators of designs a relatively simple method of protection against piracy.

Although there are many persons who frown upon legislation for the protection of designs, it is not the purpose of this article to direct any criticism against the principle of design legislation. The writer merely desires to invite consideration of the fact that S. 2075, in addition to providing protection for designs, seriously diminishes the rights now afforded by law to copyright owners. If a work of art is copyrighted and the proprietor thereafter permits the work to be embodied in the design of a useful article, the copyright in the work (under S. 2075) is lost so far as its application to useful articles is concerned (except that the proprietor may apply for protection for a period of five years). These provisions create, in effect, a terminable copyright.

Why should the creator of a work of art lose the right, secured to him by the Copyright Law, to protect his work from unauthorized copying for a period of fifty-six years? The Constitution of the United States empowers Congress "to promote the progress of . . . useful arts by securing for limited times to authors . . . the exclusive right to their respective writings". By long practice the Congress and the Courts have interpreted the term "writings" to include works of art and other works not literary in nature. This provision of the Constitution contemplated the encouragement of authors by giving them a profit incentive in the creation of their works — the power to exact compensation from those who desire to reproduce the works.

The feeling has never prevailed that artistic creations should not be disseminated as widely as possible. On the contrary, dissemination is favored. The

* Mr. Waldheim is a Member of the New York Bar and Assistant Counsel for Walt Disney Enterprises.

Louvre in Paris and the great museums of our country sell reproductions of their works of art to visitors for a small price in order that the people may view these copies from time to time and be reminded of the originals.

Suppose, then, that a work of art is reproduced to adorn some useful article — so that the user may look at this reproduction whenever he uses the article. Does not this carry out the basic purpose of the Copyright Law? Why should the creator of this work of art lose his fifty-six year copyright because his work beautifies an otherwise colorless article? Why should he be compelled, at best, to accept a copyright (as to useful articles) for only five years?

Perhaps the drafters of S. 2075 inserted these provisions because it is difficult to define an exact dividing line between useful articles which embody works of art and those which embody merely design. So the proponents of this bill resolved the difficulty by erasing the line and by assuming that art ceases to be art when it becomes part of a useful article. But the law should not falter in achieving justice simply because definitions are hard to apply. The courts continually distinguish the outlines of inexact concepts such as reasonable care, fair value and probable cause. They do not try to make judicial life easier by destroying the concepts.

When a work of art is applied to, or embodied in the form of, a useful article, it is no less a work of art. As Prof. Collingwood said of a work of art which is also useful: "What makes it art is not the same as what makes it useful".[1] There is no justification for enforcing the forfeiture of the copyright in a work of art because it is applied to a useful article.

The drafters of S. 2075, unable to differentiate between art and design, took this senseless course of partially destroying an artistic copyright when it is employed in a useful article, because they feared that the creators of designs might be able to claim copyrights in them as works of art. They were afraid that the case of *Mazer v. Stein*[2] would give designers a pretext for claiming copyright protection for fifty-six years. This fear is not justified. The copyrighted matter in *Mazer v. Stein* consisted of statuettes and it can readily be seen that statuettes can qualify as works of art. The holding in that case, and the holdings of the courts in other cases, do not warrant the conclusion that *any* design of a useful article can be protected by copyright. Those who claim copyrights in designs are always subject to the challenge that the matter in which they have claimed copyright is not copyrightable at all.

The proponents of design legislation, who seek to protect the interests of creators of designs, obviously do not have the slightest confidence themselves that designs can be protected for fifty-six years by the simple device of claiming

1. "The Principles of Art" by R. G. Collingwood, Page 32
2. 347 U. S. 201, 98 L. Ed. 630, 74 S. Ct. 460

copyrights in them. If this course could be followed by designers, why would they want a design protection law at all — one that would protect them only for five years instead of fifty-six? Why would the design interests strive to procure legislation which would give them something less than they already have?

The proponents of design legislation know that the designer cannot safely travel the copyright route unless he creates something which qualifies as a work of art. Since there are no other methods of effective protection now available, some designers may now from time to time attempt to copyright their designs. But they know that they are not traveling a safe road and, if a design law were enacted, they would surely invoke the greater security which it provides. In enacting such a law for those persons who are essentially designers it is not at all necessary or fitting that there should be an impairment of the rights of those persons who are essentially creators of works of art.

It is interesting to note that the report of the New Zealand Copyright Committee, 1959, considered the desirability of legislation similar to S. 2075. It weighed the advisability of repealing a section of the law (Section 30) which excludes from copyright protection a design which is used industrially and which is capable of being registered under the design legislation. The Committee said:

> "It seems to us that it is the existence of a dividing line between industrial art and other forms of artistic work which is at the root of the trouble. Moreover, we think it likely that . . . creating something in the nature of a terminable copyright, is itself likely to give rise to new difficulties." (page 118)

In discussing the possible repeal of Section 30 — so that a design used industrially would not be automatically excluded from copyright protection — the Committee said:

> "There is no reason to suppose that the complete repeal of Section 30 would create any difficulties of definition. It would not extend copyright into a completely new field but would merely ensure that all artistic works, whatever the field of their application, would have protection. The criterion would be the same as it now is for other artistic works, namely, whether the work is or is not an original artistic work." (page 118)

Legislation is never wholesome when it attempts to set up new rights for certain people at the expense of destroying rights enjoyed by others. There is no need for doing this in the case of design legislation. To remedy the evil effect of S. 2075, a new bill (S. 2852) has been introduced in the Senate by Senator Talmadge who said: "I do not believe that Congress should upset or diminish the present protection afforded by our copyright laws to legitimate

copyright interests. Provision can be made for registered commercial designs without prejudice, injury, or hurt to copyright owners. The bill I am introducing makes provision for that just and fair result."

An identical bill has been introduced in the House by Congressman Flynt (H.R. 9870). These bills are precisely the same as S. 2075 except that, beside protecting the authors of designs, they undertake (as the addition to their preamble states) "to preserve copyright protection for creators of artistic works in which copyright subsists" and except that they afford an opportunity to renew design protection for two additional periods of five years each. The latter change would bring our law into conformity with the law of some other countries and would place our nationals in a position as favorable as that of foreign nationals. Section 5(c) of S. 2852 provides for the extensions. Section 27 preserves any right or remedy now or hereafter held by any person under the Copyright Law except that, when a copyright proprietor himself makes use of the provisions of the Design Protection and Copyright Preservation Act, the design becomes subject to that Act. Section 32 amends the Copyright Law by making a similar provision.

Efforts have been unsuccessfully made for a half century to secure effective design legislation in this country. It would represent a major accomplishment by those concerned with this effort if they procured the passage of a bill providing such legislation. In advocating such a bill, they should not launch an attack upon the rights of those genuinely engaged in the creation of works of art. In establishing a new right for one class they should not destroy the established rights of another class. They would help their cause by doing one thing at a time — by securing protection for the interests which they represent and not by destroying protection for the interests which they do not represent.

The objectives of the proponents of design legislation would best be served by the Talmadge-Flynt Bills (S. 2852—H.R. 9870). Experience under that law would determine whether any ill effects to designers can flow from a misuse of the Copyright Law by the creators of designs. If this unlikely condition is found to exist, it will then be timely to seek a way of counteracting it. In the meantime, the effort to secure design legislation should not be turned into an onslaught upon the rights of those who will create the artistic works of the future.

Our Copyright Law has been a healthy stimulus to artistic creation. The rewards flowing to the creators of literary, musical and artistic works have made possible the enrichment of our culture and have contributed to the happiness of our people. Radio, television, the theatre, current literature and the musical world thrive on copyrighted works. Our concern for the designers of merchandise should not stifle the incentive of those whose toil and sacrifice bring us these wonderful gifts.

218. A SUMMARY OF THE EAST GERMAN DRAFT COPYRIGHT LAW

With a Prefatory Note

By WALDO H. MOORE*

Prefatory Note

What follows is a short summary of a draft copyright law recently published by the Communist government of East Germany, the so-called German Democratic Republic. As a preface to the summary, it might be well to set forth some background information.

The copyright law of Germany is made up of three separate statutes: (1) Statute on Literary and Musical Works; (2) Statute on Works of Art, Photographs, and Motion Pictures; and (3) Act on Contracts of Publication. All pre-date World War I, and all amendments pre-date World War II.

The German Democratic Republic was established by the adoption of a constitution on October 7, 1949. That constitution provides as follows:

> The intellectual work and the right of authors, inventors and artists enjoy the protection, furtherance and assistance of the Republic.

This regime has continued, however, to apply the old statutes as their copyright law.

But in terms of fact what has happened is that the regime began by allowing the so-called free market to exist side by side with the Communist economy and gradually absorbed the free market by nationalizing individual firms. This is done by converting them into government corporate entities. So at present the majority of the large publishing houses, practically all film and record enterprises, and of course all TV and radio are nationalized.

In April 1958, at what is known as the Babelsberg Conference, the Communist authorities announced a concerted program to rid all East German law of "bourgeois ideology". The present draft bill is a part of that program and is the result of more than six months of work by a special commission set up by the Ministry for Culture. It was published for comment and discussion on the tenth anniversary of the founding of the East German republic, October 7, 1959.

Members of the special commission have stated that the commission sought to embody in the draft the Marxist principle of the dialectic: the molding of opposing forces into a higher unity. They also make it clear that their

* Head, Book section, U. S. Copyright Office

approach is materialistic and that they consider that the rights accorded the author are purely statutory in origin and not based on any theory of natural rights or the "moral right", as such. They view copyright as an instrument of the socialist state, and they thus provide for a minimum of freedom of contract and a maximum of government intervention.

Summary of the Draft Copyright Law of the German Democratic Republic

The law is divided into a preamble and four major parts. The preamble, entitled *The Purpose of Copyright,* sets the tone for the entire law, as follows:

> Copyright in the German Democratic Republic contributes actively to guaranteeing the establishment of socialism in all areas of cultural life. It furthers and protects both the interests of society as a whole in the development of literary, scientific and artistic creativity as a means to a many-sided socialistic national culture, and the ever-growing participation of the masses in the cultural wealth of the nation. It is in relation to this that effective protection is accorded to the interests of the author in his work.

Part I: Copyright. The law provides that copyright shall extend to original creative works of literature, science and art made by whatever means or process provided they are set down in concrete form, and gives the following examples of copyrightable works: a) written or oral works; b) music; c) dramatic, musico-dramatic, choreographic and pantomimic works; d) works of painting, sculpture, useful graphic material and industrial art; e) films; f) radio and TV plays; g) photography (if artistic or scientific); and h) architecture (if artistic). All parts of the work, including the title if creative and original, may be protectible; and adaptations, translations and compilations may be copyrightable. Among the items not copyrightable are news reports, official government publications, and the non-creative editing of music.

The author is generally defined as the creator of the work. Where the work of several authors forms an inseparable whole, they are considered co-authors of the whole and their relationship is governed by agreement; if they cannot agree on publication, one co-author may apply to the Ministry for Culture, which will decide the matter in accordance with "the general cultural interest". The editors of compilations and the enterprises producing films are considered the authors of these works.

The copyright is defined as a unitary right made up of two parts: 1) rights of personality and 2) property rights. The former include the rights to be named as author, to decide as to the work's first publication, to be the first to make public the essential content of the work, to guard the integrity of the work, and to oppose any use damaging to the author's scientific or artistic reputation. These rights of personality are generally inalienable. The property

rights include, in theory and generally, the exclusive right to multiply or produce, commercially distribute, publicly perform or exhibit, and to film or broadcast the work in whatever manner. The property rights are transferable.

However, broad exceptions exist. The rights of public performance and mechanical reproduction are to be subject to special decrees by the Council of Ministers. As to works first published in the Republic, the Ministry for Culture can override the author's refusal to permit the use of his work and authorize its use if that is in "the general cultural interest". Also, the right to compulsory licenses to use any published work is broadly granted to radio and TV broadcasters and to government-owned film studios. Free use is considered a right, rather than a mere exception to protection, and is allowed in a very wide variety of circumstances.

The rights of personality are perpetual. After the death of the author, they devolve upon his widow, children and the authors' societies, and upon the Ministry for Culture. The property rights generally end 50 years after the author's death.

The law regulates in considerable detail the contracts for the transfer of the property rights and also provides for model contracts, which shall be drawn up by the authors' societies and approved by the Ministry for Culture.

Remedies include compensation, injunctive relief and, in the case of intentional infringement, damages.

Part II: *Neighboring Rights.* Performing soloists and ensembles, record enterprises, and radio and TV broadcasters are afforded property rights in their productions; soloists are also protected against damage to their artistic reputations. Photographs not protected by copyright, maps, and technical drawings and sculptures are also protected. Compensation for infringement shall be regulated by the Ministry for Culture, which may also authorize use of these items if consent is refused. The compulsory license provisions mentioned above also apply. The period of protection is 10 years, measured from the end of the year in which the work was first published. Certain protection is also afforded to titles not protected by copyright, to a person's picture of himself, and to diaries.

Part III: *Criminal Provisions.* These have not been formulated, and the draft merely mentions the question in general terms.

Part IV: *Final Provisions.* The law shall apply to authors who are citizens of, and to works first published in, the German Democratic Republic, and to works of citizens of countries with which the Republic has relations by treaty or reciprocal arrangement.

PART II.

LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

1. UNITED STATES OF AMERICA AND TERRITORIES

219. U. S. CONGRESS. HOUSE.

H.R. 9525. A bill to encourage the creation of original designs of useful articles by protecting the authors of such designs for a limited time against unauthorized copying. Introduced by Mr. Ford, January 11, 1960, and referred to the Committee on the Judiciary. 22 p. (86th Cong., 2d sess.)

Identical with the O'Mahoney-Wiley-Hart bill (86th Cong., 1st sess., S. 2075), except for some typographical revisions.

220. U. S. CONGRESS. HOUSE.

H.R. 9870. 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 and to preserve copyright protection for creators of artistic works in which copyright subsists. Introduced by Mr. Flynt, January 25, 1960, and referred to the Committee on the Judiciary. 23 p. (86th Cong., 2d sess.)

Companion bill to S. 2852. See Item 224 *infra.*

221. U. S. CONGRESS. HOUSE.

H.R. 11043. A bill to amend chapter 57 of title 18, United States Code, so as to make it a crime to use certain musical reproductions in the United States for certain commercial purposes. Introduced by Mr. Pelly, March 10, 1960, and referred to the Committee on the Judiciary. 2 p. (86th Cong., 2d sess.)

Proposes to make it a crime to use imported foreign sound track as background music for television shows and motion pictures where the taped music was originally performed outside the United States and reproduced by persons who at the time of the original performance were not eligible under the Immigration and Nationality Act to enter the United States for the purpose of performing such music in person.

222. U. S. CONGRESS. HOUSE.

Flynt, John J., Jr. Explanatory statement of H.R. 9870. *Congressional Record,* vol. 106, no. 13 (Jan. 26, 1960), p. 1194.

A statement somewhat similar to one made by Senator Talmadge in the Senate in connection with his introduction, on January 19, 1960, of the design protection bill, S. 2852, to which H.R. 9870 is a companion measure. See Item 224, *infra.*

223. U. S. CONGRESS. HOUSE.

Lindsay, John B. Development of federal law in the field of unfair competition. *Congressional Record,* vol. 106, no. 19 (Feb. 3, 1960), pp. 1808-1809.

Congressman Lindsay inserts in the *Record* an explanatory statement concerning H.R. 7833, "To provide civil remedies to persons damaged by unfair commercial activities in or affecting commerce," which he introduced in the first session of the 86th Congress. Mr. Lindsay indicates that the bill is the "work product" of members of the Committee on Trade Regulations of the Association of the Bar of the City of New York and that the explanatory statement was drafted by the committee. Section 2(c) which defines unfair commercial activities so as to include any act or practice for profit in violation of "reasonable standards of commercial ethics" is explained as "intended to provide Federal judges with the opportunity to apply the liberal standards of such New York State decisions as *Dior v. Milton* (9 Misc. 2d 425, aff'd, 2 App. Div. 2d 878 (1st Dep't. 1956)) and *Miller v. Universal Pictures Company* (188 N.Y.S.2d 386, 121 USPQ 475 (Sup. Ct. 1959)), free from the hampering effect of any archaic rulings in States where they sit, or in their Federal circuits."

224. U. S. CONGRESS. SENATE.

S. 2852. A bill to encourage the creation of ornamental designs of useful articles by protecting the authors of such designs for a limited time against unauthorized copying and to preserve copyright protection for creators of artistic works in which copyright subsists. Introduced by Mr. Talmadge, January 19, 1960, and referred to the Committee on the Judiciary. 23 p. (86th Cong., 2d sess.)

A new design protection bill similar to the O'Mahoney-Wiley-Hart bill (86th Cong., 1st sess., S. 2075), but with two notable exceptions. First, the instant bill proposes a 5-year term of protection plus the right to two renewal terms of 5 years each, whereas S. 2075 provides for a non-renewable, 5-year term. Second, the instant bill offers a choice be-

tween copyright protection for an ornamental design when embodied in a useful article, or the lesser protection and term afforded by voluntary registration under the proposed bill. Under S. 2075, however, copyright protection is not available for ornamental design as embodied in a useful article, and protection for such design, limited to a 5-year term, may be secured only by compliance with the provisions of the bill.

225. U. S. CONGRESS. SENATE.

Talmadge, Herman E. Copyright protection for creators of artistic works. *Congressional Record,* vol. 106, no. 8 (Jan. 19, 1960), pp. 624-627.

In connection with his introduction of a new design protection bill, S. 2852, Senator Talmadge, with unanimous consent of the Senate, inserts in the *Record* the text of the bill followed by his "Explanatory Statement" in regard thereto. See Item 224, *supra.*

226. U. S. CONGRESS. SENATE. *Committee on Finance.*

Treatment of copyright royalties for purposes of personal holding company tax. Report to accompany H.R. 7588, submitted by Mr. Byrd, January 25 (legislative day, January 22), 1960. 10 p. (86th Cong., 2d sess., S.Rept. No. 1041).

This report recommends the passage by the Senate, with amendments, of H.R. 7588, a bill amending the Internal Revenue Code to provide that personal holding company income is not to include income from copyright royalties under certain conditions. The bill was passed by the House on August 18, 1959. See 7 BULL. CR. SOC. 43, Item 12 (1959).

227. U. S. CONGRESS. SENATE. *Committee on Foreign Relations.*

Agreement on Importation of Educational, Scientific, and Cultural Materials. Hearing before the Committee on Foreign Relations, United States Senate, Eighty-sixth Congress, second session on Ex. I, 86th Congress, 2d session. January 26, 1960. Washington, U. S. Govt. Print. Off., 1960. 52 p.

See Item 228, *infra.*

228. U. S. CONGRESS. SENATE. *Committee on Foreign Relations.*

The Agreement on the Importation of Educational, Scientific, and Cultural Materials. Report to accompany Ex. I, 86th Congress, 1st session. Submitted by Mr. Fulbright, February 8, 1960. 4 p. (86th Cong., 2d sess., Ex. Rept. No. 1.)

The Senate Foreign Relations Committee which held hearings January 26 on this pact better known as the Florence Agreement (see Item 227, *supra*) reports it favorably to the Senate which shortly thereafter adopted a resolution of ratification on February 23. The Agreement, which requires signatory states to remove tariffs, under prescribed conditions, to a wide range of materials, will not go into effect for the United States until implementing legislation is enacted into law.

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

Copyright law revision; studies prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Eighty-sixth Congress, first session, pursuant to S. Res. 53. Studies 1-4. Printed for the use of the Committee on the Judiciary. Washington, U. S. Govt. Print. Off., 1960. 142 p. (86th Cong., 1st sess., Committee print).

Contents. 1. The history of U. S. A. copyright law revision from 1901 to 1954, by A. A. Goldman. 2. Size of the copyright industries, by W. M. Blaisdell. 3. The meaning of "writings" in the copyright clause of the Constitution, prepared by staff members of the New York University Law Review under the guidance of Prof. W. J. Derenberg. 4. The moral right of the author, by William Strauss.

The first of a series of committee prints to be published by the Subcommittee, containing studies prepared under supervision of the Copyright Office with a view to considering a general revision of the copyright law, and originally issued by that Office in multilithed, preliminary editions, but not with the same numbering as used in the committee prints.

230. U. S. COPYRIGHT OFFICE.

Decisions of the United States Courts Involving Copyright 1957-1958, compiled and edited by Benjamin W. Rudd. [U. S. Govt. Print. Off.] December 1959. (Bull. No. 31)

The fifteenth in a series compiled by the Copyright Office for official use and for the information of the public. It contains substantially all copyright cases, as well as many cases involving related subjects in the field of literary property, decided during the years 1957 and 1958 by either the Federal courts or the State courts of the United States. The earlier volumes in this series, Copyright Office Bulletins 17-31, are available and cover consecutive periods of years extending from 1909. A Cumulative Index covering the period from 1909 through 1954 is also

available. The price for Bulletins 17-31 plus the Cumulative Index is $35.50; Bulletin No. 31 (1957-1958) costs $2.75. All are obtainable from the Government Printing Office, Washington 25, D.C.

231. U. S. COPYRIGHT OFFICE.

Copyright Law of the United States of America. Washington [U. S. Govt. Print. Off.] Jan. 1960. (Bull. No. 14.)

The 1960 edition of Copyright Office Bulletin No. 14 contains the amendments to Title 17, United States Code, up to and including the Act of September 7, 1957 (71 Stat. 633). It is available from the Government Printing Office or from the Register of Copyrights, Library of Congress, Washington 25, D.C., for the sum of 25 cents. The new edition includes a prefatory note, and the following:

Constitutional provision respecting copyright
Copyright Law of the United States of America (Title 17, United States Code)
Schedule of laws repealed by Act of July 30, 1947
Parallel reference tables showing disposition of sections of Act of March 4, 1909, as amended, in Title 17, United States Code
Sections 1338, 1400, and 2072 of Title 28, United States Code
Copyright in territories and insular possessions of the United States
Universal Copyright Convention: effective date; application to territories
Rules adopted by the Supreme Court of the United States for practice and procedure
Regulations of the Copyright Office, Title 37, chapter II, Code of Federal Regulations
Subject index
Lists of publications and of application forms

232. U. S. COPYRIGHT OFFICE.

Copyright protection in the United States under the Universal Copyright Convention. Washington, U. S. Govt. Print. Off., Jan. 1960. 1 p. (Cir. UCC 2).

A circular explaining the conditions under which foreign works are protected in the United States under the Convention. A copy of Circular 37, Annex A, listing the accessions and ratifications to the Convention as of January 1960, is attached.

233. U. S. COPYRIGHT OFFICE.

Public domain works. Washington, Feb. 1960. 1 p. (Cir. 36 H).

A revised circular defining public domain works and explaining generally how the copyright or public domain status of works may be determined.

234. U. S. COPYRIGHT OFFICE.

Opening and Maintaining a Deposit Account. Washington, U. S. Govt. Print. Off., Mar. 1960. 1 p. (Cir. 25).

The following minimum requirements have been established:

1. The amount initially deposited and additional payments must not be less than $100.00; 2. there must be an average of 4 transactions a month; and 3. the remitter should keep such records as will enable him to maintain a sufficient balance at all times to cover charges placed against the account. This is especially important where a time limit is provided by the copyright law, as in the case of renewals, since the Office cannot undertake to process a registration unless the required fee is available. Statements will be furnished at intervals.

2. FOREIGN NATIONS

235. GERMANY. DEMOCRATIC REPUBLIC, 1949— LAWS, STATUTES, ETC.

Entwurf: Gesetz über das Urheberrecht. Veröffentlich vom Ministerium für Kultur. Berlin, VEB Deutscher Zentralverlag. [1959]. 31 p.

The text of a new East German draft copyright law issued by the Ministry of Culture, for comment and discussion, on the tenth anniversary of the founding of the German Democratic Republic, October 7, 1959.

236. GHANA. LAWS, STATUTES, ETC.

Copyright Bill. Accra, Govt. Printer, [1959]. 110 p.

A new draft copyright law. "Under the Copyright Ordinance, chapter 126, the Imperial British Copyright Act, 1911 is still in force in Ghana, although superseded in the United Kingdom by the Copyright Act, 1956, which has been accepted as a basis for drafting the proposed Ghanaian Act, but with considerable modification in detail to meet Ghanaian conditions. For the purpose of facilitating informed criticism of the draft Act, comments have been included indicating why certain sections of the United Kingdom Act are recommended for acceptance, modification or omission, as the case may be."

237. SWEDEN. LAWS, STATUTES, ETC.

Kungl. Maj:ts proposition nr 17 år 1960. Stockholm, Kungl. Boktr. P. A. Norstedt, [1960].

The text of the following draft laws proposed by the Swedish Government and recently introduced in the Swedish Parliament, and a report

thereon: Law on copyright in literary and artistic works, Law on rights in photographic pictures, Law concerning amendment of the text of sections 9 and 11 of Law No. 52 of May 29, 1931 concerning unfair competition, and a proposal for amendment of the text of chapter 1, section 8 of the Free Press Decree.

238. VATICAN CITY. LAWS, STATUTES, ETC.

N. XII: Legge sul diritto di autore, 12 gennaio 1960. Vatican City. [1960]. 3 p.

The text of a new Holy See copyright law (No. 12 of January 12, 1960) putting into force the present Italian legislation.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

239. INTERGOVERNMENTAL COPYRIGHT COMMITTEE.

[Final documents of the] Intergovernmental Copyright Committee: Fourth session, Munich, 12-17 October 1959. (12 UNESCO *Copyright Bulletin,* 253-341, No. 2, 1959.)

Contents. Records: A. Report. B. Resolutions. C. List of participants. Annex: Report on the rights of translators. In English, French and Spanish.

240. INTERNATIONAL COPYRIGHT UNION.

État au 1er janvier 1960. (75 *Le Droit d'Auteur* 1-4, no. 1, Jan. 1959.)

The annual report of the Berne Bureau listing member countries and showing the revisions of the Berne Copyright Convention ratified by each, together with their reservations, as of January 1, 1960.

241. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION.

UNIVERSAL COPYRIGHT CONVENTION: state of ratifications and accessions as at 15 November 1959. (12 UNESCO *Copyright Bulletin* 247-252, No. 2, 1959.)

In English, French and Spanish.

PART IV.

JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY

A. DECISIONS OF U. S. COURTS

1. Federal Court Decisions

242. *Miller Music Corp. v. Charles N. Daniels, Inc.*, 125 U.S.P.Q. 147 (U. S. Sup. Ct. April 18, 1960), affirming 265 F.2d 925, 121 U.S.P.Q. 204, 6 BULL. CR. SOC. 253, Item 266 (1959).

Editor's Note: Because of the importance of the following decision, it is reported in full.

On writ of certiorari to Court of Appeals for the Second Circuit, 121 U.S.P.Q. 204.

Action by Miller Music Corporation against Charles N. Daniels, Inc., for copyright infringement in which defendant counterclaims for copyright infringement. On writ of certiorari to review summary judgment for defendant. Affirmed; Mr. Justice Harlan, whom Mr. Justice Frankfurter, Mr. Justice Whittaker, and Mr. Justice Stewart join, dissenting with opinion.

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner, a music publisher, sued respondent, another music publisher, for infringement of petitioner's rights through one Ben Black, as coauthor, in the renewal copyright of the song "Moonlight and Roses." Respondent's motion for summary judgment was granted, 158 F.Supp. 188, 116 U.S.P.Q. 92, and the Court of Appeals affirmed by a divided vote. 265 F.2d 925, 121 U.S.P.Q. 204. The case is here on a petition for a writ of certiorari which we granted. 361 U. S. 809, 123 U.S.P.Q. 590.

The facts are stipulated. Ben Black and one Daniels composed the song and assigned it to Villa Moret, Inc., which secured the original copyright. Prior to the expiration of the 28-year term, Black assigned to petitioner his renewal rights in this song in consideration of certain royalties and the sum of $1,000. Black had no wife or child; and his next of kin were three brothers. Each of them executed a like assignment of his renewal expectancy and delivered it to petitioner. These assignments were recorded in the copyright office. Before the expiration of the original

copyright, Black died, leaving no widow or child. His will contained no specific bequest concerning the renewal copyright. His residuary estate was left to his nephews and nieces. One of the brothers qualified as executor of the will and renewed the copyright for a further term of 28 years. The probate court decreed distribution of the renewal copyright to the residuary legatees. Respondent then obtained assignments from them.

The question for decision is whether by statute the renewal rights accrue to the executor in spite of a prior assignment by his testator. Section 23 of the Copyright Act of 1909, 35 Stat. 1075, now 17 U.S.C. § 24, after stating that "The proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years" goes on to provide:

> "That * * * the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright."

An assignment by an author of his renewal rights made before the original copyright expires is valid against the world, if the author is alive at the commencement of the renewal period. Fisher Co. v. Witmark & Sons, 318 U. S. 643, 57 U.S.P.Q. 50, so holds. It is also clear, all questions of assignment apart, that the renewal rights go by statute to an executor, absent a widow or child. Fox Film Corp. v. Knowles, 261 U. S. 326, so holds.

Petitioner argues that the executor's right under the statute can be defeated through a prior assignment by the testator. If the widow, widower, and children were the claimants, concededly no prior assignment could bar them. For they are among those to whom § 24 has granted the renewal right, irrespective of whether the author in his lifetime has or has not made any assignment of it. See DeSylva v. Ballentine, 351 U. S. 570, 109 U.S.P.Q. 431. Petitioner also concedes — and we see no rational escape from that conclusion — that where the author dies intestate prior to the renewal period leaving no widow, or children, the next of kin obtain the renewal copyright free of any claim founded upon an assignment made by the author in his lifetime. These results follow not because the testator's assignment is invalid but because he had only an expectancy

to assign;[1] and his death, prior to the renewal period, terminates his interest in the renewal which by § 24 vests in the named classes. The right to obtain a renewal copyright and the renewal copyright itself exist only by reason of the Act and are derived solely and directly from it.

We fail to see the difference in this statutory scheme between widows, widowers, children, or next of kin on the one hand and executors on the other. The hierarchy of people granted renewal rights by § 24 are *first,* the author if living; *second,* the widow, widower, or children, if he or she is not living; *third,* his or her executors if the author and the widow, widower, or children are not living; *fourth,* in absence of a will, the next of kin. True, these are disparate interests. Yet Congress saw fit to treat them alike. It seems clear to us, for example, that by the force of § 24, if Black had died intestate, his next of kin would take as against the assignee of the renewal right. Congress in its wisdom expressed a preference for that group against the world, if the author, the widow, the widower, or children are not living. By § 24 his executors are placed in the same preferred position, unless we refashion § 24 to suit other policy considerations. Of course an executor usually takes in a representative capacity. He "represents the person of his testator" as Fox Film Corp. v. Knowles, supra, at 330, states. And that normally means that when the testator has made contracts, the executor takes cum onere. Yet it is also true, as pointed out in Fox Film Corp. v. Knowles, supra, at 330, that "it is no novelty" for the executor "to be given rights that the testator could not have exercised while he lived." It is clear that under this Act the executor's right to renew is independent of the author's rights at the time of his death. What Congress has done by § 24 is to create contingent renewal rights. Congress has provided that, when the author dies before the renewal period arrives, special rules in derogation of the usual rules of succession are to apply for the benefit of three classes of people — (1) widows, widowers, and children; (2) executors and (3) next of kin. We think we would redesign § 24 if we held that executors, named as one of the preferred classes, do not acquire the renewal rights, where there has been a prior assignment, though widows, widowers, and children or next of kin would acquire them. Certainly Fox Film Corp. v. Knowles, supra, 329-330, states that what one of the three could have done, either of the others may do. Mr. Justice Holmes speaking for the Court said:

1. Springs, Risks and Rights in Publishing, Television, Radio, Motion Pictures, Advertising, and the Theatre (2d rev. ed. 1956), pp. 94-95; Ball, The Law of Copyright and Literary Property (1944), § 243; Ladas, International Protection of Literary and Artistic Property (1938), Vol. II, p. 772. But see Shafter, Musical Copyright (2d ed. 1932), p. 177.

"No one doubts that if Carleton had died leaving a widow she could have applied as the executor did, and executors are mentioned alongside of the widow with no suggestion in the statute that when executors are the proper persons, if anyone, to make the claim, they cannot make it whenever a widow might have made it. The next of kin come after the executors. Surely they again have the same rights that the widow would have had."

The legislative history supports that view:

"Instead of confining the right of renewal to the author, if still living, or to the widow or children of the author, if he be dead, we provide that the author of such work, if still living, may apply for the renewal, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or, in the absence of a will, his next of kin. It was not the intention to permit the administrator to apply for the renewal, but to permit the author who had no wife or children to bequeath by will the right to apply for the renewal." [2]

The category of persons entitled to renewal right therefore cannot be cut down and reduced as petitioner would have us do. Section 24 reflects, it seems to us, a consistent policy to treat renewal rights as expectancies until the renewal period arrives. When that time arrives, the renewal rights pass to one of the four classes listed in § 24 according to the then existing circumstances. Until that time arrives, assignees of renewal rights take the risk that the rights acquired may never vest in their assignors. A purchaser of such an interest is deprived of nothing. Like all purchasers of contingent interests, he takes subject to the possibility that the contingency may not occur. For example, an assignment from an author and his wife will be ineffective, if on his death another woman is the widow. Examples could be multiplied. We have said enough, however, to indicate that there is symmetry and logic in the design of § 24. Whether it works at times an injustice is a matter for the Congress, not for us.

Affirmed.

Mr. Justice Harlan, whom Mr. Justice Frankfurter, Mr. Justice Whitaker, and Mr. Justice Stewart join, dissenting.

2. H. R. Rep. No. 2222, 60th Cong., 2d Sess., p. 15. And see S. Rep. No. 1108, 60th Cong., 2d Sess., p. 15.

I cannot agree to this decision, by which the assignee of an author's renewal rights in a copyrighted work is deprived of the fruits of his purchase — a purchase which, we must assume, was made in good faith and for a consideration fairly agreed upon.[1] While, for all that appears, the author in this case may not have contemplated the defeat of his assignment, the effect of the decision is to enable an author who has sold his renewal rights during his lifetime to defeat the transaction by a deliberate subsequent bequest of those rights to others in his will.

An assignee of renewal rights inter vivos cannot of course protect himself from such an unjust result by obtaining an assignment from the author's executor, who acquires his status as such only upon the author's death. Nor can he with any assurance of success seek to secure assignments from everyone who might be expected to be the fortunate legatee. In consequence, the efficacy of a good-faith attempt to accomplish a lasting conveyance of renewal rights may hereafter depend on whether a particular transaction, under the law of whichever State may ultimately govern the matter, will be deemed a contract to make a will and given effect as such. The resulting uncertainties as to construction, validity, and mode of enforcement of such transactions under the laws of the various States need hardly be spelled out. A result so unjust and unsettling, and which indeed may impair the marketability of an author's renewal rights, should be reached only if clear statutory language or evident legislative purpose fairly compels it. Far from resting on such considerations, this decision is supported only by a parlaying of an ill-considered "concession" of counsel with an exaltation of literal "symmetry and logic" ante, p. 150, over what it seems to me a more penetrating inquiry into congressional aims would have revealed.

For convenience I quote § 24 of the Copyright Act again:

> "That * * * the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall

1. Today even less than when Fisher Co. v. Witmark & Sons, 318 U. S. 643, 57 U.S.P.Q. 50, was decided, "can we be unmindful of the fact that authors have themselves devised means of safeguarding their interests." Id. at 657, 57 U.S.P.Q. at 56. More particularly there is no suggestion in this case that the sale of these renewal rights was in any way improvident.

> have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright."

On its face, the section manifests no intention to deal with the problem of priority rights as between an assignee and the persons named in the section. The discussion in the House Report quoted by the Court, ante, p. 149, likewise shows no advertence to the question, and we are referred to no other significant legislative history on this score. Hence, we must resolve the matter in light of the purpose disclosed by the structure of the provision.

On this basis we do not write upon a clean slate. In Fisher Co. v. Witmark & Sons, 318 U. S. 643, 57 U.S.P.Q. 50, it was argued that the renewal provisions of the statute demonstrated a congressional determination "to treat the author as though he were the beneficiary of a spendthrift trust." Brief for petitioners, No. 327, O. T. 1942, p. 36. The Court, finding no support in the evolutionary history of the legislation and its structure, rejected that view, and held that an author could, during the original term of his copyright, validly assign his right to apply for the renewal and that having done so he could not, upon the arrival of the renewal year, himself claim that right. The Court seems to regard that case as entirely inapplicable in a situation where, as here, the author has not survived the beginning of the renewal year. But had the statute conferred renewal rights on "the author, if still living, or if the author be not living, on his executors or administrators," I have little doubt that the Fisher decision would control this case and require its reversal. The important question, then, is to determine the extent to which Congress has seen fit "to depart from the ordinary rules of succession." In reaching its conclusion, the Court has, I think, overlooked critical distinctions between the different clauses of the statute.

The evolution of § 24 was exhaustively described and analyzed in Fisher, and need not be recanvassed here. See also DeSylva v. Ballentine, 351 U. S. 570, 574-576, 109 U.S.P.Q. 431, 432-433. Briefly, the clause regarding widows, widowers, and children originated with the 1831 Act, 4 Stat. 436, while that dealing with executors and next of kin was added in 1909, 35 Stat. 1081. The retention, at that latter date, of the provision for widows, widowers, and children, and its position in the amended statute, can only be taken as expressive of a desire to regard them, in the words of the Court, as a "preferred class," and to ensure that the author could not by request confer on another the benefits of the renewal term. Cf. DeSylva v. Ballentine, supra, at 582, 109 U.S.P.Q. at 435-436. For it would indeed be anomalous to say that an author could convey for a con-

sideration during his lifetime what he is not permitted to bequeath at death. Hence I agree that the provision for a "compulsory bequest," ibid., to the author's widow and children should be held to bar effective assignment of renewal rights as against them.

