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## **COPYRIGHT LAW REVISION STUDIES**

### **Third Committee Print Now Available**

#### STUDIES 7-10

7. Notice of Copyright, by Vincent A. Doyle, George D. Cary, Marjorie McCannon and Barbara A. Ringer.
8. Commercial Use of the Copyright Notice, by W. M. Blaisdell.
9. Use of the Copyright Notice by Libraries, by Joseph W. Rogers.
10. False Use of Copyright Notice, by Caruthers Berger.

This is the third 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.

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**BULLETINS OF COPYRIGHT DECISIONS  
TO BE BASED ON YEARS REPORTED**

The Copyright Office has announced that beginning with Bulletin No. 32 to be issued in 1961, the years covered in the Bulletins of Copyright Cases will be those during which the cases have been reported, rather than decided. This change will enable the editor to begin preparation of the bulletins for publication at the end of a calendar year, instead of delaying preparation until such uncertain time that most of the cases decided during a calendar year have been reported.

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## PART I.

## ARTICLES

1. COPYRIGHT SYMPOSIUM ON GENERAL REVISION OF THE LAW, AMERICAN BAR ASSOCIATION Patent, Trademark and Copyright Section, Washington, August 27, 1960.

The symposium on copyright, a feature of recent annual meetings of the Patent, Trademark and Copyright Section of the American Bar Association, this year featured a discussion on "Proposals for General Revision of the United States Copyright Law." The subject was discussed by a total of eighteen participants during a well attended meeting on Saturday morning, August 27, 1960, at the Shoreham Hotel in Washington, D. C. It is expected that a summary of the proceedings will be made available by the Section in printed form in due course.

In view of the numerous points of possible revision the overall plan of the meeting, under the general chairmanship of Joseph A. McDonald of Washington, former President of The Copyright Society of the U. S. A. and Chairman of the Section's Copyright Division for the Association's year 1959-1960, was to discuss those of maximum utility and most fundamental import in four groupings, each with its own panel and sub-chairman. The program was designed to survey and inform rather than to advocate particular points of view. In arranging for participation, the Chairman suggested that each sub-chairman describe the area under consideration, have one panelist set forth the reasons in favor of a particular proposed change; another the reasons against it, and a third the other alternatives. Instead of seeking to have known or avowed partisans argue their own points of view as at a Congressional hearing, each participant was asked, directly and through his sub-chairman, to present a summary of the reasons applicable to an assigned position quite apart from, and even in some instances contrary to, his personally held convictions. Seymour Bricker of Los Angeles summed it up neatly by observing at the opening of his presentation, "It is an interesting twist on a frequently used disclaimer, that this is a case in which 'the views expressed are not necessarily those of' the speaker." Full cooperation by the sub-chairmen and panelists to this end produced an unusually comprehensive and well-organized exchange of information.

Abe A. Goldman, Chief of Research, United States Copyright Office, opened the discussion with a brief review of the studies conducted by the Copyright Office with a view to revision. He observed that the previous year

marked the 50th anniversary of the Copyright Act of 1909 and that between 1924 and 1940 a series of bills was introduced for general revision, all of which bogged down in controversy of one sort or another. In keeping with the consensus of those in the field, the work now in progress centers around the activity of the Copyright Office in conducting a comprehensive program of research and evaluation and the production and dissemination of definitive studies on each of various aspects of revision.

The studies themselves do not press for particular solutions but rather make sure that all possibilities are presented for consideration. Each study has been submitted to a panel of approximately 25 and the studies, with the comments of panel members appended, are being issued by the Government Printing Office in a series of committee prints, four of which are now available containing a total of thirteen studies. Thirty-two studies have been prepared covering a wide range of points of possible amendment.<sup>1</sup> It should be noted that certain other controversial questions bearing on possible amendment exist which require separate studies. Among these are the juke-box exemption, the manufacturing clause, the protection of ornamental designs and the regulation of performing right organizations.

The four principal areas on which the attention of those present was then focused for the principal part of the session were those of notice, registration, duration and the protection of unpublished works.

Under the panel chairmanship of Philip T. Dalsimer of New York, the matter of copyright notice was discussed by Theodore R. Kupferman of New York and Morton Schaeffer of Chicago. The requirements as to form and position of the notice and the effect of improper notice or of the omission of notice were reviewed and proposals for the relaxation of requirements were outlined.

The second half-hour was devoted to an examination of the procedures and requirements with regard to the deposit of copies, the registration of claims to copyright and the recordation of assignments. Samuel W. Tannenbaum of New York acted as panel chairman and, after a brief summary of his comprehensive written contribution on the subject, called on Harry Olsson of New York, Cedric W. Porter of Boston and Alfred H. Wasserstrom of New York for their respective views.

The next panel, chaired by Seymour M. Bricker of Los Angeles, dealt with the questions of duration, renewal and the effect of death. The members of the panel were Herman Finkelstein and Sydney M. Kaye of New York and Vincent T. Wasilewski of Washington.

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1. These studies have been announced in these pages as prepared for release by the Copyright Office.

In the final quarter, under the chairmanship of John Schulman of New York, Joseph S. Dubin of Universal City and Sigrid H. Pedersen and Edward A. Sargoy of New York discussed the protection of unpublished works and the possibility of having a comprehensive federal statutory system applicable to all writings whether published or unpublished.

Before introducing the Register of Copyrights for a summation and closing statement, the general chairman, Joseph A. McDonald, gave a short summary of various questions presented by existing and potential technological advances in the fields of the transmission, storage and retrieval of information, all of which have an impact on the law of copyright through their influence on the works, materials and processes to which the law relates.

Mr. Arthur Fisher, Register of Copyrights, concluded the symposium with a series of comments on the basic need for revision, a review from his vantage point of the steps already taken in this process here and abroad and a reaffirmation of his belief that, despite the recognized difficulties, comprehensive revision will in due course be achieved.

## 2. TECHNOLOGICAL ADVANCES AND COPYRIGHT

*By* JOSEPH A. McDONALD\*

The planning of revision is a prime necessity because each body of law must grow with the state of things to which it relates. Change is the order of the day. The marvels of technical development we have seen are a gauge of those to come and many of them directly affect the law of copyright.

Some of us, brought up on Sunday evening group singing around a piano, can remember our surprise at being able to bring somewhat similar sounds out of a new type of semi-automated piano by running through it what looked like a paper roller towel full of holes. Our surprise was somewhat less than that of the copyright owner, who found that such a paper roll, capable of reproducing his composition exactly and repeatedly, was not an infringing copy.

In due course statutory amendment provided for the infringement aspect, if not the copyrightability, of the piano roll but we have seen other developments—and there will be more—which run ahead of the law and call for the judicial extension of established doctrine or the enactment of amendatory legislation.

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\* Paper delivered by Mr. McDonald, Chairman, Copyright Division, at the American Bar Association Copyright Symposium on Proposals to Revise the Copyright Law, held under the auspices of its Section of Patent, Trademark and Copyright Law in Washington, D.C. on August 27, 1960.

In one relatively young man's life there has been, in the field of sound recording, a series of advances from the rotating cylinder and the relatively high speed disc to slow, long-playing records of high quality, then to sound on film and the recording of sound on magnetic tape. In the field of motion pictures the changes have been even more impressive, proceeding from the flickering, narrow-gauge, black and white film of the early days to wide, higher speed color film, accompanied by highly sophisticated exposure and projection processes. And now we have pictures, accompanied by sound, in color as well as in monochrome, recorded on videotape which can be played back immediately and repeatedly without processing and, like audiotape, be wiped clean at the throw of a switch and used again.

Has the law of copyright kept pace with these advances? It has not in many respects.

The unauthorized recording of sound in any form is an infringement of copyrighted works. However, a good sixty years after the introduction of sound recordings they themselves may not be copyrighted. Motion pictures on the other hand have been, since the 1912 amendment, capable of being copyrighted but doubt is expressed as to the copyrightability of a videotape recording of the same or similar subject matter. It would appear that some bearing-taking and catching-up are needed.

Storage and retrieval systems for the recording and rapid reproduction of information are revolutionizing the processing of data and they will in due course fundamentally change the library system as we know it. Demonstrations of electronic legal research in the field of case law as well as statute law are being given in Washington by IBM during this Convention. The key word elements of questions in a particular field of inquiry are fed into an IBM machine already stocked with recordings of all the statutes in the field. In a remarkably short time the statutory provisions applicable to the question are selected electronically, identified in a list of citations and, if desired, the text of the sections is reproduced in typewritten form. In a similar manner case law in a particular field is electronically run down through tape recorded summaries with which another machine is loaded.

Automated patent searching is being done at the Patent Office on an experimental basis in some classes and there seems no doubt that we are headed, faster than ever, toward a push button existence.

In the not too distant future the user of a library, instead of consulting a card file and requesting books, will seat himself at an electronic desk and operate a scanning and selector system monitored in the glass top of the desk. On determining the desired source material these, too, may be brought up on the desk viewing screen for perusal as readily as though the pages of a conventional book were being turned and read. The impact on the publishing business of such a change is obvious.

Machines are being built to respond to and act upon what they "see." The actual reading by a machine of writing is as difficult a concept for us to comprehend as the storage of moving pictures by the arrangement and orientation of magnetic particles on tape used to be. Checks are already being identified, tabulated and cleared by electronic devices which are actuated by the "appearance" of figures imprinted with magnetic ink. At present the type faces are somewhat bizarre but are readily susceptible of being read by the human eye without special training. Translation ability is being similarly built into machines falling in the general category of perceptrons.

The transmission of television programs will soon be effected over long distances by bouncing the signals off satellites which either maintain a fixed position in relation to the earth or move in controlled patterns. The broadcasting of television courses from airplanes cruising at high altitudes and thus serving to supplement the instruction in schools over a wide area has been authorized.

The storage and retrieval of information is a gigantic task. The annual volume of information increases at a staggering rate and without an adequate retrieval system it might literally just as well be "thrown out the window." The early years of modern science saw a number of instances of invention and solution which had limited publication and distribution, especially prior to the development of the printing press, with the result that they lay hidden and were not found until long after someone else, working independently, re-invented the same invention and re-solved the same problem.

In view of the simplicity and economy of producing copies rapidly at the point where they are needed it is inevitable today that a tremendous amount of unauthorized copying is being done in business, in manufacturing plants and particularly in research organizations. Instead of subscribing to twenty copies of a scientific journal a research laboratory, by taking one or only a few subscriptions, can have important articles copied and distributed to those of its personnel who are working on the specific subject. The copies may be indexed and filed in a special library, or programmed into storage machines, all in the interest of the speedy dissemination of information and its accurate filing and ready retrieval.

Each of these developments carries with it questions of copyright, domestic and international in scope. While some of them can no doubt be worked out by appropriate voluntary industry agreement, others will require statutory revision for their solution.

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### 3. AN EXCLUSIVE FEDERAL STATUTORY SYSTEM FOR LITERARY AND ARTISTIC WORKS: THE CONFUSIONS IN THE DIVERSITY OF OUR PRESENT FEDERAL AND STATE SYSTEMS

By EDWARD A. SARGOY\*

#### *I. The Present State and Federal Systems of Common Law and Statutory Copyright.*

It is the purpose here to demonstrate some of the anomalies progressively becoming more confusing in this swiftly advancing electronic communications era, by reason of our fifty-one State and Federal legal systems for protecting literary and artistic works in certain stages of their dissemination. Under our ancient statutory system, the scope of the rights granted, and their judicial protection, is exclusively Federal, but only from and after either a first publication with copyright notice, or a pre-publication registration in the Copyright Office. Prior to any such publication or registration, the same work is protectible only under the respective law (common in most and statutory in some) of each of the fifty States, whatever such law, if any, may be at the time.

The multiplicity of internal judicial systems is not only most confusing to foreigners, particularly claimants entitled to our national treatment for their published as well as unpublished works under the Universal Copyright Convention to which the United States since 1955 has become an adherent with some thirty-four other nations. It is also extremely puzzling to many Americans, including many lawyers, unfamiliar with our dichotomous system of Federal statutory copyright on the one hand, the various so-called common law or State regimes on the other. Other major countries of the world ordinarily protect their literary and artistic works under a single national system, from the conception of the work to the end of its protectible life, regardless of whether and how the work is published or disseminated. The term of such protection, in the case of an author who is an individual, will usually extend for many years after his death. We too in the U.S.A. protect our works

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\* Paper delivered by Mr. Sargoy at the American Bar Association Copyright Symposium on Proposals to Revise the Copyright Law, held under the auspices of its Section of Patent, Trademark and Copyright Law in Washington, D.C. on August 27, 1960.

Mr. Sargoy is a member of the New York Bar, and the firm of Sargoy & Stein. He is past Chairman of the Committee on Copyright, Association of the Bar of the City of New York, and has been Chairman of the ABA Copyright Subsection, the Committee on Program for General Revision of the Copyright Law, Committee on International Copyright, and the Committee on Copyright Law Revision. He is a member of the Panel of Experts appointed by the Librarian of Congress for General Revision of the Copyright Law.

from the cradle to beyond the grave, in fact perpetually in theory, provided the work is never registered or dedicatorily published. This protection, our so-called common law copyright, is available exclusively under applicable State law, whatever such may be. However, upon and after its publication with copyright notice, or its registration in the Copyright Office, under the Federal copyright statute (Title 17 U. S. Code), the Federal system takes over exclusively for a limited period of twenty-eight years plus a possible like renewal period.

This multiplicity of State and Federal systems is essentially tied to eighteenth and nineteenth century conceptions of "publication" which preceded even the communication inventions of Morse, Bell and Marconi. Existing legal interpretation that public performance of a play or music, for example, is not a publication either divestive of State common law rights in the manuscript, or investive of Federal statutory copyright, derived such artificial meaning in an age when the offering for sale or distribution to the public of the printed publication was the primary vehicle for communicating literary and artistic intelligence.

Congress, some fifty years ago, in exercising its power under Article I, sec. 8 of the Constitution, to protect the writings of an author for a limited period, chose in the present Copyright Act of 1909, to continue these ancient concepts of separate legal systems for so-called published and unpublished works. It provided for Federal statutory copyright protection only after the work was published with a prescribed notice of copyright, or registered prior to publication (as to certain classes only) in the Copyright Office. It expressly reserved to the laws of the respective States, by sec. 2 of Title 17, U. S. Code, such protection and redress at common law or in equity as the particular State would choose to give an unpublished work. What was a "published" or "unpublished" work has continued to be determinable by the conceptions of the prior century.

Such diversity of systems probably sufficed for the generations in which it was so established and observed. Some States appear to have had few, if any, adjudications of common law questions. Presumably these States would, if such questions did arise, look to the reported common law decisions in those other States where the questions may have been adjudicated. Obviously, the judiciary in individual States are free to differ in their interpretation of the applicable common law principles. Also, if any State legislature were dissatisfied with local judicial interpretation of the applicable common law, it could enact appropriate modifying legislation.

However, during recent years, we have been witnessing a remarkable electronic revolution in the communication of literary and artistic intelligence, whose ultimate effects we are just beginning to grasp.

Does this diversity of legal system continue to make sense in this new electronic era? When a performance of the manuscript of the same play or piece of music, whether deposited in the owner's desk at home, or registered in the Copyright Office, or published with a copyright notice, can be simultaneously disseminated to an audience of millions of people, for commercial purposes, over networks of hundreds of radio or television broadcasting stations, in virtually every State; when visual or acoustic electronic recordings thereof via tape, film, disc or wire, can be identically repeated thousands of times in as many different places, is not the situation vitally changed? The Echo satellite which began orbiting the earth this month is merely the harbinger of more such advanced communication satellites to come, from which signals can be bounced from one spot of the earth to another. Innumerable simultaneous renditions of an identical performance already cover the country, and will soon cover the world.

Do not fifty State boundaries, with their possibly varying internal judicial interpretations and statutes, as distinguished from a single Federal system, become an anomaly, where judicial protection and redress may be sought for an infringing use of literary or musical property which has its damage impact in each of the States?

## II. *Some Legal Consequences of Continuing Our Present Diverse Systems.*

With these advances in the science of communication, what are some of the legal consequences of continuing our present system?

Apart from the typical literary, musical or artistic work embodied in a visually perceptible form of "writing" which is presently copyrightable, we must realize that sooner or later we must bring into the orbit of our Federal statute, forms of writing already being recorded on electronic tape, wire, film and discs, whose recorded symbols or tracks cannot be identified or read by visual examination. Questions of their copyrightability are being raised under the present Federal statute. When electronically activated, however, they can be projected in forms which are visually or acoustically perceptible, or both. This becomes important when we attempt to fit them to that ancient copyright word of art, "publication."

Obviously, if we do not change our system, individual State law will continue to be controlling, if public dissemination by way of performance or rendition of the work is deemed, under our long standing present concepts, neither a publication divestive of the common law right, nor investive of a statutory copyright, as in the case of the commercial performance of plays and music above mentioned. State court jurisdiction will continue to have to be invoked for protection of the work in such cases. Where diversity of

citizenship plus the requisite minimum jurisdictional amount of \$10,000 is present, Federal jurisdiction may also continue to be available, but here, of course, the doctrine of *Erie R.R. v. Tompkins*<sup>1</sup> will come into play, and call for the applicable State law to be ascertained or divined by the Federal court.

Inevitably, under modern conditions of simultaneous multiple disseminations of the work across State boundaries by radio or television broadcasting, or orbiting satellites, problems of conflict of State law must arise and be resolved. How is the State court judge, or the Federal judge necessarily taking the *Erie R.R. v. Tompkins* route, to ascertain which laws, if any, of what State or States, are to be controlling?

Shall the damage in each instance be determined by the law of the place of impact of the injury, where an authorized broadcast, for example, reaches into forty different States? Is the possible divestment or continued existence of the author's or owner's property rights sought to be protected, to be determined by the respective law of those other States, or perhaps those other countries of the world, where he has previously sought to exercise the same? Or is the question to be determined by the law of the place where he now seeks to exercise or enforce such rights?

We have already had a harbinger of how complicated these questions of "conflicts" in the judicial interpretation of common law rights can become in closely related fields, where protection has been sought, not under unavailable copyright, but under unfair competition principles, for common law property rights claimed in visual as well as acoustic recordings of performances. They are nevertheless quite pertinent and illustrative of the "conflict of laws" problem which will increasingly confront a common law copyright, if we do not choose to bring such rights into our Federal orbit, but continue to preserve our present systems of State and Federal protection.

#### A. *The Ettore case*.<sup>2</sup>

The *Ettore* case in the Federal courts of Pennsylvania, is about as graphic an illustration of these problems as can be found. The plaintiff, in the mid-1930s, had authorized the making and distribution of a sound motion picture film depicting a championship prize fight in which he was a participant. Some thirteen years later, the film was broadcast over television without plaintiff's permission, twice from Philadelphia and twice from New York. The Philadelphia broadcasts were received in New Jersey and Delaware, as well as Pennsylvania, and the New York broadcasts were received in New York and New Jersey. The plaintiff sought damages, under principles of unfair competition, for these unauthorized broadcasts. He was sustained by the U. S.

1. 304 U.S. 64 (1938).

2. *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3rd Cir. 1956).

Court of Appeals for the Third Circuit, the court taking the position that plaintiff's original authorization for theatrical exhibitions of the films did not contemplate and permit later television broadcasts in which he still retained a common law property interest.

Being a diversity case, in which the Federal court felt it had to follow the route of *Erie R.R. v. Tompkins* to ascertain applicable State law, the maze of problems confronting the court was truly confounding.

Perhaps the most difficult was determining which State's common law applied for various purposes. First, being a diversity case brought in Pennsylvania, the Federal court was obligated to follow the Pennsylvania conflict of laws rule.<sup>3</sup> Under the Pennsylvania rule, "the point of impact" of the injury or damage determines the law of the particular State to be applied. Since this was property damage, the points of impact were the places where the broadcasts were received, to wit, Pennsylvania, Delaware and New Jersey. Accordingly, the common law of each of these States had to be found, or divined if yet unsettled. The situation was similar with regard to the New York broadcasts, where both New York and New Jersey law had to be considered.

When the court came to the further question of the repetition of each broadcast, and whether the Pennsylvania single publication rule of libel was to be applied analogously to the repeated broadcasts which reached over into Delaware and New Jersey, it was necessary to ascertain whether the single publication rule was also the rule of these other States. The same was true with regard to the New York broadcast received in New Jersey. When it came to the four broadcasts in New Jersey, two each from Pennsylvania and New York, respectively, it was necessary to look to New Jersey law through the double lens of Pennsylvania and New York conflict of laws rules.

Thus, it is not surprising that Chief Judge Biggs in the *Ettore* case described as "ferocious" the task of divining what result the Supreme Court of Pennsylvania might reach.<sup>4</sup> The court regretted "the necessity of having to deal piecemeal with the problems at bar, State by State, facet by facet, detail by detail,"<sup>5</sup> when no single body of law was available.

#### B. *The Capitol Records Case.*<sup>6</sup>

In this case, the Federal Court sitting in New York, again acting under the doctrine of *Erie R.R. v. Tompkins* in a diversity case, had to determine which jurisdiction's applicable common law to apply. It had to ascertain

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3. *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

4. 229 F.2d 481, at 491.

5. *Id.* at 495.

6. *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657 (2d Cir. 1955).

whether the common law property right in matrices of performances of musical recordings, now sought to be protected against unfair competition, had already been divested and lost by the prior public sale abroad of the musical recordings made from such matrices. Here the plaintiff was owner of certain matrix records for which plaintiff had acquired from the original German owner, Telefunken, the sole right to manufacture and distribution of pressings in the United States. The matrices contained recordings of performances by famous European orchestras and artists, of symphonic and other classical music presumably now in the public domain. Plaintiff brought suit to enjoin alleged unfair competition by a competing United States record manufacturer and distributor, who had acquired identical matrices of the same records from a Czechoslovakian alien property administrator who had seized the same from a licensee of Telefunken in his country. The competitor was making and distributing the same phonograph records in the United States. The original Czechoslovakian licensee had never received United States rights from the original German owner.

Had the property right acquired by plaintiff in the sound track fixations previously been divested and made general public property by the authorized prior public retail sale and distribution of the recordings abroad? As in the *Ettore* case, the Federal court went first to the law of the place where it sat, New York, to ascertain how New York would treat the conflict of laws involved. Finding "a complete dearth" of judicial authority in New York as to the correct conflicts principle to be applied, Federal Judge Dimock, speaking for the majority, decided to make the decision "upon principle." Feeling that conceivable gradations of an author's incorporeal rights of exclusion and use are almost limitless, the Court thought it would be faced with dealing in wholly unknown property interests were it to attempt to ascertain the law of the various places of prior sale. As the Court said:

"Until we have a uniform international law of literary property it will be much more convenient to determine the effect of each act by the law of the place where the right of property is sought to be exercised."<sup>7</sup>

This would follow the English rule, said the Court, as well as harmonize with the settled rule that a copyright has no extra-territorial effect. (No copyright, however, was here involved). This reasoning conveniently brought the Court back to New York, for the applicable local law expounded in the *Metropolitan Opera* case, and avoided Judge Biggs's excursion of the *Ettore* case into foreign fields.

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7. 221 F.2d 657, at 662.

### C. *The Metropolitan Opera Case.*

Arriving in New York, the majority of the Court in the *Capitol Records* case, found available New York Supreme Court Judge Greenberg's decision in *Metropolitan Opera Ass'n v. Wagner Nichols-Recorder Corp.*<sup>8</sup> In the latter case, plaintiff Metropolitan Opera Association joined with plaintiff Columbia Records, its exclusive licensee for the manufacture and public sale of phonograph recordings of operas produced by Metropolitan, and with plaintiff American Broadcasting Company, its exclusive licensee for radio broadcasting of performances from the Metropolitan stage, in a state court action, not under copyright, but under unfair competition principles, to enjoin the defendants from unauthorizedly recording musical performances of the Saturday Metropolitan opera broadcasts by capturing such broadcasts from the air on master acoustic recordings, and from advertising, selling or distributing recordings made from such masters, and using the name Metropolitan Opera, so as to mislead the public into believing that the records so made and sold were with the consent of the plaintiffs. Plaintiff Columbia Records had previously authorizedly made and publicly sold recordings of two of the operas in question, which defendants had captured from the air. The Court recognized the existence of property rights in the plaintiffs, and protected the same against such interference and misappropriation by defendants, by sustaining the legal sufficiency of the complaints and granting the injunction requested. To the majority of the federal appellate judges in the *Capitol Records* case, such recognition and protection by the state court in the *Metropolitan Opera* case, of the still existing exclusive property right of the plaintiffs to record Metropolitan operas, meant that the "inescapable result of that case (Metropolitan Opera) is that where the originator, or the assignee of the originator, of records of performances by musical artists puts those records on public sale, his act does not constitute a dedication of the right to copy and sell the records."<sup>9</sup> Thus, the Court held in the *Capitol Records* case that, under applicable New York law, the exclusive common law property right acquired by the plaintiff to make and sell records from the Telefunken matrices it had properly obtained and owned, was still in existence, and protectible, and had not been divested by Telefunken's prior worldwide public sale of such recordings. The plaintiff in the *Capitol Records* case could therefore protect itself, on unfair competition principles, against a competitor who, without appropriate permission covering United States manufacture and distribution, sold records here made from identical matrices acquired from a European source which had no United States rights.

8. 199 Misc. 786, 101 N.Y.S.2d 483, aff'd 279 App. Div. 632, 107 N.Y.S.2d 795 (1st Dept. 1951).

9. 221 F.2d 657, at 664.

D. *The Waring and Whiteman Cases.*

As far back as 1937, the highest Court in Pennsylvania in the *Waring* case,<sup>10</sup> had likewise felt that the prior public sale of acoustic recordings was not dedicatory or divestive of Fred Waring's common law right of property in the sound track of the particular performing interpretation of the music captured on the record. On the other hand, in 1940, the U. S. Court of Appeals for the Second Circuit, speaking through Judge Learned Hand, reached a contrary result in the similar *Whiteman* case.<sup>11</sup> Judge Hand felt that just as a public sale of recordings would presumably dedicate the common law right in the uncopyrighted manuscript of the music so recorded and publicly distributed, such public sale of the same recordings should dedicate the common law right of the performer in his sound track. The *Whiteman* case doctrine was overruled by the same Court some fifteen years later in the above *Capitol Records* case, where the Court now felt that the applicable New York law to the contrary (*Metropolitan Opera*) was controlling and must be applied, this being a diversity case under *Erie R.R. v. Tompkins*. Judge Hand dissented in the *Capitol Records* case, feeling that in these types of situations a sort of Federal common law was applicable, which required the common law right to be divested upon public sale of the recordings. He was opposed to the presumably perpetual right in the recordings otherwise acquired, if State common law principles were applied, in the light of the intention evinced in Article I, sec. 8 of the Constitution for writings to be protectible for only a limited period.

E. *The Miracle Record Case and Mills Music Case.*

Other courts, impressed by Judge Hand's reasoning in the old *Whiteman* case, have uttered *dicta*, in cases involving the issue of the common law rights in the uncopyrighted musical manuscript embodied in the phonograph records publicly sold, as distinguished from the property right in the performer's recorded rendition, which are contrary to the view taken in the *Waring*, *Metropolitan Opera*, and *Capitol Records* cases. In the *Miracle Record* case,<sup>12</sup> and the *Mills Music* case,<sup>13</sup> Federal courts in Illinois and New York respectively, felt that public sale of musical recordings would in their opinion be dedicatory of the common law right in the unpublished manuscript of the musical

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10. *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 Atl. 631 (1937).

11. *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940), cert. denied, 311 U.S. 712 (1940).

12. *Shapiro, Bernstein & Co. v. Miracle Record Co.*, 91 F. Supp. 473, 475 (N.D. Ill. 1950), citing the *Whiteman* case, *supra*.

13. *Mills Music, Inc. v. Cromwell Music, Inc.*, 126 F. Supp. 54, 69 (S.D.N.Y. 1954) citing the dictum in the *Whiteman* case, *supra*.

composition, if statutory copyright had not previously been secured for such musical composition. Thus, we can see how easily the Courts, in attempting to apply local law in these common law situations, can arrive at contrary and conflicting interpretations.

When the *Waring* case decision was handed down by the highest Court of Pennsylvania, it was followed not long after by a like decision in another case brought by Fred Waring in the U. S. District Court for the Eastern District of North Carolina.<sup>14</sup> The legislatures of three States (North Carolina, South Carolina, and Florida)<sup>15</sup> thereafter enacted statutes to avoid the judicial results reached in these *Waring* cases. They provided legislatively for the automatic loss of the common law property right in the sound track of any particular performing rendition of a musical composition, after phonograph records thereof had been publicly sold in commerce within the State.

Imagine then, the "conflicts" problem of the broadcast of a recorded rendition of an uncopyrighted musical composition which has its simultaneous impact in every State. As to common law rights in the sound track of the performing rendition, we may have in certain States a continued protectible property, following the doctrines laid down in the *Waring*, *Metropolitan Opera*, *Capitol Records* and *Ettore* cases, while in other States, there might be statutes to the contrary, as in North Carolina, South Carolina and Florida. As to the uncopyrighted musical composition itself, we might have law in certain States following the *dicta* of the *Miracle Record* case and the *Mills Music* case, to the effect that the public sale of records is dedicatory of the common law rights in the otherwise unpublished and uncopyrighted musical composition. Perhaps other States might have judicial opinions or statutes to the contrary.

### III. *The Universal Copyright Convention Further Illustrates the Confusion of the Present Diverse Systems.*

Under the U.C.C., we are obligated in the U.S.A. to protect not only works of U.C.C. origin published with the requisite U.C.C. notice of copyright, but to protect as well the unpublished works of the nationals of the other member countries.<sup>16</sup> Although the U.C.C. treaty was expressly not

14. *Waring v. Dunlea*, 26 F. Supp. 338 (E.D.N.C. 1939).

15. N.C. Gen. Stat. Ann. §66-28 (1950); S.C. Code Ann. §66-101 (1952); Fla. Stat. Ann. §543.02-03 (West 1943).

16. Universal Copyright Convention, Article III-(4). This article must be read in conjunction with Article III-(1) providing for the recognition and protection of published works in the member countries, according to the Report of Rapporteur-General Sir John Blake (5 *Unesco Copyright Bull.* 42, 49-51 (1952), so that the mandate to protect unpublished works includes only those forms of work, while

self-executing under its Article X and required such implementation of domestic law as might be necessary in each member country, subdivision (2) of this Article called upon each country to have completed its implementation to give effect to Convention requirements, before its instrument of ratification, acceptance or accession was deposited. When Congress enacted the necessary amendment of our domestic law by Public Law 743, the Senate ratified the treaty, and the Executive deposited the U.C.C. ratification,<sup>17</sup> it was represented that our domestic law had been implemented to meet the requirements of this otherwise non-self-executing Convention. The Convention definition of what works were to be deemed "published" or "unpublished"<sup>18</sup> was to be controlling under the treaty for any claimant under the Convention seeking protection thereunder in another member country.<sup>19</sup>

In enacting the implementing legislation, Public Law 743, Congress amended only certain sections of our copyright statute, those dealing with published or registered works. It did not at all touch Section 2 of Title 17, U. S. Code, which still leaves to State law the protection of *unpublished* or *unregistered* works. The Congress, in enacting the legislation, the Senate in ratifying the treaty, and the Executive in depositing the ratification, undoubtedly were of the impression and intention that the U.C.C., as required by its terms, had been fully implemented by our national law prior to the deposit of our ratification.

Was United States law implemented by ratification of the U.C.C. treaty, so as to make the Convention provisions the law of the land, binding upon State courts and State legislatures,<sup>20</sup> particularly its definition of "publication,"

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still in an unpublished state, which are capable of substantive U.C.C. protection in the given country when published as provided in Article III-(1).

17. The U.C.C. Convention, Report of the Rapporteur-General, Executive M from the President to the Senate inviting ratification of the treaty, the Reports of the Senate and House Committees on the treaty and on the implementing legislation, Public Law 743, the Congressional debates and other data are reprinted in *Universal Copyright Convention Analyzed* (1955); also in Rothenberg, *Basic and Related Materials for Copyright* (1956).
18. U.C.C., Article VI.
19. A detailed analysis of the U.C.C. questions herein discussed, among others relating to the U.C.C., is contained in the articles by this panelist: "UCC Protection in the U.S.A.", 33 N.Y.U. Law Rev. 811-856 (June 1958); "The Coming Into Effect in 1955 of the Universal Copyright Convention: A National Report for the U.S.A.", submitted to the International Academy of Comparative Law for its Fifth International Congress (Brussels, 1958), and printed in 5 BULL. CR. SOC. 177 (1958).
20. When a treaty becomes effective as the law of the land, its provisions while in force, overrule and put into abeyance all conflicting provisions of *existing* or *subsequently* promulgated State or municipal law, whether statutory or judge-made. The same is true, however, only as to existing *Federal* law. See discussion in Perlman, *On Amending the Treaty Power*, 52 Colum. L. Rev. 825, 853-57 (1952).

as distinguished from any definition that the courts or legislatures of any of our fifty States might choose to give thereto? Under the Convention definition of "publication," the public sale of acoustic recordings of an unpublished musical composition would, for example, not be deemed a publication dedicatory of the rights in the manuscript, since by such definition, publication could only be made in the form of public sale or distribution of tangible copies which are visually perceptible. The Convention definition of "publication" would, of course, be directly contrary to the views expressed in the *Miracle Record* case and the *Mills Music* case. If State judicial interpretations or State statutes were to follow the views of the last two cases, how would the conflict be resolved as to the contrary Convention definition of "publication"?

If the U.C.C. still requires implementation by Congress or the respective States as to those classes of unpublished works for which the U.C.C. requires the respective countries to give protection, the rights of the foreign claimant would have to stand or fall, depending upon the law of the particular State which would be deemed to be controlling. Where an unauthorized broadcast had its impact simultaneously in many States, possible conflicting doctrines would become controlling in the different States.

It is the view, however, of this panelist, that the U.C.C. was actually fully implemented, although by implication, in what was done by Congress, the Senate and the Executive.<sup>21</sup> There are constitutional precedents in other fields of law for implementation of an otherwise non-self-executing treaty, by implication, where Congress has indicated its intent by other affirmative legislation to put the treaty fully into effect in accordance with its terms. Accordingly, in the opinion of this writer, where a foreign claimant under the U.C.C. seeks to invoke protection for his unpublished literary or musical work, either in a State court, or in a Federal court (because a treaty question may be involved, and there is the requisite minimum jurisdictional amount), both the State court and the Federal court must look to the U.C.C. treaty for its controlling definition of "publication" rather than to the possibly conflicting judicial or statutory law of the particular State of impact.

Even though implemented, as above urged, the U.C.C. treaty is not necessarily controlling, as the superseding law of the land, for every kind of unpublished work, where a foreign U.C.C. claimant may seek protection thereunder in the U.S.A. It is controlling nationally in respect of only those kinds of unpublished works which, if and when published with appropriate notice of copyright, are copyrightable and protectible under our Federal statutory copyright law, 17 U. S. Code. The Convention does not require the member

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21. For a detailed discussion of this panelist's views as to the full U.S.A. implementation of the U.C.C., by implication, see the articles by the writer, "UCC Protection in the U.S.A.", *op. cit.* footnote 19, at pp. 819-830; and "The Coming Into Effect in 1955 of the Universal Copyright Convention, etc.", *op. cit.*, footnote 19, at pp. 182-188.

countries to recognize and create new copyrightable forms of works, because other countries may do so. Works in a form capable only of acoustic rather than visual perception, such as phonograph recordings, tapes and discs, are apparently not capable of Federal statutory copyright under the present 17 U. S. Code, even as amended for the U.C.C. ratification, either as to their literary or musical content, or as to their recorded performing renditions. The Convention would, therefore, not be applicable nationally, to works in such acoustic forms, so as to make the Convention definition of "publication" take precedence over any conflicting State common or statutory law. Here, the Convention claimant of protection for any such work in acoustic form only, whether for its literary, musical or dramatic content, or for the sound track of the performing interpretation or rendition thereof, can expect, under the Convention, only non-discrimination vis-a-vis nationals, in the particular local treatment given under respective State statute or case law, whatever it may be, and cannot look to the Convention definition of "publication" as nationally overriding any such State law in these exclusively acoustic, non-copyrightable situations.<sup>22</sup>

The purpose of the foregoing discussion is not, of course, to elucidate the U.C.C. questions above raised, which this panelist has discussed in detail on other occasions, but to illustrate how complicated and difficult a situation has been created, by our diverse State and Federal legal systems, with respect to the Universal Copyright Convention.

Further, while this diversity of systems may have been set aside, as above indicated, by the U.C.C. for certain foreign claimants thereunder in the U.S.A., for their unpublished works in visually perceptible and otherwise copyrightable form, by the Convention definition of "publication" overriding possibly contrary local law, how about the millions of our own citizens to whom the Convention is not at all applicable for protection in the U.S.A., who must still continue to be confronted with our State and Federal systems under the present Act of 1909?

#### IV. Conclusion.

This is, of course, the appropriate time to consider a single Federal statutory system, as part of a general revision of our copyright law, particularly in the light of the thorough-going re-examination of all our basic copyright concepts in the Copyright Office panel studies of the past few years. The matter obviously cannot be treated in isolation, but must be considered with the various other problems of copyright, some of which will be touched upon in this Symposium by other panelists.

Our basic copyright concepts are interdependent. Shall this new Federal system provide for copyright protection automatically from creation, without

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22. *Op. cit.*, footnote 19, at pp. 830-842.

mandatory formalities, as common law now automatically protects the unpublished work? Shall we still preserve statutory formalities, such as notice of copyright, deposit and registration? Shall formalities, if preserved, be merely permissive, rather than mandatory, but nevertheless have strong statutory incentives to their utilization by way of affording simpler modes of proof, and stronger administrative and infringement remedies if utilized? Shall we have complete divisibility of rights, with its consequent effect on enforcement and taxation? Shall there be an exclusive Federal system of permissive recording of the short form grants of individual rights, licenses and other dispositions, so as to provide an effective centralized search and conveyancing record in the Copyright Office? These are some aspects of the general pattern to be considered.<sup>23</sup>

The matter of a single Federal system immediately raises the question of duration of copyright. When shall it begin and when shall it end? Unlike the theoretically perpetual common law right, a Federal copyright calls for a limited duration, under the Constitutional requirement of Article I, sec. 8. This in turn brings us to the question of individual, corporate, anonymous, and pseudonymous authors, as well as whether to preserve the present concept of renewal of copyright. Shall the term be life, or a fixed number of years after death of an individual author as in many major countries, so that all his works will fall into the public domain on the same day, with protection in the interim from their creation? In the case of corporate, anonymous or pseudonymous authors, shall the termination date be a fixed number of years from some point of beginning, such as creation, first public dissemination, or a registration? Shall the latter principle be applicable also to individual authors rather than a duration determined by the date of death? Shall the specified period of years, if that be used, be a combination of the present term and renewal period to make fifty-six years, or shall such period be fifty, seventy-five, a hundred, or some other number of years? These questions would have to be resolved before we could establish an exclusively Federal system of protection.

It has been suggested that we could simply expand our present statutory copyright system, so as to permit, on a voluntary basis, the pre-publication registration in the Copyright Office of any class of unpublished work. Under

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23. Some views of this panelist on various of the questions above mentioned, are indicated in the printed Report of Committee No. 15, Program for Revision of the Copyright Law, drafted by the writer, as Chairman, for the Section's 1957 Annual Meeting in New York City. 1957 Committee Reports of the Section of Patent, Trademark and Copyright Law, American Bar Association, 51 at 57-68. They are also contained in Commentaries on various of the Copyright Office Panel Studies on General Revision. See, in particular, the writer's Commentary on Copyright Office Study No. 7, Protection of Unpublished Works, by William Strauss.

this suggestion, the fifty-one separate State and Federal legal systems of protection in the United States would be preserved and nothing would be solved in respect of the confusions above described. Vast commercial exploitations by our modern electronic media could be continued perpetually outside the statute, under the common law, at the option of the owner, while identical exploitations under the Federal statute would necessarily have a limited term. This comparison of terms, perpetual at common law and limited under the statute for the identical commercial exploitations, was one of the matters which troubled Judge Learned Hand in his dissent in the *Capitol Records* case abovementioned.

It has also been suggested that we revise and broaden our ancient concept of "publication" so as to bring any work within the exclusive domain of the Federal statute, from the moment it is disseminated or exploited to the public. Although this would still preserve the State systems for the protection of strictly private works, such as letters, manuscripts, drawings, paintings, photographs, diaries, etc., it would concededly be a major advance, for all practical purposes, in bringing into the Federal domain virtually all works of any commercial consequence.

A third alternative is to bring everything into the Federal domain, which would be ideal from the point of view of logical consistency. Some objections, of a practical nature, may be voiced as to private letters, photographs, diaries, etc. falling into the public domain, under statutory copyright, so as to cast unfavorable reflections upon persons and family interests after the author's death; or that Federal courts may be cluttered with small fry cases. If the term were sufficiently long, so that protection were to expire a substantial number of years after the author's death, there may well be a genuine public interest by and after that time in what an author had written in an earlier era which had been withheld from public dissemination. If public disclosure might be against the interests of his family, there generally would be a good opportunity to destroy any such materials during the interim after his death. If it were not desired to utilize the Federal courts for suits that might involve thefts of private letters, manuscripts, etc., concurrent jurisdiction could be considered for State courts where the work was not publicly presented or registered, but the Federal copyright statute could at least be controlling as to the scope of exclusive rights, the term of protection, remedies, etc.

This writer would be willing to go all the way with an exclusively Federal system for all works, provided the matter of term and the various other concepts of copyright were suitably adjusted for such a revision. If that were not feasible, however, bringing into the exclusively Federal orbit all such works from the time they have voluntarily been exploited to the public, and leaving only strictly private works to State law, would be acceptable as a major advance.

*Constitutional Questions*

There would appear to be no difficulty about Congress taking over from the States the domain of protecting unpublished, unregistered works, under the Constitutional power given it by Art. I, sec. 8, which covers "writings" without any qualification concerning "publication." Under the Copyright Act of 1831, as well as the Revised Statutes of 1870, Congress provided for protection of unpublished manuscripts against unauthorized publication and printing, without calling for the formality required for other copyrightable works, such as, for example, recording the title of the work. In our present Act of 1909, Congress chose to exercise its congressional power over "writings," albeit negatively, by electing to depart from such policy, and to provide in Sec. 2 of Title 17 U. S. Code for leaving the protection of unpublished, unregistered works to common law and equity in the States.

To the extent that Congress may choose to bring what are presently common law rights in unpublished works into the exclusive orbit of the Federal domain, would it be a deprivation of vested property rights to bring into the limited copyright statute any such unpublished works as were in existence on the day the statute takes effect? Or must such a copyright statute be limited only to works created in the future? If the substituted statutory term were sufficiently long, and the scope of statutory rights sufficiently similar, the question of an arbitrary or unreasonable deprivation would appear to be avoided. There is a line of authority, under the constitutional commerce clause, to the effect that if property rights are within the purview of the exercise of a constitutional power of Congress, the beneficiaries thereof have no vested right in preventing abolition or changes by Congress, even if effective to alter existing rights. Any such constitutional power to divest or curtail vested rights, however, must not be exercised arbitrarily or unreasonably. Congress in the exercise of its constitutional power over interstate commerce can therefore, as a matter of sovereign governmental policy, enact laws which necessarily affect the existing purely private contracts or even state legislation, and can then amend its legislation so as to abolish or modify its previous enactment, expressly providing that it applies to all existing claims or rights, so as again to affect existing rights, and perhaps later restore the original legislation. Might it not then be said that Congress, in exercising sovereign governmental policy over copyright under its constitutional power, can also give and take away, in whole or in part, regardless of then existing rights.<sup>24</sup>

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24. These constitutional questions are discussed by this panelist in his commentary to General Revision Copyright Office Study No. 7, "Protection of Unpublished Works", by William Strauss. As to the question under the commerce clause, see *Seese v. Bethlehem Steel Co.*, 74 F. Supp. 412, at 419 (D. Md. 1947), and affirming opinion on appeal, 168 F.2d 58, at 62, 64 (4th Cir. 1948) cited in the above commentary.

#### 4. LIABILITY OF THE UNITED STATES GOVERNMENT FOR COPYRIGHT INFRINGEMENT

By GEORGE D. CARY\*

On September 8, 1960, the President approved enrolled bill H. R. 4059 (P. L. 86-726), which permits copyright owners to proceed against the U. S. Government in the case of copyright infringement by the Government or its contractors. Thus ended a five year struggle to place copyright owners on an equal footing with patent owners in the field of government infringement.

In form, the new law amends Title 28 U. S. Code §1498, which provides a remedy against the Government in patent infringement cases by adding a new subsection relating to copyrights, and a new provision making clear that the entire section does not apply to any claim arising in a foreign country.

In substance, an aggrieved copyright owner may now attempt to settle his claim of copyright infringement directly with the governmental agency involved. The new law specifically authorizes government agencies to "enter into an agreement with the copyright owner in full settlement and compromise for the damages accruing to him by reason of such infringement," and enables the agencies "to settle the claim administratively out of available appropriations." It is interesting to note that the new law does not itself place any monetary limit on such administrative settlements.

In the event the copyright owner is unable satisfactorily to settle the claim in such manner, he may then file a suit in the Court of Claims. If he chooses, he may in the first place bring suit directly in the Court of Claims without attempting any administrative settlement. Although a three year statute of limitations governs the filing of such actions in the Court of Claims, the law provides that, in a case where an administrative settlement is attempted, the period of limitation does not run during the period between the filing of a claim with the appropriate agency and the mailing by the Government of a denial of the claim.

The remedy of the copyright owner is exclusively against the Government. No action may be brought under this legislation against the government employee who actually performed the act of infringement while acting within the scope of his employment, nor may it be instituted against the government contractor where the latter is acting for the Government. If the contractor goes off on a "frolic of his own" and infringes without the knowledge or consent of the Government, there seems to be no reason why action in such a case could not be brought directly against the offending contractor.

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\* General Counsel, United States Copyright Office.

Parallelling the patent provision, the new law also permits a copyright owner who is a government employee to bring suit except where he was in a position to "order, influence, or induce use of the copyrighted work" by the Government.

One provision in the law might appear at first glance to relate to the recent litigation brought against Admiral Rickover.<sup>1</sup> The provision in question bars any right of action by the copyright owner or any assignee, where the copyrighted work in question was prepared by a government employee as a part of his official functions, or where "Government time, material, or facilities were used" in its preparation. As will be indicated below, this provision was conceived in 1956, prior to the *Rickover* case and so cannot be said to have been inserted as a result of that situation.

The history of the present legislation began on June 8, 1955 when Congressman S. J. Crumpacker rose on the floor of the House to direct attention to the position of copyright owners whose property rights had been infringed by the U. S. Government. Pointing out that the sovereign immunity of the Government had been earlier waived in the fields of admiralty, contracts, torts and patents, he stated that he had on that day introduced H. R. 6716, to alleviate this inequity. He asked that the bill be reviewed by the "various Government agencies, the bar associations and the several industry and professional groups concerned with copyright" so that the Congress could have "the benefits of their suggestions and advice before proceeding with further legislative consideration."

This original version, unlike the new law, provided for suits in the district courts as well as in the Court of Claims, and also provided for an administrative remedy under the Federal Tort Claims Act for claims up to the sum of \$1,000. Further, there was a provision for a 6 year statute of limitation. The bill was considered by some as susceptible of the interpretation that the Government was liable for all acts of its contractors and not merely those performed with the authorization or consent of the Government. In addition, it was not clear whether the copyright owner's remedy was exclusively against the Government, or whether it permitted him to bring action against the government employee, at his option.

In compliance with Congressman Crumpacker's suggestion for a review of his bill, the Committee on Copyright Law Revision of the Patent, Trade-mark and Copyright Section of the American Bar Association, at its annual meeting in Philadelphia in August 1955, passed a resolution favoring the purposes of the bill. The Board of Governors of the American Bar Association in April 1956 approved the bill insofar as it embodied the principle

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1. *Public Affairs Associates, Inc. v. Rickover*, 177 F. Supp. 601 (D.D.C. 1959), on appeal reversed and remanded, see Item 22, *infra*.

that copyright proprietors should have a remedy or remedies against the Government for infringement on a basis comparable to those available in actions against private citizens.

Hearings were held by Subcommittee No. 3 of the House Judiciary Committee on May 24, 1956. All of the witnesses present favored the principle of the bill, and counsel for the Subcommittee stated that no opposition had been received from any government department. The testimony primarily took the form of suggestions for modifying some of the procedural aspects of the bill, the principal ones being as follows:

(1) Mr. Herman Finkelstein, representing the Association of the Bar of the City of New York, suggested that the provision for a 6 year statute of limitations was undesirable, and recommended a period of either 3 or 4 years.

(2) Mr. Eugene Skora, Asst. General Counsel of the U. S. Information Agency, stated that the provision regarding infringements by contractors might be too sweeping, and recommended that the Government's liability should be limited to infringements directly by the Government. He further urged that the bill be limited to liability for infringements occurring in the U. S.

(3) Mr. Felix Cristofane, Comptroller and Legal Adviser, U. S. Government Printing Office, emphasized that the sole remedy should be against the Government in order to relieve a government employee who infringed upon orders of his superiors of any liability.

(4) Commander George P. Kurtz, of the Navy Department, representing the Department of Defense, recommended that the bill should closely parallel the existing provision regarding patent infringements and therefore suggested that the provisions permitting actions in the district courts and reference to procedures under the Federal Tort Claims Act be eliminated, and that governmental liability for acts of its contractors should attach only to infringing acts done with the authorization or consent of the Government. In addition, he also suggested the inclusion of provisions concerning the rights and limitations of government employees in bringing suit. As previously indicated, this, rather than the Rickover decision, was the origin of such provision.

(5) The Register of Copyrights, Arthur Fisher, agreed that the comments of the Defense Department warranted study and believed that if there was any doubt that the bill covered infringements outside the United States, it ought to be clarified.

Although the Department of State did not have a representative at the hearings to testify, it had earlier transmitted a report to the Committee favoring the principle of affording a remedy for Government infringement of copyrights, but urging the amendment of the bill to make clear that no recovery would be permitted for acts of infringement in foreign countries.

Many of these suggestions, notably excluding the recommendation of the Department of State, were approved by the House Judiciary Committee in its Report No. 2494 (84th Cong. 2d Sess.), issued on June 27, 1956. The amended bill as reported out was passed by the House on July 2, 1956. However, due to the proximity of adjournment and the pendency of the national political conventions in a presidential election year, the bill died as a result of inaction by the Senate.

Congressman Crumpacker, who was a vigorous supporter of the bill, chose not to run for re-election, but his successor, Mr. Nimtz, introduced the bill as it had previously passed the House. The bill, H. R. 8419, as introduced on June 27, 1957, was reported out of the House Judiciary Committee with some technical amendments on May 1, 1958, and passed the House on May 19, 1958. Once more a session of Congress ended before any action was taken by the Senate.

In the 86th Congress, the Secretary of Commerce on January 30, 1959, transmitted to the Speaker of the House a request for the introduction of legislation that would free government employees from the risk of being sued for copyright infringement where they were merely doing what their superiors had directed them to do, and enclosed a draft bill similar to the ones mentioned above. Consequently, Congressman Celler, Chairman of the House Judiciary Committee, introduced H. R. 4059 on February 4, 1959.

Prior to this time, on June 5, 1958 the Department of State had once more called the attention of Congress to the matter of restricting such legislation to acts of infringement occurring in the United States. The Secretary of Commerce joined with the Department of State in requesting that H. R. 4059 be so amended. The House Judiciary Committee, in favorably reporting the bill on July 1, 1959, included such an amendment. The bill was passed by the House a few weeks later, on July 20, 1959.

In the Senate, hearings were held on the bill on June 2, 1960, at which the American Book Publishers Council, the Department of Commerce and the Copyright Office appeared in favor of the bill. The lone objector was Arthur S. Curtis, an attorney who owns and operates a feature syndicate in Washington, D. C. At these hearings a question arose whether the bill might be considered to waive the constitutional immunity of Members of Congress, and as a result the Senate Judiciary Committee, on August 22, 1960, favorably reported the bill with an amendment designed to make clear that the Congressional immunity was not affected. The bill passed the Senate on August 25, 1960 and because of the amendment was referred back to the House, which concurred therein on August 26, 1960, thus clearing the bill for the President. As stated at the beginning of this note, the bill became law on September 8, 1960 when signed by the President.

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**ALIFORNIA  
ORRESPONDENCE**

By MELVILLE B. NIMMER

EDITOR'S NOTE: We are very pleased to announce that Mr. Nimmer, of the California Bar, a member of our Editorial Board, has agreed to serve as West Coast Editor of the BULLETIN and regularly to furnish news and information concerning copyright and entertainment law.

W.J.D.

This column will be devoted to the enlightenment of our Eastern brethren as to copyright activities in what they regard as the second most important copyright center—and in what we in our cheerfully provincial ignorance know to be the hub of the copyright world.

The most significant copyright decision to emanate from our courts during the past few months was undoubtedly the case of *ABC Music Corp. v. Janov*,<sup>1</sup> in which Federal District Judge Mathes ruled for the plaintiff (and their attorney, Abe Marcus) in holding the defendants liable for treble damages in addition to the statutory compulsory license royalty of two cents per record. This, notwithstanding the defendants' argument that the treble damages provision of Sec. 1(e) should be limited to instances of willful infringers, which the defendants apparently were not. Of even more interest than the decision itself was the court's assumption (joined in by both parties) that the royalty provision of Sec. 1(e) providing for a royalty of "2 cents on each such part manufactured" requires such a payment for each musical composition contained on a record, and not merely for each record. This, then, is the first express judicial recognition that with respect to LP records containing a number of musical compositions, a royalty of two cents must be paid for every one of what may be a substantial number of compositions contained on a single record. Probably most copyright attorneys have for some time assumed this to be a proper result, but the ABC case for the first time lends this assumption at least a qualified judicial sanction.

The most interesting—if not most significant—copyright (or quasi-copyright) decision from out here during the past several months was that of *Moe Howard, et al. v. Columbia Pictures, et al.*<sup>2</sup> This case is known as "The Three Stooges" case, because it was Larry, Moe and Curly Joe who

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1. 126 USPQ 429 (S.D. Calif. 1960), digested *infra*, Part IV, Item 27.

2. Not reported.

objected to Columbia Pictures' impending release of a production consisting of several old "Three Stooges" shorts joined together and released in what purported to be a feature-length motion picture. The plaintiffs succeeded in obtaining ex parte a temporary restraining order, having posted a \$2,000 bond. However, before this ruling became effective, the Court dissolved the temporary restraining order and gave Columbia a green light. Thus, The Three Stooges as knights-errant in the championship of both moral and neighboring rights have met with at least temporary defeat.

During the summer television lull a new series took to the air which may portend a new era in the electronic medium and a new challenge to the elasticity of our ancient Copyright Act. The series is known as "Wrangler," and is the first regularly scheduled TV series produced on tape. It is common knowledge that the production advantages inherent in tape may mean that it will before long largely supplant motion picture film for television purposes. The key copyright question is, of course, whether electronic tape as such is copyrightable. Notwithstanding highly respected opinion to the contrary, we (this is a columnist's "we"—which I have long had a secret urge to use) are hard put to see why the doctrine of *White-Smith v. Apollo*,<sup>3</sup> holding piano rolls (and by extension phonograph records) not to be "copies"—and by subsequent judicial decision noncopyrightable—is not equally applicable to tape. That is, the premise that a phonograph record is not copyrightable because it requires "parts of instruments" to mechanically reproduce the work, is equally true of tape. It is true that motion picture film also employs mechanical means to exhibit the work, but the individual frames of motion picture film, unlike tape, may be visually perceived without mechanical assistance. It does, then, appear to be possible that future judicial decisions will hold that the distribution, and hence publication, of taped television programs puts such programs in the public domain in accordance with the line of phonograph record cases started by Judge Igoe in the *Miracle Record* case.<sup>4</sup> A cautious approach to this potentially troublesome area would suggest that producers deposit with the Copyright Office as unpublished works scripts intended for taped productions.

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4. *Shapiro, Bernstein & Co. v. Miracle Record Co.*, 91 F. Supp. 473 (D.C. Ill. 1950).

3. 209 U.S. 1 (1908).

## PART II.

**LEGISLATIVE AND ADMINISTRATIVE  
DEVELOPMENTS**

## 1. UNITED STATES OF AMERICA AND TERRITORIES

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

Public Law 86-726, 86th Cong., H.R. 4059, Sept. 8, 1960. An Act to amend title 28 of the United States Code relating to actions for infringements of copyrights by the United States. Washington, Govt. Print. Off. 1960. 2 pp. (74 Stat. 855.)

On July 20, 1959, the House of Representatives passed H.R. 4059, which, with amendments, was passed by the Senate on August 25, 1960. The Bill was signed by the President and became law on September 8, 1960. For the history of this legislation, see Cary, *supra*, item 4. The full text of the new law is as follows: *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 1498 of title 28 of the United States Code is hereby amended by inserting the letter "(a)" at the beginning of the section and adding at the end thereof new subsections "(b)" and "(c)" reading as follows:

"(b) Hereafter, whenever the copyright in any work protected under the copyright laws of the United States shall be infringed by the United States, by a corporation owned or controlled by the United States, or by a contractor, subcontractor, or any person, firm, or corporation acting for the Government and with the authorization or consent of the Government, the exclusive remedy of the owner of such copyright shall be by action against the United States in the Court of Claims for the recovery of his reasonable and entire compensation as damages for such infringement, including the minimum statutory damages as set forth in section 101(b) of title 17, United States Code: *Provided*, That a Government employee shall have a right of action against the Government under this subsection except where he was in a position to order, influence, or induce use of the copyrighted work by the Government: *Provided, however*, That this subsection shall not confer a right of action on any copyright owner or any assignee of such owner with respect to any copyrighted work prepared by a person while in the employment or service of the United States, where the copyrighted work was prepared as a part of the official functions of the employee, or in the preparation of which Government time,

material, or facilities were used: *And provided further*, That before such action against the United States has been instituted the appropriate corporation owned or controlled by the United States or the head of the appropriate department or agency of the Government, as the case may be, is authorized to enter into an agreement with the copyright owner in full settlement and compromise for the damages accruing to him by reason of such infringement and to settle the claim administratively out of available appropriations.

"Except as otherwise provided by law, no recovery shall be had for any infringement of a copyright covered by this subsection committed more than three years prior to the filing of the complaint or counterclaim for infringement in the action, except that the period between the date of receipt of a written claim for compensation by the Department or agency of the Government or corporation owned or controlled by the United States, as the case may be, having authority to settle such claim and the date of mailing by the Government of a notice to the claimant that his claim has been denied shall not be counted as a part of the three years, unless suit is brought before the last-mentioned date.

"(c) The provisions of this section shall not apply to any claim arising in a foreign country."

SEC. 2. Nothing in this Act shall be construed to in any way waive any immunity provided for Members of Congress under article I of section 6 of the Constitution of the United States.

SEC. 3. Title 10, United States Code, section 2386(4), is amended by adding after "patents" the words "or copyrights."

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

Public Law 86-748, 86th Cong., H.J. Res. 704, Sept. 13, 1960. Joint resolution to remove copyright restrictions upon the musical composition "Pledge of Allegiance to the Flag," and for other purposes. Washington, Govt. Print. Off. 1960. 1 p.

Passed House Aug. 30, 1960. Passed Senate Sept. 1 (legislative day, Aug. 31), 1960. Approved by the President Sept. 13, 1960.

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

Infringement of copyrights by the United States. Report [to accompany H.R. 4059] Submitted by Mr. Hart, August 22, 1960. [Washington, U. S. Govt. Print. Off., 1960] 17 pp. (86th Cong., 2d sess., S.Rept. No. 1877.)

A report favoring passage by the Senate, with amendments, of H.R. 4059, a bill designed to provide for government liability for copyright infringement by the United States or its agencies. See Items 4, 6, *supra*.

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

Design protection. Hearing before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Eighty-sixth Congress, second session, pursuant to S.Res. 240 on S. 2075 and S. 2852, to encourage the creation of original ornamental designs of useful articles by protecting the authors of such designs. June 29, 1960. Printed for use of the Committee on the Judiciary. Washington, U. S. Govt. Print. Off., 1960. 99 pp.

For a brief news item on this hearing, see 7 BULL. CR. SOC. 313, Item 486 (1960).

10. 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, second session, pursuant to S.Res. 240. Studies 7-10, 11-13. Printed for the use of the Committee on the Judiciary. Washington, U. S. Govt. Print. Off., 1960. 2 v. (86th Cong., 2d sess., Committee print.)

Contents. [III]: 7. Notice of copyright, by V. A. Doyle, and others. 8. Commercial use of the copyright notice, by W. M. Blaisdell. 9. Use of the copyright notice by libraries, by J. W. Rogers. 10. False use of copyright notice, by Caruthers Berger. [IV]: 11. Divisibility of copyrights, by A. L. Kaminstein, with supplements by L. G. Margolis and Arpad Bogsch. 12. Joint ownership of copyrights, by G. D. Cary. 13. Works made for hire and on commission, by Borge Varmer.

The third and fourth in 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.