But I cannot perceive the applicability of this reasoning to the executor. There is simply no warrant for regarding him as in any way one of a "preferred class." The executor himself manifestly could not have been the object of such congressional solicitude, since he takes nothing beneficially, but only as a fiduciary for those benefited by the will. As to the latter, a legatee can be any person, corporation, or association capable of taking property by bequest. Surely we cannot infer legislative concern over the protection of the interest of whomsoever, of the large indeterminate class of potential legatees, should prove in fact to be chosen by the author. The evident purpose of the clause regarding executors was merely "to permit the author who had no wife or children to bequeath by will the right to apply for the renewal." H.R. Rep. No. 2222, 60th Cong., 2d Sess., p. 15. The Court gave full effect to that purpose in Fox Film Corp. v. Knowles, 261 U.S. 326, when it held that an executor acquired the right to apply for renewal, even though the author's death occurred prior to the renewal year, when the author himself first could have renewed his copyright. It goes beyond that purpose, and beyond anything at issue in Fox Film, to read into the statute a desire to protect legatees from the claims of an assignee of the author.

The Court's treatment of the rights of an author's next of kin is especially curious. With no more authority than what appears to me to have been a demonstratably unnecessary "concession" of counsel,[2] the Court regards it as "clear" that the next of kin take over an assignee. From this dubious premise, the Court reasons that the executor, being thus surrounded in the "heirarchy of people granted renewal rights" by persons whose rights are superior to those of an assignee, must be "placed in the same preferred position." This reasoning, I submit, ignores the legislative purpose evidenced by the statute. There is no basis whatever for supposing that next of kin were sought to be protected from loss or rights arising out of the author's acts, in the sense that widows and child-

2. It is not difficult to understand why a publisher would be content with a rule preferring the next of kin — who can ordinarily be determined with reasonable accuracy during the assignor's lifetime, and from whom an assignment can often be purchased, as indeed was done in this instance — and at the same time regard application of a similar principle to the executor as unworkable. Yet it need hardly be said that such practical considerations do not relieve this Court of the duty of construing the statute for itself.

ren were. For the obvious fact is that under the statute next of kin, though related — albeit often distantly[3] — to the author, may be deprived of any interest in the renewal rights by a bequest of those rights by the author to another — even to one who is a total stranger.

It is thus apparent that Congress had no intention of protecting next of kin from defeasance of their expectancy. Its purpose was more limited. Having determined that, despite an author's death without a surviving spouse or child prior to the renewal year, his work should not pass into the public domain, Congress sought to ensure that the failure of the author to leave a will would not bring this result about. The decision to give the renewal rights directly to the next of kin, rather than to an administrator, may well have been due to a desire to save authors' estates — which not infrequently might contain no other asset of substance — the expense of going through administration. Be that as it may, it seems to me abundantly clear that the result now reached by the Court was never intended.

To construe the statute as I have is not to "refashion" it, but only to appraise the competing claims of the author's assignee and those named in § 24 in light of the policy indicated by the manner in which the various interests involved are dealt with by the statute. The "symmetry and logic" of the provision is a dynamic, not a static or syntactical, symmetry and logic. Consistently with Fisher, the assignment is given effect as against those whose claims must rest on the voluntary decision of the author to benefit them; as to the surviving spouse and children, however, the legislative care taken to make their rights independent of the author's desires leads to a contrary result. It is only to that extent that Congress has departed from the ordinary rules of succession, in accord, it may be noted, with modern legislative trends precluding disinheritance of widows and children. We should not, by failing to heed the limits of that departure, foster an unjust and disruptive result. By undermining the sales value of renewal rights at the expense of the author and his immediate family this decision impinges on the very interests which the Copyright Act was designed to protect.

I would reverse.

3. Our reference in the DeSylva case, supra, at 582, 109 U.S.P.Q. at 435-436, to the "family" of the author was of course to the immediate family, the spouse and children, and not to all those related, however remotely, to the author.

243. *Peter Pan Fabrics, Inc., et al. v. Martin Weiner Corp.*, 274 F.2d 487, 124 U.S.P.Q. 154 (2d Cir. Jan. 27, 1960).*

HAND, Circuit Judge.

This is an appeal from a preliminary injunction, granted by Judge Herlands, forbidding the defendant to copy an ornamental design, printed upon cloth. The plaintiffs — which for the purposes of this appeal are to be regarded as one — and the defendant are both "converters" of textiles, used in the manufacture of women's dresses. A "converter" buys uncolored cloth upon which he prints ornamental designs, and which he then sells to dressmakers. The plaintiffs bought from a Parisian designer a design, known as "Byzantium" which it registered as a "reproduction of a work of art," (§ 5(h) of Title 17 U. S. Code) and for which the Copyright Office issued Certificate No. H.7290. This design they print upon uncolored cloth, sold in bolts to dressmakers. The cloth, so "converted," bears upon its edge at each repetition of the design printed "notices" of copyright which are concededly adequate under the Copyright Law. The buyers of the bolts cut the cloth into suitable lengths and use it to make women's dresses; but in doing so, they either altogether cut off the selvage which bears the notices, or else they sew the adjacent edges of the cloth together at the seams in such a way that the notices are not visible unless the seams are pried, or cut, apart, or unless the dress is turned inside out. The appeal raises two questions: (1) whether the defendant has in fact copied so much of the registered design as to infringe the copyright; and (2) whether the design was dedicated to the public, because it was sold without adequate notice of copyright as required by § 10 of the statute.

The test for infringement of a copyright is of necessity vague. In the case of verbal "works" it is well settled that although the "proprietor's" monopoly extends beyond an exact reproduction of the words, there can be no copyright in the "ideas" disclosed but only in the "expression." Obviously, no principle can be stated as to when an imitator has gone beyond copying the "idea," and has borrowed its "expression." Decisions must therefore inevitably be *ad hoc*. In the case of designs, which are addressed to the aesthetic sensibilities of an observer, the test is, if possible, even more intangible. No one disputes that the copyright extends beyond a photographic reproduction of the design, but one cannot say how far an imitator must depart from an undeviating reproduction to escape infringement. In deciding that question one should consider

* Ed. — The many interesting aspects of both the majority and dissenting opinions in this case warrant their reprinting in full. For a discussion of the import of the decision, see *Peter Pan Fabrics, Inc., et al.* v. *Dixon Textile Corp.*, item 239, *infra*.

the uses for which the design is intended, especially the scrutiny that observers will give to it as used. In the case at bar we must try to estimate how far its overall appearance will determine its aesthetic appeal when the cloth is made into a garment. Both designs have the same general color, and the arches, scrolls, rows of symbols, etc. on one resemble those on the other though they are not identical. Moreover, the patterns in which these figures are distributed to make up the design as a whole are not identical. However, the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same. That is enough; and indeed, it is all that can be said, unless protection against infringement is to be denied because of variants irrelevant to the purpose for which the design is intended.

The second question is whether the plaintiffs have forfeited their copyright. As we have said, there is no question that the bolts of cloth were adequately marked to comply with § 10, for a notice was "affixed to each copy * * offered for sale"; and, it appeared at intervals along the selvage, so that no one using the cloth could avoid seeing it. However, although the notices served the purpose of advising those who bought, or dealt with, the bolts, they did not give adequate notice to those who bought, or wore, dresses made of the cloth, for, when not altogether cut off, they were so placed as to be most unlikely to be detected. Section 21 of the act provides that the "omission by accident or mistake of the prescribed notice from a particular copy or copies shall not invalidate the copyright"; but the effective suppression of this mark on dresses is neither accidental nor mistaken; and sales with a deliberate omission of notice will forfeit the copyright (National Comic Publications, Inc. v. Fawcett Publications, Inc., 2 Cir., 191 F.2d 594; Id., 2 Cir., 198 F.2d 927.) Therefore, if we construe the words of § 10 with relentless literalism, dresses made out of the "converted" cloth may be said to be "offered for sale" without any effective notice. In support of such an interpretation it may be argued that the doctrine, *expressio unius, exclusio alterius,* would apply: that is to say, since Congress made only "omission by accident or mistake" an excuse we must not enlarge the exemption.

On the other hand, it is a commonplace that a literal interpretation of the words of a statute is not always a safe guide to its meaning. Indeed, in extreme situations this doctrine has been carried so far that language inescapably covering the occasion has been disregarded when it defeats the manifest purpose of the statute as a whole. Holy Trinity Church v. United States, 143 U. S. 457, 12 S.Ct. 511, 36 L.Ed. 226; Markham v. Cabell, 326 U. S. 404, 66 S.Ct. 193, 90 L.Ed. 165; Cawley v. United States, 2 Cir., 1959, 272 F.2d 443. We need not go so far in the case at

bar. In the first place it is hard to see how "notice" can said to be "affixed" to a "design" when it is incorporated into it; the copyrighted "work" will itself be changed, even though the change be so immaterial as not to impair the aesthetic appeal of the "design." Be that as it may, we do not hold that in no circumstances will it be possible to "affix notice" upon a "design" which will be still visible when the cloth has been made up into a garment. We do hold that at least in the case of a deliberate copyist, as in the case at bar, the absence of "notice" is a defence that the copyist must prove, and that the burden is on him to show that "notice" could have been embodied in the design without impairing its market value. The defendant asserts that this can be done but it has offered no evidence that it can be. Whatever may be shown at the trial, upon this record we hold that the "design" should be protected, *pendente lite.*

Order affirmed.

FRIENDLY, Circuit Judge (dissenting).

I regret that I cannot join in the judgment of the Court. I would reverse.

Section 10 of the Copyright Act, 17 U.S.C. §10, provides that "Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor." The question is whether plaintiffs met the second requirement.

Admittedly, the notice of copyright is not "affixed to each copy" of the copyrighted design on the dresses manufactured and sold by the purchasers that bought cloth from plaintiffs. Indeed, whether the notice remains affixed to any copy is fortuitous, since, as was conceded at the bar, plaintiffs cannot practically obtain any commitments from the manufacturers in this regard. I do not read the Court's opinion as questioning that the manufacturers make and sell the dresses in this manner "by authority of the copyright proprietor." Such sales were the very purpose of the purchases of the cloth; plaintiffs knew that the notices would generally be cut off; and I read § 10 as using "authority" in the broad sense of permission and not as requiring any technical agency relationship. It is unnecessary to debate whether the conversion of the designs into dresses was a republication; for it was an offer for sale unless we deny those words the sense they have in everyday speech. I take it no one would question that an authorized offer for sale occurred if the purchasers, with plaintiffs' acquiescence, regularly cut off the selvage bearing the copyright notice and sold the cloth in strips; I think there was no

less such an offer when the purchasers cut off the selvage and sold the cloth in dresses.

I am not altogether clear whether my brothers say that the sale of the dresses was not an offer for sale with the authority of the copyright proprietor or that it was such an offer but that notice need not be affixed if this was not feasible. The latter construction seems borne out by the suggestion that plaintiffs will be denied a final decree if defendant proves that notice could have been affixed to each copy of the design in the dresses without impairing the market value; for, unless the sale of the dresses is within § 10, plaintiffs are under no requirement to have the notice affixed. In any event the result is plain enough. Plaintiffs receive copyright protection for enabling a multitude of ladies to be caparisoned in the purple of "Byzantium" although the copyright notices, instead of being "affixed to each copy" of the design on the dresses, pile up in the cutting rooms. It is of no moment that the Court now grants protection only *pedente lite.* For the record makes it evident that designs such as plaintiffs' are anything but Byzantine in longevity — indeed, the moving affidavit gives this one but a few months of life — and in litigation of this sort the preliminary rather than the final injunction is the thing.

I could reconcile the majority's result with the language of § 10 if, but only if, there were clear evidence that the dominant intention of Congress was to afford the widest possible copyright protection whereas the notice requirement was deemed formal or at least secondary. I find nothing to support such a stratified reading of § 10. The notice requirement goes back to almost the earliest days of copyright under the constitutional grant, Act of April 29, 1802, ch. 36, 2 Stat. 171; its essentiality has been emphasized by the highest authority, Mifflin v. R. H. White & Co., 1903, 190 U. S. 260, 23 S.Ct. 769, 47 L.Ed. 1040, Miffllin v. Dutton, 1903, 190 U. S. 265, 23 S.Ct. 771, 47 L.Ed. 1043; Louis Dejonge & Co. v. Breuker & Kessler Co., 1914, 235 U. S. 33, 37, 35 S.Ct. 6, 59 L.Ed. 113 and when Congress has wished to make an exception, it has known how to do so, see 17 U.S.C. § 21. The notice requirement serves an important public purpose; the copyright proprietor is protected so long and only so long as he gives effective warning to trespassers that they are entering on forbidden ground. Miffllin v. R. H. White & Co., supra, 190 U. S. at page 264, 23 S.Ct. at page 771; Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 2 Cir., 161 F.2d 406, 409, certiorari denied, 1947, 331 U. S. 820, 67 S.Ct. 1310, 91 L.Ed. 1837. And if the statutory requirement of notice has not been met, it is immaterial whether a particular defendant had actual knowledge of a claim of copyright or not. Metro Associated Services v. Webster City Graphic, D.C.D. Iowa 1953, 117 F.Supp. 224, 234.

I realize that the view I hold may seriously impair the use of copyright to prevent piracy in an area where this has been recognized to be rampant for thirty years, Cheney Bros. v. Doris Silk Corp., 2 Cir., 1929, 35 F.2d 279, certiorari denied, 1930, 281 U. S. 728, 50 S.Ct. 245, 74 L.Ed. 1145, and probably for much longer, since it may not be practicable to affix the notice to an inside seam on every repetition of the design. It can be argued also that this is to insist on a useless formality since, though there is reason for requiring notice on each copy of a book, one notice on a dress is as good as ten. But, as was held by the Supreme Court in Dejonge, it is not for the courts to say that something less than the statutory requirement will serve. Congress has not accompanied the broadening of the subjects of copyright in § 5 with a relaxation of the notice requirement of § 10, except as it has simplified the form of notice for certain subjects in § 19 and has saved against accidental omission in § 21. Nothing gives me warrant for belief that Congress would be content with the proprietor's simply affixing the copyright notice to each copy as it leaves him, when, as here, he knows that almost every notice will be removed before the copyrighted reproductions reach their intended market. As said in Louis Dejonge & Co. v. Breuker & Kessler, supra, 235 U. S. at page 37, 35 S.Ct. at page 6, "The appellant is claiming the same rights as if this were one of the masterpieces of the world, and he must take them with the same limitations that would apply to a portrait, a holy family, or a scene of war." To be sure, the precise defect held fatal in Dejonge is not present here since the notice was on "each copy" as it left plaintiffs, but Mr. Justice Holmes' admonition remains pertinent. So also, while I do not contend decision to be controlled by National Comics Publications, Inc. v. Fawcett Publications, Inc., 2 Cir. 1951, 191 F.2d 594, 600, 601, opinion clarified, 198 F.2d 927, Deward & Rich, Inc. v. Bristol Savings & Loan Corp., 4 Cir., 1941, 120 F.2d 537, and Advertisers Exchange, Inc. v. Anderson, 8 Cir., 1944, 144 F.2d 907, these cases are at least closer than those relied on by the District Court in holding for plaintiffs. Perhaps my brothers are right in thinking that Congress wished literal compliance with § 10 to be excused under such circumstances as here; but the voice so audible to them is silent to me.

244. *Walsh v. Radio Corp. of America, et al.*, 124 U.S.P.Q. 390 (2d Cir. March 2, 1960) (Hincks, J.)

Plaintiff, trustee in bankruptcy of a night club, sought an accounting of defendants' profits from the sale of certain Glenn Miller records, or damages therefor. The records had been made from tape recordings of

radio broadcasts by Miller from the night club. The decision below was for defendants, and plaintiff appeals.

Held, affirmed.

The contract between Miller and the night club, by which Miller agreed to perform at the night club, contained nothing to show an assignment of Miller's common law copyright in his arrangements to the night club.

245. *Millworth Converting Corp. v. Slifka, et al.,* 180 F.Supp. 840, 143 N.Y.L.J. 1 (Apr. 12, 1960) (2d Cir. March 17, 1960) (Friendly, J.), reversing 124 U.S.P.Q. 413.

Action for copyright infringement. Plaintiff, a textile converter, created a fabric design by photographing a three-dimensional embroidery design, concededly in the public domain, and reproducing the two-dimensional photograph on piece goods with appropriate notice of copyright. Defendants put out a fabric design which plaintiff urged was copied from its design. Plaintiff applied for, and won, a preliminary injunction in the District Court.

Held, on appeal, reversed.

The Court first noted that, unlike the situation in *Peter Pan Fabrics, Inc., et al. v. Martin Weiner Corp.,* there was here no question of the sufficiency of plaintiff's copyright notice. It went on to decide that, although the original embroidery was in the public domain, plaintiff's photographic reproduction of the embroidery was sufficiently original to warrant copyright protection. "Here plaintiff offered substantial evidence that its creation of a three-dimensional effect, giving something of the impression of embroidery on a flat fabric, required effort and skill. Although others may have done the same with respect to other [embroidery designs], plaintiff's contribution to its reproduction of this design sufficed to meet the modest requirement made of a copyright proprietor 'that his work contains some substantial, not merely trivial, originality'." But, held the Court, defendants had not infringed plaintiff's design. "The claimed originality and the distinctive feature of plaintiff's reproduction is the three-dimensional look; that is what defendants' fabric lacks. Additionally, the butterfly patterns in plaintiff's fabrics do not appear in defendants'; the well-defined bands of color in plaintiff's cloth are not duplicated; and the sharp outline of plaintiff's patterns contrasts with the somewhat diffuse nature of the patterns and coloring in defendants' fabrics. We need not determine whether if the basic design had been original with plaintiff, defendants' fabric might not be sufficiently imitative to infringe under the test laid down by Judge Hand in Peter Pan. For here, in con-

trast, the basic design was in the public domain and plaintiff was entitled to relief only if defendants copied its 'expression,' as the defendant in Alfred Bell v. Catalda Fine Arts . . . was found to have done. . . . This defendants did not succeed in doing, whatever their intent."

246. *Peter Pan Fabrics, Inc., et al. v. Dixon Textile Corp.,* 125 U.S.P.Q. 39 (2d Cir. March 30, 1960) (Smith, J.)

Action for copyright infringement of "Byzantium" textile design involved in *Peter Pan Fabrics, Inc., et al.* v. *Martin Weiner Corp., supra.* Plaintiffs applied for, and won, a preliminary injunction against copying. They then moved for summary judgment, which was denied.

Held, on appeal, reversed and returned to the District Court for further consideration.

The Court first held the denial of summary judgment an appealable order. It then found plaintiff's design sufficiently original to be copyrightable. "While the basis of the sketches appears to have been suggested by or perhaps taken faithfully from ancient art forms, their incorporation into a combined design by the Parisian designer is clearly sufficiently original to satisfy the originality requirement of the copyright law." Defendant also argued that plaintiffs' copyright notice was insufficient. The Court, on the authority of *Peter Pan Fabrics, Inc., et al.* v. *Martin Weiner Corp., supra,* rejected this argument. "Weiner teaches that absence of notice is a defense, with the burden on the copyist to show it could have been embodied in the design without impairing its market value." Here, as in the *Weiner* case, there had been no proof before the District Court on the question whether notice could be so embodied. In addition, the affidavits on the motion for summary judgment left the issue of copying in some doubt. The District Court had grounded its denial of plaintiffs' motion for summary judgment on a finding of lack of sufficient originality to warrant copyright protection. The Court reversed the District Court on this point, and returned the case for consideration of the issues it had discussed.

247. *Whitney, et al. v. Ross Jungnickel, Inc., et al.,* 179 F.Supp. 751, 124 U.S.P.Q. 219 (S.D.N.Y. January 18, 1960) (Bryan, J.)

Action for copyright infringement and unfair competition. Plaintiffs wrote a song, inspired by Donne's Meditation, beginning, "No man is an island/no man stands alone." Defendants published a song, also based on Donne, beginning, "No man is an island/no man can stand alone." Except for these lines, the songs concededly differed in all other respects.

Held, after trial, for defendants.

The first line of each song is in the public domain. The second line might very possibly have been arrived at independently — which, indeed, was the purport of the testimony of the authors of defendants' song. Plaintiffs therefore failed to sustain their burden to prove copying.

248. *Huie v. National Broadcasting Co., Inc., et al.,* Civ. No. 60-1138 (S.D.N.Y. March 25, 1960) (Dimock, J.)

Action for copyright infringement. Plaintiff published and copyrighted a story dealing with the life of Ira Hayes, one of the Marines in the Iwo Jima flag-raising photograph, in a volume entitled "Wolf Whistle." He submitted his story to defendants for possible use as a television script, but defendants rejected it. Thereafter, defendants prepared a television show dealing with Hayes' life. Plaintiff moved for a preliminary injunction.

Held, denied.

Plaintiff's story and defendants' script, the Court noted, do contain similarities. Defendants argued that the similarities were nothing more than the facts of Hayes' life. Plaintiff urged that some of the "facts" were of his own invention. Defendants showed that plaintiff had represented them as true, and argued that plaintiff was therefore estopped to deny their truth. "Defendants are on sound legal ground in their position that [plaintiff] is estopped to say that the episodes should be treated as fictitious. Davies v. Bowes, D.C.S.D.N.Y., 209 Fed. 53, aff'd, 219 Fed. 178. The determination that these episodes must be treated as history does not decide the case, however. It does not mean that in deciding whether the TV script infringes the copyright on the story it is necessary to eliminate entirely the similarity of these pseudo-historical episodes. For example, if an historian had published a history of the negotiations between the Soviet Union and the United States with respect to nuclear explosions and copyrighted it, it would be an infringement of the copyright for another historian to publish a history re-written from the first historian's book without any independent research. . . . Defendant Miller's failure to discover that the fictional episodes were not really history is, of course, a demonstration of the fact that no independent research was made in those instances. The proof of appropriation of plaintiff's research in this case, however, is not strong enough by itself to warrant a preliminary injunction. The case cannot be fitted into my example of the history book with all of the facts copied from another. The determining question must be, therefore, whether defendant Miller has appropriated plaintiff's literary treatment of 'historical' facts. We can put aside the question of slavish copying because there is no suggestion of it here.

The question remains whether plaintiff's literary treatment of the Indian's life was of such originality that we must say that defendants' treatment of the same subject was inspired by it. There is uncontradicted evidence that defendant Miller was considering the use of the life of Ira Hayes before he ever saw plaintiff's book. Even if we eliminate the fictitious episodes created by plaintiff to forward the presentation of his theme, it is hard to see how anyone of any literary ability who proposed to do a piece on the life of Ira Hayes would strike a different note from that struck by plaintiff. Each of the contending authors seems to have made use of all of the data with respect to the life of Ira Hayes and, once that data was in hand, the theme followed by each of the authors was almost inevitable. True, defendant Miller produced a story immeasurably better than could have been produced by a use only of the actual facts of the life of Ira Hayes but plaintiff is estopped to say that the lifted episodes were not historical. Nor was their part in defendant Miller's production enough to convert it into a copy of plaintiff's literary treatment."

Also of Interest:

249. *Krendell v. Moscow, et al.,* 196 N.Y.S.2d 265 (Sup. Ct., N.Y. Co. 1959) (Markewich, J.) (oral agreement whereby plaintiff gave defendant certain data, on the basis of which defendant was to write a book, the profits from which plaintiff and defendant were to share, held unenforceable under Statute of Frauds because not to be performed within one year).

250. *Syracuse China Corp. v. Stanley Roberts, Inc.,* 180 F.Supp. 527, 125 U.S.P.Q. 62 (S.D.N.Y. Feb. 2, 1960) (Dawson, J.) (preliminary injunction granted against copying of plaintiff's ornamental design on chinaware).

PART V.

BIBLIOGRAPHY

A. BOOKS AND TREATISES

1. United States Publications

251. COPYRIGHT IN CERTAIN WORKS. A. Copyright in architectural works, by William S. Strauss. B. Copyright in choreographic works, by Borge Varmer. C. Copyright in Government publications, by Caruthers Berger. With Comments and views submitted to the Copyright Office. Washington, Copyright Office, Feb. 1960. 23, 21, 26 p. (*General revision of the copyright law, study no.* 21 (*A-C*)).

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

252. READ, OLIVER. From tin foil to stereo; evolution of the phonograph, by Oliver Read and Walter L. Welch. Indianapolis, Howard W. Sams [c1959]. 524 p.

Chapter 27, entitled "Copyrights and performance rights," includes a brief discussion of the organization of ASCAP and BMI and of the Petrillo activities to secure payments for the AFM from record manufacturers.

2. Foreign Publications

(a) In German

253. KONDA, WINFRIED. Der Schutz der beim Rundfunk Tätigen ausübenden Künstler, de lege lata und de lege ferenda. [n. p.] 1959. Inaug. — Diss. —Cologne.

A dissertation on the protection of the rights of the performing artist in radio and television in the German Federal Republic under existing and draft laws, with chapters on the protection of such rights under the laws of other countries and the Geneva and Monaco draft conventions.

254. RAAB, DIETER. Autor und Lektor; ein Beitrag zum sozialistischen Verlagswesen und Verlagsrecht in der DDR. Berlin, VEB Deutscher Zentralverlag, 1959. 75 p.

A manual of publishing and publishing law in the German Democratic Republic from the "socialistic" point of view, with particular reference to the author and the publisher's reader and their relationships.

B. LAW REVIEW ARTICLES

1. United States

255. Administrative law — scope of review — Post Office determination of obscenity subject to de novo review. (73 *Harvard Law Review* 583-586, no. 3, Jan. 1960.)

A case note on *Grove Press, Inc.* v. *Christenberry,* 175 F.Supp. 488 (S.D.N.Y. 1959) involving the Postmaster General's determination that the unexpurgated edition of *Lady Chatterley's Lover* was "obscene" and, therefore, nonmailable.

256. BERMAN, HAROLD J. Sherlock Holmes in Moscow. (11 *Harvard Law School Bulletin* 3-5, no. 4, Feb. 1960.)

An article, first published in *The Oxford Lawyer,* vol. 2, no. 2 (1959), on the legal steps taken by Professor Berman on behalf of the Sir Arthur Conan Doyle Estates to secure royalties from the Soviet Ministry of Culture for the unauthorized publication of the Sherlock Holmes detective stories in the Soviet Union.

257. Copyright: Government official entitled to copyright speeches prepared on Government time — property right not lost by limited distribution. (46 *Virginia Law Review* 137-140, no. 1, Jan. 1960.)

A case note on *Public Affairs Associates, Inc. v. Rickover,* 177 F.Supp. 601, 7 BULL. CR. SOC. 102, Item 110 (D.D.C. 1959).

258. DWORKIN, ALAN T. Originality in the law of copyright. (39 *Boston University Law Review* 526-541, no. 4, Fall 1959.)

"Prize winning entry in the Nathan Burkan Memorial Competition at Boston University School of Law for 1958-1959 . . . This article is eligible, in competition with papers from other schools, for a National

Award." The writer concludes that "in view of the ever-increasing scope of copyright protection, some degree of laxity in searching for this requirement [of originality] is to be expected from the courts in the future, especially in the field of cartography, where present decisions are irreconcilable with modern theory."

259. HARRISON, NEWT P. BLEISTEIN — before and after. (31 *Mississippi Law Journal* 84-94, no. 1, Dec. 1959.)

"The purpose of this article is to examine those decisions leading up to the *Bleistein* case [*Bleistein v. Donaldson Lithographing Co.,* 188 U. S. 239 (1903)]; to determine exactly what 'new rule' *Bleistein* laid down, and to consider the influence this decision has had on copyright protection for advertising outside the field of pictorial illustrations."

260. Intellectual property, a symposium. Co-moderators: Jerome F. Kramer and Robert A. Sturges. (9 *Cleveland-Marshall Law Review* 1-36, no. 1, Jan. 1960.)

Contents. — "Concrete" forms of intellectual property, by R. J. Fay. Statutory protection of intellectual property rights, by R. G. Smith. Submission and receipt of ideas: conflicting rights, by J. R. Teagno. Disclosure of specific types of ideas: misappropriation, by H. C. McRae. "Suggestion box" systems, by Esther Weissman. Organized scientific research and intellectual property, by R. L. McCollum. Resolution of conflicting claims to intellectual property, by W. C. McCoy, Jr. Licenses, contracts and assignments of intellectual property, by Frederic B. Schramm. Enforcement of intellectual property rights, by A. R. Teare. Restrictions on use of intellectual property, by H. S. Meyer. Protection of patents and trademarks abroad, by Norman St. Landau. Engineering patent agreements, by D. F. Harrington. Tax aspects of intellectual property, by L. R. Bloomenthal.

261. OLENDER, JACK H. Clean hands and clean material in copyright infringement actions. (21 *University of Pittsburgh Law Review* 71-85, no. 1, Oct. 1959.)

This paper, which has been entered in the 1959 Nathan Burkan Competition, purposes "to demonstrate, in the course of discussing the two defense theories [*i.e.,* unclean hands and unclean material], the importance of determining which of the two is being advanced in a case. Different results may be reached under a given set of facts depending upon which of the two theories is considered controlling."

262. REYNOLDS, W. G. Legal curbs on advertising. (6 *The Practical Lawyer* 19-30, no. 1, Jan. 1960.)

"Most of the difficulties for legal counsel stem from two congenital weaknesses of advertising people — the urge to overplay copy claims, and the tendency to purloin supporting material. This contracts the scope of this paper at the very outset to the legal curbs on deceit and piracy."

263. RICH, GILES S. Principles of patentability. (28 The *George Washington Law Review* 393-407, no. 2, Jan. 1960.)

Includes a provocative discussion of the constitutional basis of the patent and copyright laws.

2. Foreign

(a) English

264. Germany (Eastern Zone): draft copyright bill. (*E.B.U. Review* 33-34, no. 59 B, Jan. 1960.)

A summary of the provisions of the recently issued East German draft copyright bill "which have a bearing in one way or another on the interests of the broadcasting industry."

265. NAMUROIS, ALBERT. Some aspects of freedom of information. (*E.B.U. Review* 25-31, no. 59 B, Jan. 1960.)

The nature and limits of the informational function of broadcasting and the motion picture are defined, the problem of conflicts with copyright, the right of property in entertainments, the right of property in enclosed premises, and the individual's right in his own likeness discussed, and a solution suggested.

266. New Zealand: Report of the Copyright Committee, 1959. *E.B.U. Review* 35-38, no. 59 B, Jan. 1960.)

A summary of the *Report*. See also, 7 BULL. CR. SOC., page 63, item 80 (1959).

(b) French

267. HEPP, FRANÇOIS. La contrefaçon du scénario cinématographique; les conditions de l'existence du délit pénal. (26 *Revue Internationale du Droit d'Auteur* 2-29, Jan. 1960.)

A discussion, in French, English and Spanish of the conditions under which article 425 of the French Penal Code may be applicable to the infringement of a motion picture scenario.

268. ILOSVAY, THOMAS. Vers une éventuelle révision limitée de la Convention Universelle. (26 *Revue Internationale du Droit d'Auteur* 60-93, Jan. 1960.)

A discussion, in French, English and Spanish, of the problems involved in connection with a possible revision of the Universal Copyright Convention.

269. MASOUYÉ, CLAUDE. Droit d'auteur et droit fiscal. (26 *Revue Internationale du Droit d'Auteur* 30-59, Jan. 1960.)

A revised version, in French, English and Spanish, of a report on tax aspects of copyrights presented to the 48th Congress of the International Literary and Artistic Association (A.L.A.I.) meeting in Athens, September 14-19, 1959.

270. SYRETT, REGINALD A. Le Tribunal du droit d'exécution. (137 *Inter-Auteurs* 153-158, 4. trimestre 1959.)

A historical note on the organization and functions of the British Performing Right Tribunal.

271. TROLLER, ALOIS. Lettre de Suisse. (73 *Le Droit d'Auteur* 21-26, no. 2, Feb. 1960.)

A review of leading copyright decisions in Switzerland from 1948 to the present time and a discussion of the circumstances leading to the Swiss amendatory copyright law of June 24, 1955 with the reasons why the law was amended in part rather than completely revised.

(c) German

272. BAPPERT, WALTER. Entspricht das gesetzliche Verlagsrecht den modernen Bedürfnissen? (61 *Gewerblicher Rechtsschutz* und Ureheberrecht 582-592, no. 12, Dec. 1959.)

A report made to the Working Group on Copyright at the main meeting of the German Society for the Protection of Industrial Property and Copyright in Hamburg, September 24, 1959, in which Dr. Bappert answers the question whether the existing Law on Publications in the German Federal Republic is adequate to satisfy modern needs in the negative and offers sugestions as to possible revisions.

273. MÜNZER, GEORG. Kommission erfüllte Verpflichtung zum 10. Jahrestag: Entwurf des neuen Urheberrechts-gesetzes liegt vor! (*Erfindungs-und Vorschlagswesen* 161-165, Ausg. B, no. 9, Sept. 1959.)

The secretary of the commission established by the Ministry of Culture for the preparation of a new draft copyright law for the German Democratic Republic reviews the draft recently issued on the tenth anniversary of the founding of the Republic and explains how the draft serves the interests of both the public and the author.

274. PETER, WILHELM. Leistungschutz, ein Holzweg? Betrachtung zur neuesten Entwicklung einer internationalen Regelung des Leistungsschutzes der ausübenden Künstler, der Schallträgerhersteller und der Rundfunksenddeunternehmen. (8 *Österreichische Blätter für Gewerblichen Rechtsschutz und Urheberrecht* 101-11, no. 6, Nov.-Dec. 1959.)

Essentially a review of recent works on neighboring rights with a critical comment on efforts to achieve an international agreement for the protection of such rights.

275. PÜSCHEL, HEINZ. Das Urheberrecht der Deutschen Demokratischen Republik. (*Erfindungs-und Vorschlagswesen* 166-169, Ausg. B, no. 9, Sept. 1959.)

After a general evaluation of the importance of copyright in the development of a national culture, the advantages of the newly issued East German draft copyright law as compared to the West German draft are pointed out. Finally a section by section appraisal of the East German draft is made in order to show that it forms the basis for the flourishing of a socialistic German national culture.

276. RAAB, DIETER. Der künftige Muster-Verlagsvertrag für Fachliteratur und wissenschaftliches Schrifttum. (*Erfindungs-und Vorschlagswesen* 170-173, Ausg. B, no. 9, Sept. 1959.)

A discussion of the proper form and content of future standard publishing contracts for professional and scientific writings in connection with the forthcoming establishment of a new "socialistic" copyright law for the German Democratic Republic.

277. SCHRAMM, CARL. Verlagsrechtliche Fragen; Bemerkungen zum Referat des Herrn Rechtsanwalt Dr. Bappert auf der urheberrechtlichen Arbeitssitzung. (61 *Gewerblicher Rechtsschutz und Urheberrecht* 592-593, no. 12, Dec. 1959.)

Critical comments on Dr. Bappert's report. See Item 265, *supra.*

(d) Italian

278. KLAVER, FRANCA. Il diritto di autore mi rapporti tra l'U.R.S.S. e i paesi occidentali. (30 *Il Diritto di Autore* 381-395, no. 3, Jul.-Sept. 1959.)

A brief discussion of the copyright relationships between the Soviet Union and the West European countries of Italy, Great Britain, France and Germany prefaced by an analysis of the recent Supreme Court suit in Moscow on behalf of the Sir Arthur Conan Doyle Estates in which an unsuccessful attempt was made to secure royalties for unauthorized publication in Russia of the Sherlock Holmes detective stories.

279. SANCTIS, VALERIO DE. Appunti in tema di rappresentazione, esecuzione e recitazione in diritto di autore. (30 *Il Diritto di Autore* 365-380, no. 3, July-Sept. 1959.)

A discussion of the rights of public performance, representation and recitation under the Italian copyright law.

(e) Swedish

280. DELIN, LEIF. Om parodi. (28 *NIR* 234-249, no. 3-4, 1959.)

A discussion of the views of Scandinavian and other text writers as well as those of the author on the question of the extent of copyright protection against parodies.

281. HEDFELDT, ERIK. Dansk debatt om upphovsrätt. (28 NIR 260-263, no. 3-4, 1959.)

A brief summary of articles which appeared in a compilation published by the Danish Copyright Society in 1958. See 6 BULL. CR. SOC. 269, Item 282 (1958).

C. ARTICLES PERTAINING TO COPYRIGHT FROM TRADE MAGAZINES

1. United States

282. Industry seeks guard in copyright law. (117 *Film Daily* 1, 7, no. 3, Feb. 23, 1960.)

An article on a "united film industry" movement leading to the introduction of the Talmadge design protection bill (S. 2852, 86th Cong., 2d sess.) as a substitute for the O'Mahoney-Wiley-Hart bill (S. 2075, 86th Cong., 1st sess.) in order to retain existing copyright protection for toys, dolls, and other novelties developed for sale in connection with film characters, "principally those of Walt Disney."

283. PILPEL, HARRIET F. Future in retrospect — needed new laws to give creator a better shake. (217 *Variety* 45, no. 6, Jan. 6, 1960.)

A discussion of obscenity, taxation, right of privacy, libel, and protection of ideas and "gimmicks" in an attempt to "see what the courts and the legislatures might and should do for show and publishing biz" in these fields before the end of 1960.