11. U. S. COPYRIGHT OFFICE.

Circulaire UCC2 [relative à la] protection aux États-Unis du Copyright selon la Convention Universelle sur le Droit d'Auteur. *Interauteurs*, No. 139 (2. trimestre 1960), pp. 189-190.

A French translation of Copyright Office Circular UCC2 (Copyright protection in the United States under the Universal Copyright Convention). This translation has been reprinted and issued by the U. S. Copyright Office as Circular UCC2F. See 7 BULL. CR. SOC. 171, Item 232 (1960).

## 2. FOREIGN NATIONS

### 12. BELGIUM. PARLEMENT. *Chambre des représentants.*

Proposition de loi réglementant le contrôle de la perception des droits d'auteur. (50 *Revue de Droit Intellectuel, L'Ingénieur-Conseil* 166-169, nos. 5-6, May-June, 1960.)

"371, Chambre des représentants, session 1959-1960, 9 décembre 1959."

The text of a bill, introduced on December 9, 1959, in the Belgian House of Representatives, providing for government regulation of author and performing rights societies with respect to the collection of royalties.

### 13. INDIA (REPUBLIC). *Office of the Controller of Patents and Designs.*

Patent Office hand book. Delhi, Manager of Publications, 1959 [*i.e.* 1960] 321 pp.

In two parts, of which the first includes the texts, as amended, of Indian laws, rules and regulations pertaining to patents and designs, and the second, instructions for the guidance of inventors and others for the grant of patents and the registration of designs in India.

### 14. YUGOSLAVIA. *Laws, statutes, etc.*

Das jugoslawische Urheberrechtsgesetz—Zakon o autorskom pravu—Original text und deutsche Übersetzung mit einer Einführung von Borislav T. Blagojević und Vojislav Spaić. Berlin, F. Vahlen, 1960. 97 pp. (Internationale Gesellschaft für Urheberrecht. Schriftenreihe, Bd. 18.)

The original Serbo-Croatian text and German translation, on opposite pages, of the Yugoslav Copyright Law of 1957, with an introduction by Professors Blagojević and Spaić.

## PART III.

## CONVENTIONS, TREATIES AND PROCLAMATIONS

## 15. RECORDS OF THE COMMITTEE OF EXPERTS ON THE INTERNATIONAL PROTECTION OF PERFORMERS, PRODUCERS OF PHONOGRAMS AND BROADCASTERS

*(The Hague, May 9-20, 1960)*

I. The Draft International Convention concerning the Protection of Performers, Makers of Phonograms and Broadcasters (*As approved unanimously by the Committee of Experts*):

The Contracting States, moved by the desire to protect the rights of performers, makers of phonograms and broadcasters,  
Have agreed as follows:

*Article 1*

This Convention shall be effective in respect to those Contracting States which are parties to the Universal Copyright Convention or members of the International Union for the Protection of Literary and Artistic Works.

*Article 2*

The protection granted under this Convention shall leave intact and shall in no way affect the protection of the rights of authors of literary and artistic works or of other copyright proprietors. Consequently, no provision of this Convention may be interpreted as prejudicing such rights.

*Article 3*

Each Contracting State shall grant to performers, makers of phonograms and broadcasters, in respect of their performances, phonograms and broadcasts, when the country of origin of such performances, phonograms or broadcasts is another Contracting State, the same protection which it grants to its own nationals in respect of performances taking place on its territory, phonograms recorded or published on its territory and broadcasts transmitted on its territory.

*Article 4*

For the purpose of enjoyment of protection under this Convention, the country of origin shall be considered to be:

- (a) in the case of performances, the country where the performance took place; however, when the performance has not taken place in a Contracting State, and when a phonogram or a broadcast has been made thereof, its country of origin shall be considered to be the country defined in subparagraph (b) or (c) below;
- (b) in the case of phonograms:
  - (i) if published, the country of first publication; in the case of phonograms published simultaneously in a non-Contracting State and in a Contracting State, the latter shall be considered exclusively as the country of origin; a phonogram shall be considered as having been published simultaneously in several countries which has been published in two or more countries within thirty days of its first publication;
  - (ii) if unpublished, the country in which the first fixation of sounds was made, provided it was made by a national of a Contracting State;

- (c) in the case of broadcasts, the country where the broadcaster has its headquarters or the country where the broadcast is transmitted; however, any Contracting State may, in a declaration made and deposited with the depository of this Convention, require, for protection under this Convention, that the headquarters of the broadcaster shall be located on the territory of a Contracting State and that such broadcasts shall be transmitted from such territory.

#### *Article 5*

1. The protection provided for performers by this Convention shall include the possibility of preventing:

- (a) the fixation, the broadcasting and the communication to the public of their live performances, without their consent;
- (b) the fixation without their consent of their live broadcast performances;
- (c) the reproduction without their consent of a fixation of their performances:
  - (i) if the fixation itself is unlawful;
  - (ii) if the reproduction is made for purposes different from those for which the performers had given their consent;
  - (iii) if the fixation was made in accordance with the provisions of Article 14 and the reproduction is made for purposes different from those provided for by the said provisions.

2. If broadcasting was consented to by the performer, it shall be a matter for national laws and regulations to regulate the protection against rebroadcasting, fixation for broadcasting and the reproduction of such fixation for broadcasting purposes.

3. The terms and conditions governing the use by broadcasters of fixations made for broadcasting shall be determined in accordance with national laws and regulations.

#### *Article 6*

Any Contracting State may, by its national laws and regulations, specify the conditions under which performers exercise their rights, if several of them participate in the same performance.

#### *Article 7*

For the purpose of this Convention, "performance" means the recitation, presentation or performance of a literary or artistic work. It shall be a matter for national laws and regulations to extend the protection to artistes who do not perform literary or artistic works.

#### *Article 8*

Makers of phonograms shall enjoy the right to authorise or prohibit the reproduction of their phonograms either directly or when broadcast.

#### *Article 9*

If a Contracting State, under its national laws and regulations, requires as a condition of protection of phonograms compliance with formalities, these requirements shall be considered to be satisfied, as regards the makers of phonograms and the performers, if all the copies in commerce of the published phonogram bear the symbol (P) accompanied by the name of the Contracting State in which the first publication took place and the year date of this first publication placed in such a manner and location as to give reasonable notice of claim of protection.

#### *Article 10*

For the purpose of this Convention:

- (a) "phonogram" means any exclusively aural fixation of a performance or other sounds;

- (b) "maker of phonograms" means the person or corporate body who first fixes a performance or other sounds in material form;
- (c) "publication" means the multiplication of copies of the phonogram and the offering of such copies to the public in reasonable quantity.

#### *Article 11*

If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly by a broadcaster or for any method of communication to the public, a single equitable remuneration shall be paid by the user to the performers, to the makers of phonograms or to both. National laws and regulations may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.

#### *Article 12*

Broadcasters shall enjoy the right to authorise or prohibit:

- (a) the rebroadcasting of their broadcasts;
- (b) the fixation of their broadcasts;
- (c) the reproduction of unlawful fixations or of fixations made in accordance with the provisions of Article 14, if the reproduction is made for purposes different from those provided for by the above-mentioned provisions;
- (d) the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee. It shall be left to national legislation to determine the conditions under which this right may be exercised.

#### *Article 13*

1. The period of the protection granted, under the terms of this Convention, to performers, makers of phonograms and broadcasters, shall be determined by the law of the country where the protection is claimed. However, no Contracting State shall be obliged to grant protection for a longer period than that fixed by the law of the country of origin.

2. Nevertheless, the period of protection under this Convention shall in no case expire before the twentieth year following:

- (a) for performances, the end of the year in which the performance took place;
- (b) for unpublished phonograms, the end of the year of the fixation; for published phonograms, the end of the year of first publication, if the latter took place within the period of protection provided for unpublished phonograms;
- (c) for broadcasts, the end of the year in which the broadcast took place.

#### *Article 14*

Any Contracting State may provide exceptions, under its laws and regulations, to the protection of performers, makers of phonograms and broadcasters, with respect to:

- (a) private use;
- (b) use of short excerpts in connection with reporting of current events;
- (c) ephemeral fixation by a broadcaster by means of his own facilities and for his own broadcasts;
- (d) use solely for teaching purposes.

#### *Article 15*

1. Ratification or accession by a Contracting State shall imply full acceptance of all the obligations and admission to all the advantages provided by this Convention. However, a Contracting State may specify, in its instrument of ratification or accession:

- (a) that it does not intend to grant the right provided for in Article 11 or that it intends to restrict it in relation to any of the uses mentioned in that Article;
- (b) that it does not intend to be bound by one or more of the provisions of Article 12.

2. If a Contracting State makes such a declaration, the other Contracting States shall not be obliged to apply the reserved provision or provisions in their relations with such a State.

#### *Article 16*

No provision of this Convention may be interpreted as applying to the reproduction or any use of motion pictures or other visual and audio-visual fixations, except the provisions contained in Articles 12 and 5, other than paragraph 1(c) (ii) of the latter.

#### *Article 17*

This Convention is without prejudice to rights acquired in any Contracting State prior to the date of the coming into force of this Convention in such State.

## II. Report of Mr. W. Wallace, Rapporteur General

*(As approved unanimously by the Committee of Experts):*

1. The Committee of Experts on the Protection of Performers, Producers of Phonograms and Broadcasters, met in the Peace Palace at The Hague, from 9th to 20th May, 1960, on the invitation of the Government of the Netherlands.

### *I. Terms of Reference*

2. The Committee had been convened jointly by the Directors-General of the International Labour Office (ILO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works (the Berne Bureau). The task entrusted to the Committee was the preparation, on the basis of the documents submitted jointly by the three intergovernmental Organisations, of the draft of a single international instrument concerning the protection of the rights of performers, producers of phonograms and broadcasters, and of a report reflecting the opinions expressed at the meeting. The draft instrument and the report are to be submitted to a Diplomatic Conference to be convened jointly by the three intergovernmental Organisations. The Committee was requested to make every effort to reach unanimous conclusions even though it was envisaged that the draft instrument might contain different chapters and, possibly, alternative solutions to the questions under study.

### *II. Membership*

3. Thirty-one experts participated in the Committee (see list of participants, Annex A). They had been selected and invited jointly by the heads of the above-mentioned Organisations from lists submitted to them by the Governments of the following 16 States:

Argentina	Mexico
Belgium	Netherlands
Czechoslovakia	Poland
France	Sweden
Germany (Fed. Rep.)	Switzerland
India	United Kingdom
Italy	United States of America
Japan	Yugoslavia

The experts acted in their personal capacity.

4. The three sponsoring Organisations had, moreover, agreed upon a list of interested intergovernmental and nongovernmental organisations (see Annex A) which were

invited to send representatives. The representatives in question participated fully in the discussion and had the right to have their views recorded. They did not, however, have the right to vote. This enabled the views of authors, film producers and others to be expressed as well as those of the three groups most directly concerned, namely, the performers, producers of phonograms and broadcasting organisations.

### III. Documents

5. The Committee had before it:

- (a) a Draft prepared by a Committee of Experts in Geneva, in 1956, under the auspices of the International Labour Organisation (the ILO Draft);
- (b) a Draft prepared by a Committee of Experts in Monaco, in 1957, under the auspices of UNESCO and the Berne Union (the Monaco Draft);
- (c) the observations of certain Governments on these two drafts published by the Berne Union.

Its work was aided by a clear analytical document submitted jointly by the secretariats of the three sponsoring Organisations.

### IV. Opening Session and Election of Officers

6. After introductory addresses by Dr. Abbas Ammar, Assistant Director-General of the International Labour Office, Professor Jean Thomas, Assistant Director-General of UNESCO, and Mr. Charles-L. Magnin, Deputy Director of the Bureau of the Berne Union, the Committee elected by acclamation Professor G. H. C. Bodenhausen (Netherlands) as its Chairman, and thereafter, on a proposition from the Chair, the following other Officers:

Vice-Chairmen: Mr. Celakovsky (Czechoslovakia), Mr. Merani (India), Mr. Monaco (Italy), Mr. Junco (Mexico), Mr. Wiens (United States of America).

Rapporteur: Mr. Wallace (United Kingdom).

*Drafting Committee.* Chairman: Mr. Puget (France), later, Mr. Boutet (France); Members: Mr. Tiscornia (Argentina), Mr. Namurois (Belgium), Mr. de Sanctis (Italy), Mr. Abe (Japan), Mr. Valderrama Herrera (Mexico), Mr. Siekierko (Poland), Mr. Hesser (Sweden), Mr. Fisher (United States of America).

Assistants to the Chairman of the Committee of Experts:

Mr. Bolla (UNESCO), Mr. Grunberg (ILO).

7. The Working languages were English, French and Spanish and the Committee proceeded under rules formulated by the three convening Organisations.

8. The Chairman informed the Committee that it was his understanding that it was not to deal with the drafting of the so-called final clauses of the diplomatic instrument, the study of which was to be left to the secretariats of the three sponsoring Organisations, which would report thereon to the Diplomatic Conference.

9. It was agreed that the convention could include certain flexible clauses which would not necessarily be binding upon the ratifying Governments.

10. It was also agreed that decisions taken during the first discussions of the questions should be tentative and that any expert was able to change the position he had taken when the draft text came up for discussion.

## A. GENERAL QUESTIONS

### V. Scope of the Instrument

11. The first question discussed was whether the instrument should cover the three categories — performers, record producers and broadcasting organisations. Messrs. Siekierko (Poland) and Spaic (Yugoslavia) thought that it was a mistake to treat the rights of performers in the same instrument as that of record producers and broadcasting organi-

sations. In the latter's view, the first was akin to copyright and the others were *sui generis* property rights. Mr. Celakovsky (Czechoslovakia) read a telegram from the International Radio and Television Organisation, expressing the hope that this instrument would not complicate the development of the interchange of television programmes. After discussion, it was confirmed that the object of the meeting to which the experts had come from the four corners of the world was, if possible, to draft an instrument covering all three categories, and that it should therefore seek to do so. It was also agreed that there was no question of dealing with the rights of film makers, who were already covered in international copyright conventions, but that it might be necessary to consider the effect on films of the rights to be granted to the three groups directly concerned.

#### VI. *International and National Situations*

12. The question was whether the convention ought to oblige contracting States to grant the rights stipulated to its own nationals as well as to those of other contracting States. On this there was a fairly even division of opinion. Some experts took the view that international treaties should not regulate the relations between a Government and its own subjects. Other experts and participants felt that if national situations were not covered the performer might get very little protection. The acceptance of the solution that only international situations should be covered was eventually agreed to by the latter only because in their view, as the actual rights granted to performers did not in any case go very far, it was in their opinion inconceivable that the standards provided should not in any case be granted by States to their own nationals. The fact that, whatever the standards, it was very unlikely that a State would fail to do so, influenced this decision in the case of others.

#### VII. *The Grant of Rights "ex jure conventionis"*

13. The question was whether the document ought to be in a form which directly granted the rights or one which required Contracting States to legislate to grant them. This point was of practical importance only to those countries in which a convention, once ratified, becomes part of the national law. The majority of experts from these countries had a general preference that the rights should be *ex jure conventionis*.

#### VIII. *Relationship with Copyright*

14. Although certain experts felt it unnecessary, it was agreed that the draft should recite the fact that the rights of authors and their successors in title were not affected. It was clear that it was only their juridical rights that were so reserved. The effect, if any, on their commercial interests, was not of course being pronounced upon.

15. There was then the question whether membership of the proposed convention ought to be confined to certain States or not. The question, however, was not discussed as it was felt that it concerned the formal clauses and that it was to be considered by the diplomatic conference.

16. On the other hand, the question whether the convention should be effective in respect only to those Contracting States which are party to the Universal Copyright Convention or to the Berne Union (as provided for in the Monaco draft) was discussed at length, since this was considered to be a question of substance on which the experts had to express their views. Some experts considered it unfair that the convention should not be effective between countries which are not members of the Berne Union or party to the Universal Copyright Convention, but which do protect authors under systems of their own. Others suggested the insertion of a clause stipulating that each State could declare that it wished to be bound only with respect to States parties to either or both of the two world conventions on copyright. Another suggestion was made to the effect that the convention be made effective in respect of States parties to the Universal Copyright Convention or Members of the Berne Union or of the ILO or UNESCO. There were also experts, e.g. Mr. de Sanctis (Italy), who felt the convention should only be effective between States bound by the *same* copyright convention. The majority of the Committee felt that the solution of the Monaco draft mentioned above should be maintained. The subsequent adherence of any State to the Berne or Universal Conventions would make this convention also effective.

17. The final question on this point was whether the convention should say that the protection of the rights of performers, producers of phonograms and broadcasting

organisations should not be greater in content or extent than that accorded to authors. The great majority of the experts were against any such proposal on the grounds of the uncertainty of its effect and the difficulty of comparing rights which were, in their nature, different. Messrs. Puget (France) and de Sanctis (Italy), who supported it strongly, agreed that it should not be put to the vote but reserved their positions.

#### IX. Points of Attachment of the Convention

18. The question here was which criteria (territorial or national) should be adopted in deciding those performers, record producers and broadcasting organisations who could claim the protection of the draft convention. As the draft [Article 4] shows, these were decided as follows:

- (a) performers are protected if their performance takes place in a Contracting State;
- (b) producers of phonograms are protected in respect of their *unpublished* recordings if they are nationals of Contracting States, *and* the recording in question was made in a Contracting State. They are protected in respect of their *unpublished* recordings if these are first published in a Contracting State or "simultaneously" published, i.e. within 30 days, there and in another State;
- (c) broadcasting authorities are protected if their head office is in a Contracting State *or* if the broadcast in question was made from a Contracting State. But any Contracting State may, on adherence, demand that before giving protection on its territory both these tests must be satisfied, i.e. the broadcast must have been transmitted from a Contracting State by an organisation whose head office was in that State.

19. It was agreed that "publication" for the purposes of this draft means the multiplication of copies of the recording *and* the marketing of copies.

20. It will be noted that in the case of recordings a double test is provided: in the case of unpublished recordings the tests both of place of recording and of nationality of the maker; and a recording is only published for the purpose of receiving protection under the convention if, in addition to being offered for sale in sufficient quantities, the copies were also *made* in the Contracting State in question [Article 10(c)]. It should also be noted that a protected unpublished recording may on publication fall into the public domain if it is not first (or simultaneously) published in a Contracting State. It was agreed that there was no obligation on member States to insist on both tests, e.g. any Contracting State was free if it wished to demand only one of the tests as a condition for giving protection to the recorder.

21. It is also to be noted that the person protected [Article 10(b)] is the maker of the original sound recording (and his successors in title); protection is not afforded by the act of "pressing" a record. This solution accorded with the preference of the International Federation of the Phonographic Industry, as expressed by Mr. Bramall.

22. The reasons which induced the experts to recommend these solutions were as follows:

(a) *Performers.* — To adopt the criterion of the nationality of the performer would have given great difficulty in the case of a group performance. If a large orchestra contained one member who was a convention national, would that have been sufficient to protect the whole performance? Certain experts, however, felt nevertheless that the convention should also protect performers who are nationals of a Contracting State even if their performances were made in a non-Contracting State, and made a reservation. However the proviso in Article 4(1)(a) that an unprotected performance nevertheless may receive protection under (b) or (c) when published, recorded or broadcast in a Contracting State, went some way to meet their point.

(b) *Recordings and broadcasts.* — Some experts would have chosen the place as the criterion and some nationality. In some countries existing law had already chosen one or other of these criteria. The solution in each case was therefore a compromise between conflicting views. The reason for the slightly different treatment of broadcasts from that of recordings was due to the wishes of those countries in which the convention would be self-applying and who wished to adopt a single criterion for protecting broadcasts without having to legislate specifically on the point.

### X. Term of Protection [Article 13]

23. It was agreed without a vote that the term of protection of each category of rights should be the national term subject to a minimum of 20 years. But it was open to any country, notwithstanding the obligation to give the same protection to convention nationals that it gave to its own, to provide that the term of protection of any performance, recording or broadcast should not exceed that granted in its country of origin.

24. Mr. Wallace (United Kingdom) said that in his view the question of duration of term of protection of the performers' rights had no relevance except in cases in which the right given to the performer was a property right. If his right was protected by a criminal sanction it was exercisable, in respect of any particular act of recording or broadcasting, at a single moment of time.

25. It would seem that a performance which is embodied in a phonogram takes the term of protection of the phonogram. Because of the provisions of Article 13(2)(b) (which in some circumstances extends the protection for more than 20 years from the *making* of the recording) this may equally extend to the protection of the performance.

### XI. Exceptions to the Rights Granted [Article 14]

26. The Monaco draft contained the first three of the exceptions provided for in this article. On a proposal by Mr. Hesser (Sweden) it was agreed to add a fourth, i.e. that dealing with teaching purposes. After Mr. Chesnais (International Federation of Actors) had made the point that all acting was in a sense educational, most experts agreed that it should be inserted. They felt, however, that it should be construed narrowly in the sense of teaching in schools and like institutions. Certain experts expressed the opinion that the "minor reservations" mentioned in the General Report of the Brussels Conference should also be recognized.

27. It was agreed that the same four exceptions should apply to each category of the rights granted.

## B. PERFORMERS' RIGHTS

### XII. How Should They Be Protected

28. The question was discussed whether there should be an obligation to grant a "property right" to performers or whether it was sufficient to allow Contracting States to protect performers by means of penal sanctions. Although certain experts reserved their positions, the solution in the Monaco draft, which gave the option to member States to decide which method to adopt, was agreed to without a vote. It was also agreed that the draft convention should not pronounce upon the question whether or not the right should be assignable (which would in any case *not* be possible if no property right were given) and, if so, whether, having assigned his rights he could, notwithstanding such assignment, agree to carry out any engagement accepted by him for recording or broadcasting.

### XIII. "Works"

29. Should the convention protect *all* performers or only those who perform "works"? Mr. Zagar (International Federation of Variety Artists) said, and most experts agreed, that the performance of variety artists, clowns, acrobats, etc., who did not perform from written scripts merited protection in the same way as those of actors or musicians. But Mr. Hesser (Sweden) and a number of other experts emphasised the difficulty of finding a satisfactory definition which would protect them without at the same time opening the door too wide and protecting the participants in such things as sporting events. The solution eventually adopted made it obligatory for Contracting States to protect performers of literary and artistic works, as that term is understood in copyright conventions, while leaving them free to give protection to other performing artists if they wished to do so.

### XIV. Protection against the Recording (fixation) of their Live Performances without their Consent [Article 5(1)(a)]

30. Subject to a doubt expressed by Mr. Fisher (United States) as to whether a live performance came within the expression "writings" in the United States Constitution, this was agreed unanimously as far as commercial records were concerned. The experts

in their comments, were, however, fairly evenly divided on the question whether contracting States ought to permit their broadcasting organisations to make recordings without specific consent in cases in which the performer's consent to the broadcast itself had been given. This question seems mainly of practical importance if the law gives the performer a property right and, on assignment, the right to broadcast and that to record are in different hands. A number of experts and other participants wished to ensure that if this were accepted the performer should at least be able to claim, under the convention, some remuneration if the recording were subsequently used for broadcasting. The general consensus was that it was desirable that he should be so remunerated but the majority of experts were against laying down how national legislation should so provide. Mr. Ratcliffe (International Federation of Musicians) withdrew his proposals on this point since he felt they had no chance of success.

31. Paragraph 3 of Article 5 provides a solution which, after hot debate, was adopted as a compromise. It was intended that the terms and conditions for the use of recordings made for broadcasting should be laid down either in an individual contract or in a collective agreement concluded with the organisations of the performers concerned. It was also understood that in cases where the national legislation did not permit the establishment of the said terms and conditions by collective agreement, these terms and conditions should be fixed by a competent authority after consultation with the performers concerned or their organisations.

*XV. Protection against the Broadcasting of their Live Performances without their Consent [Article 5(1)(a)]*

32. This was agreed unanimously.

*XVI. Protection against the Direct Communication to the Public without their Consent of their Live Performances [Article 5(1)(a)]*

33. The case here envisaged is of clandestine diffusion of a live performance otherwise than by broadcasting, e.g. by wire. Several experts felt that, in view of the fact that the draft convention covered only international situations and that this was most unlikely to happen in practice, there was no need to include it. Mr. Ratcliffe (International Federation of Musicians), however, said that with the installation of the high fidelity cables this was in fact a real issue. The majority of experts felt that in principle this was one of the rights which the performer should enjoy and on a vote it was adopted by a majority of 14 to 11, with 3 abstentions.

34. It should be noted that this only protects *live* performances and does not affect the diffusion by wire of broadcast programmes.

*XVII. Protection against the Recording of Live Broadcast Performances [Article 5(1)(b)]*

35. It was agreed that performers should, subject to the right of Contracting States to make certain exceptions [Article 14 of the draft], be protected against the recording off-the-air of their performances, when these were given live.

36. In view of the exceptions, the practical importance of this is mainly that performers have the right to stop the making of records, off-the-air, without their consent.

*XVIII. Protection against Copying of Fixations of their Performances [Article 5(1)(c)]*

37. This question was debated at length. Fears were expressed by Mr. Lenoble (France) that the unrestricted grant of such a right might paralyse the activities of broadcasting organisations. It was urged by Messrs. Ulmer (Federal Republic of Germany), de Sanctis (Italy) and Rapoport (International Federation of Associations of Film Producers) that this should be confined to sound only and should not include visual images, but this suggestion was contested by Mr. Chesnais (International Federation of Actors) among others. Mr. Bramall (International Federation of the Phonographic Industry) emphasised the danger of stopping the recording companies sending on material to others for processing notwithstanding the consent of the performer to the original recording. Some experts urged that the performer should have a right to equitable remuneration only and not a right to forbid copying. Mr. Fisher (United States) pointed out that in the United States of America films and television are inextricably mixed and

both he and Mr. Tiscornia (Argentina) felt that it was wrong to seek, in a world treaty, to go deeply into detail. Eventually, after a working party had considered the question, the solution in Article 5(1)(c) was adopted. It was stated that if a commercial record was recorded on tape or otherwise for broadcasting use, in lieu of direct use this was not a "different" purpose within the meaning of Article 5(1)(c)(ii). It was also agreed that the word "reproduction" in Article 5(1)(c) means the making of a copy or copies, and does not mean broadcasting or the showing of a film.

#### XIX. *Collective Performances* [Article 6]

38. It was felt necessary, for practical reasons, in the case of group performances, e.g. orchestras, to leave it to Contracting States to lay down the conditions under which performers could exercise their rights [Article 6]. Mr. Ratcliffe (International Federation of Musicians) pointed out the importance of this problem to performers and the fact that the conductor's interests may not necessarily be those of the members of the group.

39. It was also pointed out that it might be wise to provide for separate consents in the case of soloists performing with an orchestra. On the other hand, experts from the broadcasting interests spoke of the impossible situation of broadcasting organisations if a multiplicity of consents had to be sought.

#### XX. *Droit moral*

40. A considerable number of experts were in favour of granting a moral right to performers, but on hearing that such a stipulation would make the convention quite unacceptable to others they agreed that there should be no requirement in the convention to grant this right, though urging that national legislation should provide for it.

#### C. RIGHTS OF PRODUCERS OF PHONOGRAMS [ARTICLE 8]

41. At the outset of the debate on these rights Mr. Bramall (International Federation of the Phonographic Industry) pointed out that although both performing and broadcasting interests had representatives among the experts, no experts had any connection whatever with the phonographic industry. He did not, however, suggest that for that reason the interests of record makers were not being given proper consideration.

42. The right to prohibit the *copying* of records [Article 8] was agreed unanimously, although Mr. Wiens (United States) made certain reservations on the point because of the situations prevailing under his national law. Mr. Celakovsky (Czechoslovakia) joined in this reservation since in his country protection is granted to performers and this sufficiently protects the record producers.

#### XXI. *Sound tracks of Films*

43. These are already protected in a number of countries as parts of films under the copyright conventions. By Article 10(a) of this draft "phonogram" is defined as meaning an exclusively aural fixation. The general consensus was that the question whether or not sound tracks should receive protection under *this* convention should be left to Contracting States to decide. On the other hand, the making of a sound track from a protected phonogram was prohibited by Article 8 of the convention and performers were protected by Article 5, paragraph 1(a) and (b) against the making of a sound track, without their consent, from their live performances and from broadcasts of their performances when these were given live.

#### XXII. *Formalities* [Article 9]

44. This article lays down the maximum formalities which a Contracting State may demand as a condition of protection of records. Any State is of course free to waive any one or more of them. The Article has much affinity to Article III(1) of the Universal Copyright Convention. The purpose of mentioning the year date is of course to be able readily to know whether or not the record's term of protection has expired. It was the understanding of the Committee that it sufficed if the records have the necessary information on their containers.

#### D. SECONDARY USES [ARTICLE 11]

45. This is one of the most important of all the provisions of the draft. It must be noted that the article has relevance to the rights both of performers and those of producers of phonograms. Either or both categories may be the recipient of the monies paid by the broadcasting organisations or theatres, restaurants, etc., which use the records for public entertainment.

46. When this was debated, Mr. Fisher (United States) pointed out that there was no question of U. S. broadcasting organisations paying for using records. The situation was the other way round; but he recognised that the situation was different in other countries of the world. Some speakers felt that remuneration should be paid for all secondary uses of records and others felt that there should be a right to forbid use altogether for these purposes and not merely a right to remuneration. On the question of to whom the money should go, at least in the first place, there was also divergence of views. Mr. Krishnamurti (India) thought it should go to the producers, and Mr. Wallace (United Kingdom) agreed that this was the best solution for practical reasons. Many others, however, thought that it should go to the performer.

47. Although Mr. Gerbrandy (Netherlands) and other experts would have preferred the formula of Article 4 of the Monaco draft, the majority view was that these rights should be expressly given but that Contracting States should be allowed to make a reservation on the point; see Article 15(1)(a). As to the recipient of the money, the majority felt that, whoever was the recipient, the performer should at least share.

48. It will be noted that the draft speaks of a "single" payment. This was inserted to save broadcasting organisations and other users having to seek out a multiplicity of recipients.

49. The word "directly" in the text of Article 11 was used to make it clear that it was dealing with the material use of a phonogram. For example, if a broadcast is rebroadcast by another station, that second station is under no obligation to make a second payment to the producer and/or performer.

#### E. RIGHTS OF BROADCASTING ORGANISATIONS [ARTICLE 12]

50. Attention was drawn at the outset of this debate to the existence of a draft arrangement drawn up under the auspices of the Council of Europe with regard to the protection of broadcasting organisations and their television programmes. This arrangement does not deal with any protection in relation to sound broadcasts.

#### XXIII. Reservations

51. The question whether Contracting States should be permitted to reserve any or all broadcasting rights (as in the Monaco draft) was then discussed. Mr. Lenoble (France) pointed out that in Europe most broadcasting was not, as in the USA, a commercial affair. It was a public service paid for by the public. He also said that the exchange of their programmes among the European stations was a matter of great importance and a certain minimum of protection was therefore needed. Mr. Fisher (United States), while agreeing that broadcasting was mainly commercial in the United States of America, drew attention to the existence there of a large non-commercial educational network.

52. Most speakers were in favour of allowing reservations and, if these were made, of permitting the application of reciprocity; and that was the solution adopted [Article 15(1)(b)].

53. Mr. Siekierko (Poland) was against giving any rights *in this* convention to broadcasting organisations.

#### XXIV. Protection against Rebroadcasting [Article 12(a)]

54. Although some speakers felt it wrong to leave the exercise of this right solely to broadcasting organisations, the text of Article 12(a) was adopted. Some felt it better, even in the performers' interests, that someone should have the right rather than that

no one should. It was agreed that the grant of this right did not extinguish any other rights enjoyed, e.g. those of authors and those of the record makers themselves.

*XXV. Protection against Fixation of Broadcasts and Reproductions thereof [Article 12(b) and (c)]*

55. In spite of the reservations of one or two experts this was agreed without a vote, subject to the exceptions in Article 14.

*XXVI. Protection for the Communication to the Public of Television Broadcasts [Article 12(d)]*

56. Messrs. van Nus (CISAC) and Vilbois (ALAI) felt that this right should only be given in the case of the public communication of sporting events, and several experts agreed. Mr. Straschnov (European Broadcasting Union) drew attention to the existence of the right to reserve [Article 15(1)(b)]. Some experts were against the whole right in principle as being unnecessary, others would have agreed to the grant of this right only on condition that remuneration would be paid to performers. It was eventually agreed that in order to make it easier for broadcasting organisations to televise sporting and other events the right should be inserted but that it should be limited in its application to cases in which there was payment for admission and that the exercise of this right could be regulated according to conditions laid down by national law.

*XXVII. Protection against Wire Diffusion*

57. There was general agreement that this convention should not grant rights to broadcasting organisations to control the diffusion by wire of their broadcasts.

F. MISCELLANEOUS

58. The formula in Article 15 which binds Contracting States, subject to the reservations specifically provided for, to full acceptance of all its obligations is similar to that contained in Article 25(3) of the Berne Copyright Convention.

*XXVIII. Effect of the Convention on Films*

59. This question was left till the end and not discussed at any length in plenary session. The intention of the Article on this point [Article 16] was to have the performer protected against clandestine filming, either live or off-the-air, and the broadcasting organisation protected for its television broadcasts even if these included films. But it was not intended to impose any obligations on States, to affect any rights of film makers or any other rights in visual or aural-and-visual fixations.

*XXIX. Structure of the Convention*

60. From time to time, during the debates in plenary session, certain experts expressed the view that the Committee was constructing too elaborate a treaty to command any large measure of agreement in the world, as distinct from in Europe. After the extent of the rights to be granted had been decided and the Drafting Committee commenced its work, a group of these experts tabled a paper suggesting the submission of a draft which was in effect a proposal for a convention within a convention. It provided for a Part A in which the only obligation of Contracting States was to give national treatment, and a Part B which would consist of all the rest of the text as proposed by the Drafting Committee (see Annex C). This structure in their view would give greater prospects of success at the diplomatic conference on this subject.

61. This was first considered at the time the text of the Drafting Committee became available. Messrs. Siekierko (Poland) and Hauser (Switzerland) said that in their view the text of the Drafting Committee was already a compromise and did not set a very high standard of protection. If there were to be a convention in two parts, as was suggested, they would be in favour of yet a different text which would give greater protection to the performer than that agreed by the Committee.

62. The above-mentioned new proposals relating to structure were criticised on other grounds by other experts. It was pointed out, for instance, that in those numerous

countries which had no national standards the acceptance of Part A only of the proposed text would afford no protection whatsoever.

63. It was unanimously agreed by the Committee that the new proposal in question would be appended to the report as the expression of the views of its sponsors.

\* \* \*

64. The Draft International Convention concerning the Protection of Performers, Producers of Phonograms and Broadcasters, and this Report were unanimously adopted by the Committee of Experts, at its last sitting, on 20th May, 1960.

Annex A. (List of participants.)

Annex B. (Officers of the Committee of Experts.)

Annex C. Proposal of Certain Experts.<sup>1</sup>

## I

### Explanatory Observations

The present proposal was moved in the belief that any convention on neighbouring rights should place the Contracting States under the obligation of granting the same rights to foreign performers, record makers and broadcasters as they grant to nationals. However, it was believed that the economic and legal situations were so different in the various countries and that the technological changes in this field continued to be so rapid that it was impractical and undesirable to establish *mandatory* uniform rules on definite minima susceptible of world-wide acceptance at the present time. Nevertheless the present proposal also contains stipulations on minimum rights and possible exceptions and reservations thereunder with the understanding that acceptance of such stipulations is *optional* for each Contracting State.

It was the firm belief of the movers of the present proposal that it created a basic convention that could be widely ratified, while, at the same time, it afforded more complex and detailed provisions for consideration and adoption by States who wish to be bound by them.

Consequently, the proposal would group in two parts the provisions of the draft with the addition of one new article.

Part A contains those provisions which assure national treatment and consequential provisions, to wit, relations to copyright conventions and protection, country of origin, formalities, definitions, and comparison of terms.

This Part also contains a provision ("Additional Article") declaring optional the acceptance of Part B, and permitting reciprocity in respect to the so-called secondary rights. Eventually, the final clauses of the Convention would also apply to this Part. *Every Contracting State would be bound by the provisions in this Part A of the Draft.*

<sup>1</sup> Messrs. Abe (Japan), Fisher (United States), Ishikawa (Japan), Krishnamurti (India), Richards (United Kingdom), Vischer (Switzerland), Wallace (United Kingdom) and Wiens (United States).

Part B contains those provisions which establish the compulsory recognition of certain rights or their restrictions.

*The provisions of this Part B of the Draft would be applicable only among those States which, at the time of ratifying the Convention or later, declare that they want to be bound by them.*

## II

### Text of proposed rearranged Draft

*The wording of the Articles referred to by numbers should be understood to be the same as in the draft adopted by the Committee.*

#### PART A

- Art. 1 (Copyright Conventions)
- Art. 2 (Safeguard of Copyrights)
- Art. 3 (National Treatment)
- Art. 4 (Country of Origin)
- Art. 7 ("Performance")
- Art. 9 (Formalities)
- Art. 10 (Definitions)
- Art. 13, para. (1) (Reciprocity *re* term of protection)
- Art. 17 (Acquired Rights)

#### *Additional Article*

(1) When depositing its instrument of ratification or accession, each State shall declare whether its ratification or accession extends to this Part A only or to both Parts A and B. Any State originally electing the first possibility may later, by a declaration deposited with the depository of the Convention, declare that it extends its ratification or acceptance also to Part B.

(2) Contracting States whose ratification or accession extends to both Parts A and B may, in their relations to States whose ratification or accession extends only to Part A, limit the protection, if any which they would otherwise grant under Article 3 (National Treatment) in connection with the broadcasting or other public communication of a phonogram to the extent to which such protection is granted by the State of origin of the phonogram.

#### PART B

- Art. 5 (Performers' Minima)
- Art. 6 (Group Performances)
- Art. 8 (Recorders' Minima)
- Art. 11 (Secondary Uses)

- Art. 12 (Broadcasters' Minima)
- Art. 13, para. (2) (Minimum Term of Protection)
- Art. 14 ("Small Exceptions")
- Art. 15 (Reservations)

16. CONFERENCE OF EXPERTS FOR THE PREPARATION OF INTERNATIONAL REGULATIONS OF THE RIGHTS OF PERFORMERS, PRODUCERS OF PHONOGRAPH RECORDS AND BROADCASTING ORGANIZATIONS. *The Hague, 9th-20th May, 1960.*

Document submitted jointly by the International Labour Office, the UNESCO Secretariat, and the Bureau of the Berne Union. (13 *UNESCO Copyright Bulletin* 51-86, 177-214, no. 1, 1960.) Contents: Introduction. Analysis of the observations and suggestions formulated by the states with regard to substance.—Annex: Text of the letter addressed on 23 April 1959 to the Director-General of UNESCO by the Director-General of the International Labour Office.

In English and Spanish.

17. COUNCIL OF EUROPE.

Arrangement européen pour la protection des émissions de télévision. (73 *Le Droit d'Auteur* 201-206, No. 7, July 1960.)

The official text, in French and English, of the final Draft European Agreement on the Protection of Television Broadcasts, which was signed on June 22, 1960 by representatives of the Governments of Denmark, France, Greece, Ireland, Italy and Turkey. The Agreement, subject to certain provisos, affords television broadcasts protection against re-broadcasting, wire diffusion, performance in public, and fixation in any form whatsoever, whether these uses are contemporaneous with the broadcast or are effected with the aid of a previous recording. One of the articles provides that the Agreement would cease to be effective, except with respect to fixations already in existence, upon the coming into force of a neighboring rights convention affording protection to television broadcasts, between at least a majority of the members of the Council of Europe that are parties to the Agreement.

18. INTERGOVERNMENTAL COPYRIGHT COMMITTEE.

Summary records [of the fourth session of the Intergovernmental Copyright Committee and the eighth session of the Permanent Committee of the International Union for the Protection of Literary and Artistic

Works, Munich, 12-17 October 1959]. (13 *UNESCO Copyright Bulletin* 11-48, 89-127, 135-174, No. 1, 1960.)

"The fourth session of the Intergovernmental Copyright Committee coincided with the eighth session of the Permanent Committee . . . which took place in Munich at the same time. The Intergovernmental Committee held—in addition to its three meetings—five joint meetings with the Permanent Committee. The summary records [in English, French and Spanish] follow in the chronological order of the meetings."

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

Universal Copyright Convention: state of ratifications and accessions as at 31 May 1960. (13 *UNESCO Copyright Bulletin* 3-8, No. 1, 1960.)

In English, French and Spanish.

20. U. S. PRESIDENT, 1953- (*Eisenhower*).

Proclamation du Président des États-Unis d'Amérique prolongeant le délai relatif à l'obtention du droit d'auteur, en ce qui concerne les oeuvres des ressortissants de l'Autriche (N° 3353, du 15 juin 1960). (73 *Le Droit d'Auteur* 230-234, No. 8, Aug. 1960.)

The text, in French and English, of Presidential Proclamation 3353 of June 15, 1960 extending the time within which copyright may be obtained, with respect to works of citizens of Austria. The texts, also in French and English, of the notes exchanged between the Secretary of State and the Austrian Ambassador in Washington in connection with the proclamation, are appended. See 7 BULL. CR. SOC. 235, Item 305 (1960).

21. U. S. TREATIES, ETC., 1953- (*Eisenhower*).

Accord de licence entre le Gouvernement des États-Unis d'Amérique et l'Association islandaise des compositeurs et titulaires des droits de représentation et d'exécution (du 2 février 1959). (73 *Le Droit d'Auteur* 234-236, No. 8, Aug. 1960.)

The text, in French and English, of a "License Agreement between the Government of the United States of America and the Icelandic Association of Composers and Owners of Performing Rights" (STEF). The agreement provides in essence for U. S. payment to STEF of \$13,500.00 for the use, by the U. S. Armed Forces Radio Network, of musical or dramatic materials in the STEF repertory from July 1, 1958 to the expiration of the agreement at midnight, June 30, 1961.

## PART IV.

**JUDICIAL DEVELOPMENTS IN LITERARY  
AND ARTISTIC PROPERTY**

## A. DECISIONS OF U. S. COURTS

## 1. Federal Court Decisions

22. *Public Affairs Associates, Inc. v. Vice Admiral Hyman G. Rickover*, 127 USPQ 231 (D.C. Cir., Oct. 20, 1960).

On appeal from the U. S. District Court for the District of Columbia, 177 F.Supp. 601, 123 USPQ 252, 7 BULL. CR. SOC. 102, Item 110 (1959). (Reed, J., Washington, J. dissenting.)

*Held*, reversed and remanded.

On the basic issue of copyrightability, the appellate court unanimously agreed with the lower court in holding that Admiral Rickover's speeches should not be deemed government publications, even though some of the material had been typed with the use of government facilities and with the assistance of a government employee. After reviewing the historical background of section 8 of the Copyright Act of 1909 and the relatively few judicial precedents interpreting that section, Mr. Justice Reed stated:

"It cannot be properly said, as appellant asserted, that a governmental official who speaks or writes of matters with which he is concerned as an official is by the very fact of being such an official barred from copyright on his productions. If they are statements called for by his official duties or explanations as guides for official action, they are barred from a copyright. A perusal, even of the titles and the places of delivery alone, should be sufficient to show that these addresses were not governmental publications in that sense. The speeches themselves bear out this statement. We hold that none of these papers is a governmental publication."

The majority opinion proceeded to state, however, that with regard to some of the speeches which had been distributed to the press, the copyright may have been forfeited on the ground that such distribution constituted a public rather than a limited publication. The opinion states in this regard:

"The agreed statement of facts in the case under consideration shows no effort to limit distribution of the speeches delivered prior to Decem-

ber 1, 1958, but rather a willingness to make them available to all who might be interested. Certainly when all of Admiral Rickover's acts of distribution are considered together—performance, distribution to the press, the copies sent to individuals at the recipient's request and those sent unsolicited, the copies sent in batches of 50 for distribution by the sponsors of speeches—it is difficult to avoid the conclusion that these acts, in their totality, constitute publication of the speeches and their dedication to the public domain. There is no effort shown to protect the author's private right in any way, no limitation upon who might obtain copies. That these speeches were open to the entire world could not have been more clearly manifested unless the author had printed upon the copies, 'All claims to copyright waived.' See *White v. Kimmel*, 193 F. 2d 744 (9th Cir. 1952).

Since the distribution was not limited in any way to a particular group, no question exists in this case as to the extent of any limitation so as to avoid 'publication' in the copyright sense. Anyone was welcome to a copy.

Nor do we have any problem as to limited use of the addresses by the press for fair comment. The press was free to use the speeches in whole or in part for their news value. But such ephemeral use is far different from the unlimited distribution to anyone who was interested which is manifested by the agreed statement of facts. It is the complete absence of limitation on the use of the printed distributions by anyone at any time which destroyed the common law rights of the author.

Copies of the speeches delivered after December 1, 1958, bore this sort of notice: 'Copyright 1958, H. G. Rickover. No permission needed for contemporaneous press use. Above copyright notice to be used if most of speech reprinted.' Copies of these speeches were deposited in accordance with the act. The appellant does not appear to contend that this notice does not contain all the formal elements required by §19 of the Code. Rather, it asserts that these notices do not comply with the act because, in addition to the required elements, they also contain a conditional permission to use the work. Appellant contends that the terms of this condition are vague, particularly 'contemporaneous' and 'press,' and for this reason the entire copyright is invalid.

With regard to the issue of fair use, it was the court's opinion that since no copy of the book or pamphlet proposed to be published was before the court, this issue should be passed upon and decided by the lower court upon remand.

Judge Washington, while agreeing that the Admiral's speeches and papers should not be considered government publications, expressed the view in accord with the lower court's decision that the dissemination

of the speeches in mimeographed form prior to delivery thereof should not be considered as a public distribution terminating the author's common law copyright. He said:

"Speeches of men in the forefront of public life are unique among literary products. Not only are they often works of considerable literary merit, but they may also be 'news' of the first importance. As 'news' they deserve the widest unfettered contemporaneous dissemination. Where, as here, an author seeks to advance this end by making copies of his speeches available to the press and other interested persons, he is serving the public's interest as well as his own. But insofar as they have a commercial value as literary works after their immediate news importance has passed, they belong appropriately to their creator. The public interest in the news value of the author's work may cut across or postpone his rights; but that is not to say that it extinguishes them.

In my judgment the rule which requires a publication to be 'limited' to avoid forfeiture of property rights in the material published is wholly inapposite here."

23. *Hayden, d.b.a. Hayden Map Co. v. Chalfant Press, Inc., et al.*, 281 F.2d 543, 126 USPQ 483 (9th Cir., Aug. 10, 1960) (Jertberg, J.), affirming 123 USPQ 475, 7 BULL. CR. SOC. 145, Item 181 (1960).

Copyright infringement action in which plaintiff sought damages and an injunction. Plaintiff was a cartographer who had made hunting and fishing maps of certain regions in California, publishing and copyrighting them in 1933, 1934, 1936, 1938 and 1950, respectively. Plaintiff contended that defendants had published maps in the period 1955-1958 which infringed his. The trial court had decided in defendants' favor on the grounds (1) that plaintiff was estopped to assert these claims and (2) that no infringement had been proved.

*Held*, on appeal, affirmed on the second ground alone.

Plaintiff had introduced evidence showing some 234 similarities between his and the defendants' maps. Said the Court: "It is important to note, however, that each one of these similarities involved the name of some geographic locus . . . or the name of some commercial tourist establishment located in the area covered by the copyrighted maps." Plaintiff had offered no direct proof of copying. Defendants, on the other hand, had offered evidence to show that they had copied their maps, with permission, from maps prepared by the Automobile Club of Southern California, which Club had prepared them independently. The Court reasoned as follows: "[A]ppellant's contention reduces itself to the claim

that having christened lakes, creeks, streams, and other geographic loci and commercial establishments, and having first depicted such names on copyrighted maps, that he thereby became entitled to protection against the use of such names by later cartographers. With such contention we cannot agree. In our view, once appellant had christened a geographic location, and depicted such name on a copyrighted map, such name may be used with impunity by later cartographers, and such name is not a part of the protected portion of the copyright."

24. *Brecht v. Bentley, et al.*, 126 USPQ 356 (S.D.N.Y. July 27, 1960) (Bryan, J.).

Action for copyright infringement in which plaintiff, claiming to be the equitable owner of the copyright in "Mother Courage," a play by his father, Bertold Brecht, sought an injunction against the production of the play by defendants in New York. Defendants answered and took plaintiff's deposition. Before plaintiff commenced taking defendants' deposition, defendants moved for summary judgment.

*Held*, motion denied.

In February, 1940, a copy of the original German text of the play had been registered for United States copyright as an unpublished work (pursuant to 17 U.S.C. §12) by Englund, a Swedish theatrical agency. Plaintiff's contention was that an express or implied agreement existed whereby Englund had registered the play for the author's benefit, and that plaintiff now represented all of the author's heirs. The Court noted that the facts were unclear as to the legal relations between Englund and the author, and thus the motion for summary judgment could not be granted. Defendants also urged that copyright in the play had been lost altogether through various publications in Europe and in the United States, each with a separate copyright notice or with no notice at all. The Court commented that the publications in the United States were translations of the original and thus, as distinguished from the original, new works. It followed that separate copyright notice on each such publication was appropriate. As to versions of the play published in Europe, there was insufficient evidence in the record to determine whether or not those publications constituted new works.

25. *Coventry Ware, Inc. v. Reliance Picture Frame Co.*, 127 USPQ 46 (S.D.N.Y. Sept. 14, 1960) (Dawson, J.).

Action for copyright infringement. The facts were not substantially in controversy. Plaintiff and defendant both were in the business of manufacturing and selling wall plaques. Plaintiff registered certain plaques

for copyright as "molded sculptures." On the back of each plaque appeared the following notice: "Hand-decorated/Coventry Ware, Inc. Made in U.S.A." Defendant admittedly manufactured and sold plaques copied from plaintiff's. Defendant, however, asserted that it was not aware of any copyright notice appearing on such plaques. It was conceded that no notice of copyright appeared on the front, or molded part, of any of plaintiff's plaques. Plaintiff and defendant each cross-moved for summary judgment.

*Held*, summary judgment granted for defendant.

Referring to 17 U.S.C. §19, the Court stated that "the statute apparently, therefore, requires that notice of copyright appear on the work of art itself, but provides that the name of the copyright proprietor may appear on some other part, such as the back, base or pedestal. If it had been intended that a copyright notice might appear on the back of the work of art it would have been easy to draw the statute to so provide. It does not so provide. It provides that the notice should appear on the work of art itself." The notice appearing on the back of plaintiff's plaques was thus insufficient.

26. *Scarves by Vera, Inc. v. American Handbags, Inc.*, 127 USPQ 47 (S.D.N.Y. Sept. 14, 1960) (Cashin, J.).

' Action for copyright and for trademark infringement. Defendant had purchased certain scarves and towels manufactured by plaintiff and bearing plaintiff's notice of copyright and trademark. Defendant had used these scarves and towels as decorative material in the manufacture of its handbags. Defendant would attach a tag to the finished handbag stating that the design was copyrighted by plaintiff, but that the handbag was manufactured by defendant. Claiming that defendant was fraudulently removing its copyright notice in violation of 17 U.S.C. §105, plaintiff moved for a preliminary injunction.

*Held*, preliminary injunction on this ground denied.

The Court noted the traditional rule barring an injunction against the commission of a crime, and thus denied plaintiff's request for an order restraining defendant from violating 17 U.S.C. §105. Plaintiff also argued that when defendant purchased goods embodying plaintiff's copyrighted designs and used them in the manufacture of handbags sold to the general public, the copyright notice was removed, thus exposing plaintiff to the danger of loss of copyright. The Court rejected this contention, reasoning as follows: "Plaintiff's argument falls short, however, because defendant by its actions cannot place plaintiff's copyrighted designs in the public domain. In order for the designs to be placed in

the public domain it must be shown that the copyrighted works left the plaintiff's possession without the required notice, and this burden is on the defendant." As to trademark infringement, the Court required defendant to sew into each handbag a notice clearly stating that it is not connected with plaintiff.

27. *ABC Music Corp., et al. v. Janov, et al., d/b/a Mode Records, Ltd.*, 126 USPQ 429 (S.D. Calif., August 22, 1960) (Mathes, J.).

Plaintiffs sued for damages under 28 U.S.C. §1338(a) for defendants' failure to pay statutory royalties pursuant to the compulsory licensing provisions of 17 U.S.C. §1(e). The parties were in agreement that the defendants were liable, under §1(e), to pay a royalty of two cents per "part." The only point of controversy between them was whether exemplary damages of six cents per "part" should be awarded.

*Held*, exemplary damages awarded.

The Court reasoned as follows: "It appears then that the tendency today is not to look for 'piracy' or 'willfulness' as a requisite to an increased award, but rather to hold that mere violation of the statutory obligations imposed upon record manufacturers who appropriate to themselves a compulsory license under §1(e) is sufficient to justify a treble-damage award. (See *Edward B. Marks Corp. v. Foulton*, 79 F.Supp. 644, 667-668, 77 USPQ 502, 504-505 (S.D.N.Y. 1948); cf.: *Shapiro, Bernstein & Co. v. Goody*, 248 F.2d 260, 266, 115 USPQ 36, 39 (2d Cir. 1957), reversing 139 F.Supp. 176, 108 USPQ 409 (S.D.N.Y. 1956), cert. denied 355 U.S. 952, 116 USPQ 601 (1958); *Davilla v. Brunswick-Balke Collender Co.*, 94 F.2d 567, 570, 36 USPQ 398, 400 (2d Cir. 1938), modifying 19 F.Supp. 819, 820, 35 USPQ 157, 158 (S.D.N.Y. 1937), cert. denied 304 U.S. 572, 37 USPQ 844 (1938).)

"In dealing with this problem the distinction between actions for infringement under §101(b) (17 U.S.C. §101 (b)) and suits for statutory royalties under §1(e) of the Copyright Act should be kept in mind, because in terms of remedy the two are quite different. Under the former an accounting of profits based upon sales is available to aid a determination of appropriate damages; while under a compulsory license, the royalty fixed by statute limits the pecuniary remedy of the copyright proprietor, irrespective of the profits which may be involved.

"Since §1(e) fixes the precise royalty recoverable for the compulsory license, it seems only just that treble damages should be awarded for a violation of §1(e), in the absence of a showing of good cause to the contrary. And the burden of making such a showing of good cause, once violation has been proved, should, of course, rest upon the defen-

dant. That is to say, since §1(e) permits anyone to exploit the property of the copyright owner for commercial advantage and limits the royalty payable for such use, those who appropriate a compulsory license without complying strictly with the requirements of §1(e), do so at their peril; and their liability for failure to perform punctually the obligations which the Act imposes may be onerous in the extreme.

"Here defendants in effect contend that their violation of the statute was merely the result of folly. But under §1(e) the folly of manufacturers is precisely one of the dangers to which copyright proprietors are continually exposed. Once their compositions have been reproduced on records, the copyright proprietors must thereafter deal alike with the reputable and the disreputable, the prudent and the foolish, the financially sound and the marginally financed.

"Add the further consideration that the disreputable and the imprudent and the marginally financed not only have it within their power to deny the copyright proprietor the benefits of his property by failure to provide an accounting and to pay royalties due, but also, by flooding and diluting the market, to deter sound and prudent manufacturers from making records of the composition.

"Here it would be a hollow victory indeed, if all that plaintiffs could recover after being forced to sue would be the statutory-two-cent royalty. They were entitled to that without bringing this action.

"For the reasons stated, judgment will be entered in favor of plaintiffs and against defendants for a royalty of '2 cents on each \* \* \* part manufactured,' plus treble damages, together with taxable costs and a reasonable counsel fee of two thousand dollars."

## 2. State Court Decisions

28. *Clevenger v. Baker, Voorhis & Co., et al.*, 203 N.Y.S.2d 812, 126 USPQ 420 (N. Y. Court of Appeals, July 8, 1960) (Froessel, J.), reversing 199 N.Y.S.2d 358, 125 USPQ 503, 7 BULL. CR. SOC. 243, Item 313 (1960).

Appeal by plaintiff from an order dismissing his complaint for failure to state a cause of action. In 1922 plaintiff wrote and published "Clevenger's Annual Practice of New York." He sold the copyright to defendants, and, from 1923 to 1956, edited the annual revisions. In 1956, he terminated his editorship. In 1959, the work appeared with the following announcement on the title page: "Clevenger's Annual Practice of New York \* \* \* 1959 Annually Revised." Plaintiff in fact had not revised this edition and alleged in his complaint that it contained many

errors. The Court pointed out that if the complaint stated any cause of action known to the law, then its dismissal below was improper.

*Held*, order dismissing complaint reversed.

The Court reasoned as follows: "The gravamen of the wrong pleaded is that the numerous errors of omission and commission in the 1959 edition of the work, impliedly attributed to plaintiff by the misleading format of the title page, have 'irreparably impaired' his otherwise excellent reputation as a reliable legal writer and lawyer. Since a jury could reasonably find that the wording and arrangement of the title page in question would mislead the reader to believe that the revision work had been done by plaintiff, the facts pleaded amount to actionable defamation. \* \* \* Defendants herein . . . had a perfect right to state that plaintiff was the *author* of the original text, but the purchase of the copyright did not carry with it a license to defame by impliedly misrepresenting plaintiff as *reviser* of an *annual edition* that contained many inaccuracies and with which he had nothing to do."

29. *Malkin v. Dubinsky, et al.*, 203 N.Y.S.2d 501 (Sup.Ct., N.Y.Co. June 1, 1960) (Amsterdam, J.).

Action for common-law copyright infringement in which plaintiff asserted that the defendants had based their motion picture, "With These Hands," upon his unpublished Yiddish-language play.

*Held*, after trial, for defendants.

The Court commented as follows: "To establish his cause of action, the onus is on the plaintiff to prove his priority of the literary material in issue; access by defendants thereto; and intentional copying of the whole or a substantial part thereof without authorization. . . . Based on the credible evidence, there is no satisfactory showing by plaintiff, of any of these elements essential to his cause. . . . In the case at bar, plaintiff's claims involve, at best, some similar material which belongs to the public domain, and some details which in the total context are trivial."

*Also of Interest:*

30. *Dell Publishing Co. v. Stanley Publications, Inc.*, 201 N.Y.S.2d 1008, 126 USPQ 305 (App. Div. 1st Dep't, June 28, 1960) (Valente, J.). Judgment for plaintiff reversed in action for unfair competition and trademark infringement involving use of magazine titles.
31. *Harrington v. Mure, et al.*, now reported, 126 USPQ 506 (S.D.N.Y. May 20, 1960) (Palmieri, J.). *Digested at* 7 BULL. CR. SOC. 293, Item 391 (1960).

32. *Karr v. Leeds Music Corp., et al.*, 126 USPQ 27 (Sup.Ct. N.Y.Co., June 21, 1960) (Capozzoli, J.). Copyright held not to protect its owner from liability for any tort which he may commit in the use of the copyrighted matter.

*Errata:*

33. *Millworth Converting Corp. v. Slifka, et al.*, 276 F.2d 443, 125 USPQ 506 (2d Cir. March 17, 1960) (Friendly, J.), digested 7 BULL. CR. SOC. 187, Item 245 (1960), *erroneously cited* as 180 F.Supp. 840; see also error in Decisions Index, 7 BULL. CR. SOC. 322 (1960).

PART V

**BIBLIOGRAPHY**

A. BOOKS AND TREATISES

1. United States Publications

34. CONANT, MICHAEL. Antitrust in the motion picture industry. Economic and Legal Analysis. *Publications of the Bureau of Business and Economic Research*, University of California, Berkeley and Los Angeles, 1960. 220 p., Bibliography, Index and Index of Cases.

The author attempts "to analyze and evaluate the impact of anti-trust actions on the structure, behavior and performance of an industry," specifically the motion picture industry of the last fifteen years, and to examine the results of *U. S. v. Paramount Pictures*, 334 U.S. 131 (1948), and the decrees of divorcement and divestiture of that case. Chapters are included on the "demand conditions" of the motion picture industry, its market structure, trade practices, and the pattern of price discrimination found within it. The author also traces "the changing law in motion picture antitrust cases during the last twenty years with emphasis on the private treble-damage suits that grew out of the evidence in the *Paramount* case."

35. DUNNE, ELIZABETH K. The Catalog of Copyright Entries; a study prepared for the United States Copyright Office by Elizabeth K. Dunne and Joseph W. Rogers, with Comments and views submitted to the Copyright Office. Washington, Copyright Office, July 1960. ii, 28, 13 pp. (General revision of the copyright law, study no. 23).

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

36. KAPLAN, BENJAMIN. Cases on copyright, unfair competition, and other topics bearing on the protection of literary, musical, and artistic works, by Benjamin Kaplan and Ralph S. Brown, Jr. Brooklyn, Foundation Press, 1960. 750 pp. (University casebook series.)

First issued in 1958 in a temporary, two-volume edition, under the title "Copyright and unfair competition," this comprehensive casebook has been revised and brought up-to-date.

37. PILPEL, HARRIET F. Rights and writers; a handbook of literary and entertainment law, by Harriet F. Pilpel and Theodora S. Zavin. [1st ed.] New York, Dutton, 1960. 384 pp.