284. PRICE, MILES O. Photocopying by libraries and copyright: a precis. (8 *Library Trends* 432-447, no. 3, Jan. 1960.)

"It is the purpose of this paper to give a brief precis of the presently available literature in English, but while it is believed that the significant items are covered, no attempt at completeness is made. Certain Copyright Office publications have been relied upon heavily, as might be expected. The most useful, temperate, and certainly the most authoritative commentaries have come, either officially or unofficially, from the experienced copyright lawyers on the Copyright Office staff, or those retained by the Office for special investigations and reports."

285. TANNENBAUM, SAMUEL W. The sacred right to be left alone. (217 *Variety* 49, no. 6, Jan. 6, 1960.)

An article on present day application by the courts of statutory and decisional law governing invasion of one's right of privacy in the entertainment field.

NEWS BRIEFS

286. BOOK PIRACY IN TAIWAN

The Wall Street Journal on March 15, 1960, reported that piracy of American books had become big business in Taiwan. High-speed photo-offset presses make it possible for Formosan publishers to print United States best-sellers and reference works for between 10% and 25% of American costs. For example, the entire 20-volume set of the Encyclopedia Britannica retails in Tapei book stores for $50. Since Nationalist China has not joined the Universal Copyright Convention, this is perfectly legal business in Taiwan, although importation of the pirated editions into the United States is, of course, illegal. Nevertheless, servicemen and other Americans visiting Formosa have taken to bringing such book bargains back to the United States with them. Late reports indicate, however, that the Taiwanese authorities are working with American publishers to find a solution to the entire problem.

287. PROTECTING OUR AUTHORS

The following Letter to the Editor appeared in *The New York Times* on April 12, 1960. The problem discussed by Mr. Rothenberg is analyzed in "Citizens Who Publish Abroad: A Study in the Pathology of American Copyright Law," by Irving Younger, 6 BULL. CR. SOC. 114, Item 112 (1959).

To The Editor of The New York Times:

The recent news item concerning the influx of Taiwan-printed copies of copyrighted American textbooks and best sellers is but a single dramatic instance of the impact of our copyright law. It highlights among other things the conflict between "cheap books" and the constitutional monopoly for the encouragement of authors and publishers.

What happens, however, when in the first instance the American scholar or novelist is unable to obtain an American publisher so that his

book is first published in London or Paris? Because of a tariff-type provision in our Copyright Act the author is entitled to only a provisional copyright (and even then only if the book is in the English language).

Unless the book is reprinted and republished in the United States within five years after the foreign publication the book will enter the public domain of Shakespeare, Dickens and Gen. Lew Wallace. The work will be freely available not only to the Taiwan printer-exporters but to the Broadway stage, the television networks, etc.

Is this a real problem? Yes. For example, the specialized nature of many scholarly studies does not justify large printings. Consequently, the high cost of American printing and binding makes publication of many worth-while works economically unfeasible. The scholar thus turns to the European publisher, whose lower production costs enable him to undertake the smaller printing.

Moreover, with the large number of American scholars doing research abroad under programs, such as Fulbright, Rockefeller, Ford and Guggenheim, the opportunity for initial foreign publication has increased manifold. Also affected are military and foreign service personnel (and their dependents) stationed abroad.

Our copyright law must be revised so that a scholar's reward should not be less than that of the author of our current best sellers.

Stanley Rothenberg

New York, April 4, 1960.

288. Reds Remove Doyle's Books From Exhibit.

Soviet authorities, according to a Reuters dispatch from London appearing in a recent issue of the *Washington Post,* have withdrawn about 50 volumes, including works by Sir Arthur Conan Doyle, from an exhibition of Russian books in London after being warned that the Doyle books were protected by copyright in England.

It will be recalled that last year Professor Harold J. Berman of Harvard Law School, as counsel for the Arthur Conan Doyle Estates, unsuccessfully argued the case for royalty payments for Russian publication of the Doyle books before the Supreme Court of the RSFSR (Russian Soviet Federated Socialist Republic). The case was argued on the principle of unjust enrichment, plaintiff not contending that under Russian law the defendant Russian publishers violated copyright.

The withdrawal of the books, according to the head of the delegation running the Russian exhibition, was made "to preserve goodwill."

289. SIXTH ANNUAL SOUTHERN CALIFORNIA PROGRAM ON ENTERTAINMENT LAW

The School of Law of University of Southern California and the Beverly Hills Bar Association announce the 6th annual Program on Legal Aspects of the Entertainment Industry to be held at the University on Saturday June 4, 1960. The program will feature legal problems in the distribution of theatrical and television film and tax aspects of the joint venture in film production.

Speakers include Peter Knecht, Warner Bros, Legal Department, and Sam Zagon, Beverly Hills attorney, whose joint subject will be"Theatrical Film Distribution"; Deane Johnson, Los Angeles attorney, "Television Film Distribution"; Benjamin W. Solomon, New York C.P.A., "Auditing Problems in Producer-Distributor Relations", and Irving Axelrad, Los Angeles attorney, "Tax Aspects of the Joint Venture".

Co-directors of the program are Dr. Victor S. Netterville, Director of the Entertainment Law Center at U.S.C., and Edward Rubin, Chairman of the Entertainment Law Committee of The Beverly Hills Bar Association.

Copyright in The U.S.S.R. and Other European Countries or Territories under Communist Government

A Selective Bibliography, with Digest and Preface

by

ALOIS BOHMER

The Copyright Society of the U.S.A. announces the publication of this bibliography, which will be distributed to Sustaining Members of the Society without charge. Copies may be obtained from the publisher, Fred. B. Rothman & Company, 57 Leuning Street, South Hackensack, New Jersey. The price to Members of the Society is $3.50, and to Non-Members, $4.50.

Copyright Society of the U.S.A.
c/o Fred B. Rothman & Co.
57 Leuning Street
South Hackensack, N. J.

Return and Forwarding Postage Guaranteed

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

Form 3547 Requested

BULLETIN

OF THE

COPYRIGHT

SOCIETY

OF THE U. S. A.

Published at

NEW YORK UNIVERSITY LAW CENTER

VOL. 7, NO. 5 JUNE, 1960

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

The Copyright Society of the U. S. A.

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

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

COPYRIGHT LAW REVISION STUDIES

Second Committee Print Now Available

STUDIES 5-6

5. The Compulsory License Provisions of the United States Copyright Law; by Professor Harry G. Henn. (GRS 1)

6. Economic Aspects of the Compulsory License in the Copyright Law; by W. M. Blaisdell. (GRS 12)

This is the second of a series of Committee Prints to be published by the Sub-Committee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, 86th Congress, First Session, pursuant to Senate Resolution 53. The print is available from the Superintendent of Documents, U. S. Government Printing Office, Washington 25, D. C., for 35 cents a copy.

GENERAL REVISION STUDY NOW AVAILABLE

DEPOSIT OF COPYRIGHTED WORKS by Elizabeth K. Dunne, Research Analyst, Copyright Office, is the twenty-second 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.).

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.

CONTENTS

THE BULLETIN of The Copyright Society of the U.S.A. is published 6 times a year by The Society at the Law Center of New York University, 40 Washington Square South, New York 11, New York: Walter J. Derenberg, *President;* Horace S. Manges, Alfred H. Wasserstrom, *Vice-Presidents;* William Klein II, *Treasurer;* Leonard Zissu, *Secretary;* Sigrid H. Pedersen, *Assistant Treasurer;* and Werner Janssen, Jr., *Assistant Secretary.*

Annual subscription: $25.

All communications concerning the contents of THE BULLETIN should be addressed to the Chairman of the Editorial Board, at the Law Center of New York University, 40 Washington Sq. So., New York 11, N. Y.

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

CITE: 7 BULL. CR. SOC. page no., Item .....(1960).

PART I.

ARTICLES

290 DURATION OF COPYRIGHT IN THE UNITED STATES—STATUS OF ASSIGNMENTS OF COPYRIGHT RENEWALS—THE BILLY ROSE CASE*

By RICHARD COLBY**

Although the United States Copyright Act is over fifty years old and perhaps on the eve of extensive revision, for the first time a tremendously important question of law is approaching final and definitive resolution in American courts. That question is whether an author, during the first term of his copyright, has the legal power to assign his copyright for the second twenty-eight-year term given by section 24 of the Act.

The present question, it should be noted, is not whether, after the author has granted the first copyright term to his publisher, he may then sell his publisher the renewal term for a sum of money. He can, as was decided by the United States Supreme Court in *Fisher Music Co.* v. *Witmark & Sons,* 318 U.S. 643, 57 U.S.P.Q. 50 (1943). The question, rather, is whether the author can do so at the time he makes his original contract with his publisher, in return for the publisher's contractual obligation to pay him royalties. The problem arises with great financial impact if the author challenges the publisher's ownership of the renewal term (or if, as discussed below, there have been competing assignments issued by the author to subsequent purchasers). The question has been complicated by some conflicting decisions, an imprecise statute, and a misstatement by some litigants of the nature of the issue.

The United States term of copyright is twenty-eight years, with a right to renew for a second twenty-eight years. In the case of an individual who is not an employee for hire, the author, if living, may renew for the second term of copyright. Even if the author has validly assigned the renewal term before it accrues (on the first day of the 28th year), such an assignment has abso-

** Copyright Counsel in New York for Paramount Pictures Corporation, Famous Music Corporation and Paramount Music Corporation; B.A. 1944 Cornell University, LL.B. 1949 Yale School of Law.

lutely no effect if the author dies prior to the 28th year. In that event, his widow or other statutory successor owns the renewal free of the author's assignment.

There are contractual techniques, however, whereby the purchaser may obtain even the widow's or other next-of-kin's assignment of the renewal at the time the author makes his sale — but, in practice, this is the unusual situation. And since this article deals only with situations in which the author survives into the 28th year, consideration of such other techniques can be left to counsel.

Under forms of agreements more prevalent thirty years ago, but still the form of contract preferred by publishers today, authors sell their compositions and all copyright therein for the publisher's commitment to pay stated royalties. Such agreements generally refer to the copyright renewal (usually they read "all copyrights and renewals thereof"). The question is whether, by this language, the publisher acquires the renewal.

The argument for the author as against the publisher is twofold: (1) that, because of a particular section of the Copyright Act, the promise to pay royalties is inadequate to support the original sale of the renewal to the publisher, and (2) that the renewal term is a separate estate, a separate entity, free of any assignments or licenses granted during the first term of copyright. Both of these positions have been urged by distinguished members of the copyright bar, but the recent decision of *Rose* v. *Bourne, Inc.,* 176 F. Supp. 605, 123 U.S.P.Q. 29, 7 Bull. Cr. Soc. 47, Item 27 (S.D.N.Y. 1959), aff'd, Item 308 *infra* (2d Cir. May 31, 1960), has rejected the author's argument. The law stated by the *Rose* case is that, on the facts discussed in this article, the publisher owns the renewal.

The answers given to the author's arguments will be stated in reverse order since the second can be dealt with more briefly than the first. While there are decisions to the effect that the renewal term is a separate estate, such decisions have no relevance to the instant situation. They apply where, for example, an author has granted a license for motion picture rights in a book for "the term of copyright therein" without squarely indicating that the time in which to make a motion picture includes the renewal term. In that area, the renewal term is indeed free of the license. The separate-estate argument also applies where the author dies prior to the 28th year and the inheriting widow refuses to extend the producer's time in which to make the projected motion picture — an issue of considerable importance when dealing with elderly authors, and of dramatic effect when a young author dies.

The answer to the other main argument — inadequate compensation — is more complicated. Whether or not a publisher may validly acquire a renewal right against an author's claim of inadequate consideration may depend upon the context in which the question is presented. If it comes up in a law-

suit directly between the publisher and the author, different factors are present than exist in lawsuits between either (a) the publisher and a later assignee of the author, or (b) between competing assignees of publisher and author.

The problem has become confused because the rules which apply to one situation have been discussed in terms of the other. Cases have not generally come up as between publisher and author, but rather in situations in which the original contract with the publisher (containing the assignment of the renewal right) was not recorded within the time required by law, and the author has later made another assignment of the right to renew. In this situation, the recording section of the Copyright Act becomes extremely important. It provides (section 30 of the Act):

> "Every assignment of copyright [the courts have held that this includes copyright renewals and rights to renew] shall be recorded in the copyright office within three calendar months after its execution in the United States or within six calendar months after its execution without the limits of the United States, in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded."

In defining "a valuable consideration" for this purpose, the courts have firmly held that, unless the subsequent assignee of the renewal copyright gave more than a promise to pay royalties to the author, such subsequent assignee, even if without notice of the first assignment, would *not* prevail as against, for example, the original publisher who had obtained his assignment first in point of time, but had failed to record it. The reason for the rule was recently restated in *Venus Music Corp.* v. *Mills Music, Inc.*, 261 F.2d 577, 119 U.S.P.Q. 360 (1958), discussed below, as based on the trust rule that relief will be denied to a purchaser even if without notice of the prior sale on the ground that the subsequent purchaser's equity arises, not out of his mere lack of notice, but out of injury to him, through an innocent change of position to his prejudice. Relief will be denied where payment remains executory and there is no irrevocable change of position.

The requirement of "notice" seems to entail more than constructive notice, for the requirement is that the publisher record within three months (or six months for foreign documents) in order to protect himself from a later assignment for value which is duly recorded within the three-month period. This suggests that recordation after three months is not notice to the subsequent assignee unless he receives actual notice of the first assignment.

It is to cases relating to competing assignments (defining "value" for the above purpose) that authors have pointed for authority that a promise to pay royalties unaccompanied by an additional payment is inadequate to support an

assignment by an author to his first publisher of the renewal right before the renewal term begins. In my opinion, the problem of competing assignments has no bearing as between author and publisher. If, under usual doctrines of common law, the author has the capacity to assign (for example, if he is an adult), then he can so assign his renewal right in return for the publisher's promise to pay royalties, and the assignment to the publisher is valid *as against the author* in the absence of defenses such as fraud. Moreover, one court has said that a promise to pay royalties in the future is an adequate consideration as between the publisher and the author (in a case between a publisher and a later assignee of the author). The Court of Appeals for the Second Circuit so held in *Gumm* v. *Jerry Vogel Music Co.,* 158 F.2d 516, 71 U.S.P.Q. 285 (1946):

> "Contrary to the appellant's contention the Dillon assignments to Von Tilzer were bilateral contracts imposing mutually enforceable rights and duties. See *Wood* v. *Lucy, Lady Duff-Gordon,* 222 N.Y. 88."

The *Wood* case holds that the right to exploit imposes the obligation to do so in good faith to produce royalties, and thus a promise to pay royalties, if sales are made, is legal consideration, at least in New York, as between the parties to such a contract.

However, it was only a year and a half before the *Gumm* decision that the same federal court said, in *Rossiter* v. *Vogel,* 148 F.2d 292, 294, 65 U.S.P.Q. 72, 73:

> "Whatever might be the adequacy of such a promise to pay royalties beginning only twelve years hence on so ephemeral a thing as a popular song — especially before the days of sound films and the extensive development of the radio — the important point here is that the judge concluded there was no such contract."

The *Rossiter* case thus turned on the absence of a contract, but the warning was plain.

To convey what I think is a sound interpretation of this apparent conflict between cases in the same court, a brief analysis of those cases follows, but I first would emphasize that the comment by the court in *Rossiter* should give considerable pause. My best judgment is that the court would not so hold today and would follow the line of its statement in the *Gumm* case, holding that, as between publisher and author, a renewal right can be conveyed in the manner in which publishers traditionally have obtained renewal rights — by assignment before the renewal term begins and in the same document in which they acquire the original copyright, supported by a promise to pay royalties but without any additional dollar payment.

One judge on the Second Circuit bench recently made statements in dissent on another issue which indicate that the court may still have an open mind on this issue. In *Miller Music Corp.* v. *Daniels, Inc.,* 265 F.2d 925, 926, 121 U.S.P.Q. 204, 205, aff'd, 125 U.S.P.Q. 147 (U.S. Sup. Ct., April 18, 1960) the dissenting judge said:

> "The author not only can assign the original copyright, see 17 U.S.C. § 28 (1952), but also the renewal copyright as well, *once the renewal right has vested in him.* See *Fred Fisher Music Co.* v. *M. Witmark & Sons,* 318 U.S. 643, 645, 57 U.S.P.Q. 50, 51 (1943). Similarly, 'an agreement to assign his renewal, made by an author *in advance of the twenty-eighth year* of the original term of copyright, is valid and enforceable.' Id. at 645, 57 U.S.P.Q. at 52." (Emphasis added.)

This language carefully avoids saying how soon before the renewal term such an assignment can be made.

Returning now to the *Rossiter* case, the dispute there arose between competing assignees from the composer, and not between publisher and author. In the first decision in this case, 134 F.2d 908, 57 U.S.P.Q. 161, the court held for the plaintiff assignee (the publisher) of the renewal right who was first in time as against the second assignee. The latter, although recording in time (plaintiff did not), gave no more than a promise to pay royalties for the renewal right. However, the case was remanded for trial because the second assignee asserted that the first assignment was fraudulent or based on inadequate consideration.

On the trial, the issue was whether the prior assignment was valid and ought to prevail. This issue was decided on general grounds of equity, not under any section of the copyright law, thus sidestepping the precise point — that is, just what constitutes a good first assignment in a case where the second assignment runs afoul of the recording section of the copyright law because the second assignee did not give "value." The court did not pass on this issue and found, as quoted above, that the first assignee had not even made a promise to pay specific royalties: it was thus an assignment without consideration, for which the assignee paid nothing.

To resolve the issue between two "bad" assignments, the court said that the second assignee's promise to pay royalties of 50% of gross receipts was "considerably more generous than any suggested by plaintiff." Hence, the case was decided for the second assignee on the ground that the first assignee gave nothing, not even a promise to pay royalties. However, in ruling for the second assignee who gave "only" a promise to pay royalties, which is not "value" under the recording section, the court felt compelled to clarify the basis of its decision by saying:

> "There seems to have been some misinterpretation of the statement in our previous opinion . . . that 'it has been universally held that a mere promise to pay does not constitute a valuable consideration within the recording acts.' But this had to do only with the effect of recording the assignments, as indeed the authorities cited made amply clear. Discussion of the equity or inequity of the transaction occurred elsewhere in the opinion and followed the lines applied herein."

The decision on November 18, 1958, in *Venus Music Corp.* v. *Mills Music, Inc.,* 261 F.2d 577, 119 U.S.P.Q. 360, also by the Second Circuit, must be considered. The facts were quite similar to *Rossiter* (competing assignments from the same person), except for the controlling fact that the first assignee paid "something" for the renewal right as against the second assignee, who only promised to pay royalties. The second assignee's promise was not "value" under the recording section, and therefore the second assignment had run afoul of the recording statute even though it was recorded and the first was not. The "something" that the first assignee paid was $200 (not as an advance against royalties, which the composer was apparently also to receive). The first assignee prevailed on the theory that a later assignee should not prevail against someone who paid value.

Thus, in *Rossiter,* the first assignee promised nothing, and, in *Venus,* the first assignee paid cash. For cases in which both the first and the later assignee promised merely royalties, we must look to *Von Tilzer-Gumm* and *Marks* v. *Harris.*

In *Von Tilzer* v. *Jerry Vogel Music Co.,* 53 F. Supp. 191, 59 U.S.P.Q. 292, aff'd sub nom. *Gumm* v. *Jerry Vogel Music Co.,* 158 F.2d 516, 71 U.S.P.Q. 285, the Second Circuit considered the following situation. A composer, one Dillon, in 1911 assigned the copyright and his renewal rights to plaintiff publisher, by the usual form of agreement, in return for a promise to pay royalties. Although this instrument was not recorded until 1938, when the co-composer, Von Tilzer, applied for renewal and assigned the renewal to plaintiff publisher (his company), plaintiff prevailed as against the assignee of Dillon, the Vogel Music Co., which had recorded promptly, but which only promised to pay royalties to Dillon for the renewal term (50% of gross receipts).

The case is thus a square holding that a "mere" promise to pay royalties during a renewal term, a promise made in the original agreement, is valid as against a later assignee who paid no more, in a case between competing assignees of the author. On appeal, the Second Circuit said that the first promise to pay royalties was adequate consideration, citing *Wood* v. *Duff-Gordon,* discussed above. The only area of doubt, therefore, arises from the fact that the *Von Tilzer-Gumm* case did not come up between publisher and author. However, the appellate court, by citing the *Wood* case, seems to have indicated that

such an assignment of renewal rights is valid, *unless* the author gets more than a promise to pay royalties from a later assignee who records in three months and who does not have actual notice of the first assignment.

This point was reaffirmed in *Marks* v. *Harris,* 255 F.2d 518, 117 U.S.P.Q. 308 (1958), *cert. denied,* 358 U.S. 831, 119 U.S.P.Q. 501, involving competing assignees. Indeed, the flat statement quoted below from this decision may foretell that the *Rose* case will be affirmed. The judge who decided *Rose* relied upon *Marks,* indicating that the second assignee of an author who either has notice of a prior, original assignment to the purchaser, or who pays nothing other than a promise to pay royalties, stands in the shoes of the author as against the publisher. This rule permits the publisher to defend his ownership of the renewal term on the basis that there was adequate consideration in his original promise to pay royalties — a doctrine of local law, as contrasted with the rules of the Copyright Act, which is silent in this respect. The Act merely uses the word "consideration" in section 30 without providing a definition, to find which the federal courts have some times turned to the law of the appropriate state (*Gumm*) and sometimes to general rules of law (*Rossiter* and *Marks*).

In noting that the second assignee had actual notice of the prior assignment, the court in *Marks* also said that there was adequate consideration to support the prior assignment, such consideration being an advance against royalties and the usual promise to pay royalties, but not an additional sum recoupable from royalties (255 F.2d 518, 522, 117 U.S.P.Q. 308, 310):

> "Although a promise to pay royalties in the future, coupled with notice of a prior claim before payment, might deprive a subsequent purchaser of the status of a bona fide purchaser under § 30, *Rossiter* v. *Vogel,* . . . the doctrine has no application to a prior purchaser, which is what plaintiff is here. Thus in order to upset the 1933 agreement, defendant must show the lack of any consideration, which obviously is out of the question. Plaintiff's ownership, therefore, is well supported by the record, and the district court correctly rejected defendant's claims to the songs at issue."

Equally pertinent in any discussion of this question is the Supreme Court's remark in *Witmark,* 318 U.S. 643, 57 U.S.P.Q. 50, 21 (1943):

> "Concededly, the author can assign the original copyright. . . ."

Thus, as is the practice, original copyrights are assigned by "mere" promises to pay royalties. As was carefully stated by the Supreme Court in *DeSylva* v. *Ballentine,* 351 U.S. 570, 106 U.S.P.Q. 347 (1956):

> "This Court has already traced the development of the renewal term in the several copyright statutes enacted in this country. See *Fred Fisher Music Co.* v. *M. Witmark & Sons,* 318 U.S. 643; where it was held

> that the author, during his lifetime, could make a binding assignment of the expectancy in his future rights of renewal."

Since renewal rights may be assigned before the renewal term, as decided in *Witmark,* the question becomes whether a renewal right can only be assigned as it was in *Witmark* — after the original contract, and with a cash payment.

In *Rose* v. *Bourne, Inc.,* cited supra, the district court ruled for the publisher, disposing of the "mere" promise to pay royalties argument along the lines noted above, even though the contract in suit excluded royalties for certain uses (foreign sales and foreign mechanical recording income) and even though plaintiffs argued that the passage of time and industry change required the decision to be for them. The court, however, looked into the royalties paid by defendant to plaintiff-composers over the years, finding them to amount to a substantial sum, and also noted that the composers "offered no evidence of the adjustments necessary to accomplish a complete rescission at this late date." With these admonitions in mind, the court ruled that any inadequacy of consideration resulting from a subsequent event does not render the transaction voidable, if the consideration (the promise to pay royalties) was legally adequate (although as a practical matter conjectural) at the time of the original transfer.

The court's statement that rescission would be improper without allowing a substantial adjustment to the publisher is particularly interesting. The court said:

> "The royalty payments were in no way related to the copyright or the renewal. *** As held, above, the expectancy was, with other rights, the subject of a present assignment for an adequate consideration which was not allocated among the several rights. It will not do to follow the composers' suggestion and deprive the publisher of the copyright as renewed without any adjustment. That would be to make a contract to which the publisher had never assented. The publisher is entitled to all of the rights for which he bargained or, if the composers are entitled to relief, to have the bargain completely rescinded."

Although the court in *Rose* sharply criticized plaintiff's claims as a "frivolous refusal to accept" the decision of the Supreme Court in *Witmark,* the court did not allow counsel fees to the successful party on this aspect of the case, as permitted by the Act, because of the existence of *Rossiter,* with its language, as set forth above, casting doubt on the adequacy of "such a promise to pay royalties beginning [in that case] only twelve years hence on so ephemeral a thing as a popular song — especially before the days of sound films and the extensive development of the radio. . . ."

One year after *Rossiter,* the same court, in *Gumm,* indicated that it was not disposed to hold to its *Rossiter* views, and, in *Marks,* seemed to reject them as then "obviously . . . out of the question." On the appeal in *Rose,* the issue arises directly between publisher and author. On its resolution hinges the control of many important musical and literary properties.

Ed.: On May 31, 1960, subsequent to the preparation of the above article, the Court of Appeals for the Second Circuit affirmed the District Court's decision in *Rose* v. *Bourne, Inc.* (see 7 Bull. Cr. Soc. page 239, Item 308, infra.) In pertinent part, the Court's opinion is as follows:

> "The *Fisher* case indicated that an author might challenge the validity of his assignment of his expectancy in the renewal rights if the consideration for the assignment was inadequate. Judge Dimock held that the 1923 assignment was supported by adequate consideration and we adopt his excellent analysis of the question as applied to the facts in this case. . . .
>
> "It is clear that unlike the 1910 agreement in *Rossiter* v. *Vogel,* 134 F.2d 906 (2 Cir. 1943), the 1923 assignment before us conveyed renewal rights, and this Court has repeatedly held that a power of attorney to apply for renewal rights will be implied from the fact of the assignment. . . ."

We may suppose, therefore, that, if a song is not exploited during its original term of copyright, the courts may question whether there was in fact any payment, the only consideration for the assignment having been a promise to pay royalties. In such a circumstance, it may be that courts would deal differently with the copyright renewal. The question would not arise, however, if something more than a promise to pay royalties was made at the beginning, if a reasonable sum of money were paid to the composer.

Thus, except for the unlikely situation of a musical or literary work which had no life at all during its first 28 years, the issue discussed in this article has been settled by the Court of Appeals for the Second Circuit.

291. AN ENGLISH MUSIC PUBLISHER COMMENTS ON SOME ASPECTS OF COPYRIGHT LAW

By L. A. BOOSEY*

American copyright law holds that it is not possible for a copyright owner to grant the synchronization right for music in films and at the same time to withhold the performing right. This rule holds good only in the United States. Even today it is difficult to tell what its full implications may be, but it has successfully prevented any fees being collected from motion picture houses in America for many years.

This rule is a source of considerable irritation in Europe because the European performing right societies collect and hand over to America large sums of money annually in fees for the performance of American music in motion picture houses in Europe, while the European composer gets nothing on this score from the United States. This brings me to the heart of my comments. Composers, be careful what you sign, for if you make over all of your rights in the showing of a film without specifically reserving your performing rights in the music for all countries except the United States, you will be in danger of losing very large sums of money should your film be successful in Europe.

Another thing I would advise composers to do is to insist upon a clause in their contracts with producers forbidding the substitution of an alternative music score. This is something which is done extensively in Europe, because the money at stake is substantial. For instance, according to my last information, the Danish Society takes 4% of the gross box office income in each theatre; in Italy, the Italian Society receives 2.1%; in France, it is 1.75%; in Belgium, Finland, Holland, Hungary, Iceland, Poland, Sweden and Switzerland, it is 1% or a little more. From this you will realize the lengths to which local composers will go to get a film redubbed with their own music.

I dare say that composers will be interested to learn that the matter has been taken up by the International Confederation of Societies of Composers, Authors and Publishers, known as CISAP for short, and the rule has been adopted that even when the music of a film has been changed, the performing fees will be credited to the original composer unless specific provision allowing a change is made in his contract with the producer. But neither ASCAP nor

* Honorary President, Performing Right Society, Ltd. Mr. Boosey's comments are based upon a talk recently delivered by him in Los Angeles, California.

BMI is a member of CISAP, so this rule does not operate to the benefit of American composers. They should, therefore, insist upon a clause forbidding such redubbing of music.

American authors will also be interested to learn that, acting through CISAP, we in Europe have drawn up a charter of the rights of authors. Such a document has no legal validity, of course, but morally it is extremely important. CISAP is recognized throughout Europe as being entitled to speak for authors and composers on an international level. It maintains close liaison with the Berne Copyright Bureau and UNESCO. Both these bodies send representatives to the meetings of the Legislation Committee of CISAP, and it was this Committee which produced the authors' charter.

On many occasions, CISAP has been able to intervene effectively on behalf of authors. For example, during the debates that preceded the passage of the United Kingdom Copyright Act of 1956, a strong attack on authors' rights was mounted by the broadcast relay services — that is, companies which transmit to their subscribers BBC programs and the programs of any foreign stations which they care to pick up. The Brussels Convention of 1948 clearly lays down the rule that such companies are liable to authors. Nevertheless, during the debates, the companies argued that they should not be obligated to compensate authors. CISAP passed a resolution on the subject, and, in the House of Lords, Lord Mancroft said, "Reference was made in another place [the House of Commons] to a resolution passed by [CISAP] . . . and this is at any rate an indication that internationally our proceedings are being observed and our position may be called in question." I am sure that CISAP'S statement stiffened the Government's opposition to the amendments that were being offered. As a result, although we did not get all that we think the Brussels Convention calls for, we had a very substantial measure of success.

292. COPYRIGHT IN CHESS GAMES

By RICHARD WINCOR*

While it is always easy, perhaps too easy, to suggest that any cultural activity is a fragment of the tense dialogue between East and West, it is nevertheless true that the honorable and ancient game of chess has a curious stature that ranks it with the theatre, ballet and other entertainments that have become part of the Cold War. (The temptation is to say "pawns" instead of "entertainment," so deeply has the nomenclature of chess become embedded in our thinking.) In any event, chess is a part of our civilization. The excellence of the Russians at this art has done them no harm, and the emergence of several young American players of great skill, together with rising stars from the Scandinavian and Latin countries, has insured a continued prominence for chess in our time — which it well deserves.

For chess is no ordinary game. It is a battle, an art, a science, an all-out embracement of a contest unique in that its outcome does nobody any real good but it produces an almost morbid interest and pleasure. More to the point, it is a *creative* function. Perhaps it is not going too far to say that the sequence of moves in a particular game constitutes a writing of an author in the broad sense with which that ambiguous concept has become invested.

If this is so, it may be entitled to copyright protection pursuant to Article I, Section 8, of the Constitution. Whether or not this is sociologically desirable is not the whole question. Before publication, certainly, property may come into existence and automatically be protected by common law copyright whether or not we approve the subject matter and the economic results of such protection. A foolish letter or a bad play is a proper subject for common law copyright; so, too, may be the moves in a chess game.[1]

The first problem that suggests itself is one of ownership. An artificial chess problem, like a puzzle, presents less difficulty, but in a real game there are two players. There is little logic in a winner-take-all approach; both players have made creative contributions to the final work. In fact one player may have played brilliantly only to botch everything at the end by a sudden blunder. A

* A member of the New York Bar.

1. The notion that chess moves may be copyrighted is not entirely a new one. See, for example, Kohler, "Is There a Copyright in a Chess Game," in *Weiner Schachzeitung*, 1909, pp. 169-170, suggesting that a chess game may not be copyrighted, but that an unauthorized report of a private game might constitute an actionable interference with the players' right of privacy.

sensible solution would seem to be one in accord with the structure of a collaborative work of art; treat victor and vanquished as joint owners or tenants in common so that either may license the work (without destroying its value) subject to a duty to account. Alternatively, the English rule may be applied, knocking both heads together before any deals can be made. See *Joint Ownership of Copyrights,* General Revision of the Copyright Law #13, by George D. Cary (1958). It is true that the collaborators in the chess case are adversaries, but anyone with backstage experience in the creative field will recognize that the same may be true in the case of a song or television program. In chess, at least, the contest is formalized and played according to rules.

The second problem is whether or not the actual playing of a chess game constitutes publication. Again, the most orthodox copyright rules appear applicable: playing the game is merely a performance, and so does not constitute publication under American law. *Ferris* v. *Frohman,* 223 U.S. 424 (1912). Publication would occur when the score of the game is written out and printed in newspapers and chess periodicals — and there is no reason why the published score could not be printed with proper notice and deposited with the Register of Copyrights, perhaps as a book or as part of the periodical in which it appears.

If these assumptions have any merit, the third problem raises more directly a question of social desirability. If chess is to be encouraged, should newspapers and magazines which publish the scores of games have to pay royalties for doing something that deserves applause? Some of them would certainly wash their hands of the whole affair if a charge were imposed. Once again, however, practice in fields involving copyrighted works suggests an approach. Under a recent Writers Guild of America Minimum Basic Agreement a broadcaster can procure the right to show kinescope recordings in foreign countries upon token payment of $1.00 per country to the writer of the material. The same system of token residuals might serve in the case of chess scores until the subject has been further explored and tested by business experience.

Another problem that inevitably arises is the question of infringement. Since chess openings have become somewhat standard, and indeed whole games have occasionally been repetitions of prior games, there would be a risk of making every chess player an infringer. One answer is that publication, not merely re-playing the moves, would be prohibited without consent; and any complainant would have to show access to his own original chess score, again in accordance with traditional principles of copyright.

Fair use and fair comment present some of the most intriguing problems in connection with this subject. The area of fair use would require stretching to include the practice of chess players pillaging each other's games to improve

their own. As to fair comment, how would the law grapple with those annotations in which third parties insert observations under various moves showing where White went wrong or Black was planning a brilliant combination? It will not do to say that these traditional doctrines would make it possible for a periodical to print the whole score of a game without worrying about copyright. A drama critic, after all, does not give his readers the entire text of the play.

And so there are two separate questions concerning chess copyright. The first, whether a chess game is inherently susceptible of legal protection in accordance with sensible rules; and the answer may well be yes. The second, whether such protection is a good idea. Only experience can furnish an answer. On the one hand, copyright protection might improve the lot of those chess players (such as the Americans) who are not afforded state subsidies. On the other hand, it might discourage interest in chess by making it economically impossible for newspapers and periodicals to publish the games. One possible approach is to grant nominal royalties or token residuals. Possibly a minor industry would grow up and new practices become established. Possibly the entire subject might become an element in international negotiations. The results cannot be foreseen but further thinking would appear warranted.

Whose move?

293. PROTECTION OF LITERARY AND ARTISTIC WORKS IN ARGENTINA

(With a survey of international relations in this field)

By CARLOS MOUCHET

Editor's Note: The following article by the distinguished Argentine scholar was first published in *La Ley*, October 3, 1959, and is reprinted with the permission of the author. The translation is by William J. Thomson and Evelyn Dunne.

I. It is necessary to say a few preliminary words on the importance of the work of intellectual creators and on the necessity of obtaining more recognition for them. Taking, as an example, men of letters, we might recall that a few years ago a French author expressed the opinion that writers — as custodians of the national language — had done more for the survival of France than the

Maginot Line. The idea could be extended to countries like ours where cultural values can constitute one of the fundamental lines of defense for a worthy national existence and survival.

The re-establishment, within our community, of an intellectual and spiritual scale of values is basic to every effort for the recovery of our tormented country. Our crisis is, to a great extent, a profound moral and intellectual crisis, inasmuch as the greatest events in human life happen within the conscious mind and are later projected into actions. Writers, philosophers, jurists, artists, men of science, can and should be the esteemed creators of new spiritual trends that will guide our country on the path to self-respect, peace and united labor. The primacy of economic factors, erroneously accepted as if they were cosmic phenomena not governed by ethical conduct, makes us sometimes forget the other scales of values that give meaning and strength to individual and collective lives.[1]

II. In the Argentine Republic the law in force, since the year 1933, Law No. 11,723[2] on "regime of intellectual property," constitutes an extensive codification based on provisions of private law (national and international) and public law (administrative, penal and procedural).

This law replaced Law No. 7092[3], the first enacted in the country on this subject, which was a modest legal text consisting of twelve articles, hurriedly approved in 1910, at a time when it was necessary to show the world that the "Indian raid" had also disappeared in the intellectual field.

The writers of the Law of 1933 were motivated by the best intentions for establishing a modern and efficient system of protection of the rights of both national and foreign authors, and they accordingly introduced many innovations, although some of these were not exclusively based on the manifest interests of authors.

A liberal system of protection for the works of foreign authors was established, with the sole proviso that these "belong to nations which recognize the intellectual property rights" (Art. 13), but the truth is that this ample protection was lessened by other provisions intended to facilitate the free publication of translations. Severe penal sanctions were provided for infringers of the law, but certain technical defects made them partially ineffective. A Registro Nacional de la Propiedad Intelectual (National Copyright Registry) was created, and regulations were drawn up for the registration of works and the

1. It is necessary to go beyond recognizing posthumously the social function, the merits and the rights of those who labor in the sciences, literature and the arts. These men are amongst those who will help us save and preserve our country.

2. ADLA, 1920-1940, p. 443 [Anales de legislación Argentina]

3. ADLA, 1889-1919, p. 797.

administrative procedures to be followed, with a cumbersome system of formalities. Very appropriately a Comisión Nacional de Cultura (National Commission for Culture) was founded for the encouragement of literary and artistic creation, and legal measures were provided for the better protection of authors' rights. New legal institutions appeared, such as rights of performing artists, the right to one's own likeness, etc. Also included among the works protected were "the models and works of science applied to commerce or industry," but without the addition of the necessary standards to regulate the protection of these intellectual creations — which must be placed in an intermediate zone between copyright law and patent law — so that this protection is ineffective in actual practice.

III. Now that an eventful quarter century has passed by, the moment seems to have come to attempt an inventory of the experience gained in the study and application of Law 11,723, as well as to establish the position of Argentina with regard to the protection of international copyright in literary and artistic works.

Law No. 11,723 represents, from the point of view of principle, a hybrid system, because of the lack of harmony among the systems existing in various legal sources upon which it is based, for instance, between foreign sources such as the Italian Law of 1925 and the old Spanish Law of 1879 on "intellectual property."

The whole architecture and the spirit of the law now in force suffer from the capital error of having started from the controversial concept, already obsolete in legal science, of assimilating intellectual rights to "property," forgetting that works of the mind must be treated by the law as an expression of the personality and dignity of their creators and as belonging to the world of culture. Force of habit and preconceived ideas have affected this sector of knowledge and legal activity. For a matter of cultural concern necessitating new and appropriate legal institutions, an attempt has been made, although without success, to fit this subject into archaic molds corresponding to materialistic concepts of law.

The very terminology of "intellectual property" produces lamentable consequences in the solutions arrived at. In law it can be said as in the Gospel: "In the beginning was the Word."

This legal text, when closely examined, is found to be full of profound contradictions resulting from the conflict of forms, and the incongruous subjects. Thus, "property deeds" are granted for the works, and infringements of the law are treated like crimes against property.

The development of this matter in the Argentine, in its legislative, jurisprudential and scientific aspects, is rather limited.

The national interest in the question has lagged. In 1898 the Argentine diplomat and writer, Miguel Cané, after having attended a conference on this subject held in Paris, stated that Argentina could not be missing from these international agreements, not only for reasons of propriety but also "for high moral reasons." Thirty-nine years were needed to obtain the ratification of the Pan American Convention on Intellectual and Artistic Property, signed in Buenos Aires in 1910, and almost seven years in the case of the Inter-American Convention signed in Washington in 1946. The ratification of the Universal Convention (Geneva, 1952) was obtained in a shorter time: five years. Insofar as the Berne Convention is concerned, the adherence of Argentina was never obtained in spite of negotiations initiated at various times. And the first partial reform[4] of Law No. 11,723, to which we shall refer hereinafter, was effected in 1957, that is to say, twenty-four years after its enactment.

Having created the Registro Nacional de la Propiedad Intelectual in 1933, upon the basis of the old Oficina de Deposito Legal de Obras, (Office for Legal Deposit of Works), which operated within the National Library, this organization has not received the necessary means to promote the development of specialized studies nor to exercise duly the policing functions assigned to it.

In 1952, by a mistake in judgment the Comisión Nacional de Cultura (National Commission of Culture) was suppressed. In it the associations of authors and certain state organizations were properly represented, in a certain "corporate" sense. There was created, in its stead, the Direccion de Cultura (Department of Culture) in the Ministerio de Educacion.

Of late there has been a reaction against the previous indifference towards the promotion of literary, artistic and scientific activities. The Fondo Nacional de las Artes (National Arts Fund) was created by Decree Law 1224[5] of February 3, 1958,[6] and also the Consejo Nacional de Investigaciones Scientificas (National Council for Scientific Investigation), thereby reinstating from certain points of view, the activities of the extinct Comisión Nacional de Cultura and laudable efforts are being made to remedy the disastrous neglect of intellectual creators and of the cultural progress of the country.

It must be pointed out that the first of the aforementioned decree laws, establishing the resources of the Fondo Nacional de las Artes, included "the copyright fees to be paid for works in the *domaine public payant*" (Art. 6, par. c). In other words, this is the way the regime established by Law 11,723 on intellectual property was modified.

---

4. See Decree 12,063/57, ADLA, XVII-A, p. 755.
5. ADLA, XVIII-A, p. 584.
6. Published in the *Boletín Oficial* of February 14, 1958.

Nothing can be affirmed as yet about the definitive success of the above mentioned decree law insofar as its application is concerned, because it had barely been enacted when it was the target of criticisms by authors[7]. It has also been objected to, although for different reasons, by publishers.

IV. Students of intellectual rights constitute a much reduced group, most of whom at one time belonged to the Instituto Argentino de Derecho Intelectual (Argentine Institute of Intellectual Rights). At present there is no specialized publication, since the extinction of the *Boletín de Derecho Intelectual* (Bulletin of Intellectual Rights), which we directed with Sigfrido A. Radaelli, and of the magazine *Derechos de Autor* (Authors' Rights), published by Eduardo Augusto García.

A common preoccupation with copyright matters has produced a fraternal relationship between jurists and creators of intellectual works, although writers and artists have sometimes mistrusted or made fun of lawyers, beginning with Shakespeare (Hamlet contemplating the skull of the presumed lawyer), Montaigne, Tolstoy, Dostoyevsky, Anatole France and many others. Writers fled the ordinarily dry forms of the law, with its austere general terms, and have expressed astonishment at Philistines, the professions and the rigidity of justice.

But, a fair solution to meet the expectations of intellectual creators must take the form of a system drawn up in accordance with legal technique, which necessitates applying the most detailed and careful means in order to contain within the legal framework the varied and subtle manifestations of intellectual activity. Let us not forget, as a philosopher of legal science said, that "in law a technical defect almost always leads to an injustice"[8].

The advancement of intellectual rights is as much due to the action of the authors themselves as to the labor of the legal experts in this field. Sometimes, by a strange paradox, they stumble against the indifference of the parties who presumably will benefit. To deal with intellectual rights means to plunge completely into a "fight for the right."

The most important authors' associations for the collection of royalties are the Sociedad Argentina de Autores y Compositores de Música (Argentine Society of Authors and Composers of Music) (SADAIC) and the Sociedad General de Autores de la Argentina (General Association of Authors of Argen-

7. Thus, the Sociedad Argentina de Escritores (SADE) has objected to it because the societies of authors and the most important cultural institutions of the country were not represented on the board of directors of the "Fondo" as was considered necessary to keep this organization free from political influences and in condition to safeguard the freedom of culture and the legitimate interests of literature and art, that is to say, free from "thought-control."

8. Luis Legaz y Lacambra, "Introducción a la ciencia del derecho" (Introduction to the Science of Law," Barcelona (Ed. Bosch), 1943, p. 84.

tina) (Argentores). The notable efficiency of their activity in the economic aspect of the collection of fees must be recognized as well as the intense "guild" spirit which animates their affiliates, even though they take no interest in activities carried out by similar associations in Europe (the publication of specialized journals in the field of copyright, scientific investigation of the matter, etc.).

On the other hand, no effective or compelling collective force is exerted by the Sociedad Argentina de Escritores, (Argentine Association of Writers), which embraces the majority of our country's writers. There is a certain resistance on the part of writers to consider themselves as "guild members" [9]. They are influenced by the individualistic concept of the dignity of the writer's profession, and also by a certain timidity and embarrassment in asserting their claims to what belongs to them. They sometimes seem to forget Goethe's phrase "He who believes that right is on his side must maintain it strongly; a right conceded out of courtesy would have no meaning."

For their part, the publishers and others interested in the business of exploiting intellectual works are only relatively preoccupied with these problems, and react only when they feel their interests are affected.

V. The laws, while not too abundant, or, on the whole, of a very high standard, have established some precedents interpretative of the legal system in force[10]. The courts have dealt, amongst others, with the following questions: the concept of the protectible original creation and plagiarism; moral right; the theory of collaboration; the protection of specific works (musical, cinematographic, radio-theatre, folklore, maps and plans, legal writings, commercial catalogs, epitaph inscriptions, industrial models and designs, sculptures, photographs, recipes); unpublished works; protection of titles and pseudonyms; protection of foreign works and the problem of translations; the right to quote and to publish anthologies; editorial contracts; the scope of the registration of works and transfers in the Registro Nacional de Propiedad Intelectual; the rights of performing artists; administrative and legal proceedings; definition of criminal acts; criteria for establishing the indemnity for infringement of copyright, etc.

9. However, the Sociedad Argentina de Escritores has recently extended an agreement with "Argentores" in order to make the collection fees a reality. Likewise, steps have been taken to assure, as a guild protective measure, payment for every lecture given by members of SADE.

10. Since it would be too lengthy to indicate the relevant court decisions, we refer to those listed and classified in the work of Carlos Mouchet and Sigfrido Radaelli "Derechos intelectuales sobre las obras literarias y artisticas" (Intellectual Rights in Literary and Artistic Works,) Buenos Aires, 1948, vol. I, pp. 96 and following; in the encyclopedia, "World Copyright," edited by Dr. H. L. Pinner, and in the respective sections of the review *La Ley*.

VI. Since the enactment in 1933 of Law No. 11,723, and as its defects became apparent, there have been various private and official attempts to initiate the reform of certain specific provisions of the system established thereby. When this law was first enacted, we were among the first, in collaboration with Sigfrido A. Radaelli, to point out a serious legal and technical defect which rendered the law partially ineffective in one of its fundamental aspects, that is, the penal sanctions.

Draft laws to reform the Penal Code in relation to Law No. 11,723 were submitted to the National Congress by Drs. Coll and Gómez (1937), by Dr. José Peco (1942) and by the National Executive Authority (1951), as well as a draft law by Representative Cáceres (1942), proposing the amendment of the chapter on penal sanctions of the aforementioned law. Likewise, draft laws partially amending the law were submitted by Representatives Stanchina (1941), Sancerni Giménez (1941), Klix López (1947), Fregosi (1947), and García (1948). In addition, various measures, memoranda, and declarations have been presented by writers' groups or societies, all too numerous for inclusion here[11].

In 1943 the Sociedad Argentina de Escritores and the Cámara Argentina del Libro (Argentine Chamber of Books) jointly proposed amendments relative to the following problems: modification of the provisions relating to translation of foreign works; elimination of registration as a condition for the protection of intellectual works; specific protection of titles and pseudonyms; better regulation of the right to quote and to publish anthologies; determination of the requirements for preventive measures in cases of infringement of the law; efficient penal action and indemnity for infringement of the moral right. Both institutions have also suggested measures for the protection of the integrity and fidelity of works in the public domain and utilized in teaching. Also an inter-union agreement was arrived at, with respect to a publishing control stamp, which was not ratified by the publishers[12].

The Instituto Argentino de Derecho Intelectual (Argentine Institute of Intellectual Rights) also proposed amendments of interest not only to writers but also to other groups of intellectual producers, which were directed to the necessity of giving greater effectiveness to penal sanctions, to the regulation of the protection of so-called industrial models and designs, to the protection of architectural works, etc. It also proposed, in 1943, by means of the amendment and amplification of the regulations of Law No. 11,723, solutions for

11. In Carlos Mouchet and Sigfrido A. Radaelli, op. cit. Vol. II, pp. 202 et seq. Vol. III, pp. 449 et seq.

12. Ibidem. Vol. II, pp. 277 et seq.

problems related to the control of publications by the administration and the customs, the broadcasting of intellectual works, and the regulation of the royalty-collecting organizations[13].

VII. Without going into criticism of the underlying philosophy of Law No. 11,723, we shall refer to certain practical deficiencies it presents.

We must begin by pointing out the justifiable criticism of the system of formalities relative to the enjoyment of copyright: Failure to register a work in the Registro Nacional de la Propiedad Intelectual results in suspension of the copyright (Art. 63) [14]. The system of opposition to registrations is inspired from the trademark law, a mistake in view of the peculiarities distinguishing copyright from trademark. It is also necessary to register assignments to insure their validity against third parties (Art. 53). Therefore, any negligence on the part of the author, or, worse, of the publisher (compelled by law to register all works) suspends the enjoyment of the economic rights of the author. And what is more serious is that this system, which goes so far as to require the granting of a title of definitive property (Art. 59), leads many to believe that the registration of works affords a perfect proprietary right, which may be invoked against third parties, to enjoy the exclusive exploitation of works which often have no originality or merit whatsoever. As was to be expected, the courts have established a mere rebuttable presumption "juris tantum" of property afforded by registration.

This criterion of the formalities, when applied to foreign works published in their country of origin, in a language other than Spanish (Art. 23), renders ineffective in actual practice the apparently very liberal protection recognized to the foreign work (Art. 13), and has led to the practice of a sort of free and legalized piracy. In effect, Arts. 13 and 23 provide:

> "Article 13. All provisions of this Law, with the exception of those of Article 57, shall be equally applicable to scientific, artistic and literary works published in foreign countries, whatever may be the nationality of their authors, provided they belong to countries which recognize copyright.

13. See Instituto Argentino de Derecho Intelectual, "Las Sanciones penales en la ley 11,723, La protección de los dibujos y modelos industriales," "Penal Sanctions under Law 11,723. The protection of Industrial Models and Designs," Buenos Aires, 1942 (pamphlet). These studies are reproduced in Carlos Mouchet and Sigfrido A. Radaelli, op. cit. Vol. III, pp. 244 et seq., 292 et seq. and 304 et seq.

14. This suspension only affects the enjoyment of the economic exploitation of the work, not the exercise of rights relative to the moral right. See Carlos Mouchet and Sigfrido A. Radaelli "Los derechos del escritor y del artista," (The Rights of the Writer and the Artist.) Buenos Aires (Ed. Sudamericana) p. 83, 1957.

"Article 23. The holder of the right of translation shall have copyright in the translation subject to the conditions agreed to with the author and provided that the translation agreement is registered in the National Copyright Registry (Registro Nacional de Propiedad Intelectual) within one year of the publication of the translated work.

"Failure to register the translation agreement shall involve suspension of the rights of the author or his successors in title until such registration is accomplished. The rights of the author or his successors in title shall be recovered by the act of registration for the corresponding term and under the corresponding conditions, without prejudice to the validity of the translations made during the time the agreement was not registered."

The courts, in civil and criminal actions, have sustained the legality of translations published without authorization of the author or authorized publisher during the time the contract of translation was not registered[15]. This system was particularly prejudicial to those European countries not bound to Argentina by international treaties, since our country has not adhered up to now to the Berne Convention, which is completely liberal in the matter of formalities. The situation has improved with the ratification of the Universal Convention, to which the most important western European nations and the United States of America already belong. The government has issued a new decree regulating the application of Art. V of the Universal Convention in the matter of licenses to translate, and to which we shall refer hereinafter.

A defect of the chapter on penal sanctions of Law No. 11,723, which we pointed out in 1933 in collaboration with Sigfrido A. Radaelli, has rendered them partially ineffective. By assimilating, according to various hypotheses, the infringement of copyrights to the crimes of swindling and embezzlement, contemplated in the Penal Code, it so happens that when the typical elements of these crimes are not present in a case, the courts have not considered the penalties applicable. This defect does not affect the protection of theatrical or musical works, which are thus the best protected works[16].

In cases such as these, laymen may well wonder what hinders the writing of laws in clear, straightforward language. Montaigne said: "Why does our common language, so simple for other uses, become obscure and unintelligible in contracts and testaments? Why is a person who clearly expresses himself in what he says or writes, unable to find in juridical terms any way of expressing himself, that is not subject to contradiction?" ("Essays," Vol. III, Chapter 13).

15. Carlos Mouchet and Sigfrido A. Radaelli, ibid, pp. 176 et seq.

16. Carlos Mouchet and Sigfrido A. Radaelli, ibid, pp. 176 et seq.

The writer of legal rules is not always a good draftsman and, in addition, in dealing with subjects such as this, it is not always easy to fit the changing realities of life into rigid abstract categories.

VIII. The authors' societies obtained from Decree Law 12,063[17] issued October 2, 1957 by the provisional government, the extension of the "post-mortem" enjoyment of the economical exploitation of authors' rights from thirty to fifty years, thus amending Arts. 5 and 84 of Law No. 11,723, the term becoming identical with the term established by the Berne Convention. A few days before, the Sociedad Argentina de Escritores had brought the question before the public when the famous novel by Güiraldes, "Don Segundo Sombra," fell into the public domain.

The above mentioned decree law establishes, furthermore, a new regulation for the registration of periodical publications in the Copyright Registro. It also shortens the term of publication in the *Boletín Oficial* of the lists of works submitted for registration.

In 1948 the Senate, on the basis of a draft law of Senator Tascheret, had already approved the extension of the copyright term to fifty years, but at that time the draft law failed to receive the approval of the Chamber of Deputies. Inversely, in the year 1954, the Chamber of Deputies approved a draft law on the extension of the term presented by two representatives, Mrs. Parodi and Dr. Benitez, which this time failed to obtain the approval of the Senate. The lack of progress in the Legislature was due, on the one hand, to the resistance presented by the publishing industry, and, on the other hand, to the criticism raised as to one of its provisions, which provided that works that had entered the public domain on account of the expiration of the term of thirty years should revert to "private domain until the fifty-year term was completed." Such a text benefited not only heirs and legatees but also publishers and other classes of assignees, which was unjust. It also established, in Art. 2, that "The State is entitled to the right of enjoyment of economic benefits of those national or foreign works which enter or have entered the public domain by virtue of the provisions of Law No. 11,723 and the present law." Let us remember as a precedent that in a draft law presented by the National Executive Authority on September 30, 1932, it was established that upon the expiration of the term of private exploitation of works, these works became "Government property" (Art. 16). Such a provision was not included in Law No. 11,723 when it was enacted in the following year.

The 1954 Draft Law also provided in Art. 1 (based on the theory of the social functions of property, established in the constitutional reform of 1949

17. Published in the *Boletín Oficial* of October 11, 1957.

and repealed on May 1, 1956) a sort of legal license for the "diffusion (sic) or translation" of works of the intellect in cases where the heirs or successors at law did not exercise such a right.

The reform of the year 1957, provided for by Decree Law No. 12,063, in following the general outline of the Draft Law of 1954, retained traces of some of its failing and added a few other provisions susceptible of being criticized, such as those referring to the "automatic" reversion of the works to the private domain, without distinction between heirs and assignees.

The ambiguous wording of Article 84 as amended may give rise to some difficulties of interpretation. The new text:

> "Article 84. Works which, according to the provisions of Law 11,723, are deemed to have passed into the public domain without the term of fifty years having expired shall revert automatically to the private domain until the completion of this term, without prejudice to any rights acquired by third parties in reproductions of these works made during the interval between the expiration of the term of thirty years and the extension to fifty years provided by this Decree-Law."

The solutions adopted in European laws which, by reason of the state of war, extended the terms of duration of copyright, should have been considered. Thus, in Italy, a Decree-Law of July 20, 1945, extended by the Law of December 19, 1956, established that the extension of term provided for in the law benefited only authors, and their heirs and legatees. The situation of the assignees was considered, and they were granted the right to use the rights previously acquired by them, on condition of the payment of an appropriate remuneration to the author and the heirs[18]. A somewhat similar system was followed by French Laws of February 3, 1919 and September 21, 1951.

The new language of Art. 84 gives rise to the same objection provoked by the analogous provision in the 1954 Draft-Law: the prospect that when the work had been assigned under the old law, the assignees would receive an unexpected "gift" of a further twenty years of economic exploitation of such a work, without any benefit to the heirs of the author-assignor from the extension. This interpretation would be contrary to the ends sought by the enactment of Decree Law 12,063, expressed in its introduction, where it is declared that "it not only protects the heirs of the authors but it corrects the disadvantageous position in which such heirs find themselves in other States." But the truth is that the text of the new provision makes no distinction between the rights of the heirs and the rights of third parties (assignees).

Likewise the "automatic" reversion to private domain merits criticism insofar as it affects title-holders other than the heirs. This means that the bene-

18. See *"Le Droit d'Auteur,"* Berne, November 15, 1945, p. 122 and July 1957, p. 125.

ficiaries will need to take no steps in order to benefit by the extension. This would make sense in the case of the heirs, but not in the case of assignees, who will thus reacquire the rights without having to prove the existence of such rights, which are often derived from defective titles.

Under Arts. 13 and 15 of Law 11,723 the extension to fifty years would also benefit foreign works published for the first time in countries whose laws also insure protection for such a term.

In order to regulate one of the aspects of Decree Law No. 12,063, the Ministerio de Educación y Justicia (Ministry of Education and Justice) issued, on October 16, 1957, a resolution[19] covering the position of publishers of works that were at the time of their utilization in the public domain, and that by virtue of the above mentioned decree-law revert to the private domain.

The publishers had to declare before the Registry, prior to November 15, 1957, the editions issued under such conditions, and the Registry had to stamp the declared copies and make a record of this act.

We should point out the injustice involved under the new system of registration of periodical publications in making the protection of the works contained in periodical publications dependent on compliance of the owner of such publications with the registration requirement. This demonstrates once more the absurdity of the system of formalities adopted by Law 11,723.

IX. Up to a short time ago Argentina was bound to American countries (with the exception of Venezuela and El Salvador) by means of the Montevideo Copyright Treaty of 1889, the Pan American Convention of Buenos Aires of 1910, and the Washington Convention of 1946. These latter treaties are rather liberal in the matter of formalities.

The scope of such relations has been enlarged recently to cover countries on other Continents by virtue of the ratification of the Universal Copyright Convention of 1952 at Geneva. The comparatively rapid ratification by Argentina of this Convention was prompted by the realization that a great number of ratifications had been obtained for this Convention, those of the United States of America and the important European nations which belong to the

19. Published in the *Boletín Oficial* of November 4, 1957.

Berne Union being considered particularly significant. The ratification of the Universal Convention was effected on October 2, 1957 by Decree-Law No. 12,088[20, 21].

The countries that are bound to Argentina by international treaties in the field of copyright are as follows:

AMERICA

Bolivia. Montevideo Treaty of 1889 and Washington Convention of 1946.

Brazil. Buenos Aires Convention of 1910 and Washington Convention of 1946. (*Ed.*: Brazil ratified the U.C.C. Oct. 13, 1959.)

Colombia. Buenos Aires Convention of 1910.

Cuba. Washington Convention of 1946 and Universal Convention.

Costa Rica. Buenos Aires Convention of 1910, Washington Convention of 1946 and Universal Convention.

Chile. Montevideo Treaty of 1889, Buenos Aires Convention of 1910, Washington Convention of 1946 and Universal Convention.

Ecuador. Buenos Aires Convention of 1910, Washington Convention of 1946 and Universal Convention.

Guatemala. Buenos Aires Convention of 1910 and Washington Convention of 1946.

Haiti. Buenos Aires Convention of 1910 and Universal Convention.

Honduras. Buenos Aires Convention of 1910 and Washington Convention of 1946.

Mexico. Buenos Aires Convention of 1910, Washington Convention of 1946 and Universal Convention.

Nicaragua. Buenos Aires Convention of 1910 and Washington Convention of 1946.

---

20. ADLA, XVII-A, p. 757.

21. Published in the *Boletín Oficial* of October 15, 1957. Our opinion on the Universal Convention may be seen in Carlos Mouchet and Sigfrido A. Radaelli, "Los derechos del escritor y del artista" (The Rights of the Writer and the Artist) cit. pp. 308 et seq. See also Eduardo F. Mendilaharzu, "Nuestra ratificación de la Convención Universal en materia de derechos de autor y su incidencia en nuestro regimen nacional," (Our Ratification of the Universal Copyright Convention and its effect on our internal law) in *La Ley*, Vol. 86, p. 917.

Panama. Buenos Aires Convention of 1910.

Paraguay. Montevideo Treaty of 1889, Buenos Aires Convention of 1910 and Washington Convention of 1946.

Peru. Montevideo Treaty of 1889 and Buenos Aires Convention of 1910.

Dominican Republic. Buenos Aires Convention of 1910 and Washington Convention of 1946.

United States. Buenos Aires Convention of 1910 and Universal Convention.

Uruguay. Montevideo Treaty of 1889 and Buenos Aires Convention of 1910.

EUROPE

The countries bound to the Argentine Republic by the Universal Convention: German Federal Republic, Andorra, Austria, Spain, France, Great Britain, Ireland, Italy, Iceland, Liechtenstein, Luxembourg, Monaco, Portugal, Vatican City and Switzerland. (*Ed.*: Czechoslovakia ratified the U.C.C. Oct. 6, 1959.)

It should be remembered that several European countries have adhered to the Montevideo Treaty of 1889 and that their adhesions were accepted by Argentina. These countries are: France (1896), Spain (1900), Italy (1900), Belgium (1903), Austria (1923), Germany (1926), and Hungary (1931). The adhesion of Spain was not ratified. This Treaty and the adhesions thereto have mainly a historic value.

ASIA

Countries bound to the Argentine Republic by the Universal Convention: Cambodia, the Philippines, India, Israel, Japan, Laos, Lebanon, and Pakistan.

AFRICA

Liberia is bound to the Argentine Republic by the Universal Convention.

X. The application in the Argentine Republic of Art. V of the Universal Convention, insofar as it refers to the granting of licenses to translate foreign works, has been regulated by the government by Decree 1155[22] of January 31, 1958[23].

22. ADLA, XVIII-A, p. 556.

23. Published in the *Boletín Oficial* of February 13, 1958.

The non-exclusive licenses to translate and publish in this country works originally written in a foreign language or works the Spanish translations of which are already out of print, will be granted by the Copyright Registry (Art. 1).

The applicant must comply with the various requirements provided for in Art. V of the Convention. To guarantee the correct translation of the work by a competent person, a permanent committee has been created with the function of watching over this aspect. It establishes that 10 percent over the sales price of the work will be paid as a fee by the applicant, of which one-third must be deposited in a special account in the National Bank of Argentina, and that a bond for the remaining two-thirds, payable within the term of two years, must be posted.

Decree 1155 repeats, also, the concept of "publication" established by Art. V of the Universal Convention.

As we said before, the application and regulation by Argentina of Art. V of the Universal Convention improves, with respect to the countries parties to this agreement, the lamentable situation created by the regulations for translations established by Art. 23 of Law No. 11,723.

XI. The extension to fifty years of the "post mortem" term, the implementation of Art. V of the Universal Convention and the creation of a *"domaine public payant"* tend to benefit national and foreign authors. Living authors and the heirs of those who are deceased will not have to suffer to the same extent as heretofore from the competition of works in the public domain. All this restricts the activity of the publishers, who operated principally with works not subject to the payment of royalties.

In view of these partial reforms of Law 11,723 on the subject of "the regime of intellectual property," there still exists the necessity in Argentina of tackling the integrated study, by experts in the subject, of the system of protection of works of intellectual creation, not forgetting inventions, scientific discoveries, and industrial designs and models. In this task it will be necessary to consult the interests of the various parties affected. We believe that the studies carried out thus far, and the work of the courts provide a sufficient basis for undertaking this task.

PART II.

LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

1. UNITED STATES OF AMERICA AND TERRITORIES

294. U. S. CONGRESS. HOUSE.

H.R. 11658. A bill to amend chapter 57 of title 18, United States Code, so as to make it a crime to use certain musical reproductions in the United States for certain commercial purposes. Introduced by Mr. Holt (by request), April 7, 1960, and referred to the Committee on the Judiciary. 2 p. (86th Cong., 2d sess.)

Identical with H.R. 11043, introduced by Mr. Pelly, March 10, 1960. See 7 BULL. CR. SOC. 167, Item 221.

295. U. S. CONGRESS. HOUSE.

H. J. Res. 704. Joint resolution to remove copyright restrictions upon musical composition "Pledge of Allegiance to the Flag", and for other purposes. Introduced by Mr. Rabaut, May 10, 1960, and referred to the Committee on House Administration. 2 p. (86th Cong., 2d sess.)

This resolution proposes, in part, that the musical composition, which had been copyrighted by the composer, Irving Caesar, and later assigned to Congressman Rabaut who in turn assigned it to the U. S. Congress, be declared in the public domain.

296. U. S. CONGRESS. HOUSE. *Committee on the Judiciary.*

Libonati, Roland V. Reports on the revision of the Hague Arrangement Concerning the International Deposit of Designs and the Intergovernmental Copyright Committee meeting in Munich, Germany. January 1960. Printed for the use of the Committee on the Judiciary, House of Representatives. Washington, U. S. Govt. Print. Off., 1960. 39 p. (Committee print.)

Representative Libonati, who attended the meetings, submits to the committee his report containing "a history of the steps leading to the meeting of the Hague, as well as . . . [his] comments on the problems and issues which were considered by the Committee of Experts." In the

preface, Mr. Libonati expresses the hope that the report "will be of aid in connection with enabling legislation which would be needed if the Draft Arrangement [formulated by the Committee of Experts and printed as one of the appendices of this report] is formally ratified as a treaty."

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

Patents, trademarks, and copyrights. Report of the Committee on the Judiciary, United States Senate, made by its Subcommittee on Patents, Trademarks, and Copyrights pursuant to S. Res. 53, Eighty-sixth Congress, First Session, as extended. March 16, 1960. Washington, U. S. Govt. Print. Office, 1960.

The annual report of the Subcommittee giving a review of its work in connection with patent, trademark, and copyright bills referred to it during the 1st session of the 86th Congress. A statement about, and a list of the Copyright Office law revision studies, which are being published as committee prints, is included.

298. U. S. LAWS, STATUTES, ETC.

Public Law 86-435, 86th Congress, H.R. 7588, April 22, 1960, 74 Stat. 77. An Act to amend the Internal Revenue Code of 1954 with respect to the treatment of copyright royalties for purposes of the personal holding company tax. Washington, Govt. Print. Off., 1960. 2 p.

This law is designed to exempt most music publishing companies from the onerous personal holding company tax provisions of the Internal Revenue Code, to which many such companies have in recent years become subject. With the shift from sheet music sales to recording, performance and other royalties as the major source of their income, many music publishers have in the last decade become subject to the personal holding company provisions on the ground that 80% or more of their gross income constituted "royalty income" and hence, "personal holding company income." The personal holding company provisions of the Code are aimed primarily at the investment-type company and not at the operating company, and for this reason the Treasury Department consented to the removal, through this law, of an obvious inequity.

To avoid classification as personal holding company income, the copyright royalties must now meet three conditions:

(1) Such royalties (exclusive of those received from copyrights on works created by shareholders of the corporation) must constitute 50% or more of the corporation's gross income.

(2) To insure that any corporation which has any appreciable amount of other personal holding company income is not excluded from the personal holding company category, the new law requires that other types of personal holding company income must be no more than 10% of the corporation's gross income. Excluded, however, from the computation of such other personal holding company income are copyright royalties (but not royalties from copyrights created by any shareholder owning more than 10% of the corporation's stock) and dividends from any corporation in which the taxpayer corporation owns 50% or more of the stock and which corporation itself meets the three conditions.

(3) To emphasize the application of the new liberalizing amendment only to bona fide operating companies and not to mere passive investment-type companies, the taxpayer corporation's allowable deductions for ordinary and necessary business expenses must equal 50% or more of its gross income. Such deductions, however, may not include compensation for personal services rendered by its shareholders or royalties to such shareholders.

The new law applies only to royalties from statutory copyrights secured in this country or foreign countries, and to taxable years beginning after December 31, 1959.

299. U. S. LAWS, STATUTES, ETC.

Code of Federal Regulations. Title 37, revised as of January 1, 1960. Washington, Office of the Federal Register, 1960. 134 p.

Chapter II contains the current Regulations of the Copyright Office.

300. U. S. COPYRIGHT OFFICE.

General information on copyright. Washington, U. S. Govt. Print. Off., Feb. 1960. 7 p. (Cir. 35.)

A revised informational circular which attempts "to furnish answers to some of the questions which are commonly asked of the Copyright Office."

2. FOREIGN NATIONS

301. GERMANY (FEDERAL REPUBLIC, 1949—) LAWS, STATUTES, ETC.

Un progetto di legge sul diritto di autore e diritti affini presentato dal Ministro di Giustizia della Republica federale di Germania. (30 *Il Diritto di Autore* 678-713, No. 4, Oct.-Dec. 1959.)

Italian translation of the texts of the new draft copyright laws of the German Federal Republic issued recently by the German Federal Ministry of Justice.

302. GERMANY (FEDERAL REPUBLIC, 1949—) LAWS, STATUTES, ETC.

Projet de loi ministériel sur le droit d'auteur et les droits apparentés (Loi sur le droit d'auteur) (*Interauteurs, no.* 138, 45-74, 1. trimestre 1960.)

French translation of the texts of the new draft copyright laws of the German Federal Republic issued recently by the German Federal Ministry of Justice.

303. LIECHTENSTEIN. LAWS, STATUTES, ETC.

Gesetz vom 8. August 1959 über die Abänderung des Gesetzes vom 26. Oktober 1928 betr. das Urheberrecht an Werken der Literatur und Kunst. 5 p. Liechtensteinisches Landes-Gesetzblatt, Jahrg. 1959, Nr. 17, ausgegeben am 26. Oktober 1959.

An amendatory copyright law of Aug. 8, 1959, effective on the date of its publication, i.e., Oct. 26, 1959. The principal change from the basic law of Oct. 26, 1928 is the prolongation of the term of protection from 30 years plus life to 50 years plus life.

304. LIECHTENSTEIN. LAWS, STATUTES, ETC.

Loi modifiant celle du 26 octobre 1928 concernant le droit d'auteur sur les oeuvres littéraires et artistiques. (73 *Le Droit d'Auteur* 77-79, no. 4, April 1960.)

French translation of an amendatory copyright law. See Item 303, *supra.*

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

305. UNITED STATES. TREATIES, ETC. *The President.*

Proclamation 3353. Copyright Extension: Austria.

A proclamation issued on June 15, 1960, by President Eisenhower, in conjunction with an exchange of diplomatic notes between the Secretary of State and the Austrian Ambassador provides an extension of one year of time for Austrian citizens to comply with procedural formalities necessary to bring their literary, artistic, and musical works within the protection of the United States Copyright Law (*Federal Register,* Vol. 25, No. 117 (June 16, 1960), p. 5373).

The new proclamation permits citizens of Austria who were unable to apply for United States copyright registration or renewal for their works during the period from March 13, 1938 and before July 27, 1956 to do so during the year following the proclamation. Affected are those Austrian works that were either first published or produced outside the United States or became subject to renewal of United States copyright during that period.

Austrians lacked the facilities essential for compliance with the conditions and formalities of our copyright law during several years of the period because of disrupted conditions preceding and arising out of World War II.

The 1938 date is the beginning of the occupation of Austria and the 1956 date is one year after the effective date for the United States of the Austrian State Treaty of 1955. Under that treaty, occupation troops were withdrawn from Austria.

The United States Copyright Law provides that there shall be no liability for the lawful use of any of the affected works prior to the proclamation date or for the continuation during the subsequent year of any undertaking that involves expenditure or contractual obligation in connection with the lawful exploitation of any such work.

The text of the proclamation follows:

(reprinted from *The Federal Register,* Vol. 25, No. 117, June 16, 1960)

TITLE 3—THE PRESIDENT

Proclamation 3353

COPYRIGHT EXTENSION: AUSTRIA

By the President of the United States of America

A Proclamation

WHEREAS the President is authorized, in accordance with the conditions prescribed in section 9 of title 17 of the United States Code, which includes the provisions of the act of Congress, approved March 4, 1909, 35 Stat. 1075, as amended by the act of September 25, 1941, 55 Stat. 732, to grant an extension of time for fulfillment of the conditions and formalities prescribed by the copyright laws of the United States of America, with respect to works first produced or published outside the United States of America and subject to copyright or to renewal of copyright under the laws of the United States of America, by nationals of countries which accord substantially equal treatment to citizens of the United States of America; and

WHEREAS satisfactory official assurances have been received that since December 14, 1907, citizens of the United States have been entitled to obtain copyright protection for their works in Austria on substantially the same basis as citizens of Austria without the need of complying with any formalities, provided such works secured protection in the United States; and

WHEREAS, by virtue of a proclamation by the President of the United States of America, dated April 9, 1910, 36 Stat. 2685, citizens of Austria are, and since July 1, 1909, have been, entitled to the benefits of the aforementioned act of March 4, 1909, other than the benefits of section 1(e) of that act; and

WHEREAS, by virtue of a proclamation by the President of the United States of America, dated March 11, 1925, 44 Stat. 2571, the citizens of Austria are, and since August 1, 1920, have been, entitled to the benefits of section 1(e) of the aforementioned act of March 4, 1909:

NOW, THEREFORE, I, DWIGHT D. EISENHOWER, President of the United States of America, under and by virtue of the authority vested in me by the aforesaid title 17, do declare and proclaim:

That with respect to (1) works of citizens of Austria which were first produced or published outside the United States of America on or after March 13, 1938 and prior to July 27, 1956, and subject to copyright under the laws of the United States of America, and (2) works of citizens of Austria subject to renewal of copyright under the laws of the United States of America on or after March 13, 1938 and prior to July 27, 1956, there has existed during several years of the aforementioned period such disruption or suspension of facilities essential to compliance with the conditions and formalities prescribed with respect to such works by the copyright laws of the United States of America as to bring such works within the terms of the aforesaid title 17, and that, accordingly, the time within which compliance with such conditions and formalities may take place is hereby extended with respect to such works for one year after the date of this proclamation.

It shall be understood that the term of copyright in any case is not and cannot be altered or affected by this proclamation, and that, as provided by the aforesaid title 17, no liability shall attach under that title for lawful uses made or acts done prior to the effective date of this proclamation in connection with the above-described works, or with respect to the continuance for one year subsequent to such date of any business undertaking or enterprise lawfully entered into prior to such date involving expenditure or contractual obligation in connection with the exploitation, production, reproduction, circulation, or performance of any such work.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the City of Washington this fifteenth day of June in the year of our Lord nineteen hundred and sixty, and of the Inde-
[SEAL] pendence of the United States of America the one hundred and eighty-fourth.