A compilation of articles from Mrs. Pilpel's column in the *Publishers' Weekly* entitled "But Can You Do That?" The material, dealing with current judicial developments in libel, privacy, copyright, protection of ideas, unfair competition, contracts, taxes, and censorship in the United States has been broadened "by introductions to each section which give illuminating, over-all summaries of each subject."

38. RINGER, BARBARA A. Renewal of copyright; a study prepared for the United States Copyright Office . . . with Comments and views submitted to the Copyright Office. Washington, Copyright Office, Aug. 1960. 1 v. (various pagings) (General revision of the copyright law, study no. 24).

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

39. ROTHENBERG, STANLEY. Legal protection of literature, art and music. Foreword by Abel Green. New York, Clark Boardman Co., 1960. 367 pp.

An up-to-date text on United States copyright law "written for legal practitioners, businessmen in the fields of publishing, producing and advertising, and others such as agents, writers, composers, actors, etc., who wish to promote and protect creative endeavor . . . Selections of representative commercial agreements, illustrative registration forms, international conventions, rules and regulations, and the Copyright Act, are included."

## 2. Foreign Publications

### 1. In French

40. PIAT, COLETTE. La protection des créations dans le domaine de la couture et de la mode. Paris, Librairie du Journal des Notaires et des Avocats, 1959. 158 pp. (Comment faire, 16.)

A review of the historical development of design protection in France with a summary and analysis of the provisions of the various French laws protecting the designs produced by seasonal fashion industries. The author concludes that the effectiveness of design protection in France is paralyzed by the confusion and complexity caused by several coexisting statutes, and that the law on "seasonal creations" of 1952, which was intended to reinforce protection for seasonal fashion designs, has actually had the opposite effect. She recommends a new statute in which the various provisions applicable to such designs are combined and synthesized.

### 2. In Italian

41. FRANCESCHELLI, REMO. Trattato di diritto industriale, parte generale. Milano, A. Giuffrè, 1960. 2 v.

A comprehensive treatise on the history and sources of, and institutions dealing with, intellectual property rights (patents, trademarks, copyrights, etc.) in Italy and other countries, and on the international plane, in an attempt to demonstrate that laws relating to such rights are, in reality, branches of the law of competition.

## B. LAW REVIEW ARTICLES

### 1. United States

42. Copyright—speeches—common-law protection of copies distributed to a "limited" audience. (45 *Iowa Law Review* 896-902, No. 4, Summer 1960.)

"This comment [on the *Rickover* case, 177 F.Supp. 601, 7 BULL. CR. SOC. 102, Item 110 (D.D.C. 1959)] concerns primarily the protection afforded an author's speeches without regard to his status as a government employee."

43. KAPLAN, BENJAMIN. [A review of] Universal Copyright Convention, an analysis and commentary by Arpad Bogsch. New York, R. R. Bowker Co., 1958. (54 *The American Journal of International Law* 704-706, No. 3, July 1960.)
44. MEYER, HAROLD S. Incentives and limitations in use of intellectual property. (42 *Journal of the Patent Office Society* 480-495, No. 7, July 1960.)

A brief discussion of anti-trust problems in the exploitation of intellectual property rights such as patents, copyrights, trademarks and the like, with a listing "of some rather simple principles which will give reasonable assurance of freedom from conflict with the anti-trust laws."

45. SOKOLSKI, EDWARD A. Is our design patent statute adequate? (42 *Journal of the Patent Office Society* 496-505, No. 7, July 1960.)

"The purpose of this paper [is] to examine the design patent laws in the light of the overlapping coverage of the copyright laws and to make some suggestions for reform."

## 2. Foreign

### (a) English

46. MOODY, C. R. Letter from New Zealand. (5 *Industrial Property Quarterly* 3-9, No. 3, July 1960.)

A survey of recent legislative and judicial developments in New Zealand relating to industrial property protection. The survey includes a discussion of the recommendations of the New Zealand Copyright Committee with respect to design protection which appeared in its *Report* issued in 1959.

### (b) French

47. BERMAN, HAROLD J. La loi soviétique et le droit d'auteur des étrangers. *Revue Internationale du Droit d'Auteur*, No. 28 (July 1960), pp. 5-51.

Translation, in French, German, and Spanish, of "Rights of foreign authors under Soviet law," first published in 7 BULL. CR. SOC. 67, Item 85 (1959).

48. DERENBERG, WALTER J. Lettre des États-Unis. Letter from the United States. (73 *Le Droit d'Auteur* 207-226, No. 7, July 1960.)

A survey, in French and English, of legislative and judicial copyright developments in the United States during 1959, based on the author's article which appeared in 1959 *Annual Survey of American Law*. See 7 BULL. CR. SOC. 248, Item 327 (1960).

49. DESBOIS, HENRI. Le droit d'auteur des étrangers en France (à propos de l'affaire du "Rideau de Fer"). *Revue Internationale du Droit d'Auteur*, No. 28 (July 1960), pp. 78-107.

A commentary, in French, English and Spanish, on a French Supreme Court decision of December 22, 1959 (the *Iron Curtain* case) which affirmed a judgment rendered by the Paris Court of Appeal to the effect that a foreign author is entitled to copyright protection in France for his work first published elsewhere even though the country of origin may not extend reciprocal protection to a French work. The case involved the unauthorized use, in a motion picture exhibited in France, of music by four Soviet composers.

50. GOLDBAUM, WENZEL. La lutte pour le droit d'auteur au Pérou. *Inter-auteurs*, No. 139 (2. trimestre 1960), pp. 97-103.

Dr. Goldbaum, whose recent demise is reported in a footnote, comments favorably on the new Peruvian Draft Copyright Law under consideration by the Senate. He criticizes, however, one provision under which a certificate of title of "definitive" ownership is issued by the Registry of Copyrights after a work has been listed in the official gazette and no protest has been received, since automatic copyright is granted by another provision.

51. International Confederation of Authors' and Composers' Societies. *Legislative Commission*. [Riunioni, Firenze, 28-31 marzo 1960.] (31 *Il Diritto di Autore* 126-147, No. 1, Jan.-Mar. 1960.) *Contents*. Deliberazioni e voti. Note, sur les questions inscrites à l'ordre du jour de la réunion, par Valerio de Sanctis. Les décisions du Conseil de l'Europe relatives à la conclusion d'arrangements: (a) sur l'échange de programmes de télévision, (b) sur la protection des émissions de télévision; rapports presentato dal Prof. Dr. Philipp Möhring.

The original French texts of the votes and resolutions adopted by the Commission with respect to comparative law, article 6 of the Berne

Convention, neighboring rights, antitrust legislation, the new draft laws of the German Federal Republic on copyright and performing rights societies, and the Report of the New Zealand Copyright Committee, 1959. Also included are a note on the agenda by the President of the Commission, Mr. de Sanctis, and a favorable report, by Dr. Möhring, on the decisions of the Council of Europe relative to the conclusion of arrangements for the exchange of television programs and the protection of television broadcasts.

52. MELAS, VICTOR TH. Lettre de Grèce. (73 *Le Droit d'Auteur* 241-243, No. 8, Aug. 1960.)

A survey of recent Greek jurisprudence in the field of copyright.

53. MIRAT, JEAN. L'Affaire du Kid. *Revue Internationale du Droit d'Auteur*, No. 28 (July 1960), pp. 108-119.

Arguments of the late "Bâtonnier" of the Bar of the Paris Court of Appeal before that court on January 29, 1959, in an action for copyright infringement and violation of the moral right, arising out of the defendant's unauthorized reproduction of copies of the Charlie Chaplin silent motion picture, "The Kid," to which French sub-titles and a music sound track had been added, and the completion of contracts for the lease of the picture. The noted lawyer represented Mr. Chaplin and a French company to which all exploitation rights to the picture had been assigned.

54. La Protection des photographies dans la législation des pays de la Convention universelle n'appartenant pas à la Convention de Berne. Fold. sheet. (Supplement à la *Revue Internationale du Droit d'Auteur*, No. XXVIII, juillet 1960.)

The texts, in French, of the provisions with respect to protection of photographs which appear in laws of U.C.C. countries which do not belong to the Berne Copyright Convention. The texts are given in tabular form on a folded sheet which is issued as a supplement to the July 1960 issue of the *Revue*.

55. TOURNIER, ALPHONSE. L'auteur et l'artiste interprète ou exécutant. *Revue Internationale du Droit d'Auteur*, No. 28 (July 1960), pp. 52-77.

A comparison, in English, French, and Spanish, between the rights of an author in his literary or musical work with those of the performer in his performance or interpretation of the same work.

56. WHALE, ROYCE F. Pourquoi cette absence de l'U. R. S. S. des relations internationales en matière de droit d'auteur? *Interauteurs*, No. 139 (2. trimestre 1960), pp. 95-96.

A brief note attempting to explain the reasons for Russian abstention from international copyright relations. The writer believes that this abstention is as much a political as economic question, but expresses optimism that the situation will be remedied.

(c) German

57. BRUGGER, GUSTAV. Kartellrecht und Urheberrecht. *Archiv für Urheber-, Film-, Funk- und Theaterrecht*, vol. 27, No. 3/4 (Apr. 1, 1959), pp. 189-232; vol. 31, No. 1/2 (Apr. 2, 1960), pp. 1-63.

A study, in two parts, on "Cartel law and copyright" in West Germany. The first part is devoted to an attempt to work out the bases for the Law against Restraint of Trade (GWB) in order to show what its relations are to copyright law, and the second, to special problems, in the field of cartel law, pertaining to the exploitation of cultural materials.

58. FRIEBERGER, KURT. Der Europarat als Gesetzgeber des Urheberrechts. (31 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 64-74, No. 1/2, Apr. 2, 1960.)

A critical comment concerning the activities of the Council of Europe as "legislator of copyright." The author concludes that it is high time that the Council be reminded that the governments it serves have for the last three quarters of a century undertaken and fulfilled their obligations toward protecting the rights of authors by their accession to the Berne Convention.

59. GOLDBAUM, WENZEL. Dazu die Erwiderung. 31 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 84-85, No. 1/2, Apr. 2, 1960.)

A reply to Lehbruck by the late Dr. Goldbaum. See Item 60, *infra*.

60. LEHBRUCK, GUIDO. Nochmals: Boris Pasternaks "Doktor Schiwago" und der internationale Urheberschutz. 31 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 74-83, No. 1/2, Apr. 2, 1960.)

The author disagrees with the position taken by Dr. Goldbaum in the article which appeared in 29 UFITA 32 (1959), to the effect that "Dr. Zhivago" is protected neither in Italy nor in member countries of

Berne and U. C. C., although first published in Italy, a member of both Berne and U. C. C.

61. LIERMANN, HANS. Zur Problematik eines ewigen Urheberrechts. (31 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 157-162, No. 3/4, May 2, 1960.)

Arguments for and against perpetual copyright in the light of discussions concerning the revision of the West German copyright law.

62. MÖHRING, PHILIPP. Verwertungsgesellschaftenrecht. *Interauteurs*, No. 139 (2. trimestre 1960), pp. 104-109.

A critical examination of the provisions of the West German Draft Law on Performing Rights Societies, issued by the Federal Ministry of Justice in August 1959.

63. NEUMANN-DUESBERG, HORST. Die "verwandte Schutzrechte" im Urheberrechts-Gesetzentwurf 1959. (31 *Archiv für Urheber- Film- Funk- und Theaterrecht* 162-177, No. 3/4, May 2, 1960.)

An examination of the basic questions involved in the legal protection of neighboring rights with special reference to the provisions relating thereto which appear in the latest West German Draft Copyright Law issued by the Ministry of Justice in August 1959.

64. PLAGE, WILHELM. USA—Copyright—Merkblatt (3. Nachtrage): Merkblatt des Copyright Office über choreographische Werke. *GEMA Nachrichten*, No. 47 (July 1960), pp. 23-24.

This article, fourth in a series of "information sheets" concerning U. S. copyright matters of interest to German authors and publishers, explains Copyright Office Circular 51 (Choreographic works). See 7 BULL. CR. SOC. 44, Item 15 (1959).

65. SCHIEFLER, KURT. Zur Regelung des Folgerechts im Ministerialentwurf des Urheberrechtsgesetzes. (31 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 177-207, No. 3/4, May 2, 1960.)

An examination of "droit de suite" in the light of its proposed regulation in the latest West German Draft Copyright Law. Includes a comparative analysis of legislation on the subject, and a discussion of its justification, legal nature, suggestions made for its formulation, and the extent to which it should be granted to alien artists.

66. WICHER, HANS. Folgerecht und Versteigerungsrecht; ein Diskussionsbeitrag zur Urheberrechts[re]form. (31 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 207-209, No. 3/4, May 2, 1960.)

A discussion of the possible effects of a new West German law pertaining to public auctions, effective Oct. 1, 1960, on "droit de suite," offered as a contribution toward copyright law reform in West Germany with special reference to article 41 of the new Ministry of Justice Draft Copyright Law.

67. ZIEGLER, JEAN ALEXIS. Le Fonds National des Arts de la République Argentine. *Interauteurs*, No. 139 (2. trimestre 1960), pp. 110-114.

A review of the organization and functioning of the Argentine National Fund for the Arts, established by decree-laws of Feb. 3 and Apr. 25, 1958. See 5 BULL. CR. SOC. 359, Item 461 (1958).

#### NEWS BRIEFS

68. NEIGHBORING RIGHTS.

The Neighboring Rights Panel met on Friday, August 26, in the new State Department building in Washington, D. C. to review recent developments, discuss the draft treaty prepared at the Hague last May 9-21, and consider future policy with respect to U. S. participation therein. Arthur Fisher, Register of Copyrights, presided, and Arpad Bogsch, Legal Advisor, Copyright Office, commented on the draft convention.

The Panel was established January 1955 to deal with neighboring rights problems. It is composed of individuals from, or with particular knowledge of, the following industries and interests: record producers, broadcasting, motion pictures, book publishers, musicians, actors, U. S. State, Labor, and Commerce Departments, and the Copyright Office.

69. THIRD JOINT SESSION OF UNESCO COPYRIGHT COMMITTEE AND BERNE PERMANENT COMMITTEE.

The Intergovernmental Copyright Committee (UNESCO) and the Permanent Committee of the International (Berne) Union for the Protection of Literary and Artistic Works will hold their fifth and ninth sessions, respectively, and their third joint session, from October 31, 1960 through November 5, 1960, in London. The President of The Copyright Society of the U.S.A., Prof. Walter J. Derenberg, has been invited to attend as observer on behalf of the Society. Dr. Arpad Bogsch of the Copyright Office and a representative of the Department of State will also attend. Professor Derenberg will also represent the International Law Association, as chairman of its Trade Marks and Copyright Committee.

70. COPYRIGHT PUBLICATIONS CENTER AT NEW YORK UNIVERSITY LAW SCHOOL. *Collection of Foreign Periodicals.*

Since the establishment of the Copyright Publications Center, co-sponsored by New York University Law School and the Copyright Society of the U.S.A., in 1959, the leading foreign periodicals dealing specifically with literary and artistic property and related fields have been received regularly. Our collection includes a steadily growing number of back volumes.

The periodical collection is now available at the Center to all interested members of the Copyright Society and others authorized to use the library facilities of New York University Law School.

For the convenience of members and subscribers to THE BULLETIN, we list hereinafter the foreign periodicals which are now being received regularly. Included are some publications which deal only partially with copyright, but are deemed of sufficient interest to warrant inclusion. The list is arranged alphabetically according to country. It is planned to issue supplemental lists from time to time

Our members and friends will note that we still lack early volumes of some important publications, and, of course, we would welcome any gifts that would help to complete the files.

- AUSTRIA: OESTERREICHISCHE BLAETTER FUER GEWERBLICHEN  
RECHTSSCHUTZ UND URHEBERRECHT  
1953 to date  
*Published:* Bi-monthly at Vienna  
*Covers:* All phases of industrial property and copy-  
right
- BELGIUM: REVUE DE DROIT INTELLECTUEL  
1956 to date  
*Published:* Bi-monthly at Brussels  
*Covers:* Industrial property and copyright
- CANADA: FOX'S PATENT, TRADE MARK, DESIGN AND COPY-  
RIGHT CASES  
1940 to date (v. 1-18)  
*Published:* Annually at Toronto
- FRANCE: REVUE INTERNATIONALE DU DROIT D'AUTEUR  
1953 to date  
*Published:* Quarterly at Paris (articles in 3 lan-  
guages, French, English, Spanish)  
*Covers:* Copyright

INTER-AUTEURS

October 1960

*Published:* at Paris

Official publication of CISAC

REVUE INTERNATIONALE DE LA PROPRIETE INDUSTRIELLE ET ARTISTIQUE

1949 to date (v. 1-40)

*Published:* Quarterly at Paris

Official publication of the Union des Fabricants; covers industrial and artistic property

COMMUNICATION (*Revue Internationale de la Concurrence*)

1956 to date

*Published:* Monthly at Paris

Official publication of the International League Against Unfair Competition

GREAT BRITAIN:

THE AUTHOR

1955 to date

*Published:* Quarterly at London

Official publication of the Society of Authors

PERFORMING RIGHT

1954 to date

*Published:* Annually at Banbury, England

Official publication of the Performing Right Society, Ltd.

REPORTS OF PATENT, DESIGN, AND TRADE MARK CASES

1950 to date

*Published:* Monthly at London by the Patent Office  
Official British Case Reports, covering all phases of industrial property and copyright

ITALY:

IL DIRITTO DI AUTORE

January 1944 thru June 1946

January 1947 to date

*Published:* Quarterly at Rome

Official publication of the Italian Society of Authors and Publishers, covering all phases of copyright

RIVISTA DELLA PROPRIETA INTELLETTUALE ED INDUSTRIALE

1952 to date

*Published:* Quarterly at Milan

*Covers:* Industrial property and copyright

RASSEGNA DELLA PROPRIETA INDUSTRIALE, LETTERARIA ARTISTICA

1954 to date

*Published:* Bi-monthly at Milan

*Covers:* Industrial property and copyright

RIVISTA DI DIRITTO INDUSTRIALE

1952 to date

*Published:* Quarterly at Milan

*Covers:* All phases of industrial property

BOLLETTINO DELL'UFFICIO DELLA PROPRIETA LETTERARIA, ARTISTICA E SCIENTIFICA

1959 to date

*Published:* Monthly at Rome, by the Copyright Office  
Official bulletin, covering copyright

THE NETHERLANDS: BIJBLAD BIJ DE INDUSTRIELE EIGENDOM

1958 to date

*Published:* Monthly at 'Gravenhage, by the Patent Office

*Covers:* All phases of industrial property

SWITZERLAND:

REVUE SUISSE DE LA PROPRIETE INDUSTRIELLE ET DU DROIT D'AUTEUR

1955 to date

*Published:* Bi-annually at Zurich

Official publication of the Swiss AIPPI; covers industrial property and copyright

E.B.U. REVIEW (*Sound and Television Broadcasting News*)

1958 to date

*Published:* Bi-monthly at Geneva

Official publication of the European Broadcasting Union

## E.B.U. DOCUMENTATION AND INFORMATION BULLETIN

July 1950 through November 1957

*Published:* Bi-monthly at Geneva by the European Broadcasting UnionWEST GERMANY: GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT  
1949 to date*Published:* Monthly at Weinheim*Covers:* All phases of industrial property and copyrightGEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT  
AUSLANDS—UND INTERNATIONALER TEIL

1954 to date

*Published:* Monthly at Weinheim*Covers:* All phases of industrial property and copyright (GRUR International Section)

## ARCHIV FUER URHEBER- FILM- FUNK- UND THEATERRECHT

1955 to date

*Published:* Monthly at Baden-Baden*Covers:* All phases of copyright with particular emphasis on motion picture law

## G.E.M.A. NACHRICHTEN

1957 to date

*Published:* Quarterly at Berlin by the German Performing Rights Society*Schriftenreihe* (Monographs)

## INTERNATIONALE GESELLSCHAFT FUER URHEBERRECHT E.V.

V. 1 (1955) through v. 19 (1960)

*Published:* Periodically at Berlin

Monographs dealing with all phases of copyright

## WIRTSCHAFT UND WETTBEWERB

1955 to date

*Published:* Monthly at Düsseldorf*Covers:* Cartels, antitrust law, and all phases of unfair competition

UNESCO: COPYRIGHT BULLETIN

1948 to date (v. 1-13)

*Published:* Bi-annually at Paris—trilingual

SUPPLEMENT TO COMPILATION OF OFFICIAL DOCUMENTS OF INTERGOVERNMENTAL ORGANIZATIONS CONCERNING NEIGHBORING RIGHTS  
1955 to date

COPYRIGHT LAWS AND TREATIES OF THE WORLD  
1956 to date

*Annual Supplements, 1957, 1958, 1959*

*Published:* Annually at Washington by UNESCO, the United States Copyright Office and the Industrial Property Department of the Board of Trade of the United Kingdom

BERNE BUREAU:

LE DROIT D'AUTEUR

1952 to date

*Published:* Monthly at Geneva

Official publication of the International Union for the Protection of Literary and Artistic Works

LA PROPRIETE INDUSTRIELLE

1949 to date

*Published:* Monthly at Geneva

Official publication of the International Bureau for the Protection of Industrial Property

INDUSTRIAL PROPERTY QUARTERLY

1956 to date

*Published:* Quarterly at Geneva

Official publication of the International Bureau for the Protection of Industrial Property (in English)



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## **COPYRIGHT LAW REVISION STUDIES**

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13. Works Made for Hire and On Commission, by Borge Varmer.

#### **FIFTH COMMITTEE PRINT STUDIES 14-16**

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15. Photoduplication of Copyrighted Material by Libraries, by Borge Varmer.
16. Limitations on Performing Rights, by Borge Varmer.

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17. The Registration of Copyright, by Professor Benjamin Kaplan.
18. Authority of the Register of Copyrights to Reject Applications for Registration, by Caruthers Berger.
19. The Recordation of Copyright Assignments and Licenses, by Alan Latman, assisted by Lorna G. Margolis and Marcia Kaplan.

These are the fourth, fifth and sixth of a series of Committee Prints published by the Sub-committee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, pursuant to Senate Resolution 240, 86th Congress, Second Session. The prints are available from the Superintendent of Documents, U. S. Government Printing Office, Washington 25, D. C.: the fourth committee print 45 cents, the fifth print 35 cents, the sixth print 40 cents a copy.

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**Arthur Fisher**

*May 3, 1894–November 12, 1960*

## Arthur Fisher

When it became known during the joint meeting of the UNESCO Intergovernmental Committee and the Permanent Committee of the Berne Union at London early in November 1960 that Arthur Fisher, our Register of Copyrights and the official representative of our country at every previous gathering of these groups, was unable to attend for reasons of health, a resolution was immediately adopted by the delegates from over thirty countries to dispatch a special telegram expressing heartfelt wishes for his speedy recovery. Only one week later it was learned that, shortly after he had received this tribute, Arthur Fisher passed away as a result of an attack of acute leukemia at Georgetown Hospital in Washington.

Since Arthur's death, numerous editorials and eulogies have been published, acknowledging the enormous contribution of this dedicated public servant toward the revision of our outmoded domestic copyright law and toward substantial improvement of our international copyright relations.

There would seem to be little need, therefore, once more to review the evidence of his leadership in these fields. Suffice it to recall that with the assistance of a board of distinguished copyright experts from our country, Arthur Fisher played a vital part in bringing about the creation of the Universal Copyright Convention and—perhaps an even more difficult task—its ultimate ratification by the United States Senate after the necessary domestic legislation implementing the treaty had been passed under his guidance as Public Law 743 in 1954.

However, Arthur Fisher's devotion to the task of awakening our country from copyright isolationism and assuring our participation in the solution of related problems concerning international protection of intellectual property did not end with the ratification of the UNESCO Convention. On the contrary, this proved to be only a starting point for his pioneering efforts and intense studies in the areas of neighboring rights and international design protection. It is largely due to his efforts and vision that the copyright and patent bars in the United States have begun to realize the ultimate significance of these problems and the need for our country to make its voice heard with regard thereto, even though our present philosophy may differ substantially from that prevailing in European countries. Arthur's untimely death has now brought his efforts to a halt just a short time before the proposed convocation of Diplomatic Conferences intended to formulate international agreements in these areas.

At the same time, Arthur Fisher developed an ambitious and forward-looking project aiming toward the complete revision of our Copyright Act

of 1909. With the assistance of a specially selected panel of experts and Arthur's own able staff, the groundwork for such revision has been laid by the preparation of studies (now published as Senate Documents) comprising upwards of thirty scholarly essays intended to serve as the basis for drafting a new United States Copyright Act. The revision program, writes Frederic Melcher in *Publisher's Weekly*, may be considered "a monument to Arthur Fisher, lawyer of statesmanlike vision and constructive power."

Thus far I have only mentioned Arthur Fisher's well-recognized contributions toward national and international copyright generally. To this I must now add the unique role which Arthur played in the formation of The Copyright Society of the U.S.A. and the publication of its BULLETIN. It can be stated without exaggeration that he was actually the founder of the Society and the *spiritus rector* in bringing it into being. If our publication may have found substantial support and praise, both here and abroad, its success must in no small part be attributed to Arthur Fisher's untiring interest and collaboration in the publication of each issue of the BULLETIN during the past eight years.

Moreover, none of us who had the privilege of close cooperation with Arthur Fisher will ever forget his profound interest in law teaching and law school activities. As a former law professor, Arthur realized that the ultimate success of all efforts toward more effective protection of every form of intellectual property will depend, in the last analysis, on the understanding and interest which may be aroused by inspired teaching and by the availability of well-supplied copyright law libraries. It was with this objective in mind that he made available the resources of his Office and his personal advice for projects such as the recently founded Copyright Publications Center at the Law School of New York University, and similar collections in California and elsewhere in this country.

In honoring his memory, the Society will make every effort to preserve and improve the scholarly and impartial character of its publication as originally conceived and subsequently fostered by the founders of the Society with Arthur Fisher's help.

Our readers may recall that this courageous and dedicated man, in late August 1960, found the strength to participate in the Copyright Symposium held during the meeting of the American Bar Association, without giving any sign even to his closest friends or to his associates in the Copyright Office that he might not have another opportunity to address the Bar.

Our Society and copyright owners and lawyers everywhere will honor his memory by trying to continue his life's work and follow the path he blazed.

WALTER J. DERENBERG

## PART I.

## ARTICLES

70. THIRD JOINT MEETING OF UNESCO INTERGOVERNMENTAL  
COPYRIGHT COMMITTEE AND BERNE PERMANENT  
COMMITTEE

*(London, Oct. 31–Nov. 4, 1960)*

By WALTER J. DERENBERG

The Intergovernmental Copyright Committee and the Permanent Committee of the International (Berne) Union for the Protection of Literary and Artistic Works held their fifth and ninth sessions, respectively, from October 31 to November 4, 1960, in London, England.

This was the third joint meeting of the two Committees since 1958 (see 6 BULL. CR. SOC. 26, Item 2 (1959)). As in the two previous years, it was the purpose of the joint meetings, which are well attended, to discuss basic international copyright problems and to consider possible revision of the Universal Copyright Convention and the Berne Convention. There were 31 countries represented at the London meeting, as well as four intergovernmental and eighteen nongovernmental organizations. Among the latter were the International Law Association and The Copyright Society of the U.S.A., both of which the writer represented as observer upon special invitation by both UNESCO and the Berne Bureau.

The meetings were held at Church House, Westminster, and were opened by Professor Eugen Ulmer of Munich, as Chairman of both Committees; the Committees then proceeded to elect as Chairman for the London meeting Mr. Gordon Grant, Comptroller General of the British Patent Office and Head of the Industrial Property Department, Board of Trade (U.K.), and as Vice-Chairman, Mr. Shizuo Saito, Counsellor, Embassy of Japan, London (Japan).

The following five items were discussed jointly by the two Committees, although each group, as in the past, voted separately on resolutions which were subsequently adopted with regard to these items:

- (a) Criminal prosecution of copyright infringement
- (b) International protection of performers, recorders and broadcasters ("Neighboring rights")
- (c) International protection of works of applied art and designs

- (d) Rights in cinematographic works
- (e) Cooperation between the UNESCO Secretariat and the United International Bureaux in matters of publications.

At the first meeting, the Secretary of UNESCO's Copyright Division, Mr. Juan O. Diaz Lewis, presented a comprehensive report on the present status of the Universal Copyright Convention. He mentioned that only one State, Belgium, had since the Munich meeting in 1959 (see 7 BULL. CR. SOC. 117, Item 163 (1960)) deposited with the Director-General of UNESCO its instrument of ratification, bringing to 35 the number of States which are parties to the Convention. He reported, however, that progress had been made in certain States (Colombia, Panama, the Scandinavian countries, the Netherlands, Australia, Canada, New Zealand, and Venezuela) tending towards ratification of or accession to the Convention.

## A. JOINT RESOLUTIONS

I. *Criminal infringement.* The first jointly discussed problem concerned the finding of ways and means to bring about more effective criminal prosecution of copyright infringers; this point had originated with a proposal by the Government of India at the Munich 1959 meeting. The Indian proposal consisted of four major points:

- (i) If a copyright is alleged to have been infringed, to what authority in the country of infringement may a complaint be addressed?
- (ii) Who is entitled to complain in the case of such an infringement? In particular, apart from the author or copyright proprietor, is it possible for a foreign government so to act on behalf of its nationals or for an organization to proceed on the author's or copyright proprietor's behalf?
- (iii) To what extent will criminal proceedings require the presence of the injured party?
- (iv) What administrative steps may be taken to prevent an infringement of copyright?

At the Munich meeting the UNESCO Secretariat and the Bureau of the Berne Union were invited to prepare comprehensive reports on presently available statutory provisions concerning criminal copyright infringement in the various countries and such reports were presented at the London meeting. After joint discussion by both Committees, Resolution No. 36(V) was separately voted and adopted by both Committees and may be found as *Appendix I* to this report.

II. *Neighboring rights.* This problem was examined at a joint meeting of both Committees. The Committees had before them two reports, one from the Bureau of the Berne Union and the other from the UNESCO Secretariat.

The reports particularly referred to the meeting of the Committee of Experts of The Hague, in May 1960, under the auspices of the International Labour Office, UNESCO and the Berne Union, which had adopted a draft International Convention concerning the Protection of Performers, Makers of Phonograms and Broadcasters (see 8 BULL. CR. SOC. 31, Item 15 (1960)). In addition, the reports also dealt with the measures included in the European Arrangement on the Protection of Television Broadcasts, signed on June 22, 1960 by representatives of the Governments of Denmark, Greece, France, Ireland, Italy and Turkey (see text in French and English at 73 *Le Droit d'Auteur* 201-206 (July 1960), reported 8 BULL. CR. SOC. 45, Item 17 (1960)), and considered limitations of the Arrangement with regard to its subject, duration and territorial scope in accordance with the resolutions adopted by the Committees at their previous joint sessions.

The Committees were then advised by Mr. Gérard Bolla, of the UNESCO Secretariat, that the Italian Government had invited the Directors-General of the International Labour Organization, UNESCO, and the Director of the Bureau of the Berne Union to hold a Diplomatic Conference in Rome in the Spring of 1961 for the purpose of adoption of the new Convention.

It was the consensus of the majority of delegates, however, that the holding of the Diplomatic Conference in the Spring of 1961 would be premature, since it was unlikely that the respective Governments would have had sufficient time to study the comments of other Governments by that time, and that the date for the Conference should not be set before October 1961. Both Committees then separately adopted a resolution to this effect (appended to this report as *Appendix II*). Two Member States of the Intergovernmental Committee (the United States and France) abstained from voting on this resolution on the ground that their Governments had not yet formulated a final opinion about the desirability of such a Conference and their participation therein.

III. *Cinematographic works.* There was also joint discussion of the controversial problem of rights in cinematographic works. In this respect the Committees examined two documents, jointly prepared by UNESCO and the Bureau of the Berne Union, one of which contained an analytical study prepared on implementation of the resolutions adopted at the Munich meeting in 1959. Both Committees agreed upon appointing a small working committee, whose report may serve as a basis for the next Diplomatic Conference for the Revision of the Berne Convention, to be held in Sweden in 1965. This working group may desire to invite interested private organizations to express their views. After thorough discussion, both Committees adopted a resolution to this effect, which may be found in *Appendix III* hereto.

IV. *International design protection.* There was also joint discussion of the problem of international protection of works of applied art and design. While no specific resolutions were adopted on this subject, attention centered primarily around Article 14 of the Draft Arrangement on the International Deposit of Designs drawn up in 1959 in The Hague (see text, 7 BULL. CR. Soc. 82, Item 86 (1959)), which provides that the provisions of the Arrangement shall not prevent the claiming of wider and possibly dual protection resulting from the domestic law of a Contracting State, and shall not affect in any way the protection granted to works of art or works of applied art by international treaties or conventions.

Both Committees, after having considered the possible impact of Article 14 on formalities in either the design or copyright fields and their interrelationship, jointly agreed on the following propositions submitted by the representatives of the United States:

(1) The mere fact that an article bears a copyright notice, such as the international symbol established by Article III of the Universal Copyright Convention, or that it has been registered as a work of art or work of applied art under the domestic copyright law of a country, shall not affect the eligibility of any design incorporated in such an article for registration on the International Designs Register, or for the protection as a design in countries permitting cumulative protection or design protection only.

(2) The mere fact that a work of art or work of applied art bears a design notice, such as the international symbol provided for in Article 9 of the Draft Arrangement on the International Deposit of Designs, or that it has been registered as a design under the domestic law of a country or on the International Designs Register, shall not affect its eligibility for protection as a work of art or a work of applied art under domestic copyright statutes and international copyright treaties or conventions in countries permitting cumulative protection or design protection only.

There was general agreement that no country would be obligated to grant both copyright and design protection at the same time. Both Committees then decided to communicate their views to the Diplomatic Conference at The Hague to be held November 14-26, 1960, concerning revision of the Draft Arrangement on the International Deposit of Designs drawn up in 1959 at The Hague.<sup>1</sup>

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1. The United States is represented at The Hague meeting by several official delegates including Dr. Arpad Bogsch, of the Copyright Office, and P. J. Federico, of the United States Patent Office. We expect to advise our readers in detail of the results of this meeting in one of the next issues of THE BULLETIN.

V. *Cooperation re publications.* Both Committees also had a helpful and constructive joint session discussing closer cooperation between themselves in the matter of publications. The following is quoted with regard to this item from the comprehensive report by the UNESCO Secretariat on the London meeting, which has just become available:<sup>2</sup>

The Committees expressed satisfaction with the recent publication of the Spanish version of "Copyright Laws and Treaties of the World" and with the impending completion of the French version of the same work, prepared jointly by the two Secretariats with the assistance of the Belgian, French and Swiss Governments. As far as other publications are concerned the Committees welcomed the announcement that negotiations were in progress between the two Secretariats for the publication in English and Spanish in the UNESCO Copyright Bulletin of certain of the articles appearing in French in the Berne Union's "*Le Droit d'Auteur.*" Moreover, they expressed approval of the co-operation to be established between the two Secretariats tending towards the publication of résumés of court decisions in collaboration with such national institutions as the Copyright Society of the United States and the Intellectual Property Institute of the University of Munich. The Committees expressed the wish that co-operation in publication matters should be as close as possible between the two Secretariats in order to have as wide a reading public as possible.

## B. SEPARATE RESOLUTIONS

We shall now briefly report on those questions which were separately discussed and on some of which resolutions were passed by only one of the two Committees.

### *(Intergovernmental Committee)*

(a) Turning first to the Intergovernmental UNESCO Committee, there was an interesting discussion with regard to the advisability of sending a circular letter to States presently members of the Universal Copyright Convention, requesting their views on the need of an early revision of the Convention with regard to such points as minimum rights, translation rights, and the definition of the concept of "publication." It was decided unanimously that such circular letter should not be sent at the present time in view of the fact that several countries are presently engaged in the process of ratifying the Convention or adhering thereto, and that it would be inad-

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2. RECORDS, Intergovernmental Copyright Committee, Fifth Session, London, November, 1960, published at Paris 10 November 1960 in English, French and Spanish.

visible to create the impression that a revision of the Convention was imminent. It was, however, agreed to give further study to the three problems referred to. Messrs. Bogsch (U.S.A.) and Professor Ulmer (Fed. Rep. of Germany) were invited by the Chairman to act as consultants to the Secretariat in the further study of these questions.

(b) The Intergovernmental Committee also considered a report prepared by the Secretariat after the Munich meeting on the protection of translators. The Committee had before it a comprehensive study of protection of translators outside the Member Countries and an elaborate report prepared by the International Federation of Translators, seeking broader copyright protection for its members. While the Federation's report raised many interesting questions of the moral right and related problems of translators, it was the sense of the Committee that some of these questions were outside its jurisdiction and would, in fact, if adopted, result in broader protection to translators than to the authors of the original works. No formal resolution was adopted with regard to these problems.

(c) One of the most important subject matters which was taken up by the Intergovernmental Committee was UNESCO's desire to provide assistance to other States or newly recognized States in the field of copyright, with a view toward ultimate ratification by those States of the Universal Copyright Convention. Dr. Bogsch (U.S.A.) called the Committee's attention specifically to the fact that since the Munich meeting, a number of African countries had become independent nations; he suggested that everything should be done through the sending of experts or through special regional meetings to assist such new nations. It was the view of the Committee that a program should be envisaged which may be used to give assistance not only to nations already recognized but also to those which may become independent in the foreseeable future. This discussion resulted in the adoption of Resolution No. 39 (V) appended to this report as *Appendix IV*.

*(Berne Union Committee)*

The Permanent Committee of the Berne Union adopted three separate resolutions, (1) on the composition of the Committee, (2) on the suggestion of possible extension of the time of copyright after the author's death, and (3) concerning the transfer of the Bureau's headquarters from Berne to Geneva. These three rather brief resolutions are appended to this report as *Appendix V*.

At the end of the sessions, the two Committees accepted an invitation extended by the representative of Spain on behalf of his Government to hold the next joint meeting in his country. It was suggested that the time of the meeting should be arranged so as to make it possible for representatives

coming from other Continents to attend that meeting as well as the proposed Diplomatic Conference on Neighbouring Rights to be held in Italy at approximately the same time. It was also suggested that perhaps the joint meetings should in the future be convened every two years, rather than every year; and that, in view of the fact that both the Berne Bureau and UNESCO had now well-equipped headquarters, it may be desirable to hold future meetings at one or the other.

In conclusion, reference should be made to an exceptionally interesting problem which was not formally on the Agenda of either Committee but which it was believed merited attention of all those interested in musical copyright and, more particularly, in certain aspects of the moral right. The representative of France advised the meeting that an intensive study had recently been undertaken by a music scholar from which it appeared that certain musical scores were currently published in versions substantially different from the original manuscript scores of the composers which, in some instances, are unavailable to contemporary musicians and scholars.

Inasmuch as the author of this study, Denis Vaughan, was present at the meeting, both Committees extended an invitation to him to address the meeting on this subject. In view of the considerable interest created by Mr. Vaughan's presentation, both Committees decided to ask their Secretariats to make Mr. Vaughan's statement available to all Members and to give further study to the problems raised in his report. Through the courtesy of Mr. Vaughan, his manuscript has been made available to the Copyright Society in advance of its proposed general distribution and we are pleased to print the text of his address separately following this report.

### *Appendix I.*

#### INTERGOVERNMENTAL COPYRIGHT COMMITTEE RESOLUTION No. 36(V) PERMANENT COPYRIGHT COMMITTEE RESOLUTION No. 3

#### *Criminal Proceedings in Case of Copyright Infringement*

The Permanent Committee of the Berne Union,  
The Intergovernmental Copyright Committee,

HAVING considered the reports submitted by the Bureau of the Berne Union and by the Secretariat of UNESCO,

HAVING noted the lack of uniformity of national legislation as regards possible criminal proceedings for infringement of copyright as well as the fundamentally different procedure applicable in such cases in the several States,

RECOMMENDS States which belong to the Berne Union or are parties to the Universal Copyright Convention to facilitate the application of criminal proceedings in case of infringement of copyright,

INVITES the Bureau of the Berne Union and the Secretariat of UNESCO to carry out a joint enquiry in States which belong to the Berne Union or are parties to the Universal Copyright Convention on the following points:

- (i) If a copyright is alleged to have been infringed, to what authority in the country where this has taken place can complaint be made?
- (ii) Who is entitled to complain in the case of such an infringement? In particular, apart from the author or copyright proprietor, is it possible for a foreign State so to act on behalf of its nationals or for any organisation so to act on this author's or copyright proprietor's behalf?
- (iii) To what extent do proceedings necessitate the physical presence of the injured party?
- (iv) What are the administrative steps calculated to prevent an infringement of copyright?

IT ALSO INVITES the Bureau of the Berne Union and the Secretariat of UNESCO to make a joint report on this to one of the next joint meetings of the Permanent Committee of the Berne Union and the Intergovernmental Copyright Committee.

### *Appendix II.*

#### INTERGOVERNMENTAL COPYRIGHT COMMITTEE RESOLUTION No. 38(V) PERMANENT COPYRIGHT COMMITTEE RESOLUTION No. 6

#### *Neighbouring Rights*

The Permanent Committee of the Berne Union,  
The Intergovernmental Copyright Committee,

HAVING noted with thanks the kind invitation extended by the Italian Government to convene at Rome the diplomatic Conference for the adoption of an International Convention concerning the Protection of Performers, Makers of Phonograms and Broadcasters,

CONSIDERS that the draft final clauses jointly prepared by the three Secretariats should be submitted to the governments as soon as they are ready, so as to enable them to transmit their comments on the draft final clauses as well as on the results of The Hague Committee of Experts (1960) together,

CONSIDERS that in order to give each government time for the study of the comments of other governments on the Draft Convention of The Hague as well as on the draft final clauses, the Directors-General of the I.L.O. and UNESCO and the Director of the Berne Bureau, in agreement with the Government of Italy and in the light of the comments received from the governments should convene the diplomatic Conference in 1961, but not earlier than October of that year.

### *Appendix III.*

#### INTERGOVERNMENTAL COPYRIGHT COMMITTEE RESOLUTION No. 37(V) PERMANENT COPYRIGHT COMMITTEE RESOLUTION No. 5

#### *Rights in Cinematographic Works*

The Permanent Committee of the Berne Union,  
The Intergovernmental Copyright Committee,

HAVING taken note of the reports submitted by the Bureau of the Berne Union and by the Secretariat of UNESCO,

CONSIDERS that the analytical working document jointly prepared by the Berne Union and the Secretariat of UNESCO constitutes an appropriate basis for further study,

INVITES the Chairman to set up, in agreement with the Director of the Berne Union and the Director-General of UNESCO a small working group which may seek the views of all interested groups. The opinion of the Members of this working group shall have no binding effect on their respective governments. The working group shall present its report to a future joint session of the Permanent Committee and the Intergovernmental Copyright Committee, preferably in 1961, but not later than 1962.

#### *Appendix IV.*

### INTERGOVERNMENTAL COPYRIGHT COMMITTEE RESOLUTION NO. 36(V)

#### *UNESCO Program of Participation in the Activities of Member States*

The Intergovernmental Copyright Committee,

HAVING noted with satisfaction the proposals submitted by the Director-General to the General Conference of UNESCO at its 11th session concerning the inclusion of copyright within the framework of the Organization's Programme of Participation in the activities of Member States in accordance with the recommendation in this regard formulated by the Committee at its 4th session,

NOTING that since the drafting of the Director-General's proposals to the General Conference a number of States on the African Continent have become independent,

CONSIDERING that the protection of the rights of intellectual creators constitutes an important institution in the development of national culture,

CONSIDERING, moreover, that the formulation of the legislative principles of such protection is one of the fundamental factors in the organization of the cultural life of the new States,

CONSIDERS, that UNESCO should provide the necessary assistance to those States in order to enable them to set up legal institutions for the protection of copyright and to establish international copyright relations with the other States of the world through accession to one or more of the multilateral copyright conventions,

CONSIDERS, further, that the assistance in question should, upon the request of the States concerned, take one of the forms provided by the general principles of the so-called Participation Programme,

DRAWS ATTENTION to the necessity to provide additional funds to satisfy the apparently urgent needs in the field of copyright of the new African States and of States in other regions of the world,

RECOMMENDS to the Director-General, that in view of the accession to independence of a number of States on the African Continent, he make to the General Conference, at its 11th session, the necessary proposals to widen the scope of the Participation Programme in the field of copyright, in order to enable him to satisfy the urgent needs of the new States and of States in other regions of the world.

#### *Appendix V.*

### PERMANENT COPYRIGHT COMMITTEE RESOLUTIONS NOS. 1, 2 AND 8

#### *On the Composition of the Permanent Committee:*

The Permanent Committee of the International Union for the Protection of Literary and Artistic Works,

HAVING taken note of Canada's resignation from, and of Spain's application for, membership of the Permanent Committee,

And having regard to Article 4 of the Provisional Rules,

DECIDED to admit Spain to membership of the Permanent Committee in Canada's place.

*Concerning the Extension of the Terms of Protection After the Author's Death:*

The Permanent Committee of the International Union for the Protection of Literary and Artistic Works,

HAVING considered the International Bureau's report on the inquiry conducted in the countries belonging to the Berne Union as a result of Resolution No. 1 carried at the Permanent Committee's 8th session,

CONSIDERING that, of 44 member countries, 34 have so far replied to this question, 4 replies being favourable to prolongation, 8 States taking no position, 2 having deferred their replies, and 20 declaring themselves opposed to prolongation,

INVITES International Bureau for the Protection of Literary and Artistic Works to give consideration to a draft additional protocol to the Berne Convention, open to all countries belonging to the Berne Union and wishing to have such prolongation.

*On the Transferring of the Headquarters of the United International Bureaux to Geneva:*

The Permanent Committee of the International Union for the Protection of Literary and Artistic Works,

HAVING heard a report by the Director of BIRPI on transferring the headquarters of these Bureaux to Geneva,

LEARNED with pleasure that these Bureaux had suitable accommodation, including a well-equipped library.

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## 71. THE PROBLEM OF MORAL RIGHTS IN THE PRESERVATION AND AVAILABILITY OF ORIGINAL MUSICAL SCORES

By DENIS VAUGHAN\*

### *Introduction.*

The matter of music is one of the most intangible and powerful means of stirring the emotions. To make musical sounds which are not charged with meaning or intention is one of the growing habits of the day, and the ear is being taught to "stare" at every minute of the clock. Not only is background music, intended to arouse no emotional response, being trained on our dulled senses, but music which is charged with artistic expression is being presented in such a way that the sounds do not carry their full import. That this is due to a lack of personality on the part of the interpreter is one possible reason, but another might be that some barrier is being erected between the composer and the interpreter, bringing with it a weakening of individuality and a consequent lack of character in performance.

I have worked for many years with Sir Thomas Beecham, first as a performer on the organ, pianoforte, harpsichord and double bass, and then as his Assistant Conductor and Chorus Master. This contact has taught me more about the matter of music than any other single influence in my life, showing me not only how to extract the individual characteristics of each composer and each nationality, but many of the technical details which can mean life or death in the transmission of a musical phrase.

Sir Thomas, in common with several great conductors including Toscanini and Bruno Walter, had the habit of adding many signs to the printed music in order to explain his interpretation clearly to the orchestral musicians, which allows him to conjure the effects to life in performance by his use of gesture without having worried the executant by the deadening repetition and verbal explanation of the phrase during rehearsals. From the study and placing of these signs, it has become obvious that to move them even slightly can change the whole meaning of a phrase, a point on which every great or sensitive performer agrees.

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\* Mr. Vaughan is an Australian conductor and musicologist. This address was presented at a meeting of the Berne Permanent Committee during the London November 1960 meeting, to which members of the UNESCO Intergovernmental Committee were invited. See *supra*, p. 77.

*The Problem of the "Urtext"*

In the last few years I have been able to study the manuscripts of many composers, particularly of those who wrote for the theatre. Taking into account the changes which the composer made or might have made in the printing proofs and elsewhere, I have been surprised to find that the current printed editions still tend to differ, in many cases widely, from the documented intention of the composer, mainly as regards the dynamics and other signs which form an integral part of the music. Whilst examples are to be found in Bizet's "Carmen," Debussy's "Pelleas and Melisande" and works of Berlioz and Rossini, particularly striking examples have appeared in the works of Verdi and Puccini.

For simplicity may I examine the case of Verdi's "Falstaff"? Books and articles have been written showing that the alterations which Verdi wrote into his printing proofs were later transferred in his own hand to the autograph score, making this document the chief expression of his wishes. On the last page of the second Act he wrote *one* accent. In the edition published in 1912 this was amplified to become 20 accents. In two subsequent editions, dated 1954 and 1959, these were further amplified to become 214 accents—one to almost every note on the page. This cancerous growth is to be found in some form or other throughout the score, each page showing an average of 60 changes, many of which are posthumous. All the other printed works of Verdi and Puccini bear evidence of a similar procedure.

This might be accounted for as the addition of theatrical performing traditions, although there is no indication to this effect on the title page, which announces merely that the later editions are "revised and *corrected*." None of these editions, printed by publishers in several countries, corresponds with the manuscripts, or with the large orchestral score which Verdi might have seen during his lifetime.

By musical demonstrations I have shown that these changes are appreciable to the ear, and that they therefore modify the composer's intention in its written form. In any case it is obvious that great composers would not trouble themselves to write signs which would not affect the sound of music.

In the words of Dr. Mosco Carner, an eminent authority on Puccini, "By reproducing the composer's original dynamic marks, tempo changes and manner of playing in a new edition, one would receive a more characteristic, clearer and in some ways, more individual picture of what the composer aimed at in his detailed vocal and instrumental treatment than is the case at present. There can in my opinion be no argument about this." Maestro Tullio Serafin says "There is no doubt that a reprint of the musical material would be extremely interesting if made exactly on the autograph copies of the respective composers and would offer a great advantage to the performers, especially if foreigners

and not in possession of our language. The increased fidelity and clarity of their performances would be indisputable."

Dr. Bruno Walter says "To be sure of the Urtext is essential to the adequate performances of our great composers' scores." These opinions are endorsed by Igor Stravinsky, Thomas Beecham, Pierre Monteux, Vittorio Gui, Antonino Votto, Fritz Reiner, Eugene Ormandy, Herbert von Karajan, Ildebrando Pizzetti, Leonard Bernstein, Professor Felsenstein, Professor Westrup and others.

To remedy this alarming situation, partly due to the poor, neglected or disregarded proof-reading by the composers and to the technical inadequacy of their descendants I would like to propose that, where applicable, 1) the droit moral should be capable of being delegated to an external body of experts (similar to auditors in the world of commerce). Due to the fact that composers often write several versions of the same passage, I propose that 2) A single definition of the label "Urtext" be approved: "That system of publishing which reproduces exactly the notes and signs, wherever they may be found in the author's own handwriting, and in which the editorial modifications, whilst being typographically distinguishable, have as their sole aim the correction of imprecisions, and not the addition of interpretative intentions not virtually included in the original text."

3) Serious consideration should be given to the legal stipulation that all editorial modifications, whether restricted to "Urtext" requirements or not, should be typographically distinguishable giving due regard to the engraving costs and legibility.

This system has found precedence in the printing of, for example, the Bible, and is evidently not unacceptable to the general public.

This extraordinary case prompts two further considerations: a more accurate guide is needed to define how much editorial modification constitutes the basis for a new edition. To add 213 signs (without defining their source) to a single page of text is surely sufficient to relabel the edition. But if it is allowed that only slight modification can constitute a new edition, it might be possible to show that in some countries the copyright has not yet started on the unadulterated texts of Verdi.

This leads to the second consideration: whether the conditions which might surround the composer's signing away of his rights, possibly under financial pressure or theatrical haste, should remain the controlling factors, despite the vast structure which has been built throughout the world from the composer's quick gesture. Verdi and Puccini protested on repeated occasions against the inaccuracy of the printing of their texts. Were their families or the State to withdraw the adulterated operas from circulation, as has been suggested, the lives of some of the world's most prominent personalities would

be vitally affected, and many theatres might have to close. This impractical proposition points to the value of an extension of the field of copyright to protect the interests of the consumer, without whom it would not exist. At the moment these consumers are unable to do other than interpret and hear impure material.

That the label should accurately describe the contents is a prime necessity, that the printed matter is accurate is a second. If on top of that the editorial additions were easily recognizable in detail, all possible complaint would then be quelled.

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## 72. LEGAL ASPECTS OF MOTION PICTURE PRODUCTION IN EUROPE \*

By RICHARD COLBY\*\*

This paper will be concerned with problems facing those of us who serve as legal advisors on motion picture and related projects in Europe. It will not attempt to deal with problems of local law, such as wage and social security or tax withholding regulations, which exist, for example, in Italy, or local tax matters in European countries as they affect local residents.

It is my purpose to call your attention to various points related to copyright protection, buying stories in Europe, music in pictures, financing and mortgage techniques and, very briefly, special contracts for stars and directors. I also want to mention what can become the most important document of all, the so-called laboratory pledgeholder agreement with the foreign producer, the American distributor, the laboratory and often the producer's bank. If there are different distributors in different countries and therefore several laboratories, the procedure is more complicated since there are multiple parties sometimes with different interests. The conflicting interests arise because each distributor may want control over the original negative, but is frequently able to accept an arrangement which merely insulates the negative in one laboratory with each party having the right to order prints from, for example, London, or print from dupe negative facilities, with other adequate safeguards in the contracts.

### 1. *Copyright protection for international motion pictures.*

I have found, to my surprise, a lack of appreciation in Europe for the Universal Copyright Convention. I say surprise because I had thought when I first approached these problems that European counsel—that is, those with whom I have dealt—would have embraced that Treaty more completely. It is a magnificent Charter, fathered by many of the distinguished lawyers in this room. Yet, the English publishers of a great treatise on copyright forgot to put a copyright notice on its most recent edition, despite discussion of the Convention within its ample pages. I asked them about this and received the following reply:

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\* Copyright © 1960 by Richard Colby. All rights reserved. Address before the Copyright Bar at New York City, Oct. 21, 1960.

\*\* 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.

"The omission of the copyright notice from this book was a mistake. We are sorry that this happened, but if one must make a mistake, big ones are more fun, and what better book than a book on copyright from which to omit a copyright notice."

From another country, I had a letter indicating that they think we are likely to give up our requirement, and that of the UCC, that there be a copyright notice. The point came up as to an exception in our statute by reason of which no notice is required under a special fact situation, to which I will refer later. My correspondent in Europe wrote to his European client with a copy to me that the United States Copyright Office was striving to reduce to a minimum the formalities surrounding United States law so as to make United States law more consonant with the principles of the Berne Convention embraced by the majority of *civilized* countries.

The lesson I learned from these instances, and others, is that we must make sure that works which emanate from Europe, including books and motion pictures, have proper copyright notices. This can be vital in those instances in which the first publication or distribution occurs in Europe.

I have found that producers in France and Italy may not, unless requested, put a copyright notice on their pictures, their answer being that a notice is not necessary under French or Italian law or under the Berne Convention. After this is explained, as diplomatically as possible, as preferable for UCC international protection to supplement Berne protection, the question arises as to the name of the copyright proprietor. Here the requirements of nationality and subsidy take over.

Since these pictures are frequently entitled to very large government subsidies and must qualify as locally owned and controlled productions, we must not lose the producer's opportunity to get subsidy by placing a copyright notice in the name of an American corporation. The better technique would seem to be a notice in the name of the foreign producer, retaining some control over the copyright by an assignment to the distributor at the appropriate time, or by sufficient safeguards in the contracts.

If a production qualifies for two subsidies, for example, a French-Italian coproduction (and there may soon be British coproductions), it may be advisable to have the copyright and the copyright notice in the name of both the French and the Italian producing organizations. This may actually be necessary to qualify for each subsidy, and reasons of diplomacy again dictate that, if you use one producer's name, you must use the other's name. These productions frequently involve really independent, local producers and raise other practical problems, but on the legal side, this question of the name or names of the copyright proprietor can be extremely important.

However, where there are also different distributors in different countries, the question of divisible copyright under the Convention may arise and sometimes there may even be some distrust between the different financing groups, secrets which do not lend themselves to light luncheon conversation.

Parenthetically, let me add here that proper notices should appear, even on foreign language versions, to ensure UCC protection and avoid the problem whether an English language version is a new work.

If the producer or publisher agrees to a UCC notice, he may still have some reluctance to putting copyright in the producer's name, as distinguished from the persons defined as "authors" in the French and Italian laws. Producers have some fear that they cannot be the copyright owner of the finished motion picture because of the underlying rights of the statutory authors.

In Italy, Articles 44 and 46 provide for certain financial rights of authors of motion pictures, but Article 45 grants the right of economic utilization to the producer. I have suggested to Italian counsel that the use of a copyright notice in the producer's name would protect the authors, not derogate from their rights.

In France, the statute is even more restrictive. Article 1 grants the exclusive property right in a work to its authors, but Article 14 does not list the producer as an author as it does list the director, the authors of the script and the music.

However, I think that the same argument applies and that Article 17 of the French law, which similarly gives the producer the right of exploitation, permits the producer to act, at least, as the trustee of the work, subject to his financial obligations under Articles 26 and 35, which, as you know, provide for the participation of the authors in certain of the receipts.

I think this point of view is being accepted on the basis of protecting, not hurting, the authors' rights. In any event, the UCC would seem to have some control over local law. The first time I inquired why French and Italian producers were not using copyright notices, although the UCC became effective in France in 1956 and in Italy in 1957, I was told that local requirements had been met by registration of the intention to produce a motion picture, and by financial registrations affecting foreign currency with the appropriate Ministry and, therefore, that such films did not need a copyright notice for Berne protection. While true, this procedure does not make use of UCC protection.

I also call your attention to the question whether a uniform copyright notice throughout the world is needed under the UCC. Discussions I have read on this subject indicate that the matter should be considered in terms of whether a particular country follows theories of divisible or indivisible copyright, and whether the Convention notice must be in the name of the original proprietor or the proprietor at the time of distribution and publication. These

theoretic points assume significance with a motion picture which has international financing or different international distributors.

An English view here is that distribution of a motion picture is not a "publication" under English law. However, since it is considered to be a publication under regulations of our Copyright Office and, I believe, under Article VI of the UCC, the English producer and his solicitor will usually agree to our need for a copyright notice.

As these productions assume international and multi-national scope, we will be required to know more and more of the workings of the Berne Convention and the UCC. In so far as problems between two Berne countries may affect your client's property, with related effects under American law, Article XVII of the UCC and its Appendix become important. As you will recall, these declare that the UCC shall not determine rights between two Berne countries as to works having as their country of origin a Berne Convention country. Where motion pictures have Berne country nationality, yet are financed in whole or in part from the United States, there will be problems that can be answered only in terms of the Berne Convention and its applicable Revisions.

The most satisfactory form of copyright notice for maximum international protection for protected literary and cinematographic works is as stated at the head of this paper. If the proprietor is a corporation, the notice is the same and should read, for example:

Copyright © 1960 by Paramount Pictures Corporation.  
All rights reserved.

Each element of the notice is important and is required or desirable by reason of two treaties and the United States Copyright Act. No notice, of course, is required by the Berne Convention or the statutes of the European countries. In view of the fact that the UCC form of notice and the United States notice are identical, for example:

© 1960 by Richard Colby

a brief statement may be helpful to European, Commonwealth and perhaps American counsel as to why I have recommended the additional word "Copyright" and the phrase "All rights reserved".

We generally use the word Copyright in addition to the required UCC copyright symbol, ©, simply to explain, in order to be purposely redundant (out of an excess of caution) and avoid the trouble of needlessly having to defend assured rights. However, the phrase "All rights reserved" is used because of the Buenos Aires Convention of 1910 to indicate a reservation of rights under that Treaty. The members of that Convention include the major countries in the Western Hemisphere.

The increasingly important Latin American market, and the growing trend for foreign properties to achieve success in countries beyond the country of origin, suggest the advisability that all copyright notices take advantage of the simple copyright line first quoted in this paper.

## 2. *Subsidies.*

Since the practical problem I have just stated lends so much influence to foreign subsidies, I would like next to touch upon it. A recent change in French law and a change in English law should be mentioned. In France, since January of 1960, new regulations apply. These regulations provide rates of subsidy which decline over a period of years, looking to their abolition after June 30, 1968.

The most astonishing phase of the French system is the right of the French producer—the real French producer—to get, in addition to a 6% subsidy on receipts in France, a 25% subsidy on his receipts outside Metropolitan France. There are only two qualifications on this to have in mind—we are speaking, with respect to the 25% subsidy, of his share only of distribution profits outside France and, secondly, those receipts must be repatriated to France, subject then to local controls—a risk which may be handsomely overcome by the 25% bonus just stated.

In Italy and in England, the subsidy does not affect earnings outside those countries.

I do not enter upon a detailed statement of the reasons for foreign subsidies—a political question—except to indicate the obvious—the successful desire of those countries to encourage their own producers and to encourage production in their countries.

There is a new Films Act in the United Kingdom which takes effect January 1, 1961. It is known as the Films Act 1960 and should be distinguished from the Cinematograph Films Act of 1960 which the new Act repeals. There are differences in the phrasing between the two 1960 Acts which may be significant. The new statute is a handy document because it codifies the 1948 Act and the 1960 Act, and affects the April 1960 regulations of the Board of Trade.