DWIGHT D. EISENHOWER

By the President:
DOUGLAS DILLON,
Acting Secretary of State.

[F.R. Doc. 60-5633; Filed, June 15, 1960; 11:23 a.m.]

306. UNITED STATES. DEPT. OF STATE.

Treaties in force; a list of treaties and other international agreements of the United States in force on January 1, 1960. Compiled by the Treaty Affairs Staff, Office of the Legal Advisor, Dept. of State. Washington, U. S. Govt. Print. Off., 1960. 284 p. (Publication 6959.)

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 county or other political entity, with subject headings under each country or other entity. Part 2 includes multilateral treaties and other agreements, arranged under subject, together with a list of the states which are parties to each agreement.

In the appendix is included 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, 1960 are also included in the main sections under appropriate countries or subject headings.

307. Draft Regulations implementing the Draft Arrangement concerning the International Deposit of Designs. (5 *Industrial Property Quarterly* 64-71, no. 2, April 1960.)

"The present Draft Regulations were drawn up by a Working Group [which met from Jan. 25-29, 1960 at The Hague] in accordance with the procedure laid down in point 23 of the Explanatory Statement attached to the Draft Arrangement." See 7 BULL. CR. SOC. 82 at 94, Item 86 (1959).

PART IV.

JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY

A. DECISIONS OF U. S. COURTS

1. Federal Court Decisions

308. *Rose, et al.* v. *Bourne, Inc.*, Docket No. 26015 (2d Cir. May 31, 1960). (*per curiam.*)

Editor's Note: The opinion of the United States Court of Appeals for the Second Circuit affirming the District Court's decision, 176 F. Supp. 605, 123 U.S.P.Q. 29, 7 Bull. Cr. Soc. 47, Item 27, is sufficiently important to warrant reprinting in full. The reader's attention is also directed to the article by Richard Colby, *supra* in this issue, discussing the *Rose* case.

Before Waterman and Barnes,* *Circuit Judges,* and *Smith, District Judge.*

Plaintiff appeals from a judgment on a counterclaim entered in the United States District Court for the Southern District of New York, Dimock, *J.*, declaring defendant to be the legal owner of the renewed copyright upon the song "That Old Gang of Mine." The decision below is reported at 176 F. Supp. 605.

Affirmed.

PER CURIAM:

This case calls for an adjudication of the ownership of the right to renew the copyright upon the song, "That Old Gang of Mine." The song was written by Billy Rose, Mort Dixon and Ray Henderson.[1] Dixon died sometime subsequent to May 17, 1950, and the executor of his estate has joined the two surviving authors as the third plaintiff herein. On April 19, 1923 the three authors entered into an agreement with defendant's predecessor, Irving Berlin, Inc., for the publication of the song. The terms of the agreement with respect to the payment of royalties are set forth in

* Of the Ninth Circuit, sitting by designation.

1. The lyrics of the song were written by Rose and Dixon. The music was composed by Henderson. The statute, 17 U. S. C. §24, refers to all persons who create copyrightable works by the generic name "author." Throughout this opinion Rose, Dixon and Henderson are referred to as "authors" in accordance with this statutory language.

Judge Dimock's opinion below, 176 F. Supp. 605, 608-609 (S. D. N. Y. 1959), and need not be here repeated. By this agreement the authors assigned to defendant's predecessor the musical composition "That Old Gang of Mine" along with certain specified rights in that song including "* * * all copyrights and the rights to secure copyrights and extensions and renewals of copyrights. * * *"

The song was first registered with the Copyright Office on April 23, 1923 as an unpublished work. Under Section 24 of the Copyright Act, 17 U. S. C. §24, and Section 202.17 (a) of the Rules of the Copyright Office, 37 C. F. R., application for renewal of a copyright upon a work originally registered in an unpublished form must occur within the twenty-eighth year of the copyright term. It is settled that prior to the renewal period an author's interest in the renewal rights is only an expectancy which can be defeated by his death prior to the commencement of the renewal period. See *Miller Music Corp.* v. *Daniels,* 362 U. S. 373, 80 S. Ct. 792 (April 18, 1960). However the author may assign this expectancy and the assignment is valid against the world if the author is alive at the commencement of the renewal period. *Fred Fisher Music Co.* v. *M. Witmark & Sons,* 318 U. S. 643 (1943); *Miller Music Corp.* v. *Daniels, supra* at p. 375, 80 S. Ct. 792, 794. In this case the renewal period began on April 24, 1950, and since all three authors were alive on that date, the case falls within the rule of *Fred Fisher Music Co.* v. *M. Witmark & Sons, supra.*

The *Fisher* case indicated that an author might challenge the validity of his assignment of his expectancy in the renewal rights if the consideration for the assignment was inadequate. Judge Dimock held that the 1923 assignment was supported by adequate consideration and we adopt his excellent analysis of the question as applied to the facts of this case, 176 F. Supp. 605, 611-12. See also *Gumm* v. *Jerry Vogel Music Co.,* 158 F. 2d 516 (2 Cir. 1946); *Marks Music Corp.* v. *Harris Music Pub. Co.,* 255 F. 2d 518, 521-22 (2 Cir. 1958), *cert. denied,* 358 U. S. 831.

It is clear that unlike the 1910 agreement in *Rossiter* v. *Vogel,* 134 F. 2d 908 (2 Cir. 1943), the 1923 assignment before us conveyed renewal rights, and this court has repeatedly held that a power of attorney to apply for renewal rights will be implied from the fact of the assignment. See *Rossiter* v. *Vogel, supra* at p. 911. Therefore we affirm Judge Dimock's conclusion that appellee, having made a timely filing for renewal, is the present legal owner of the renewal copyright.

Appellants also object to Judge Dimock's award to appellee of $7,500 in attorney's fees. The reasons for this award are to be found in the opinion below, 176 F. Supp. 605, 612. Under 17 U. S. C. §116 the dis-

trict court may award the prevailing party a reasonable attorney's fee as part of the costs. There is no abuse of discretion here.

Affirmed.

309. *Axelbank* v. *Roney, et al.*, 277 F.2d 314, 125 U.S.P.Q. 262 (9th Cir. April 25, 1960.) (Jertberg, J.)

Action for copyright infringement and unfair competition. Defendant counterclaimed for damages for libel. After trial, for defendant.

Held, on appeal, affirmed.

Plaintiff had spent many years accumulating newsreels of the Russian Revolution. In 1937, from those newsreels, he assembled a film which he entitled "Tsar to Lenin." This film was registered for copyright in March 1937. Defendant also acquired newsreels of the Russian Revolution, but defendant's activities were conducted primarily in Europe, and were independent of the activities of plaintiff. Defendant licensed NBC and other producers to use his film on telecasts. Some of this footage was identical to portions of "Tsar to Lenin." In September 1955, plaintiff wrote to a television station suggesting that defendant had deliberately pirated "Tsar to Lenin," and this letter formed the basis of defendant's counterclaim for libel. The appellate court adopted the finding of the trial court to the effect that documentary films of the sort collected by both plaintiff and defendant had been freely sold during the 1920s and 1930s, and hence were in the public domain. The only elements of plaintiff's film protected by his copyright were "the sequential development, the commentary . . . , and one map. . . . " There was no direct evidence of pirating, and there was no similarity between defendant's films and the protectible portions of plaintiff's film. Thus there was no infringement. The court went on to hold that plaintiff's letter to the television station was libelous per se, was motivated by malice, and thus was not privileged.

310. *Consumers Union of United States, Inc.* v. *Hobart Mfg. Co., et al.*, 125 U.S.P.Q. 296 (S.D.N.Y. April 20, 1960.) (Dimock, J.)

Action for copyright infringement. Plaintiff moves for preliminary injunction.

Held, denied.

Defendant circulated among dealers a sales bulletin alleged to contain material from plaintiff's Consumer Reports. Plaintiff had rated a washing machine manufactured by defendant as second-best. Defendant's sales bulletin commented upon and rebutted this rating. Said the court: "In no instance did material which was copied into the Bulletin have

any original literary forms which would entitle it to copyright protection. Each item was a bald statement of fact which can hardly have been stated in any different fashion. I am faced with an intent to clothe with copyright protection a compilation of facts. . . . The directories cases are exceptions to the rule that facts are not a proper subject of copyright. That exception does not go so far, however, as to prohibit non-competitive use of facts set forth in a copyrighted collection." The court went on to find that plaintiff and defendant were not in competition, and that plaintiff suffered at most trivial damage when defendant circulated its sales bulletin.

311. *Walters* v. *Shari Music Publishing Corp., et al.,* Civ. No. 119-246 (S.D.N.Y. April 22, 1960.) (Dimock, J.)

Action for copyright infringement. Plaintiff and defendants make cross-motions for summary judgment.

Held, both motions denied.

In February 1954 plaintiff registered for copyright a song entitled "Iron Bar." Thereafter, plaintiff employed defendant Burgie to make a recording of the song. Burgie did so. In September 1955 Burgie registered for copyright a song entitled "Jamaica Farewell," which plaintiff now alleged was stolen by Burgie from "Iron Bar." The latter song, however, appeared to be based upon a Jamaican folk song. It was this folk song which Burgie claimed to have copied in creating "Jamaica Farewell." The court characterized the melody of "Iron Bar" as a confidential matter disclosed by plaintiff to defendant in the course of their employer-employee relationship. Thus, "if defendant Burgie had got his first acquaintance with the tune when hired . . . his subsequent use of the tune was a violation of his confidential relationship with plaintiff. His exploitation of the melody was in direct competition with his former employer from whom, by hypothesis, he had obtained it." Whether this "hypothesis" was factual or not could be resolved only upon trial.

312. *Elekes* v. *Bradford Novelty Co.,* 125 U.S.P.Q. 166 (D. Mass. March 15, 1960.) (Julian, J.)

Action for copyright infringement of two ornamental stars.

Held, after trial, for defendant.

In March 1953, plaintiff had registered a foil star with the Copyright Office as a work of art, or a model or design for a work of art. In November 1954, plaintiff had registered a plastic star with the Copyright

Office, placing it in the same category as the foil star. Plaintiff sent a drawing of the plastic star to defendant in late 1954. The drawing itself was not copyrighted. Approximately one year prior to this time, defendant had itself created an ornamental star. Defendant had manufactured and sold its star in commercial quantities, while plaintiff had manufactured its stars merely as samples. The court examined plaintiff's and defendant's respective stars, and found them different. "It follows that the defendant has not infringed the plaintiff's copyright. A copyright protects only the expression of an idea and not the idea itself. There cannot be an infringement of a copyright without copying."

2. State Court Decisions

313. *Clevenger* v. *Baker, Voorhis & Co., et al.,* 125 U.S.P.Q. 503 (N. Y. App. Div., 1st Dept. April 26, 1960.) (Frank, J.)

Action for damages for "misrepresentation of editorship." The trial court denied defendants' motion to dismiss the complaint. See *Clevenger* v. *Baker, Voorhis & Co., et al.,* 125 U.S.P.Q. 421, 7 BULL CR. SOC. 104, Item 114 (Sup. Ct., N. Y. Co. 1959)

Held, reversed.

Plaintiff sold to defendant the right to use the name "Clevenger" on a particular law book which was to appear in annual editions. Plaintiff edited these editions until 1956, when he terminated relations with defendant. Plaintiff now argues that the phrase "annually revised" on the 1959 edition implied that he was the editor of that edition. "The plaintiff has no right to demand that the defendants must print the names of the revisers or specifically state that the plaintiff is not the reviser. It is enough if they do not represent that he is the reviser if, in fact, he is not."

314. *Fabrics by Bus Davies, Inc.* v. *Kay Windsor Frocks, Inc., et al.,* 125 U.S.P.Q. 470 (Sup. Ct., N. Y. Co. May 2, 1960.) (Hecht, J.)

Action for common law copyright infringement. Defendant moves for judgment on the pleadings.

Held, granted in part, denied in part.

Plaintiff printed its fabric design on bolts of cloth and gave limited quantities to defendant for the purpose of making sample dresses. This limited distribution did not constitute publication, and thus plaintiff's design was subject to common law copyright protection. Plaintiff's second

cause of action, however, alleged breach of contract, but plaintiff failed to allege that one of the defendants knew of the existence of the contract between plaintiff and another of the defendants. Thus the former defendant was entitled to judgment on the pleadings. Plaintiff's third cause of action was merely a repetition of the first, and so defendants were entitled to judgment on the third cause of action.

315. *Zahler* v. *Columbia Pictures Corp. et al.,* 125 U.S.P.Q. 462 (Calif. Dist. Ct. of Appeals May 2, 1960.) (Shinn, J.)

Action for injunction to restrain defendant from using plaintiff's music on television. The trial court held for defendant, and plaintiff appeals.

Held, affirmed.

Defendant television station televised a movie with background music composed or conducted by plaintiff. Plaintiff had given the station's licensor a license to use the music, which license was construed to include television broadcasting. In addition, plaintiff had assigned his performing rights to a publisher who was a member of ASCAP. The defendant television station was an ASCAP licensee, and hence was entitled to perform the music in question.

Also of Interest:

316. *Anderson* v. *National Broadcasting Co. Inc.,* 178 F. Supp. 762 (S.D.N.Y. Nov. 17, 1959.) (Weinfeld, J.)

(Denial of motion for injunction to prevent broadcasting of television program containing reference to "The Plainsman".)

317. *Dodge, Inc.* v. *General Classics, Inc.,* 125 U.S.P.Q. 431 (N.D. Ill. April 13, 1960, May 18, 1960.) (Robson, J.)

(Plaintiff held in contempt of court for violating order forbidding it to impair defendant's business pending determination of a copyright infringement action.)

318. *Greenfield* v. *Tanzer, et al.,* 125 U.S.P.Q. 392, (D. Mass. April 22, 1960) (Ford, J.)

(Plaintiff awarded statutory damages in copyright infringement action because no evidence was adduced to show that the defendant corporation had actually earned a profit through the infringement; individual defendant held not liable because she did not participate in the infringement.)

319. *In re Estate of Latouche,* 198 N.Y.S.2d 489 (Surr. Ct., N. Y. Co. Jan. 15, 1960.) (Cox, J.)

(Attorneys' services in connection with sale, lease, and license of opera written by decedent held to represent valid claim against estate.)

320. *Pape Television Co.* v. *Associated Artists Production Corp., et al.,* 125 U.S.P.Q. 322 (5th Cir. April 26, 1960.) (Tuttle, J.)

(District Court's dismissal of complaint charging defendant with violations of the antitrust laws through block-booking of films reversed.)

321. *Peter Pan Fabrics, Inc., et al.,* v. *Dixon Textile Corp.,* 125 U.S.P.Q. 426 (2d Cir. May 18, 1960.) (*per curiam*)

[Request for en banc consideration of question whether District Court's decision was appealable denied; see *Peter Pan Fabrics, Inc. et al.* v. *Dixon Textile Corp.,* 125 U.S.P.Q. 39, 7 BULL. CR. SOC. 188, Item 246 (2d Cir. March 30, 1960).]

322. *Stone* v. *Goodson, et al.,* 125 U.S.P.Q. 466 (N. Y. Ct. of Appeals. April 28, 1960.) (Burke, J.)

(Appellate Division's reversal of trial court's grant of summary judgment affirmed because of existence of fact issue as to defendants' use of plaintiff's idea for television program "The Price is Right.")

323. *Vidor* v. *Serlin, et al.,* 7 N. Y. 2d 502, 125 U.S.P.Q. 364 (N. Y. Ct. of Appeals April 1, 1960) (Desmond, J.)

(Judgment for plaintiff affirmed in declaratory judgment action to determine who owned motion picture rights in a particular book. Plaintiff and defendants were assignees of the author. Defendants' assignment was prior in point of time, but had never been recorded in the Copyright Office. Plaintiff's assignment was so recorded, and plaintiff had no actual notice of the assignment to defendants. The court noted that an assignment of motion picture rights was recordable under the copyright statute.

324. *Walt Disney Productions* v. *American Broadcasting-Paramount Theatres, Inc.,* 180 F. Supp. 113 (S.D.N.Y. Jan. 5, 1960) (Weinfeld, J.)

(Summary judgment denied because of existence of fact issues in action to declare an agreement void.)

B. DECISIONS OF FOREIGN COURTS

1. Soviet Union

325. *Estate of Arthur Conan Doyle* v. *Ministry of Culture of the U.S.S.R., et al.,* (Supreme Court, R.S.F.S.R., Case No. 5-573d9, 1959), on appeal from the decree of the Moscow City Court of 15 Nov. 1958.

Editor's Note: Through the courtesy of Professor Harold J. Berman, of Harvard University, whose brief in this case was published, with his explanatory notes, in "Rights of Foreign Authors Under Soviet Law," 7 BULL. CR. SOC. 67, Item 85, we are privileged to print the English translation of the written decision of the Supreme Court of the Russian Soviet Federated Socialist Republics, which became available in May 1960.

The Judicial Division for Civil Cases of the Supreme Court of the RSFSR, consisting of M. I. Kovalkin, presiding, and A. P. Belov and L. M. Aleksandrovskaia, members of the Court, has considered at a judicial session of 17 August 1959 the interlocutory appeal of Harold J. Berman from the decree of a Member of the Moscow City Court of 15 November 1958 concerning the dismissal of a complaint.

Having heard the report of Member of the Court Kovalkin, the explanations of Mr. Berman, and the opinion of Procurator Neshcheglotova holding that the appeal should be denied, the Judicial Division has

ESTABLISHED:

Mr. Berman, acting on a power of attorney of the trustee of the Estate of Arthur Conan Doyle, brought suit in the Moscow City Court against the Ministry of Culture of the USSR, the Foreign Languages Publishing House, the State Literary Publishing House, the Geographical Publishing House and the Children's Publishing House to recover 2,033,-347 rubles as remuneration for the published works of A. Conan Doyle.

The Member of the Moscow City Court dismissed the complaint, relying in his decree upon Art. 2 of the Civil Code of the RSFSR and Art. 2 of the Fundamental Principles of the Right of Authorship.

In his appeal, Mr. Berman seeks reversal of the decree, relying on the fact that the suit is not for the recovery of author's remuneration but on the ground of Art. 399 of the Civil Code of the RSFSR.

Having examined the contents of the complaint and the documents attached to it, and having judged the arguments set forth in the appeal, the Judicial Division does not see a ground for satisfying it.

As is apparent from the complaint and the materials attached to it, the object of the suit is the demand for recovery of remuneration for

the republication by the aforementioned publishing houses of the works of A. Conan Doyle.

This dispute should be decided under the law on the right of authorship. However, inasmuch as Art. 2 of the Fundamental Principles of the Right of Authorship provides that for works which have appeared abroad the right of authorship is recognized only when there is a special agreement of the USSR with the appropriate State and only within the limits established by such agreement, and since there is no such agreement between the USSR and Great Britain, it must be recognized that the heirs of the above-named author have no right to resort to a court with a suit for recovery of remuneration for the republication by the named publishing houses of his works on the territory of the USSR.

The Judicial Division for Civil Cases of the Supreme Court of the RSFSR cannot recognize as well-founded the arguments set forth in the appeal concerning the fact that the suit is presented not under the law on the right of authorship but on other grounds — under Art. 399 of the Civil Code of the RSFSR.

In the presence of a special law on the right of authorship which defines the conditions and procedures of its application to works which have appeared abroad, the presentation to publishing houses of a demand for recovery of remuneration for republication of such works on other grounds must be considered as an evasion of that law.

Therefore the Member of the Moscow City Court correctly dismissed the complaint and there is no ground for reversal of his decree.

Proceeding from the aforesaid, and under Art. 249 of the Code of Civil Procedure of the RSFSR, the Judicial Division has

DECIDED:

The interlocutory appeal of Mr. Berman from the decree of the Member of the Moscow City Court of 15 November 1958 is denied.

Presiding — Kovalkin

Members of the Court —

Belov and Aleksandrovakaia

PART V.

BIBLIOGRAPHY

A. BOOKS AND TREATISES

1. United States Publications

326. AMERICAN BAR ASSOCIATION. *Section of Patent, Trademark and Copyright Law.* Summary of proceedings: Miami Beach, Florida, August 22-26, 1959. Officers, committees, 1959-1960. Roster. Chicago, American Bar Center [1960] 120 p.

Includes summaries of the Copyright Symposium and of the reports of committees of the Copyright Division dealing with copyright law revision, international copyright relations and conventions, Copyright Office affairs, program for revision of copyright law, program for protection of industrial designs, related rights, and authors.

327. DERENBERG, WALTER J. Copyright Law. New York. New York University School of Law, 1960. Pp. 650-658. 1959 ANNUAL SURVEY OF AMERICAN LAW, reprinted, 35 *New York University Law Review* No. 3.

The 1959 annual survey of legislative and judicial copyright developments in the United States.

328. DUNNE, ELIZABETH K. Deposit of copyrighted works; a study prepared for the United States Copyright Office, . . . with Comments and views submitted to the Copyright Office. Washington, Copyright Office, Jan. 1960. 65, 7 p. (*General revision of the copyright law, study no.* 22.)

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

329. PILPEL, HARRIET F. A Copyright Guide, by Harriet F. Pilpel and Morton David Goldberg. New York, R. R. Bowker Co. in co-operation with The Copyright Society of the U. S. A., 1960. 40 p.

A manual, in the form of questions and answers, on U. S. and international copyright, designed to provide general background information for the assistance of those who deal with the copyright questions which usually arise in connection with literary works.

330. BOHMER, ALOIS. Copyright in the U. S. S. R. and other European countries or territories under communist government; selective bibliography with digest and index. South Hackensack, N. J. Published for The Copyright Society of the U. S. A. by Fred B. Rothman, 1960. 62 p.

An annotated bibliography on copyright in the U. S. S. R., Bulgaria, Czechoslovakia, East Germany, Hungary, Poland, Rumania, and Yugoslavia, covering selected items published between the respective dates on which the communist governments were established in the countries listed and October 1, 1959.

2. Foreign Publications

(a) In English

331. HERBERT, SIR ALAN P. "Public lending right"; a preliminary memorandum humbly submitted to the Society of Authors. Shrewsbury, Wilding & Son, Ltd. Mar. 1960. 23 p.

Appendices (pp. 8-23); A. Some facts and figures illustrating the dimensions of the lending trade, and (2) some possible methods of determining X. B. Other libraries. C. Some information from Mr. Alan White, publisher, chairman of Methuen & Co. Ltd. D. The Danish arrangement. E. Some personal notes on books by this author in the local free library. F. Draft of a Libraries (Public Lending Right) Bill.

The memorandum, prepared by the chairman of a committee appointed by the Society of Authors to investigate means of securing some remuneration with respect to library borrowings, proposes a right, parallel to the public performing right, which "should remain with the author (who would normally share it with his publisher, as the musicians do), and should not be enjoyed or exploited by any other person except with permission, and here and there, payment."

332. RUSSELL-CLARKE, ALAN DAUBENEY. Copyright in Industrial Designs. 3d ed. London, Sweet & Maxwell, 1960. 233 p. Appendices (pp. 143-228): 1. Registered Designs Act, 1949. 2. The Designs Rules, 1949. 3. The Designs (Amendment) Rules, 1955. Copyright Act, 1956.

"In the present edition . . . [the author has] reverted to the plan of the first edition by limiting the scope of the work to copyright in industrial designs, and not considering other branches of copyright law save in so far as they relate to designs which may have an industrial application."

333. SEINE (DEPT.) The artistic professions, by Jean Benedetti, Prefect of the Dept. of the Seine. New York, Copyright Society of the U. S. A. Apr. 1960. 39 p. Translation by Evelyn Dunne of *Les professions artistiques,* which appeared in La Conjuncture économique dans le Département de la Seine pour le quatrième trimestre 1958.

Issued by The Copyright Society of the U. S. A. to its sustaining members and subscribers, a report on economic conditions in the artistic professions (plastic and graphic arts; music and entertainment) in the Department of the Seine, which includes the city of Paris.

(b) In German

334. PLAGIAT [VON] SCHULEZE [ET. AL.] Berlin, F. Vahlen [1959]. 86 p. (Internationale Gesellschaft für Urheberrecht. Schriftenreihe, Bd. 14.)

Contents. Einleitung, von Erich Schulze. Das Musikplagiat, von Walter Petzl. Das Plagiat in Titel und Text, von Günther Schwenn. Plagiat und Schutz der "Film-Idee," von Wolf Neumeister. Parodie und Plagiat, von Erik Becker. Das Plagiat im internationalen Recht, von Ludwig Schneider. Der Schutz des Urheberrechts gegen plagiarische Verletzungen im Zivilprozess.

A collection of articles on various problems of plagiarism under German and international law, with an introduction by Dr. Schulze in which a hope is expressed that this work will contribute, in connection with current German copyright law reform, a satisfactory solution to the problems treated therein.

335. ULMER, EUGEN. Urheber- und Verlagsrecht. 2., neu bearb. Aufl. Berlin, Springer, 1960. 471 p. (Enzyklopädie der Rechts- und Staatswissenschaft. Rechtswissenschaft.)

The second revised edition of the author's treatise on copyright and publishing laws of the German Federal Republic, first published in 1951. The chapters on moral rights, motion pictures, performing rights organizations and neighboring rights have been rewritten, and a new chapter on the U. C. C. as well as reports on the draft laws concerning copyright and performing rights organizations added.

B. LAW REVIEW ARTICLES

1. United States

336. CHOVANES, EUGENE. Patents, trademarks and copyrights in the Trust Territory of the Pacific Islands. (42 *Journal of the Patent Office Society* 254-264, no. 4, April 1960.)

The conclusion is reached that the Trust Territory has no statutory law governing protection of patents, trademarks, and copyrights, there being little need for such law because of its "subsistence economy." However, trademarks and copyrights are protectible by common law and should the need arise, "the High Commissioner could extend the pertinent laws of the United States to the Territory."

337. Copyrights—subjects—A government official may copyright speeches prepared and delivered outside the scope of his official duties. (73 *Harvard Law Review* 1219-1222, no. 6, April 1960.)

A case note on *Public Affairs Associates, Inc.* v. *Rickover,* 177 F.Supp. 601, 7 BULL. CR. SOC. 102, Item 110 (D.D.C. 1959).

338. FINKELSTEIN, HERMAN. Music and the Copyright Laws — the Economics of Authorship. 2 *New Hampshire Bar Journal* 136 (April 1960).

ASCAP'S General Attorney has written an informative article on the protection of music, with a brief historical note on New Hampshire and the law of copyright.

339. GEEN, WILLIAM J. "Copyright" protection for uncopyrightables: the common-law doctrines [by William J. Geen and Harry K. Schwartz]. (108 *University of Pennsylvania Law Review* 699-734, no. 5, Mar. 1960.)

A "survey of the development and application of common-law doctrines at the peripheries of the Copyright Act." At the end of the study the question is raised "whether, if a rational scheme for the protection of literary property is to be achieved, the courts of the several states are to be the agency for its realization."

340. KUPFERMAN, THEODORE R. Copyright Protection for Commercial Prints and Labels. (33 *Southern California* Law Review 163 No. 2, Winter 1960.)

An expansion of Mr. Kupferman's address before the American Bar Association at Miami Beach, August 22, 1959, which first appeared in 7 BULL. CR. SOC. 16, Item 3 (Oct. 1959).

341. O'BRIEN, PHILIP J., JR. The travails of a federal law of unfair competition. (15 *The Business Lawyer* 179-288, no. 2, Jan. 1960.)

"This article has a three-fold purpose: (1) to indicate, generally, the difficulties which the proponents of a uniform federal law of unfair competition have encountered since *Erie* v. *Tompkins;* (2) to trace, more particularly, judicial construction of those portions of the Lanham Act which are concerned with unfair competition; and (3) to discuss new legislative proposals which have been made in this field [largely concerned with the Lindsay Bill (H.R. 7833, 86th Cong., 1st sess.)]"

342. PUNTURERI, ROCCO L. Copyright—literary property in government officials—writings of a government official not part of his official duties are not in the public domain although they relate to or arise out of his official duties. (35 *Notre Dame Lawyer* 286-288, no. 2, March 1960.)

A case note on *Public Affairs Associates, Inc.* v. *Rickover,* 177 F.Supp. 601, 7 BULL. CR. SOC. 102, Item 110 (D.D.C. 1959.)

2. Foreign

(a) English

343. GRECO, PAOLO. Songs, plagiarism and coincidence. *E.B.U. Review* 26-31, No. 60B March 1960.)

A study of the problems involved in an infringement action recently decided by the Rome Court of Appeal wherein "the Court addressed itself to solving in substance the question of 'chance coincidences' in original work, *i.e.* to determining what standards Italian law had adopted for the settlement of the dispute that arises between two or more persons who, having written identical works of the intellect independently of one another, each claim copyright in their own works."

(b) French

344. ABEL, PAUL. Lettre de Grande-Bretagne. Letter from Great Britain. (73 *Le Droit d'Auteur* 49-58 no. 3, March 1960; 83-93, no. 4, April 1960.)

A summary of the Obscene Publications Act, 1959, and a review of judicial and other developments in the field of copyright and related matters in Great Britain during 1959, in French and English.

345. DIAZ LEWIS, JUAN O. Assistance aux états dans le domaine du droit d'auteur. (*Interauteurs* 15-19, no. 138, 1. trimestre 1960.)

Comments concerning the possible effects, on the development of world copyright, of the adoption by UNESCO of a recommendation made by the Intergovernmental Copyright Committee (I.G.C.C.) at its 4th session (Munich, Oct. 1959) to the Director-General of UNESCO that he extend the so-called participation program to the field of copyright law. Under this program, the extension of which was recommended by the I.G.C.C. as the result of a proposal by the U. S. representative, UNESCO could finance visits of governmental officials working on the revision of their copyright laws to other countries having wider experience in the regulation and administration of copyright, finance the visits of experts of such countries to countries with less experience, finance the organization of seminars, or grant fellowships. Cf. 12 *UNESCO Copyright Bulletin* 264, no. 2 (1959.)

346. SKONE JAMES, F. E. De la protection au Royaume-Uni des oeuvres d'origine étrangère. (*Interauteurs* 20-23, no. 138, 1. trimestre 1960.)

A brief discussion of some of the questions presented in an examination of the protection accorded by British legislation to works of foreign origin.

(c) German

347. BUSSMAN, KURT. Rechtsprobleme bei Film und Fernsehehen. (29 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 158-176, no. 3/4, Oct. 1, 1959.)

A discussion of the legal problems arising out of the co-existence of, and competition between, motion pictures and television in the German Federal Republic.

348. ERDSIEK, GERHARD. Der Regierungsentwurf zum Personlichkeits- und Ehrenschutzgesetz. (29 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 1-15, no. 1/2, Sept. 1, 1959.)

An analysis of the proposed new provisions of the German Civil Code concerning protection of honor and personal rights, *e. g.,* right of privacy and its limitations in the public interest.

349. FROMM, FRIEDRICH KARL. Das Recht zur Fortsetzung eines urheberrechtlich geschützten Werkes. (29 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 321-335, no. 5/6, Nov. 1, 1959.)

A discussion of the question whether continuations and other uses of a copyrighted work constitute "free use" of such work so as to be permissible under laws of copyright and unfair competition of the German Federal Republic.

350. GENTZ, GÜNTHER. Interpretation und Phonogramm. (62 *Gewerblicher Rechtsschutz und Urheberrecht* 73-77, no. 2, Feb. 1960.)

An analysis of the protection of performers under existing laws of the German Federal Republic and under the several proposed draft laws with a discussion of the allocation of rights between performing artists and record producers in the light of the legal situations in Germany, the United Kingdom and the United States.

351. GOLDBAUM, WENZEL. Boris Pasternak's "Doktor Schiwago" und der internationale Urheberschutz. (29 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 32-39, no. 1/2, Sept. 1, 1959.)

A discussion of the international treatment of Pasternak's "Dr. Zhivago" in the light of the Berne and Universal Copyright Conventions.

352. GOLDBAUM, WENZEL. Rechtsschutz ausländischer Urheber in Sowjetrussland. (29 *Archiv für Urheber-, Film, Funk- und Theaterrecht* 205-208, no. 3/4, Oct. 1 ,1959.)

A brief survey of the protection of foreign authors in the U.S.S.R. with special mention of the recent *Sherlock Holmes* case.

353. HUBMANN, HEINRICH. Die Einheit der Berner Union. (*Gewerblicher Rechtsschutz und Urheberrecht, Auslands- und internationaler Teil* 77-79, no. 2, Feb. 1960.)

Dr. Goldbaum's thesis that the Berne Union is in a state of decline as presented in his *Verfall und Auflösung der sogenannten Berner Union* (Berlin, 1959) is strongly criticized.

354. HUBMANN, HEINRICH. Rechtsfragen des Aki-Kino-Prozesses. (29 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 177-204, no. 3/4, Oct. 1, 1959.)

A legal opinion concerning a case pending before the Appeals Court, Hamburg, instituted by the Northwest German Broadcasting Association (NWRV) against a motion picture theatre seeking an injunction against the showing of its televised newsreels in the theatre.

355. KRAUSE, GÜNTER B.. Zur Abgrenzung der Werkvermittlungsarten. (62 *Gewerblicher Rechtsschutz und Urheberrecht* 14-17, no. 1, Jan. 1960.)

A critique of the terminology used by Carl Haensel in his article, "Aufführung, Vortrag und Rundfunkweitergabe," 28 *UFITA* 1 *et seq.* and 149 *et seq.* (1959), and in the recent German Federal Ministry of Justice draft copyright law, to describe and define various methods of communicating a work to the public.

356. LEINVEBER, G. Grundfragen des zivilrechtlichen Persönlichkeits- und Ehrenschutzes; eine Kritische Stellungnahme zum Referentenentwurf eines Gesetzes zu dessen Neuordnung. (62 *Gewerblicher Rechtsschutz und Urheberrecht* 17-26, no. 1, Jan. 1960.)

A critical comment on the proposeed new provisions of the German Civil Code concerning protection of honor and personal rights.

357. LIERMANN, HANS. Zum Konflikt zwischen Urheberrecht und Kartellrecht. (29 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 315-321, no. 5/6, Nov. 1, 1959.)

A discussion of conflicts between copyright and antitrust laws in Germany with the conclusion that since copyright is by its very nature a lawful monopoly, antitrust law is not applicable.

358. MÖHRING, PHILIPP. Kartellrecht und Urheberrecht, von Philip Möhring und Otfried Lieberknecht. (29 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 269-314, no. 5/6, Nov. 1, 1959.)

A discussion of the relationships and possible conflicts between copyright and antitrust laws in Germany with the conclusion that there may be possible conflict where exploiters of copyrightable materials either discriminate or dominate the market.

359. OVERATH, JOHANNES. Komponist und Interpret. (29 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 336-343, no. 5/6, Nov. 1, 1959.)

An address on the subject of the respective contributions of the composer and the performing artist delivered in Berlin before the International Copyright Society on the occasion of the first German church music festival. Professor Overath points out that the performing artist is not an author and, therefore, is not entitled to copyright protection but to adequate compensation for his performance.

360. SCHULTZE, ERICH. Urhebervertragsrecht. (29 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 209-213, no. 3/4, Oct. 1, 1959.)

A case is made for statutory guarantee of minimum compensation for authors in their contractual relations with publishers in the German Federal Republic and the incorporation of analogous labor law in the proposed new copyright statute is suggested.

361. SPENGLER, ALBRECHT. Der Film in der Europäischen Wirtschaftsgemeinschaft (E W G). (29*Archiv für Urheber-, Film-, Funk- und Theaterrecht* 15-31, no. 1/2, Sept. 1, 1959.)

A discussion of the difficulties that stand in the way of a common market for motion pictures in the European Economic Community, such as censorship, laws of unfair competition and copyright, quotas, etc.

362. STREULI, ADOLF. Zur Frage der Nachprüfungsbefugnis der Eidgenössischen Schiedskommission für die Verwertung von Urheberrechten. (*Gewerblicher Rechtsschutz und Urheberrecht, Auslands- und internationaler Teil* 10-11, no. 1, Jan. 1960.)

A discussion of the jurisdiction of the arbitration commission set up for the control of the Swiss performing rights society. The writer concludes that the commission is authorized to determine only whether the society has abused its monopoly but not whether its fees are equitable and fair.

363. TROLLER, ALOIS. Das Urheberpersönlichkeitsrecht und der Film in rechtsvergleichender Ubersicht. (29 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 141-157, no. 3/4, Oct. 1, 1959.)

A comparative law study of the moral right with special reference to motion pictures in which the author concludes that the incorporation of the moral right doctrine in copyright laws is just as questionable for motion pictures as it is for other works.

364. ULMER, EUGEN. Der Vergleich der Schutzfristen im Welturheberrechtsabkommen; ein Beitrag zur Fraze der Uberführung von Konventions recht in Landesrecht. (*Gewerblicher Rechtsschutz und Urheberrecht, Auslands- und internationaler Teil* 57-65, no. 2, Feb. 1960.)

An analysis of the "comparison of terms" provisions of the Universal Copyright Convention offered as a contribution to the question of implementation of national legislations to conform with Conventional requirements.

365. ULMER, EUGEN. Die Münchner Tagungen des Ständigen Ausschusses der Berner Union und des Regierungsausschusses des Welterheberrechtsabkommens. (*Gewerblicher Rechtsschutz und Urheberrecht, Auslands- und internationaler Teil* 12-15, no. 1, Jan. 1960.)