I call your attention to two changes among others. First, a provision in section 23 permits the Board of Trade to allocate a higher or a lower figure to the salary which may be submitted to it as the compensation of a star or director. This, of course, affects the requirements of British and non-British labor costs. The second change deals with whether the producer can be incorporated in any Commonwealth country or whether it must, if it is a corporation, be a UK company to be eligible for subsidy. If your client is affected by this point, you will want to review the language of section 51 (5) of the Act and particularly section 5 of the Third Schedule attached to the Act.

### 3. *Currency problems.*

In Italy, there has been a recent change with respect to the transfer of blocked lire. *Film Daily* and *Variety* have recently mentioned this. My present information is that, as usual, some restrictions remain and that the use of blocked lire for production of motion pictures, as distinguished from convertibility of portions into dollars, must still be submitted to the unblocking procedures which have heretofore been in effect.

In Spain, I have observed that, before blocked pesetas can be used, an equal sum of new money, for example, English pounds, must be sent into Spain. There are regulations and forms to worry about in each country.

### 4. *Literary rights.*

Here you will find new types of contracts, a lack of understanding of United States copyright renewal problems and some very special situations. For example, in France, under its 1957 Copyright Law, authors, I am told, cannot convey rights in perpetuity. There must be some time limit. Article 31 provides that the rights "shall be delimited as to extent and purpose, as to place, and as to *duration*."

On top of this is the custom of French authors to limit licenses to a period as short as 25 years.

We find that an increasing number of books and plays first come to our attention in Europe so that this subject, apart from where the picture is produced, has always been important in itself. When making a foreign purchase, the parties should have in mind the necessity to file special United States information tax return forms number 1001A.

### 5. *Austrian Copyright.*

I call your attention to an important Proclamation on Copyright by our President. In June, he issued the Austrian Extension Proclamation, the text of which may be found in the June 1960 issue of the Copyright Society Bulletin (7 BULL. CR. SOC. 235, Item 305).

We have found at least one instance in our catalogue of a work which is entitled to the benefits of the Proclamation. Time will not permit a detailed statement of its significance, except to say that a so-called wartime literary work, published abroad *without* a copyright notice in a language other than English between 1938 and 1956 may now until June 1961 be registered and entitled to protection under our statute. In a way this supplements the now discarded *Heim* rule,<sup>1</sup> and gives a statutory base for such Austrian registrations.

I mention this matter because of the importance of Germany and Austria as a source of talent and literature of interest to our clients.

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1. *Heim v. Universal Pictures Co.*, 154 F.2d 480, 68 U.S.P.Q. 303 (2d Cir. 1946).

#### 6. *Special contracts—stars, directors.*

If you represent a foreign star or deal with star contracts on behalf of the producer or distributor, you will want to consider the provisions of French and Italian laws with respect to the right of some persons to participate in the earnings of a picture. In Italy, I find that the contract may substitute a flat amount if one can be negotiated, whereas in France this does not seem to be generally possible. However, the levels of participation in France have thus far been left to negotiation between the parties. I have also found a tendency toward Swiss and Liechtenstein corporations which, in each instance, provide fascinating tax situations.

#### 7. *Moral rights.*

The field of moral rights must be carefully considered as we deal more and more with foreign authors and especially directors in foreign countries. While moral rights cannot be transferred or waived, they can be approved—that is, the final work can be approved, and this will provide some protection for the producer and distributor from a change of mind on the part of the author. For example, Article 22 of the Italian law provides that the adaptation or modification brought to a book by the creation of a motion picture or a play may not be challenged by the author if he was "aware of and accepted the modification." While this sounds like a simple consent, it is more; it is an approval after the work is completed and screened and will be some insurance for the future. The approval can be withheld, but it is at least worth seeking in writing, unless to ask for it would create the problem you want to avoid.

#### 8. *Music.*

This subject is really as broad as the title of this talk, and out of respect for it, I will not try to treat it too broadly or too thinly. Let me mention a few experiences as an alert to the existence of certain problems. I will mention three points—the contract with the composer who scores a picture, the performance right societies, and the mechanical rights societies.

(a) Usually the foreign producer and his attorney in Europe prepare and execute the composer contracts, at least the first few times without consulting the lawyer in New York. The main source of confusion is the renewal term since most of these agreements are not "employments." Whether the renewal should be included will depend on the business arrangement, but frequently it is not separately considered.

(b) Turning to the performance societies, for example, the English, French and Italian—PRS, SACEM and SIAE—I find that each has a different approach to our problems. I do not infer lack of cooperation or understanding, which

have always been excellent, but differences based on local law and its relationship to the situation in the United States, and particularly the law of the ASCAP decree.

It is clear that PRS and SACEM control performance rights to the exclusion of the composer. Their respective members assign the performance rights to them and the user must negotiate licenses where appropriate with them. SACEM has an office in New York, but we contact PRS in London, and SIAE in Rome.

In Italy, SIAE apparently functions more like ASCAP with the composer retaining the right to deal non-exclusively with the user.

While a SACEM license is generally needed for performance in the United States of French music, there are distinctions between French-produced and American-produced motion pictures which affect the manner of payment.

Of course, we know that theatres outside the United States arrange for the performance license so that the need for a special license should be considered in terms of where the picture will be exhibited.

I do not attempt to catalogue the facts as to when a license for the United States should be obtained, but merely wish to indicate that among the factors to consider are the distribution territory, the nationality or membership status of both the composer and the producer, and the legal position of each society in the United States in relation to the law established in the *Alden-Rochelle*<sup>2</sup> case and the ASCAP decree.

(c) At this point I turn for a moment from motion pictures to music publishing and mechanical rights. When dealing with European composers on behalf of a music publisher or when representing composers, you may find that membership in BIEM, the European mechanical rights society, must be considered. (You will understand that I am talking about the *Bureau International de l'Édition Mécanique* as distinguished from the American performance rights society, *Broadcast Music, Inc.*, known as BMI. I will refer to *Bureau International de l'Édition Mécanique* as the Bureau or BIEM.) I have recently corresponded with BIEM in Paris and find that the Bureau does more than issue mechanical licenses on approval of the copyright owner, and collect fees for him. BIEM states that it issues such licenses on its own authority in certain countries without consulting the composer or his publisher. BIEM's letter to me goes on to say that BIEM then divides the royalties between the composer and his assignee according to the contract between them.

A corollary of this is that the music publisher probably does not actually receive the composer's share of mechanical income in these instances, he having already received it from BIEM or its local affiliated society.

BIEM, of course, acknowledges an exception for the United States and

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2. *Alden-Rochelle v. ASCAP*, 80 F.Supp. 888, 78 U.S.P.Q. 197 (S.D. N.Y. 1948).

Canada to its exclusive control of mechanical rights and has confirmed to me that the publisher can deal directly with the phonograph record company for uses in the United States and Canada.

There is an open question whether this exception for the United States and Canada is not actually broader and covers all English-speaking countries. Our London office tells me that this is subject to some negotiation and that in practise the English publishers collect 100% of the mechanical income for the Commonwealth countries, at least until any advance against royalties has been recouped, whereupon a new arrangement is made with the record companies, who thereafter turn over the composer's share directly to BIEM's affiliate in England, an organization called Britico.

Returning now to motion pictures, we find that the motion picture and television synchronization right—a form of recording right in a different medium than phonograph records just discussed—is treated differently by BIEM. These synchronization rights of BIEM members can generally be negotiated directly with the composers or their publishers without regard to BIEM. However, I say "generally" because BIEM has said that there may be some limits on this depending on the citizenship of the composer involved.

As you know, BIEM also licenses users for phonograph record performance in countries, such as France and, I believe, England, which recognize a separate phonograph performance right. The royalties paid to the publisher are, I understand, net of payments to the composer.

There can be a number of variations on these problems, depending on which societies represent the composer. His memberships, such as PRS, SACEM and BIEM, should be verified so that contracts and licenses will comply with each special situation. You will also want to consider whether the contract form of the American Guild of Authors and Composers is applicable.

#### 9. *Financing, security and laboratory agreements.*

The basic motion picture contracts may involve a production-distribution contract, one or perhaps two mortgages depending on how many currencies are involved, a completion bond issued by Film Finances Limited, possibly a co-financing agreement among the investing partners and perhaps also with the English Government lending organization, National Film Finance Corporation, and frequently any number of special payment instructions.

The completion bond, in brief, is a surety document of great importance, by which completion of production by the actual producer in Europe is guaranteed and any cost of production in excess of the approved budget is paid by the guarantor, subject to certain modest conditions. Our experience indicates that a most valuable aspect of the guarantee is the detailed study of the budget, even after approval by the investing distributor, which is made by a company such as Film Finances Limited before it goes on risk. It also provides a con-

siderable service in its preliminary administration of the distributor's money through detailed advice to the producer in Europe, for all of which, needless to say, the producer pays a fee.

Having put a project together, it is our function to protect it, to nurture it and to safeguard it with our lives against impatient clients, unknown creditors, conflicting assignments, and lack of prompt and accurate information. You will want to consider the following possibilities:

In putting together his financing, a producer frequently makes arrangements with several sources. These may include a major distributor here, banks in Rome, Paris and London or investing syndicates, such as we have encountered in England. The preparation of papers to satisfy all the lawyers is staggering and the responsibility frequently falls to the lawyer in New York. Quite often the slightest misdescription in one paper can cause difficulty when that paper is registered, perhaps on the Public Cinematografic Register in Rome, or in the French Curator's Office, or the English Company Registration Office, an official government office. I state this not in criticism of the producer's counsel in Europe, but as an alert to the fact that frequently the only source of coordinated information is the lawyer's office in New York. This need for central control really comes after the basic contracts are prepared and production problems first begin to develop.

I have even received an opinion (which I find hard to understand) from distinguished counsel in Rome that we in New York must recognize and cannot ignore an assignment, by a producer to a bank, of distribution income if that assignment is recorded on the official Italian Register, regardless whether the producer notifies the distributor of the assignment. Our Rome counsel said that registration creates "a presumption of the vesting of rights" under Italian law, and therefore that we are required to remit that share to the assignee and risk a double payment if we do not know about the assignment on the Italian Register. My specific problem was complicated by the fact that the assignment conflicted with another. While it may be easier to avoid periodic checks of the Register in Rome and thus not know what is happening, I have found it better to jump in through Rome counsel and get the Register corrected if you can still get the necessary signatures. Although the concept of being affected by such a unilateral act may offend our sense of the law, it is an important European view, perhaps based on the civil law. This is one, however, that a lawyer will not be able to explain to his client.

In England, there is an interesting procedure with mortgages to secure financing—that is, if you can get romantic about mortgages. We generally record the mortgage in Washington in the Copyright Office, but English counsel have asked us to substitute or, at least, to supplement such recordation by registration in the official English Company Registration Office. Under English

law, I am advised that this is considered notice to the world, at least if the issue is tested in England.

If there is other financing in England, the other parties, such as Lloyds Bank, National Film Finance Corporation, and Film Finances Limited, will doubtless record their mortgages, called Charges, and to ensure equal priority or protection, if that be your arrangement, one must similarly register in England to protect the American client.

The same document can be recorded in our Copyright Office although you will want to have it properly acknowledged. Before the papers are executed, their language should be checked against our usual requirements, for example, the New York Civil Practice Act. English charges may refer to the powers of a Receiver appointed under their Property Act, but these seem to be quite broad. Nevertheless, there are always certain points to be expressly included or excluded.

In Italy, there are several types of security arrangements, called Simple or Private Deeds, Mortgage Deeds, and Acts of Cession, each with different filing fees. When some of the financing is in dollars and some in lire or other currency, the practical difficulties may suggest separate financing documents with the possibility of drafting conflicts between them and the need for clarifying letters and amendments which themselves become rather complicated.

Laboratory pledgeholder agreements, which I described earlier, should be mentioned again here because they are an integral part of the security arrangements.

Running across most of what I have said, and my final point, are the special problems involved in verifying a chain of title when dealing with foreign properties, be they books or finished motion pictures. Outright purchases of completed pictures, as distinguished from investment in pictures in production, can be quite complicated because you will not be familiar with the documents and their history, which would have been the case had you lived through the financing and original contractual problems. The typical sale may involve a French-Italian coproduction in which the seller is not the original producer and may even be three or four steps removed. Some or all of these transfers may be incomplete on paper and some, but not all, may be officially registered. Some of the territorial rights may already have been licensed.

There are other documents to be filed for pictures in production. Usually the foreign producer and his lawyer can handle them but, when possible, he should generally clear the papers with you. You should be consulted by foreign counsel about all these papers which may include currency unblocking license applications and the registration of productions with appropriate government departments before and after completion. There are different techniques for checking chains of title in each country, which supplement search procedures

available in the United States. Local laws generally require these registrations for various purposes and each may reveal additional information. No project should have your approval unless you look into the official registrations in Europe.

There are a few official registers to check, but they may not be conclusive. There are registers in Italy, France and England and, where there are currency restrictions, such as in Spain and Italy, there are treasury documents which can sometimes be examined.

I do not mean to suggest in anything that I have said that European producers and their counsel do not generally understand our point of view. Rather the burden is frequently the other way round. On some of our legal problems they understandably need our help, which will be warmly returned. In the area of financing, subsidy and currency exchange problems, they have a good deal to teach us.

Generally, I believe there is a trend to less control over actual production except through the selection, for example, of the director, with detailed production matters left to local producers. From the legal side, this is important to meet nationality, subsidy and quota rules. The American producer, whether a major company or an independent producer, becomes more a financier and advisor in production matters. It happens that this development has brought new talent to our work, new producers, new directors, new writers and new stars. Many of these talented people are finding opportunities in Hollywood or in independent associations with American companies. A process of learning from one another is going on and we, as hard working counselors, must be prepared for new legal ideas while striving better to learn our own.

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### 73. SOME TAX ASPECTS OF THE DISPOSITION OF LITERARY AND ARTISTIC PROPERTY

By DANIEL A. PINKUS\*

This is a review of some of the Internal Revenue treatment of the income received from the sale or assignment of rights in the kind of work subject to statutory copyright in the United States.

The discussion is phrased largely in terms of sales of literary property since much of the law concerned with the taxation of copyrighted works has arisen because of the large lump sums paid in recent years for motion picture rights in such property. Where the artist is compensated for the use of his work in payments directly dependent upon the volume of sales or performances, as is generally the case with musical composition rights and publishing royalties, there is virtually no room for tax maneuvering.<sup>1</sup> The income is unquestionably in the nature of royalties which are traditionally taxable as ordinary income taxes. A transaction, however, which can be construed to be a sale, presents the allure of capital gains treatment. In addition, an author or proprietor of a literary work may be in a position to spread the incidence of taxation of his royalties over a more or less greater period of time, for reasons which will be discussed.<sup>2</sup>

Those problems, such as the deductibility of expenses,<sup>3</sup> which concern the author or proprietor of a copyrighted work no more than any other self-employed person, will not be raised here. We are essentially concerned with the tax effects of an author's assignment to a publisher or a motion picture company of the right to exploit his work in a single medium. The first question is whether he can apply the capital gains rates to the proceeds of

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1. An exception to this is the obvious possibility of legislative action such as P.L. 86-435. This bill is a special interest provision for the music publishing industry, and will be discussed, *infra*.
2. Since the copyright involved in the case of literary works is created by the same statute as musical, photographic and artistic works, it can be fairly assumed that these other works would be afforded similar treatment by the tax law.
3. An author, as any taxpayer, would be entitled to deduct any trade or business expenses which he could justify under Section 162 of the Internal Revenue Code of 1954, or of expenses incurred in the production of income, under Section 212. It has been ruled, however, that the cost of "vanity" publishing would not be so deductible, but would be required to be capitalized. I.T. 1287, I-1 *Cum. Bull.* 28 (1922).

such a sale, and in this regard there must be discussed the difference in treatment afforded the author *vis a vis* a proprietor who is not the author. Second, if the author is a non-resident alien, he may not be taxable on that portion of the proceeds which represents income for the use of his work outside of the United States, and the problem of making an allocation of the proceeds should be the subject of careful planning. There is included a treatment of several devices designed to mitigate the impact of the higher tax rates on large sums received in any one year in respect to a particular work. These devices include the averaging of income over the period of the creation of the work, averaging it over a longer period than that in which it is actually earned, and the assignment of the income to another taxpayer.

### *The Capital Gains Status of the Proceeds of the Sale of Rights*

The rule is well established that an author is not entitled to treat the proceeds of a sale of his work as a capital gain. This rule follows, today, by virtue of the exclusion in Section 1221 of the Internal Revenue Code of 1954 from capital asset status, of:

- “(3) a copyright, a literary, musical, or artistic composition, or similar property, held by—
- (A) a taxpayer whose personal efforts created such property, or
  - (B) a taxpayer in whose hands the basis of such property is determined . . . by reference to the basis of such property in the hands of the person whose personal efforts created such property; . . .”

While the effect of this provision is to require the author (or his donee) of a literary work to treat the proceeds of the sale of rights in such a work as ordinary income, there is left open to one other than the author, the possibility of achieving capital asset status for the identical property. The history of this provision has created distinctions which result in the fact that even in the hands of a proprietor who is not the author, the property may not be a capital asset and its sale will not necessarily result in a capital gain.

Despite the very enumeration in the statute<sup>4</sup> of the several rights granted by the Copyright Act, the Treasury Department early adopted the theory of the “one-package” rule that a copyright cannot be considered to be divisible, and ruled that sales of serial rights and motion picture rights must, for tax purposes, be considered to be the granting of licenses, and not sales of property.<sup>5</sup> Since the Commissioner considered the copyrights in question to

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4. 17 U.S.C. 1; 61 Stat. 652.

5. I.T. 2735, XII-2 *Cum. Bull.* 131 (1933).

be indivisible,<sup>6</sup> and since obviously in each case the whole copyright was not transferred, it followed that the assignments were merely licenses, and the resulting income was royalties. This ruling was made in spite of the fact that the payments were in lump sums, and were not related to the amount of income which the purchaser might derive from their exploitation. This position was adopted in substance by the courts, particularly in the Second Circuit Court of Appeals in a line of cases extending until 1950.<sup>7</sup>

In that year the Court of Claims held that an author could obtain capital treatment upon disposition of rights in his work in a single medium under the terms of the statute<sup>8</sup> if the work was not (1) stock in trade or inventoriable; (2) property used in the taxpayer's trade or business; or (3) property held for sale to customers in the ordinary course of trade or business.<sup>9</sup> The case involved the sale of motion picture rights in a novel by one whom the court found to be an amateur author, and thus the property could not be considered in one of the above classes.

In the light of this situation, Congress, in 1950, closed even this door by providing<sup>10</sup> that a capital asset could not be "A copyright; a literary, musical, or artistic composition; or similar property" held by "a taxpayer whose personal efforts created such property."<sup>11</sup> The present Section 1221 of the Code substantially re-enacts this provision.

While the above effectively precludes an author from obtaining a capital gain upon the sale of rights, a series of rulings and cases have given a proprietor of a work (so long as his basis is not determined with reference to the author) a more preferred status. In 1954, the Revenue Service considered its old 1933 ruling, I.T. 2735, *supra*, and recognized a copyright to be divisible for tax purposes, stating, in part, that:

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6. Following the early rule of such cases as *Witmark v. Pastime Amusement Co.*, 298 F. 470 (E.D. S.C., 1924) *aff'd per curiam*, 2 F.2d 1020 (4th Cir., 1924).

7. *Sabatini v. Commissioner*, 98 F.2d 753 (2nd Cir., 1938) *aff'g* 32 B.T.A. 705 (1938); *Irving Berlin v. Commissioner*, 42 B.T.A. 668 (1940); *Estate of Marton*, 47 B.T.A. 184 (1942); *Ehrlich v. Higgins*, 52 F.Supp. 805 (S.D. N.Y., 1938); *Goldsmith v. Commissioner*, 143 F.2d 466 (2nd Cir., 1944), *cert. den.* 323 U.S. 774 (1944); *Sax Rohmer v. Commissioner*, 153 F.2d 61 (2nd Cir., 1946) *cert. den.* 328 U.S. 826 (1946). But see *Wodehouse v. Commissioner*, 166 F.2d 986 (4th Cir., 1948) *rev'd* 337 U.S. 369 (1949).

8. Section 117 (a), Int. Rev. Code of 1934.

9. *Herwig v. United States*, 105 F.Supp. 384 (Ct. Cl., 1952).

10. Revenue Act of 1950; 64 Stat. 932.

11. For an example of the operation of the statute in a case involving income received by an "amateur author" both prior to and subsequent to the 1950 amendment, see *Stern v. United States*, 164 F.Supp. 847 (E.D. La., 1958) *aff'd* 262 F.2d 957.

“ . . . a copyright proprietor's grant of the exclusive right to exploit a copyrighted work in a particular medium effects a transfer of property, and that a grant of less confers only a license on the grantee.” Rev. Rul. 54-409, 1954-2 *Cum. Bull.* 174, 176.

The text of the ruling qualifies the proposition by requiring that the grant must be exclusive, that it must be for the duration of the copyright in the particular medium, and that the consideration for the transfer cannot be measured by a percentage of the receipts over the duration of the grantee's use of the property. In a recent ruling and in the light of recent developments in the taxation of patent royalties,<sup>12</sup> the Service has modified this position further by holding that:

“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 a percentage of the receipts from the sale, performance, exhibition, or publication of the copyrighted work . . . or whether such receipts are payable over a period generally co-terminous with the grantee's use of the copyrighted work.”<sup>13</sup>

At this time, even prior to the above liberalization of the rules as to proprietors, the reports are replete with cases holding taxpayers entitled to treat as long term gain, the proceeds of the sale of copyright material, and the ruling will no doubt spur the purchases of copyrights with a view towards their eventual resale.<sup>14</sup>

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12. See, for a fuller discussion of the law relating to the taxation of patent royalties, Pilpel, “Tax Law Affecting Copyrights: 1954-1956,” February, 1957 *Taxes*; and “Developments in Tax Law Affecting Copyrights in 1954,” April, 1955 *Taxes*. See also Section 1235, Int. Rev. Code of 1954; Vincent Marco, 25 T.C. 544 (1955); and Reid v. Commissioner, 26 T.C. 622 (1956).

13. Rev. Rul. 60-226 I.R. Bull. 1960-25, June 20, 1960.

14. See Anatole Litvak, 23 T.C. 441 (1954); Fred MacMurray, 21 T.C. 15 (1953); James M. Fidler, 20 T.C. 1081 (1953); Pat O'Brien, et al., 25 T.C. 376 (1955); Julius H. Marx, 29 T.C. 88 (1957); Gershwin v. United States, 153 F.Supp. 477 (Ct. Cl., 1957), and Rev. Rul. 55-706, 1955-2 *Cum. Bull.* 300. It should be noted that even were a copyright considered to be a capital asset in the hands of the author, under Treasury rulings O.D. 966, 1921-2 *Cum. Bull.* 155 and I.T. 1287, 1-1 *Cum. Bull.* 28 (1922), it would be depreciable. The basis is limited to the actual cost of production, i.e., the copyright registration fee, and perhaps attorney's fees expended to secure registration; but not the author's time or labor. Under current regulations, Section 1.167(a)-6, a copyright is clearly depreciable.

Before leaving the capital gains area, another recent development in the copyright area must be considered. Prior to the erection, in 1936, of a statutory scheme<sup>15</sup> designed to prevent excessive accumulations of earned income by closely held corporations, it was possible to transfer income-producing property to a corporation with a view towards turning the ordinary income into capital gains. This might be done by having the income accumulated by the corporation after paying the regular corporate taxes, and without taxation of these sums to the shareholders. Later, the stock might be sold for a capital gain at a price reflecting the amount of the accumulations. In the alternative, the stock might be passed by bequest without the recognition of the gain, or the corporation dissolved, and the liquidating dividend treated as a capital return. While the intricacies of such a plan cannot be elaborated here, the net effect would be to reduce an individual's income taxes while increasing his basis in the stock. The Personal Holding Company Tax was enacted to prevent accumulations by levying upon the accumulated income a surtax which under the present statute<sup>16</sup> is as much as 85% of the undistributed personal holding company income over \$2,000.

As a special concession to the music publishing industry the 86th Congress recently passed an amendment to Section 543 of the Revenue Code which exempts certain income from the Personal Holding Company tax.<sup>17</sup> Section 543, which proscribes which income is subject to the surtax, now exempts copyright royalties if certain conditions are met. In brief, copyright royalties must comprise 50% or more of the gross income of the company, other personal holding company income cannot account for more than 10% of the total gross income, and deductible operating expenses must account for 50% of the company's gross revenues. The Congressional reports on the bill<sup>18</sup> indicate that these conditions were tailored to fit music publishers, and to operate so that active, operating companies will not be subject to the tax, while merely passive investment holding companies will remain taxable on copyright royalty income.

Since the statute is not, by its terms, limited to music publisher's income, but extends to any copyright income, there is left room for some sophisticated tax planning by other copyright proprietors. Presumably this would take the form of a transfer of a copyright by an author or proprietor to a corporation which is active in some other business but operating with a minimal profit

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15. Personal holding company tax. Revenue Act 1936, Sec. 351. The successor provisions are now embodied in Int. Rev. Code of 1954, Secs. 541-547.

16. Sec. 541, Int. Rev. Code of 1954.

17. P.L. 86-435, 86th Cong., April 22, 1960, H.R. 7588.

18. House Rep. 915; Senate Rep. 1041.

margin. Assuming the copyright income constituted 50% or more of the gross income, the only problem (and it is by no means one easy of solution), would be to create deductions sufficient to qualify under the statutory test as 50% of the gross income.

*The Apportionment of Income from Sources Within and Without the United States*

Under the present statute<sup>19</sup> a non-resident alien is in no event taxed on income from sources not within the United States if he is not engaged in trade or business here. Income from sources within the United States is defined, in part, as:

"Rentals or royalties from property located in the United States or from any interest in such property, including rentals or royalties from the use of or for the privilege of using in the United States . . . copyrights . . . and other like property." <sup>20</sup>

Because of the foregoing, where rights are purchased by a United States motion picture company, publisher, or magazine, it is very much to the advantage of the foreign author to be able to show that a portion of the consideration was paid for the right to exploit the rights outside of this country. This is particularly important in the case of motion picture companies which traditionally earn a very substantial portion of their income from exhibition in foreign countries.

In I.T. 2735, supra, the Commissioner indicated a willingness to allocate freely. He ruled that sums received for Canadian serial rights, English stage rights, and such consideration as could be shown to be for the privilege of using motion picture rights outside of the U.S., would not be taxable to the foreign author involved.

*Estate of Marton*, 47 B.T.A. 184 (1942), raised the problem of how proof of these items was to be made. There the Board of Tax Appeals was presented with the problem of allocating the consideration received for the sale to M.G.M. of world-wide film rights in a book first copyrighted in a Berne Union country. The contract of sale did not specify what portion of the consideration was contemplated as being for the foreign rights, but the taxpayer sought to secure such allocation by showing the percentage of exhibition revenue which M.G.M. normally received from the United States, and that from the rest of the world. The taxpayer contended that since his copyright protection was virtually world-wide, such an allocation would represent the relative values of the domestic and foreign rights.

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19. Sec. 871, Int. Rev. Code of 1954.

20. Sec. 861(a)(4), Int. Rev. Code of 1954.

Taxpayer's efforts did not meet with success. The Court implied that had the contract contained a recital of a reasonable breakdown of the amounts, it would have adopted the recital, but that "Under . . . (the circumstances) . . . we cannot determine what the rights were outside of those possessed under the copyright of the work in the United States . . ." <sup>21</sup>

The courts have thus tended to treat the problem only as one of proof. In *Sax Robmer*, 17 T.C. 1467 (1950), expert testimony was offered (by the literary agent who had negotiated the sale), substantiated by the circulation figures of the magazine to which the sale was made, tending to show that approximately five percent of the consideration would normally be attributable to distribution of the magazine in Canada. The allocation was upheld.

On the other hand, in *Sax Robmer v. Commissioner*, 153 F.2d 61 (2nd Cir., 1945),<sup>22</sup> the Court of Appeals upheld a Tax Court finding that on the submission of circulation figures alone, there was insufficient evidence to make any allocation. Since the court did indicate that on a more adequate trial presentation, taxpayer might have won, it is clear that the difficulty of proof should not be underestimated.

Attempted allocations were not accepted in several cases subsequent to this case in the Second Circuit,<sup>23</sup> the leading one being *Wodehouse v. Commissioner*, decided in 1949, and involving a sale, as in *Robmer*, of serial rights to a magazine which was distributed in the United States and in Canada. The contract recited the sale of Canadian rights, but did not allocate the purchase price. Taxpayer introduced evidence that approximately six percent of the circulation was in Canada and that sales by lesser known authors of Canadian rights alone had brought sums in excess of the amount here claimed to be allocable to the use of the story in Canada. Both the Tax Court and the Circuit Court took the position that taxpayer had failed to sustain his burden of proof, although the Circuit Court opinion was not unanimous.

Justice Swan dissented on the ground that taxpayer had actually sustained his burden remarking that *Robmer* had implied that this very sort of evidence would be acceptable.

He cited authority<sup>24</sup> including *George M. Cohan v. Commissioner*, 39 F.2d 540 (2nd Cir., 1930), to the effect that when the facts show that taxpayer is entitled to *some* relief, although he may have failed to demonstrate the exact amount thereof, the court cannot refuse to make some finding of

21. 47 B.T.A. 184, 186.

22. Cert. den., 328 U.S. 862.

23. *Molnar v. Commissioner*, 156 F.2d 924 (1946); *Misbourne Pictures v. Johnson*, 90 Supp. 978 (S.D.N.Y. 1950) aff'd 189 F.2d 774 (2nd Cir., 1951); *Wodehouse v. Commissioner*, 177 F.2d 881 (2nd Cir., 1949).

24. The leading case is *Helvering v. Taylor*, 293 U.S. 507 (1935). To the same effect, see *Gaspar v. Commissioner*, 225 F.2d 284 (6th Cir., 1955).

fact. Thus, Justice Swan would have remanded the case to the Tax Court for further proof.

Learned Hand concurred with the opinion of the Court, indicating that he was in sympathy with the dissenting opinion, and that in all justice, the Tax Court should be forced to make some finding. On the other hand, he felt constrained to exclude Wodehouse from getting some allocation for the reason that the *Robmer* decision had, sub silentio, overruled the *Cohan* case, so that it was no longer the rule that the Tax Court was required to make a finding. In other words, reasoned Justice Hand, prior to *Robmer* some allocation would have been required. The Court's erroneous decision in *Robmer* had (perhaps unintentionally) changed this rule. Since *Robmer* was such a recent precedent, it would be unwise to reverse it so soon. Thus, he was constrained to vote for the Government, not because of the merits of its case, but because of the requirements of orderly judicial administration.

The law in the Second Circuit therefore appears to be that unless the taxpayer can clearly show in the trial court not only that he is entitled to an allocation, but the specific amount thereof, he will not be entitled to treat any of the income as being from a source without the United States. This, unless the holding of the Fourth Circuit in a companion case has changed the law.

The exact issues, involving the identical taxpayer, were dealt with in the same year<sup>25</sup> by the Court of Appeals for the Fourth Circuit. There, it was also determined that the Canadian rights clearly had some value. It was held, however, that mere difficulty in arriving at some allocation did not excuse the Tax Court from so doing. The opinion stated that it did not mean to imply that the allocation need be solely on the basis of the circulation figures. Accordingly, the matter was remanded with a direction to the Tax Court to establish some allocation.

Whether, in the light of this ruling, the Second Circuit might reconsider its position is a matter of speculation. It may well be that the reason the issue has not arisen since *Wodehouse* is that most standard publishing and motion picture contracts have now preempted the possibility of the question arising, by specifically reciting the amount of the consideration allocable to foreign rights. Not to include such a clause in a contract involving a non-resident author, under the circumstances, would seem today to be unreasonably tempting fate.

#### *Devices for Shifting Income to Other Years and Other Taxpayers*

There is a very distinct change of atmosphere in moving from a discussion of the tax effects upon the sale of a copyrighted work itself, to a

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25. *Wodehouse v. Commissioner*, 178 F.2d 987 (4th Cir., 1949).

discussion of the kind of device which seeks to shift the burden of taxation of the income thereof into other years, and to other (presumably related) taxpayers.

The importance of so shifting the income arises from the fact that an author's earnings are inclined to fluctuate greatly from year to year. In addition, it is not uncommon to find that sales of subsidiary rights, e.g., motion picture and book club sales, give rise to substantial income, more often than not in lump sum form. For these reasons, there will follow a discussion of plans designed to (1) spread such income back over the period of the creation of the work, (2) spread it forward to insure receipt of the income in relatively stable and relatively smaller annual sums, and (3) assignments of income prior to its receipt, to other taxpayers.

#### *Spread Forward and Spread Back Provisions*

Section 1302 of the Internal Revenue Code of 1954 provides that if a work is created over a period of twenty-four months or more, and eighty percent of the income from this work received (1) during the taxable year, (2) all preceding years, and (3) the twelve months following the taxable year, is received in the taxable year in question, the author will be permitted to compute his tax so that it is no higher than it would have been had the income been received ratably over the period (not to exceed thirty-six months) preceding the close of the taxable year.

For example, if an author writes a book between January 1, 1960 and December 31, 1961 and has it published on the latter date, receiving \$100,000 in royalties during 1962 (and no more than \$25,000 in 1963) he can treat the 1962 income as if it were received \$33,333 in each of the years 1960, 1961 and 1962.

Thus, in *Robertson v. Commissioner*, 343 U.S. 711 (1952), the taxpayer had composed a symphonic work between 1937 and 1940. He submitted it in 1947 in a contest, for which he was awarded a \$25,000 prize. The taxpayer contended that his income was to be considered earned during 1937-1939, however the Supreme Court held that under the language of the statute<sup>26</sup> the income was to be considered earned in the thirty-six months including the year of the sale and the two years immediately prior thereto (1945-47).

There may be included in this period time spent writing material which is deleted from the finished work, *Richardson v. Commissioner*, 14 T.C. 547 (1950), so long as it contributes to the development of the final product.

26. ". . . Had been received ratably over that part of this period preceding the close of the taxable year, but not more than thirty-six calendar months." Section 107(b), Int. Rev. Code of 1939.

At the same time, it is the date of the actual decision to write, rather than the time of germination of the idea, that controls. *Beardsley v. United States*, 140 F.Supp. 541 (D. Conn., 1956).

As to the mechanics of using Sec. 1302:

"The Treasury Department takes the position that where income may be received in the next year in an amount which might defeat the availability of Section 1302 relief, a request may be made for an extension of time within which to file the income tax return for the current year. If the return is timely filed, the tax should be computed without benefit of this relief, and if it subsequently appears that the relief is available, a claim for relief will be in order." Greenbaum, "The Professional Writer," 15 *N.Y.U. Inst. of Taxation* 269, 273.

Since it cannot be expected that an author will normally receive enough income in any one year to qualify as to the eighty percent requirement, there has grown up a practice of providing a formula in the original publishing contract designed to meet this test. The essence of such a clause is that it requires the publisher to pay to the author, without reference to when the money is earned by the publisher, a specified amount in the first year of big earnings. Since that figure must be at least eighty percent of the money previously earned plus the amount which will be earned in the following year, there must be a limitation on the following years' income, i.e., it cannot be more than twenty-five percent of that in the base year.

A clause tailored to meet the terms of Section 1302 can be combined with a "spread forward" device very comfortably, and so long as the agreement is entered into prior to the time and royalties are earned by the publisher, and so long as certain other criteria (to be discussed) are met, the government will not attack this kind of deferred compensation agreement.<sup>27</sup>

If the contract calls for annual payments over a very long period of time, the author might run the risk of bankruptcy on the part of the publisher, in which he would be merely a general creditor. The advisability of accepting this risk must necessarily vary from case to case inasmuch as the higher the author's tax bracket is, the greater will be the opportunities for tax savings.

A second problem to be avoided is that which may arise from the fact that in a later year the author may be enjoying a great success from a new work, and he will not then want the income which he has so carefully deferred. Again, it is conceivable that the work may be so successful that the major effect of the contract is to provide extra capital for the publisher's operation for a considerable time to come.

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27. 46 Rev. Rul. 60-31, 1960-1 *Cum. Bull.* 17.

All of the above dictate that cautious planning should limit a "spread forward" to no more than a few years.

The chief obstacle to the effectiveness of such a deferred compensation arrangement is that the Treasury may take the position that the income is constructively received in the year in which earned by the publisher. In this connection, the government has ruled that so long as the contract does not provide that the income being held for the author is to be segregated and so long as interest is not payable on such sum, it will not raise the constructive receipt argument. Accordingly, it is obvious that the author must, if he desires to defer the income, forego interest or any other form of compensation from the publisher for its use of his money.<sup>28</sup>

In drafting a clause designed to spread both forward and back, it would seem advisable to estimate as closely as possible, the total earnings of the work. It is suggested that a maximum of one-half of this sum (or the total royalties to which the author is entitled, whichever of these figures is smaller) be paid in the first year. To qualify under Section 1302, the contract would then put a limit for year number two, of no more than one-fourth of the amount received in the first year. Payment in the succeeding years should then be kept relatively constant, except insofar as the revenues decline as the popularity of the work wanes.

Thus, if it were anticipated that a work will earn approximately \$100,000, and it is published during 1960, the amount payable in that year would be limited to \$50,000. Under Section 1302, \$16,666 would be considered received in each of the years 1958, 1959, and 1960. To qualify under the 80% limitation of Section 1302, no more than \$12,500 (20 percent of the total of \$50,000 received in 1960) could be payable in 1961. The balance of \$37,500 could then be spread over three years (1962-1964) with the following result:

1958	1/3 of \$50,000	\$16,666
1959	1/3 of \$50,000	\$16,666
1960	1/3 of \$50,000	\$16,666
1961	20% of \$50,000	\$12,500
1962	1/3 of \$37,500	\$12,500
1963	1/3 of \$37,500	\$12,500
1964	1/3 of \$37,500	\$12,500

With a plan of this sort, the risk of bankruptcy of the publisher is limited to four years (1961-1964).

28. *Ibid.*

The only remaining problem concerns the extent to which a publishing contract, previously entered into, could be modified to achieve such a result when, unexpectedly, a book proves to be substantially more successful than anticipated. This would be a particularly acute problem where the contract to publish a first work gives the publisher an option on the author's next several books at the same terms. If the first book is a great success, the insertion of this sort of clause would be most important. Apparently, under the cases, such a modification would be permissible as to royalties not yet earned, to the extent that the modification constituted a novation, i.e., an entirely new disposition of the parties' obligations.<sup>29</sup>

It may be noted at this point that an author who takes advantage of the averaging provisions of the Code is entitled to deduct, over the period the income is considered received, any expenses which are directly dependent upon the income received.<sup>30</sup> This relates particularly to literary agents' commissions. The Treasury position is, however, that the spreading of deductions will not be permitted for such extraordinary expenses as attorneys' fees for the defense of a libel action.

### *Assignments of Income*

What is probably the next most efficacious device for the reduction of taxes directly upon royalties in any one year is the assignment of the right to receive the income to a closely-related taxpayer who is in a lower tax bracket.

The leading cases in this area as they relate to authors, involve *Sax Rohmer* and *P. G. Wodehouse*.<sup>31</sup> The distinction upon which they turn is the theory that the taxpayer has, or has not, assigned not only the right to receive the future income, but the underlying obligation, as well.<sup>32</sup>

The *Rohmer* case involved a transfer to the author's wife of the income on books to be written. The assignment was implemented through a direction to the author's New York agent that one-half of all of Rohmer's future earnings in this country be paid to his wife, and the court held this to be an assignment of future income with the result that taxpayer paid not only the gift tax on the value of the transfer, but the income tax as well.

The *Wodehouse* case arose first in the Second Circuit where a substantially similar arrangement was upheld. The court ruled that the only valid

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29. See, in particular, *Commissioner v. Oates*, 207 F.2d 711 (7th Cir., 1953), and the cases cited therein. The *Oates* case is cited with approval in Rev. Rul. 60-31, supra.

30. I.T. 3773, 1945-1 *Cum. Bull.* 151.

31. *Sax Rohmer v. Commissioner*, 14 T.C. 1467 (1950); *Wodehouse v. Commissioner*, 177 F.2d 881 (2nd Cir., 1949); *Id. v. Id.*, 178 F.2d 987 (4th Cir., 1949).

32. See *Helvering v. Eubank*, 311 U.S. 122 (1940); *Lucas v. Earl*, 281 U.S. 111 (1929).

reason for striking such an assignment would be a finding that no real donative intent was involved, and that after the assignment, the donor still retained dominion over the property. Since in this case the author's wife had an enforceable right under the contract to an undivided interest in the royalties, the assignment was upheld.

When the Fourth Circuit<sup>33</sup> passed on the identical assignment and reviewed the Second Circuit position, it conceded that Wodehouse's New York literary agent was under an obligation to pay one-half of the income to Mrs. Wodehouse, but found that ". . . In this little tax drama . . ." the wife was just a receiver of the income and so taxed it to the author.

Due to more recent decisions in the First and Second Circuit Courts of Appeal, it has become easier for the taxpayer to effectively assign his income. *Commissioner v. Reece*, 232 F.2d 30 (1st Cir., 1956), involved an assignment by an inventor of all the royalties under a patent to his wife. It was upheld. In *Heim v. Fitzpatrick*, 262 F.2d 887 (2nd Cir., 1959), taxpayer was also an inventor. He assigned to a closely-held corporation some rights to exploit a patented invention, reserving to himself the right to negotiate further applications of the invention. Taxpayer then assigned a twenty-five percent interest in the royalties to his wife. The Commissioner took the position that the royalties were taxable to *Heim*, but this Court, citing *Commissioner v. Reece*, supra, held that the assignment was not of the income alone, but of an undivided interest in the basic contract.

Since it appears that the above cases modify the *Wodehouse* decisions,<sup>34</sup> it would now seem possible for an author to assign an undivided percentage interest in his publishing contract to another. He would be liable for the gift tax thereon, but the income would be taxable only to the recipient.<sup>35</sup>

Few conclusions can be drawn from the above discussion of tax-saving plans for the reason that the effectiveness of each plan must necessarily vary

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33. See footnote 31, supra.

34. See also, *Wodehouse v. Commissioner*, 19 T.C. No. 65 (1952), where the Tax Court indicated that it now considered valid an assignment identical with that dealt with above.

35. While this discussion is limited to several of the tax saving devices more commonly used, it is not meant to imply that there are not others. For example, it may be that the sale of a manuscript can be treated as an installment sale of casual personal property under Section 453 of the Internal Revenue Code of 1954. In addition, it is possible for a noted author to give away his original manuscripts and secure a charitable deduction to the extent of the fair market value thereof, thus reducing his taxable income. Careful tax planning might also include, at the time of a motion picture sale, an agreement to have the author receive an interest in the motion picture which might give rise to a capital gain upon the disposition of such interest.

with the circumstances of each case. With safety at least the following can be said:

1. The spread back provisions of Section 1302 are a matter of statutory right—if the author meets its stringent terms. If he would not otherwise meet them, a carefully drafted provision in the publishing contract can do so artificially.

2. The publishing (or movie) contract can also insure that the income will be spread forward over a period of years. The constructive attribution to the author of income received by his publisher can be avoided if the contract antedates the receipt by the publisher of the royalties, and if:

- (a) The income is not segregated by the publisher and:
- (b) No interest is payable to the author thereon.

3. An assignment of an undivided income interest in a work may effectively be made. Under such an assignment, if it predates the publishing, the author will not be taxed on that portion of the income received by his assignee, although he will be required to pay a gift tax thereon.

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PART II.

**LEGISLATIVE AND ADMINISTRATIVE  
DEVELOPMENTS**

1. UNITED STATES OF AMERICA AND TERRITORIES

74. U. S. COPYRIGHT OFFICE.

Audio-visual material. Washington, U. S. Govt. Print. Off., Oct. 1960. 2 p. Cir. 54. Accompanied by "Blank 54: A guide to forms to use for audio-visual materials" (1 p.).

A circular which describes the kinds of audio-visual materials for which copyright registration is possible and explains how to determine the proper application form for each.

75. U. S. COPYRIGHT OFFICE.

Changes of title. Washington, U. S. Govt. Print. Off., Sept. 1960. 1 p. Cir. 19A.

A circular explaining two methods available for placing a new title for a previously copyrighted work in the indexes or records of the Copyright Office.

76. U. S. COPYRIGHT OFFICE.

Ideas, plans, methods, or systems. Washington, U. S. Govt. Print. Off., Oct. 1960. 1 p. Cir. 31.

A revised circular explaining that ideas, etc. are not copyrightable as such, but that only the particular manner in which they are expressed or illustrated can be protected by copyright.

77. U. S. COPYRIGHT OFFICE.

Publications of the Copyright Office. Washington, U. S. Govt. Print. Off. 2 p. Cir. 75.

A substantially revised circular listing the publications prepared by, or under the supervision of, the Copyright Office, and telling how they may be obtained.

## PART III.

**CONVENTIONS, TREATIES AND  
PROCLAMATIONS**

## 78. UNITED STATES—AUSTRIA. TREATIES, ETC.

Proclamation 3353. Copyright Extension: Austria.

Notenwechsel zwischen der Bundesregierung der Republik Österreich und der Regierung der Vereinigten Staaten von Amerika über die nachträgliche Zulassung von Registrierungen beim Urheberrechtsbüro der Vereinigten Staaten von Amerika, 1960 *Bundesgesetzblatt für die Republik Österreich* 4 Oktober 1960, nr. 188, pp. 1972-4. In English and German. (Official diplomatic exchange of notes between the United States and the Austrian Federal Government, concerning the extension of time for Austrians to comply with procedural formalities necessary to bring Austrian literary, artistic, and musical works within the protection of U. S. Copyright Law. See also 7 BULL. CR. SOC. No. 5, Item 305 and 8 BULL. CR. SOC. No. 1, Item 20 (1960).

The text of the diplomatic exchange as printed in English follows:

ÖSTERREICHISCHE BOTSCHAFT  
WASHINGTON

Washington, June 15, 1960

Sir:

I have the honor to inform you that the attention of the Austrian Federal Government has been invited to paragraph (b), section 9 of title 17 of the United States Code, codified and enacted into positive law by the act of Congress approved July 30, 1947 (61 Stat. 652), which provides for extending, on a reciprocal basis, the time for the fulfillment of the conditions and formalities prescribed by the copyright laws of the United States in the case of authors, copyright owners, or proprietors of works first produced or published outside the United States of America who are or may have been temporarily unable to comply with those conditions and formalities because of the disruption or suspension of the facilities essential for their compliance.

My Government has requested me to inform you that, by reason of the conditions arising out of World War II, Austrian authors, copyright owners, and proprietors have lacked, during several years of the

time since March 13, 1938, the facilities essential to compliance with and to the fulfillment of the conditions and formalities established by the laws of the United States of America relating to copyright.

It is the desire of the Austrian Federal Government that, in accordance with the procedure provided in the above-mentioned paragraph (b), section 9 of title 17 of the United States Code, the time for fulfilling the conditions and formalities of the copyright laws of the United States of America be extended for the benefit of citizens of Austria whose works are eligible to copyright in the United States.

With a view to assuring the Government of the United States of America reciprocal protection for authors, copyright owners and proprietors who are citizens of the United States, the Austrian Federal Government has requested me to invite your attention to the Austrian law on copyright, Federal Law Gazette No. 111/1936, as amended, and the Ordinance of the Minister of Justice of December 9, 1907, Imperial Law Gazette No. 265/1907 (continued in force by virtue of section 101 of the law, Federal Law Gazette No. 111/1936), concerning copyright protection in relation to the United States of America, whereby citizens of the United States have been and are 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. This very liberal legislation was kept in force during the war and continues to remain in force. United States authors have accordingly suffered no prejudice in their rights in Austria because of the war.

The Austrian Federal Government would therefore, greatly appreciate it if the President of the United States would proclaim, in accordance with the aforesaid title 17 of the United States Code, that by reason of the disruption or suspension of facilities during several years of the time after March 13, 1938, citizens of Austria who are authors, copyright owners, or proprietors of works first produced or published outside the United States and subject to copyright or renewal of copyright under the laws of the United States were temporarily unable to comply with the conditions and formalities prescribed with respect to such works by the copyright laws of the United States, and that the time within which compliance with the conditions and formalities may be fulfilled be appropriately extended.

Accept, Sir, the assurances of my highest consideration.

PLATZER m. p.

The Honourable Christian A. Herter  
Secretary of State

DEPARTMENT OF STATE  
WASHINGTON

June 15, 1960

Excellency:

I have the honor to acknowledge the receipt of your note of today's date in which you refer to paragraph (b), section 9 of title 17 of the United States Code, codified and enacted into positive law by the act of Congress approved July 30, 1947, which authorizes the President to extend by proclamation the time for compliance with 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 under the laws of the United States of America when the authors, copyright owners, or proprietors of such works are or may have been temporarily unable to comply with those conditions and formalities because of the disruption or suspension of the facilities essential to such compliance.

You state that by reason of conditions arising out of World War II authors, copyright owners, and proprietors who are citizens of Austria lacked during several years of the time after March 13, 1938, the facilities essential to compliance with and to the fulfillment of the conditions and formalities established by the laws of the United States of America relating to copyright.

You express the desire of the Government of Austria that, in accordance with the procedure provided in the above-mentioned paragraph (b), section 9 of title 17 of the United States Code, the time for fulfilling the conditions and formalities of the copyright laws of the United States of America be extended for the benefit of citizens of Austria whose works are eligible to copyright in the United States of America.

With a view to assuring the Government of the United States of America reciprocal protection for authors, copyright owners, and proprietors who are citizens of the United States of America, you invite attention to the very favorable legislation in Austria which was kept in force during the war and you add that, as a consequence, American authors have suffered no prejudice to their rights in Austria because of the war. You add that the Austrian copyright laws and ordinance to which you refer continue to remain in force.

I have the honor to inform you that, with a view to giving effect to the extension proposed in the note under acknowledgement, the President has issued today a proclamation, declaring and proclaiming, pursuant to the provisions of paragraph (b), section 9 of the aforesaid title 17 on the basis of the assurances set forth in your note that as regards

(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 extended with respect to such works for one year after the date of the proclamation. The proclamation provides that it shall be understood that the term of copyright in any case is not and cannot be altered or affected by the President's action and that the extension is subject to the proviso of the said title 17 that no liability shall attach thereunder for lawful uses made or acts done prior to the effective date of that proclamation in connection with the works to which it relates, or in 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.

Accept, Excellency, the renewed assurance of my highest consideration.

For the Secretary of State:  
EDWIN M. MARTIN m. p.

His Excellency  
Dr. Wilfried Platzer  
Ambassador of Austria

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## PART IV.

**JUDICIAL DEVELOPMENTS IN LITERARY  
AND ARTISTIC PROPERTY**

## A. DECISIONS OF U. S. COURTS

## 1. Federal Court Decisions

79. *O'Brien v. Thall, et al.*, 127 USPQ 296 (2d Cir. Nov. 1, 1960) (per curiam), affirming 127 USPQ 325 (D. Conn. Mar. 7, 1960) (Anderson, J.).

Action for copyright infringement and unfair competition. The trial court found for defendants, concluding that the evidence failed to prove copying of plaintiff's musical setting of the Gettysburg Address.

*Held*, on appeal, affirmed.

After noting that it had heard both plaintiff's and defendants' compositions and had studied the printed scores, the court commented as follows: "We too find no substantial evidence of copying or wrongful appropriation. See particularly *Arnstein v. Porter*, 2 Cir., 154 F.2d 464, 68 USPQ 288. It seems to us plain that the ruling below was right. That conclusion is further fortified by the consideration that any similarities of rhythm which are plainly attributable to the words and phrases of the common 'lyric,' constitute no indication whatever of improper copying or wrongful appropriation. For just as the text of the address is in the public domain so is the natural rhythm of the words in which its thoughts are articulated."

80. *Rose, et al. v. Bourne, Inc.*, 127 USPQ 187 (S.D.N.Y. Dec. 31, 1959) (Dimock, J.). Cert. denied, Nov. 9, 1960, 127 USPQ No. 7, iii (Nov. 14, 1960).

Application by defendant for counsel fees pursuant to leave granted in the court's opinion on the merits of the action, 176 F.Supp. 605, 123 USPQ 29, 7 BULL. CR. SOC. 47, Item 27 (1959). Said the court: "The penalty element is an important factor in the award of counsel fees in copyright cases. I can see little reason why an unsuccessful party in a bona fide dispute over a copyright matter should pay his opponent's lawyers' fees any more than he should in the general run of litigation. I am not inclined to charge a copyright litigant with his opponent's lawyers' fees except to penalize conduct which seems to merit a penalty."

The court noted that the original action presented a question as to the application of *Rossiter v. Vogel*, 148 F.2d 292, 65 USPQ 72

(2d Cir. 1945), whether the bare legal validity of an assignment of the expectancy of a copyright renewal was insufficient where title would not be supported by a court of equity; and this question, the court felt, was sufficiently open to dispute as to warrant the conclusion that defendant here should pay its own counsel fees.

As to plaintiffs' insistence, however, that (1) defendant had failed to make adequate accountings and to exploit the song in question, and (2) an assignee has no rights except to compel the assignor to apply for renewal, despite *Fisher Co. v. Witmark & Sons*, 318 U.S. 643, 57 USPQ 50 (1943), construed in *Rossiter v. Vogel*, 134 F.2d 908, 57 USPQ 161 (2d Cir. 1943), and 148 F.2d 292, 65 USPQ 72 (2d Cir. 1945), there could be no bona fide dispute. Hence the court awarded \$7500 to defendant as counsel fees for work performed on these two issues.

81. *Peter Pan Fabrics, Inc., et al. v. Dixon Textile Corp.*, 127 USPQ 329 (S.D.N.Y. June 3, 1960) (Levet, J.).

Action for copyright infringement in which plaintiffs move for summary judgment. The trial court's denial of an earlier motion for summary judgment had been reversed by the court of appeals. 280 F.2d 800, 125 USPQ 39 (2d Cir. 1960), 7 BULL. CR. SOC. 188, Item 246 (1960).

*Held*, motion granted. Permanent injunction issued and question of damages referred to a special master.

Plaintiffs were manufacturers of printed textiles which bore notice of copyright on the selvage, a portion of the material which is ordinarily removed or concealed in the process of fabricating the finished garment. Defendant argued that plaintiffs' copyright was thus forfeit by reason of defective notice. The court pointed out that *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 124 USPQ 154 (2d Cir. 1960), 7 BULL. CR. SOC. 182, Item 243 (1960), holds that the burden is on the defendant-copyist to show that notice could have been embodied on the textile design without impairing its market value. Here, the plaintiffs submitted affidavits which "have convinced this court that there is no other feasible location for placement of the copyright notice on the textile other than the selvage and that placement of the copyright notice in the middle of the design would make the textile completely unusable for garments since garments having such a notice on their face would be unsaleable. . . . The contention of the defendant that notice of the copyright could be affixed to dresses by way of a hang tag cannot be sustained. This method of notice does not meet the

burden of showing that notice could have been embodied in the design. . . .”

## 2. State Court Decisions

Also of Interest:

82. *Denker v. Twentieth Century-Fox Film Corp., et al.*, 127 USPQ 439 (Sup. Ct., N.Y. Co. Nov. 4, 1960) (Lupiano, J.). The court denied defendants' motion to dismiss a complaint which alleged an action for breach of contract by reason of defendants' failure to commence work on a film within one year when the contract between the defendants and the plaintiff-author stated that defendants "contemplate" that production work would start within one year.
83. *Rayven Music Co., et al. v. Embassy Picture Corp., et al.*, 127 USPQ 438 (Sup. Ct., N.Y. Co. Nov. 3, 1960) (McGovern, J.). The court denied a temporary injunction barring alteration of a film sound track because "temporary injunctive relief at this time would work considerable havoc in the exploitation of a considerably valuable and costly asset."
84. *Standley, et al. v. Commissioner of Internal Revenue*, 127 USPQ 221 (Tax Court Oct. 19, 1960) (Tietjens, J.). The court held that, under section 107(b) of the Internal Revenue Code of 1939, petitioner had failed to prove that work on his novelty song had covered 36 calendar months from beginning to completion of its composition.
85. *United Artists Corp., et al. v. Exodus Motion Picture Corp.* (unreported) (Sup. Ct., N.Y. Co. Aug. 26, 1960) (Epstein, J.). The court granted a temporary injunction barring defendants from releasing a 1949 Italian film under the title, "Exodus."
86. *Brecht v. Bentley, et al.*, now reported 185 F.Supp. 890 (S.D. N.Y. July 27, 1960) (Bryan, J.). *Digested at* 8 BULL. CR. SOC. 50, Item 24 (1960).

## B. DECISIONS OF FOREIGN COURTS

## 1. Canada

87. **EDITOR'S NOTE:** In view of the importance of the following decision by the Supreme Court in Canada, clarifying several important aspects of Canadian Copyright Law, particularly with regard to musical performing rights and the requirement of registration of works of foreign authors in Canada, we are publishing the decision in its entirety, including an annotation prepared by Dr. Harold G. Fox, Q.C., our Canadian correspondent.

W.J.D.

*Durand et Cie. v. La Patrie Publishing Company, Ltd.* (Supreme Court of Canada, June 24, 1960), Coram:—the Honorable Justices Taschereau, Cartwright, Fauteux, Abbott, and Judson. Reasons of the Court by Mr. Justice Abbott.

*Annotation by Dr. Harold G. Fox, Q.C.:*

This is a judgment of considerable importance in that it clarifies the position as to copyright in works in existence before the present Copyright Act came into effect on January 1, 1924. It has often been overlooked that, although Canada had, before that date, legislation of its own respecting copyright and that this legislation required registration at Ottawa, nevertheless failure to comply with that legislation did not necessarily deprive authors of Canadian copyright in their works. This was so by virtue of the fact that some Imperial statutes relating to copyright such as the Dramatic Copyright Act of 1833 and the Literary Copyright Act of 1842 were also in force in Canada. The effect of the International Copyright Act of 1844 was to extend the benefit of that Act to foreign authors but, by its terms, registration at Stationers Hall was still required. The International Copyright Act of 1886, however changed that principle.

The Berne Convention was signed by Great Britain in 1887 and an Imperial Order in Council was then issued giving full effect to the Convention throughout the British Dominions. The Convention was placed as a schedule to that Order and the Order was to be construed as if it formed part of the International Copyright Act of 1886. Registration was thus rendered no longer necessary for copyright to subsist in the works of foreign authors, not only in Great Britain but also in the Dominions.

The interesting point that follows from this is that, although works of foreign authors were protected in Canada without any formality, the works of Canadian authors did not obtain protection in other Berne Convention countries, although by virtue of the Literary Copyright Act of 1842 they did obtain protection throughout the British Dominions.

## ABBOTT J.

The present action was brought by appellant alleging infringement of copyright by reason of the broadcasting on March 12, 1950, of a series of records over Radio Station CHLP then owned and operated by the respondent. The broadcast consisted of a major portion of the well-known opera "Pelléas et Mélisande," of which the appellant claims to be proprietor of both the copyright and the performing rights.

The relevant facts can be shortly stated. The opera in question, the lyrics of which were written by Maurice Maeterlinck and the music composed by Claude Debussy was first publicly performed at the Opéra Comique in Paris on April 30, 1902. At that time, Maeterlinck was a citizen of and resident in Belgium and Debussy a citizen of and resident in France. The appellant firm has been engaged for many years in France in the business of acquiring copyright in and promoting the licensing of literary, dramatic and musical works and, depending upon the character of the work, grants licenses itself or does so through agents delegated by it to grant licenses and to collect royalties. It bases its title to copyright and performing rights in the said opera upon an assignment from the authors dated March 31, 1905. Debussy died in 1918 and Maeterlinck in 1949.

It is common ground that appellant did not register the work in question under, or otherwise comply with, the Canadian copyright legislation in force in Canada prior to January 1, 1924, and that it had therefore acquired no copyright or performing rights in Canada prior to that date, apart from any such rights to which statutes of the United Kingdom then in force in Canada might entitle it.

The learned trial judge found that the authors Maeterlinck and Debussy had validly assigned their copyright and performing rights to appellant's predecessors in title. There is ample evidence to support that finding and it should not be disturbed. He held however that while appellant was vested with the copyright to the work in question the present action must be dismissed because (1) appellant had assigned its rights to sue directly, to a society of authors, composers and publishers of music in France—known colloquially as SACEM—and (2) because it came within the provisions of s.48 of the Copyright Act R.S.C. 1952, c.55, and had failed to comply with the requirements of that section.

Appellant appealed from that judgment, limiting its appeal to two issues namely, the findings (1) that appellant's action failed because of the application of s.48 of the Copyright Act and (2) that it had vested a third party with the right of action. The respondent cross-appealed.

I shall deal first with the two issues raised in the main appeal. It was established in evidence that the authors Maeterlinck and Debussy were members of SACEM, that appellant had adhered to its statutes and by-laws, and that SACEM had authorized "Canadian Publishers and Authors Association of Canada Limited" a performing rights society doing business in Canada—known colloquially as CAPAC—to grant licenses in Canada for works included in SACEM's repertoire. It was also established that in 1950 respondent had paid an annual fee to CAPAC which authorized respondent to broadcast all works included in the repertoire of that society. The Assistant General Representative of SACEM for the United States, Canada and Mexico, called as a witness, testified positively however, that "Pelléas et Mélisande" was not included in the repertoire of his society and that the society did not grant licenses for the performing rights to that work. Aside from any other consideration, in the light of that evidence, I am unable with respect, to agree with the finding of the learned trial judge that, because of its arrangements with SACEM, appellant was precluded from suing respondent for infringement.