An account of the proceedings of the joint sessions of the Permanent Committee of the Berne Union and the Intergovernmental Copyright Committee held at Munich, October 12-17, 1959.

(d) Italian

366. GIANNINI, AMEDEO. Atti ufficiali, pubblicazioni ufficiali e difese giudiziarie. (30 *Il Diritto di Autore* 513-542, no. 4, Oct.-Dec. 1959.)

A discussion of the question of the protectibility, and availability to the public, of official publications and legal documents and briefs, both domestic and foreign, under Italian law.

367. SANCTIS, VITTORIO M. DE. Diritto d'autore e proprietà industriale in Italia e negli Stati Uniti d'America; alcuni caratteri differenziali. (30 *Il Diritto di Autore* 655-677, no. 4, Oct.-Dec. 1959.)

A comparative study of the systems of copyright and industrial property protection in Italy and the United States. The writer concludes that protection of the public interest and promotion of cultural and economic progress are manifested in both systems but by different methods.

368. SPAZIANI TESTA, EZIO. Le elaborazioni delle opere letterarie. (30 *Il Diritto di Autore* 543-617, no. 4, Oct.-Dec. 1959.)

An abridgment of a thesis, University of Rome, 1958-59, on protection of elaborations of literary works under Italian copyright law with reference to the problem of distinguishing between the kinds of elaborations which require the consent of the authors of the original works and those which do not.

C. ARTICLES PERTAINING TO COPYRIGHT FROM TRADE MAGAZINES

1. United States

369. COPYRIGHT PROBLEMS. (21 *College & Research Libraries* 212-222, 246, no. 3, May 1960.) "Papers . . . presented as a symposium sponsored by the Governmental Relations Section of ALA's Library Administration Division at Washington, D. C., June 23, 1959."

Contents.—Introduction: copyright law revision and libraries, by R. E. Chapin. Copyright, libraries, the public interest, by Benjamin Kaplan. Photocopying and fair use, by E. G. Freehafer. Copyright notice, by J. W. Rogers. Deposit of copies of copyright works in the Library of Congress, by R. D. Rogers.

370. FORMOSA BANS EXPORTS OF PIRATED BOOKS. (77 *Publishers' Weekly*, 34-35, no. 14 April 4, 1960.

Article on the banning order issued by the Chinese Nationalist Government on March 24 as a result of the intercession of the U. S. State Department. Reactions of American publishing circles are noted expressing skepticism as to the probable effectiveness of the ban in the absence of Formosan adherence to the Universal Copyright Convention and implementation of domestic legislation to conform with provisions of the Convention.

371. LEWIS, JAY. Choreography and federal copyright; Kirstein: 'Who's worth pirating?' (218 *Variety* 69, 76, no. 5, March 30, 1960.)

A summary of the Copyright Office general revision study no. 21 B, "Copyright in choreographic works, by Borge Varmer," and of the comments thereon submitted to the Copyright Office.

372. OGANESOFF, IGOR. Chinese pirates find a new kind of booty: American best-sellers. (155 *The Wall Street Journal* 1-16, no. 51, March 15, 1960.)

An article by a staff reporter of the *Journal* in Taipei, Formosa, on the unauthorized reproduction and sale, by Formosan firms, of American reference books and best-sellers at a fraction of U. S. list prices.

373. PILPEL, HARRIET F. Some basic questions and answers about copyright law. [Part 1]. Harriet F. Pilpel and Morton David Goldberg. (9 *Infinity* 14-17, no. 3, March 1960.)

The first of a "series of columns intended to clarify certain aspects of . . . laws [governing the use of photographs] as they apply to photo-journalism," in the forms of questions and answers, adapted in part from the authors' "A Copyright Guide." See Item 329, *supra.*

374. UNNA, WARREN. U. S. considers agreement to admit foreign books duty-free. (*The Washington Post, Times Herald,* April 3, 1960, p. A 12.)

An article on the United States tariff on books and the Florence Agreement, recently approved by the Senate.

2. England

375. Lending rights for authors; Sir Alan Herbert's bill. (*The Bookseller,* no. 2830, March 19, 1960, pp. 1346-1353.) A summary of a memorandum submitted to the Society of Authors by Sir Alan Herbert. See Item 331, *supra.*

376. Public lending right; librarians' arguments answered. (*The Bookseller,* no. 2832, April 2, 1960, pp. 1519.) Brief summaries of answers, which appeared in the correspondence columns of the *Times,* to librarians' arguments in opposition to Sir Alan Herbert's proposed "Public Lending Right" for books.

377. The Public lending right; librarians join issue with Sir Alan Herbert. (*The Bookseller,* no. 2831, March 26, pp. 1422-1424.) An article on critical reactions of British librarians to Sir Alan Herbert's proposal of a "Public Lending Right" for books. See Item 331, *supra.*

COMMUNICATIONS

To the Editors:

It was with great interest and, unfortunately, a sense of disappointment that I read Joseph Iseman's account of Gov. Stevenson's efforts to arrive at an understanding with the Soviet Union concerning payments to American authors for the use of their works in that country [7 BULL. CR. SOC. 155, Item 216 (1960)]. It merely confirmed my view that Gov. Stevenson's mission was doomed to failure from its inception.

Gov. Stevenson went as representative of the Authors League, whose members are writers of literary works. As Mr. Iseman indicates, works of American authors are published and widely read in Russia whereas comparatively few contemporary Russian works are known in our country. Any agreement with the Soviet Union limited to *literary works* would result in a greater benefit to American authors than to Russian authors.

But what of the creators of works other than literary works? These creators did not figure in Gov. Stevenson's proposals and there, I suspect, may be at least a partial explanation of the failure to come to any agreement.

What is the situation, for example, with composers of musical works? Recently there was a great deal of public indignation in our country when we learned of a Russian attempt, later abandoned, to produce "My Fair Lady" without the composers' consent and without compensation to them. But if you look to the other side of the street you see Russian musical works used each day without compensation to their creators. Shostakovich, Khatchaturian and Prokofiev are among the most widely performed contemporary composers in America, yet they receive no compensation. I doubt if there is any American serious composer who has more recorded works available in the United States than Prokofiev. According to the current Schwann catalog, there are more than 20 different recordings of "Peter and the Wolf" available in the United States — yet neither Prokofiev nor his beneficiaries has received royalties from the sale of these recordings. I recall watching a very successful television program based on "Peter and the Wolf" and I would hazard a guess that this was done without consent or compensation. In the case of Shostakovich, not only was his work used in a film without compensation, but it was an anti-Communist film at that. The courts held that he was without remedy to prevent the use of his music in the film.[1]

I recognize that over-riding the questions of reciprocal compensation for creators is the problem of basic U. S. — Soviet relations. The point of this letter, however, is that there can be small prospect of an agreement to recognize the rights of American authors in Russia and Russian authors in America unless it is part of a comprehensive arrangement which includes all creators of artistic works, authors, composers, artists and others. This, I believe, is a realistic approach. The advantages are obvious to all and need not be set forth here.

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

I add one other note. Our ultimate objective should not be limited to a bilateral agreement with the Soviet Union; rather, we should use our persuasive powers to urge the Soviet government to join the Universal Copyright Convention. In this connection, we would do well to remember that it was not until 1955 that the United States became party to a worldwide international copyright agreement. Moreover, Czechoslovakia, an "iron curtain" country, has recently joined the Universal Copyright Convention and I submit that extension of the Convention through ratification by the Soviet Union and other nations of Eastern Europe would be the best way of assuring a freer exchange of cultural activities which, in the long run, must aid in bringing about a lessening of world tensions.

EDWARD M. CRAMER

Member of the New York Bar

Copyright Society of the U.S.A.
c/o Fred B. Rothman & Co.
57 Leuning Street
South Hackensack, N. J.

Return and Forwarding Postage Guaranteed

Form 3547 Requested

BULLETIN

OF THE

COPYRIGHT

o

SOCIETY

o

OF THE U. S. A.

Published at

NEW YORK UNIVERSITY LAW CENTER

VOL. 7, NO. 6 AUGUST, 1960

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

The Copyright Society of the U. S. A.

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

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

BINDING NOTICE

This issue of the Bulletin completes volume 7. A title page and index to the volume are included herein in order to facilitate its use.

Bound copies of the Bulletin may be readily obtained. Volumes 1 through 7, soundly bound in cloth, with title and volume stamped thereon, are offered:

To members or subscribers returning the six issues....ea. vol. $3.25 postpaid

To members or subscribers who wish to keep their unbound
issues, the complete volumes 1 to 4, bound....ea. vol. $9.75 postpaid
the complete volumes 5 to 7, bound....ea. vol. $18.75 postpaid

To new members and subscribers,
volumes 1 to 4, bound... ea. vol. $13.25 postpaid
volumes 5 to 7, bound ...ea. vol. $28.25 postpaid

Single back numbers, volumes 1-4 .....$2.00 ea.
volumes 5-7 .....$4.50 ea.

The Copyright Society of the U.S.A.
c/o Fred B. Rothman & Co.
57 Leuning Street
South Hackensack, N. J.

Enclosed please find check in the amount of $.....
in payment of the following:

Bound copy of:

vol. 1 ☐ vol. 4 ☐
vol. 2 ☐ vol. 5 ☐
vol. 3 ☐ vol. 6 ☐
vol. 7 ☐

@ $3.25 per vol. $.....

Ship to: Name .....

Address .....

City .....Zone..... State.....

Please make remittances payable to THE COPYRIGHT SOCIETY OF U.S.A.

BULLETIN

OF THE

COPYRIGHT

•

SOCIETY

•

OF THE U. S. A.

VOLUME 7

OCTOBER 1959 - AUGUST 1960

Published at

NEW YORK UNIVERSITY LAW CENTER

THE BULLETIN of The Copyright Society of the U.S.A. is published 6 times a year by The Society at the Law Center of New York University, 40 Washington Square South, New York 11, New York: Walter J. Derenberg, *President;* Horace S. Manges, Alfred H. Wasserstrom, *Vice-Presidents;* William Klein II, *Treasurer;* Leonard Zissu, *Secretary;* Sigrid H. Pedersen, *Assistant Treasurer;* and Werner Janssen, Jr., *Assistant Secretary.*

Annual subscription: $25.

All communications concerning the contents of THE BULLETIN should be addressed to the Chairman of the Editorial Board, at the Law Center of New York University, 40 Washington Sq. So., New York 11, N. Y.

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

CITE: 7 BULL. CR. SOC. page no., Item .....(1960).

CONTENTS

GENERAL REVISION STUDIES NOW AVAILABLE

THE CATALOG OF COPYRIGHT ENTRIES by Elizabeth K. Dunne, Research Analyst, and Joseph W. Rogers, Chief, Cataloging Division, Copyright Office, is the twenty-third 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.).

RENEWAL OF COPYRIGHT by Barbara A. Ringer, Assistant Chief, Examining Division, Copyright Office, is the twenty-fourth 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.).

Persons and groups concerned with these problems may secure copies of these studies, to which are attached the comments and views of the consultants, by sending a request addressed to R. G. Plumb, Head, Information and Publications Section, Copyright Office, Washington 25, D. C.

Such persons and groups are invited to submit their comments to the Copyright Office.

PART I.

ARTICLES

378. COPYRIGHT REGISTRATION AS A CONDITION PRECEDENT TO AN INFRINGEMENT ACTION: OR *WHITE-SMITH* v. *GOFF* REVISITED

By GEORGE D. CARY*

Title 17, United States Code, provides in section 13 that

> "No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with."

This provision specifies two conditions that must be met before the infringement suit can be instituted, namely, (1) copies must be deposited, and (2) a registration must be made. The relatively recent case of *Vacheron & Constantin-Le Coultre Watches, Inc.* v. *Benrus Watch Co.*[1] held that unless an applicant could convince the Register of Copyrights, either by mandamus or otherwise, that his copyright claim should be registered, section 13 prevents him from bringing any infringement action. A dissent in that case considered that such a rule was burdensome. It expressed the opinion that, if the applicant did all that could be reasonably expected to obtain a registration, he should be able to bring the infringement action even though the Register of Copyrights refused to make the registration.

Thus, for the first time did a court squarely pass upon this provision of the law. Although the decision upheld the literal meaning of the words of the statute, it would seem in order to explore the ramifications of the ruling in view of the vigorous nature of the dissent.

In the opinion of the District Court in *Vacheron*,[2] the problem was briefly referred to in a footnote. Doubt was expressed that the plaintiff claimant could bring suit for infringement in the absence of compelling the registration of his

* General Counsel, U.S. Copyright Office. The views expressed herein are those of the author and do not necessarily reflect the views of the Copyright Office.

1. 260 F. 2d 637 (2d Cir. 1958).

2. 155 F. Supp. 932 (S.D.N.Y. 1957).

claim. The court, however, concluded that it was unnecessary to pass upon the question because of its conclusion that the copyright claim was invalid.

On appeal, however, the Second Circuit Court of Appeals took a different view of the problem. It held that it had no power to pass upon the validity of the copyright until claimant obtained a registration of his claim in the Copyright Office. Judge Hand, for the majority, considered that the few existing decisions[3] did not furnish a satisfactory answer to the question. In his view *Goff*,[4] about which more will be said later, constituted mere dictum, and was not an authoritative holding. He construed the holding in *Bouvé*[5] to mean that in the District of Columbia no infringement action could be brought in the absence of a certificate of registration; since mandamus would not lie in that jurisdiction if there was another remedy, the issuance of mandamus clearly implied that no other remedy was available. However, the decisive factor in his mind was the language of section 13 of the copyright law itself.[6] He construed this to mean that registration was clearly a condition precedent to the maintenance of an infringement action.

Chief Judge Clark dissented from the majority holding in *Vacheron,* one ground of his disagreement relating to the problem under discussion. The crux of the difference concerns the meaning of the word "registration" in section 13. Judge Hand had construed this to refer to an affirmative action by the Register of Copyrights, subsequent to the deposit of the application by the claimant. Judge Clark, on the other hand, considered that no such affirmative action was required, that "registration" was completed when the applicant complied with all required procedures and deposited his material with the Register. Judge Clark seemed fearful that, if "registration" were construed as requiring subsequent positive action by the Register, this might lead to an impairment of claimant's rights, for example, if the Register delayed taking action until the statute of limitations had run. He concluded that the general statutory scheme

3. *White-Smith Music Pub. Co.* v. *Goff,* 187 F. 247 (1st Cir. 1911); *Lumiere* v. *Pathé Exchange, Inc.* 275 F. 428 (2d Cir. 1921); *Bouvé* v. *Twentieth Century-Fox Film Corp.* 122 F. 2d 51 (D.C. Cir. (1941); *Rosedale* v. *News Syndicate Co. Inc.* 39 F. Supp. 357 (S.D.N.Y. 1941); *Algonquin Music, Inc.* v. *Mills Music, Inc.* 93 F. Supp. 268 (S.D.N.Y. 1950). In *Bouvé* the issuance of a writ of mandamus against the Register of Copyrights was upheld where that official had refused to make registration of a clearly copyrightable work, the refusal being grounded upon alleged failure of claimant to file application in the proper classification. In *Lumiere, Rosedale* and *Algonquin,* infringement actions were dismissed, without prejudice, where the plaintiffs had failed to obtain certificates of registration.

4. Supra, n. 3.

5. Supra, n. 3.

6. 17 U.S.C. 13.

of copyright did not warrant such interpretation. To his way of thinking, the holding in *Goff* was not mere dictum, but constituted *stare decisis* and should have been followed.

The difference in views, resting as it does upon the meaning of the word "registration" and the legal standing of *Goff*, would seem to constitute good reason for more extended consideration of the two points of difference than was undertaken in the opinion.

With respect to the holding of *Goff*, it should first be emphasized that this case was instituted, argued and decided almost contemporaneously with the enactment of the 1909 copyright law.[7] This is of interest since it would not be surprising to find that some provisions of the new and untried law had not been fully considered by the parties involved. These parties might be less than human if they had not failed to note that some pre-existing concepts of the earlier laws no longer were applicable.

It is interesting to speculate the extent to which these factors may have had any bearing upon the decision in *Goff*. It can first be noted, for example, that the Act of 1870[8] had provided that a person would not be entitled to copyright unless he had, before publication, filed a printed copy of the title of the work with the Librarian of Congress, and also forwarded two copies of the work to that official within ten days after publication. The Librarian's duty in this connection was merely the recording of that title in a book. In 1874[9] a new provision was added to the effect that no infringement action could be brought unless a specified form of notice was inserted in or upon the copyrighted work. At the time of the decision in *Goff*, therefore, there had existed for nearly half a century a concept that copyright was achieved by depositing material with the Librarian, who then kept a record of the titles. In addition, the right to bring suit was contingent upon the insertion of a specified form of notice upon the work in question. In short, the securing of copyright as well as the right to bring infringement actions, depended solely upon the actions of the claimant, and not in any way upon those of a public official.

In 1909, a change was made in this concept. No longer was it sufficient to include a specified form of notice in the work in order to be able to bring an infringement action. The new law provided that copies had to be deposited and a registration had to be made; this was to be followed by the issuance of

7. The renewal application was received in the Copyright Office in July 1909, only a few days after the effective date of the new law. The decision of the lower court was handed down in August 1910; that of the First Circuit Court of Appeals in March 1911.
8. Act of July 8, 1870 § 90, 16 Stat. 212.
9. Act of June 18, 1874, § 1, 18 Stat. 78.

a certificate of registration, which constituted prima facie evidence of the facts contained therein, and which would permit an infringement action to be instituted.

In *Goff*, the plaintiff, a music publisher, had attempted to make a renewal registration of a composition which had been assigned to it. The Copyright Office had refused to make the renewal on the ground that, as "proprietor," the claimant did not fall within the list of statutory persons entitled to renewals. The claimant then instituted the infringement action. The court, after a review of the law, held that the claimant had no standing under the law and entered a decree for the defendants. The Court of Appeals upheld. In its opinion, the Court made the following observation, which served as the basis of the difference of opinion in *Vacheron* between Judges Hand and Clark:

> "It offered registration under the statute, and, although registration was refused, yet it fully complied with the requirements of law, and is entitled to maintain this suit if it had any statutory right to the extension." [10]

Implicit in this thought is the concept that plaintiff's right to bring the suit depended solely upon his own compliance with the requirements of the law. No reference was made to the provision of section 13, and it is not unreasonable to conclude that, instead of construing the new copyright law, the court was expressing in an offhand manner what it supposed to be a basic unchanging truth or premise.

This leads to the question whether the provision of section 13 was even argued before the court. An examination of the briefs submitted to the Court of Appeals for the First Circuit reveals that the provision in question was not mentioned by either counsel. Interestingly enough, the appellant did state that the renewal copyright was considered to attach automatically "upon application for it made to the Copyright Office and duly registered therein." [11] His brief makes no distinction between the making of an application and the subsequent act of registration, and apparently treats the mere deposit of the application itself as the equivalent of registration. As authority for his statement he included an excerpt from a decision of the year 1884,[12] at which time, it will be recalled, the right to copyright and the right to institute an infringement action depended solely upon the action of the claimant. The quotation was to the effect that the Librarian of Congress merely received the title and made a record of

10. 187 F. 247.

11. Brief for Complainant, Appellant, pp. 9-10, *White-Smith Music Pub. Co.* v. *Goff*, 187 F. 247 (1st Cir. 1911).

12. *Chicago Music Co.* v. *J. W. Butler Paper Co.* 19 F. 758 (C.C.N.D. Ill. 1884).

it in a book kept in his office; that the Librarian issued no certificate "or anything in the nature of a patent." The excerpt concluded with the statement that:

> "The rights of the party holding a copyright, therefore, depend wholly on whether he has in fact complied with the terms of the law or not, and not upon the fact that he has obtained a certificate from the Librarian."

Counsel apparently was unaware that the 1909 law had departed from this concept. In view of the similarity of the language of the court in *Goff,* to the excerpt quoted from the old 1884 case, it may well be that the First Circuit Court likewise was unaware of the change — even to the point of failing to recognize that, under the new Act, the Librarian of Congress did not participate at all in the registration process.

It therefore appears that (1) the point in question was not argued in *Goff,* (2) counsel for appellant was mistakenly adhering to a concept that had been changed by the 1909 Act, (3) the Court overlooked the requirement of the 1909 law, and (4) counsel for defendant, who stood most to gain by invoking the provision of the 1909 law, completely overlooked it. In these circumstances, a reasonable basis exists for the conclusion that the statement in *Goff,* was, as Judge Hand held in *Vacheron,* mere dictum, or at least a questionable interpretation of the law.

Since the conjunctive condition of "registration" was apparently not considered in *Goff,* and was not discussed at length in *Vacheron,* a brief examination of its meaning as determined by other courts may be helpful in the understanding of the problem.

First, consulting the ordinary dictionary definition of the word "registration" existing at the time of the enactment of the 1909 Act, we find

> "The act of entering in a registry; . . . enrollment; recording, as the registration of a mortgage . . ." Funk & Wagnalls Standard Dictionary of the English Language (1907).

> "The transcription of documents in a public register, so that an authentic copy may remain even if the original be lost or destroyed . . ." The Modern World Dictionary of the English Language (1911).

It is to be noted that the ordinary definition imports an *act,* which naturally implies some positive action. A court construed the word as follows:

> "What is registration? It is the act of making a list, or catalogue, or schedule, or register. The word 'registration' is an ordinary one; it it used in a generic sense, not technical; . . ." [13]

Again, the concept of an *act* appears in this definition.

Although no copyright cases have been found which give adequate treatment to the meaning of the word "registration" as used in section 13, a consideration of cases construing the "recording" of documents is desirable because of the analogous nature of the two procedures. That "recording" is a positive act and not a mere receipt of a document, is substantiated by the cases. It has been held that the mere leaving of a paper with the official did not constitute the act of recording;[14] that the mere filing of a transcript of a judgment in the clerk's office was not a recording;[15] that where the fee was paid after a specified time limit, the document had not been recorded — even though the latter had been filed previously within the time limit;[16] or that the inscription by a county recorder of the word "recorded" on a tax sale certificate and the placing of it in a desk drawer, contemporaneous with the entering of a memorandum of sales in an unofficial book kept by the official, was not a recording.[17]

The logical premise that "registration" implies a positive act in addition to the mere filing of an application finds conclusive support in the copyright law itself. Admittedly this support is not found in any one particular section. However, an examination of the entire Act confirms the holding of Judge Hand.

Section 10 of the present Act[18] prescribes the manner in which copyright is obtained, by publication with the required form of notice. Section 11[19] then provides that "registration" of the copyright claim may be obtained if one complies with the provisions of the law. However, since a mere deposit of material with the Register of Copyrights does not necessarily insure that the provisions of the law have been complied with, it seems obvious that some action must be taken to ascertain whether the requirements have been met. Otherwise, "registration" could not take place.

13. In Re Appointment of "Supervisors of Election" in the State of Delaware. 1 F. 1 (C.C.D. Del. 1880).
14. *People ex rel. Simons* v. *Dowling*, 84 Misc. 201, 146 N.Y.S. 919 (Sup. Ct. 1914).
15. *Omaha Loan & Bldg. Assn.* v. *Turk*, 146 Neb. 859, 21 N.W. 2d 865 (1946).
16. *Radway* v. *Selectmen of Dennis*, 266 Mass. 329, 165 N.E. 411 (1929).
17. *Dougery* v. *Bettancourt*, 214 Cal. 455, 6 P. 2d 499 (1931).
18. 17 U.S.C. 10.
19. 17 U.S.C. 11.

A single example is sufficient to illustrate the point. Under section 9[20] only certain foreign nationals are entitled to the benefits of the U. S. Copyright Law. With an exception not relevant here, citizens or subjects of the U.S.S.R. are not entitled to copyright in the United States. Under Judge Clark's reasoning in *Vacheron,* if an application by an author who is a national of the U.S.S.R. were deposited in the Copyright Office, the claimant could bring an infringement action, notwithstanding the failure to comply with the very important condition of the law respecting proper citizenship. If the application must be considered as "registered" under these circumstances, other questions are raised, but left unanswered, such as: Is the Register required to issue a certificate of "registration"? Must the application be recorded in the indexes of the Office? Must the "registration" be included in the Catalog of Copyright Entries, which, like the certificate is also prima facie evidence of the facts? If the registration process means anything, it means that the Copyright Office is required to inspect the application and other material deposited with a copyright claim and refuse registration unless all the provisions of the law have been complied with.

Further, by section 207,[21] the Register of Copyrights is authorized, subject to the approval of the Librarian of Congress, to make "rules and regulations for the registration of claims to copyright as provided by this title." This provision was apparently intended to insure that the privileges of obtaining a registration and receiving a certificate, which are referred to in section 11, shall be afforded only if the duty of "complying with the provisions of this title" are met. And so the Government's chief legal officer, the Attorney General, has held. In a 1915 opinion he stated, with reference to this rule-making authority of the Register, that it

> ". . . plainly indicates that he has at least some measure of discretion in the administration of the act. Manifestly, in the exercise of that discretion *he may make such investigation and require such showing of compliance with the law as may be necessary to enable him to determine whether the prerequisites imposed have been met.*" (Underscoring supplied).[22]

In the same opinion, the Attorney General pointed out that if no such discretionary power exists, "that officer is reduced to the role of a mere automaton," and concluded that "Clearly, such a construction would serve to defeat the purpose and intent of the act."

20. 17 U.S.C. 20.
21. 17 U.S.C. 207.
22. 30 Ops. Atty. Gen. 422 (1915).

The foregoing would seem to support Judge Hand's ruling that "registration" is a positive act which the Register of Copyrights must actually perform before the claimant can institute infringement proceedings. This conclusion stems from the likelihood that *Goff* was mere dictum or that at least it was the result of a misconception; that the other analogous decisions are clear in holding that that public official with whom documents are left for recording must perform a positive action in order that the "recording" may be said to have been accomplished; and that the copyright law itself as interpreted by the Attorney General of the United States, requires a positive act on the part of the Register to effect a "registration."

Nevertheless there are some pressing considerations which warrant careful attention to the rationale of Judge Clark's dissent. It is undeniably burdensome for a claimant to be required to seek mandamus against the Register[23] before he can bring an infringement action. The cost of bringing two separate actions — one against the Register in the District of Columbia, and the subsequent infringement action in the other jurisdiction — certainly can work a hardship upon copyright claimants.

Not the least of the difficulties is the possibility that the statute of limitations with regard to the infringement may run before the mandamus action is settled and the infringement action can be instituted. This is especially true where, as Judge Clark pointed out, the preliminary injunction originally granted was dissolved; this meant that the court was prevented from continuing the case and thereby insuring that the statute of limitations would not run.

In addition, it would seem to be a more efficient use of our overcrowded and overworked court system to permit the validity of the copyright to be established in the same action in which infringement is alleged. A caveat to this statement is necessary, however. If all copyright claimants who are refused registration of their claims should be permitted to file infringement actions, the registration system could become meaningless, and the gates of possible abuse would be opened wide. Procedural safeguards against such abuse should be provided. In addition, where an infringement action is instituted following the refusal of the Register to issue a certificate of registration, it would seem fair and just that the Register be notified of the pendency of the action in order that he may make application to become a party to the proceedings and defend his position. Within such limitations, it would seem eminently desirable that the present copyright law be amended to accomplish the just result called for by Judge Clark in *Vacheron.*

23. The mandamus action must be filed in the District of Columbia.

379. PROTECTION IN THE UNITED KINGDOM OF WORKS OF FOREIGN ORIGIN

By F. E. SKONE JAMES*

English law does not recognise such a thing as "world copyright", but only compares rights in the United Kingdom in accordance with the provisions of the Copyright Act, 1956, which has no force outside the United Kingdom.

The position in this respect differs from that before 1957. The Copyright Act, 1911, extended throughout the British Commonwealth as an act of Imperial Legislation, but the Act of 1956 can only be extended to territories governed from the United Kingdom and even then may be substantially varied in each area. The self-governing dominions at present remain subject to the Act of 1911, but new copyright acts are contemplated in Canada, Australia, New Zealand and elsewhere. India already has a new copyright act. It may be regarded as something of a misfortune that a subject such as copyright, which deals with material such as books, films and musical works, which are exploited throughout the world, should thus be threatened with greater rather than less diversity of law.

I now propose to indicate some of the consequences of our form of legislating for works originating outside the United Kingdom.

The basic principle of our law of copyright is to apply the Copyright Act 1956, within the United Kingdom to works originating outside the United Kingdom as though they had originated in the United Kingdom. Thus works first published in Berne Convention or UNESCO countries are given the same protection as if they had been first published in the United Kingdom, and unpublished works of subjects of such countries are given the same protection as if they had been the works of United Kingdom subjects. The effect of this is that we are not concerned with the law of the country of origin, except to a limited extent in relation to term of copyright. Assume, for example, that one is concerned with a work first published in Holland, and written by a Dutchman resident in Holland, who has no interest outside Holland, the work being published by a Dutch publisher. Nevertheless, English law is not concerned with who is the owner of the copyright in the work in Holland, or what his rights are there. English law would consider who would be the owner of such a work if first published in England by a British subject resident there,

* The distinguished English copyright expert, Mr. Skone James, has permitted the Editors to reproduce here his original manuscript, first published in French in *Interauteurs,* No. 138, 1st Quarter, 1960. Our thanks are due both to the author and to the Editors of *Interauteurs.*

and with what rights in England such a British subject would possess. It then applies these rights in England in respect of the Dutch work.

The result of this is that circumstances may arise in which the owner of the copyright in a work in England is not the same as the owner of the copyright in the work in another country, although there has been no express intention to sever such ownership.

An obvious example of this is in the case of works of employees or commissioned works. S.4 of the Copyright Act, 1956 deals with this class of case. Where a literary, dramatic or artistic work is made in the course of the author's employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service the proprietor obtains the copyright so far as relates to publication in any newspaper, magazine or similar periodical, but the author retains the copyright for other purposes. This is a special provision of English law, and may not exactly correspond to the law of the country of origin of the work, so that the copyright owner in England may differ from the copyright owner in the country of origin.

Apart from newspapers and magazines, where a work is made by an author in the course of his employment under a contract of service the copyright vests in the employer. There is a great deal of English case law as to what is meant by a contract of service, as distinct from a contract for services, and here again differences may arise between the law of England and the law of other countries.

Again, in the case of commissioned photographs or paintings, it is provided that where the person placing the commission agrees to pay for it the copyright prima facie vests in the person placing the commission. This again may differ from the law of the country of origin.

Another matter affecting title to works of foreign origin is transmission on death. Copyright in English law is regarded as personal property. If the deceased author left a Will, then his copyrights will vest in his executor but the executor can only make a title in England after there has been an English grant of probate. If the author dies intestate, then his copyrights remain outstanding or possibly vested in the President of the Probate Division, until there has been a grant of administration. But in either case, a foreign executor or universal heir has no title to sue in this country until a grant has been obtained. There is also a provision in the Act of 1956, that a bequest by Will of the manuscript of an unpublished work is presumed to comprise the copyright in the work.

By English law an assignment of copyright requires to be in writing and signed by or on behalf of the assigned law. There is also a new provision in the Copyright Act of 1956 by which an author may assign the copyright in a

work not yet written by him with the effect that as soon as the work is written, the copyright therein will automatically vest in the assignee. This provision will, it is thought, apply in the case of a work wherever written which is protected in the United Kingdom. On the other hand, this provision cannot, it is thought, affect the title to an English work in foreign countries, who do not recognize an assignment prior to the creation of the work.

English law makes important distinctions between an assignment and a publishing agreement constituting an exclusive licence to publish.

Once the right is assigned, the assignee has complete control and so long as he does not pass off an altered work of the original author, he is at liberty to make any use of the work he may think fit. An exclusive licencee, on the other hand, will be bound only to use the work within the expressed terms of his licence. Moreover, an assignee cannot effectively be bound not to reassign the work to another. This may have serious consequences where the assignment is made on royalty terms, because the right to payment of royalties is a contractual right only exercizable against the first assignee, who may become insolvent. Some protection is effected by law in the case of a bankrupt publisher, but it is safer to grant an exclusive license terminable in the case of bankruptcy or not subject to transmission.

The Act of 1956 has for the first time given an exclusive licencee a right to sue for infringement.

There is a good deal of English case law as to how an assignment is to be distinguished from an exclusive licence. Merely calling a document a licence does not necessarily make it so if on its proper construction it is an assignment. A provision that in some circumstances the rights granted are to revert to the author may indicate an assignment, since if a licence determines there is nothing to revert.

English law is concerned only with infringements of copyright in this country. Certainly where the defendant is not within the jurisdiction of the English Courts he cannot be sued in respect of infringement abroad, and probably unless he consents, he could not be so sued even if he were in the jurisdiction.

It was formerly thought possible that an action could be brought in England in respect of a broadcast from a foreign station, largely intended to be heard in England, on the ground that the performance really took place in this country. But the Act of 1956 by saying that a broadcast takes place at the place from which the broadcast is made, seems to indicate that such a broadcast would be held to have taken place out of the jurisdiction and therefore not be amenable to proceedings in the English Courts, although the person responsible may be within the jurisdiction.

The Act of 1956 has made important alterations in respect of infringement by importation. Under the Act of 1911, it was only an infringement to import an infringing work if the importation was for purposes of sale or hire. Under the Act of 1956, any importation is an infringement if it is otherwise than for private and domestic use. Furthermore, under the Act of 1911 a work became an infringing copy only if it was imported in contravention of the Act and that meant that it was imported for the purposes of sale or hire and to the knowledge of the importer is a work which would infringe copyright if it had been made in the United Kingdom. But under the Act of 1956, a work is an infringing copy if it is an article which would have constituted an infringement if made in the United Kingdom. Consequently, it is an infringing copy whatever the knowledge of the importer.

A further point which frequently arises with regard to the protection of works of foreign origin in the United Kingdom is how far the copyright notice required under the UNESCO Convention is a condition of their protection. The answer is that there is no such requirement of English law. The copyright notice is only required to secure protection in countries which are members of that Convention, and not of the Berne Convention.

I have outlined some of the questions which arise when considering the protection given by English law to works of foreign origin. Basically, they are treated as though they were United Kingdom works and English law is concerned neither with the foreign law applicable to them in their country of origin nor with the provisions of the various conventions. It applies to them the same statutory provisions as are applicable to works of English origin.

380. HOT WATER BOTTLES

By SIR ARCHIBALD F. HARRISON, O.B.E.*

At the present moment the law of industrial design is the subject of an enquiry by a Departmental Committee. Of the many matters which will come under their consideration not the least important is the definition in the Registered Designs Act of the expression 'design' which is set out in sub-section (3) of section 1. The courts have, on a number of occasions, considered the language of that sub-section and one of the most recent cases was *Cow* (*P.B.*)

* Sir Archibald Harrison, Secretary of the British Trade Marks, Patents & Designs Federation, published the very interesting article reproduced here in the Federation's *Monthly Report*, June 1960. He has graciously given his permission to reprint the article in entirety in THE BULLETIN.

Ld. v. Cannon Rubber Manufacturers Ltd.[1] It cannot be said that it propounds any new doctrine on designs law but it does throw a little more light on some of the difficulties and obscurities of that very important sub-section.

The action in question was in respect of the alleged infringement of a design for a hot water bottle and the novelty claimed was said to reside in the shape or configuration of the article. The unusual feature of the bottle consisted of defined diagonal ribs regularly disposed on the front and back and extending right up to the sides. Otherwise the bottle was of a conventional shape with detail which was referred to by one of the judges as falling within the category of common trade variants. The defendants' bottle was also ribbed in a similar way at a similar angle but in a different direction and was in general shape fairly close to the outline of the plaintiffs' bottle.

It was the ribbing therefore that was the crux of the matter and the question was whether the defendants in producing the ribbed bottle had infringed the plaintiff's registered design.

For the defendants there was clearly only one line of defence — namely the classic one — that of attack. There was, they contended, no infringement because there was no valid registered design to infringe. This argument involved them in a number of propositions on the interpretation of the sub-section and led to some interesting comments by the judges. The case was heard in the first instance by Lloyd-Jacob, J., and then went to the Court of Appeal (Lord Evershed, M.R., Lord Justice Sellers and Lord Justice Harman) where the principal judgment was delivered by Lord Evershed, M.R. Lloyd-Jacob, J., found that the design was validly registered and had been infringed and this was upheld by the Court of Appeal.

Sub-section (3) of section 1 of the Registered Designs Act, 1949, is as follows:

> (3) In this Act the expression 'design' means features of shape, configuration, pattern or ornament applied to an article by any industrial process or means, being features which in the finished article appeal to and are judged solely by the eye, but does not include a method or principle of construction or features of shape or configuration which are dictated solely by the function which the article to be made in that shape or configuration has to perform.

The defendants contended that the 'shape or configuration' of the bottle, which were the features for which novelty had been claimed in the statement of novelty filed by the plaintiffs, did not include the ribbing and that the disposition of the ribs should be regarded as pattern or ornament.

1. (1959) 9 R.P.C. 240 14 R.P.C. 327.

Since the statement as regards novelty put no reliance upon the ribs the defendants submitted that the only novelty claimed was as to outline.

There were two points here therefore, namely:-

(a) the effect of confining the claim for novelty to 'shape or configuration', and

(b) the meaning of 'shape or configuration'.

In the event it was not necessary for the court to express a final view on (a) but Lord Evershed had this to say on it:-

"I should not wish, for myself, to assent to that (i.e. the defendants) proposition or to hold that the result of confining the statement of novelty to 'shape or configuration' had the effect — in the nature of estoppel — for which Mr. Bevan contends, if the truth is that the novelty resided elsewhere than in the shape or configuration."