The learned trial judge also held that appellant came within the terms of s.48 of the Copyright Act, R.S.C. 1952, c.55, relating to performing rights societies. That section reads in part as follows:

48.—(1) Each society, association or company that carries on in Canada the business of acquiring copyrights of dramatico-musical or musical works or of performing rights therein, and deals with or in the issue or grant of licenses for the performance in Canada of dramatico-musical or musical works in which copyright subsists, shall, from time to time, file with the Minister at the Copyright Office lists of all dramatico-musical and musical works, in current use in respect of which such society, association or company has authority to issue or grant performing licenses or to collect fees, charges or royalties for or in respect of the performance of its works in Canada.

There was no evidence that appellant "carries on in Canada the business of acquiring copyrights of dramatico-musical or musical works or of performing rights therein" and, with respect, the learned trial judge was in error, in my opinion, in holding that the section applied to appellant.

This disposes of the main appeal but by its cross-appeal respondent has appealed against the finding of the learned trial judge that appellant holds the copyright and performing rights to the opera in question.

The existence of such rights depends upon the interpretation and effect to be given to the Copyright Act 1921 (now R.S.C. 1952, c.55) and in particular to sections 4, 42, 45 and 47 of that Act. Appellant's contention that it was entitled to copyright in the work in question under s.4 of the Act, in my opinion, cannot be supported. That section reads in part as follows:

4. (1) Subject to the provisions of this Act, copyright shall subsist in Canada for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work, if the author was at the date of the making of the work a British subject, a citizen or subject of a foreign country that has adhered to the Convention and the Additional Protocol thereto set out in the Second Schedule, or resident within Her Majesty's Dominions; and if, in the case of a published work, the work was first published within Her Majesty's Dominions or in such foreign country; but in no other works except so far as the protection conferred by this Act is extended as hereinafter provided to foreign countries to which this Act does not extend.

Reading the Act as a whole, it is clear, in my opinion, that s.4 was intended to operate prospectively, and that it applies only to rights acquired on or after January 1, 1924, the date upon which the Act became effective. The scheme upon which the Act is drawn up is to deal with copyright law as it is to be under the Act when it comes into force, leaving for special treatment a subject which requires special treatment—namely, the grafting into the new and comprehensive code of law of all works in respect of which copyright, performing rights and common law rights existed under the old law; see *Coleridge-Taylor v. Novello & Co. Ltd.*, [1938] 3 All E.R. 506 at 509 and *Fox* "Canadian Law of Copyright" at p.220. Such special treatment is provided by s.42. That section and the First Schedule of the Act unconditionally preserved existing rights by providing

"Where any person is immediately before the 1st day of January, 1924, entitled to any such right in any work as is specified in the first column of the First Schedule, or to any interest in such a right, he is, as from that date, entitled to the substituted right set forth in the second column of that Schedule, or to the same interest in such a substituted right, and to no other right or interest, and such substituted right shall subsist for the term for which it would have subsisted if this Act had been in force at the date when the work was made, and the work had been one entitled to copyright thereunder."

In order to be entitled to the substituted right under s.42 and the First Schedule, a right must have subsisted immediately prior to January 1, 1924.

The Canadian Copyright Act in force prior to January 1, 1924 (the Dominion Copyright Act 1875, 38 Vic. c.88, carried forward with some amendments into the Revised Statutes of Canada 1906 as chapter 70) did not deal with performing rights—as distinct from copyright—in dramatic, musical, or dramatic-musical works, and under the Canadian legislation in force in 1902 (the 1875 Act with amendments) copyright in dramatic or musical works existed only if such works were registered under the Act and notice given on the printed work. As I have said, it is common ground that no such formalities were ever complied with in Canada. However, certain Imperial Statutes to which I shall refer presently, did deal specifically with performing rights, as distinct from copyright.

It follows that any performing right which appellant may have held in Canada prior to January 1, 1924, could only have existed by virtue of such Imperial Statutes. The Imperial Statutes having particular relevance are The Dramatic Copyright Act, 1833, 3-4 Will. IV, c.15, The Copyright Act, 1842, 5-6 Vic. c.45, The International Copyright Act, 1886, 49-50 Vic. c.33, and an Order-in-Council passed in 1887, under the last mentioned Act, adopting the Berne Convention.

The Dramatic Copyright Act, 1833, was the first statute to grant the exclusive right to perform dramatic compositions. It conferred upon the author of any dramatic piece or his assignee the sole liberty of representing it, or causing it to be represented, at any place or places of dramatic entertainment in any part of the United Kingdom or the British Dominions but it did not touch musical compositions. The performing rights in musical compositions were protected for the first time by the Copyright Act 1842, which enacted that the provisions of the Dramatic Copyright Act, 1833, and the Copyright Act, 1842, should apply to musical compositions and that the sole liberty of representing or performing any dramatic or musical composition should endure and be the property of the author and his assigns for the term provided in the 1842 Act for the duration of copyright in books. That term was fixed as being the life of the author and seven years after his death or forty-two years, whichever should be the longer. Both the 1833 Act and the 1842 Act were made applicable to the British Dominions and called for registration at Stationers' Hall in London.

Prior to 1911 the right of foreigners to obtain copyright protection in the United Kingdom depended upon various Copyright Acts

(including the Acts of 1833 and 1842 to which I have referred) and two International Copyright Acts, namely The International Copyright Act, 1844, 7-8 Vic. c.12, and The International Copyright Act, 1886. Both these latter Acts provided for copyright protection to foreigners upon their complying with certain registration requirements and were made applicable to all British Dominions. The International Copyright Act, 1886, was enacted following the International Conference held in Berne in 1885, and it empowered the Crown, by Order-in-Council, to adhere to the Convention agreed to at that Conference. Both France and Belgium were also adherents to the Convention. On November 28, 1887, an Order-in-Council was passed giving effect to the Berne Convention, which (translated into English) appears as a Schedule to the Order. As a consequence, under the International Copyright Act, 1886, and the Order-in-Council of November 28, 1887, the Berne Convention itself and the subsequent Act of Paris, were made effective in Great Britain, became part of the municipal law, and, as such, have been interpreted by the Courts; *Hanfstaengl v. Empire Palace*, [1894] 3 Ch. 109. The same result followed in the British Dominions (including Canada) to which the Act of 1886 and the Order-in-Council were made applicable.

Counsel for respondent argued before us that notwithstanding the provisions of the International Copyright Act, 1886, and the Order-in-Council of 1887, registration was still required under the Copyright Act, 1842, and the Dramatic Copyright Act, 1833, and that such registration not having been made, no copyright existed under the said Acts. He relied for that proposition upon the opinion expressed by Sterling J. in *Fisburn v. Hollingshead*, [1891] 2 Ch. 371, but that decision was overruled by the Court of Appeal in *Hanfstaengl v. American Tobacco Company*, [1895] 1 Q.B. 347, which held that in the case of foreign works to which the International Copyright Act 1886 and the Order-in-Council applied, registration was no longer required.

The Copyright Act, 1842, The Dramatic Copyright Act, 1833, and the International Copyright Acts, were repealed by the Copyright Act, 1911, 1-2 Geo. V, c.46, a consolidating and amending Act covering the whole subject of copyright. The 1911 Act did not extend to a self-governing Dominion unless declared by the legislature of that Dominion to be in force therein, but it conferred authority upon a Dominion legislature, to repeal (subject to the preservation of all legal rights existing at the time of such repeal) any or all enactments passed by the Imperial Parliament (including the Act of 1911) so far as operative within such Dominion. Pursuant to that authority, the Canadian

Copyright Act, 1921, 11-12 Geo. V, c.24, which was in large part based on the Imperial Act of 1911, and which came into force on January 1, 1924, repealed (1) all the Imperial enactments relating to copyright so far as their application to Canada was concerned and (2) all prior Canadian legislation upon the subject, saving of course any legal rights existing at the time of such repeal.

In *Routledge v. Low* (1868), L.R. 3 H.L. 100, the Judicial Committee held that the Imperial Copyright Act, 1842, extended the protection of British copyright to all the British Dominions. Following the enactment of the Canadian Copyright Act in 1875, notwithstanding the fact that the Canadian Parliament had exercised its power under s.91 of the British North America Act, 1867, to pass a statute relating to copyright, the Ontario Court of Appeal decided in *Smiles v. Belford* (1877), 1 O.R. 447, that the Copyright Act, 1842, was also in force in Canada, and that decision was followed in *Black v. Imperial Book Co.* (1904), 8 O.L.R. 9. Appeal was taken to the Supreme Court of Canada in the *Imperial Book Company Case*, 35 S.C.R. 488, but this Court dismissed the appeal upon other grounds and expressly refrained from expressing an opinion one way or the other upon the question as to whether *Smiles v. Belford* was rightly decided. Since the enactment of the Copyright Act 1921, this constitutional question has of course become one of diminishing importance. *Smiles v. Belford*, however, has been consistently followed in the Canadian courts, accepted by the text writers and, in my respectful opinion, it correctly stated the law.

It follows that in my opinion (i) The Dramatic Copyright Act, 1833, The Copyright Act, 1842, The International Copyright Act, 1886, the Order-in-Council passed under the latter Act in November 1887, and the terms of the Berne Convention itself, all applied in Canada prior to January 1, 1924, and (ii) that under their combined application, immediately before that date the appellant, as the successor in title to Maeterlinck and Debussy, was entitled to the copyright and performing rights in the opera "Pelléas et Mélisande" in the United Kingdom and throughout the British Dominions, including Canada.

There remains the question as to whether appellant became entitled to the substituted right provided for under s.42 of the Copyright Act 1921, now R.S.C. 1952, c.55. On this point the decision of the Judicial Committee in *Mansell v. Star Printing & Publishing Co. of Toronto Ltd.*, [1937] A.C. 872, is of little assistance. The artistic copyright in issue in that case, subsisted in the United Kingdom under the Fine Arts Copyright Act, 1862, 25-26 Vic. c.68, which was never in force in Canada,

and copyright in Canada could only have existed therefore by registration under the Canadian Act of 1906 which had not been done.

In *Francis Day & Hunter v. Twentieth Century-Fox Corporation* [1939], 4 All E.R. 192, however, the literary work concerned came under the Imperial Copyright Act, 1842, which was in force in Canada. The Judicial Committee was able to dispose of the controversy in that case upon another ground without deciding whether appellant was entitled to the substituted right under s.42. However, it is to be observed that before dealing with that other ground Lord Wright at p.197 after stating the arguments of counsel on this point, used the expression "assuming, but not deciding, that the appellant company is entitled to the copyright in Canada which it claims." I might add here that the record in the present case shows that appellant had complied with the requirements of the Copyright (Musical Compositions) Act, 1882, 45-46 Vic. c.40, which their Lordships held in the *Francis Day and Hunter Case* extended to Canada by necessary implication and effect although not in terms extended to this country.

I am satisfied that the substituted right provided by s.42 of the Act of 1921, does apply to copyright subsisting in Canada prior to January 1, 1924, by virtue of Imperial legislation in force in Canada prior to that date as well as to copyright subsisting by virtue of prior Canadian legislation, that in consequence appellant became entitled to that substituted right, and that such right was in force when the present action was taken.

In the result the appeal should be allowed and the cross-appeal dismissed. There would seem to be no necessity now to grant appellant the injunction asked for. No special damages were alleged or proved but appellant claimed the sum of \$600 for what it describes as punitive damages. There appears to have been only one broadcast by respondent of the opera in question, and in the circumstances, I would award appellant damages in the sum of \$600, the amount claimed in the action.

Appellant is entitled to its costs in the Exchequer Court and on the appeal and cross-appeal to this Court.

## 2. England

88. EDITOR'S NOTE: For the following short particulars and decision, we are indebted to M. W. Dennehy, Acting Secretary of the Performing Right Tribunal. *Barrington Electronics Limited and Sales Agencies Limited*, Referors, and *Phonographic Performance Limited*, Licensing Body, Performing Right Tribunal (PRT.6/60) October 10, 1960. Reference under Section 25, Copyright Act, 1956.

### *Short particulars:*

Barrington Electronics Ltd. is a private limited company which, amongst other things, carries on a business of placing on suitable sites coin operated automatic gramophones, commonly known as juke boxes. Since they control and "site" almost 100 such juke boxes, they are classified for licensing purposes as "multiple operators."

Their juke boxes are moved from site to site as policy or circumstances may require, and the division of the fortnightly "take" between themselves and the site-owners is a matter of individual negotiation and agreement.

The juke boxes in question are nearly all of a model which carries 30 2-sided records, which are classified as "60-selection machines," and the agreed sites are mostly cafes and public houses, scattered over a wide area.

The Licensing Body in this reference was Phonographic Performance Ltd., a company which has agreements with the owners of the performing right in sound recordings whereby the Licensing Body becomes the assignee of those rights, but stands possessed, in trust for the respective owners, of the amounts collected in respect of the relative licence fees charged for the performance in public of those sound recordings. The trusts on which those amounts are held for distribution are not relevant to this reference.

The assignors of these rights are the makers of gramophone records, and comprise all but an insignificant minority of such makers with whom juke box operators are concerned.

In January, 1958, the Licensing Body entered into agreements with three organisations representing between them some 80% of the "multiple operators" of all juke boxes known to the Licensing Body. By those agreements, the members of those organisations accepted a scheme relating to "multiple operators" propounded by the Licensing Body. In accordance with the provisions of this scheme, any "multiple operator" can, for a fee of £4.12.0 per machine, obtain a licence for a year

entitling such operator to perform in public any sound recording which has become vested in the Licensing Body.

It was this scheme which Barrington Electronics Ltd. referred to the Tribunal.

The complaint made was that the scheme was both unjustifiable and unfair; unjustifiable because (it was contended) the price paid to buy a gramophone record in itself covered the right to perform it; and unfair because a flat rate was exacted as a fee, regardless of the "selection" of the machine, and irrespective of the remunerative quality of the site on which it was placed.

The Tribunal concluded that the complaint was not well founded on either ground. The right to perform a gramophone record which a purchaser acquires does not extend in law to a right to perform it in public. The copyright as regards the latter is legally vested (by the provisions of s.12 of the Copyright Act, 1956) in the maker of the sound recording, and is quite independent of the sale of the record. Furthermore, Barrington Electronics Ltd., having applied for a licence under the scheme, cannot at the same time deny the right of the Licensing Body to grant one.

As to the flat rate, this commended itself to the Tribunal as the only practicable method of arriving at a reasonable figure, provided that the amount of the fee was not in itself oppressive. The actual amount, which is the equivalent of 1s. 9d. per juke box per week did not seem an excessive charge to make in all the circumstances. Any more complicated method of computation, moreover, would involve an increased cost of administration which would add to rather than subtract from the burden that the operator would have to bear.

P.T.O.

*Decision:*

This reference is made under section 25 of the Copyright Act, 1956, and relates to a licence scheme which prescribes the fees to be charged by Phonographic Performance Ltd. (the "Licensing Body" herein) for the grant of licences to "multiple" operators of coin operated automatic gramophones (known as "juke boxes") for the performance in public of gramophone records on juke boxes. "Multiple" (as opposed to "single") operators are operators who own and "site" more than one juke box.

The Referors were originally Barrington Electronics Ltd. and Sales Agencies Ltd. But at the opening of the hearing before the Tribunal,

Mr. Reay, who then appeared on behalf of both Referors, asked leave, on behalf of Sales Agencies Ltd. to withdraw their reference pursuant to the provisions of rule 15 of the Performing Right Tribunal Rules, 1957 (as amended). Mr. Foster, on behalf of the Licensing Body, having waived the right to receive notice in writing, the Tribunal dispensed with all requirements as to such notice, and gave leave to withdraw as asked, on the terms that the costs of the Licensing Body, so far as increased by the participation in the reference of Sales Agencies Ltd. up to the time of the hearing, should be paid by Sales Agencies Ltd. to the Licensing Body.

Thereupon Barrington Electronics Ltd. became the sole Referors, and are hereinafter called "the Referors."

It should here be mentioned that towards the conclusion of the hearing, while Mr. Foster was making his final submissions to the Tribunal, Mr. Reay (a Solicitor, whose conduct of his clients' case, so far as the Tribunal is concerned, was unexceptionable) announced that his retainer had been withdrawn, and retired from the case. Thereupon, the Tribunal, in the exercise of its powers pursuant to rule 14 of the Performing Right Tribunal Rules, 1957 (as amended), allowed Mr. Dawson-Ellis, the Chairman and Managing Director of the Referors, to appear on their behalf.

The Referors proved that they were at all material times a private limited company, carrying on a business which (amongst other things) consisted in placing juke boxes on suitable sites (a proceeding known as "siting" them), where they could be operated by the insertion of the appropriate coin and the selection of a choice of tunes available for performance.

Juke boxes vary considerably among themselves in size, design and what is called "selection"; that is to say, the range of choice in records for performance. Each record represents two "selections," and the juke boxes sited by the Referors were (with very few exceptions) what are known as "60-selection machines."

It was said that the Referors had on site at the time of the hearing some 96 machines.

The Referors were incorporated on the 25th May, 1959, and their accounts for their first year's trading are not yet forthcoming. Some incomplete figures purporting to show the cash receipts during the earlier months of their trading were hurriedly prepared at a very late stage in the proceedings. Six collector's books were put in evidence at the hearing. Some estimates of outgoings were given in oral evidence. But

the form and content of these figures and estimates provided no basis on which the Tribunal could found any relevant conclusion.

It was said on behalf of the Referors that the weekly cost of acquiring their machines on hire-purchase, together with their outgoings for siting and servicing and their overhead expenditure for administration would render the business wholly unprofitable for the first three years, and would absorb what profits there might be in a fourth year, after which the machines would become obsolescent and expensive to maintain. At the same time (although it did not appear how), they were anxious to insist that the business was not to be looked on as one which offered no prospect of profit. What did appear was that in making their calculations, the Referors expected to buy their machines at a retail price from an associated company of theirs, carrying on business at the same address, and to pay off the whole sum in three years out of income. It further appeared that they expected to run their business wholly with machines offering a relatively small selection of records which, by the admission of their own witnesses, are rapidly giving place to larger machines of greater "selection."

Much of the evidence turned on the importance of siting machines. It was said that the best sites, where large receipts were to be anticipated, were difficult both to secure and to hold. The competition of the owners of the larger and more modern machines was represented as being very fierce and ruthless, and the Tribunal was told that certain site-owners had no scruples about breaking their contracts if it suited them to substitute other parties' machines for those which they had undertaken to instal on behalf of the Referors. The result was said to be that the Referors' machines were forced into less lucrative sites, with the disagreeable consequences that takings were reduced, siting costs were increased, and that changes of site were so frequent that the Referors did not themselves know how many machines were on site at any given time nor even where they were in some cases to be found. Nonetheless, their collector seems to have been able to trace them all without difficulty when he paid his visits (generally fortnightly) for the purpose of bringing in the takings.

The sites selected by the Referors were almost exclusively at cafes and public houses. The terms made with the site owners were a matter of bargaining. They varied from an equal division of the takings at the best sites (of which there were said to be only six) to the collection for the Referors on other sites of the first £4 or £3 per fortnight and the division in agreed proportions of the balance between themselves and the site owner.

That being the nature of the business, the Referors complain of the annual charge of £4.12.0 per machine made to them by the Licensing Body for a licence to perform records in the manner described. That charge is a standard amount which, after many years without a change, was established by the Licensing Body in January, 1958, as the rate to be paid for a licence by "multiple" operators of juke boxes. (The charge made to "single" operators, which is regulated by a separate scheme, is considerably higher.) The figure was arrived at as a result of negotiations between the Licensing Body and a certain large-scale organisation known as Phonographic Operators Association Ltd., and was concurred in at the time by two further organisations, known respectively as Amusement Caterers' Association and Amusement Trades' Association. Those three organisations together represent the operators of some 80% of all juke boxes known to the Licensing Body. It was said that in 1955 only 500 juke boxes were licensed and that the present total number of machines on site was known to be upwards of 10,000 (of which only 96 are owned by the Referors). The actual number was in fact believed to be over 20,000, and possibly even as many as 25,000.

The major complaints of the Referors are that that charge (which represents a sum of 1s. 9d. per week per machine) is excessive, and should be purely nominal, and that there ought at any rate to be a differentiation in favour of the owners of juke boxes of small or relatively small "selection" in respect of the licence fee.

In support of their contention that the charge is excessive, the Referors argued that, as purchasers of records, they had impliedly paid for the licence to perform them in public, and even if technically liable in law, they should not as a matter of justice, be called upon to pay a second time for that included item. They maintained that the manufacturers of records had established the Licensing Body as a mere facade behind which to collect that for which they had already been paid. They contended that so far from infringing a right to the detriment of those manufacturers, they were in fact furthering their trading interests by giving free publicity to their products, and that it was consequently "commercially unjustifiable" that they should be expected in addition to pay for so doing. It would appear also to have been suggested that because the manufacturers of records were said to be wealthy and powerful, they should be restrained from exacting yet further wealth by charging fees to struggling operators.

Against those arguments, the Licensing Body relied simply on the rights of those who had placed their interests in its hands. These are,

according to evidence which the Tribunal accepts, some 90% of the manufacturers of records, who are concerned to enforce their rights under s.12 of the Copyright Act, 1956. This section confers a copyright on the maker of a sound recording restricting (amongst other matters) the causing of the recording to be heard in public.

The Referors at the outset of the hearing did indeed concede that they were in no position to dispute the legal right of the manufacturers, as represented by the Licensing Body, to recover at least a nominal fee. In fact, they admitted, by referring to the Tribunal, as a "person claiming that he requires a licence" under section 25(1)(b) of the Copyright Act, 1956, the licence scheme now under consideration, that they were precluded from contending otherwise. But after they had withdrawn Mr. Reay's retainer (as has been mentioned), they sought to argue that the Licensing Body was not, even as a matter of law, entitled to claim a fee. They called in question the right of the Licensing Body to recover fees as itself the owner, or as agent for any owner, of the copyright. This was presumably alternative to their previous contention that the indisputable legal title of the Licensing Body was being used as a device to enable the manufacturers in effect to recover double payment.

The Tribunal is satisfied, on the evidence before it, that the copyright conferred by section 12 of the Copyright Act, 1956, on the makers of sound recordings is legally vested in the Licensing Body, and that it is not open to the Referors in this reference to go behind the title of the Licensing Body or to question the legality or the merits of the copyright which the Licensing Body seeks to enforce.

As to the amount of the fee, the Licensing Body contends: first, that it is reasonable on its own merits; secondly, that it represents an amount which has been freely agreed to by those who represent a great majority of all the known operators of juke boxes.

The Tribunal accepts both of those contentions.

The argument of the Referors that there ought to be some differentiation as between fees charged in respect of machines of smaller "selection" and those charged in other cases might appear on the face of it to have something to recommend it. The Referors argued strenuously that there should be lower licence fees both for juke boxes of smaller "selection" and for juke boxes operating in public houses, in which hours of business were always curtailed, with the consequent limitation of takings from their machines. Indeed, wherever circumstances were apt to produce a wide difference in takings, it seemed to

be suggested that the fee should be adjusted accordingly. No proposal was however made as to any particular scale, nor as to any criterion, whether of "selection" of machine or of nature of site or of prosperity of the operator, on which such a scale might be based. Nor was it indicated how differentiation would apply in the case of an operator who had machines of various "selection" on sites of varying quality. If the fee represented a heavy burden laid upon the operator, it might well seem hard that small returns should bear the same amount as large profits. But a weekly sum of 1s. 9d. per machine cannot be regarded as onerous in relation to a "60-selection" machine.

That, however, is not the only ground on which differentiation does not find favour with the Tribunal. It has already appeared that the cost of administration involved in the collection of fees for licences is heavy; as high even as some 30% of gross takings. Not only has this been shown on its side by the Licensing Body; but the Referors themselves have bitterly complained of the amount of office work involved in having to make periodical returns of their machines on site. Nothing can be more certain than that those costs would be increased out of all proportion to any relief that the operators of machines of smaller "selection" might enjoy, if the returns had to be complicated by details which would be required for the assessment of scaled fees varying with the "selection" of each category of machine. Indeed, the amounts payable in respect of fees might have to be increased for everyone—to the benefit of no one but the extra clerical staff which would be required for the purpose of making and checking returns.

Finally, the Tribunal bears in mind that when the current charge was negotiated, the principle of differentiation came up for discussion, and was not pursued. It is not without significance that amongst the owners of at least 10,000 juke boxes, none has thought fit to come forward as a party to this reference in support of the contentions of the Referors.

In the result, the complaint of the Referors fails on every issue, and accordingly, there being no class other than multiple operators of juke boxes to which the scheme under reference relates, the scheme is confirmed.

The Tribunal being of opinion that, while the Referors were reasonably justified in referring the scheme to the Tribunal, the proceedings were conducted by them with too little regard to the costs that were being involved. The Referors will therefore contribute 100 guineas towards the costs of the Licensing Body.

[*Order:*]

The reference coming on for hearing on the 19th, 20th, 21st and 22nd days of September, 1960, before this Tribunal in presence of the solicitor for the Referors and counsel for the Licensing Body, AND upon reading the representations in writing served in this reference AND upon the above-named Sales Agencies Limited by its solicitor withdrawing its reference AND upon hearing the evidence of the witnesses and considering the documents which were tendered in evidence AND upon hearing what was alleged in argument by or on behalf of the remaining parties respectively:

THE TRIBUNAL ORDERS AS FOLLOWS:

1. That the Licence Scheme for the performance in public by multiple operators of coin operated automatic gramophones of gramophone records on such gramophones, introduced by the Licensing Body and being the subject-matter of this reference, be and is hereby confirmed.
2. That the costs of the Licensing Body, so far as increased by the participation in this reference of the said Sales Agencies Limited up to the time of the hearing on the 19th day of September, 1960, be paid by the said Sales Agencies to the Licensing Body.
3. That the costs of the Licensing Body to the extent of one hundred guineas be paid by the above-named Barrington Electronics Limited to the Licensing Body.

(Sgd.) WALTER RAEBURN  
CHAIRMAN

For and on behalf of the Tribunal  
10th October, 1960.

## PART V.

## BIBLIOGRAPHY

## A. BOOKS AND TREATISES

## 1. U. S. Publications

89. CLARK, AUBERT J. *The Movement for International Copyright in Nineteenth Century America*. Washington, D. C. The Catholic University of America Press, 1960. 186 pp. Appendices, Bibliography and Index.

A dissertation submitted to the Graduate School of Arts and Sciences of the Catholic University of America. The author, following a brief chapter on United States copyright in the 18th century, comprehensively covers, the history of U. S. copyright during the last century; but he seems to be actually unaware of the most significant developments in international copyright in more recent years. Thus, in his preface written in 1960, the author states: "Among the civilized nations of the West only the United States and Russia lagged (and still lag) in the legal protection given to literary and artistic property through international copyright laws." While the Berne Convention and the failure of the United States to adhere thereto are discussed, there is no mention whatever of the Universal Copyright Convention of which the United States has been a signatory since 1954. The author's interest and research in his subject apparently ceased with the passage of the Platt-Simonds Act in 1891.

90. ROGERS, JOSEPH W. *U. S. National Bibliography and the Copyright Law. An Historical Survey*. New York, R. R. Bowker Company, 1960.

The author, a staff member of the United States Copyright Office, has made a valuable, well-documented historical study of the major U. S. bibliographies, showing the relationship of the "Catalog of Copyright Entries" of the Library of Congress to other U. S. bibliographic works, such as "Books in Print," the "Cumulative Book Index," etc., and has also recorded concisely and factually the developments leading not only to the Copyright Acts of 1891 and 1909, but also through World War II. *Contents*: Introduction; Predecessors of the "Catalog of Copyright Entries"; The Act of March 3, 1891; The "Catalog of Copyright Entries," 1891-1909; The Act of March 4, 1909, including

the Cataloging Provisions of the Memorandum Draft Bill of October 23, 1905, development of the Draft Bill, the provisions in detail, and discussion of the relevance of the provisions to anticipated uses of the Catalog as well as of the cataloging provisions and the provisions as adopted; and Operations under the Cataloging Provisions of the Act of 1909 through World War II. There is a foreword by Verner W. Clapp of the Library of Congress, a "postscript" and an Index.

91. GITLIN, PAUL and WOODWARD, WILLIAM REDIN. Tax aspects of patents, copyrights and trademarks. Revised to August, 1960. New York, Practising Law Institute, 1960. 78 pp. (*Current Problems in Federal Taxation.*)

The authors, experienced in patent and copyright law, have analyzed the Internal Revenue Code as it applies to these fields. Among the topics are: Assignments and Licenses, Installment Sales, Capital Gains and Losses on Sales, Holding Periods, Tax Relief under Section 107, Concentration of Income, Permitted Allocation to Prior Years, the 36-Month Requirement, Allocation of Expenses, Damages as Income, World Wide Rights, Lump Sum Royalties, Taxation of Nonresident Aliens, Tax Relief Conventions, Deductions from Gross Income, Death of Owner and Long Range Tax Planning. This is a revised edition of a book first published by the PLI in 1950.

92. LYON-CAEN, GÉRARD. Motion pictures in the Berne Convention. New York, Copyright Society of the U. S. A. Sept. 1960. 61 p. A translation by Evelyn Dunne, of "Le Cinéma dans la Convention de Berne," which appeared in 72 *Le Droit d'Auteur* 217-225, no. 12, Dec. 1959.

Distributed by The Copyright Society of the U. S. A. to its sustaining members and subscribers, October 1960. See 7 BULL. CR. SOC. 152, Item 207 (1960).

## 2. Foreign Publications

### (a) In French

93. GENIN, MARIE THÉRESE. L'éditeur. Préf. de Jacques Rodolphe-Rousseau. Paris, Libraires techniques, 1959. 189 pp. (Statuts professionnels).

A commentary on French law relating to publishing and book-selling with appendices containing the articles of association of the National Syndicate of Publishers, texts of the French legal deposit and copyright laws, and extracts from the "Joint National Publishing Agreement."

## (b) In German

94. BLOMEYER, ARWED. *Der Urheberrechtsschutz für den ausübenden Tonkünstler nach deutschem Recht*. Stuttgart, W. Kohlhammer, 1960. 52 pp.

A discussion of copyright protection for the performing musician under German law with specific reference to the question whether public performance by means of phonograph records or tape recordings requires the consent of the performing artist in addition to that of the author.

## (c) In Spanish

95. MOUCHET, CARLOS and CARLES, MANUEL. *Reunion Interamericana sobre derechos de autor*. Buenos Aires, Ministry of the Interior of Argentina, 1960. 53 pp.

The distinguished Argentine copyright experts have produced this work on the rights of the author in the Americas as part of the celebration of the 150th Anniversary of the Revolucion de Mayo, and the founding of the Republic.

## B. LAW REVIEW ARTICLES

## 1. United States

96. COLSEY, WILLIAM, III.

Copyrights—the protection of advertising. (5 *Villanova Law Review* 615-637, no. 4, Summer 1960.)

The purpose of this comment, which was entered in the Nathan Burkan Memorial Competition, is "to examine the avenues of legal protection which are available to the advertiser, with a particular emphasis on the manner in which the application of the copyright laws afford[s] unique and advantageous protection."

97. Copyrights: assignment of renewal rights. (74 *Harvard Law Review* 115-116, no. 1, Nov. 1960.)

A brief note on the Supreme Court decision in *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U. S. 373, 7 BULL. CR. SOC. 174, Item 242 (1960).

98. DAVIS, CHESTER L., JR. Protection of fabric designs. (4 *Patent Trademark and Copyright Journal of Research and Education* 276, Fall 1960.)

"The primary purpose of this paper is to present an objective analysis of existing law, emphasizing several recent and notable cases from the second circuit which provide relief against design piracies."

99. GRANNEY, CHARLES F. Manner of publication determinative of action for invasion of privacy. (9 *Buffalo Law Review* 362-369, no. 2, Winter 1960.)

A case note on *Aquino v. Bulletin Co.*, 190 Pa. Sup. 528, 154 A.2d 422 (1959).

100. GRISWOLD, ERWIN N. The Supreme Court, 1959 Term. (74 *Harvard Law Review* 81, no. 1, Nov. 1960.)

Dean Griswold reviews the decision on assignment of renewal rights in *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U. S. 373, 7 BULL. CR. SOC. 174, Item 242 (1960).

101. MINICK, KARAN F. Right of government officials to copyright their speeches and publications. (33 *Southern California Law Review* 447-451, no. 4, Summer 1960.)

A note on the district court decision in the *Rickover* case, 177 F. Supp. 601, 7 BULL. CR. SOC. 102, Item 110 (D.D.C. 1959).

## 2. Foreign

### 1. In English

102. KRAGEM, BJORG. The Norwegian Literary Copyright Bill. *E.B.U. Review*, no. 63 B, 30-33, Sept. 1960.

An analysis of the provisions "which are thought to be of special relevance to sound broadcasting and television," in a "Bill respecting Copyright in Literary Works," which was introduced in the Norwegian Storting on January 8, 1960.

103. SAVINSON, RICHARD. Local authority functions and copyright. (124 *Justice of the Peace and Local Government Review* 607-608, no. 38, Sept. 17, 1960.)

A brief summary of some of the provisions of the U. K. Act of 1956 affecting the following functions: the renting, by local authorities, of halls owned by them, for dances, theatrical performances, meetings, etc., the making, by libraries, of copies of copyrighted works for the purpose of research or private study, and the use and performance of copyrighted works in schools.

### 2. In French

104. BOLLA, GÉRARD. Droits dit voisins: une analyse du projet de Convention de la Haye. (31 *Il Diritto di Autore* 280-289, no. 2, Apr.-June, 1960.)

A brief analysis of the draft international convention for the protection of neighboring rights prepared by the Committee of Experts meeting at the Hague, May 9-20, 1960, with special reference to "certain provisions which merit being made the object of a very careful examination before the diplomatic conference of 1961."

105. RUDNICKI, WALERY J. Modification des lois et de la pratique dans le domaine du droit d'auteur après la seconde guerre mondiale en Pologne. (73 *Le Droit d'Auteur* 258-260, no. 9, Sept. 1960.)

A survey of legislative and judicial copyright developments in Poland after World War II.

### 3. In German

106. SCHONHERR, FRITZ. Der Haager Entwurf eines internationalen Abkommens über den Leistungsschutz. (9 *Österreichische Blätter für Gewerblichen Rechtsschutz und Urheberrecht* 61-63, no. 4, July-Aug. 1960.)

A brief summary of the "significant content" of the Draft International Convention on Neighboring Rights which was unanimously adopted by the Committee of Experts meeting at The Hague, May 9-20, 1960.

107. SCHULZE, ERICH. Die Veröffentlichungen von Wenzel Goldbaum. (31 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 375-384, no. 5/6, Aug. 2, 1960.) "Zusammengestellt nach Materialien der Deutschen Bibliothek, Frankfurt a. M., der Deutschen Bücherei, Leipzig und der Internationalen Gesellschaft für Urheberrecht (INTERGU), Berlin."

A bibliography of the late Dr. Wenzel Goldbaum compiled on the basis of materials in the depository libraries of Frankfurt and Leipzig, respectively, and of the International Copyright Society, Berlin.

108. SANCTIS, VALERIO DE. Lettre d'Italie. (73 *Le Droit d'Auteur* 250-258, no. 9, Sept. 1960.)

A survey of recent Italian legislative and judicial developments in the field of copyright and related areas, and an item on the setting up, by the Legislative Committee of CISAC at its Florence Meeting in March, 1960, of two work groups charged with preparing comparative law studies. The legislation concerns protection of service marks with respect to broadcasting and entertainment, motion pictures, and the creation of a Ministry of Tourism and Entertainment.

109. STRASCHNOV, GEORGES: Arrangement européen pour la protection des émissions de télévision. (73 *Le Droit d'Auteur* 263-268, no. 10, Oct. 1960.)

A commentary on the European Agreement on the Protection of Television Broadcasts drafted by the Committee of Legal Experts of the Council of Europe and approved with amendments by all the governmental experts who were present at a session of this Committee on the 29th and 30th April 1960.

110. WAWRETZKO, HERBERT. Die GEMA und sonstige Verwertungsgesellschaften in System der deutschen und der internationalen Wettbewerbsbeschränkungen. (31 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 287-316, no. 5/6, Aug. 2, 1960.)

A discussion of the question whether GEMA and other German performing rights societies are monopolistic enterprises which come under the antitrust provisions of the West German law against restraint of trade or of the treaty establishing the European Economic Community, with the answer in the negative.

#### 4. In Italian

111. CARRELLI, GUSTAVO. Appunti in tema di tutela penale dei diritti degli autori. (31 *Il Diritto di Autore* 1-20, no. 1, Jan.-Mar. 1960.)

A discussion of the penal protection of copyrights in Italy.

112. COLLOVA, TADDEO. Sui diritti esclusivi dell'autore e sulla utilizzazione radiofonica dei dischi del commercio. (31 *Il Diritto di Autore* 21-50, no. 1, Jan.-Mar. 1960.)

A strong defense of the principle expressed, among others, by the Belgian Supreme Court of Appeal in a decision of January 19, 1956, to the effect that an author has the right to authorize the "radiophonic" use of trade records, the manufacture and distribution of which he has permitted for private use only.

113. FABIANI, MARIO. Appunti sulla tutela giuridica della regia teatrale e televisiva. (9 *Rassegna di Diritto Cinematografico, Teatrale e della Radiotelevisione* 77-82, no. 3, May-June 1960.)

A discussion of the legal protection of theatrical and television productions in Italy.

114. GIANNINI, AMEDEO. Manoscritti e diritti di autore. (9 *Rivista di Diritto Industriale* 37-60, no. 1, pt. 1, Jan.-Mar. 1960.)

A discussion of the manuscript as a subject of copyright protection, both as a valuable collector's item and as a creative work, with special reference to Italian legislation.

115. GIANNINI, AMEDEO. Opere future. (58 *Rivista del Diritto Commerciale e del Diritto delle Obbligazioni* 21-37, no. 1-2, pt. 1, Jan.-Feb. 1960.)

An examination of the problem of the transfer, under the Italian Copyright Law, of rights in future works, with specific reference to applicable publishing contracts.

116. In tema di diritti connessi: un incontro di giuristi promosso dalla rivista "Il Diritto di Autore." (31 *Il Diritto di Autore* 51-60, no. 1, Jan.-Mar., 1960.)

An account of a meeting of jurists, sponsored by "Il Diritto di Autore," and held on April 23, 1960 at the headquarters of the Italian Society of Authors and Publishers (SIAE). The topic for discussion, proposed by the Legal Council of the Society, was on problems relating to neighboring rights within the framework of existing Italian legislation and in the international sphere.

117. NATALE, GIUSEPPE. Il diritto demaniale nella legge italiana sul diritto di autore. (31 *Il Diritto di Autore* 195-216, no. 2, Apr.-June 1960.)

A commentary on articles 175 and 176 of the Italian Copyright Law which provide for payment of "domanial fees" to the State for performances or broadcasts of public domain works or of protected elaborations of such works.

118. RICA-BARBERIS, M. Uso ed abuso dell'immagine ed esercizio del diritto. (58 *Rivista del Diritto Commerciale e del Diritto Generale delle Obbligazioni* 74-75, no. 1-2, pt. 1, Jan.-Feb. 1960.)

A proposal for the revision of article 10 of the Italian Civil Code relating to the protection of the right in one's own picture in order to extend such protection and harmonize it with that afforded by the pertinent provisions of the Copyright Law.

119. TROCCHI, VITTORIO. Nota di informazione e di commento alla "Legge sul diritto di autore" promulgata nello Stato della Città del Vaticano. (31 *Il Diritto di Autore* 118-125, no. 1, Jan.-Mar. 1960.)

Information and comments concerning the new copyright law of the Holy See promulgated January 12, 1960. See 7 BULL. CR. SOC. 173, Item 238 (1960).

C. ARTICLES PERTAINING TO COPYRIGHT  
FROM TRADE MAGAZINES

1. United States

120. JUHLIN, ALTON P. Reproduction—current practices in map libraries. (51 *Special Libraries* 247-251, no. 5, May-June 1960.)

An analysis of the answers to a questionnaire which was sent, in January 1959, by the Geography and Map Division of the Special Libraries Association to 134 map libraries throughout the United States. The author concludes that the average library "is perfectly willing to reproduce copyrighted maps for both its own clientele and the general public without permission from the copyright owner."

121. KAMINSTEIN, ABRAHAM L. Maps, charts and copyright. (51 *Special Libraries* 241-243, no. 5, May-June 1960.)

The Deputy Register of Copyrights and Chief of the Examining Division presents briefly the historical background of copyright protection of maps in the United States, the requirements of the present law for such protection, and some of the problems of the librarian in dealing with copyrighted maps.

122. LEE, PAUL B. Copyright—the publisher's viewpoint. (51 *Special Libraries* 244-246, no. 5, May-June 1960.)

An official of a map publishing firm presents the views of a publisher concerning the unauthorized reproduction of copyrighted works with particular reference to libraries.

123. MACDONALD, JOHN D. The sad case of the dead author. (178 *Publishers' Weekly* 35, no. 14, Oct. 3, 1960.)

A professional writer gives a brief account of what he learned and what he had done to protect his heirs with respect to his copyrights as the result of recent conferences with the trust officer of his bank.

124. PILPEL, HARRIET F. Some further reflections on The sad case of the dead author [by] Harriet F. Pilpel . . . [and] Maurice C. Greenbaum. (178 *Publishers' Weekly* 18-19, no. 20, Nov. 14, 1960.)

The writers "point out some further considerations to be taken into account by the author and his trust officer beyond those raised by John D. MacDonald in his recent PW article 'The sad case of the dead author.'" See Item 123, *supra*.

125. SPIVACKE, HAROLD. [A review of] Copyright Law Symposium Number 10 . . . New York: Columbia Univ. Press, 1959. (17 *Music Library Association Notes* 401-403, 2d ser., no. 3, June 1960.)

Emphasizes only those sections of the studies the reviewer believes are of immediate interest to a music librarian.

126. U. S. Copyright Office mulls discontinuation of catalog publication. (219 *Variety* 43, no. 11, Aug. 10, 1960.)

A brief summary of the Copyright Office general revision study no. 23, "The Catalog of Copyright Entries," by Elizabeth K. Dunne and Joseph W. Rogers.

## 2. England

127. Lending Right Bill introduced in Parliament. *The Bookseller* no. 2849 808-809, (July 30, 1960).

An article on the "Libraries (Public Lending Right) Bill" recently introduced in the House of Commons by Mr. Woodrow Wyatt, M.P. The Bill is the joint work of the Society of Authors and the Publishers Association. See 7 BULL. CR. SOC. 249, Item 331 (1960).

128. "Public lending right"; the second round. (71 *The Author* 85-90, no. 1, Autumn 1960.)

A summary of "the position reached by the Public Lending Right campaign when this issue of *The Author* went to the printer." See 7 BULL. CR. SOC. 249, Item 331 (1960).

## NEWS BRIEFS

129. ABRAHAM L. KAMINSTEIN APPOINTED REGISTER OF COPYRIGHTS

As this issue goes to press, word has been received of the appointment by L. Quincy Mumford, Librarian of Congress, of Abraham L. Kaminstein, Acting Register, to succeed the late Arthur Fisher as Register of Copyrights, effective December 24, 1960. It is planned to include in our February 1961 issue full details on this appointment.

130. NEW COPYRIGHT BULLETIN PUBLISHED IN MEXICO

Under the auspices of the Secretaria de Educacion Publica, there was initiated at Mexico City in July, 1960, a new *Boletin de la Direccion*

*General del Derecho de Autor.* The first issue contains the Universal Copyright Convention and a list of the 31 countries (now increased to 35) which had ratified the Convention as of the date when the new *Boletin* was prepared; listings of recent registrations by number, title, class, and copyright owner are also included.

131. FOURTH SUPPLEMENT TO "COPYRIGHT LAWS AND TREATIES OF THE WORLD"

In November 1960, the fourth supplement to the "Copyright Laws and Treaties of the World" was published, containing replacement and additional pages to bring the basic volume up-to-date as of January 1, 1960.

*Announcement*

APPOINTMENT OF BOARD OF FOREIGN COLLABORATORS

In connection with the expansion program of The Copyright Society of the U.S.A. and the Copyright Publications Center of New York University Law School, we advised our members and subscribers in our October 1960 issue (at pages 64-68) of the list of foreign publications in the copyright field which are currently received by and available at the Copyright Publications Center.

We now take pleasure in announcing that, in furtherance of this program and for the purpose of assuring worldwide up-to-date coverage of all phases of copyright, the Editorial Board has invited, with the assistance of the late Arthur Fisher, a panel of distinguished copyright experts in all major countries of the world to serve as our foreign collaborators.

It is gratifying to report that all invitees who have thus far responded to the invitation have agreed to collaborate with the Society. While the list is still incomplete, we take this opportunity to present the names of our principal foreign collaborators on a country-to-country basis. Additions to the Board will be announced from time to time.

Through the cooperation of the members of this Board, we hope to be in a position to keep abreast of all important legislative, judicial, and administrative developments abroad.

The following is a list of the foreign copyright officials and experts who will serve as correspondents for our publication:

ARGENTINA:	Dr. Ricardo E. Tiscornia <i>Director, Office of Intellectual Property</i>
AUSTRALIA:	Mr. K. B. Petersson <i>Registrar of Copyrights</i>
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## COPYRIGHT LAW REVISION STUDIES

### Seventh, Eighth and Ninth Committee Prints Now Available

#### SEVENTH COMMITTEE PRINT STUDIES 20-21

20. Deposit of Copyrighted Works, by Elizabeth K. Dunne.
21. The Catalog of Copyright Entries, by Elizabeth K. Dunne and Joseph W. Rogers.

#### EIGHTH COMMITTEE PRINT STUDIES 22-25

22. The Damage Provisions of the Copyright Law, by William S. Strauss.
24. Remedies Other Than Damages for Copyright Infringement,
23. The Operation of the Damage Provisions of the Copyright Law: assistance of William A. O'Brien and Herbert Turkington.  
An Exploratory Study, by Prof. Ralph S. Browne, Jr., with the by William S. Strauss.
25. Liability of Innocent Infringers of Copyrights, by Alan Latman and William S. Tager.

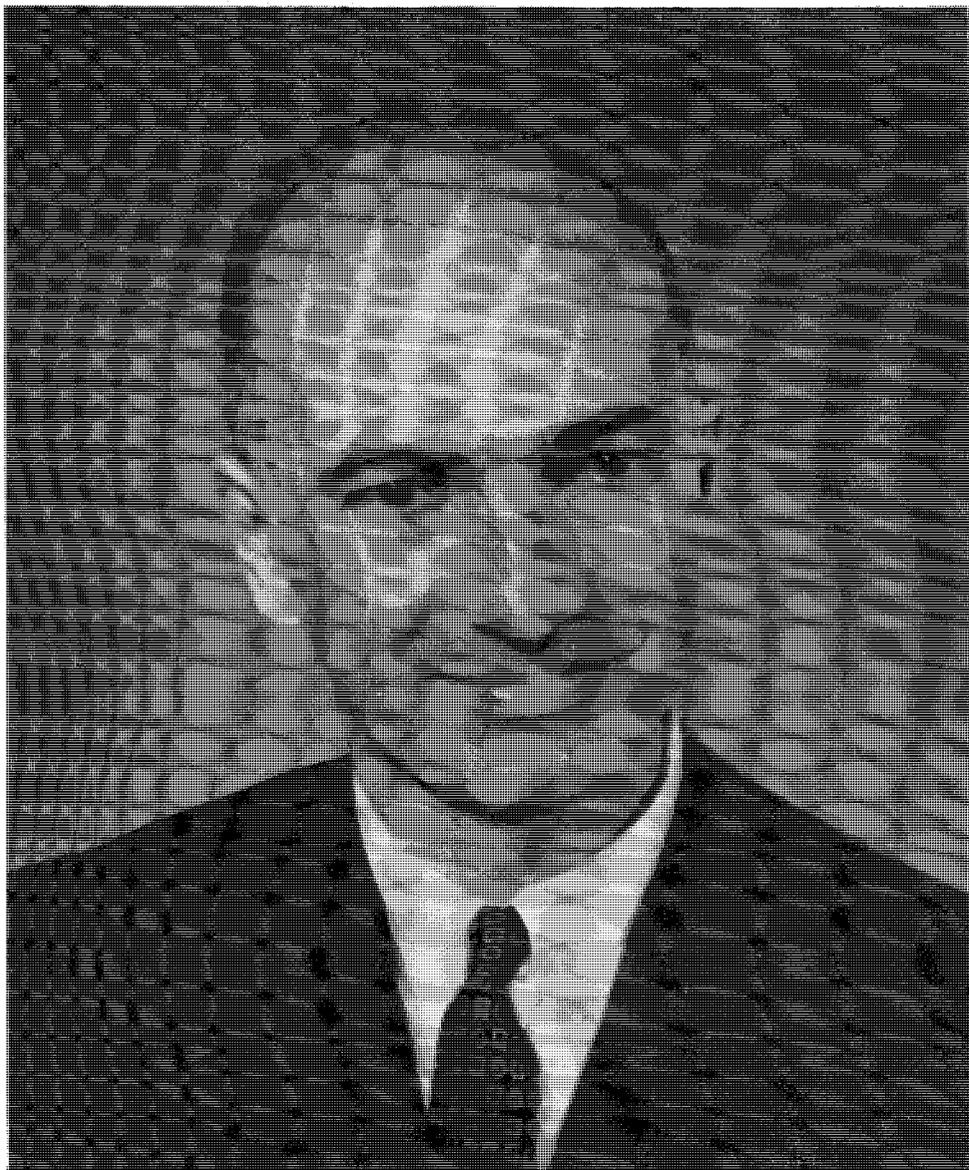
#### NINTH COMMITTEE PRINT STUDIES 26-28

26. The Unauthorized Duplication of Sound Recordings, by Barbara A. Ringer.
27. Copyright in Architectural Works, by William S. Strauss.
28. Copyright in Choreographic Works, by Borge Varmer.

These are the seventh, eighth and ninth of a series of Committee Prints published by the Sub-committee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, United States Senate, pursuant to Senate Resolution 240, 86th Congress, Second Session. The prints are available from the Superintendent of Documents, U. S. Government Printing Office, Washington 25, D. C.; the seventh committee print is 25 cents a copy, the eighth print 45 cents, and the ninth print 35 cents.

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**Abraham L. Kaminstein**  
*6th U. S. Register of Copyrights*

## THE NEW U.S. REGISTER OF COPYRIGHTS—

### Abraham L. Kaminstein

Effective December 24, 1960, Abraham L. Kaminstein was appointed by L. Quincy Mumford, Librarian of Congress, to be the sixth U. S. Register of Copyrights. Mr. Kaminstein had served as Acting Register since the death of Arthur Fisher on November 12, 1960.

Mr. Kaminstein was born in New York City on May 13, 1912. He was educated at the College of the City of New York and at Harvard Law School, from which he received LL.B. and LL.M. degrees in 1935 and 1936. He was appointed a research fellow in 1936-37. In 1947 he joined the staff of the U. S. Copyright Office as Chief of the Examining Division and for the past year has served also as Deputy Register.

He worked closely with the late Arthur Fisher in preparing the U. S. proposals for the Universal Copyright Convention and was adviser to the U. S. Delegation at the Paris meeting of 1951 where the preliminary draft Convention was prepared. He has also been an active participant in the general work of the Copyright Office in the preparation for the proposed revision of the present copyright law and is the author of "Divisibility of Copyright," one of the studies now made available in the Fourth Committee Print of the Sub-Committee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate.

The appointment of Abraham Kaminstein to the post of Register is generally regarded as assurance that the program for revision of the outmoded U. S. Copyright Act of 1909 will continue to go forward under enlightened and concerned leadership and that the United States will not lose ground in its constantly improving international copyright relations. The Society joins with the Bar and copyright owners everywhere in extending best wishes to the new Register.

## In Memory of Arthur Fisher

The Board of Directors of the American Book Publishers Council have asked that the following resolution, adopted in memory of Arthur Fisher, be published in our pages:

"Arthur Fisher, as Register of Copyrights of the United States, brought to the public service a profound knowledge of copyright, a unique breadth of vision, great intellectual power, a tireless zeal, a single-minded devotion to the public interest, and an integrity of purpose that commanded the respect of all those privileged to know him. The Universal Copyright Convention will remain a monument to his achievement, as will the searching scholarship and far-sightedness of plan underlying the proposed revision of the Copyright Act which was his goal. All those who are concerned with the creation and dissemination of the products of the human mind and spirit will remain his debtors."

The Society has also received the following letter from The Director General of the Copyright Office of Mexico:

"Por su carta de fecha 7 de este mes me he enterado—con profunda pena del sensible fallecimiento del Sr. Arthur Fisher, persona por demás estimable y de reconocidos méritos por su labor en la materia autoral, a quien tuve el gusto—y el honor de conocer en La Haya el pasado mes de mayo, con motivo de la Reunión de Expertos sobre la reglamentación internacional de los derechos de los artistas ejecutantes, de los fabricantes de fonogramas y de los organismos de radiodifusión.

"Como funcionario del Gobierno Mexicano y en mi propio nombre, le ruego acepte mis sinceras condolencias, mismas que agradeceré haga extensivas al Departamento de Estado correspondiente de su país.

(signed) Lic. Ernesto Valderrama Herrera

*(English translation:)*

"By your letter dated the 7th instant I have learned with deep regret of the sad demise of Mr. Arthur Fisher, a person worthy of the greatest esteem and deserving great merit for his labor on copyright matters, whom I had the pleasure and honor of meeting at The Hague during the last month of May, on the occasion of the Convention of Experts on the international regulation of the rights of performing artists, record manufacturers and broadcasting organizations.

"As an official of the Mexican Government and in my own behalf I beg you to accept my sincere condolences, which I would also ask you to convey to the corresponding government office of your country."

## PART I.

## ARTICLES

## 132. INTERNATIONAL ASPECTS IN REGARD TO THE PROTECTION OF INDUSTRIAL DESIGNS

By JAMES W. MILES\*

It was hoped at the time of the Conference of Lisbon for the Revision of the International Convention for the Protection of Industrial Property that the postponement of the discussion in respect of applied art, designs and models for consideration by a Study Group of experts representing both the Copyright and the Industrial Property Conventions would lead to some satisfactory solution of the problem.

It was reasonable to attribute previous failure to the fact that, while this was a matter which affected both Copyright and Industrial Property, it had been considered at prior conferences for the revision of these conventions from one angle only, and therefore the discussions had been inconclusive. Moreover, it had been often convenient, in order to avoid continuing the discussion, to assert that, considering its importance in relation to the Convention not being revised, the matter was really outside the scope of the particular Conference in question.

These hopes for a solution through the efforts of the international Study Groups have not been fulfilled and it therefore may be interesting and helpful to examine the factors which appear to have some bearing on such failure and which may also assist in a clarification of the issues.

At the time of the Conference of Lisbon a good deal of investigation relating to this problem had been, and was still being conducted in a number

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\* Dr. James W. Miles is a Barrister of the Supreme Court of New Zealand and has represented his country as delegate to various international conferences, including the UNESCO Copyright Conference, 1949; the Commonwealth Law Conference, London, 1955; Lisbon Conference for the Revision of the Industrial Property Convention, 1958; and the AIPPI Congress, 1960. He was a member of the New Zealand Copyright Committee, 1957-1959, and is the author of "National and International Aspects of Industrial Property" (1944). Dr. Miles is also a member of the Society's Board of Foreign Collaborators (see 8 BULL. CR. SOC. 144-5, No. 2, 1960).

of countries independently, either as a separate problem, or in a general review of Copyright or Industrial Property law.<sup>1</sup>

The practical aspects involving the recognition of the importance of artistic design in modern industry are illustrated in the success of the activities of such bodies as The Council of Industrial Design, with the general objective of promoting, by all practical means, the improvement of design in the products of British industry.<sup>2</sup>

In the same year as the Conference of Lisbon, there was held the Brussels International Exhibition where the latest designs in all branches of industry from the most important industrial countries in the old and new world were impressively displayed.

It was interesting to note also that at this time a good deal of interest was manifest in the United Kingdom in the question of the legal protection of the industrial designs of British manufacturers opening up new markets in Europe.

By comparison with other countries, the protection available to British industry, particularly on an international basis, appeared clearly inadequate.<sup>3</sup>

In British Commonwealth countries generally, some branches of industry, to whom both the national and international law on this matter is of great importance, had come to the conclusion that the existing legal provisions for the protection of their valuable designs should be improved.

In the United States the importance of copyright in the protection of artistic designs applied in industry had come into prominence since the decision in *Mazer v. Stein* in 1954.<sup>4</sup>

When all this evidence is considered it becomes apparent that the Study Group dealing with this problem, pursuant to the Resolutions of Geneva and

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1. In Canada a Royal Commission had been set up in 1954 to inquire into Federal legislation relating, inter alia, to industrial designs and copyright. This Commission had not completed its work. In New Zealand a Committee had been appointed in 1957 to review the law of Copyright. This Committee did not conclude its sittings until 1959. In Australia a Copyright Committee had not completed its sittings. The Australian Report has been completed but has not yet been made available. The Design law in New Zealand had been reviewed by a Departmental Committee in 1953. In the U.S.A., H.R. 8873 had been introduced in 1957.
  2. The latest report of the Council of Industrial Design records the popularity of the permanent exhibition in London which has been maintained since 1956 with the objective of winning markets at home and abroad for the highest standards of imaginative design by British manufacturers. The average daily total of products on display throughout the year was 1,080 and average daily attendance since 1956 has been 2,200. Investigation appears to show that only a very small percentage of these designs have any legal protection either in the United Kingdom or abroad.
  3. See "Design", published by The Council of Industrial Design, No. 116, August 1958.
  4. 347 U.S. 201; 98 L.Ed. 630; 74 S.Ct. 460.

Lisbon, did not have before it a great deal of the relevant evidence, and it is not surprising in the circumstances that no great progress was achieved in the reconciliation of the overlap between the protection of applied art under the Berne and Geneva Conventions and the protection of designs and models under the Paris Convention.

It is fitting, however, to pay tribute to all the work that has been done, some under difficult circumstances not indicated in the written record, and, in particular, the preparatory work for The Hague Conference for the Revision of the Arrangement of The Hague. The Committee of Experts who devoted themselves to this preparatory work placed on record that they were of the opinion

“that a more effective protection of designs was more important than ever before; that designs played an effective part in the marketing of goods of all kinds; that the international value of good design was constantly increasing; and that the unauthorised copying, or unlawful imitation was detrimental to the designer, the industrialist, and the public which was frequently misled by imitations.”<sup>5</sup>

A convenient commencing point in the examination of the efforts to find a solution to this whole problem is the decision reached by the Geneva and Lisbon Resolutions<sup>6</sup> which are, in effect, a unanimous opinion that the matter should be considered by experts representative of the Copyright and Industrial Property Conventions. It follows that in dealing with the respective aspects of applied art under copyright and of designs and models under industrial property law, the principles governing the proprietary rights under these International Conventions must be borne in mind.

A preliminary clarification seems necessary to avoid confusion and misapprehension at the outset.

“Applied art” is art applied in industry and the principle involved, and recognised by the great majority of Berne Convention countries, is that an artistic work is entitled to protection by copyright whether or not intended or applied for utilitarian or industrial purposes.<sup>7</sup>

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5. *Industrial Property Quarterly*, (Berne) No. 1. 57, (January 1960). For the report on the diplomatic conference, see item 133, *infra*.

6. See XII *Unesco Copyright Bulletin*, No. 1 (1959).

7. In European states, whatever the difference in details an artistic work is protected by copyright even if it is essentially for practical purposes. See “Le Droit d’Auteur”, 53 (1942).

In the application of this principle there may be differences of opinion in different countries and by the Courts in the same countries, just as there may be a difference of opinion as to what may constitute "an artistic work."

"Applied art" is not defined in the copyright conventions and it is not necessary to do so, just as it is not necessary to define "an artistic work."

The fact that there may be such differences of opinion as to what may comprise an artistic work or applied art does not preclude the successful application of this Berne Convention principle that the industrial or utilitarian application of an artistic work is no barrier to the acquisition or enjoyment of copyright.

Further, the fact that a small minority among member countries of this Convention does not admit that applied art should be a subject matter of copyright at all, does not mean that full consideration should not be given to the detailed facts showing that this majority principle has long worked satisfactorily in practice.

Thus the question of applied art must be considered primarily in its appropriate setting in the field of copyright, and this majority view, which, in effect, is that all artistic works should be equally entitled to protection by copyright, is, therefore, primarily not an industrial property question at all.

The argument has long been raised in support of the minority view that the protection of applied art by copyright, without registration, would result in uncertainty and confusion and that the undue length of the Berne copyright term would create restrictive monopolistic rights, but in most cases where this objection has been raised, it appears to have been overlooked that these theoretical objections are most convincingly answered by the practical experience of many European countries whose law and practice does not appear to have been considered at all.

The two main preliminary aspects of the problem are thus:

1. The examination of the issues involved in the protection of applied art as part of the field of artistic works protected under the Berne Copyright Convention;
2. The examination of the issues involved in the protection of designs and models in the field of industrial property under the Paris Convention.

Three further important factors must also be borne in mind from the outset:

1. The Paris Convention is based on a system of registration but under the Berne Convention no registration is necessary;
2. The principles of these two branches of law are entirely different but they each have long been widely successful in the field in which they are applied;

3. The scope of "applied art" and "designs and models" are not co-extensive. A great deal of confusion and misconception has arisen because this fact has sometimes been overlooked from the beginning.<sup>8</sup>

With these matters in mind the next stage in the logical examination of the problem would appear to be to examine the practical operation of these two branches of law so far as they cover "industrial designs" or designs applied in industry.

There is nothing in the copyright conventions which precludes the application of copyright works in industry, and on the contrary, it jumps to the mind that the numerous examples of large scale reproduction of copyright works in various branches of industry are just the normal exercise of the right that copyright confers.

The Paris Convention for the Protection of Industrial Property also, in effect, confers protection for original creations of the mind for the benefit of industry, but upon quite different terms and principles.

It was never intended, however, nor is it necessary, that these Conventions should be mutually exclusive because they are based upon different principles of law. The underlying conception of each is that the author or inventor should have an exclusive right in his creation or invention.

In actual operation, the rights conferred by these Conventions are today so extensively used in and so important to industry that they are, in fact, inextricably interwoven and interdependent.

This is precisely the case in regard to applied art and designs and models, and one of the reasons why this is not so apparent, on a first assessment of the problem in the British Commonwealth and the U.S.A., is and has been the importance attached to a registration system in these countries.

The fact that the protection of industrial designs in the United Kingdom and design patents in the U.S.A. exists only by a system of registration under the industrial property law has led to the misconception that cumulative protection as applied art under copyright would be something new and a very dangerous innovation. In English legal text books the matter has been generally dealt with as if the protection available abroad is also only by registration under the law of industrial property.

The importance of the Berne Copyright Convention and its great success has been the surprising fact that it works admirably without any registration

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8. There is a good deal of evidence that both in the United Kingdom and in the U.S.A., the existing international protection of applied art has not been appreciated; and that the principle sanctioned in *Mazer v. Stein* has long been successfully applied in Berne Convention countries.

system at all, and that this results in inestimable advantages in national and international copyright. Applied art is a part of one segment in this wide field.

A study of the evidence before recent committees reviewing this problem in the U.S.A. and in the United Kingdom shows that these facts in the history of international copyright have not been sufficiently considered.

There has developed a habit of thinking in the United Kingdom and in the U.S.A. that this is a matter of domestic law and that in arriving at a solution a system of registration is essential. It is necessary, however, to bear in mind that the international aspects are the most important and when these are considered, any system of registration under the industrial property law relates only to less than half the scope of the problem.

Domestic legislation is necessary but international agreement is also virtually essential and in some respects the international aspects are continually becoming more important and the need for uniformity much greater. Practically all the countries now considering this problem as a national matter are also members of the Paris or Berne International Conventions and the problem has been a recurring one on the agenda of all the Conferences for the Revision of these Conventions for the past 50 years. A solution to be satisfactory must be an international one.

When the foregoing matters are considered the following conclusions appear to emerge:

1. The whole field of applied art is not directly capable of being assessed by impressive records of the number of cases protected, but even a very limited investigation of the position, industry by industry, will show that the number of artistic works applied in industry (which are protected by copyright in almost all Berne Convention countries except those of the British Commonwealth) are very much greater in numbers and value than those protected as designs and models under the Arrangement of The Hague or under the corresponding domestic legislation relating to industrial property.

2. The fact that registration is not necessary in the whole field of Copyright in the United Kingdom, and that this has worked well for nearly 50 years in the United Kingdom itself raises a presumption that it would also work well if the generally recognised copyright field in respect of artistic works were restored to its full scope under United Kingdom copyright law. This presumption is of course supported by the experience of other Berne Convention countries where all artistic works are equally protected by copyright.

3. The fact that the United Kingdom is the only Berne Convention country which has adopted such a provision as Section 10 of the (U.K.) Copyright Act 1956 makes it desirable to consider, as the whole matter is now being reexamined, whether this departure from the majority view has not been unsound from the beginning.

These, of course, are matters of particular reference to the position in English law but they are also of great importance at the international level, because of the influence English law and the English point of view has had in the U.S.A. and at recent International Conferences in regard to this problem.

It can be pointed out that the majority view has not been strongly argued against the British view at International Conferences but this does not mean that is not strongly held. English law is not an easy subject for Continental lawyers to debate with English legal experts, but they are not likely to depart from the majority view or forego their rights under the Berne Convention and under the reservation conferred by Article 14 of the Draft Arrangement of the Hague.

On the other hand, the difficulties of obtaining international agreement among Paris and Berne Convention countries to a new "hybrid" law on designs arising out of the existing United Kingdom Designs law or the U.S.A. Design Patent law would be insuperable.<sup>9</sup>

The much less difficult, more logical and equitable course would appear to be to adopt the majority view as a basis for discussion and a solution.

International agreement on the position of applied art does not seem to present any great difficulty. It is the majority view already and it has worked satisfactorily; it does not preclude the possibility of any of the contemplated improvements of the industrial property law in regard to designs and models.

The clarification and consideration of these issues at the national and in particular at the international level, it is thought, may well result in the removal of the first and major obstacle to the solution of this problem, and in the immediate improvement in the scope and effectiveness of international protection. There would also be involved the important principle in the reconciliation of the Paris and Berne Conventions that the principles and the law of both copyright and industrial property are necessary for the protection of proprietary rights which are legitimately within the scope of both of these Conventions.

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9. It would seem that the supporters of such a project both in the United Kingdom and in the U.S.A. have not given full consideration to Article 2(5) of the Berne Convention.

### 133. DIPLOMATIC CONFERENCE ON THE INTERNATIONAL DEPOSIT OF INDUSTRIAL DESIGNS.

*(The Hague, Nov. 14-28, 1960)*

By ARPAD BOGSCH

In the December 1959 issue (7 BULL. CR. SOC. No. 2, 82-94), we reported on the meetings of an international committee of experts preparatory to the revision of the Hague Arrangement on the International Registration of Designs.

The revision conference took place at The Hague from November 14 to November 28, 1960. Twenty-six countries participated through official delegations: Austria, Belgium, Denmark, the Dominican Republic, Finland, France, the Federal Republic of Germany, the Holy See, Hungary, Ireland, Italy, Liechtenstein, Luxembourg, Monaco, Morocco, the Netherlands, Norway, Rumania, Spain, Sweden, Switzerland, Turkey, the United Arab Republic, the United States, the United Kingdom, and Yugoslavia. The U. S. Delegation was chaired by Mr. Philip Young, Ambassador to the Netherlands, and its members were Messrs. Arpad Bogisch, Legal Advisor, U. S. Copyright Office; Pasquale J. Federico, Examiner-in-Chief, U. S. Patent Office; and Harvey J. Winter, Assistant Head, International Business Practices Division, Department of State. The Dutch Government acted as host, and the Bureau of the International (Paris) Union for the Protection of Industrial Property acted as secretariat.

Although the conference was called a "conference of revision," in fact it drafted an entirely new treaty which is fundamentally different from the one now in force among a small number of countries. The full text of the new treaty ("Agreement") and its Regulations are reprinted hereafter.

At the close of the conference, representatives of eleven countries signed the Agreement and the Regulations: Belgium, France, the Federal Republic of Germany, Holy See, Italy, Liechtenstein, Luxembourg, Monaco, the Netherlands, Switzerland, and Yugoslavia.

It is planned to convene again the U. S. Advisory Committee established last year, in order to receive the views of private groups interested in the international deposit of industrial designs. At the meeting members of the U. S. Delegation will report on The Hague conference and discuss in detail any aspects of the texts adopted by the conference. Following the meeting, interested private groups will be invited to communicate their views to the State Department, Office of International Trade.

## A. THE AGREEMENT

### AGREEMENT OF THE HAGUE

*Concerning the International Deposit of Industrial Designs of 6th November, 1925, as revised at London on 2nd June, 1934, and at The Hague on 28th November, 1960.*

The Contracting States,

Moved by the desire to provide the creators of industrial designs with the opportunity of obtaining by an international deposit an effective protection in a larger number of States;

Considering it desirable to that end to revise the Agreement for the International Deposit of Industrial Designs signed at The Hague on 6th November, 1925, and revised at London on 2nd June, 1934;

Have agreed as follows:

#### Article 1

- (1) The Contracting States constitute a Separate Union for the International Deposit of Industrial Designs.
- (2) Only States members of the International Union for the Protection of Industrial Property may become parties to this Agreement.

#### Article 2

For the purposes of this Agreement the following expressions shall have the meanings attributed to them herebelow:

<i>Agreement of 1925</i>	Agreement of The Hague for the International Deposit of Industrial Designs of 6th November, 1925
<i>Agreement of 1934</i>	Agreement of The Hague for the International Deposit of Industrial Designs of 6th November, 1925, as revised at London on 2nd June, 1934
<i>This Agreement or the present Agreement</i>	The Agreement of The Hague for the International Deposit of Industrial Designs as established by the present instrument
<i>Regulations</i>	Regulations for the execution of the present Agreement
<i>International Bureau</i>	Bureau of the International Union for the Protection of Industrial Property
<i>International deposit</i>	A deposit made in the International Bureau
<i>National deposit</i>	A deposit made in the national office of a Contracting State
<i>Multiple deposit</i>	A deposit including several designs

*State of origin of an international deposit*

The Contracting State in which the applicant has a real and effective industrial or commercial establishment or, if the applicant has such establishments in several Contracting States, the Contracting State which he has indicated in his application; if the applicant does not have such an establishment in any Contracting State, the Contracting State in which he is domiciled; if he has no domicile in a Contracting State, the Contracting State of which he is a national

*State having a novelty examination*

A Contracting State the national law of which provides for a system which involves a preliminary *ex officio* search and examination by its national office as to the novelty of each deposited design.

**Article 3**

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 designs in the International Bureau.

**Article 4**

- (1) International deposit may be made in the International Bureau:
  1. directly, or
  2. through the intermediary of the national office of a Contracting State if the law of that State so permits.
- (2) The national law of any Contracting State may require that international deposits of which it is the State of origin shall be made through its national office. Non-compliance with this requirement shall not affect the effects of the international deposit in the other Contracting States.

**Article 5**

- (1) The international deposit shall consist of an application, one or more photographs or other graphic representations of the design, and payment of the fees prescribed by the Regulations.
- (2) The application shall contain:
  1. an enumeration of the Contracting States in which the applicant requests the international deposit to be effective;
  2. the designation of the article or articles in which it is intended to incorporate the design;
  3. if the applicant wishes to claim the priority provided for in Article 9, a statement of the date, the State, and the number of the deposit which gives rise to the right of priority;
  4. such other particulars as the Regulations prescribe.

- (3) (a) In addition, the application may contain:
1. a short description of characteristic features of the design;
  2. a statement as to who is the true creator of the design;
  3. a request for deferment of publication as provided for in Article 6(4).
- (b) The application may be accompanied also by samples or models of the article or articles incorporating the design.
- (4) A multiple deposit may include several designs intended to be incorporated in articles included in the same class of the International Design Classification referred to in Article 21(2), item 4.

### Article 6

- (1) The International Bureau shall maintain the International Design Register and shall register the international deposits therein.
- (2) The international deposit shall be deemed to have been made on the date on which the International Bureau received the application in due form, the fees payable with the application, and the photograph or photographs or other graphic representations of the design, or, if the International Bureau received them on different dates, the last of these dates. The registration shall bear the same date.
- (3) (a) For each international deposit, the International Bureau shall publish in a periodical bulletin:
1. reproductions in black and white or, at the request of the applicant, in colour, of the deposited photographs or other graphic representations;
  2. the date of the international deposit;
  3. the particulars prescribed in the Regulations.
- (b) The International Bureau shall send the periodical bulletin to the national offices as soon as possible.
- (4) (a) At the request of the applicant, the publication referred to in paragraph (3)(a) shall be deferred for such period as he may request. This period may not exceed twelve months computed from the date of the international deposit. However, if priority is claimed, the starting date of this period shall be the priority date.
- (b) At any time during the period referred to in subparagraph (a) the applicant may request immediate publication or may withdraw his deposit. The withdrawal of the deposit may be limited to one or more Contracting States and, in the case of a multiple deposit, to only some of the designs included therein.
- (c) If the applicant fails to pay in time the fees payable before the expiration of the period referred to in subparagraph (a), the International Bureau shall cancel the deposit and shall not effect the publication referred to in paragraph (3)(a).
- (d) Until the expiration of the period referred to in subparagraph (a) the International Bureau shall keep in confidence the registration of deposits made subject to deferred publication, and the public shall have no access to any documents

or objects concerning such deposits. These provisions apply without limitation in time if the applicant has withdrawn the deposit before the expiration of the said period.

- (5) Except as provided in paragraph (4), the Register and all documents and objects filed with the International Bureau shall be open to inspection by the public.

#### Article 7

- (1) (a) A deposit registered in the International Bureau shall have the same effect in each of the Contracting States designated by the applicant in his application as if all the formalities required by the national law for the grant of protection had been complied with by the applicant and as if all administrative acts required to this end had been accomplished by the Administration of such State.  
(b) Subject to the provisions of Article 11, the protection of designs the deposit of which has been registered in the International Bureau is governed in each Contracting State by those provisions of the national law which are applicable in that State to designs the protection of which has been claimed on the basis of a national deposit and concerning which all formalities and acts have been complied with and accomplished.
- (2) An international deposit shall have no effect in its State of origin if the national law of that State so provides.

#### Article 8

- (1) Notwithstanding the provisions of Article 7, the national office of a Contracting State the national law of which provides that the national office may, on the basis of an administrative *ex officio* examination or pursuant to an opposition by a third party, refuse protection, shall, in case of refusal, notify the International Bureau within six months that the design does not meet the requirements of its national law other than the formalities and administrative acts referred to in Article 7(1). If no such refusal is notified within a period of six months, the effects of the international deposit shall commence in that State as from the date of that deposit. However, in a Contracting State having a novelty examination, the effects of the international deposit, while retaining its priority, shall, if no refusal is notified within six months, commence at the expiration of the six-month period unless the national law provides for an earlier date for deposits made with its national office.
- (2) The period of six months referred to in paragraph (1) shall be computed from the date on which the national office receives the issue of the periodical bulletin in which the registration of the international deposit has been published. The national office shall communicate this date to third parties at their request.
- (3) The applicant shall have the same means of recourse against the refusal of the national office referred to in paragraph (1) as if he had deposited his design in that national office; in any case, the refusal shall be subject to a request for re-examination or appeal. The notification of such refusal shall indicate:
  1. the reasons for which it is found that the design does not meet the requirements of the domestic law;

2. the date referred to in paragraph (2) ;
  3. the time allowed for a request for re-examination or appeal ;
  4. the authority to which the request or appeal may be addressed.
- (4) (a) The national office of a Contracting State the domestic law of which contains provisions of the kind referred to in paragraph (1) and which requires a statement as to who is the true creator of the design or a description of the design, may provide that, upon request and within a period not less than sixty days from the sending of such a request by the said office, the applicant shall file in the language of the application filed with the International Bureau:
1. a statement as to who is the true creator of the design ;
  2. a short description emphasizing the essential characteristic features of the design as shown by the photographs or other graphic representations.
- (b) No fees shall be charged by a national office in connection with the filing of such statements or descriptions or for their possible publication by the national office.
- (5) (a) Any Contracting State the domestic law of which contains provisions of the kind referred to in paragraph (1) shall notify the International Bureau accordingly.
- (b) If a Contracting State has several systems for the protection of designs one of which provides for novelty examination, the provisions of this Agreement concerning States having a novelty examination shall apply only to the said system.

### Article 9

If the international deposit of a design is made within six months of the first deposit of the same design in a State member of the International Union for the Protection of Industrial Property, and if priority is claimed for the international deposit, the priority date shall be that of the first deposit.

### Article 10

- (1) An international deposit may be renewed every five years by paying, during the last year of each period of five years, the renewal fees prescribed by the Regulations.
- (2) Subject to the payment of a surtax fixed by the Regulations, a period of grace of six months is granted for the renewal of the international deposit.
- (3) At the time of paying the renewal fees, the international deposit number and, if the renewal is not to be effected for all the Contracting States for which the deposit is about to expire, the Contracting States for which the renewal is to be effected, must be indicated.
- (4) Renewal may be limited to less than all the designs included in a multiple deposit.
- (5) The International Bureau shall record and publish the renewals.

### Article 11

- (1) (a) The term of protection granted by a Contracting State to a design for which an international deposit has been made shall not be less than:
  1. ten years from the date of the international deposit if the deposit was renewed;
  2. five years from the date of the international deposit in the absence of renewal.
- (b) However, if, according to the provisions of the national law of a Contracting State having a novelty examination, protection starts at a date later than that of the international deposit, the minimum terms provided in subparagraph (a) shall be computed from the date at which protection starts in that State. The fact that the international deposit is not renewed or is renewed only once does not affect the minimum terms of protection thus defined.
- (2) If the national law of a Contracting State provides for designs for which a national deposit has been made a protection the duration of which, with or without renewal, is longer than ten years, protection of the same duration shall, on the basis of the international deposit and its renewals, be granted in that State to designs for which an international deposit has been made.
- (3) A Contracting State may, by its national law, limit the minimum term of protection of designs for which an international deposit has been made to the terms provided for in paragraph (1).
- (4) Subject to the provisions of paragraph (1)(b), the protection in a Contracting State shall terminate at the date of expiration of the international deposit, unless the national law of that State provides that the protection shall continue after the date of expiration of the international deposit.

### Article 12

- (1) The International Bureau shall record and publish changes affecting the ownership of a design concerning which an international deposit is in effect. It is understood that the transfer of the ownership may be limited to the rights arising out of the international deposit in less than all the Contracting States and, in the case of a multiple deposit, to less than all the designs included therein.
- (2) The recording referred to in paragraph (1) shall have the same effect as if it had been made in the national offices of the Contracting States.

### Article 13

- (1) The owner of an international deposit may, by means of a declaration addressed to the International Bureau, renounce his rights for all or only some of the Contracting States and, in the case of a multiple deposit, for all or some of the designs included therein.
- (2) The International Bureau shall record and publish such declarations.

**Article 14**

- (1) No Contracting State may, as a condition of recognition of the right to protection, require that the article incorporating the design bear an indication or mention of the deposit of the design.
- (2) If the domestic law of a Contracting State provides for a notice on the article for any other purpose, then such State shall consider such requirements fulfilled if all the articles offered to the public under the authorization of the owner of the rights in the design, or a tag attached to such articles, bear the international design notice.
- (3) The international design notice shall consist of the symbol ® (a capital D in a circle) accompanied by:
  1. the year of the international deposit and the name, or usual abbreviation of the name, of the depositor, or
  2. the number of the international deposit.
- (4) The mere appearance of the international design notice on the articles or the tags shall in no case be interpreted as implying a waiver of protection by virtue of copyright or otherwise whenever, in the absence of such notice, a claim to such protection can be made.

**Article 15**

- (1) The fees prescribed by the Regulations shall consist of:
  1. fees for the International Bureau;
  2. fees for the Contracting States designated by the applicant, namely:
    - a) a fee for each Contracting State,
    - b) a fee for each Contracting State having a novelty examination and which requires the payment of a fee for such an examination.
- (2) Any fees paid for the same deposit for a Contracting State under paragraph (1), item 2. a), shall be deducted from the amount of the fee referred to in paragraph (1), item 2. b), if the latter fee becomes payable for the same State.

**Article 16**

- (1) The fees for Contracting States referred to in Article 15 (1), item 2, shall be collected by the International Bureau and paid over annually to the Contracting States designated by the applicant.
- (2) (a) Any Contracting State may notify the International Bureau that it waives its right to the supplementary fees referred to in Article 15(1), item 2. a), in respect of international deposits of which any other Contracting State making a similar waiver is the State of origin.
  - (b) It may also make a waiver in respect of international deposits of which it is itself the State of origin.

### Article 17

The Regulations shall govern the details concerning the implementation of this Agreement and particularly:

- (1) the languages and the number of the copies in which the application for deposit must be filed and the data to be supplied in the application;
- (2) the amount, due date and method of the payment of the fees for the International Bureau and for the States, including the limits of the fee for Contracting States having a novelty examination;
- (3) the number, size, and other characteristics of the photographs or other graphic representations of each design deposited;
- (4) the length of the description of characteristic features of the design;
- (5) the limits of and conditions under which samples or models of the articles incorporating the design may accompany the application;
- (6) the number of the designs that may be included in a multiple deposit and other conditions governing multiple deposits;
- (7) all matters relating to the publication and distribution of the periodical bulletin referred to in Article 6(3) (a), including the number of copies of the bulletin 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;
- (8) the methods of notifying by the Contracting States of any refusal made under Article 8(1), and the methods of communicating and publishing of such refusals by the International Bureau;
- (9) the conditions of recording and publication by the International Bureau of changes affecting the ownership of a design referred to in Article 12(1) and of renunciations referred to in Article 13;
- (10) the disposal of documents and articles concerning deposits for which the possibility of renewal ceases to exist.

### Article 18

The provisions of this Agreement shall not prevent the claiming of the application of possible wider protection resulting from the national law of a Contracting State, nor shall 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 19

The fees of the International Bureau for the services provided by the present Agreement shall be fixed in such a manner:

- (a) that their yield covers all the expenses of the International Design Service and all those necessitated by the preparation for and holding of meetings of the International Designs Committee or conferences of revision of the present Agreement.
- (b) that they allow for the maintenance of the reserve fund referred to in Article 20.

**Article 20**

- (1) There is hereby established a reserve fund of two hundred fifty thousand Swiss Francs. The amount of the reserve fund may be modified by the International Designs Committee referred to in Article 21.
- (2) The surplus receipts of the International Design Service shall be credited to the reserve fund.
- (3) (a) However, at the time of the coming into force of this Agreement, the reserve fund shall be constituted by each Contracting State paying a sole contribution computed in proportion to the number of units corresponding to the class to which it belongs by virtue of Article 13(8) of the Paris Convention for the Protection of Industrial Property.  
(b) States which become party to the present Agreement after its coming into force shall also pay a sole contribution. This shall be computed according to the principles referred to in the preceding subparagraph in such a manner that all States, whatever the date of their becoming party to the Agreement, pay the same contribution for each unit.
- (4) When the amount of the reserve fund exceeds the established ceiling, the surplus shall be periodically distributed among the Contracting States in proportion to the sole contribution of each until the amount of each contribution is reached.
- (5) When the sole contributions shall have been fully reimbursed, the International Designs Committee may decide that States subsequently becoming party to the Agreement are not required to pay the sole contribution.

**Article 21**

- (1) There is hereby established an International Designs Committee consisting of representatives of all the Contracting States.
- (2) The Committee shall have the following duties and powers:
  1. to establish its own rules of procedure;
  2. to amend the Regulations;
  3. to modify the ceiling of the reserve fund referred to in Article 20;
  4. to establish the International Design Classification;
  5. to study matters concerning the application and possible revision of the present Agreement;
  6. to study all other matters concerning the international protection of designs;
  7. to comment on the yearly administrative reports of the International Bureau and to give general directives to the International Bureau concerning the discharge of the duties entrusted to it by virtue of this Agreement;
  8. to draw up a statement on the foreseeable expenditure of the International Bureau for each three-year period to come.
- (3) The decisions of the Committee shall be taken by a majority of four fifths of its members present or represented and voting in the case of paragraph (2), items

1, 2, 3, and 4, and by a simple majority in all other cases. Abstentions shall not be considered as votes.

- (4) The Committee shall be convened by the Director of the International Bureau:
  1. at least once every three years,
  2. at any time on request of one third of the Contracting States, or, if deemed necessary, at the initiative of the Director of the International Bureau or the Government of the Swiss Confederation.
- (5) The travel expenses and subsistence allowances of the members of the Committee shall be borne by their respective Governments.

#### **Article 22**

- (1) The Regulations may be amended either by the Committee as provided for in Article 21(2), item 2, 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 a circular letter addressed to the Government of each Contracting State. The amendments will be considered as adopted if, within one year from their communication, no Contracting State has communicated an objection to the Government of the Swiss Confederation.

#### **Article 23**

- (1) This Agreement shall remain open for signature until 31st December, 1961.
- (2) It shall be ratified and the instruments of ratification shall be deposited with the Government of the Netherlands.

#### **Article 24**

- (1) States members of the International Union for the Protection of Industrial Property which do not sign this Agreement may accede thereto.
- (2) Such accessions shall be notified through diplomatic channels to the Government of the Swiss Confederation, and by it to the Governments of all Contracting States.

#### **Article 25**

- (1) Each Contracting State undertakes to provide for the protection of designs and to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Agreement.
- (2) At the time a Contracting State deposits its instrument of ratification or accession, it must be in a position under its national law to give effect to the terms of this Agreement.

**Article 26**

- (1) This Agreement shall enter into force one month after the date on which the Government of the Swiss Confederation shall have dispatched a notification to the Contracting States of the deposit of ten instruments of ratification or accession at least four of which being those of States which, at the date of the present Agreement, are not party to the Agreement of 1925 or the Agreement of 1934.
- (2) Thereafter, the deposit of the instruments of ratifications and accessions shall be notified to the Contracting States by the Government of the Swiss Confederation. Such ratifications and accessions shall become effective one month after the date of the dispatch of such notification unless, in the case of accession, a later date is indicated in the instrument of accession.

**Article 27**

Any Contracting State may at any time notify the Government of the Swiss Confederation that this Agreement shall apply also to all or any of the Territories for the international relations of which it is responsible. Thereupon the Government of the Swiss Confederation shall communicate this notification to the Contracting States and the Agreement shall apply to the said Territories at the expiration of one month after the dispatch of the communication by the Government of the Swiss Confederation to the Contracting States unless a later date is indicated in the notification.

**Article 28**

- (1) Any Contracting State may, by notification addressed to the Government of the Swiss Confederation, denounce this Agreement in its own name or on behalf of all or any of the Territories as to which a notification has been given under Article 27. Such notification shall take effect one year after its receipt by the Government of the Swiss Confederation.
- (2) Denunciation shall not relieve any Contracting State of its obligations under this Agreement in respect of designs deposited in the International Bureau before the effective date of the denunciation.

**Article 29**

- (1) This Agreement shall be submitted to periodical revision with a view to the improvement of the protection resulting from the international deposit of designs.
- (2) Revision conferences shall be called at the request of the International Designs Committee or of not less than half of the Contracting States.

**Article 30**

- (1) Two or more Contracting States may at any time notify the Government of the Swiss Confederation that, subject to the conditions indicated in the notification:

1. a common office has been substituted for their several national offices;
  2. they are to be considered as a single State for the purposes of Articles 2 to 17.
- (2) This notification shall take effect six months after the date of dispatch of the communication of this notification which shall be made by the Government of the Swiss Confederation to the Contracting States.

### Article 31

- (1) Only the present Agreement shall be applicable in the mutual relations of States parties to both the present Agreement and the Agreement of 1925, or the Agreement of 1934. However, such States shall in their mutual relations apply the Agreement of 1925 or the Agreement of 1934, whichever is the case, to designs which were deposited in the International Bureau prior to the date at which the present Agreement became applicable in their mutual relations.
- (2) (a) Any State party to both the present Agreement and the Agreement of 1925 shall continue to apply the Agreement of 1925 in its relations to States parties only to the Agreement of 1925, unless it denounced the Agreement of 1925.  
(b) Any State party to both the present Agreement and the Agreement of 1934 shall continue to apply the Agreement of 1934 in its relations to States parties only to the Agreement of 1934, unless it denounced the Agreement of 1934.
- (3) States parties to the present Agreement only shall not be bound to States which, without being party to the present Agreement, are party to the Agreement of 1934 or the Agreement of 1925.

### Article 32

- (1) Signature and ratification of, or accession to, the present Agreement by a State party, at the date of this Agreement, to the Agreement of 1925 or the Agreement of 1934, shall be considered as including signature and ratification of, or accession to, the Protocol annexed to the present Agreement, unless such State makes at the time of signing or depositing the instrument of accession an express declaration to the contrary effect.
- (2) Any Contracting State having made the declaration referred to in paragraph (1), or any other Contracting State not party to the Agreement of 1925 or the Agreement of 1934, may sign or accede to the Protocol annexed to this Agreement. At the time of signing or depositing its instrument of accession it may declare that it does not consider itself to be bound by paragraph (2)(a) or (2)(b) of the Protocol; in this case, the other States parties to the Protocol shall be under no obligation to apply the excluded provision in their relations to that State. The provisions of Articles 23 to 28 inclusive, shall apply by analogy.

### Article 33

The present Act shall be signed in a single copy which shall be deposited in the archives of the Government of the Netherlands. A certified copy shall be forwarded by the latter

to the Government of each State which will have signed the present Agreement or which will have adhered thereto.

In witness whereof the undersigned Plenipotentiaries, having presented their duly recognized full powers, have affixed their signature.

Done at The Hague, the 28th November, 1960.

### PROTOCOL

States parties to this Protocol have agreed as follows:

- (1) The provisions of this Protocol shall apply to designs which have been deposited internationally and for which one of the States parties to this Protocol is deemed to be the State of origin.
- (2) In respect of designs referred to in paragraph (1) above:
  - (a) The term of protection granted by States parties to this Protocol to designs referred to in paragraph (1) shall not be less than 15 years from the date provided for in Article 11, paragraph (1)(a) or (b), as the case may be.
  - (b) The appearance of a notice on the articles incorporating the designs or on the tags attached thereto shall in no case be required by the States parties to the present Protocol, either for the exercise of rights in their territories arising from the international deposit, or for any other purpose.

In witness whereof, the undersigned duly authorized Plenipotentiaries, have signed the present Protocol.

Done at The Hague, the 28th November, 1960.

### REGULATIONS

#### Rule 1

- (1) The application referred to in Article 5 of the Agreement shall be written in English or French on forms distributed by the International Bureau, and it shall be filed in three copies.
- (2) The application shall contain:
  - (a) the name or the trade name and the address of the applicant; if there is an agent, his name and address; if several addresses are given, the address to which the International Bureau must send its communications;
  - (b) the designation of the Contracting State in which the applicant has a real and effective industrial or commercial establishment or, if the applicant has such establishments in several Contracting States, the Contracting State which he indicates as the State of origin of the international deposit; if the applicant does not have such an establishment in any Contracting State, the Contracting State in which he is

- domiciled; if he has no domicile in a Contracting State, the Contracting State of which he is a national;
- (c) the designation of the article or articles in which it is intended to incorporate the design;
  - (d) the list of the documents, and of the samples or models, if any, accompanying the application, and a statement of the amount of fees transmitted to the International Bureau;
  - (e) the list of the Contracting States in which the applicant requests the international deposit to be effective;
  - (f) if the applicant wishes to claim the priority provided for in Article 9 of the Agreement, a statement of the date, the State, and the number of the deposit which gives rise to the right of priority;
  - (g) the signature of the applicant or his agent.
- (3) In addition, the application may contain:
- (a) a short description of characteristic features of the design, including colours; this description cannot exceed one hundred words;
  - (b) a statement as to who is the true creator of the design;
  - (c) a request for publication in colour;
  - (d) a request for the deferment of the publication under Article 6(4)(a) of the Agreement.
- (4) The application may be accompanied by:
- (a) documents supporting the priority claim;
  - (b) samples or models of the article incorporating the design; such samples or models shall not exceed 30 centimeters (12 inches) in any dimension; articles made from perishable or dangerous materials are not acceptable.

## Rule 2

- (1) (a) The number of the designs an applicant may include in a multiple deposit shall not exceed:
1. twenty, if he does not request deferment of publication;
  2. one hundred, if he requests that publication be deferred according to Article 6(4)(a) of the Agreement.
- (b) Multiple deposits including not more than twenty designs shall hereinafter be referred to as "ordinary multiple deposits," and multiple

deposits including more than twenty designs shall hereinafter be referred to as "special multiple deposits."

- (2) All designs included in a multiple deposit must be intended to be incorporated in articles included in the same class of the International Design Classification.
- (3) Each design included in a multiple deposit must be identified by a different number indicated both in the application and on the photographs or other graphic representations accompanying the application.
- (4) The list of the Contracting States in which the applicant requests the international deposit to be effective must be the same for each design included in a multiple deposit.
- (5) If the applicant wishes to request the deferment of the publication under Article 6(4)(a) of the Agreement, he must ask for the same period of deferment in respect of all the designs included in a multiple deposit.

### Rule 3

- (1) (a) If the applicant wishes that the publication of the registration in the International Design Gazette be deferred, he must indicate in his application the period for which he requests such deferment.
  - (b) The period of deferment may not exceed twelve months computed from the date of the international deposit or, if priority is claimed, from the priority date.
  - (c) If the applicant does not indicate the period, the International Bureau shall treat the request as if it indicated the maximum permissible period.
- (2) At any time during the period of the deferment of the publication, the applicant may, by letter addressed to the International Bureau, request immediate publication. Such request may be limited to one or more Contracting States and, in the case of a multiple deposit, to only some of the designs included therein.
- (3) At any time during the period of the deferment of the publication, the applicant may, by letter addressed to the International Bureau, withdraw his deposit. Withdrawal may be limited to one or more Contracting States and, in the case of a multiple deposit, to only some of the designs included therein.
- (4) (a) If, before the expiration of the period of deferment, the applicant pays all the required fees referred to in Rule 7, the International

- Bureau shall proceed to the publication in the *International Design Gazette* immediately after the expiration of the period of deferment.
- (b) If the applicant fails to pay the fees provided for in Rule 7(3), item *b*), the International Bureau shall not proceed to the publication and shall cancel the deposit.

#### Rule 4

- (1) For publication in black and white, a photograph or other graphic representation of 9 by 12 centimeters ( $3\frac{1}{2}$  by 5 inches) shall be attached to each of the three copies of the application.
- (2) For publication in colour, one positive transparency ("diapositive" film) and three colour prints thereof, these prints being 9 by 12 centimeters ( $3\frac{1}{2}$  by 5 inches), shall be attached to the application.
- (3) The same design may be photographed or graphically represented from several angles.

#### Rule 5

- (1) When action is taken through an agent, it shall be necessary to file a power of attorney. Formal attestation of the power shall not be required.
- (2) Interested parties who, under Article 12(1) of the Agreement, request the registration of changes affecting the ownership of a design shall furnish to the International Bureau the necessary supporting documents.

#### Rule 6

- (1) Six months before the starting date of each possible renewal period of an international deposit, the International Bureau shall send a reminder to the owner of the deposit, or, if he has an agent whose name appears in the Register, to such agent. Failure to send such notification shall have no legal consequences.
- (2) (a) Renewal is effected by the payment, during the last year of the five-year period about to expire, of the international and State renewal fees.  
  
(b) If renewal was not effected during the period prescribed by subparagraph (a), the applicant may, during the period of grace referred to in Article 10(2) of the Agreement, effect renewal if, in addition to the international and State renewal fees he pays the surtax provided for this purpose. The renewal fees and the surtax must be paid at the same time.

- (c) At the time of paying the international and State renewal fees, the international deposit number and, if the renewal is not to be effected for all the Contracting States for which the deposit is about to expire, the Contracting States for which the renewal is to be effected, must be indicated.

#### Rule 7

- (1) The nature and the amounts of the fees are set forth in the schedule of fees attached to the present Regulations and forming part thereof.
- (2) For a deposit made without a request for deferred publication, the applicant shall pay at the time of filing:
1. the international basic fee;
  2. the international supplemental fee if the deposit is an ordinary multiple deposit; if he makes two, three, four or five ordinary multiple deposits on the same day, he shall pay the international supplemental fee provided for special multiple deposits;
  3. the international publication fee;
  4. the ordinary State fees;
  5. the State novelty examination fees; the ordinary State fee, paid for a State shall be deducted from the novelty examination fee required by the same State.
- (3) For a deposit made subject to a request for deferred publication, the applicant shall pay:
- a) at the time of filing:
1. the international basic fee;
  2. the ordinary State fees;
- b) before the expiration of the period of the deferment of the publication:
1. the international supplemental fee, in case of a multiple deposit;
  2. the international publication fee;
  3. the supplemental ordinary State fees, in case of a special multiple deposit;
  4. the State novelty examination fees; the ordinary State fee paid for a State shall be deducted from the State novelty examination fee required by the same State.
- (4) All fees shall be payable in Swiss Francs.

**Rule 8**

- (1) As soon as the International Bureau has received the application in due form, the fees payable with the application, and the photograph or photographs or other graphic representations of the design, the date of the international deposit and the deposit number shall be written and the seal of the International Bureau shall be stamped on each of the three copies of the application and on each of the photographs. Each copy of the application shall be signed by the Director of the International Bureau or his representative designated by him for this purpose. One of the copies shall become part of the Register as the official act of registration; another copy shall be returned to the applicant as the certificate of deposit; the third copy shall be loaned by the International Bureau to any national office which may request it.
- (2) Refusals referred to in Article 8 of the Agreement, renewals, changes affecting the ownership of a design, changes in the name or address of the owner of the deposit or his agent, declarations of renunciations, withdrawals by virtue of Article 6(4)(b) of the Agreement, and cancellations by virtue of Article 6(4)(c) of the Agreement, shall be recorded and published by the International Bureau.

**Rule 9**

- (1) The International Bureau shall publish a periodical entitled "*Bulletin international des dessins ou modèles: International Design Gazette.*"
- (2) The *Gazette* shall contain, for each registered deposit: reproductions of the deposited photographs or other graphic representations; indication of the date of the international deposit and of the international deposit number; the name or the trade name and the address of the applicant; the designation of the State of origin of the deposit; the designation of the article or articles in which it is intended to incorporate the design; the list of the Contracting States in which the applicant requests the international deposit be effective; indication of the date, the State, and the number of the deposit invoked for the priority right, if such right is claimed; the description of characteristic features of the design if such is contained in the application; the statement as to who is the true creator of the design if such statement is contained in the application; any other necessary data.

- (3) Furthermore, the *Gazette* shall contain full information as to the recordings referred to in Rule 8(2).
- (4) The *Gazette* may contain indexes, statistical data and other general information.
- (5) Data concerning particular deposits shall be published in the language in which the application accompanying the deposit was made. General information shall be published in both English and French.
- (6) The International Bureau shall, as soon as possible, send to the national office of each Contracting State one free copy of the *Gazette*. Furthermore, each national office shall, upon request, receive not more than five copies free of charge, and not more than ten copies at one third of the regular subscription fee.

#### **Rule 10**

Notifications of refusal by national offices referred to in Article 8 (1) of the Agreement shall be sent in three copies to the International Bureau. If the notification was made within the term provided for in Article 8 (1) and (2) of the Agreement, it shall be communicated to the person shown by the International Register as the owner of the deposit and, if the deposit has been made through the intermediary of a national office, to such office if it so wishes. The fact of such notification, and the later reversal, if any, of the refusal, shall be published in the International Design Gazette. If the notification of refusal was sent after the expiration of the said term, the International Bureau shall call this fact to the attention of the national office which sent said notification.

#### **Rule 11**

The International Bureau may dispose of the samples and models referred to in Article 5 (3) (b) of the Agreement, and may destroy the files, five years after the date on which the possibility of renewal ceases to exist or on which the deposit was withdrawn or cancelled, unless the person shown by the International Design Register as the last owner of the deposit has requested that they be returned to him at his expense.

#### **Rule 12**

These Regulations shall enter into force simultaneously with the Agreement.

## SCHEDULE OF FEES

<i>International basic fee:</i> .....	25 Francs per deposit whether single, ordinary multiple, or special multiple
<i>International supplemental fee:</i>	
— in case of ordinary multiple deposit, if deferred publication is not requested .....	15 Francs for the second design 10 Francs for the third design 5 Francs for the fourth design 2 Francs per design for the 5th to the 20th design
— in case of an ordinary multiple deposit, if deferred publication is requested .....	25 Francs for the first design 15 Francs for the second design 10 Francs for the third design 5 Francs for the fourth design 2 Francs per design for the 5th to the 20th design
— in case of special multiple deposit (which is always with deferred publication) .....	25 Francs for the first design 15 Francs for the second design 10 Francs for the third design 5 Francs for the fourth design 2 Francs per design for the 5th to 100th design
<i>International publication fee:</i>	
— for publication in black and white .....	25 Francs per standard space
— for publication in colour .....	100 Francs per standard space
A standard space is a space of 6 by 9 centimeters (2½ by 3½ inches).	
A standard space shall not include more than four figures; the figures may show the same design viewed from different angles, or they may relate to different designs.	
<i>Ordinary State fee:</i>	
— for a single deposit .....	5 Francs per designated State
— for an ordinary multiple deposit .....	5 Francs per designated State
— for the first 20 designs in a special multiple deposit .....	5 Francs per designated State
<i>Supplemental ordinary State fee in case of a special multiple deposit:</i> .....	2,50 Francs per designated State for each group of 20 designs or fraction thereof, except the first 20 designs.

*State novelty examination fee:*

a fee the amount of which is fixed by the national office of the State having a novelty examination. This fee may exceed neither three fourths of the fee for designs deposited with the national office, nor 50 Francs:

- per group of five designs each in a multiple deposit if the designs within the group (1) are variations of the same design or (2) are the same design applied to different articles;
- per design in all other cases.

If, in the course of the examination, the national office finds that the groups referred to above do not satisfy the said conditions, it shall notify the applicant and shall allow him at least 60 days for the payment of the resulting difference in the fee. On the other hand, if the applicant, after payment of the fee, discovers that he did not take full advantage of the possibility of the grouping referred to above, he may request the national office to reimburse the resulting difference in fees.

*International renewal fee:*

- for a deposit containing one design ..... 50 Francs
- for the first design in an ordinary multiple deposit ..... 50 Francs
- for each additional design in an ordinary multiple deposit ..... 10 Francs
- surtax referred to in Rule 6 (2) (b), per deposit ..... 10 Francs

For the sole purpose of computing the renewal fee, the special multiple deposit shall be divided in deposits containing not more than twenty designs each.

*State renewal fee:*

- for a deposit containing one design ..... 10 Francs per designated State
- for an ordinary multiple deposit ..... 10 Francs per designated State

For the sole purpose of computing the renewal fee, the special multiple deposit shall be divided in deposits containing not more than twenty designs each.

*For the filing and publication of the description referred to in Rule 1 (3) (a) if it contains from 41 to 100 words ..... 10 Francs*

*For the recording and publication of changes affecting the ownership of a design, in one or more States, in respect to one design, or more designs contained in the same multiple deposit ..... 25 Francs*

*For the recording and publication of changes in names or addresses in respect to one design, or more designs contained in the same multiple deposit ..... 5 Francs*

*For furnishing extracts from the Register or from the file 15 Francs per page or fraction thereof*

*For furnishing a copy of the certificate of deposit ..... 15 Francs*

*For the furnishing of information concerning the contents of the Register ..... 15 Francs per hour or fraction thereof required for the furnishing of the information*

*For a certificate certifying the identity of a photograph, graphic representation, sample or model, furnished by the person requesting the certificate ..... 10 Francs*

## PART II.

**LEGISLATIVE AND ADMINISTRATIVE  
DEVELOPMENTS**

## 1. UNITED STATES OF AMERICA AND TERRITORIES

## 134. U. S. CONGRESS. HOUSE.

H. R. 2537. A Bill to implement the Agreement on the Importation of Educational, Scientific and Cultural Materials, opened for signature at Lake Success on November 22, 1950. Introduced by Mr. Daniels January 12, 1961, and referred to the Committee on Ways and Means. 10 p. (87th Cong., 1st sess.)

The text of the bill reads as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "The Educational, Scientific, and Cultural Materials Importation Act."*

SEC. 2. The purpose of this Act is to enable the United States to give effect to the Agreement on the Importation of Educational, Scientific, and Cultural Materials, opened for signature at Lake Success on November 22, 1950, with a view to contributing to the cause of peace through the freer exchange of ideas and knowledge across national boundaries.

SEC. 3. Subject to section 4 of this Act, the following articles shall be exempt from any duty imposed by the Tariff Act of 1930, as amended, and from any import tax imposed by the Internal Revenue Code of 1954, as amended (hereinafter referred to as "duty-free treatment"):

## SCHEDULE A

## BOOKS, PUBLICATIONS, AND DOCUMENTS

- (i) Printed books and pamphlets.
- (ii) Newspapers and periodicals.
- (iii) Books and pamphlets produced by duplicating processes not included in paragraph (i) of this schedule A.
- (iv) Official Government publications, that is, official, parliamentary, or administrative documents.

(v) Travel posters and travel literature (pamphlets, guides, timetables, leaflets, and similar publications), whether illustrated or not, including those published by private commercial enterprises, the purpose of which is to stimulate travel outside the United States.

(vi) Publications the purpose of which is to stimulate study outside the United States.

(vii) Manuscripts.

(viii) Catalogs listing books and publications offered for sale by publishers or booksellers established outside the United States.

(ix) Catalogs listing films, recordings, or other visual or auditory material of an educational, scientific, or cultural character issued by or on behalf of the United Nations or any of its specialized agencies.

(x) Music in manuscript or printed form, or reproduced by duplicating processes other than printing.

(xi) Geographical, hydrographical, or astronomical maps and charts.

(xii) Architectural, industrial, or engineering plans and designs, and reproductions thereof, intended for study in scientific establishments or educational institutions approved for duty-free treatment of such articles in order to further the purpose of this Act.

The exemptions provided by this schedule A shall not apply to—

(a) stationery.

(b) books, publications, and documents (except catalogs, travel posters, travel literature, newspapers, and periodicals) published by or for a private commercial enterprise for advertising purposes, unless it is determined that the educational, scientific, or cultural nature of any such book, publication, or document justifies its duty-free treatment in order to further the purpose of this Act.

(c) Newspapers and periodicals in a majority of the issues of which the Secretary of the Treasury determines advertising matter to be in excess of 70 per centum by space.

(d) All other articles (except catalogs) in which the advertising matter is in excess of 25 per centum by space, as determined by the Secretary of the Treasury. In the case of travel posters and literature, this percentage shall apply only to private commercial advertising matter by a person other than the person by or for whom the poster or literature is published.

## SCHEDULE B

WORKS OF ART AND COLLECTORS' PIECES OF AN EDUCATIONAL,  
SCIENTIFIC, OR CULTURAL CHARACTER

(i) Paintings, drawings, and copies of paintings or drawings, executed entirely by hand, but not including manufactured decorated wares.

(ii) Hand-printed impressions, produced from hand-engraved or hand-etched blocks, plates, or other material, signed and numbered by the artist.

(iii) Original works of art of statuary or sculpture, whether in the round, in relief, or in intaglio, not including mass-produced reproductions or works of conventional craftsmanship of a commercial character.

(iv) Collectors' pieces and objects of art imported by or for public galleries, public museums, or other public institutions, approved for duty-free treatment of such articles in order to further the purpose of this Act, not intended for resale.

(v) Collections and collectors' pieces in such scientific fields as anatomy, zoology, botany, mineralogy, paleontology, archeology, and ethnography, not intended for resale.

(vi) Antiques, that is processed articles in excess of one hundred years of age at the time of importation, subject to the provisions of section 489 of the Tariff Act of 1930, as amended.

## SCHEDULE C

VISUAL AND AUDITORY MATERIALS OF AN EDUCATIONAL,  
SCIENTIFIC, OR CULTURAL CHARACTER

(i) Films, filmstrips, microfilms, and slides, of an educational, scientific, or cultural character, when imported by or for organizations (including broadcasting organizations) approved for duty-free treatment in order to further the purpose of this Act, for exhibition by such an organization for educational, scientific, or cultural purposes.

(ii) Newsreels (with or without sound track) depicting events of current news value at the time of entry, or withdrawal from warehouse, for consumption, so entered or withdrawn in either negative form, exposed and developed, or in positive form, printed and developed, when imported by organizations (including broadcasting organizations) approved for duty-free treatment of such articles in order to further the purpose of this Act.

(iii) Sound recordings of an educational, scientific, or cultural character for use exclusively by educational, scientific, or cultural organizations (including

broadcasting organizations) approved for duty-free treatment of such articles in order to further the purpose of this Act.

(iv) Films, filmstrips, microfilms, and sound recordings of an educational, scientific, or cultural character produced by the United Nations or any of its specialized agencies.

(v) Patterns, models, and wall charts for use exclusively for demonstrating and teaching purposes in educational, scientific, or cultural institutions approved for duty-free treatment of such articles in order to further the purpose of this Act.

#### SCHEDULE D

##### SCIENTIFIC INSTRUMENTS AND APPARATUS

Scientific instruments or apparatus, intended exclusively for educational purposes or pure scientific research and not for resale contrary to the purpose of this Act: *Provided*, That such scientific instruments or apparatus are consigned to scientific or educational institutions approved for duty-free treatment of such articles in order to further the purpose of this Act, and that they are to be used under the control and responsibility of these institutions; and

(b) That no similar articles of equivalent scientific value were being manufactured or produced in the United States at the time such instruments or apparatus were ordered.

#### SCHEDULE E

##### ARTICLES FOR THE BLIND

(i) Books, publications, and documents in raised characters for the blind.

(ii) Other articles specially designed for the educational, scientific, or cultural advancement of the blind imported by or for organizations concerned with the welfare of the blind approved for duty-free treatment of such articles in order to further the purpose of this Act.

#### SCHEDULE F

##### ARTICLES FOR SHOWING AT PUBLIC EXHIBITIONS

Educational, scientific, or cultural materials imported exclusively for showing at a public exhibition approved for duty-free treatment of such articles in order to further the purpose of this Act, and for subsequent reexportation.

SEC. 4. (a) Notwithstanding the provisions of section 3 of this Act, the President may proclaim that he has determined that as a result of the duty-

free treatment of any article pursuant to that section, such article is being imported into the United States in such increased quantities, either actual or relative, as to cause or threaten serious injury to the domestic industry producing like or directly competitive articles; and, if the President so proclaims, such duty-free treatment shall be suspended unless the President specifies in his proclamation a rate of duty or import tax lower than the rate which would have resulted from a suspension and declares that such lower rate is adequate to prevent or remedy such injury. Such suspension or specified rate shall be in effect with respect to articles entered, or withdrawn from warehouse, for consumption on and after the date specified in the proclamation; and, when the President determines that the duty-free treatment of such article may be restored without causing or threatening serious injury to the domestic industry concerned, he shall so proclaim, and the duty-free treatment provided for in section 3 of this Act shall again become effective. Before exercising his authority pursuant to this subsection the President may request the United States Tariff Commission for an investigation and report.

(b) The provision in section 3 for the duty-free treatment of an article for which duty-free treatment is also provided in a trade agreement entered into under section 350 of the Tariff Act of 1930, as amended, shall not affect the operation of section 7 of the Trade Agreements Extension Act of 1951, as amended, with respect to that article.

SEC. 5. (a) The President may designate officers of one or more Government agencies, in addition to the Secretary of the Treasury, to make certain determinations and to grant certain approvals necessary to carry out the provisions of section 3 of this Act.

(b) In making determinations and granting approvals to carry out the provisions of this Act, the Secretary of the Treasury and any other officer designated by the President pursuant to subsection (a) of this section shall, as appropriate, consult with additional Government agencies; and any agency so consulted shall cooperate fully in such consultation. The Secretary of the Treasury and any other officer so designated may utilize, by delegation or otherwise, the services and facilities of any additional Government agency in accordance with agreements between such Secretary or other officer and the head of such additional Government agency, which agreements may include payment for such services and facilities in advance or by way of reimbursement. All determinations made by any such other officer to carry out schedule D, or exception (b) to schedule A, of section 3 shall be promptly certified by him to the Secretary of the Treasury and all other determinations or approvals by any such other officer shall be promptly notified to the Secretary of the Treasury or his delegate; and any such other officer shall establish, in agree-

ment with the Secretary of the Treasury, procedures for such prompt certification or notification, as the case may be. The Secretary of the Treasury or another officer designated by the President pursuant to subsection (a) of this section shall publish a description of the articles which are from time to time accorded duty-free treatment pursuant to schedule D of section 3.

(c) In addition to the specific powers conferred by this Act, the Secretary of the Treasury and any other officer designated by the President pursuant to subsection (a) of this section are severally authorized to make such rules and regulations as may be necessary to carry out their respective functions under this Act.

SEC. 6. This Act shall apply to articles entered, or withdrawn from warehouse, for consumption on and after a day to be proclaimed by the President, which day shall be within a period of three months after the day on which the United States instrument of ratification of the Agreement on the Importation of Educational, Scientific, and Cultural Materials shall have been deposited.

135. U. S. CONGRESS. HOUSE.

H.R. 70. A bill to require juke box operators to pay royalty fees for the use of the musical property of composers, authors, and copyright owners. Introduced by Mr. Celler, January 3, 1961, and referred to the Committee on the Judiciary. 2 p. (87th Cong., 1st sess.)

The text is identical with that of H.R. 5921, 86th Cong., 1st sess., also introduced by Mr. Celler. See 6 BULL. CR. SOC. 240, Item 244 (1959).

136. 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, second session, pursuant to S. Res. 240. Studies 14-25. Printed for the use of the Committee on the Judiciary. Washington, U. S. Govt. Print. Off., 1960. 4 v. (86th Cong., 2d sess., Committee print.)

Contents. [V]: 14. Fair use of copyrighted works, by Alan Latman. 15. Photoduplication of copyrighted material by libraries, by Borge Varmer. 16. Limitations on performing rights, by Borge Varmer. [VI]: 17. The registration of copyright, by Benjamin Kaplan. 18. Authority of the Register of Copyrights to reject applications for registration, by Caruthers Berger. 19. The recordation of copyright assignments and licenses, by Alan Latman, assisted by Lorna G. Margolis and Marcia

Kaplan. [VII]: 20. Deposit of copyrighted works, by Elizabeth K. Dunne. 21. The Catalog of Copyright Entries, by Elizabeth K. Dunne and Joseph W. Rogers. [VIII]: 22. The damage provisions of the copyright law, by William S. Strauss. 23. Operation of the damage provisions of the copyright law, by Ralph S. Brown, Jr., with the assistance of William A. O'Brien and Herbert Turkington. 24. Remedies other than damages for copyright infringement, by William S. Strauss. 25. Liability of innocent infringers of copyrights, by Alan Latman and William S. Tager.

The fifth to eighth 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.

137. U. S. COPYRIGHT OFFICE.

Related Code provisions; a list of some provisions of the United States Code and the Code of Federal Regulations dealing with or related to copyright (exclusive of 17 U.S.C. and 37 C.F.R. ch. II). Compiled by Marjorie McCannon, assistant chief, Reference Division. Washington, U. S. Govt. Print. Off., Oct. 1960. 17 p. Cir. 86.

A substantially revised circular.

138. U. S. COPYRIGHT OFFICE.

United States copyright relations of current interest; a selective listing of proclamations, treaties and conventions concerning copyright relations of the United States with other countries. Revised to Dec. 1, 1960. Washington, Dec. 1960. 14 p. ICR-1.

139. U. S. TREASURY DEPARTMENT. *Internal Revenue Service*. Rev. Rul. 60-358, I.R. Bulletin, Nov. 28, 1960, p. 9.

The Ruling deals with television films, taped shows for reproduction and other property of a similar character. Various methods of computing depreciation of such property under §167(b) of the 1954 Internal Revenue Code have been found inadequate when applied to television films. This has resulted in a distortion of income under returns filed by taxpayers deriving income from such property. The Internal Revenue Service has announced that the so-called "income forecast"

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method is readily adaptable for computing depreciation of the cost of television films without producing any serious distortion of income.

The Ruling issued describes this method and illustrates how depreciation may be computed. The method described constitutes an acceptable method for computing reasonable depreciation allowance in such cases. The income forecast method will permit of accelerated depreciation, thus bearing a close relation to the usually larger income realized in the earlier years of showings of such television films. The Ruling permits of adjustment from year to year based upon current estimates of estimated future income. Thus, under the Ruling it would be possible to adjust the income forecast, where there has been substantial over estimation or under estimation as a result of circumstances occurring in subsequent years. This Ruling clarifies an area that has been subject to confusing treatment of depreciation with respect to leased or rented television films including taped shows for reproduction.

## 2. FOREIGN NATIONS

### 140. ECUADOR. *Laws, statutes, etc.*

Loi sur la propriété intellectuelle (des 24 octobre 1959 et 22 janvier 1958). (73 *Le Droit d'Auteur* 246-250, no. 9, Sept. 1960.)

French translation of the copyright law of Ecuador. Also published in *Revue Internationale du Droit d'Auteur*, no. 29 (Oct. 1960), pp. 159-166.

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## PART III.

**CONVENTIONS, TREATIES AND PROCLAMATIONS**

141. International Confederation of Authors' and Composers' Societies. *21st Congress, Bürgenstock and Berne, 1960.*

[Activité du] XXI<sup>e</sup> Congrès de la Confédération internationale de la Confédération internationale des Sociétés d'auteurs et compositeurs (Bürgenstock et Berne, 12-16 septembre 1960). (73 *Le Droit d'Auteur* 269-271, no. 10, Oct. 1960.)

A summary of the activities, and the texts of the resolutions and decisions made at the 21st meeting of CISAC. The resolutions and decisions related to the following subjects: agreements concluded by the Council of Europe in the matter of television, draft convention on neighboring rights, draft copyright laws of the German Federal Republic, copyright protection in newly independent countries, protection of plastic works, loans of books in public libraries, copyright glossary, convention of the Berne Union, and moral right of the author.

142. International Copyright Union. *Permanent Committee. 9th, London, 1960.*

[Actes de la] Neuvième session du Comité permanent de l'Union internationale pour la protection des oeuvres littéraires et artistiques (Londres, 31 octobre-4 novembre 1960). (73 *Le Droit d'Auteur* 324-335, no. 12, Dec. 1960.)

Records of the 9th session of the Permanent Committee of the Berne Union, including a list of participants, and the report and resolutions in French and English in parallel columns. (See 8 BULL. CR. SOC. 71, Item 70 (Dec. 1960).)

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## PART IV.

**JUDICIAL DEVELOPMENTS IN LITERARY  
AND ARTISTIC PROPERTY**

## A. DECISIONS OF U. S. COURTS

## 1. Federal Court Decisions

143. *Reeve Music Co., et al. v. Crest Records, Inc., et al.*, 285 F.2d 546, 128 U.S.P.Q. 24 (2d Cir. Dec. 15, 1960) (Swan, J.).

Appeal from a decision of the District Court, 128 U.S.P.Q. 37 (E.D.N.Y. June 22, 1959) (Abruzzo, J.), in which plaintiffs were granted summary judgment in an action for copyright infringement, and in which defendants were enjoined from further unauthorized use of plaintiffs' musical compositions. The trial judge referred the matter to a Special Master for ascertainment of damages.

*Held*, affirmed in part, dismissed in part.

The Court first pointed out that the reference to a Special Master rendered the judgment interlocutory, and hence non-appealable. Only the granting of a temporary injunction was reviewable on appeal at this stage. The defendants' contention was stated by the Court as follows: "The defendants are affiliated corporations to whom we shall refer respectively as Crest and Shelley. They conducted their operations at the same address in Huntington Station, N. Y. Crest produced the 'master stamper' which Shelley used to 'press' a number of records which included the plaintiffs' songs. Each defendant contends that it was acting as a subcontractor for . . . a Canadian corporation, which was not a party to plaintiffs' action, and that neither manufactured the infringing records within the meaning of §101(e) which, inter alia, empowers the court to grant an injunction against copyright infringement by the 'unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music.' The defendants contend that their position is supported by *G. Ricordi & Co. v. Columbia Graphophone Co.* (D.C.N.Y.), 270 F. 822, and *Edward B. Marks Music Co. v. Foullon* (D.C.N.Y.), 79 F. Supp. 664, 77 U.S.P.Q. 502, affirmed, 2 Cir., 171 F.2d, 905, 80 U.S.P.Q. 56." The Court rejected this contention as follows: "Under §101(e), on the other hand, 'manufacture' is an act of infringement, and 'courts have long recognized that infringement of a copyright is a tort, and all persons concerned therein

are jointly and severally liable as such tort feasons.' *Ted Browne Music Co. v. Fowler*, 2 Cir., 290 F. 751, 754. We think it plain that here, whether or not the separate act performed by each defendant constitutes 'manufacture,' the two defendants, acting in concert, 'manufactured' the infringing discs."

144. *Orgel, et al. v. Clark Boardman Co., et al.*, Civ. 92-2 (S.D.N.Y., March 30, 1960) (Dimock, J.).

Action for copyright infringement in which plaintiffs asserted that their book, "Orgel On Valuation Under Eminent Domain," had been plagiarized by defendants' book, "Jahr On Eminent Domain—Valuation and Procedure," with regard to the former's treatment of valuation. Defendants conceded access. The only issue, therefore, was whether plaintiff had established copying by defendants.

*Held*, after trial, for plaintiffs.