On (b) Lord Evershed observed that it was quite true that in some earlier cases 'shape' and 'configuration' had been regarded as something like synonymous terms, used in contradiction to 'pattern' on the one hand or 'ornament' on the other. "But" he continued, "I do not think it right to say that the division between 'shape and configuration' on the one side and 'pattern or ornament' on the other is at all rigid; and applying what I hope is a common sense test to this hot water bottle, I would have thought it right to say that the ribbing is so marked a feature of the bottle as a whole as to be entitled to be described as a feature of its configuration. It may not be 'shape', but I think it is 'configuration'."

Lloyd-Jacob, J., did not think that the observations of the judges in previous cases amounted to an interpretation of 'shape or configuration' as meaning nothing more than outline. Taking as an illustration one form in which butter is served wherein a ridged wafer is formed into a roll, he expressed the opinion that "the design applied to it is only completely stated when to an indication of its tubular outline a reference to the corrugation of the surfaces is added".

On configuration he has this to say:-

"As a matter of ordinary usage, the attribution of the word 'configuration' to peculiarities of geographical contour would no doubt tend to associate the word with surface rather than structural variations, so that where, as in the definition here, both shape and configuration are specifically referred to, the intentional inclusion of these ribbed faces within the claim to novelty must be regarded as established."

Sellers, L. J., put the matter as follows:

"The design does no doubt create a pattern to the eye *but this is incidental.*"

It will be recalled that Lord Evershed referred to the ribbing as being "so marked a feature of the bottle as a whole as to be entitled to be described as a feature of its configuration." These last two remarks are significant as indicating the distinction between pattern and configuration. This distinction may in some cases be of importance — as indeed in this case — because of subsection (3) whereby the expression 'design' does not include 'a method or principle of construction or *features of shape or configuration* which are dictated solely by the function which the article to be made in that shape or configuration has to perform'.

The defence took both these points. On the second the argument was that the sole object of the ribbing was to radiate the heat and the most effective and economical way of making the ribs was by a mould and a circular saw which resulted in diagonal ridges — in short the ridges on the plaintiff's bottle were a purely functional device. Lloyd-Jacob, J., refuted this argument on the following grounds:

(1) It failed to note the difference between the provision of ribbing of some kind and the choice of a diagonal direction for its employment "for the evidence simply established that heat radiation without discomfort or risk owes nothing to the direction in which the ribbing is disposed";

(2) it was not established that the provision of spacing members, formed in the bottle faces during manufacture of such dimensions and so located as to secure the required effect must necessarily be in the form of ribs.

Lord Evershed, although eventually coming down, as did the other judges of the Court of Appeal, on the same side, was more hesitant. He agreed with Counsel for the appellants that "one must not so rigidly construe this language as to make it only apply to a feature every characteristic of which is only attributable to purely functional requirements." In illustration of this the judge referred to the hole at the bottom of the bottle for hanging it up and said, "Mr. Bevan pointed out that it is not necessary that the hole should be round, or of any particular dimensions. I see the force of that; and I do not want, on this occasion — because it is remote from the subject-matter — to express views upon what sort of hole might or might not qualify as part of the design not being a feature dictated solely by function. There might be a stage at which the nature and dimension and all the rest of it of the hole was so obviously part of the design that its functional requirement was secondary. On the other hand, in these bottles that I have here, nobody, I should have thought, would doubt for a moment that the hole was purely functional."

He agreed that the ribbing was functionally useful but he was not satisfied that the defendants had proved "that it was that object and that object alone,

which dictated the adoption of this type of ribbing." Sellers L. J., observed that in order to establish that diagonal ribs were dictated solely by function it would be necessary to show that the function obviously involved the design "or at least that it was the cheapest and simplest way to achieve the function intended."

The question of whether a design is dictated solely by function obviously must depend on the particular facts and even so can be difficult. There is indeed room for discussion whether in fact it is the right question. The modern trend in certain fields is for functional design and there is certainly no antithesis between good design and function — function is not regarded as the enemy of design. In cases of this sort therefore we have the theoretical paradox that the better the design the more likely is it to be excluded from design protection!

The other point taken by the appellants was that the ribbing was 'a method or principle of construction' and so not a design as defined.

There is a good summary of the meaning of these words at page 17 of *Copyright in Industrial Designs* by A. D. Russell-Clarke which was referred to with approval by Luxmoore, J., in *Kestos Ld.* v. *Kempat Ld.* in 1935[2] (in which the design of a brassiere was challenged *inter alia* on the ground that it was 'a mode or principle of construction'). It is as follows:—

> "A mode or principle of construction is a process or operation by which a shape is produced, as opposed to the shape itself. To say that a shape is to be denied registration because it amounts to a mode or principle of construction is meaningless. The real meaning is this, that no design shall be construed so widely as to give to its proprietor a monopoly in a mode or principle of construction. What he gets a monopoly for is one particular individual and specific appearance. If it is possible to get several different appearances, which all embody the general features which he claims, then those features are too general, and amount to a mode or principle of construction. In other words, any conception, which is so general as to allow of several different specific appearances being made within it, is too broad, and will be invalid as amounting to a mode or principle of construction."

The words 'mode or principle of construction' first appear in the statute law in the Act of 1919, but long before that the judges had construed the conceptions in the pre-1919 statute of shape, configuration, pattern or orna-

2. 53 R.P.C. p. 139

ment as not including a mode of construction. In *Moody* v. *Tree*,[3] a case of 1892, the design registered was a picture of a basket, the claim being for the pattern of the basket, consisting of the osier being worked in singly and all the butt ends being outwards. It was obvious that there could be made by this method of construction any number of baskets differing in pattern, except that all would have a certain common characteristic due to the method of construction and visible to the eye. It was held that the registration was bad, as being an attempt to register a conception as to the mode of construction and not as to shape, configuration, pattern or ornament. In the case of *Bayers Design* in 1907[4] the claim was for a method of making corsets with horizontal gores. There was no limitation of the design to a particular description of corsets and the court held it was unregistrable as being a mere mode of manufacture.

The phrase which incorporates the effect of these decisions in the 1948 Act does not perhaps fit as neatly as it might into the sub-section. In the present case indeed Harman L. J., observed that he was unable to see how as a matter of English a design could be 'a method or principle of construction' and Lord Evershed refers to it as 'a difficulty in language' and suggests that what is meant is 'an illustration of a method or principle of construction.'

Looking at the earlier cases under the statute the basic idea behind the words put in an interesting manner by Lloyd-Jacob J., in the plastic basket case of *Rosedale Associated Manufacturers Ld.* v. *Airfix Products Ld.*[5] in 1956:

> "The argument at the hearing turned upon that exception which is contained in the words 'does not include a method or principle of construction.' In one sense every article that is fabricated requires for its production a method of construction in that somebody has to decide what method shall be adopted by which the article of that shape shall be produced. In addition there are some articles which have features of shape necessarily incorporated in them if for no other reason than that such an article could never be produced except by the adoption of such features of shape. To take the instance that I put in argument. . . . , if the article is a table, it must necessarily have a table-top, which can only be called a table-top if some member or members displace it from the ground. A table requires a table-top and certain supporting members, and, in so far as any design of table relied upon the inclusion of a top and a support therefor, to that extent it would include a method or principle of construction. The claim to novelty in relation to the top or the supporting members

3. 9 R.P.C. 233
4. 24 R.P.C. 65
5. 73 R.P.C. 360

could only be in relation to some particular shape or configuration applied to them independently of that essentiality of shape or configuration conditioned by the use to which the article is put. In my judgment, only such general conceptions of shape or configuration as are necessitated by a method or principle of construction are excluded from consideration in the present case."

In the present hot water bottle case all the judges refused to hold that the ribbing amounted to a method or principle of construction. This is how Lloyd-Jacob J., expressed the matter:

"The use of a moulding operation for the construction of hot water bottles is clearly not affected by this registration, and the only matter to be considered is the method of machining the faces of moulds so as to cause excrescences to appear on the face of the moulded article. Such machining can, of course, take any form which the operator chooses. If machining in parallel lines is decided upon, the lines can follow the direction of the length of the width, or be diagonally disposed, or be in a combination of two or all of them. The width of the grooves, as also the spaces between them, can be uniform or varied, and they can be continuous or discontinuous at will.

"Variations in any of these respects, still more in a combination of two or more of them, will permit the production of an article moulded therein the appearance of which will differ from that illustrated in the design application. Only if these differences could properly be dismissed as modifications or variations not sufficient to alter the character, or substantially to affect the identity of the design in suit would the objection be sustained.

"It is, in my judgment, impossible to hold * * * that the design in suit is of so comprehensive a character that it embraces every conceivable configuration of the faces of a hot water bottle wherein raised portions of prescribed dimensions alternate with hollows of prescribed dimensions. This objection, in my opinion, fails."

Here the curtain falls on the legal adventures of this particular rubber hot water bottle. We can say farewell to it with the pleasant thought that, in addition to its usual and kindly function of radiating warmth, it has on this occasion radiated a certain amount of light!

381. TRENDS INDICATED IN THE 1959 SUPPLEMENT TO THE U. S. COPYRIGHT OFFICE BIBLIOGRAPHY ON DESIGN PROTECTION

By Barbara A. Ringer and William Strauss

I. *General approach to design protection.*

Last June the Copyright Office issued a supplement to the *Bibliography on Design Protection* published in June 1955.[1] The 1955 *Bibliography* listed some 264 English-language articles, books, and documents bearing on the design problem, with fairly extensive summaries. Its immediate purpose was "to furnish a tool to be used by the members of the Copyright Office staff working on new legislation to protect designs." It embodied "an attempt to suggest the history and scope of the subject, the principal arguments of the various interested groups, and the basic theoretical and practical problems involved."

Since 1955 there have been a number of striking developments in the design protection area. Two important new design bills have been introduced in Congress,[2] and an inter-industry design protection committee — the National Committee for Effective Design Legislation — has been formed and is functioning actively. The problem of design piracy has been before the courts with increasing frequency, and with results that could not have been foretold a decade ago. Concentrated efforts are under way in several countries to revise existing design legislation, and within the last year the problems of better international design protection have become a major topic of discussion at the meetings of international organizations dealing with intellectual and industrial property.

In view of these developments, the Copyright Office decided to issue a supplement which would bring the annotated *Bibliography* to date, and would also expand its scope to include listings and summaries of foreign-language publications, all design bills introduced in Congress since 1914, and most of the significant American court decisions on designs. While the 1955 *Bibliography* covered 70 pages, the so-called "Supplement" is 160 pages long.

The 286 publications, legislative proposals, and court decisions listed and summarized in the 1959 Supplement reflect some significant

1. The 1955 *Bibliography* was compiled and edited by Barbara A. Ringer. The 1959 *Supplement* was compiled by William Strauss, Borge Varmer, and Caruthers G. Berger, under the editorial supervision of Mr. Strauss and Miss Ringer.

2. H. R. 8873, 85th Cong., 1st Sess. (1957); S. 2075, 86th Cong., 1st Sess. (1959).

new trends in the field of design protection. It is the purpose of this commentary to review the contents of the Supplement, and at the same time to describe the nature and significance of some of the most important trends which it reveals.

II. *Judicial developments in the United States.*

Well over half of the 1959 Supplement consists of a section entitled "Court Decisions on Designs," in which 111 American cases on design protection are listed, summarized, and indexed. While the case law in this area is still evolving, it seems possible to extract some fairly definite trends.

a. *Copyright trends.*

Before 1954 the relatively few American cases that considered the question of copyright in designs were either negative or inconclusive. *Mazer* v. *Stein*[3] in which the Supreme Court upheld the validity of copyright in a statuette used as a lamp base, may thus be considered as a definite turning point. This decision established that a work of art is still entitled to copyright protection even if it has been embodied in or applied to a useful article; this protection is not affected by the intention of the artist as to the use of his design, the potential availability of design patent protection, or the industrial processes involved in its production.

Since *Mazer* the courts have been increasingly liberal in their attitude toward copyright in designs, notably in the fields of dolls, costume jewelry, and textile fabrics. The cases have considerably expanded the concept of what is copyrightable as a "work of art," and have been extremely flexible in adapting the requirements of the copyright notice to fit the design situation. This trend of increased liberality shows every sign of continuing, and is undoubtedly the most important development in the design field during the last five years.

b. *Unfair competition trends.*

Recent developments in the field of unfair competition are less conclusive than those in the copyright area, but they may eventually prove equally significant. Several unfair competition cases, exemplified in the design field by *Dior* v. *Milton*,[4] indicate a trend toward protection of industrial and intellectual property on the theory of "misappropriation," and away from the traditional requirements of palming off, secondary meaning, and customer confusion.

3. 347 U. S. 201 (1954).

4. 9 Misc. 2d 425, 155 N.Y.S. 2d 443 (Sup. Ct.), aff'd mem., 2 App. Div. 2d 878, 156 N.Y.S. 2d 996 (1st Dep't 1956).

c. *Design patent trends.*

It is well known that, not long ago, the possibility of having the courts uphold the validity of a design patent was considered worse than poor. This situation appears to have been improved to some extent since the enactment of 35 U.S.C. § 103 in 1952, and a few recent design patents seem to have been upheld on standards lower than the "inventive genius" test. Nevertheless, as far as can be determined without a complete survey of all pertinent cases, the mortality rate of design patents in the courts is still high.

III. *Legislative trends in the U. S. A.*

The 28-page section of the 1959 Supplement entitled "Design Bills Introduced in Congress" deals with the 48 design protection bills introduced between 1914 and 1959. It includes information concerning the introduction of each bill and its subsequent history, together with summaries of the contents of each bill, committee report, and legislative hearing dealing with designs. Since the O'Mahoney Bill now before Congress was drafted in the light of fifty years' experience with proposed legislation, a review of this legislative history can be instructive.

a. *Principles and standards of protection.*

It seems fair to say that the basic reason for the continuous introduction of design bills over the last fifty years was the inadequacy of the design patent law. This inadequacy was considered too fundamental to be corrected by revision of the patent statute. Instead, most of the bills were based on what may, broadly speaking, be called "copyright principles" — that is, protection of original designs against copying — but provided shorter and more limited protection than that available under the existing copyright law. Only the so-called Vandenburg Amendment to the Duffy and Daly Copyright Bills during the late 1930's provided full copyright protection for designs. The hearings on these bills indicate that there was widespread opposition to treating designs the same as books, musical compositions, and other copyrightable works; the previous approach of a special law giving short-term, limited protection to designs, was considered more appropriate.

The drafters of the most recent design bills — the Willis Bill of 1957 and the O'Mahoney Bill of 1959 — have returned to this earlier approach. Furthermore, in the light of the *Mazer* case and the subsequent broadening of the field of designs now subject to protection under the copyright law, the most recent bills contain provisions aimed at avoiding an overlap between protection under copyright and under the new design statute.

One of the main points at issue in the discussions of previous bills was whether, as a condition of protection, a design should merely be "original" — that is, created independently without copying — or whether it should also be "novel" — in the sense of never having existed anywhere before. There were many who felt that the novelty standard was unrealistic in relation to designs and that administrative searching of the prior art — which almost necessarily accompanies the standard of novelty — would make protection too slow and expensive in most cases to be of value. On the other hand, there was some sentiment favoring administrative screening to avoid the registration of fraudulent or colorable claims. The 1957 Willis Bill, like the existing copyright law, rejected novelty as a standard of protection, and provided for no administrative screening. The O'Mahoney Bill of 1959, however, specifically excludes "staple or commonly-known" designs from registration, and would give the public an opportunity to file "objections" to registration on the ground that a design is staple or commonly-known.

b. *Term and scope of protection.*

Aside from those copyright measures incorporating the Vandenburg Amendment which would have given designs the full copyright term, almost all the bills sharply limited the duration of design protection. The length of term varied from a maximum of five years to a maximum of twenty years, and most bills included provisions for one or more renewals. The 1957 Willis Bill provided a five-year term renewable for another five years, and the pending O'Mahoney Bill provides a single five-year term.

Another major bone of contention over the years was whether protection should be extended to all original designs, regardless of the type of useful article in which they are embodied, or whether protection should be limited to designs for certain specified categories of articles. Some of the earlier bills would have extended only to specific classes of designs, but these provoked considerable opposition on the grounds that they were illogical, represented class legislation, and would create insuperable administrative problems. The Willis and O'Mahoney Bills would afford protection to the designs of useful articles without distinction of kind.

Unquestionably the strongest and most effective opposition to all bills during the years before World War II came from various groups — notably the retailers — who felt that the legislation would subject them to liability through no fault of their own. It seems clear today that the earlier bills did not go far enough to safeguard the interests of these

groups. The Willis and O'Mahoney Bills contain carefully drafted provisions which, in general terms, would limit liability to the manufacturers and importers of infringing articles, and those who act collusively with them.

c. *Formalities and conditions of protection.*

Nearly all of the design bills have provided for both notice and registration; the earliest bills placed registration in the Patent Office, but from 1924 on almost all of the bills would have been administered by the Copyright Office, the Willis and O'Mahoney bills leaving the question open. One of the bills in 1924 dispensed with a notice requirement, but this omission caused sharp criticism and was quickly rectified. However, it was generally recognized that the notice provisions of the copyright law do not fit the design situation, and the requirement for a design notice in most of the bills, including Willis and O'Mahoney, have been carefully tailored to meet the special needs of designs.

Sharp controversies arose on several occasions as to whether protection under a bill should be limited to published designs, or should also be extended to unpublished or "drawing board" designs. Opposition to unpublished registration arose from a fear of "strike suits" and from concern that someone might register all possible variations of a popular design and thereby secure a monopoly. The Willis Bill would have permitted registration for unpublished designs under certain very limited conditions, but the O'Mahoney Bill makes protection available only to published designs.

IV. *Trends shown in recent books and articles on designs.*

The 44-page section of the 1959 Supplement entitled "Books and Articles on Protection of Designs" lists and summarizes 127 recent works on design protection, including 37 foreign-language publications. Even though these works were all published within a relatively short period, they appear to reveal some definite new trends in the thinking of experts on design protection.

a. *Domestic trends.*

Since the impact of the *Mazer* case had only started to be felt in 1955, it is not surprising that American writings on design protection during the past four years have put great emphasis on copyright as a means of combating design piracy. Along with a growing recognition of the economic and cultural importance of designs, there has been general acceptance that the originality principle is broad enough, concep-

tually and constitutionally, to protect industrial and commercial designs as the "writings of an author." Indeed, a few writers have suggested that the Copyright Office is incorrect in refusing registration for "shape" designs such as those for automobiles and dresses, and that the present copyright law is capable of protecting all original designs as it now stands. Most commentators seem to feel, however, that the present copyright law is ill-adapted for design protection, and that remedial legislation along the lines of the Willis or O'Mahoney Bills is needed to resolve the situation.

Recent American writings on the design problem also stress the emergence of unfair competition as an important and effective method for protecting designs. No less than 22 law review articles and notes have dealt directly with this subject during the last four years, and there appears to be a growing alarm at the tendency of courts to protect designs outside the statutory boundaries of patents and copyrights.

b. *Foreign and international trends.*

Within the last few years design protection has suddenly erupted as a matter of world-wide concern. Active legislative consideration is being given to the problem in a number of countries besides the United States, and design has become a major topic of discussion on the international level.

It is not surprising that the attitudes of foreign writers on the design problem have been influenced by the theories on which their own countries' design laws are based. This is particularly true in the case of French writers, since in France the theory of "the unity of art" — under which works of applied art are assimilated to other artistic works and are accorded full copyright protection — is strongly established. At the same time, however, a number of recent foreign writings have expressed growing dissatisfaction with the present national and international situation in the design field, and have urged reconsideration of the entire problem in order to arrive at simpler, more effective, and better-considered legal protection.

PART II.

LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

1. UNITED STATES OF AMERICA AND TERRITORIES

382. U. S. CONGRESS. HOUSE. *Committee on House Administration.*

Removing copyright restrictions upon the musical composition "Pledge of Allegiance to the Flag," and for other purposes. Report (to accompany H.J.Res. 704) submitted by Mr. Hays, June 1, 1960. 1 p. (86th Cong., 2d sess., H.Rept. No. 1728.)

A brief report recommending passage, by the House, of the resolution with slight amendment. See 7 BULL CR. SOC. 231, Item 295 (1960).

383. U.S. CONGRESS. HOUSE. *Committee on Interstate and Foreign Commerce.*

Songplugging and the airways: a functional outline of the popular music business. Staff study for the Committee on Interstate and Foreign Commerce, House of Representatives, Eighty-sixth Congress, second session. May 1960. Printed for the use of the Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce. Washington U. S. Govt. Print. Off., 1960. 13 p. (Subcommittee print.)

"The main emphasis [of the study] is on the manufacture and distribution of phonograph records and on the related subject of the use of music by broadcasters." In this connection, the exclusive rights to reproduce copyrighted music mechanically and to perform such material publicly for profit (17 U.S.C. sec. 1(e)) are discussed as they affect songwriters and publishers.

384. U. S. LAWS, STATUTES, ETC.

Public Law 86-262, 86th Cong., H.R. 6249, approved Sept. 14, 1959. An Act to amend paragraph 1629 of the Tariff Act of 1930 so as to provide for the free importation of tourist literature, to liberalize the tariff laws for works of art and other exhibition material, and for other purposes. Washington, Govt. Print. Off., 1959.

The purpose and general statement of the Committee on Ways and Means, House of Representatives, is set forth in its Report No. 984 of August 24, 1959, to accompany H.R. 6249, a bill containing provisions identical with those enacted in P.L. 86-262.

385. U. S. DEPARTMENT OF THE TREASURY. *Internal Revenue Service.*

The *Internal Revenue Bulletin,* June 20, 1960, at p. 8, includes the following:

The consideration received by a proprietor of a copyright for a grant transferring the exclusive right to exploit the copyrighted work in a medium of publication throughout the life of the copyright shall be treated as proceeds from a sale of property, regardless of whether the consideration received is measured by percentage of the receipts from the sale, performance, exhibition, or publication of the copyrighted work, or is measured by the number of copies sold, performances given, or exhibitions made of the copyrighted work, or whether such receipts are payable periodically over a period generally coterminous with the grantee's use of the copyrighted work.

2. FOREIGN NATIONS

386. NORWAY. *Kirke- og undervisningsdepartementet.*

Ot. prp. nr. 26 (1959-60): Lov om opphavsrett til åndsverk. [Oslo?] 1960.

A report on the Norwegian draft copyright law by the Church and Education Department of Norway with the text of the draft law, to which are appended the texts of the Brussels revision of the Berne Convention, in French and Norwegian, and of the Universal Copyright Convention, in Norwegian. The report and draft were approved by royal resolution on Jan. 8, 1960, and submitted to the Parliament.

PART III.

CONVENTIONS, TREATIES AND PROCLAMATIONS

387. Committee of Experts for the Preparation of International Regulations for the Rights of Performers, Producers of Phonographic Records and Broadcasting Organizations. *The Hague, 9th-20th May,* 1960.

Document[s] submitted jointly by the three Secretariats. (*Le Droit d'Auteur,* vol. 73, no. 5 (May 1960), pp. 109-124; no. 6 (June 1960), pp. 137-199.)

Contents. Introduction (French and English):

A. Organization of the Committee of Experts.

B. Historical background. Analysis of the observations and suggestions formulated by the states with regard to substance (French and English). Draft Convention (French and English). Report of Mr. Wallace, Rapporteur General (French and English). Inaugural address of Mr. Ch.-L. Magnin (French). Draft Convention (Spanish). Report of Mr. Wallace, Rapporteur general (Spanish).

Documents submitted by the Secretariats of I. L. O., International Copyright Union and UNESCO.

388. THE "FLORENCE AGREEMENT." *Agreement on the Importation of Educational, Scientific, and Cultural Materials.*

On February 23, 1960, the Senate adopted a resolution of ratification of the Agreement on the Importation of Educational, Scientific, and Cultural Materials, also known as the "Florence Agreement" (Ex. I, 86th Cong., 1st Sess.).

The Agreement is not to become effective as regards the U. S. pending enactment of implementing legislation which has been drafted and is awaiting approval of various Government Agencies. It is not expected that such legislation will be enacted by this Congress before it adjourns.

Because of the interest which has been expressed in this Agreement, parts of Mr. Fulbright's report from the Committee on Foreign Relations are reproduced below.

1. MAIN PURPOSE OF THE AGREEMENT

The main purpose of the Agreement on the Importation of Educational, Scientific, and Cultural Materials (commonly known, and hereinafter referred to, as the "Florence agreement") is to enable organizations and individuals in the participating countries to obtain such materials with less difficulty through reduction of tariff and trade obstacles. It is believed that ratification and implementation of the Florence agreement would promote the fuller exchange of knowledge and ideas across free-world national boundaries with a consequent substantial contribution to international understanding.

2. BACKGROUND

The formulation of an international agreement to overcome governmental obstacles to the free flow of educational, cultural, and scientific materials was proposed in 1948 by the General Conference of the United Nations Educational, Scientific, and Cultural Organization (UNESCO). Following drafting revisions by a meeting of contracting parties to the

General Agreement on Tariffs and Trade — consulted because of the proposal's character — a text was unanimously adopted by the General Conference of UNESCO at its 1950 session in Florence. The Secretary-General of the United Nations having received instruments of ratification or acceptance from 10 countries, the Florence agreement came into force in May 1952. To date, 31 states have become parties to the agreement; none of the Communist bloc countries has joined.

While the United States actively participated in the drafting of the agreement and the negotiations leading to its adoption, this country did not become a signatory until June 1959. The explanation for the delay given by the executive branch relates to a requirement first to seek ratification and judge the effects of the Universal Copyright Convention, which also concerns the importation of published materials. Because of delayed ratification of that convention by other English-speaking countries, data on its effects could not be gathered at any earlier time. Now, however, according to the State Department report to the President:

> From import information obtained to date it would appear that the increase in English language imports under the Universal Copyright Convention is not significant in relation to the total volume of domestic production, and is in fact so small that it could very well represent a normal year-to-year variation rather than a result of the change in the manufacturing clause.

In receipt of this pertinent information, the executive branch undertook to bring about U. S. participation in the Florence agreement.

3. Nature of the Agreement

The Florence agreement is concerned with six basic categories of materials: books, publications, and documents; works of art and collectors' items; visual and auditory materials; scientific instruments or apparatus; books and other articles for the blind; and public-exhibition materials of a prescribed nature. The contracting states undertake to arrange for duty-free entry of these materials insofar as they are specifically defined in five annexes to the agreement. As an example of such definition, stationery and publications which are primarily commercial or advertising materials, except catalogs and travel publications, are excluded. Furthermore, the necessary licenses and/or foreign exchange are to be granted for the importation of certain categories of publications, and articles for the blind, which either are consigned to public institutions or are of an official governmental, United Nations, or travel-promotion character.

The provisions governing works of art are so drafted as to ensure

only inclusion of items of genuine and individual artistic and educational merit. In most instances where visual and auditory materials are involved, it is provided that they can enter duty-free only when imported by organizations of an educational character approved by the competent authorities of the importing country and when intended for noncommercial use. Here, as elsewhere in the agreement, the certifying agent for the United States would be the Secretary of the Treasury.

The provisions of annex D, covering scientific instruments or apparatus have such limited scope that they may be quoted directly. They are included in the agreement if—

> * * * intended exclusively for educational purposes or pure scientific research, provided: (*a*) That such scientific instruments or apparatus are consigned to public or private scientific or educational institutions approved by the competent authorities of the importing country for the purpose of duty-free entry of these types of articles, and used under the control and responsibility of these institutions; (*b*) That instruments or apparatus of equivalent scientific value are not being manufactured in the country of importation.

In addition to the inherent restrictive terms of the agreement, the national interests of the United States — and those of the other contracting countries — are protected in two ways. First, the participants may prohibit or limit the importation, or the circulation after importation, of items on grounds relating directly to national security, public order, or public morals. Secondly, the protocol of reservation, if adopted as recommended, would permit the United States (and other participants on a reciprocal basis) to suspend, in whole or in part, any of its obligations under the agreement if, as a result of those obligations, any materials covered by the agreement are being imported in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of similar or directly competitive products.

With respect to the duration of the Florence agreement, any participating country may denounce the agreement by an instrument in writing deposited with the Secretary-General of the United Nations. The denunciation would take effect 1 year after its receipt.

PART IV.

JUDICIAL DEVELOPMENTS IN LITERARY AND ARTISTIC PROPERTY

A. DECISIONS OF U. S. COURTS

1. Federal Court Decisions

389. *H. M. Kolbe Co.* v. *Armgus Textile Co., et al.,* 126 U.S.P.Q. 1 (2d Cir. May 27, 1960) (per curiam).

The Court of Appeals here affirmed the grant of a temporary injunction against copyright infringement of a textile design. Judge Friendly dissented on the ground that the notice of copyright affixed to the textile was insufficient. The District Court's opinion granting the injunction is reported at 126 U.S.P.Q. 11 (S.D.N.Y. April 28, 1960) (Murphy, J.), and comments on the sufficiency of the notice of copyright as follows: "The only other issue, viz., that plaintiff has printed its notice of copyright on the selvage, is no longer open to question and must as a matter of law be considered as sufficient. See Peter Pan Fabrics, Inc. v. Martin Weiner, 274 F.2d 487, 124 U.S.P.Q. 154, [7 BULL. CR. SOC. p. 182, Item 243] (2d Cir. 1960)."

390. *Hampton, et al.* v. *Paramount Pictures Corp., et al.,* 125 U.S.P.Q. 623 (9th Cir. June 2, 1960) (Hamley, J.)

Action for copyright infringement of the silent film, "The Covered Wagon." Defendants impleaded third-party defendants. After trial, defendants were enjoined from exhibiting "The Covered Wagon" and third-party complaint was dismissed.

Held, on appeal, affirmed.

Plaintiff had licensed to the third-party defendant, Kodascope, the right to use "The Covered Wagon" for "non-theatrical" exhibition purposes. Defendant had obtained the film from Kodascope, and hence was not authorized to exhibit it for any but non-theatrical purposes. The court further found that plaintiff had not abandoned its rights in the film and was not estopped to assert the claims here involved.

391. *Harrington* v. *Mure, et al.,* Civ. No. 138-328 (S.D.N.Y. May 20, 1960) (Palmieri, J.)

Action for a declaratory judgment as to plaintiff's rights in a song registered for copyright by defendant music publisher, and purportedly written by the individual defendants. Plaintiff made no allegation of infringement, and raised no issue as to the validity of the copyright. At trial, pursuant to the court's suggestion, defendants moved to dismiss the action for lack of jurisdiction of the subject matter.

Held, motion granted.

Said the court: "[T]he fact that plaintiff Harrington alleges a co-authorship of a copyrighted composition does not bring this claim within the exclusive jurisdiction of the federal district court 'in copyright cases.' The nature of the disputed facts and the character of the relief to which plaintiff may be entitled indicate that his action is cognizable in the state court."

392. *Norbay Music, Inc.* v. *King Records, Inc.,* 126 U.S.P.Q. 231 (S.D.N.Y. July 12, 1960) (Edelstein, J.)

Action for royalties under Section 101 (e) of the Copyright Act. Plaintiff owned the copyright on the song, "Slow Walk," and alleged that defendant had made a recording of this song without paying the statutory royalties. Defendant urged, by way of defense, that plaintiff had licensed a third company to make records of this song in October 1946, and that notice of use was not filed until November 1957. Defendant contended that such tardy filing under Section 101(e) worked a forfeiture of plaintiff's right to royalties. Plaintiff argued that filing was merely a condition precedent to bringing suit. Both plaintiff and defendant moved for summary judgment.

Held, summary judgment granted for defendant.

The court reasoned as follows: "Although the statute does not specify the time within which the copyright owner must file the notice, to permit the filing after the production of recordings began would be to negative the procedure set forth by Congress."

393. *Perkins Marine Lamp & Hardware Corp.* v. *Long Island Marine Supply Corp.,* 126 U.S.P.Q. 169 (E.D.N.Y. July 13, 1960) (Bartels, J.)

Action for copyright infringement. Plaintiff asserted that defendant had copied certain illustrations from its catalogue of marine hardware. Defendant urged, by way of defense, that it had copied these illustra-

tions from the catalogues of third parties who apparently had themselves copied from plaintiff's catalogue. Plaintiff moved for a preliminary injunction.

Held, motion granted.

The court commented as follows: "Where injunctive relief is sought, a copier from a copier is in no better position than one who copies directly from the copier."

In addition, a certain number of copies of plaintiff's catalogue had appeared without copyright notice, apparently by accident. The court referred to Section 21 of the Copyright Act, and held that plaintiff had not lost its copyright in the catalogue.

394. *Amplex Mfg. Co.* v. *A.B.C. Plastic Fabricators, Inc., et al.,* 125 U.S.P.Q. 648 (E.D. Pa. June 7, 1960) (Clary, J.)

Action for copyright infringement of a catalogue of commercial signs. The allegedly infringed matter consisted of illustrations of particular type styles admittedly in the public domain, and of items sold by both plaintiff and defendant.

Held, after hearing, for plaintiff. Permanent injunction granted and damages in the amount of $500 assessed.

Said the court: "[W]e feel that the plaintiff's illustrations have satisfied the bare minimum requirements of the Copyright Act [for copyrightability]. Although the Egyptian lettering may be but an arrangement of letters which themselves are undoubtedly part of the public domain, the distinguishable variation in the arrangement and manner of presentation — the dark background, the particular size of the letters, their spacing, their arrangement into three rows — all combined to give the product independent authorship worthy of protection against copying. This is even more evident in the case of the drawings of the several products, which, although simple in form, present an original effort and illustration of the particular products."

2. State Court Decisions

395. *Miller* v. *Universal Pictures Co., et al.,* 201 N.Y.S.2d 632 (App. Div. 1st Dep't June 14, 1960) (per curiam.)

Plaintiff, executrix of Glenn Miller, sued defendant for damages and an accounting of profits derived from the release by defendant Decca Records of phonograph records made from the soundtrack of the film, "The Glenn Miller Story," produced by defendant Universal Pictures.

Held, on appeal, judgment for plaintiff reversed and new trial ordered.

The agreement between plaintiff and defendant Universal, pursuant to which the film had been produced, made no mention of phonograph records. Universal did not use the original Glenn Miller recordings, but rather, through its own orchestra, imitated them. The trial court had found that Universal has misappropriated plaintiff's property. The Appellate Division rejected this conclusion: "Plaintiff never had, and certainly does not now have, any property interests in the Glenn Miller 'sound.' Indeed, in the absence of palming off or confusion, even while Glenn Miller was alive, others might have meticulously duplicated or imitated his renditions. . . ."

Nor, on the facts of this case, was the Appellate Division prepared to find an implied negative covenant by which Universal could be deemed to have agreed not to make records from the soundtrack. The court pointed out, however, that plaintiff might well be entitled to royalties on the profits derived from the sale of such records. Since plaintiff had not urged this theory in the trial court, a new trial was necessary.

396. *Cantor* v. *Mankiewicz, et al.,* 125 U.S.P.Q. 598 (N.Y. Sup. Ct. N.Y. Co. May 18, 1960) (Capozzoli, J.)

Action for common-law copyright infringement. Plaintiff claimed that the photoplay, "The Barefoot Contessa," was plagiarized from her unpublished manuscript. At the close of the entire case, defendants moved to dismiss the complaint.

Held, motion granted.

The court noted that plaintiff's circumstantial evidence on the issue of access raised at most a suspicion that defendant had indeed had access to plaintiff's manuscript. The defendant vigorously denied such access, and the court concluded that the evidence was insufficient to warrant a finding that the plaintiff had proved access through circumstantial evidence. On the question whether access could, in this case, be inferred from similarities between plaintiff's and defendant's work, the court found in the negative.

Also of Interest:

397. *Independent News Co., et al.* v. *Williams,* 126 U.S.P.Q. 181 (E.D. Pa. June 28, 1960) (Wood, J.) (denial of preliminary injunction to bar defendant from purchasing mutilated copies of plaintiff's comic books and selling them as comic books at a reduced price).

398. *North American Lace Co.* v. *Sterling Laces, Inc.,* 125 U.S.P.Q. 526 (S.D.N.Y. June 1, 1960) (Cashin, J.) (design patent on lace edging held invalid for lack of invention).

399. *Massapequa Publishing Co.* v. *The Observer, Inc., et al.,* 126 U.S.P.Q. 229 (E.D.N.Y. July 20, 1960) (Bartels, J.) (partial summary judgment granted in action for copyright infringement and unfair competition, decreeing that defendant's newspaper articles infringed plaintiff's articles).

400. *Peter Pan Fabrics, Inc., et al.* v. *Candy Frocks, Inc.,* 126 U.S.P.Q. 171 (S.D.N.Y. June 21, 1960) (Cashin, J.) (preliminary injunction granted in action for infringement of copyright on textile pattern).

401. *Unistrut Corp., et al.* v. *Power, et al.,* 126 U.S.P.Q. 82 (1st Cir. June 30, 1960) (Aldrich, J.) (claim of copyright infringement held invalid because plaintiff did not prove that its allegedly plagiarized catalogue had been deposited with the Copyright Office).

402. *Z Bar Net, Inc., et al.* v. *Helena Television, Inc.,* 125 U.S.P.Q. 595 (Montana District Court June 3, 1960) (Lessley, J.) (plaintiffs held to have no property interest in programs broadcast by them and received through defendant's private antenna system).

B. DECISIONS OF FOREIGN COURTS

1. England

403. *Warwick Films Productions, Ltd., et al.* v. *Eisinger, et al.,* High Court of Justice, Chancery Division (May 16, 1960) (Danckwerts, J.)