The Court noted that the similarity between plaintiffs' and defendants' treatment of valuation was striking. Plaintiffs' scheme of analysis was original, and, said the Court, "For two minds independently to reach two such similar analyses would be an unbelievable coincidence." In addition, there were many instances of "almost verbatim identity of language in the two works." Further, defendants' book contained many illustrative examples and suggestions similar to those contained in plaintiffs' book, as well as similar citations in support of particular propositions of law. Finally, the Court pointed out one common error in the miscitation of a case, and concluded as follows: "When the books are read together in continuity the content is so similar in arrangement, in language and in substance that the conclusion is inescapable that the individual defendant took unfair advantage of his access to the individual plaintiff's book in the compilation of the part of his work which dealt with valuation."

The Court referred the issue of damages to Newman Levy, Esq., as master. Mr. Levy, in a report filed July 14, 1960, found defendants' profits derived from the infringing book to have been \$12,849.32. He pointed out that only 35% of the book contained plagiarized material, and therefore recommended that 35% of defendants' profits be awarded to plaintiffs. In addition, he recommended as "appropriate equitable relief" the sum of \$7,000, plus counsel fees of \$10,000.

Both parties took exceptions to various parts of the master's report. In a memorandum filed November 29, 1960, the Court rejected the master's recommendation of a 35% apportionment: "Such a rule of thumb will not do. No evidence that was introduced can serve as a basis

for determining how much of defendants' profits resulted from the the plagiarism. For aught that appears, the legitimate 65% of the pages in *Jahr* may have been completely without influence in the sales. Under those circumstances plaintiffs are entitled to all of defendants' profits." The Court went on to disallow the master's recommendation of \$7,000 as "appropriate equitable relief," but otherwise adopted the master's recommendations.\*

145. *The Procter & Gamble Co. v. Moskowitz, et al.*, 127 U.S.P.Q. 523 (E.D.N.Y. Nov. 30, 1960) (Abruzzo, J.).

Action for copyright infringement. Plaintiff moved for a preliminary injunction, contending that defendants had infringed its copyright on an entry blank for the "Presidential Party Contest." This blank incorporated much original art and textual material. The defendants engaged in the business of selling answers to plaintiff's puzzle contest at \$5.00 each.

*Held*, preliminary injunction granted.

The Court reasoned as follows: "*Gemeroy v. Leopold*, 79 F.Supp. 458 (S.D.N.Y.); *Philadelphia Record Co. v. Leopold*, 40 F.Supp. 346, 51 U.S.P.Q. 163 (S.D.N.Y.); and *Hearst Consolidated Publications, Inc. v. Doe*, N.Y.L.J., February 25, 1959, p. 12, col. 7 (not officially reported), laid down the rule that selling answers to a puzzle contest was an unlawful interference with the plaintiff's business and copyright and is, in effect, inducing spurious and fraudulent performances on the part of prospective contestants, and, because of that, injunctive relief should be granted because of the inadequacy of the remedy at law."

146. *M. Witmark & Sons, et al. v. Tremont Social and Athletic Club; Chappell & Co., et al. v. Tremont Social and Athletic Club*, 188 F.Supp. 787, 127 U.S.P.Q. 447 (D. Mass. Nov. 16, 1960) (Caffrey, J.).

Action for copyright infringement in which plaintiffs alleged the unauthorized public performance for profit by defendant of copyrighted songs owned by plaintiffs. The parties stipulated that the only issue was whether the songs were played "publicly for profit." Defendant was a social and athletic club open seven days a week, serving liquor but not food. Revenues from such liquor sales were the club's principal source of income. The surplus was used to support various athletic teams for which the club purchased equipment. The club manager

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\* A Notice of Appeal was filed by defendants on January 17, 1961.—Ed.

testified that there were some 200-300 members, but evidence indicated that, for all practical purposes, anyone could join. On Friday and Saturday evenings, a small band played for the entertainment of customers. There was evidence to the effect that the band was an independent contractor.

*Held*, after trial, for plaintiffs.

The fact that the band was an independent contractor did not relieve the proprietor of liability for copyright infringement. As to the substantive issue, the court commented as follows: "I find that this case involves a public playing for profit without license of copyrighted musical compositions owned by plaintiffs and that it falls squarely within the ruling of Judge Aldrich in *Alan Jay Lerner et al. v. Club Wander In, Inc.*, 174 F. Supp. 731, 122 U.S.P.Q. 595 [7 BULL. CR. Soc. 50, Item 30 (1959)] [D. Mass. 1959]."

147. *Sweet Music, Inc. v. Melrose Music Corp., et al.*, 189 F. Supp. 655, 127 U.S.P.Q. 513 (S.D. Cal. Dec. 7, 1960) (Mathes, J.).

Copyright infringement action in which plaintiff sought damages, an injunction, and a declaratory judgment. The facts were not disputed, and were stated by the Court as follows: "Prior to July 21, 1929, Milo A. Sweet and Glen Grant created the original musical composition 'Fight On,' comprised of music written by Sweet and lyrics written by both Grant and Sweet. This composition was regularly published with notice of copyright, and timely claim of copyright was registered in the Copyright Office by the predecessor of defendant Melrose Music Corp., acting as agent for both Grant and Sweet. Later in 1929, the co-authors entered into an agreement transferring to the predecessor of defendant Melrose Music Corp. the 'exclusive band, orchestra, folio and sheet music publishing rights of the said composition for the term of present copyright and all renewals thereof,' in consideration of certain specified royalty payments. Some ten years later, in 1939, the co-authors agreed to make timely application for renewal of the copyright at the expiration of the original 28 year term, and to 'sell, assign, transfer and deliver' to the predecessor of defendant Broadcast Music, Inc., all of their renewal rights, in return for royalties to be paid during the renewal period. Composer Grant died in 1941, leaving a widow. In 1955 Sweet and Grant's widow, after obtaining renewal of the copyright, purported to assign the renewed copyright to plaintiff, who took the assignment with full knowledge of the 1929 and 1939 agreements. Defendant Broadcast Music, Inc., has since assigned to Meridian Music Corp. any interest it may have in the renewed copyright, excepting

'public performance' rights." Plaintiff urged that Grant's death prior to the renewal term nullified the 1929 and 1939 agreements. Defendants urged that Grant's death did not affect Sweet's obligations, and hence defendants were tenants in common with plaintiff.

*Held*, after trial, for defendants.

Commenting on plaintiff's argument, the Court said: "To hold then that the entire assignment is of no force, merely because part of an otherwise valid assignment fails due to the death of one of the assignors, would be to ignore the policy clearly expressed by the Congress in §28 of the Act and elucidated by the Supreme Court in *Fisher Music Co. v. Witmark & Sons*, . . . 318 U.S. 643, 57 U.S.P.Q. 50. Plaintiff's argument overlooks the fact that the renewal provisions of §24 of the Act [17 U.S.C. §24] were designed to protect only the classes of persons specifically designated therein, and not a surviving co-author. If Sweet and Grant each had executed separate assignments of their respective interests in the renewal copyright, it is beyond argument that both Sweet and plaintiff, as his transferee with notice, would be bound under the rationale of the *Fisher* case. The mere circumstance that they happened to join in the same assignment agreement should not dictate a different result in the face of the policy declared in §28 of the Act." Plaintiff also urged that there was lack of mutuality of remedy, since defendants could not be obligated to perform their part of the bargain due to Grant's death. The Court rejected this contention: "By their claims at bar defendants in effect assert that they remain bound by the assignment agreements. They cannot rely on the assignment agreements and at the same time refuse to perform their obligations thereunder." The Court concluded that each side to this litigation was the owner of one half an undivided interest in the renewal copyright.

## 2. State Court Decisions

148. *Noble v. D. Van Nostrand Co.*, 128 U.S.P.Q. 100 (N.J. Superior Ct., Chancery Div. Oct. 28, 1960) (Collester, J.).

Action based on common-law copyright, in which plaintiff sought a temporary injunction against the publication by defendant of a book entitled, "Your Garden In The South," by Hamilton Mason. Plaintiff and Mason had begun work as collaborators on a book dealing with a similar topic, but had suffered a falling out prior to any formal literary composition. They had amassed much research data, however, and plaintiff now asserted that publication of Mason's book would violate her rights in this data.

*Held*, temporary injunction denied.

The Court commented as follows: "There is no question but that both the plaintiff and Mr. Mason jointly owned the research data. Does such a joint ownership give to either the plaintiff or Mr. Mason the right to bar each other from using the product of their joint efforts? . . . In summary, it may be stated that generally with respect to the problems of co-owners of literary or creative productions in the copyright field, Courts have held (1) such co-owners are tenants in common, (2) one co-owner may use or license the use of the production without the consent of the other, being liable only for a duty to account for profits, (3) the tendency of the courts is to oppose judicial action which discourages collaboration in literary or creative productions or restricts or bars the publication of creative works, (4) neither co-owner occupies a superior right in a literary or creative work, and (5) an injunction or action for accounting will not lie against the licensee of one co-owner by the other. . . . It is my opinion that the plaintiff and Mr. Mason owned the compilation of research data as tenants in common and that neither has a superior right over the other. I am of the opinion that each co-owner can use the same without the consent of the other. If the plaintiff has a remedy, it would seem to be in an action for accounting against Mr. Mason, who is not a party to this suit. Nor do I infer by this statement that the plaintiff is entitled to maintain such an action. It is my opinion that the plaintiff does not have a right to injunctive relief against the defendant . . ."

149. *Columbia Broadcasting System, Inc., et al. v. Circle Bar and Grill, Inc., et al.* (N. J. Superior Ct., Chancery Div., Passaic Co. December 16, 1960) (Grimshaw, J.).

Plaintiff broadcasting company had an agreement with the New York Football Giants with regard to the broadcasting of football games. The agreement provided that the games were not to be broadcast into an area within 75 miles of the city where each game was played. Defendants obtained special television equipment which permitted reception of plaintiff's telecasts within the proscribed 75 mile area. They advertised in local newspapers to the effect that such games could be watched at plaintiff's auditorium, and charged admission to the general public for entry to the telecasts.

*Held*, consent judgment entered enjoining defendants from continuing such conduct in the future.

(Editor's note: This matter is interesting in that it appears to recognize property rights in an uncopyrighted telecast. Being a consent judgment, however, its value as precedent may be limited.)

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150. *Etienne Aigner, Inc. v. Becho, et al.*, 127 U.S.P.Q. 100 (Sup. Ct., N. Y. Co. Sept. 16, 1960) (Streit, J.).

Action for unfair competition in which plaintiff sought a temporary injunction. Plaintiff was a manufacturer of handbags, as were defendants. Defendants' product was so similar to plaintiff's "as to compel the inference that piracy occurred."

*Held*, motion granted in part.

The Court stated: "An imitator, while he may copy that which has become public property, may not do so as the result of knowledge he acquires through a breach of trust or confidence, or by inducing a breach of the trust and using the knowledge obtained by such breach." The papers before the Court presented an issue of fact as to whether a breach of trust had indeed occurred, and thus temporary injunctive relief was inappropriate. The Court did, however, enjoin defendants from marketing handbags similar to plaintiff's without a clear designation that such handbags were of defendants' manufacture.

*Also of Interest:*

151. *Blisscraft of Hollywood v. United Plastic Co., et al.*, 127 U.S.P.Q. 452 (S.D.N.Y. Nov. 25, 1960) (Solomon, J.) (complaint and counterclaim both dismissed in action for design patent and trademark infringement).
152. *Consumer Profit Sharing Co. v. Original Green Stamp Co.*, 127 U.S.P.Q. 463 (Sup. Ct., Kings Co. Nov. 30, 1960) (Cone, J.) (temporary injunction denied in action for unfair competition and under N. Y. Penal Law §964).
153. *Delmonico Hotel Corp. v. Delmonico Delicatessen, Inc.*, 127 U.S.P.Q. 470 (Sup. Ct., N. Y. Co. Nov. 24, 1960) (Markowitz, J.) (petition denied in action under N. Y. Penal Law §964).
154. *Lincoln Center for the Performing Arts, Inc. v. Lincoln Center Classics, Record Society, Inc., et al.*, 127 U.S.P.Q. 467 (Sup. Ct., N. Y. Co. Nov. 18, 1960) (Markowitz, J.) (petition granted in action under N. Y. Penal Law §964).
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## PART V.

## BIBLIOGRAPHY

## A. BOOKS AND TREATISES

## 1. United States Publications

155. BUGBEE, BRUCE WILLIS. The early American law of intellectual property: the historical foundations of the United States patent and copyright systems. Ann Arbor, Mich. c1960. 420 p.

Thesis—University of Michigan.

A dissertation which "attempts to explore the genesis of United States patent and copyright law," with an extensive bibliography.

156. GITLIN, PAUL. Tax aspects of patents, copyrights and trademarks, by Paul Gitlin and Wm. Redin Woodward. Rev. to Aug. 1960. New York, Practising Law Institute, c1960. 78 p. (Current problems in federal taxation.)

This revised edition of a booklet first published in 1950 describes the general legal characteristics of the rights covered, and discusses the different types of tax treatment applicable to income from exploitation of these rights, deductions from gross income, problems raised by death of owner of patent or copyright, and tax planning.

157. ROGERS, JOSEPH W. U. S. national bibliography and the copyright law, an historical study. Foreword by Verner W. Clapp. New York, R. R. Bowker Co., 1960. 115 p.

An exploration into the motivations affecting the form and content of the *Catalog of Copyright Entries* beyond those evident in the legislative history connected therewith. Relationships are indicated between the *Catalog* and other bibliographical tools which make up, in their totality, the United States national bibliography.

158. SCHNAPPER, M. B. Constraint by copyright; a report on "official" and "private" practices. Washington, Public Affairs Press, 1960. 154 p.

A critical commentary on the "copyrighting of material of a predominantly official nature by or through government officers," with a chapter devoted to the *Richover* case.

## 2. Foreign Publications

## (a) In German

159. KATZAROV, KONSTANTIN. Gewerblicher Rechtsschutz und Urheberrecht der UdSSR und der Volksdemokratien Europas. Weinheim/Bergstr., Verlag Chemie, 1960. 378 p.

A comparative study of industrial property and copyright protection under the Communist systems of the U.S.S.R., Albania, Bulgaria, Yugoslavia, Poland, Czechoslovakia, and Hungary.

## (b) In Spanish

160. United Nations Educational, Scientific and Cultural Organization. Repertorio universal de legislación y convenios sobre derecho de autor. Compilado por la Organización de las Naciones Unidas para la Educación, la Ciencia y la Cultura, en colaboración con la Unión Panamericana, el Ministerio de Educación Nacional de España y la Secretaría de Educación Pública de México. Paris, Organización de las Naciones Unidas para la Educación, la Ciencia y la Cultura, and Aguilar, Madrid, 1960. 2 v. (2817 p.).

To be kept up-to-date by annual supplements.

The Spanish version of the *Copyright Laws and Treaties of the World*, compiled by Manuel Canyes, Francisco Cervera, Juan O. Díaz Lewis, Gaspar Gómez de la Serna, Thomas Ilosvay, Luis Reque and Manuel White Morquecho.

## B. LAW REVIEW ARTICLES

## 1. United States

161. BACON, JUDD L. Literary and artistic property—common-law copyright—filing of architectural plans in a public office as publication. (59 *Michigan Law Review* 133-136, no. 1, Nov. 1960.)

A case note on *Smith v. Paul*, 345 P.2d 546, 7 BULL. CR. SOC. 146, Item 184 (Cal. Dist. Ct. App. 1959).

162. Copyrights: renewal; composer's assignment defeated by his executor. (8 *UCLA Law Review* 203-208, no. 1, Jan. 1961.)

A case note on the Supreme Court decision in *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U. S. 373, 7 BULL. CR. SOC. 174, Item 242 (1960).

163. DERENBERG, WALTER J. Recent publications in the field of literary, artistic, and industrial property. (9 *American Journal of Comparative Law* 522-533, Summer 1960.)

An annual review of works of special interest published in Europe and elsewhere abroad and in the United States, on the subject of copyright as well as industrial property.

164. KERSON, D. L. A. Sequel rights in the law of literary property. (48 *California Law Review* 685-696, no. 4, Oct. 1960.)

"It is the purpose of this comment [which will be entered in the Nathan Burkan Memorial Competition] to discuss the protection given to the author's sequel rights [*i.e.*, the creator's right to re-use of his principal and secondary characters in new situations] by the laws of unfair competition, trade-mark, and copyright."

165. NIMMER, MELVILLE B. An introduction to copyright. (36 *Los Angeles Bar Bulletin* 90, January 1961.)

A summation of copyright intended for the general practitioner.

166. PAUL, JAMES C. N. The Post Office and non-mailability of obscenity: an historical note. (8 *UCLA Law Review* 44-68, no. 1, Jan. 1961.)

"Inquiring into the claimed statutory authority of the Post Office to censor the mails, the author reviews the history of federal anti-obscenity legislation . . . He finds that the basic purpose of Congress was to provide criminal sanctions for the dissemination of obscenity via the mails, and concludes that there is a serious question whether an independent censorship program such as that assumed by the Post Office has been authorized by Congress."

167. SCHRADER, GEORGE D. Some aspects of copyright law. (20 *Revista del Colegio de Abogados de Puerto Rico* 271-281, no. 3, May 1960.)

An outline of some of the basic features of U. S. copyright law.

## 2. Foreign

### (a) English

168. MILES, J. W. The international protection of applied art, designs and models. *Revue Internationale du Droit d'Auteur*, no. 29 (Oct. 1960), pp. 52-65.

A discussion, in English, French and Spanish of some of the problems involved in securing adequate legal protection for works of art

applied in industry, with particular reference to the conflicts between the copyright and patent "approach" to the problems and the need for their reconciliation.

169. VALLILA, EERO. The Finnish copyright bills. *EBU Review*, no. 64 B (Nov. 1960), pp. 34-37.

A brief commentary on those provisions which "call for improvement as far as broadcasting is concerned" contained in a "Bill respecting copyright in literary and artistic works and a Bill respecting rights in photographs," introduced recently in the Finnish Parliament.

(b) French

170. BOLLA, GÉRARD. La réforme de la législation sur le droit d'auteur en Nouvelle-Zélande. *Revue Internationale du Droit d'Auteur*, no. 29 (Oct. 1960), pp. 66-91.

An analysis, in French, English and Spanish of the *Report on copyright* of the New Zealand Copyright Committee. See 7 BULL. CR. SOC. 63, Item 80 (1959).

171. DITTRICH, ROBERT. Lettre d'Autriche. (73 *Le Droit d'Auteur* 279-290, no. 11, Nov. 1960.)

A survey of Austrian copyright legislation since the entry into force of the current copyright law on July 1, 1936.

172. MASOUYÉ, CLAUDE. Le droit d'auteur en U.R.S.S. *Revue Internationale du Droit d'Auteur*, no. 29 (Oct. 1960), pp. 2-43.

"A survey [in French, English and Spanish] . . . [of] the present state of [copyright] legislation applicable in the U.S.S.R., the philosophy of the Russian law, various considerations of a practical order . . . [and] a few general conclusions."

173. ROHDE, HENNING. Essai de définition de l'œuvre dramatique. *Inter-auteurs* (3d quarter 1960), pp. 211-215.

A discussion of certain problems in defining a "dramatic work," occasioned by the development and use, during the past fifty years, of many kinds of mechanical reproductions, so that presentation on a stage is no longer a prerequisite of a "drama."

174. RONGA, G. Arthur Fisher. (73 *Le Droit d'Auteur* 339-340, no. 12, Dec. 1960.)

A eulogy, in French and English in parallel columns, of the late Register of Copyrights.

175. RONGA, G. Situation dans l'Union de Berne des pays devenus récemment indépendants. (73 *Le Droit d'Auteur* 320-324, no. 12, Dec. 1960.)

"A legal outline [in French and English in parallel columns] as to the solution of some problems facing the Berne Union and its future," with respect to countries of the Union which recently became independent.

176. ROTH, E. La musique, son exécution et les droits voisins. *Revue Internationale du Droit d'Auteur*, no. 29 (Oct. 1960), pp. 44-51.

A discussion, in French, English and Spanish, of the neighboring rights problem with respect to the performance of music. The author feels that "in order to deal with the problem of the performer one ought to distinguish between the so-called serious and the so-called popular or dance music," since in the case of the latter, "it is in fact the performer rather than the composer who decides . . . [its] destiny."

177. TOURNIER, JEAN LOUP. Nouvelles d'Amérique du Nord. *Revue Internationale du Droit d'Auteur*, no. 29 (Oct. 1960), pp. 92-111.

Commentaries, in French and English, on *Schwartz v. Broadcast Music, Inc.*, 180 F.Supp. 322, 7 BULL. CR. SOC. 141, Item 179 (S.D.N.Y. 1959), the revised ASCAP Consent Decree of Jan. 7, 1960, *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373, 7 BULL. CR. SOC. 174, Item 242 (1960), and *Durand & Co. v. La Patrie Pub. Co., Ltd.* (Can. Sup. Ct. 1960).

178. TROLLER, ALOIS. Réflexions sur l'Urheberpersönlichkeitsrecht. (73 *Le Droit d'Auteur* 304-319, no. 12, Dec. 1960.)

An analysis of the complexities of the theory of the "Urheberpersönlichkeitsrecht" which is often identified with the moral interests of the author or the "droit moral." The author traces the origin of the theory, its development in doctrine and jurisprudence, and analyzes its scope and application in present legal systems. He favors the return to the Gierke's concept, which does not separate material and moral interests of the author; the name, however, should be changed, perhaps to the "Intellectual Property." He then points out that the "Urheberpersönlichkeitsrecht" and the "droit moral" are foreign bodies which should

be banished by jurisprudence and doctrine from "the judicial arsenal of copyright."

(c) German

179. HEISIG, WALTER. Die Qualität als Kriterium für das Entstehen des Urheberrechtes bei Industrieproduktgestaltung; Eu V-Interview mit Herrn Heissig, Direktor des Instituts für angewandte Kunst, Berlin. (9 *Erfindungs und Vorschlagswesen* 82-84, Ausg. B, no. 4, Apr. 1960.)

An interview by the editor of *Erfindungs und Vorschlagswesen* with the director of the Institute of Industrial Art, Berlin, in which the latter suggests, with respect to the new East German draft copyright law, "quality as a criterion for effective copyright in the designing of industrial products."

180. KAEMMEL, ERNST. Gedanken und Vorschläge zum Entwurf eines Gesetzes über das Urheberrecht. (9 *Erfindungs und Vorschlagswesen* 18-20, Ausg. C, no. 1, Jan. 1960.)

"Considerations and proposals for the draft law concerning copyright" of the German Democratic Republic (East Germany).

181. LEMKE, PETER. Die industrielle Formgebung in der Rechtsordnung der Deutschen Demokratischen Republik. (9 *Erfindungs und Vorschlagswesen* 9-12; 78-82; 102-104, nos. 1, 4, 5, Jan., Apr., May, 1960.)

An examination of industrial design protection in the German Democratic Republic (East Germany), in three installments, of which the first deals with the general field of inventions and innovations, the second with relevant provisions of the new draft copyright law, and the third with the German Law on Designs of 1876.

182. MÜNZER, GEORG. Industrieproduktion und Urheberrecht. (9 *Erfindungs und Vorschlagswesen* 97-101, Ausg. C, no. 5, May 1960.)

Changes are suggested in provisions of the new East German draft copyright law in order to promote more effectively the initiative and creative fantasy of the designer and thus attain the world level in the field of industrial design.

183. MÜNZER, GEORG. Vom Ich zum Wir; Betrachtungen zur Neugestaltung des Urheberrechts. (9 *Erfindungs und Vorschlagswesen* 120-124, Ausg. C, no. 6, June 1960.)

An answer to criticism that the East German draft copyright law does not properly promote the development of a Communist society and

fails to give proper consideration to the position of the author in a collectivist society.

184. MÜNZER, GEORG. Zur Diskussion über den Entwurf eines Gesetzes über das Urheberrecht. (9 *Erfindungs und Vorschlagswesen* 15-18, Ausg. C, no. 1, Jan. 1960.)

A discussion of some of the proposals for changes in the East German draft copyright law.

185. POINTET, PIERRE JEAN. Der Schutz der Presseinformationen. [Übers. von Eugen D. Graue] *Gewerblicher Rechtsschutz und Urheberrecht, Auslands und internationaler Teil*, no. 11 (Nov. 1960), pp. 537-546.

A brief outline of the efforts to secure protection, by an international agreement, against the unauthorized use of press news.

186. SCHULZE, ERICH. Die Urheberrechtsreform in unserem geteilten Deutschland. *GEMA Nachrichten*, no. 48 (Nov. 1960), pp. 4-8.

A brief comparison between the recently issued draft copyright laws of West and East Germany.

### C. ARTICLES PERTAINING TO COPYRIGHT FROM TRADE MAGAZINES

#### 1. United States

181. ALLEN, HARRY, JR. Canadian board hears copyr't fees proposals. (72 *The Billboard* 4, 37, no. 53, Dec. 31, 1960.)

An article on recent hearings before the Copyright Appeal Board to consider submissions by Broadcast Music Canada Ltd. and Composers, Authors and Publishers Association of Canada (CAPAC) on changes in music performance fees.

182. Copyright law. (9 *Infinity* 16-17, no. 8, Oct. 1960.)

An editorial criticizing the "unreasonable" copyright notice requirements with respect to photographs.

183. Economics of publishing: 1—Three views of author-publisher relationships. (178 *Publishers' Weekly* 20-23, no. 26, Dec. 26, 1960.)

A summary of the first of a series of panel discussions on the general theme of "The Economics of Publishing," launched November 23

in New York by the Trade Book Clinic of the American Institute of Graphic Arts. The speakers were Kenneth S. Ginninger, Paul R. Reynolds, and Gerald Frank, who presented the views of a publisher, literary agent, and writer, respectively, on financial relationships between author and publisher.

184. FINKELSTEIN, HERMAN. How shall the life and terms of copyright be extended? (221 *Variety* 5, 36, no. 6, Jan. 4, 1961.)

The General Attorney for ASCAP makes a case for increasing the copyright term of protection.

185. OKTAY, ELIZABETH J. Library photocopying of copyrighted materials for private use. *The National Micro-News*, no. 48 (Oct. 1960), pp. 82-91.

A discussion of the question of whether libraries are infringers when the photocopy copyrighted materials without consent of the copyright owner.

186. PILPEL, HARRIET F. Copyright, a \$6,000,000,000 biz; let's convene to draft new laws. (221 *Variety* 5, 36, no. 6, Jan. 4, 1961.)

A strong plea is made for a meeting of all interested groups to help lay the foundation for a new copyright law to replace the present one which "is regarded as inadequate and unsatisfactory by virtually all branches of the entertainment and literary and musical and artistic world which it is supposedly designed to serve."

187. ROGERS, JOSEPH W. Libraries and copyright law revision: progress and prospects. (55 *ALA Bulletin* 56-58, no. 1, Jan. 1961.)

The Chief of the Copyright Cataloging Division discusses briefly the activities of the Copyright Office looking toward a general revision of the copyright law and points out the possible effect of a new law on libraries. He feels that librarians should make their views known on copyright problems which may affect their services to the public.

## 2. Canada

188. MCGEACHY, J. B. The Canadian publishing and printing industry is losing millions because U. S. copyright permits anyone to plagiarize Canadian works. (55 *The Financial Post* 7, no. 1, Jan. 7, 1961.) (Toronto.)

A feature article on recent hearings conducted by a Royal Commission headed by Grattan O'Leary, inquiring into the Canadian printing and publishing industry. The domestic manufacturing requirement of

the U. S. law and its effect on the printing and publishing industry is criticized. The article concludes with an inquiry as to why Canada has not yet revised its copyright law to permit its entry into the U.C.C. and to enable Canadian authors to have unrestricted sale of their works in the U. S. without running into the 1,500 copy limitation.

### 3. England

189. Libraries Bill "talked out"; authors can always go into factories, says M.P. *The Bookseller*, no. 2869 (Dec. 17, 1960), pp. 2334-2336.

A summary of the second reading debate of the Libraries (Public Lending Right) Bill in the House of Commons on December 9th.

190. The Public Lending Right Bill; Library Association's reasons for opposing it. *The Bookseller*, no. 2868 (Dec. 10, 1960), pp. 2294-2296.

Summary of a press conference held by the British Library Association at its headquarters on December 6th "to put out and explain a memorandum 'The Library Association's case against the Libraries (Public Lending Right) Bill.'" The full text of the memorandum appears at end of the article.

191. Public Lending Right Bill; support from both sides of the House. *The Bookseller*, no. 2687 (Dec. 3, 1960), pp. 2244-2245.

An article on the latest developments regarding efforts to provide for remuneration of authors and publishers for books supplied to and issued by public and lending libraries. A bill which was introduced in the House of Commons on November 23d is no longer designed to amend the Copyright Act but is presented under the Libraries Act and includes provisions for legalizing charges, by libraries, for certain services.

### NEWS BRIEFS

192. A new volume in the Cumulative Series of the Catalog of Copyright Entries for Motion Pictures has just been published, entitled *Motion Pictures 1950-59*. This is a list of 27,310 motion pictures registered in the U. S. Copyright Office from January 1, 1950 to December 31, 1959. It includes many nontheatrical films produced for educational and advertising purposes as well as the features, short subjects and newsreels produced for exhibition in theatres and over television.

This is the fourth volume in a series which now includes all of the more than 100,000 films registered in the Copyright Office since the beginning of the motion picture industry in 1894. All four volumes are available from the Superintendent of Documents, at prices ranging

from two dollars (*Motion Pictures, 1894-1912*), to eighteen dollars (*Motion Pictures, 1912-1939*). The two other volumes covering the period 1940-1949 and 1950-1959 are available at ten dollars each.

#### *Announcements*

L'Association Litteraire et Artistique Internationale (ALAI) has asked the Society to inform its members and the readers of the BULLETIN that individual memberships in the Association are available at an approximate annual fee of three dollars. The Association was founded in 1878, under the sponsorship of Victor Hugo, and played an active part in the preparation of the Berne Convention in 1886.

Problems currently under study by the Association and which were also subjects considered at the Athens convention of 1959, include motion pictures, applied arts, copyright term, the rights of performers and of broadcasting organizations. All reports are published in French, and at present no English translation facilities are available.

The Association has suggested that if there should be sufficient interest in the United States in the activities of ALAI, consideration might be given here to the formation of a national group (minimum, ten members), and to translation of the materials into English. More detailed information on the qualifications for membership may be obtained by communicating with the President, M. Marcel Boutet, or with M. Jean Vilbois, Perpetual Secretary, at the ALAI offices, 117 Boulevard Saint Germain, Paris VI.

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#### Copyright Institute at Vanderbilt Law School

An *Institute on Musical Copyright Law and the Music Industry* at Vanderbilt Law School in Nashville, Tenn., is scheduled for Monday, April 17, 1961, co-sponsored by the Nashville Bar Association.

Participants will discuss the Common Law and Statutory Background of the Law of Musical Property (George D. Cary, General Counsel, Copyright Office); Problems of Ownership and Rights in Musical Works (Prof. Walter J. Derenberg); Protection of Phonograph Records (Sidney A. Diamond); Use of Music on Radio and Television (Joseph A. McDonald); Copyright Infringement (Leonard Zissu); and there will follow a panel discussion including all participants on The Future of Musical Copyright Law.

The evening session will be devoted to a discussion of The Performing Rights Societies, with Herman Finkelstein, General Attorney for ASCAP; Sydney M. Kaye, Chairman of the Board for BMI; and Sigmund Timberg, formerly of the Antitrust Division, participating, Prof. Derenberg, moderator. Dean John W. Wade will preside in the morning and Robert W. Sturdivant of the Nashville Bar Association in the afternoon. Registration fee is \$7.50.





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THE BULLETIN of The Copyright Society of the U.S.A. is published 6 times a year by The Society at the Law Center of New York University, 40 Washington Square South, New York 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*.

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## COPYRIGHT LAW REVISION STUDIES

### Tenth and Eleventh Committee Prints Now Available

#### TENTH COMMITTEE PRINT STUDIES 29-31

29. Protection of Unpublished Works, by William S. Strauss.
30. Duration of Copyright, by James J. Guinan, Jr.
31. Renewal of Copyright, by Barbara A. Ringer, with the assistance of Julius A. Culp.

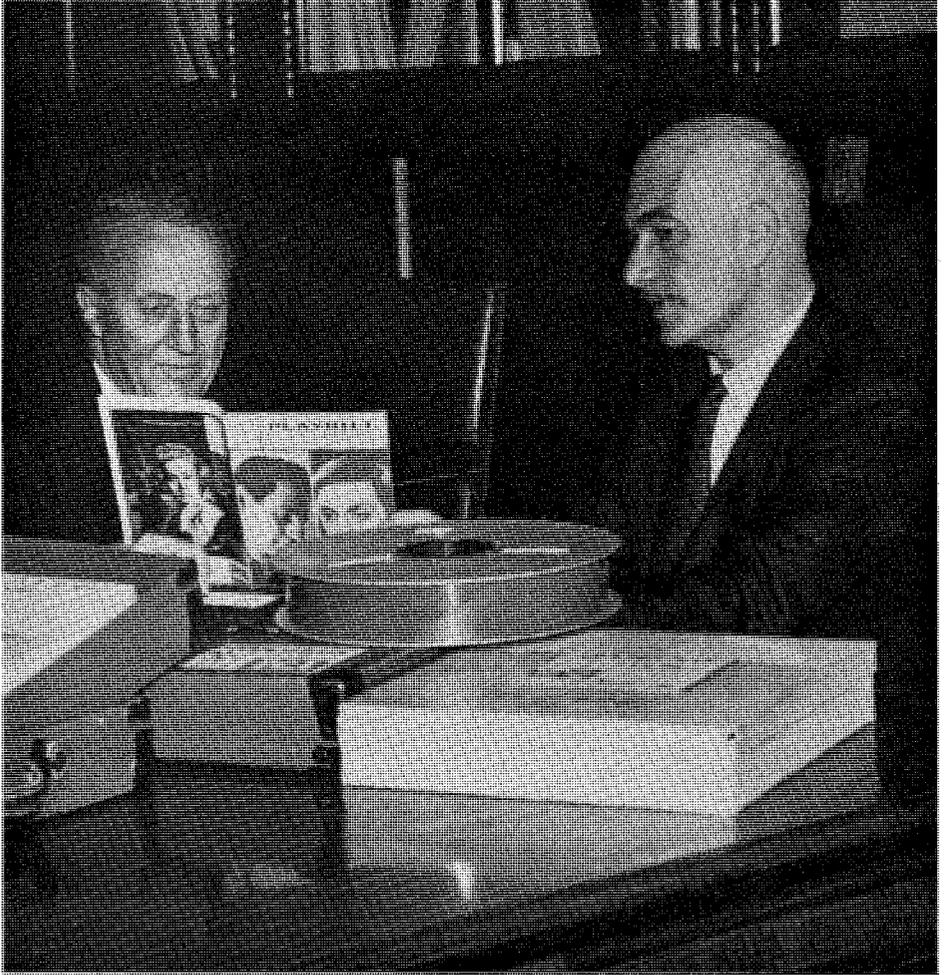
#### ELEVENTH COMMITTEE PRINT STUDIES 32-34

32. Protection of Works of Foreign Origin, by Arpad Bogsch.
33. Copyright in Government Publications, by Caruthers Berger.
34. Copyright in Territories and Possessions of the United States, by Borge Varmer.

These are the last two of a series of Committee Prints published by the Sub-committee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, United States Senate, pursuant to Senate Resolution 240, 86th Congress, Second Session. The prints are available from the Superintendent of Documents, U. S. Government Printing Office, Washington 25, D. C., the tenth print at 60 cents and the eleventh and final print at 25 cents.

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The U.S. Register of Copyrights, A. L. Kaminstein (*right*) accepting from Fulton Brylawski, Washington copyright counsel of Paramount Pictures Corporation and member of The Copyright Society of the U.S.A., the first magnetic video tape for registration by the Copyright Office on April 19, 1961. The tape is Gian Carlo Menotti's opera, "The Consul," produced by International Telemeter Company, a division of Paramount Pictures Corporation. The first "publication" of the tape was a distribution by pay television on wire to viewers in Etobicoke, Canada, who were supplied with the special "Playbill" held by Mr. Brylawski. One copy of the video tape of "The Consul" shown here has been added to the Collection of the Library of Congress Music Division, which already includes a few video tapes presented as gifts to the Music Division.

## AN HISTORIC "FIRST"—COPYRIGHT OFFICE ACCEPTS MAGNETIC VIDEO TAPE FOR REGISTRATION

PARAMOUNT PICTURES CORPORATION

April 28, 1961

Professor Walter J. Derenberg  
Chairman, Editorial Board  
The Copyright Society of the U. S. A.  
165 Broadway  
New York 6, New York

Dear Walter:

Re: THE CONSUL

May I through THE BULLETIN bring an historic event in copyright to the attention of the Copyright Bar. On April 19, 1961, we submitted and the Register of Copyrights has accepted copyright registration for magnetic video tape. The production is International Telemeter's tape recording of Gian Carlo Menotti's opera, THE CONSUL. Telemeter, as you may know, is a division of Paramount Pictures Corporation.

There are many fascinating and novel points of law involved in the Register's acceptance of video tape since a picture or image can not be seen if tape is held up to light. It will, as you know, only project pictures and sound when played through appropriate electronic playbacks. Questions of general interest include copyrightability under the Constitution and sections 4 and 5 of the Copyright Act, the class of registration for video tape, publication by distribution to a Telemeter licensee for viewing in homes, the character of the underlying literary property (here a copyrighted musical drama), the grand performing rights, protection from infringement under several parts of section 1 of our Act (the new significance of the words "any transcription or record" in sections 1 (c) and 1 (d) of the Act), protection under the Universal Copyright Convention and in the Berne Union (in this instance first publication occurred in a Berne country), and the fact that this first registration of video tape was effected by pay television on wire.

You may be interested to know that the first transmission to homes occurred in Etobicoke, Canada, and that the tape bore and projected a U.C.C. copyright notice.

As you suggested, I enclose a copy of the copyright certificate and a picture of our Washington copyright attorney and good friend, Fulton Brylawski,

submitting the first video tape for registration to Abraham L. Kaminstein, the Register of Copyrights.

Time does not now permit me to discuss the legal issues since this news finds the April issue of THE BULLETIN at the printer. Interesting research materials to which I, however, direct attention are as follows: Meagher, Copyright Problems Presented By a New Art, 30 N.Y.U. L. Rev. 1081 (1955); Letter to Arthur Fisher, late Register of Copyrights, from Edward A. Sargoy dated December 1, 1958 and printed at page 127 of Copyright Revision Study No. 16 entitled Limitations on Performing Rights by Borge Varmer; Public Law 575, 82d Cong., 1st Sess., House Report 1160 (1951) and Conf. Report 2486 (1952) and Hearings before the Committee on the Judiciary on H. R. 3589 (1951); Needham, Tape Recording, Photocopying and Fair Use, 10 ASCAP Copyright Law Symposium 75 at 102 (1959); Concurring Opinion of Mr. Justice Douglas in *Mazer v. Stein*, 347 U. S. 201, 100 U.S.P.Q. 325 (1954) and Copyright Revision Study No. 3, The Meaning of "Writings" in the Copyright Clause of the Constitution.

Related points of interest are the use of copyright form L-M as for motion pictures and the pertinence of Deposit Agreements with the Librarian of Congress.

I believe you will agree that this event, of perhaps epoch making importance, will be of some interest to the television, motion picture, phonograph and sound recording industries and their counsel. I hope that time will indicate this to have been a well considered step under our present Act, a shot heard but not seen round the world.

Sincerely yours,

RICHARD COLBY\*

RC:MB

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\* Copyright Counsel in New York for Paramount Pictures Corporation and member of the Editorial Board of The Copyright Society of the U. S. A.

Reproduced below is the first page of Registration No. Lp 18984, in Classes L-M, covering "The Consul" by Gian Carlo Menotti, granted to International Telemeter Company, a division of Paramount Pictures Corporation, on April 19, 1961:

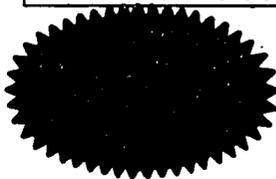
Page 3

**Certificate**  
**Registration of a Claim to Copyright**  
 in a motion picture

<b>FORM L-M</b>	
CLASSES	REGISTRATION NO
<b>L-M</b>	Lp 18984
DO NOT WRITE HERE	

This is To Certify that the statements set forth on this certificate have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

*William L. Kaminstein*  
 Register of Copyrights  
 United States of America



**1. Copyright Claimant(s) and Address(es):**

**International Telemeter Company, a division of**  
 Name **Paramount Pictures Corporation**  
 Address **1501 Broadway, New York 36, New York**  
 Name \_\_\_\_\_  
 Address \_\_\_\_\_

**2. Title: THE CONSUL**  
 (Title of the motion picture)

**3. (a) Nature of Work:**  
 Photoplay                       Motion picture other than a photoplay

**(b) Description of Copies: 137 minutes**

**(c) Number of Prints Deposited (for unpublished works only):** \_\_\_\_\_

**4. Author:**

**International Telemeter Company, a division of**  
 Name **Paramount Pictures Corporation**                      Citizenship **U. S. A.**  
 (Name of country)  
 Domiciled in U. S. A.   No      Address **1501 Broadway, New York 36, N. Y.**

**5. (a) Date of Publication:**

**December 31, 1960**

**(b) Place of Publication:**  
**Canada**  
 (Name of country)

**6. (a) Previous Registration or Publication:**

Previous registration                       Previous publication

**(b) New Matter in This Version:**  
 \_\_\_\_\_  
 \_\_\_\_\_

*Complete all applicable spaces on next page Lp.*

## NEW COPYRIGHT OFFICE APPOINTMENTS

A realignment of duties in the Copyright Office has resulted in the appointment of George D. Cary, formerly General Counsel of the Office, to the position of Deputy Register of Copyrights. Mr. Cary joined the staff of the Copyright Office in April 1947 and has served successively as Attorney, Assistant Chief of the Examining Division, and Principal Legal Adviser. He was appointed General Counsel in 1957. Mr. Cary is a native of Missouri, and holds the degrees of B.S. in Economics from the University of Pennsylvania, LL.B. from George Washington University Law School, and LL.M. from Georgetown University. During World War II, he served in the U. S. Navy and has the rank of Commander in the Naval Reserve. Mr. Cary will be responsible for legislation, congressional liaison on copyright and related matters, and projects which are the common concern of the Copyright Office and the Department of State. In the absence of the Register he will head the Office and will assume a major role in administration and policy formulation.

Abe A. Goldman, formerly Chief of Research, has been appointed to the position of General Counsel. The position of Chief of Research has now been abolished and Mr. Goldman will supervise long range as well as current research. Mr. Goldman joined the Copyright Office in 1952 as Legal Adviser, and since December 1956 he has been in charge of the legal studies looking toward revision of the copyright law. He is a native of Indiana and received the J.D. degree, cum laude, in 1931 from the University of Chicago. Mr. Goldman has represented the Copyright Office at international meetings and also works with the Panel of Consultants on general revision of the law.

Barbara A. Ringer, a member of the Copyright Office staff for 11 years, and most recently Acting Chief of the Examining Division, has been appointed Chief of that division. A native of Lafayette, Ind., Miss Ringer received an M.A. degree from George Washington University in 1947, and a law degree from Columbia University in 1949.

During her career in the Copyright Office, Miss Ringer has received a Superior Accomplishment Reward, a Library of Congress Superior Service Award, and the William A. Jump Meritorious Award for Exemplary Achievement in Public Administration. She is the author of two studies and co-author of a third in the series entitled *Studies in the General Revision of the Copyright Law*. She is also the author of a bibliography on design protection and various articles in encyclopedias and periodicals.

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Miss Ringer is a recognized authority in her field. She has worked extensively on the question of copyright protection for designs and has served on the drafting committee of the Coordinating Committee of the American Patent Law Association, which is concerned with this problem.

All three appointees are members of the American Bar Association and Mr. Cary is Vice Chairman of the Capitol Hill Section of the Federal Bar Association.

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## PART I.

## ARTICLES

## 193. COPYRIGHTS, COMRADES, AND CAPITALISTS—

*An Inquiry into the Legal Rights of Soviet and American Authors\**

By HILLER B. ZOBEL\*\*

*Caveat:* Because my reading knowledge of Russian is nil, I have been totally unable to utilize treatises, reports of cases, and other materials printed only in that tongue. The following paper is therefore by no means a definitive canvass of the whole field of Soviet copyright; it is rather an eclectic treatment founded exclusively on those materials available in French or English. In other words, if the reader is prepared to recognize the wholly non-Cyrillic character of the paper's background, he may yet find the information it contains accurate and, I hope, interesting.

Although the copyright statutes and law of the Soviet Union offer many points of interest, both to the student of copyright and to the critic of Soviet law generally, this paper will not attempt a summary of copyright in the U.S.S.R. It will treat the statutes, of course: the Basic Copyright Law of the Soviet Union and the Copyright Law of the Russian Soviet Federal Socialist Republic (which implements the Basic Law and may be treated as part of it). But for the "law-in-a-nutshell" analysis of these Acts, the reader should refer to Gsovski's *Soviet Civil Law*.<sup>1</sup> My approach will be more limited. In the first place, I have narrowed my focus to include only those aspects of Soviet copyright which permit intelligent comparison with American copyright, a field perforce limited by the miniscule number of Soviet legal sources available. I have, moreover, been hampered by my inability to read Russian. It may appear that attempting to found an analysis of Soviet law solely on those sources printed in English or French is indeed to stage *Uncle Vanya* without Vanya. Perhaps this is so. Nonetheless, a certain amount of material is published in non-Russian tongues, some of it readily accessible. It is a secondary aim of this essay to demonstrate that students interested in Soviet law can, if they will, find linguistically comprehensible sources, both original and secondary.

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\* First Prize Essay, 1959 Nathan Burkan Memorial Competition, Harvard Law School.

\*\* A.B. Harvard, 1953; LL.B., Harvard, 1959; member, Massachusetts Bar; associate, Bingham, Dana & Gould, Boston.

1. 1 Gsovski, *Soviet Civil Law* (hereinafter cited as Gsovski) 606-17 (1948).

### *Purposes of Copyright*

Superficially, the very concept of a copyright seems antithetical to a socialist society. The basis of such a society is a community of ownership in "private" property, whereas the essence of a copyright is a monopoly (albeit a limited one) over the reproduction of works of the mind. Despite the apparent polar disparity of the respective theories, however, the granting of copyrights in both systems of law, Soviet and American, has been accorded strikingly similar rationalization. Both sets of copyright legislation seek to better society as a whole by encouraging intellectual effort. In each legal system, this aim has necessitated modification of the initial absolute. Thus in the United States the "exclusive mantle",<sup>2</sup> the individual's property right to reproduce "the fruit of his particular intellectual labors",<sup>3</sup> has been granted, not simply to benefit the author, but to induce him "to 'bring out' his work, to make it accessible to the public."<sup>4</sup> The conditions under which society permits the author to exploit his property are hopefully designed to maximize the "benefit to the public."<sup>5</sup> To the extent necessary to effectuate this end, the author must relinquish that right to property which is fundamental to the American legal system.

Starting from the opposing theoretical extreme, the Soviets, too, have found it necessary to modify their practice. While the tendency has been "to 'socialize' the product of the labor of Soviet writers to the widest possible extent,"<sup>6</sup> to stress that "the author in the U.S.S.R. does not have a monopoly in his work,"<sup>7</sup> the Soviets have realized that declarations of this sort are not in themselves sufficient to stimulate intellectual production. The whole Soviet copyright system manifests the recognition that rewards are necessary, that the author must be afforded some security and proprietorship if he is to be encouraged to further creativeness. "Copyrights," says one Russian commentator, "are an incentive to the development of Soviet multi-national culture. For this reason they must be observed to the letter."<sup>8</sup>

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2. Pogue, *Borderland—Where Copyright and Design Patent Meet*, 52 Mich. L.Rev. 33, 36 (1953).

3. *Id.*, at 40.

4. Wasserstrom, *The Copyrighting of Contributions to Composite Works: Some Attendant Problems*, 31 Notre Dame Law. 381, 395 n. 71 (1956).

5. Pogue, *op. cit. supra* note 2, at 40.

6. Levitsky, *Soviet Press and Copyright Legislation: Some Legal Concepts*, 25 Fordham L.Rev. 469, 483 (1956).

7. 2 *Sovetskoye Grazhdanskoye Pravo* 226 (1944), quoted in Levitsky, *op. cit. supra* note 6, at 483 n. 73.

8. Lashkul, "Prevent Copyright Violations", *Sovetskaya Moldavia*, 28 Aug. 1955, translated in 7 *Curr. Dig. Sov. Press*, No. 37, at 21, 22 (1955).

Thus both Soviet and American systems have moved toward a similar, if not a common, solution to the basic problem. In comparing the different methods each has adopted, one would do well to recall that each system regards copyright as the result of a bargain struck off between society and the author. This paper, consequently, will examine the *quid pro quo* of this exchange in the U.S.S.R. and in the United States; it will attempt to compare the recompense each country affords its authors, and the restrictions it imposes on them in return. In this connection, as in any examination of copyright generally, the student must view the landscape through a particular set of lenses; he must ask two questions:<sup>9</sup> "What works are protected?" and "What uses can be made of these works only with the consent of the author (or of his successor in interest)?" These questions frame the inquiry into Soviet copyright, although it will not always be possible, analytically, to answer them individually, any more than it is possible to decide which eyepiece of a pair of binoculars is contributing the image seen in the single field.

### *Right to First Publication*

The social value of any intellectual creation commences only when the creator communicates his work to others. Conceivably, therefore, society might seek to regulate (that is, to shorten) the interval between completion and publication, in order to permit more rapid social utilization. Even in the U.S.S.R., however, the law leaves to the author the decision as to when, if at all, the finished work will be revealed to the world.<sup>10</sup> In the United States, the "common-law right of first publication" receives zealous protection; the right remains in the bashful author and his successors forever. Thus an ill-disposed descendant or literary executor can, out of any motive or none, suppress material which may have genuine historic, artistic, or even social value.<sup>11</sup> Whether the Russian author would enjoy this much protection is doubtful. For one thing, Soviet law as a whole protects private rights only if they are exercised in consonance with "their social and economic purpose."<sup>12</sup> The Soviet State possesses an effective device to prevent undue delay in presentation: it can nationalize the works of any composer, author, or (presumably) artist. A law of May 14, 1925, for example, declared any translation of Upton Sinclair's writings to belong to the R.S.F.S.R.<sup>13</sup> As we shall see later,

9. 2 UNESCO Copyright Bull., Nos. 2-3, at 18 (1949).

10. U.S.S.R. Copyright Law §7 (1928), 2 Gsovski 401.

11. See *Chamberlain v. Feldman*, 300 N.Y. 135, 89 N.E.2d 863 (1949), in which the literary assigns of Mark Twain successfully enjoined publication of a hitherto "missing" story whose manuscript the defendant had lawfully acquired from a third party.

12. R.S.F.S.R. Civil Code §1 (1922), 2 Gsovski 16.

13. R.S.F.S.R. Laws 1925, text 336 (1925), 2 Gsovski 416.

Soviet law regards translations as works separate from their originals (and translators as independent creators, entitled to their own copyrights). The effect of this law, therefore, is to deprive an artist (the translator) of the right to control the initial disclosure of his work. The citizen who might happen to translate, say, *Dragon's Teeth* would find *Zoobi Drakona* liable to enforced publication the moment he completed it.

The right to first publication, moreover, is severely limited by the State's monopoly of all publishing outlets.<sup>14</sup> An American author may withhold his work with an eye to securing a better financial arrangement, or perhaps even to publishing it himself. The Soviet author's right, by contrast, extends only to the *time* of disclosure; he cannot use it to improve his position in the market. (I will dodge a potential counterargument based on the existence of "socialist competition" among State publishing organs by pointing out that the Soviet industry seems to be quite strictly compartmentalized, with new works of Soviet belles-lettres appearing principally through one organization, the Publishing House "Soviet Writer."<sup>15</sup>)

### *Who Is An Author?*

Even if an individual possesses a "literary, scientific, or artistic work",<sup>16</sup> he is entitled to copyright protection only if the creation passes certain legal tests.

1. *Originality*. The Soviet author need prove only that the work bears an impression which is demonstrably his own. In a case before the Supreme Court of the U.S.S.R.,<sup>17</sup> the author of a manual of tractor operation prevailed despite defendant's assertions that (1) the diagrams merely duplicated factory blueprints; (2) the instructions were rewritten blueprint specifications. The Court rejected both defenses: "Such copying would prevent the granting of a patent, but not the protection of a copyright."<sup>18</sup> The slight requirement of originality makes the Soviet rule remarkably similar to that followed by American courts.<sup>19</sup> And, incidentally, if "copying" means "*independent* reproduction," the Soviet court was expressing another thought familiar to American law, which demands absolute originality only of a would-be patentee.<sup>20</sup>

14. 2 Gsovski 401; Levitsky, *op. cit. supra* note 6, at 476-77.

15. Kremlev, "In Defense of the Reader", *Kommunist*, No. 8, June, 1957, 123-28, translated in 9 *Curr. Dig. Sov. Press*, No. 32, 10-12, at 10 (1957).

16. U.S.S.R. Copyright Law §4 (1928), 2 Gsovski 400.

17. State Scientific-Technical Publishing House "Mashgiz" v. Morosov, *Sbornik Post. Pl. i Opr. Koll. Verkh. Suda SSSR* (1944), discussed in Hazard, *Law and Social Change in the U.S.S.R.* (hereinafter cited as Hazard) 196 (1953).

18. *Ibid.*

19. *Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951).

20. *Ibid.*

Out of the question of originality arises another problem common to both countries: what degree of "merit" ought the law to demand as a prerequisite to copyright? In the United States, the answer is None: "He who can impress his individuality on the expression of scientific, literary, artistic, musical, or other media, is protected by law, even if, by critical literary, artistic, or musical standards, his creation be not very high."<sup>21</sup>

As a result, courts and Copyright Office<sup>22</sup> have opened wide the sanctuary. Perhaps this is necessary. The sad consequence, however, is that a judge like Learned Hand must devote to a controversy over comic-strip characters the time and acumen he would otherwise be able to spend solving questions of arguably broader application and greater importance. (Or is the size of the economic interest involved justification enough?)

The Russian statute invites the same problem, for it extends copyright "to any literary, scientific, or artistic work, regardless of the manner and form of its reproduction or the value and purpose of the work."<sup>23</sup> Faced with a claim based on authorship of a pest-control directive, written by a government specialist, a Soviet court in 1929 tried to hold back the flood, declaring that "an administrative instruction" does not give rise to copyright.<sup>24</sup> But the trend toward a broad copyright coverage appears to be as strong in the U.S.S.R. as it is here. A *Pravda* article five years ago complained bitterly of the "translator businessman", who exhumes forgotten songs in foreign languages, has them cheaply translated, and then markets the result. These cultivators of "the unique cult of the chance 'strike'", and their "extravagance and lack of scruple are encouraged . . . by the copyright laws," particularly the section quoted at the head of this paragraph.<sup>25</sup>

2. *Creation in the line of official duty.* If X hires Y to create a work, American law, generally speaking, attributes the "authorship", and hence the copyright, to the employer.<sup>26</sup> The Soviet statutes do not cover this subject,

21. Yankwich, *Originality in the Law of Intellectual Property*, 11 F.R.D. 457 (1951). See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

22. See dissenting opinion of Douglas, J., in *Mazer v. Stein*, 347 U.S. 201, at 221 (1954).

23. U.S.S.R. Copyright Law §4 (1928), 2 Gsovski 400.

24. *Sokolov v. State Bakery Inspection Office*, 8 *Sud. Prak. R.S.F.S.R.* 7 (1929), in Hazard & Weisberg, *Cases and Readings on Soviet Law* (hereinafter cited as Hazard & Weisberg) 180, at 181 (1950). As to the "authorship-in-the-course-of-official-duty", see *infra* note 28.

25. Chaplygin, "Gold Mine", *Pravda*, 15 Oct. 1954, translated in 6 *Curr. Dig. Sov. Press*, No. 42, at 28 (1954).

26. 17 U.S.C. §26 (1947). In "a commission or employment situation . . . the intent of the parties should control" the question of *who* has copyright. Cohen, *An Artist Sells a Painting: The Courts Go Astray*, 5 U.C.L.A. L.Rev. 235, 244 (1958). But

although it has been said in regard to a motion-picture that the copyright is "recognized as belonging to the . . . studio."<sup>27</sup> Three cases, however, suggest that an author who creates a work on his employer's time and in the course of assigned duties does not possess the copyright.<sup>28</sup> Each of the authors worked for a State agency; two of them, indeed (Vinogradov and Sokolov), had been expressly ordered to produce the piece in issue, a fact which the respective courts found dispositive. The problem of the creative government worker has risen in the United States also, and appears to have been similarly treated. A work created while the author is in government service, in connection with his official duties, and during working hours belongs to the government.<sup>29</sup> But the mere fact of creation *while* in government employ (as opposed to line-of-duty creation) does not deprive the author of title.<sup>30</sup>

3. *Joint-authorship*. When the contributions of two or more individuals have been merged into one work, a question arises as to which of the contributors is entitled to share in the copyright privilege. The American statute is silent on this point, but the courts have established tests to determine when a contributor may claim the benefits of co-authorship. Ordinarily, the contributions need not be of equal magnitude or importance,<sup>31</sup> nor must they be inseparable.<sup>32</sup> The elements of joint-authorship are: "(1) scienter—knowledge that each contribution is intended to be added to for a complete work; and (2) resultant fusion of the work into a unity for copyright purposes."<sup>33</sup>

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"where a contract of employment is silent, there may be an implication in favor of the employer." *W.H. Anderson Co. v. Baldwin Law Pub. Co.*, 27 F.2d 82, 88 (6th Cir. 1928).

27. R.S.F.S.R. Copyright Law §3 (1928), 2 Gsovski 411: author's right to compensation for public showings. See U.S.S.R. Copyright Law §8 (1928), 2 Gsovski 401-02: "The exclusive right to the public performance of an unpublished dramatic, musical, . . . or cinematographic work shall belong to the author of the work."
28. *Gorbunov v. Alma Ata Administration for Gidrometshluzhba*, *Sud. Prakt. SSSR* 27 (1942), discussed in Hazard 197; *Sokolov v. State Bakery Inspection Office*, *supra* note 24; *Vinogradov v. State Soap Rendering, Candle, and Chemical Factory No. 1*, 8 *Sud. Prakt. R.S.F.S.R.* 7 (1929), in Hazard & Weisberg 181.
29. *Sawyer v. Crowell Publishing Co.*, 46 F.Supp. 471 (S.D.N.Y. 1942), *aff'd*, 142 F.2d 497 (2d Cir. 1944). See generally Stiefel, *Piracy in High Places—Government Publications and Copyright Law*, 24 Geo. Wash. L.Rev. 423 (1956).
30. *Solomons v. United States*, 137 U.S. 342 (1890) (patent).
31. Rosengart, *Principles of Co-Authorship in American, Comparative, and International Law*, 25 So. Cal. L.Rev. 247, 248 (1952).
32. *Id.*, at 251.
33. Taubman, *Joint Authorship and Co-Ownership in American Copyright Law*, 31 N.Y.U. L.Rev. 1246, 1249 (1955).

The Soviet law<sup>34</sup> gives "copyright in a work composed by the collaboration of two or more authors" to "all the joint authors," regardless of whether the final product is indivisible or not.<sup>35</sup> The word "collaboration" implies that each contributor must intend not simply that his fragment become part of a whole (the American test), but that he must be contemplating *the* whole which actually results. On the other hand, in *Vinogradov's Case*,<sup>36</sup> one of the defenses to an action for royalties was the assertion that the plaintiff's fellow-workers had helped him prepare the report which was the subject of the suit. Although it was not clear that the other workers had had *this* report in mind when assisting (and, incidentally, although they had disclaimed any royalties), the court held that the work belonged to the group, and for that reason (*inter alia*) plaintiff could claim no copyright.

An excellent comparative study by Rosengart suggests that the Russian law of co-authorship derives from the French<sup>37</sup> concept that "in order to form an indivisible whole characterized by co-ownership, a work composed of words and music must have been created by a united effort and under a common inspiration."<sup>38</sup>

#### *What Works May Be Copyrighted?*

The Soviet Basic Law extends an umbrella even more commodious than the American "all the writings of an author."<sup>39</sup> Soviet copyright applies to "any literary, scientific, or artistic work."<sup>40</sup> The catalogue which follows this ample statement indicates the vast area of protection: even oral works and dances unreduced to writing, for example, are within the charmed circle.<sup>41</sup>

1. *Translations.* It is in its treatment of translations and translation rights that Soviet copyright law most shocks non-Russian lawyers. An anonymous Swiss reaction seems typical: "The Soviet legislation has stripped the

34. U.S.S.R. Copyright Law §5 (1928), 2 Gsovski 400.

35. But a motion-picture copyright belongs to the studio. See text at note 27, *supra*.

36. *Supra*, note 28.

37. *Supra*, note 31, at 274.

38. *Supra*, note 31, at 272, citing *Cour de Cassation (Ch. Crim.)*, 4 Feb. 1881, *aff. Billet, Annales de la Propriete Industrielle, Artistique, et Litteraire 1881*, at 240.