Action for copyright infringement. Plaintiffs were the producers of a film about Oscar Wilde based on "The Trials of Oscar Wilde," by Montgomery Hyde, published in 1948. Defendants were the producers of a film on the same subject based upon a book entitled "Oscar Wilde: Three Times Tried," published in 1912, portions of which were copied, with permission, in Hyde's book. Plaintiffs moved for a preliminary injunction to bar defendants from exhibiting their film until after a plenary hearing of the instant action.

Held, motion denied.

The court could arrive at no conclusion, on the evidence before it, as to the copyright ownership of the 1912 book nor as to the provisions of the Copyright Act of 1956 or of 1941, respectively, which might apply. Defendants suggested that plaintiffs were morally in the wrong because the idea of the film came from defendants. As to this, the court commented, "It is probable, I think, that there is not much to choose between them in what is called the matter of cutthroat competition." On the balance of convenience, too, the preliminary injunction had to be denied.

PART V.

BIBLIOGRAPHY

A. BOOKS AND TREATISES

1. Foreign Publications

(a) In English

404. DADACHANJI, RUSTOM R. Law of literary & dramatic copyright in a nut-shell. 1st ed. Bombay, 1960. 223 p.

A reference work on Indian copyright law written essentially for laymen. It includes chapters giving "a bird's-eye-view" of the English law, the background to the Indian law and how the English law became applicable to India, and the methods of acquiring international copyright under the Universal Copyright Convention.

(b) In French

405. ADAM, H. T. L'action du Conseil de l'Europe dans le domaine de la propriété intellectuelle. *Études sur la propriété industrielle, littéraire, artistique,* Paris, Sirey, 1960. Pp. 195-205.

A brief account of the activities of the Council of Europe in the field of intellectual property.

406. BOLLA, PLINIO. Perspectives d'une convention internationale concernant la protection de certains droits dits voisins du droit d'auteur. *Études sur la propriété industrielle, littéraire, artistique,* Paris, Sirey, 1960. Pp. 207-218.

A survey of the development of neighboring rights and of efforts to achieve an international convention for its protection, with suggestions for shaping such a convention.

407. BONNEFOY, GASTON. La nouvelle législation sur la propriété littéraire et artistique: droit d'auteur, contrefaçon, contrat d'édition; commentaire article par article de la loi 57-927 [*i.e.,* 57-298] du 11 mars 1957. Préf. de Paul Coste-Floret. Paris Éditions Montchrestien [1959] 300 p.

An article-by-article commentary on the French Copyright Law of 1957.

408. BOUTET, MARCEL. Le droit d'auteur et les droits dérivés. *Études sur la propriété industrielle, littéraire, artistique,* Paris, Sirey, 1960. Pp. 219-223.

Brief observations on the development, types and content of neighboring rights.

409. CARTERON, PAUL. Les confins du modèle et du brevet d'invention. *Études sur la propriété industrielle, littéraire, artistique,* Paris, Sirey, 1960. Pp. 21-31.

A brief discussion of the demarcation between copyright and patent protection of designs and models with special reference to the new legal situation created by the French Copyright Law of 1957.

410. CASSIN, RENÉ. L'intégration, parmi les droits fondamentaux de l'homme, des droits des créateurs des oeuvres de l'esprit. *Études sur la propriété industrielle, littéraire, artistique,* Paris, Sirey, 1960. Pp. 225-237.

Comments on the integration, among the fundamental rights of man, of the rights of creators of intellectual works, with special reference to article 27 of the Universal Declaration of Human Rights, proclaimed by the General Assembly of the United Nations on Dec. 10, 1948.

411. DESBOIS, HENRI. Caractères essentiels de la revision de Bruxelles de la Convention de Berne. *Études sur la propriété industrielle, littéraire, artistique,* Paris, Sirey, 1960. Pp. 239-246.

A review of the changes brought about in the Berne Convention by the Brussels revision and the motivations therefor.

412. ÉTUDES SUR LA PROPRIÉTÉ INDUSTRIELLE, LITTÉRAIRE, ARTISTIQUE; MÉLANGES MARCEL PLAISANT. Paris, Sirey, 1960.

A collection of studies on industrial, literary and artistic property offered in homage to Marcel Plaisant on the occasion of the fiftieth anniversary of his admittance to the Paris bar. The separate studies are listed at Items 405, 406, 408, 409, 410, 411, supra, and Items 414, 416, 417, 419, 421, and 422, infra.

413. GREFFE, PIERRE. Les droits des éditeurs et imprimeurs publicitaires sur leurs créations (la loi du 11 mars 1957) 2. éd. Paris, Dalloz, 1960. 19 p.

A brief discussion of the changes brought about by the French Copyright Law of 1957 with respect to the rights of one who creates or reproduces a work of applied art as a salaried employee or independent contractor in relation to the rights of his employer or client for whom the work is produced.

414. HEPP, FRANÇOIS. Les "nouveautés" de la Convention universelle sur le droit d'auteur. *Études sur la propriété industrielle, littéraire, artistique,* Paris, Sirey, 1960. Pp. 267-271.

A brief survey of some of the important innovations in international copyright protection brought about by the Universal Copyright Convention.

415. INTERNATIONAL COPYRIGHT UNION. Le cinèma dans la Convention de Berne. The cinema in the Berne Convention. Genève, Bureau international pour la protection des oeuvres littéraires et artistiques, 1960. 157 p.

At head of title: Union internationale pour la protection des oeuvres littéraires et artistiques.

The report, in French, of Professor Lyon-Caen on copyright questions relating to cinematography, which had been submitted to the International Copyright Union at its seventh session (Geneva, Aug. 18-23, 1958), followed by replies and comments thereon, summarized in part, in French and English, of various international organizations to which copies of the report had been sent by the International Bureau.

416. LUND, TORBEN. Les droits des fabricants de disques. *Études sur la propriété industrielle, littéraire, artistique,* Paris, Sirey, 1960. Pp. 259-266.

A comparative examination of the legal protection of manufacturers of phonograph records with special reference to Scandinavia.

417. MAGNIN, CH.-L. La Convention de Berne et l'évolution du droit d'auteur international. *Études sur la propriété industrielle, littéraires, artistique,* Paris, Sirey, 1960. Pp. 273-286.

The history of the origin and rise of the Berne Copyright Convention and its significance in the development of international copyright.

418. RECHT, PIERRE. Le droit d'auteur sur les exécutions publiques des oeuvres musicales. Bruxelles, F. Larcier, 1960. 549 p.

A case book on copyright in public performances of musical works in Belgium, divided into two parts, the first being a systematic synthesis of principles as expressed in case law and the second a chronological compilation of cases decided from 1889 through 1959.

419. SANCTIS, VALERIO DE. En matière de transmission du droit d'auteur. *Études sur la propriété industrielle, littéraire, artistique,* Paris, Sirey, 1960. Pp. 287-294.

The author presents briefly his concept of the legal nature of copyright in an examination of the legal questions arising out of a transfer of that right. He maintains that this concept is not in contradiction with Italian legislation or general principles underlying pertinent provisions of multilateral conventions, Berne, in particular.

420. SCHULZE, ERICH. L'artiste et la technique; protection de la prestation de service de l'artiste exécutant. The performer and the technique; protection of the performer's contribution of service. Berlin, F. Vahlen, 1960. 77 p. (International Gesellschaft für Urheberrecht. Schriftenreihe, Bd. 19.)

A discussion, in French, with English translation by Hilary Tee, of the protection of performers' rights with special reference to German laws, past, present and proposed. Dr. Schulze makes a case for such protection by labor regulations rather than copyright.

421. ULMER, EUGEN. L'oeuvre cinématographique et ses auteurs. *Études sur la propriété industrielle, littéraire, artistique,* Paris, Sirey, 1960. Pp. 181-186.

A comparison of the pertinent provisions in the French Copyright Act of 1957 and the U. K. Copyright Act of 1956 with respect to the question of the authorship of a cinematographic work.

422. VAUNOIS, LOUIS. L'évolution du droit moral. *Études sur la propriété industrielle, littéraire, artistique,* Paris, Sirey, 1960. Pp. 295-301.

The historical development of the moral right of the author with references to French case law.

(c) In German

423. GOLDBAUM, WENZEL. Verfall und Auflösung der sogenannten Berner Union und Übereinkunft zum Schutz von Werken der Literatur und Kunst. Berlin, F. Wahlen, 1959. 94 p.

An attempt to show that the "so-called" Berne Union and the Convention for the Protection of Literary and Artistic Works are in a state of collapse.

424. TROLLER, ALOIS. Eingriffe des Staates in die Verwaltung und Verwertung von urheberrechtlichen Gefugnissen. Berlin, F. Vahlen, 1960. 129 p. (Internationale Gesellschaft für Urheberrecht. Schriftenreihe, Bd. 17.)

A critical, comparative analysis and survey of legal provisions regulating the operation of performing rights organizations with the conclusion that it is desirable to have as little state regulation of such organizations as is compatible with the interests of the general public.

(d) In Italian

425. BONASI BENUCCI, EDUARDO, ED. Codice della proprietà industriale e del diritto d'autore: legislazione interna, convenzioni e accordi internazionali, legislazioni straniere. [Per cura di] Eduardo Bonasi Benucci [e] Mario Fabiani. Milano, A. Giuffré, 1960. 2019 p. (Collezione legislativa).

A collection of texts of laws on copyright, inventions, designs and models, trademarks and trade names, unfair competition and restrictive trade practices, effective as of January 1, 1960, with the latest texts of all conventions relating thereto to which Italy is a party, including previous texts whenever still in effect in one or more countries. The work is made up of three parts covering (1) internal legislation (Italy), (2) conventions (multilateral and bilateral), and (3) foreign legislation (Belgium, France, Germany, Great Britain and Northern Ireland, Luxemburg, Holland, United States, and Switzerland).

B. LAW REVIEW ARTICLES

1. United States

426. Copyrights—equity—neither filing of architectural plans nor erection of building is such publication as would forfeit common-law copyright. (34 *St. John's Law Review* 326-330, no. 2, May 1960.)

A case note on *Smith v. Paul,* 174 Cal. App. 2d 804, 345 P. 2d 546, 7 BULL. CR. SOC. 146, Item 184 (D.C. App. 1959).

427. Copyrights—government employee—application of patent law "shop right" rule to speeches of naval officer. (34 *St. John's Law Review* 322-326, no. 2, May 1960.)

A note on the *Rickover case,* 177 F.Supp. 601, 7 BULL CR. SOC. 102, Item 110 (D.D.C. 1959).

428. Copyrights—in general—broad copyright protection for textile designs despite absence of notice of copyright from finished dresses. (73 *Harvard Law Review* 1613-1616, no. 8, June 1960.)

A case note on *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.,* 274 F.2d 487, 7 BULL. CR. SOC. 182, Item 243 (2d Cir. 1960).

429. Copyrights—Right of Administrator c.t.a. To Renew and Extend Copyright. (33 *Fordham L. Rev.* 159, 1959.)

A case note on *Gibran* v. *National Comm. of Gibran,* 255 F.2d 121, (2d Cir.), 5 BULL. CR. SOC. 301, Item 380, cert. denied 358 U.S. 848 (1958).

430. Copyrights—subjects—compulsory filing and construction of building from plans not divestitive of common-law copyright in plans. (73 *Harvard Law Review* 1391-1393, no. 7, May 1960.)

A case note on *Smith v. Paul,* 174 Cal. App. 2d 804, 345 P.2d 546, 7 BULL. CR. SOC. 146, Item 184 (D.C. App. 1959).

431. GROSS, J. ARTHUR. Patent aspects in Government contract negotiations. (41 *Chicago Bar Record* 395-404, no. 8, May 1960.)

Advice to a lawyer on how to protect a client's patent and other proprietary rights, including copyrights, in his contract negotiations with the Government.

432. GUNNELS, DONALD L. Copyright protection for writers employed by the Federal Government. (1960 *Washington University Law Quarterly* 182-194, no. 2, Apr. 1960.)

This note, which received first place in the 1960 Nathan Burkan Memorial Competition at Washington University School of Law, discusses the questions involved in *Public Affairs Associates, Inc. v. Rickover,* 177 F.Supp. 601, 7 BULL. CR. SOC. 102, Item 110 (D.D.C. 1959) and *Sherrill v. Grieves,* 57 Wash. Law Rep. 286 (Sup. Ct. D.C. 1929). A conclusion is given that "no basis exists for distinguishing the positions of Government and private employees with respect to literary property rights."

433. HENN, HARRY G. [A review of] Copinger and Skone James on the law of copyright. Ninth edition. By F. E. Skone James and E. P. Skone James. London: Sweet & Maxwell Limited. 1958. (46 *American Bar Association Journal* 659, no. 6, June 1960.)

See 5 BULL. CR. SOC. 366, Item 479 (1958).

434. KOTZEN, STANLEY ROBERT. Copyright—right of government officer or employee to his literary product. (33 *Temple Law Quarterly,* 365-369, no. 3, Spring 1960.)

A note on the *Rickover* case, 177 F.Supp. 601, 7 BULL. CR. SOC. 102, Item 110 (D.D.C. 1959).

435. LATHAM, PAUL L. Copyrights v. lawyers' rights. (41 *Chicago Bar Record* 413-414, no. 8, May 1960.)

A brief comment on the significance of the district court and appellate decisions in the *Beardsley* case, 151 F.Supp. 28, 4 BULL. CR. SOC. 141, Item 332 (S.D.N.Y. 1957) and 253 F.2d 702, 5 BULL. CR. SOC. 229, Item 285 (2d Cir. 1958), with respect to the question whether a copyright of a legal form should "be allowed to impede the free use by a lawyer of any language he believes will best serve his purpose."

436. MILLS, ROBERT A. Taxation of copyright income under the 1954 Internal Revenue Code. (1960 *Washington University Law Quarterly,* 195-206, no. 2, Apr. 1960.)

This note, which received second place award in the 1960 Nathan Burkan Memorial Competition at Washington University School of Law, points out "the serious inequities [of the Code] in the treatment of copyrights" and its failure "in the area of copyright income to give consistent and clear indication of the tax liabilities of copyright holders."

437. MORRISON, PETER H. Copyright publication and phonograph records. (48 *The Georgetown Law Journal* 683-708, no. 4, Summer 1960.)

Based on the author's paper, "Copyright publication: the sale and distribution of phonograph records," winner of honorable mention in the ASCAP Nathan Burkan Memorial Competition, 1958, and published in *Copyright Law Symposium*, no. 10 (1959). See 7 BULL. CR. SOC. 149, Item 194 (1960).

438. NOTARIANNI, JOSEPH J. Copyright—literary property—government official retains literary property right in speeches delivered while in government employ. (9 *Catholic University Law Review*, 104-106, no. 2, May 1960.)

A note on the *Rickover* case, 177 F.Supp. 601, 7 BULL. CR. SOC. 102, Item 110 (D.D.C. 1959).

439. OWNBEY, LLOYD C., JR. The civil remedies for disklegging. (33 *Southern California Law Review* 190-207, no. 2, Winter 1960.)

"This comment [awarded first prize, Nathan Burkan Competition, 1959, University of Southern California] explores the history of the disklegging problem [*i.e.*, unauthorized duplication of phonograph records] through a brief chronological survey of the eight cases which the author feels have contributed most to the development of the law in this field; presents an analysis of the various remedies which have been proposed in connection with disklegging; and, finally suggests a theory under which at least limited relief might be granted to recording artists and recording companies."

440. SHENAS, GEORGE P. Copyright: infringement: composer-assignor's capacity to sue. (7 *U.C.L.A. Law Review*, 520-524, no. 3, May 1960.)

A case note on *Manning v. Miller Music Corp.*, 174 F.Supp. 192, 6 BULL. CR. SOC. 302, Item 345 (S.D.N.Y. 1959).

441. YANKWICH, LEON R. Intent and Related Problems in Plagiarism. (33 *Southern California Law Review* 233-259, no. 3, Spring 1960.)

Another fascinating discussion by Judge Yankwich on the subject of plagiarism, both unconscious and intentional. He concludes that "progress lies less in a more definite recital of the rights of the 'author' in his 'writings' than in the creative work of lawyers and judges in formulating and adapting the law of copyright to such new media of expression as

may arise," and that "the present law, by allowing latitude in recovery, lodges in the court the power to avoid injustices in 'vicarious' cases and to confine 'serious' infringements to 'intentional' infringements." He ends, "the judicial way of enforcing the copyright protection of authors may seem slow at times. But it is the more lasting in the end."

442. YOUNGDAHL, JAMES E. Copyright law and the employment relation. (5 *Saint Louis University Law Journal* 510-538, no. 4, Fall 1959.)

This article, which "appeared in the Nathan Burkan National Competition in 1959," seeks "to examine the relationship between the law of copyright and the law of employment, whether a fair balance is being kept between the employer and the employee, the publisher and the author, in the light of modern business realities."

443. ZUCKMAN, HARVEY LYLE. Obscenity in the mails. (33 *Southern California Law Review* 171-188, no. 2, Winter 1960.)

"This article is devoted to an analysis of the present status of postal obscenity law and makes recommendations for legislative change where such action seems necessary or desirable."

2. Foreign

(a) English

444. BRACK, HANS. The place of broadcasting in the ministerial drafts for revision of the German Copyright Law. (*E.B.U. Review* 26-34, no. 61B, May 1960.)

445. GYLES, R. V. Operation of Imperial Acts in Australia: Copyright Owners' Reproduction Society, Ltd. v. E. M. I. (Australia) Pty. Ltd. [(1958-59) 32 A. L. J. R. 306]. (3 *Sydney Law Review* 359-363, no. 2, Mar. 1960.)

A comment on questions raised in a recent Australian case which held that a U. K. Board of Trade inquiry, made in 1928 pursuant to section 19(3) of the U. K. Copyright Act, 1911, as to the adequacy of the royalty rate for mechanical recordings, an Order made as a result of the inquiry increasing the rate, and an Act of the Imperial Parliament confirming the Order have no effect upon the law as a self-governing dominion.

446. JENSEN, EJNAR. The Danish Copyright Bill. (*E.B.U. Review* 32-34, no. 62B, July 1960.)

A brief summary of the provisions of special significance from the point of view of radio and television contained in two bills, one on copyright in literary and artistic works, and the other on rights in photographs, which were submitted by the Danish Minister of Education to the Danish Parliament early in January 1960.

447. KILGOUR, D. G. Canadian Copyright Law—Royal Commission Report—Fundamental Changes Recommended. (36 *Canadian Bar Review* 569-579, 1959.)

Analysis of the Royal Commission Report on Copyright (Ottawa, 1957) by a member of the Law Faculty, University of Toronto, who concludes: "Altogether it is an original and occasionally a radical document. Indeed one wonders how the Commissioners * * * ever arrived at unanimity. If and when it leads to legislative action it will require the closest scrutiny. Meanwhile it deserves the study of all who are interested in copyright matters."

448. MENTHA, BÉNIGNE. Copyright reform in the Federal Republic of Germany; some comments on the latest proposals. (*E.B.U. Review* 20-25, no. 61B, May 1960.)

A general perspective of the latest West German draft copyright laws issued by the Ministry of Justice in May 1959.

(b) French

449. ANSERMET, ERNEST. La musique et son exécution. (*Revue Internationale du Droit d'Auteur* 56-71, no. 27, Apr. 1960.)

The famous founder and conductor of the Orchestra of French-Speaking Switzerland expresses his point of view "as to the respective importance and value of the share and contributions of those who combine to present a musical work to the public." The article appears in French, English, and German.

450. BOURSIGOT, HENRI. Le sort du droit moral dans le mariage de l'artiste ou: les enseignements du procès Bonnard. (30 *Archiv für Urheber-, Film-, Funk und Theaterrecht* 176-192, no. 3/4, Feb. 1, 1960.)

A critique of the French Supreme Court decision of Dec. 4, 1956

in the *Bonnard* case, under which, according to the writer of this comment, "the moral right, inalienable and imprescriptible, is nothing more than a pecuniary right and a temporary right."

451. CASTELAIN, R. Interprètes, progrès social et droits voisins, par R. Castelain et M. Curtil. (*Revue Internationale du Droit d'Auteur* 72-93, no. 27, Apr. 1960.)

"The purpose of this article [in French, English, and Spanish] is intended to show the present state of the French jurisprudential evolution regarding the legal nature of the relations binding performers with those who call on them." The writer concludes that "the orientation envisaged by French case-law . . . [should] be retained for the contribution it makes to the search for solutions in the field of neighboring rights."

452. KAUFMANN, GUY. Nouvelles d'Allemagne Orientale. (*Revue Internationale du Droit d'Auteur* 94-101, no. 27, Apr. 1960.)

A summary of the recently issued draft copyright law of the German Democratic Republic (East Germany).

453. LAURENS, MARCEL. La contrefaçon en matière de chansons. (*Revue Internationale du Droit d'Auteur* 4-19, no. 27, Apr. 1960.)

A discussion, in French, English, and Spanish, of the principles involved in determining infringement of light music and songs. The writer concludes that although technical analysis by experts should not be ignored, the greater probative value should be attributed to the judgment of the average or below-average auditor.

454. MATTHYSSENS, JEAN. Droits de reproduction et de représentation cinematographiques [sic] en droit français. (*Revue Internationale du Droit d'Auteur* 20-55, no. 27, Apr. 1960.)

A discussion, in French, English, and Spanish, of the question whether, under the French Copyright Law of 1957 and under the prior law, "the cinematographic adaption belong[s] to the performing right (transferred by the author) or to the right of reproduction (reserved) or to both."

455. PLAISANT, ROBERT. La loi française du 11 mars 1957 sur le droit d'auteur: l'exploitation du droit pécuniaire. (8 *Rivista di Diritto Industriale* 244-277, no. 3-4, July-Dec. 1959, pt. 1.)

An analysis of articles 33 to 38 of the French Copyright Law of 1957 relating to the exploitation of the economic rights of the author.

456. La Protection des photographies dans la législation des pays de la Convention de Berne. 2 fold. sheets. (Supplément à la *Revue Internationale du Droit d'Auteur, no. XXVII,* avril 1960.)

The texts, in French, of the provisions, with respect to protection of photographs, which appear in laws of the 44 member states of the Berne Copyright Convention. The texts are given in tabular form on two folded sheets which are issued as supplements to the April 1960 issue of the *Revue.*

457. RECHT, PIERRE. Lettre de Belgique. (73 *Le Droit d'Auteur* 129-137, no. 6, June 1960.)

A survey of recent judicial and legislative developments concerning copyright in Belgium.

458. VAUNOIS, LOUIS. Lettre de France. (73 *Le Droit d'Auteur* 102-109, no. 5, May 1960.)

Comments on copyright decisions of French courts during 1959.

(c) German

459. KAEMMEL, ERNST. Gedanken und Vorschläge zum Entwurf eines Gesetzes über das Urheberrecht. (9 *Erfindungs und Vorschlagswesen* 18-20, no. 1, Ausg. C Jan. 1960.)

In a discussion of the new East German draft copyright law, the writer points out that the draft is not a "government bill" but simply forms a preliminary basis for discussion, and then offers his opinion as to the comments and views received thereon.

460. MÜNZER, GEORG. Wesen und Inhalt des Verlagsvertrages und des Auftrages. (9 *Erfindungs und Vorschlagswesen* 60-64, no. 3, Ausg. B, Mar. 1960.)

Proposals for the formulation of new, standard publishing contracts for East Germany with respect to completed works and works to be created in the future.

461. MÜNZER, GEORG. Zur Diskussion über den Entwurf eines Gesetzes über das Urheberrecht. (9 *Erfindungs und Vorschlagswesen* 15-18, vol. 9, no. 1, Ausg. C Jan. 1960.)

Generally favorable comments concerning the new East German draft copyright law, but with suggestions for some changes.

462. NIPPERDEY, HANS C. Das allgemeine Persönlichkeitsrecht. (30 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 1-29, no. 1/2, Jan. 2, 1960.)

A brief analysis of the general right of personality under German law covering the various components of the right such as right of privacy, right in one's own picture, libel and slander, etc.

463. PETER, WILHELM. Die Entwicklung der Leistungsschutzrechte im Spiegel des neueren Schrifttums. (*Gewerblicher Rechtsschutz und Urheberrecht, Auslands- und internationaler Teil* 176-186, no. 4, Apr. 1960.)

A discussion of the development of legal protection of neighboring rights as reflected in recent literature.

464. SCHRAMM, CARL. Der Schutz des Ideenanregers. (30 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 129-175, no. 3/4, Feb. 1, 1960.)

A discussion of the protection of ideas under German case and statute law with particular reference to the situation where a person originates an idea which is used by another person in the creation of a protectible work.

465. TROLLER, ALOIS. Das Urheberrecht der Dozenten an ihren Vorlesungen. [Zürich, 1960]. 8 p. Offprint from *Schweizerische Juristen-Zeitung* 197-204, no. 13 (1960).

A comparative analysis of the rights of university lecturers in their lectures.

(d) Norwegian

466. HAXTHOW, EGIL. Filmen, filmatiseringen og "le droit moral." (29 *NIR* 12-22, no. 1, 1960.)

An article on the moral rights problem in connection with the adaptation of literary works to the screen in Norway, with some reference to other countries.

C. ARTICLES PERTAINING TO COPYRIGHT FROM TRADE MAGAZINES

1. United States

467. COPYRIGHT LAW AND THE SCHOLAR. (177 *Publishers' Weekly* 39-43, no. 24, June 13, 1960.)

An article summarizing the addresses of Lambert Davis, director of the University of North Carolina Press, Verner Clapp, president of the Council on Library Resources, and Abe A. Goldman, chief of research for the U. S. Copyright Office, principal speakers on a copyright panel devoted to an examination of fair use in the copying of copyrighted materials for scholarly purposes. The panel met in Pittsburgh on May 23 at the second general session of the annual meeting of the Association of American University Presses.

468. IMPORTATION PROBLEMS; rules governing appraisal of books for duty. (178 *Publishers' Weekly* 38-44, no. 3, July 18, 1960.)

"Article . . . based on the paper delivered at a panel on importation problems during the recent ABPC annual meeting by Customs Examiner Arthur I. Demcy, who has revised it for publication in PW in collaboration with his fellow panelists." Includes the procedures that must be followed by importers of English language books as the result of the Universal Copyright Convention.

469. KOSHEL, JOHN. Tape (not necessarily red) and the Law. (*HiFi/Stereo Review* 52, March 1960.

Some dos and donts for amateur recordists briefly and concisely set forth.

470. MELCHER, FREDERIC G. Copying for what purposes and under what control? (177 *Publishers' Weekly* 50, no. 22, May 30, 1960.)

An editorial on a recent meeting, in Washington, D. C., of an informal group bearing the name, Committee to Investigate Copyright Problems Affecting Communication of Educational and Scientific Information, and on the copyright problems it was organized to investigate concerning the use of copying machines for reproduction of scientific and cultural materials.

471. PILPEL, HARRIET F. But Can You Do That? (175 *Publishers' Weekly* 64, no. 21, May 25, 1959.) Includes discussions of *Peter Pan Fabrics, Inc.* v. *Brenda Fabrics, Inc.; Modern Aids, Inc.* v. *R. H. Macy & Co., Inc.;* and *Stone* v. *Goodson.*

472. PILPEL, HARRIET F. But Can You Do That? (175 *Publishers' Weekly* 34, no. 26, June 29, 1959.) Discussions of *Thompson* v. *Upton,* 146 A.2d 880 (Md.App.Ct. Dec. 23, 1958); *Feldman* v. *Bernham,* 6 N.Y.App.Div.-2d 498 (1958); *Paramount Film Distributing Corp.* v. *City of Chicago;* and *State of New Jersey* v. *Kinney Building Drug Stores, Inc.,* Essex Co., New Jersey 1959.

473. PILPEL, HARRIET F. But Can You Do That? (176 *Publishers' Weekly* 36, no. 5, August 3, 1959.) Discussions of *Maloney* v. *Stone et al; Fader* v. *Twentieth Century-Fox Film Corp.;* and *Stern* v. *U.S.*

474. PILPEL, HARRIET F. But Can You Do That? (176 *Publishers' Weekly* 31, no. 10, Sept. 7, 1959.) Discussions of *Manning* v. *Miller Music Corp.;* and *Cortley Fabrics Company, Inc.* v. *Slifka.*

475. PILPEL, HARRIET F. But Can You Do That? (176 *Publishers' Weekly* 36, no. 13, Sept. 28, 1959.) Discussions of *Insull* v. *N. Y. World Telegram Corp.,* 172 F.Supp. 615 (E.D. Ill., 1959), a libel suit; *Berkson* v. *Time, Inc.,* 8 App.Div. 2d 352 (1st Dept. 1959), another libel suit; and *Dan Kasoff, Inc.* v. *Palmer Jewelry Mfg. Co.*

476. PILPEL, HARRIET F. But Can You Do That? (176 *Publishers' Weekly* 25, no. 17, Oct. 26, 1959.) Discussions of *Barr* v. *Matteo* and the Supreme Court Rules in a libel case; also *Wanamaker* v. *Fulton Lewis, Jr.,* trial of a libel case in the D.C. district court; *Meyer* v. *U.S.* (compensatory damages and taxes); and *In re National Council Books,* 121 USPQ 198, registration of trademark for a book.

477. PILPEL, HARRIET F. But Can You Do That? (176 *Publishers' Weekly* 16, no. 22, Nov. 30, 1959.) Discussions of *Commissioner* v. *Cowden,* 32 Tax Court No. 73 (1959); and *Aquino* v. *The Bulletin Company,* a right of privacy case in the Superior Court of Pennsylvania, decided Sept. 16, 1959.

478. PILPEL, HARRIET F. But Can You Do That? (176 *Publishers' Weekly* 41, no. 25, Dec. 28, 1959.) Discussions of "A 'Good' Libel Decision", *Lawrence J. Ogden* v. *The Association of the United States Army,* D.C. D.C. Oct. 14, 1959; another libel case, *Grover MacLeod* v. *Tribune Publishing Co., Inc.,* Supreme Court of California in Bank, Aug. 3, 1959; *Rose et al.* v. *Bourne, Inc.; Miller* v. *Daniels;* and *Vaudable* v. *Montmarte, Inc.,* the trade name case which involved a New York City restaurant operating under the name "Maxim's".

479. PILPEL, HARRIET F. But Can You Do That? (177 *Publishers' Weekly* 42, no. 9, Feb. 29, 1960.) Discussions of Internal Revenue Ruling 60-31, I.R.B. 1960-5, 17; *Krendell* v. *Moscow,* concerning a story about the "Andrea Doria"; and *Original Sound Record Co.* v. *United Telefilm Records, Inc.*

480. PILPEL, HARRIET F. But Can You Do That? (177 *Publishers' Weekly* 17, no. 13, Mar. 28, 1960.) Discusses slander in a charge of Communism, *Grein* v. *LaPoma;* and *Insull* v. *N.Y. World-Telegram Corp.,* under the title "When can a publisher be sued outside of his home state?"

481. PILPEL, HARRIET F. But Can You Do That? (177 *Publishers' Weekly* 52, no. 17, Apr. 25, 1960.) Here again Mrs. Pilpel discusses the question whether libel can be enjoined, *Wolf* v. *Gold,* 9 App.Div.2d 257 (2d Dept. 1959), motion for leave to appeal denied, 196 N.Y.Supp. 2d 600. She also discusses *Times Film Corp.* v. *City of Chicago,* 272 F.2d 90 (7th Cir. 1959), certiorari granted Mar. 21, 1960), on the "question of precensorship".

482. PILPEL, HARRIET F. But Can You Do That? (177 *Publishers' Weekly* 40, no. 22, May 30, 1960.) Discussions of *Miller* v. *Daniels,* and *Medina* v. *United Press Association,* 16 Misc. Rep. 2d 876 (N.Y.Sup.Ct. 1959).

483. RUSSAK, BEN. Russian copyright; is there common ground for a convention? (178 *Publishers' Weekly* 38-40, no. 2, July 11, 1960.)

The Russian objections to participation in an international copyright convention are presented by a former representative for U. S. publishers in Europe, but optimism is expressed as to the outcome of future negotiations with the Russians.

484. TAUBMAN, JOSEPH. Theatrical Limited Partnerships. (*Taxes—The Tax Magazine* 979-984, Nov. 1959.)

The tax ramifications of the business side of a limited partnership, a favored device for theatrical productions, is discussed.

2. England

485. PUBLIC LENDING RIGHT FORUM. (*The Bookseller* 1965-1966, no. 2839, May 21, 1960.)

An article on the speeches delivered by Sir Alan Herbert and representatives of British libraries and publishers at a forum on the proposed Public Lending Right scheme held at the National Book League, London, on May 16.

NEWS BRIEFS

486. DESIGNS: HEARINGS ON S. 2075 (86th CONG., 1st SESS.) AND S. 2852 (86th CONG., 2d SESS.)

Preliminary hearings were held with respect to these two bills on Wednesday, June 29, 1960 before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee, with Senator Hart as Acting Chairman.

Leading the preliminary group of witnesses, Senator Talmadge, sponsor of S. 2852, introduced former Governor Ellis Arnall, counsel for the Independent Motion Picture Producers Association and Walt Disney Studios, who spoke briefly on behalf of the Talmadge Bill. He was followed by Judge Giles Rich of the Court of Customs and Patent Appeals, who set forth the part played by the Coordinating Committee, of which he is Chairman, in the development of S. 2075.

L. Quincy Mumford, Librarian of Congress, testifying, listed as one of his reasons for favoring S. 2075 the fact that the present copyright situation has caused the Library to become a depository of "materials not within its normal purview," and expressed the opinion that creators of ornamental designs should have protection for their works, as a matter of equity. Arthur Fisher, Register of Copyrights, detailed reasons favoring S. 2075 and hoped that a way could be found to harmonize the two bills to meet the points raised by Governor Arnall.

Alan Latman, Executive Secretary of the National Committee for Effective Design Legislation, described the nature of the support for design protection, compared the two bills, and concluded that the provisions of S. 2075 "go further in achieving the delicate balance required in this area than any other proposal yet put forward."

In adjourning the short hearing, Senator Hart expressed his belief that the ground had only been broken, and considered it highly probable that further hearings would be held before the next session of Congress.

487. GOVERNMENT INFRINGEMENT BILL (H.R. 4059, 86th Cong., 1st Sess.)

On Thursday, June 2, 1960, Messrs. Arthur Fisher, Register of Copyrights, and George D. Cary, General Counsel of the Copyright Office, appeared before the Senate Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary and testified in support of this bill, which would permit aggrieved copyright owners to file claims with, or sue the Government, in cases of copyright infringement by the United States or its contractors.

Other witnesses testifying in favor of the bill were Robert J. Dodd, Jr., General Counsel, and Kenneth McClure, Assistant General Counsel, Department of Commerce, and Robert W. Frase, representing the American Book Publishers Council and the American Textbook Publishers Institute. Mr. Arthur Curtis, attorney and proprietor of a Washington, D. C. newspaper syndicate, opposed the bill principally on the alleged ground that it should be retroactive and unless covering a wider area might harm more than help certain creators, and consequently urged a number of changes in the bill.

Senator Hart, Acting Chairman of the Subcommittee, indicated that even though the bill did not go as far as Mr. Curtis urged, it appeared to be an improvement over the existing situation which denies to authors and copyright owners the right of suit against the Government.

A bill similar to H.R. 4059 passed the House of Representatives in two previous Congresses but in both cases died in the Senate in the closing days of the sessions. The present bill passed the House last July, and it is now hoped that the way may be cleared for final Senate approval before adjournment of the present session.

488. HAGUE ARRANGEMENT ON THE INTERNATIONAL REGISTRATION OF DESIGNS

The draft texts drawn up last year by an international committee of experts were subjected to scrutiny and comment in the past few weeks in the meetings of two influential international private organizations, the

International Association for the Protection of Industrial Property (AIPPI) and the International Chamber of Commerce. Both gave general endorsement to the drafts.

The AIPPI meetings took place in London from May 27 to June 4, and the International Chamber of Commerce meetings at Paris on June 9 and 10.

489. NEW ADHERENCE TO THE UNIVERSAL COPYRIGHT CONVENTION

We have been informed by the Department of State that on Tuesday, May 31, 1960, Belgium deposited its instrument of ratification of the Universal Copyright Convention, and Protocols 1, 2, and 3, with the Director-General of Unesco.

Under Article IX, paragraph 2, of the Convention, the latter will come into force in respect of Belgium three months after the deposit of its instrument of ratification, i.e., on August 31, 1960. Belgium is the 35th country to adhere to the Convention.

INDEX

Volume 7—October 1959—August 1960

LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS, CONVENTIONS, TREATIES AND PROCLAMATIONS

Item

Item

Item

DECISIONS

Item

Item

TREATISES, ARTICLES AND EDITORIALS

Authors

*All references are to item number, except where page numbers are given.

*All references are to item number, except where page numbers are given.

*All references are to item number, except where page numbers are given.

Subject Matter

*All references are to item number, except where page numbers are given.

Item*

*All references are to item number, except where page numbers are given.

*All references are to item number, except where page numbers are given.

Item*

*All references are to item number, except where page numbers are given.

Item*

*All references are to item number, except where page numbers are given.

Item*

*All references are to item number, except where page numbers are given.

Item*

*All references are to item number, except where page numbers are given.

Copyright Society of the U.S.A.
c/o Fred B. Rothman & Co.
57 Leuning Street
South Hackensack, N. J.

Return and Forwarding
Postage Guaranteed

Form 3547 Requested