39. 17 U.S.C. §4 (1947).

40. U.S.S.R. Copyright Law §4 (1928), 2 Gsovski 400.

41. *Ibid.* Attempts to enact such a broad statute in the United States would (other questions aside) raise an interesting issue as to the extent of the constitutional grant. U.S. Const. Art. I, §8. It was Professor Chafee's opinion that the Constitution "probably" requires an element of permanence in the objects protected. Chafee, *Reflections on the Law of Copyright*, 45 Colum. L.Rev. 503, 505 (1945).

author in radical fashion.”<sup>42</sup> Indeed it has. “Translation of another person’s work into a different language” is the very first item in a list of actions which “shall not be considered infringements of copyright.”<sup>43</sup> Generally speaking, the translator and his publisher owe the original author nothing. Only in the case of a Russian translation of a work which originally appeared in “one of the languages of the people of the U.S.S.R.” or “instances of translation from the language of one ethnic group into that of another,” is any remuneration at all due, and even then only to the extent of sixty percent of the established royalty rate for the original work.<sup>44</sup>

Cavalier though it may be in its attitude toward the product of the original author’s labor, the Soviet statute deserves at least a modicum of respect. The harsh terms resulted from a conscious decision that “it was in conformity with the cultural interests of the people of the Union, who are composed of diverse races speaking different languages, to assure a free exchange of literary and scientific values.”<sup>45</sup> Or, as an American commentator has more accurately rationalized the Soviet position: “The social progress of the various minority peoples of the Soviet Union toward socialism and communism . . . requires that artistic productions become available to them at minimum cost.”<sup>46</sup> The Soviet law (whatever we may think of the policy behind it) thus offers an interesting example of the way copyright legislation may be used to achieve social goals. Whether a future American copyright statute could or should be so constructed, or whether by the terms of the Constitutional grant it must seek only to protect literary property rights, are questions far outside the scope of the present inquiry.

Whatever the purposes of the statute, the freedom of translation which it allows extends without limit. Soviet courts, in fact, will not enforce a publishing contract which attempts to reserve to the author the translation right.<sup>47</sup> The author may retain only the right to correct and edit the translation.<sup>48</sup>

The translator, however, receives the treatment accorded any original creator, because translation is a named subject of copyright.<sup>49</sup> His royalty rate

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42. 57 Droit d’Auteur 7 (1944).

43. U.S.S.R. Copyright Law §9(a) (1928), 2 Gsovski 402.

44. *New Royalty Rates in the Russian Republic* (1947), translated in UNESCO, *Copyright Laws and Treaties of the World* (1956).

45. Heifetz, *Copyright in the U.S.S.R.*, 49 Droit d’Auteur 86, 89 (1929). Heifetz was a professor at Leningrad University; he later published a textbook (in Russian) on Soviet copyright law. 45 Droit d’Auteur 119 (1932).

46. Hazard 192.

47. Heifetz, *op. cit. supra* note 45, at 89.

48. *Ibid.*

49. U.S.S.R. Copyright Law §4 (1928), 2 Gsovski 400.

is only one-third that of an author<sup>50</sup> but if he has been so wise as to translate a play, he shares in the box office receipts to the same extent as a proper playwright.<sup>51</sup> Such stipends sometimes reach figures incredible to Americans, who tend to rank translators (except for an occasional well-known classicist) with hack-writers. One Soviet lady, for example, received over 1,000,000 rubles for an "ordinary conscientious translation" of *Pygmalion*.<sup>52</sup> The incongruity of the system has disturbed even the Soviets, as the *Pravda* article mentioned earlier<sup>53</sup> indicates. Its author adverts to the policy behind the original statute, urges that conditions have changed, and complains that the outdated law blocks progress.<sup>54</sup>

In the light cast by the legal and economic conditions of Soviet publishing, the foreign author's chances for recompense glow so dimly as to be barely visible. Soviet law compels recognition of foreign copyright "only if the U.S.S.R. has a special agreement to this effect with the country concerned", an empty concession, because the Russians have not yet concluded any such agreements.<sup>55</sup> It is true that Soviet publishers sporadically credit royalties to foreign authors. These, however, usually take the form of augmentation of authors' accounts in Russia, the money itself not being available for spending outside the U.S.S.R.<sup>56</sup> The normal experience of foreigners is typified by an incident recounted by Professor Chafee:

"An English writer on statistics, on hearing that 80,000 copies of his book had been sold in Russia, sent a courteous letter to the Soviet Government to ask whether royalties were paid semi-annually as in England. An equally courteous reply said that royalties to capitalists were contrary to proletarian principles. However, they were getting out 80,000 copies more and would be very glad to insert any corrections that he wished to send for a second edition."<sup>57</sup>

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50. *Supra*, note 44. The system of author remuneration will be more fully discussed later.

51. Chaplygin, *op. cit. supra* note 25.

52. *Ibid.*

53. *Ibid.*

54. *Ibid.*: "The copyright statute was written at a time when we had fewer theatres than we do now, fewer books were published, and there were not nearly so many opportunities for choosing good works. Now this obsolete statute is hindering progress."

55. U.S.S.R. Copyright Law §2 and note (1928), 2 Gsovski 399.

56. Hazard 192.

57. Chafee, *op. cit. supra* note 41, at 523.

Politico-economic principles aside, the fact is that foreign literature is a big business in Russia. During 1955 and 1956, for example, assorted works of Sir Arthur Conan Doyle appeared in various editions totalling 925,000 copies; Verne's *Captain Grant's Children*: 1,517,000 copies in the same years, plus 300,000 copies in a "collected works" edition; three romances by Dumas père: 2,615,000 copies plus 300,000 copies in the "collected works."<sup>58</sup> If the popularity of these authors is representative of the Russian appetite for Western literature, small wonder that even living writers have had such difficulty persuading the Soviet publishing industry to share some of the profits. Secure in the protection of the copyright law, the publishers, if they eventually give anything to the authors, will do so only if State policy changes (because the State, after all, is the ultimate publisher in the U.S.S.R.). Apart from such a policy change, a foreign author's only hope for payment lies in some kind of non-copyright approach. Professor Berman, representing the estate of Sir Arthur Conan Doyle, has tried the idea of a recovery for unjust enrichment, basing his claim on Article 399 of the R.S.F.S.R. Civil Code: "Whoever has been enriched at the expense of another, without sufficient ground provided by law or contract, must restitute that which he has groundlessly received. . . ." <sup>59</sup> In view of the explicit "ground provided by law" in the case of translations, and the fact that the law does not regard a translator as enriching himself at the expense of the author, it is difficult to see how even this ingenious theory can accomplish anything.<sup>60</sup>

2. *Music*. The Basic Act protects musical works<sup>61</sup> and even the performance rights of unpublished works (with the proviso, in the latter case, that once the composer has permitted his work to be publicly performed, the appropriate Republican Ministry of Education may authorize performance without consent, although it must tender the statutory royalties).<sup>62</sup> "Cultural-

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58. Kremlev, *op. cit. supra* note 15, at 10.

59. R.S.F.S.R. Civil Code, Art. 399 (1922), 2 Gsovski 206.

60. Professor Berman succeeded in putting his case before the Moscow City Court, but his action was dismissed without trial. For the decision on appeal, see 7 BULL. CR. SOC. 246 item 325 (1960). See also Berman, "Foreign Authors under Soviet Law," 7 BULL. CR. SOC. 67 (1959). The Soviets, incidentally, published some Doyle material in *English*, for use in language courses. Whether Doyle could recover if he were alive is a nice question. As it is, his estate appears barred by the Basic Law, which limits the author's right to a period of his life plus fifteen years. Text at note 102 *infra*. (Doyle died in 1930; the right therefore expired in 1945, and the applicable statute of limitations quashes any actions brought after 1948. Text at note 163 *infra*.)

61. U.S.S.R. Copyright Law §4 (1928), 2 Gsovski 400.

62. *Id.*, §8, 2 Gsovski 401-02.

educational institutions" may perform unpublished musical compositions without liability for infringement, so long as no admission is charged.<sup>63</sup>

This is quite similar to the American statute, which preserves to the copyright holder of a musical composition the "exclusive right" to "perform the copyrighted work publicly for profit."<sup>64</sup> The legal battles in the United States have centered over the definition of performance-for-profit.<sup>65</sup> The rule seems to be that if the music constituted part of the benefit for which the customer paid, the performance was "for profit", even though no separate fee was charged for the music. In Russia, the "separate fee" distinction is taken, but only for purposes of calculating the amount of royalty due. An illustrative case involved a motion picture theatre which entertained its patrons with "live" music between showings. The concerts were unquestionably an attraction,<sup>66</sup> but the customer paid no additional fee for the pleasure of listening. The court, therefore, applied the rate established by the Republican Ministry of Education for such cases: five percent of the *wages* of the performing musicians. Had a separate fee been assessed, the royalty rate would have been one-and-one-half percent of the *gate receipts*.<sup>67</sup>

To assure themselves of their due recompense, some 10,000 authors and composers have joined an all-Union Administration, direct descendant of a protective society organized in 1870.<sup>68</sup> Authors register their works with the Administration, which employs agents throughout the country to enforce observance of copyrights and the payment of royalties. "Certain directors of theatre and amusement establishments completely evade these"<sup>69</sup> although theoretically "(n)o organization in the U.S.S.R. has the right to issue tickets for sale without first registering them with the appropriate official of" the Administration.<sup>70</sup> Payments are made directly to the Administration, which

63. *Id.*, §9(i), 2 Gsovski 404. But R.S.F.S.R. Copyright Law §43 (1928), 2 Gsovski 426, requires a production contract and payment of royalties in these cases.

64. 17 U.S.C. §1(e) (1947).

65. *E.g.*, *Herbert v. The Shanley Co.*, 242 U.S. 591 (1917) (music played during meals in hotel dining room); *M. Witmark & Sons v. Pastime Amusement Co.*, 298 Fed. 470 (E.D.S.C. 1924), *aff'd* memorandum decision, 2 F.2d 1020 (4th Cir. 1924) (music accompanying silent movie).

66. Hazard 201.

67. Administration for the Protection of Authors' Rights—Theatre "Aurora", 13 *Sov. Yust.* 51 (1937), in Hazard & Weisberg 184; discussed in Hazard 201.

68. *Protection of Authors' Rights in the U.S.S.R.*, Soviet Literature (1954), No. 7, at 213.

69. Lashkul, "Prevent Copyright Violations", *Sovetskaya Moldavia*, 28 Aug. 1955, translated in 7 *Curr. Dig. Sov. Press*, No. 37, at 21 (1955).

70. *Supra*, note 68, at 214.

forwards them to its members.<sup>71</sup> The obvious parallel between the Soviet Administration and the American Society of Composers, Authors, and Publishers (ASCAP)<sup>72</sup> revives the suggestion advanced earlier in this paper that Soviet and American methods of protecting authors' rights are sometimes remarkably alike.

The protection of recording rights affords still another example of this parallelism. Although the Soviet Basic Law contains nothing analogous to Section 1(e) of the American Act,<sup>73</sup> the Soviet Supreme Court easily read an equivalent protection into the statute when the issue was presented to it:<sup>74</sup> Section 7 of the Basic Law, the Court reasoned, gives the author the right to derive profits from his exclusive right to reproduce his work by any legal means; Section 9, which lists sixteen specific *noninfringements*, does not mention the manufacture of phonograph records; inasmuch as no other law limits the force of Section 7, the Court concluded, unauthorized recordings must infringe the musical copyright.<sup>75</sup>

There can be no claim under Soviet law to rights resulting from the performance of a musical work over radio or television, a claim which has sometimes been sustained in the United States.<sup>76</sup> The Soviets have arrogated to the Commissariat (now the Ministry) for Post & Telegraph the "right to transmit by radio and wire musical, dramatic, or musico-dramatic works, lectures, reports, etc. performed in theatres, concert halls, auditoriums, and other public places." Neither author, performer, producer, nor theatre-owner is entitled to any additional remuneration if the State exercises its right.<sup>77</sup>

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71. *Ibid.*

72. For a full discussion of ASCAP by its General Attorney, see Finkelstein, *Public Performance Rights in Music and Performance Right Societies*, Seven Copyright Problems Analyzed 69 (1952).

73. 17 U.S.C. §1(e) (1947). Note the compulsory licensing provisions, designed to prevent monopoly.

74. Order of the 45th Plenum of the Supreme Court of the U.S.S.R. (1933), translated in Hazard & Weisberg 185. But compare UNESCO Copyright Bull., Nos. 2-3, at 28 (1949), which says it is "unclear" whether the Soviet author has the exclusive right to authorize sound recordings of his work.

75. Hazard & Weisberg 186.

76. Metropolitan Opera Association v. Wagner-Nichols Recorder Co., 199 Misc. 786, 100 N.Y.S.2d 483 (1950). See also Kaplan, *Performer's Right and Copyright: The Capitol Records Case*, 69 Harv. L.Rev. 409 (1956).

77. Act of 10 April 1929, U.S.S.R. Laws 1929, text 230, 2 Gsovski 398. See also 57 Droit d'Auteur 7 (1944); 61 *Id.* 54 (1948).

*Securing Copyright: Protection Without Formalities*

The Russian author who has created an original work falling within the wide sweep of the Basic Copyright Law can secure a statutory copyright simply by publishing the work. Unlike the United States Act, under which publication without notice of copyright effects a divestiture of rights and an enforced dedication of the work to the public,<sup>78</sup> the Soviet law regards publication simply as an act starting the period of copyright protection. In only three cases does failure to affix notice adversely affect rights: (a) Photographs published without notice either lose the copyright *ab initio* or forfeit an already complete right;<sup>79</sup> (b) A literary author's work is liable to use in a song (without recompense) unless he prohibits such use by "a declaration printed on *each* copy of his work";<sup>80</sup> (c) An architect or engineer who publishes "plans, drawings, or designs" cannot prevent another from executing the buildings or structures involved unless "when publishing the same" he "reserved such right for himself exclusively."<sup>81</sup> (The American law on this point duplicates the Soviet: publication of architectural drawings without securing copyright defeats the architect's right to prevent their use by others.<sup>82</sup>)

Apart from these exceptions, neither notice nor publication has any effect on the securing or forfeiting of copyright. Because, as we shall see, the author of a book or song can claim copyright at any time, no matter how long after the work first went to the public, the immateriality of notice can produce results guaranteed to stun an American copyright lawyer. Consider the following vignette. In 1905, at the height of the Russo-Japanese War, Fyodor Bogoroditsky set a patriotic poem to music and sang it to his friends; they in turn sang it to others, who passed the tune to still others; Fyodor, in short, had authored a hit. For reasons known best to himself, however, he chose to wait until 1946 before asserting his rights. "I send you the score of my song," he wrote the All-Union copyright agency. "Now it is widely sung by choirs. The melody is somewhat enriched, but its essence is the same. I ask that the

78. "Publication with notice of Copyright is the essence of compliance with the Statute, and publication without proper notice amounts to a dedication to the public sufficient to defeat all subsequent attempts at copyright protection." Conger, D.J., in *Wildman v. N.Y. Times Co.*, 42 F.Supp. 412, 414 (S.D.N.Y. 1941).

79. *Tolchan v. Publishing House "Moscow Worker"*, 7 *Sud. Prak. R.S.F.S.R.* 7 (1929), in Hazard & Weisberg 187. The case was decided under an earlier copyright statute, but the requirement of notice was the same then as now: U.S.S.R. Copyright Law §12 (1928), 2 Gsovski 406.

80. U.S.S.R. Copyright Law §9(h) (1928), 2 Gsovski 404 (emphasis added).

81. *Id.*, §9(n), 2 Gsovski 404.

82. Kaplan & Brown, *Copyright and Unfair Competition* 228-29 (1958).

author's copyright in this . . . tune be credited to me." And the copyright was recognized forthwith.<sup>83</sup>

For the Soviets, publication in the copyright sense consists of publishing (in the ordinary sense) "by an appropriate technical method."<sup>84</sup> The words seem to imply that it is the actual productive process that is important, not some future distribution or sale. If this is true, the Soviet law eliminates a source of difficulty which has plagued American law—the definition of "publication" (in the copyright sense), with its attendant imps: limited publication,<sup>85</sup> divestitive publication,<sup>86</sup> and investitive publication.<sup>87</sup> The question of publication by means of phonograph records still remains. Although the Soviet statutes say nothing about it, the Supreme Court, in the opinion establishing the composer's exclusive recording right, limited its consideration to the case of a work already "published in printed form."<sup>88</sup> This suggests that a recording may not be "an appropriate technical method" of publishing music. The Soviet position thus approximates that of the United States, which requires a notational basis for musical copyright.<sup>89</sup>

In another aspect of publication, however, the Soviets differ radically from the United States. Under Section 14 of the Basic Law, public performance of "a dramatic or musico-dramatic work, or of a musical work" has "for the purposes of computing the duration of copyright . . . the same effect as publication."<sup>90</sup> The American statute does not cover this question, but the strongly-established rule is that performance does not constitute publication.<sup>91</sup>

Both the U.S.S.R. and the United States require deposit of copyrighted works.<sup>92</sup> Responsibility, in the Soviet Union, falls on the publisher,<sup>93</sup> although

83. *Supra*, note 68. On these facts, an American court would almost certainly find a dedication. See *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 444, 194 Atl. 631, 636 (1937).

84. U.S.S.R. Copyright Law §14 (1928), 2 Gsovski 406.

85. *White v. Kimmel*, 193 F.2d 744 (9th Cir. 1952).

86. *Ibid.*

87. *Atlantic Monthly Co. v. Post Publishing Co.*, 27 F.2d 556 (D. Mass. 1928).

88. *Supra*, note 74.

89. *White-Smith Music Co. v. Apollo Co.*, 209 U.S. 1 (1908). See Kaplan, *Publication in Copyright Law: The Question of Phonograph Records*, 103 U. Pa. L.Rev. 469, 482 (1955). Cf. *Shapiro, Bernstein & Co. v. Miracle Record Co.*, 91 F.Supp. 473 (N.D. Ill. 1950). [But see *supra*, p. 205.]

90. *Supra*, note 84.

91. *Ferris v. Frohman*, 223 U.S. 424 (1912). The Soviet statute, *supra*, note 84, provides that "construction of an architectural work" is publication. The American rule inclines the other way; for a view of the authorities, see Kaplan & Brown, *op. cit. supra*, note 82, at 228-29.

92. U.S.S.R.: see Hazard 195; U.S.: see 17 U.S.C. §13 (1947).

93. Hazard 195.

failure to deposit "has no effect on the copyright."<sup>94</sup> This is substantially true in the United States also. The Act exhorts deposit "promptly" after publication, but the *Washingtonian* case has interpreted the word to mean "any time before an action for infringement is brought."<sup>95</sup> The deposit-registration tandem is thus little more than a procedural prerequisite to the filing of a complaint. Soviet law goes even farther; it views registration solely as a means "of certifying the time of the first appearance of a work";<sup>96</sup> refusal of the Registry to enroll a work does not foreclose proof by other means of the time of publication. Faced with a similar refusal, an American author may take the more direct step of suing to compel the Register of Copyright to grant him a certificate.<sup>97</sup> In either system, the Registry's document is merely prima facie evidence of the truth of the statements made therein.<sup>98</sup>

### *Duration of the Period of Copyright Protection*

The United States Act grants copyright for twenty-eight years from the date of first publication (renewable for an equal additional period).<sup>99</sup> Protection extends indiscriminately to any qualifying work. Books, photographs, ragtime numbers, and statuettes of Balinese dancers, all can claim coverage for "28-and-28". The Act simply ignores the possibility that differences in nature and use among the assorted forms of copyrightable expressions may compel a more functional treatment of each genre, and "that the various works and their various media of circulation demand far more individualized treatment than they now get."<sup>100</sup> Duration of copyright presents difficulties which Professor Chafee put at the head of his list of specific problems springing from the Act of 1909.<sup>101</sup>

The Soviets have avoided blanket coverage. They give a basic right (the lifetime of the author plus fifteen years),<sup>102</sup> with specified exceptions. Thus

94. 2 UNESCO Copyright Bull., Nos. 2-3, at 94 (1949).

95. *Washingtonian Publishing Co. v. Pearson*, 306 U.S. 30 (1939); cf. 17 U.S.C. §13 (1947).

96. Rules of the People's Commissariat for Education (R.S.F.S.R.), 8 Aug. 1929, 1 Gsovski 617.

97. *Bouve, Register of Copyright v. Twentieth-Century-Fox Film Corp.*, 122 F.2d 51 (D.C. Cir. 1941). But without a certificate, the author may not sue an infringer; he must sue the Register first. *Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co.*, 155 F.Supp. 932, at 934 n. 1 (S.D.N.Y. 1957).

98. R.S.F.S.R. Copyright Law §9 (1928), 2 Gsovski 414; 17 U.S.C. §§209, 210 (1947).

99. 17 U.S.C. §24 (1947). For unpublished works copyrighted under 17 U.S.C. §12, the period of protection dates from deposit. *Marx v. United States*, 96 F.2d 204 (9th Cir. 1938).

100. Kaplan, *op. cit. supra* note 89, at 490.

101. Chafee, *Reflections on the Law of Copyright*, 45 Colum. L. Rev. 503, 719 (1945).

102. U.S.S.R. Copyright Law §10 (1928), 2 Gsovski 405.

dances, pantomimes, movie scenarios, and films enjoy a flat ten-year period of copyright,<sup>103</sup> as do collections of photographs,<sup>104</sup> periodicals, and encyclopedias.<sup>105</sup> The periods in almost all cases date from January 1 of the year of publication,<sup>106</sup> with a right in the copyright holder's heirs to enjoy the remaining portion of the term if he should die before its end.<sup>107</sup> The fifteen-year posthumous period granted to the heirs of an author holding the basic copyright begins on January 1 of the year he dies.<sup>108</sup>

At the end of the statutory period, the copyright expires permanently; the Soviets have made no provision for renewal.<sup>109</sup> Note also that if the immediate heirs die before the expiration of the fifteen-year addendum (or the original term, if the copyright covers one of the special cases), the right dies with them; they may not pass it through their estates.<sup>110</sup> The American copyright is a privilege much less personal. True, the author must survive into the twenty-eighth year in order to vitalize his (or his assignee's) renewal right.<sup>111</sup> But even if the author should die early in the term, the renewal right passes to his surviving spouse and children, provided they live into the twenty-eighth year; if they do not, then his executors or, if he leaves no will, his next of kin, preserve the renewal right;<sup>112</sup> and anyone who rightfully renews may

103. *Id.*, §11, 2 Gsovski 405-06.

104. *Id.*, §12, 2 Gsovski 406. Single photographs are protected for five years.

105. *Id.*, §13, 2 Gsovski 406. Contributors to periodicals and encyclopedias retain individual copyright in their contributions. For the confused situation in the United States, see Wasserstrom, *The Copyrighting of Contributions to Composite Works: Some Attendant Problems*, 31 Notre Dame Law. 381 (1956).

106. *Id.*, §14, 2 Gsovski 406. The exceptions:

(a) *Motion pictures*—period of copyright begins "the day of the first public showing of the film," R.S.F.S.R. Copyright Law §7 (1928), 2 Gsovski 413 (unless the script has previously been printed; in that case, the date of the printing initiates the *film's* copyright);

(b) *Encyclopedias*—period starts on the date of publication of the last volume, unless the volumes have appeared at intervals greater than six months, in which case the publication of each volume starts a separate period. *Id.*, §8, 2 Gsovski 413.

107. U.S.S.R. Copyright Law §15 (1928), 2 Gsovski 407.

108. *Ibid.*

109. It has been said that the U.S.S.R. is one of six or seven countries affording a period of protection after the expiration of the statutory coverage, during which period of "*domaine public payant*" a would-be user must pay royalties either to the State or to an authors' society. 2 UNESCO Copyright Bull., Nos. 2-3, at 128 (1949). No Soviet statutory provision was cited, however, and none has been found.

110. 1 Civil Law Textbook 266 (1938), cited in 2 Gsovski 407.

111. 17 U.S.C. §24 (1947). And see *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943).

112. 17 U.S.C. §24 (1947).

deal with the renewed copyright just as he would with an original: he may assign, grant, mortgage, or bequeath it.<sup>113</sup>

Apart from the copyright disadvantages attendant on premature demise, Soviet authors and their heirs face another liability not found in American law. They run the risk that the U.S.S.R. or the Republic where the work was first published or is presently located may exercise eminent domain over the copyright in "any work", and may purchase it "compulsorily."<sup>114</sup> In the R.S.F.S.R., the author of a work subject to forced purchase retains a right to royalties, but only in such amount as the State may choose to allow.<sup>115</sup> As the State sets even the normal royalty rate, the author (or the heir) does not appear to be losing much. Works susceptible of performance, however, may not be produced, when sequestered, without State authorization; and the royalties are payable not to the author, but to the State.<sup>116</sup> This provision, together with the clause in the Basic Law which enables the State to *compel* performance,<sup>117</sup> gives the government a potential stranglehold on Soviet playwrights, composers, and choreographers (and their respective successors in interest).

In contrast, the only section of the United States Act which touches the possibility of governmental use of privately copyrighted material carefully emphasizes that such use in no way impairs any rights pre-existing in the copyright holder.<sup>118</sup>

### *Assignability of Copyright*

As we saw earlier,<sup>119</sup> the American copyright proprietor may treat his property like any other piece of personalty, and may freely assign, grant, mortgage, or bequeath it, subject only to the requirement of recording the assignment to protect the assignee against a "subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded."<sup>120</sup>

The analogous Soviet provision is equally broad: "A copyright may be alienated in its entirety or in part by a publishing contract, a will, or in some

113. *Id.*, §28.

114. U.S.S.R. Copyright Law §20 (1928), 2 Gsovski 409.

115. R.S.F.S.R. Copyright Law §13 (1928), 2 Gsovski 415. An analogous provision appears in the Ukrainian Copyright Law §30 (1929), translated in UNESCO, *Copyright Laws and Treaties of the World* (1956).

116. R.S.F.S.R. Copyright Law §15 (1928), 2 Gsovski 416-17.

117. U.S.S.R. Copyright Law §8 (1928), 2 Gsovski 402.

118. 17 U.S.C. §8, second paragraph (1947).

119. *Supra*, note 113.

120. 17 U.S.C. §30 (1947).

other legal manner.”<sup>121</sup> In fact, however, the holder of a Soviet copyright finds its alienability severely restricted. For one thing, the list of eligible alienees is itself small. Publishing is exclusively a State enterprise, with royalty scales fixed by official decree. In this system the author deals with the State directly, or he deals with no one. Even if we could assume that the Soviets, so neuralgic on the subject of “profiteering”, would tolerate the presence of a literary middleman (who buys from authors and sells to publishers), the author would have no reason to treat with him. Because royalties are rigidly set, the middleman has no opportunity to establish a profit: he cannot buy from the author at much less than the official figure, and he certainly cannot receive from the publisher a price much above it. This is not to say that influence, “contacts”, and “pull” are not important in the Soviet publishing industry. There is no reason to suppose that these factors are less vital there than in any other area of Soviet life.<sup>122</sup> All I mean now is that “pull” does not manifest itself in the brokerage of copyrights.

Another clog on free alienation of copyrights stems from the law itself, which virtually directs the parties to a Standard Publishing Contract, promulgated by the Ministry of Education. The parties may conclude a contract differing somewhat from the model, but it must not deprive the author of any advantages he would enjoy under the Standard Contract.<sup>123</sup> Thus the author cannot relinquish any one benefit (or combination thereof) in hopes of securing a better total arrangement. Further, such freestyle contract is subject to statutory limitations as to terms, consideration, and time of performance.<sup>124</sup> Assignment of copyright to a performable work must similarly follow a “production contract” format outlined in the Copyright Law,<sup>125</sup> while contracts for the publication of musical works are even more strictly limited to State-decreed provisions.<sup>126</sup>

Finally, although the Soviet author may nominate by will the individual who is to enjoy the fifteen-year period of posthumous protection,<sup>127</sup> in view of the closed-market nature of Soviet publishing, the beneficiary possesses an asset capable of only limited exploitation. Still, the copyright in his hands is

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121. U.S.S.R. Copyright Law §16 (1928), 2 Gsovski 407.

122. On the importance of “pull” in everyday Soviet life, see Kalb, *Eastern Exposure passim* (1958).

123. R.S.F.S.R. Copyright Law §26 (1928), 2 Gsovski 421. For the text of the Standard Contract, see 2 Gsovski 427.

124. R.S.F.S.R. Copyright Law §§17-23 (1928), 2 Gsovski 417-21.

125. *Id.*, §§30-38, 2 Gsovski 422-25.

126. *Id.*, §27, 2 Gsovski 422.

127. *Supra*, note 107.

as valuable as it was in the author's; viewed that way, perhaps the Soviet and American laws treat the devisee equally.

Despite its restriction of free transferability, the Soviet law gives the author a surprising amount of control over what his assignee does with the work. Neither publisher<sup>128</sup> nor theatrical producer,<sup>129</sup> for example, may re-assign rights without the author's written consent. But the Standard Publishing Contract does reserve the publisher's right to reassign expectations and obligations in the event of changes in his "Plan".<sup>130</sup>

### *Divisibility of the Copyright*

The United States Act treats the alienable copyright as "a bundle of distinct and specific monopolies, each of which must rest on an express clause in the statute."<sup>131</sup> The Act spells out the various rights accruing to a copyright proprietor, without explicitly authorizing him to dispose of them separately. The statute regards A as holding *the* copyright in his novel, even though he has sold the "stage" rights to B and the "movie" rights to C. The Act does not conceive of B as holding the "stage" copyright, of C as holding the "movie" copyright. Of course, B and C may secure their own copyrights on the works they have lawfully derived from A's novel. But the novel's copyright remains in A unless he disposes of it, too, no matter what he has permitted the others to draw from the basic work. In fact, however, A has indeed divided up his copyright. It makes little difference whether we regard A as having "licensed" B and C, or as having "assigned" them their respective rights; the result of the transactions has been to split *the* copyright which the statute conferred on A.

The Soviet law goes more directly to the same result, expressly permitting alienation of the copyright "in its entirety or in part."<sup>132</sup> The grant has only limited value, however, because the only derivative rights under the Soviet author's control are the motion picture rights; any other derived creation is specifically declared not to be an infringement.<sup>133</sup> And even the motion picture right stands on shaky footing, because the statute authorizes a would-be producer to circumvent a recalcitrant author by petitioning the Ministry of Education to compel the writer to authorize the picture.<sup>134</sup>

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128. R.S.F.S.R. Copyright Law §24 (1928), 2 Gsovski 421.

129. *Id.*, §44, Gsovski 426.

130. Standard Publishing Contract §24, 2 Gsovski 437.

131. Chafee, *op. cit. supra* note 101, at 521.

132. *Supra*, note 121.

133. U.S.S.R. Copyright Law §9(b) (1928), 2 Gsovski 403.

134. *Id.*, §9, note 1, 2 Gsovski 405.

An author dealing with a motion picture studio retains faint rights. The studio may not secure an assignment for more than three years,<sup>135</sup> which at least prevents a studio from "covering up" works it does not wish to produce at once. Further, a script-writer whose work has been filmed is entitled to rewrite the scenario and vend it elsewhere.<sup>136</sup> Rights such as these, which might have considerable meaning in a competitive industry, lack real importance in a State-controlled economy. Whether the presence of "socialist competition" breathes life into them is a question beyond the range of this paper.

### *The "Moral Right"*

Despite its indifference to certain conventional perquisites of authorship, Soviet law is surprisingly solicitous of the so-called "moral right", the protection, independent of strict *copyright*, extended to the personal rights of an author *vis a vis* his work; the right, for example, to claim the authorship of the work (or to have it published anonymously); the right, too, to prevent even authorized publishers from issuing mutilated versions of the work. The United States Act does not protect these rights, and "the doctrine of moral right as such is not recognized in the United States."<sup>137</sup> But the authorship or "paternity" right is preserved under doctrines of contract, privacy, or unfair competition, while the right to the integrity of one's work finds similar protection.<sup>138</sup>

At least one commentator feels that despite statutory protestations to the contrary, "Soviet (copyright) law does not recognize the notion of moral wrong nor the reparation of the same by a sum of money."<sup>139</sup> The skimpy available evidence indicates that this view may be too extreme. As far as "paternity" is concerned, it is arguably correct. The statute does give the author the right to "publish his work under his own name," or pseudonymously, or anonymously,<sup>140</sup> but nothing gives him the right to compel his publisher to print his name on the work. The law in this respect appears to be what it was in 1926 when the Supreme Court of the R.S.F.S.R. denied relief to a plaintiff suing his publisher for having issued "a translation, refusing to indicate the plaintiff's name as translator." (In Russia, remember, a translator is an author.) According to the text-writer who reported the case in 1934, as illustrative of

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135. R.S.F.S.R. Copyright Law §41 (1928), 2 Gsovski 425.

136. *Id.*, §42, 2 Gsovski 426.

137. Strauss, *The Moral Right of the Author*, 4 Am. J. Comp. L. 506, 521 (1955).

138. *Id.*, at 521-22.

139. Targonski, review of Heifetz, *Copyright in Russia* (1931), 45 Droit d'Auteur 119, 120 (1932).

140. U.S.S.R. Copyright Law §7 (1928), 2 Gsovski 401.

current law: "The judges opined that the plaintiff had not shown sufficient damages and that the violation of his moral interest and of his prestige as a writer were not worth the trouble of mentioning."<sup>141</sup>

The picture is, however, somewhat brighter as to the "integrity" right. The statute clearly gives the author the absolute right during his lifetime to bar any changes suggested by publisher or producer;<sup>142</sup> after his death, the right continues in the author's successors, watered down by a provision permitting the Minister of Education to authorize changes if the successors refuse.<sup>143</sup> These rights are inalienable even though the author "alienates the economic rights."<sup>144</sup> As the Supreme Court of the U.S.S.R. declared in 1940: "Even the publishing house could not obtain by contract the author's right to control alterations in the work."<sup>145</sup> This right also covers an author's relations with the studio converting his literary work into a movie.<sup>146</sup> If the law is strictly applied, Soviet authors thus enjoy a privilege that American novelists have long been striving (with notable lack of success) to wring from Hollywood.

### *Infringements*

Because Copyright is in many respects an integrated subject, it is a difficult one to discuss piecemeal. Analysis of one phase invariably entails some examination of other areas. The preceding portion of the paper has generally concerned itself with the questions basic to an examination of Soviet copyright law: How does the author secure copyright? What does he get for his trouble? The next appropriate inquiry: What acts by others violate the author's right? What does Soviet law regard as copyright infringement?

Apart from violations of the author's right to first publication or first performance, the most important infringement of Soviet copyright is a failure to pay agreed royalties.<sup>147</sup> An American lawyer would regard this as a cause of action in contract, not as an injury based on copyright. This points up the difference between the Soviet concept of copyright and ours. The Russians

141. Review of Lesman, Copyright in the U.S.S.R. (1934), 48 *Droit d'Auteur* 24 (1935).

142. U.S.S.R. Copyright Law §18 (1928), 2 Gsovski 409.

143. R.S.F.S.R. Copyright Law §28 (1928), 2 Gsovski 422. The Ministry may also authorize changes in works on which the copyright has expired. *Id.*, §29, 2 Gsovski 422.

144. 2 UNESCO Copyright Bull., Nos. 2-3, at 58 (1949).

145. Administration for the Protection of Authors' Rights v. Institute of Language and Literature, Azfan, *Sbornik Post. Pl. i Opr. Koll. Verkh. Suda SSSR* 283 (1940), discussed in Hazard 193.

146. R.S.F.S.R. Copyright Law §41 (1928), 2 Gsovski 425.

147. Lashkul, "Prevent Copyright Violations", *Sovetskaya Moldavia*, 28 August 1955, translated in 7 *Curr. Dig. Sov. Press*, No. 37, at 21-22 (1955).

view copyright jealously. They see it as a method of assuring the author a fair return, as it were, but nothing more. We, on the other hand, regard copyright as a benevolent monopoly, freely granted to encourage the author to exploit the full potential economic value of his work. The very structure of the respective statutes emphasizes the contrast: ours enumerates the rights and monopolies conferred on a copyright holder,<sup>148</sup> while the Soviets list the acts which are *not* infringements.<sup>149</sup> We say to the proprietor: "Here is what you alone may do with the work." They say: "Here is what anyone may do with it."

The cartography of infringement under Soviet law therefore depends largely on what the statute does *not* say. That, at least, is how the Soviet courts seem to approach the problem. For example, in a case involving unauthorized phonograph records, the judges first noted the statute's silence on the subject, and then held such recording to be an infringement.<sup>150</sup>

Other sections of the paper having discussed the more significant non-infringements *en passant* (*supra*, pp. 9, 14-15), we can limit our examination of the matter now to a glance at the Soviet equivalent of the "fair-use" doctrine. In American law, the term denotes a privileged "tracking" or other use of copyrighted material (as, for example, when Scholar X's treatise embodies a quotation from the work of Scholar Y). The Soviets profess the same sort of idea, although they do not seem to have labelled it. Short "liftings" are privileged,<sup>151</sup> as are reviews transmitting the "essence" of the work reviewed,<sup>152</sup> reports of public speeches,<sup>153</sup> and news stories reprinted one day later.<sup>154</sup> The statute sets upper limits on the tolerated amount of plagiarism: 10,000 printed characters of prose per author "borrowed", 40 lines of poetry, or 40,000 characters from "fundamental scientific works."<sup>155</sup> In practice, however, the courts prohibit "only 'excessive' borrowing," determining in each case what is "excessive."<sup>156</sup>

To illustrate the courts' approach to fair use and to infringement cases in general, I want to take up now *Saltanov v. Erasmus and the Soviet Encyclo-*

148. 17 U.S.C. §1 (1947).

149. U.S.S.R. Copyright Law §9 (1928), 2 Gsovski 402-05.

150. Order of the 45th Plenum of the Supreme Court of the U.S.S.R. (1933), translated in Hazard & Weisberg 185. See also *supra*, text at note 74.

151. U.S.S.R. Copyright Law §9(c) (1928), 2 Gsovski 403.

152. *Id.*, §9(d), 2 Gsovski 403.

153. *Id.*, §9(e), 2 Gsovski 403.

154. *Id.*, §9(f), 2 Gsovski 403. Cf. *International News Service v. Associated Press*, 248 U.S. 215 (1918).

155. R.S.F.S.R. Copyright Law §5 (1928), 2 Gsovski 412.

156. Levitsky, *Soviet Press and Copyright Legislation: Some Legal Concepts*, 25 *Fordham L.Rev.* 469, 483 (1956).

*pedia*,<sup>157</sup> a decision whose salient points permit a fruitful comparison with American law.

Plaintiffs had authored a pre-Revolutionary German-Russian technical dictionary, which had been republished several times, the latest edition (183,000 words) appearing in 1934. In 1931, defendant publisher had issued a 30,000-word Russo-German technical dictionary compiled by defendant author. This work, too, had been successful: it was reprinted in 1932 and 1934. Alleging plagiarism, plaintiffs sued for 10,000 rubles damages. Three aspects of the case claim special attention: the use of experts; the concept of a period of limitations; and, finally, the application of a rule of fair use.

1. *Experts.* At the trial, both sides introduced expert witnesses; the testimony of course conflicted. Even had the experts been unanimous, however, indications are that the court would have felt free to overrule them, if the weight of other evidence had so warranted.<sup>158</sup> The Soviet courts, like our own, utilize experts only as an adjunct to decision.<sup>159</sup> Having found that the defendants had indeed infringed, the trial court in the *Saltanov* case based its assessment of damages on the estimate offered by the *defense* witnesses, who had acknowledged "borrowing" only to the extent of twenty-five percent of the new work. The court therefore awarded damages amounting to one-quarter of the amount sued for.<sup>160</sup> It also taxed the defendants for the fees of *all* the experts.

2. *Period of Limitations.* Soviet law enforces copyright protection in three ways. First, through the Criminal Code,<sup>161</sup> which punishes an individual plagiarist by correctional labor up to three months, or by a fine not to exceed 1000 rubles. Second, by permitting the injured author to sue the infringing publishing house for a portion of the royalties due, the amount varying with the seriousness of the infringement.<sup>162</sup> Finally, by allowing the victimized

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157. 17 *Sov. Yust.* 51, in Hazard & Weisberg 178 (1937).

158. *Vinogradov v. State Soap, Rendering, Candle, and Chemical Factory No. 1*, 8 *Sud. Prak. R.S.F.S.R.* 7, in Hazard & Weisberg 181 (1935).

159. On the American employment of experts, see Bullen, *The Role of Literary Experts in Plagiarism Trials*, 7 *Am. U. L.Rev.* 55 (1955), and Orth, *The Use of Expert Witnesses in Musical Infringement Cases*, 16 *U. Pitt. L.Rev.* 232 (1955).

160. American courts also frequently rely on experts when setting damages. Bullen, *op. cit. supra* note 159, at 65.

161. R.S.F.S.R. Criminal Code §177, in Hazard & Weisberg 178; *cf.* 17 U.S.C. §§104, 105 (1947).

162. Decree of the People's Commissariat for Education of the R.S.F.S.R., 8 June 1930, discussed at length in Levitsky, *op. cit. supra* note 156, at 482. *Cf.* 17 U.S.C. §101(b) (1947).

creator to sue for damages under Chapter XIII of the R.S.F.S.R. Civil Code, "Obligations Arising From Injury Caused to Another."<sup>163</sup>

The Saltanovs selected this last method. In bringing their action, however, they neglected the effect of the applicable three-year period of limitations. The trial court also ignored this aspect of the case, and defendants apparently did not press it on appeal. The upper court, however, found the issue central, and decided the case accordingly. (Such recognition of error *sua sponte* suggests, incidentally, that Soviet appellate courts are not limited to deciding "questions raised below"; this restriction would be intolerable in an avowedly educative, preceptorial legal system like that of the U.S.S.R.<sup>164</sup>)

The high court here agreed that the suit had been timely brought with respect to the last pirated edition (1934). But, it said, only the first edition (1931) constituted the infringement which started the period of limitations; a reprint of an offending work is not "a new act in law."<sup>165</sup> An American court, it is safe to say, would have reached the opposite conclusion. We, too, have a three-year statute of limitations on civil actions for copyright infringement,<sup>166</sup> but for over a century the rule has been that even if the statutory period has run as to the original infringement, "every printing for sale caused by the defendant (is) a new infraction of the right"; if the action is then brought within the required time, the defendant will be liable.<sup>167</sup>

3. *Fair Use*. Because the limitations issue was so thoroughly dispositive, the Court's remarks on fair use must rank only as dicta. Nonetheless, the judges clearly thought the topic important because, in keeping with the educational nature of Russian jurisprudence, they took some pains to explain their views. To begin with, they said, Section 9(b) of the Basic Law permits the use of an existing, protected work to create a new work, a privilege justified only to "the extent to which the author of the new work has used creativeness."<sup>168</sup> Some of the experts did regard the second dictionary as creative; a court, presumably,

163. R.S.F.S.R. Civil Code, Chapter XIII (1922), 2 Gsovski 207-17.

164. For an analysis of the so-called parental nature of Soviet law, see Berman, *Justice in Russia* 199-291 (1950).

165. *Supra*, note 157, at 179.

166. 71 Stat. 633 (1957). This is an amendment to §115 of the Copyright Act, which previously had given a limitation period for criminal proceedings only. Federal courts hearing copyright actions would analogize an appropriate period from State law: "Some courts have applied the state statute of limitations pertaining to torts . . . other courts have applied the state statute . . . pertaining to conversions, injuries to personal rights, injuries to property rights, trover, liabilities not under contract, or other general provision." 2 *U.S. Code Cong. and Adm. News* (1957) 1961.

167. *Reed v. Carusi*, 20 Fed. Cas. 431 (No. 11,642) (C.C.D.Md. 1845), per Taney, C.J.

168. *Supra*, note 157, at 179.

would not be unjustified in reaching the same conclusion. Moreover, "similarity in a noticeable measure is inescapable in such publications as dictionaries."<sup>169</sup> Defendant's use, therefore, was not unfair.

Because of the difference in governing statutes, it is impossible to gauge an American court's reaction to this branch of the decision. The interested reader may enjoy perusing *College Entrance Book Co. v. American Book Co.*,<sup>170</sup> a New York version of the *Saltanov* case. There, too, the experts clashed as to the degree of correspondence between two foreign-language lexicons (actually competing French review grammar-vocabularies). The trial judge had dismissed the complaint, but the appellate court rejected the defendant's evidence, concluding that both books "met exactly the same demand in the same market, and defendant's copying was unquestionably to avoid the trouble or expense of independent work. This is an unfair use."<sup>171</sup>

### *The Author as Worker*

When he goes to court, the Soviet author finds himself, procedurally speaking, in a pleasantly anomalous position. Although, as we shall see shortly, established authors generally enjoy such a favored financial status that one would not think of them as "workers", the courts nevertheless grant the author-suitor many of the advantages usually reserved for ordinary "toilers." The text-writers appear to be divided on the propriety of this treatment, some maintaining that the copyright is a worker's right, others that it is a right *sui generis*,<sup>172</sup> not to be protected as workers' salaries are protected. Practice and the Basic Law itself seem to support the former view:<sup>173</sup> the author suing on his copyright can utilize the same speedy procedure that a worker commands when suing for his wages; if he wins, the author, like the worker, will be paid immediately, even though the defendant is appealing; the Code of Civil Procedure exempts him from the payment of court fees and costs;<sup>174</sup> finally, his unsatisfied judgment takes priority over secured creditors and even over the State's tax lien.<sup>175</sup>

169. *Ibid.*

170. 119 F.2d 874 (2d Cir. 1941).

171. *Id.*, at 876.

172. Heifetz, *Copyright in the U.S.S.R.*, 49 *Droit d'Auteur* 86, 90 (1929), which vigorously criticizes the first position.

173. *Ibid.* Also U.S.S.R. Copyright Law (preamble) §3(b), in UNESCO, *Copyright Laws and Treaties of the World* (1956). See Order of the 45th Plenum of the Supreme Court of the U.S.S.R., *supra*, note 150, at 186 (an attempt to expedite the recovery of performance-right royalties).

174. R.S.F.S.R. Code of Civil Procedure §43(d). *Cf.* Heifetz, *op. cit. supra* note 172, at 90.

175. Heifetz, *op. cit. supra* note 172, at 90.

The Soviets continue to analogize authors and workers when the author appears as defendant, too. Ordinary workers receiving salary advances are not required to pay back the money, even though the employer is able to make out a complete case of what an American lawyer would call "unjust enrichment."<sup>176</sup> This principle applies notwithstanding that "payment (was) made because of conscious deception on the part of the worker."<sup>177</sup> Courts are beginning to apply it to authors: Professor Berman recently observed a case in the Moscow City Court in which a publishing house was suing an author to recover 12,000 rubles paid as an advance on a book which had never been published, due to a change in the publisher's "Plan". The court held that the author was a worker *pro hac vice*, and therefore not bound to make good.<sup>178</sup>

### Remuneration

Like workers, authors are recompensed at State-fixed rates. Although the Soviets speak of "royalties", the word does not carry the American connotation of payment based on sales. The Soviet "royalty" looks not to the number of copies sold, but, in the first instance, to the number of pages the work comprises. The statute does allow some leeway in the establishment of a publishing contract,<sup>179</sup> but the royalty figure in the case of literary authors appears to be determined by three non-consensual elements:<sup>180</sup>

1. The type of work, or "genre". No matter what genre may be specified in the contract, the royalty payment is based on the genre which actually appears.<sup>181</sup>
2. The press run, or "*tirage*". In most cases, the genre fixes the tirage.
3. The "category" within which the work belongs, according to its "idealistic and artistic" value.<sup>182</sup> There are three categories: (a) "outstanding works";

176. *Odessa Bread Trust v. F.*, reported in Konstantinovsky & Berman, *Soviet Law in Action* 60, 61 (1953).

177. *Odessa Bakery v. S.*, reported in Konstantinovsky & Berman, *op. cit. supra* note 176, at 71.

178. Conversation with Professor Berman, 31 October 1958. The trial itself took place in September, 1958.

179. *Supra*, note 123.

180. See *Literary Royalty Rates in the Russian Republic* (1944) and *New Literary Rates in the Russian Republic* (1947), both translated in UNESCO, *Copyright Laws and Treaties of the World* (1956). For an excellent overall view of the Soviet royalty system, see Levitsky, *op. cit. supra* note 156, at 477-81, on which the following discussion relies heavily.

181. U.S.S.R. Supreme Court, ruling of 20 March 1942, cited in Levitsky, *op. cit. supra* note 156, at 478 n. 44.

182. *New Literary Royalty Rates in the Russian Republic*, *supra*, note 180.

(b) "good works satisfying high idealistic and artistic standards"; (c) "satisfactory works, as well as the works of writers who are beginners."<sup>183</sup>

Whatever its category, a work which goes through more than one edition earns royalties at a lower rate in its later editions; any overage above the allowable number of copies per edition is considered to commence a new edition.<sup>184</sup>

Non-literary authors, too, feel State-imposed limitations on their earnings. Writers and composers for the stage, for example, are paid an initial amount, plus a percentage of the admissions: one-and-one-half percent per act for plays; two percent per act for operas; three percent of the total "gate" for variety shows.<sup>185</sup> (Does this scale represent an attempt to shape popular taste, indirectly, through author incentives? Or does it merely reflect that taste itself?) Composers of "straight" music likewise earn at a State-set rate.<sup>186</sup>

Although they may achieve financial recognition only under fixed pay scales, Soviet authors apparently thrive. In the period 1943-47, when incomes above 12,000 rubles were subject to a thirteen percent surtax, the tax statute provided no brackets above 12,000 rubles for non-authors, while author's brackets continued up to 300,000 rubles (where the excess was taxed at fifty-five percent).<sup>187</sup>

This suggests that nobody but an author could be expected to earn so much money. If one recalls the "ordinary translation" which netted 1,000,000 rubles,<sup>188</sup> the suggestion appears eminently reasonable.

To increase the fiscal reward of Soviet creativeness, the Russians have lowered the rate for authors to a flat thirteen percent on everything over 12,000 rubles a year.<sup>189</sup> Here again the Soviets seem to be using indirect methods to further social, cultural, and (in the long run) political aims by stimulating intellectual production. To the extent that they must rely on cold cash incentives, they may be said to be adopting methods more monetary than Marxist (a criticism to which the Soviets are apparently indifferent; they have consistently utilized the principle of the money reward as an aid to material progress). In contrast, the openly free-enterprise United States eschews these methods almost completely. American authors "are not only not encour-

183. *Ibid.*

184. *Ibid.*

185. *Protection of Authors' Rights in the U.S.S.R., Soviet Literature* (1954), No. 7, at 214.

186. See 2 Gsovski 422, and *supra*, text at note 67.

187. Decree of 30 April 1943, *Ved. Verkh. Sov. SSSR*, No. 7 (1943), cited in Hazard 202 n. 30.

188. *Supra*, text at note 52.

189. 3 *Spravochnik po Zak.*, at 122 (1949), in Hazard 203 n. 31.

aged by our tax laws but are actually discriminated against.”<sup>190</sup> Given a chance to remedy this situation in 1954, with the passage of the new Internal Revenue Code, Congress chose rather not to disturb the status quo, with the result that today, except for the “spread-back” provision,<sup>191</sup> “the vehicles of thought itself . . . are relegated taxwise to a least favored position in our economy.”<sup>192</sup>

The Soviet effort to brighten the fiscal atmosphere in which authors labor once extended so far as to exempt the value of an existing copyright from inclusion in the author’s taxable estate upon his death.<sup>193</sup> This provision has lost force (but not significance) because of the blanket abolition of the inheritance tax.<sup>194</sup> Under the United States Code, a copyright is “property” of the holder; its market value must therefore be included in the decedent proprietor’s gross estate.<sup>195</sup>

#### *Authors, Publishers, and the Plan*

Although the preceding few paragraphs have indicated the extent of the financial incentives which the Soviets deliberately offer to authors, I have not meant to suggest that the Russians have effectively solved the problem of encouraging intellectual output. They have taken conscious steps, which is certainly more than we have done. On the other hand, their very effort to raise creative productivity may itself stunt creativeness. Authors and publishers alike, it seems, find themselves unable to work comfortably within the inflexible strictures of a Plan.

The publisher (that is, the manager of the State-owned publishing house) feels the Plan’s pressure first. When handling a book by a “new” author, he faces two immutable “givens”: the small number of copies he is permitted to print,<sup>196</sup> and an out-of-date price list not at all tied to production costs.<sup>197</sup>

190. Pilpel, *Tax Aspects of Copyright Property*, 1953 Copyright Problems Analyzed 177, 178 (1953).

191. *Int. Rev. Code of 1954* §1302.

192. Pilpel, *Developments in Tax Law Affecting Copyrights in 1954*, 33 Taxes 271 (1955). See also Pilpel, *Tax Law Affecting Copyrights: 1954-1956*, 35 Taxes 76 (1957). Although I share the author’s concern, I cannot help wondering just how we can establish a tax arrangement which will encourage socially-valuable intellectual production without at the same time dumping a bonanza into the coffers of such downright *anti-intellectuals* as the comic-book publishers.

193. U.S.S.R. Copyright Law §15, second paragraph (1928), 2 Gsovski 407.

194. Note, 2 Gsovski 407.

195. *Int. Rev. Code of 1954* §2031.

196. *Supra*, note 180. And see R.S.F.S.R. Copyright Law §21 (1928), 2 Gsovski 419.

197. *Kremlev*, “In Defense of the Reader”, *Kommunist*, No. 8, June 1957, 123-28, translated in 9 *Curr. Dig. Sov. Press*, No. 32, 10-12, at 11 (1957).

Forced to the intersection of these two walls, he then finds himself required to satisfy a Plan emphasizing large profits. Moreover, the production schedules included in the Plan impose an intolerable rigidity on a business which seems to thrive best on fluidity and "finds". The Heaven-sent "discovery", however, has no place in Soviet publishing today. "No matter how good or how topical the novel, it cannot be published if it is not in the Plan."<sup>198</sup>

Able to publish only an inadequate number of copies (unless the book is a "mass edition",<sup>199</sup> which is almost never the case with works by new authors), and gripped by a price list that makes him "shun a new book like the devil shuns incense, since he knows beforehand that it will incur a loss",<sup>200</sup> the publisher turns his attention to translated best-sellers or cheap mass editions of known Soviet writers.

The eventual loser is the new writer. Generally neglected as a result of the publisher's aversion to financial failure, he is hard put even if the publisher does agree to accept his work. Because of the maximum-copy figure, he cannot derive enough royalties to sustain himself during the years until publication of his next book.<sup>201</sup>

Nor is the Plan's quota the only constriction on author and publisher. Permeating every aspect of the industry is the doctrinal felt necessity. The author of a work found to lack "ideological foundation" has no contract rights whatsoever against a publisher who refuses to publish or pay agreed royalties.<sup>202</sup> The Standard Publishing Contract recognizes the potential difficulty, and seeks to avoid it by clauses which void the contract if various named government bodies fail to approve the work. (Generally, the author is permitted to retain a portion of the royalties.)<sup>203</sup>

Absent ideological missteps and contract provisions, Soviet authors receive adequate protection against publishers who refuse to publish accepted manuscripts. If the publisher delays beyond the date set in the contract, the author may recover the full amount of royalties promised,<sup>204</sup> a rule which

198. *Id.*, at 12.

199. *Supra*, note 180.

200. Kremlev, *op. cit. supra* note 197, at 11.

201. *Ibid.*

202. Solonevich v. Publishing House "Our Newspaper", 15 *Sud. Prak. R.S.F.S.R.* 4 (1931), in Hazard 81.

203. Standard Publishing Contract §§21-22, 2 Gsovski 436-37. See also §24, mentioned in text at note 130, *supra*, which reserves to the publisher the right to assign his contract rights and duties if his Plan should change.

204. R.S.F.S.R. Copyright Law §23 (1928), 2 Gsovski 420; Kirpichnikov v. Peat Institute, 9 *Sots. Zak.* 77 (1940), in Hazard & Weisberg 182.

seems to make time the veritable quintessence of a Soviet publishing contract. The author may also, as in the United States,<sup>205</sup> compel a recalcitrant publisher to return his manuscript to him.<sup>206</sup> And then he can commence anew the process of securing, defending, and enjoying his Soviet copyright.

#### 194. INTER-AMERICAN MEETING ON COPYRIGHT

*(Buenos Aires, 1960)*

By MANUEL CANYES\*

This meeting was held from July 25 to 29, 1960, under the auspices of the General Administration of Culture of the Nation and of the National Executive Committee for the Observance of the 150th Anniversary of the Argentine May Revolution. Its purpose was to promote the unification of the laws of the hemisphere on copyright in order to ensure better protection for the author as well as to promote the organization of societies of authors in the various countries and to strengthen those already in existence.

Numerous papers were presented on practically every phase of copyright. These were read and discussed in four working committees that were organized at the outset of the conference.

The resolutions approved were incorporated in the Final Act, which is reproduced below in English.

As will be observed, several resolutions recommend the modernization and unification of the national laws in harmony with international agreements and treaties. Many of the resolutions have to do with the functions and activities of societies of authors, with ways and means of strengthening them or with the establishment of new ones in countries where they are not now operating.

One of the resolutions approved is worth special mention because it may lead to concrete and effective results on the official level. This is the second resolution adopted by the Second Committee. It suggests to the Governments that they propose to UNESCO and to the Organization of American States the convocation of an Inter-Governmental Conference of American States on Copyright to study and discuss the problems related to the subject.

The Government of Argentina has already approached UNESCO on the holding of this Conference in 1962. If a similar proposal is addressed to the OAS by one or more governments, it is possible that arrangements may be made by the two organizations to sponsor such a conference.

205. *Schisgall v. Fairchild Publications*, 207 Misc. 224, 137 N.Y.S.2d 312 (1955).

206. R.S.F.S.R. Copyright Law §23, last sentence (1928), 2 Gsovski 421.

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The last Inter-Governmental Conference of Experts in America of a general character was held in 1946 when the Washington Convention was adopted.

Such a meeting in 1962 would provide an opportunity to review the whole field of copyright protection from the point of view of both national legislation and treaties and to recommend measures to improve and strengthen the rights of authors and to promote the dissemination of intellectual works.

FINAL ACT OF THE INTER-AMERICAN MEETING ON COPYRIGHT  
(Translated by Leon K. Smith, Department of Legal Affairs, Pan American Union)

The Inter-American Meeting on Copyright, which took place in Buenos Aires from July 25 to 29, 1960, approved the following resolutions:

I

With respect to the topic of the First Committee, "Status of legislation in the American countries in the field of copyright. Problems and solutions", the reporter of which was Dr. Sigfrido Radaelli, the Meeting:

1) *Resolves:*

To adopt as its own and to reaffirm the resolution approved at the Tenth General Conference of the Inter-American Bar Association, held at Buenos Aires in 1957, which reads:

- a) Suggest to the OAS that it take appropriate measures to achieve the unification, in all of the American countries, of provisions for the protection of exclusive enjoyment of copyrights;
- b) Advise the legislative bodies that when they consider amplifying the legal periods of protection of copyright through complementary provisions that these provisions benefit primarily the heirs and legatees of authors rather than their assignees.

2) *Recommends:*

That the societies of authors in America promote, before their respective governments, the inclusion in protective legislation covering intellectual rights, provisions prohibiting stipulations by which authors commit their future productions, except in the case of a specific work.

3) *Recommends:*

- a) That the countries of America eliminate from their copyright laws the provisions that reduce financial benefits from an intellectual work

when complying with any other formality which is not established in Article III of the Universal Convention.

- b) That the "copyright notice" established by the Convention should be considered as evidence of "juris tantum" presumption of ownership of the right of publication of the work, that is to say, a way or means of utilizing copyright to give publicity to the work.

4) *Recommends:*

To include in the copyright legislation of every country procedural standards—which do not now appear in civil law procedure—that will strengthen the juridical personality of societies of authors, allowing them to substantiate the requirements of their personality in court according to the following principles:

- a) That objections made on the grounds of lack of personality against such juridical persons should not be submitted for prior substantiation, but that their determination should be made at the time of passing judgment on the principal issue;
- b) That juridical persons connected with copyright have the power to substantiate the complementary requirements of the personality they invoke in the probatory period of the principal issue.

5) *Recommends:*

That the possibility be studied, at a future meeting of representatives of authors of the different countries, of preparing a draft Copyright Code, gathering the principles of greatest generality and acceptance and devoting to special aspects a few sound provisions also unanimously recognized in the field of copyright.

And thus an advance may be made from drafts and suggestions, which are presented as simple aspirations and compilations, to the adoption of a draft of a strictly legal character which will contribute to the formulation of a set of rules and standards.

That this draft, a work resulting from the opinion, study and experience of representatives from all countries, constitute a work of high priority so that in every country a positive codification may be promoted.

6) *Recommends:*

That provision be made in the legislation of the different American countries for the exemption from taxes and other encumbrances on original

theatrical works of local authors and of foreign authors with not less than five years of residence in the respective country.

7) *Recommends:*

The inclusion of the following standards in the legislation of the different countries:

- a) The awarding by the State of positive advantages to proprietors who construct theaters.
- b) In the cases of demolition of theatrical halls the owner of the area shall have the obligation of constructing in the new building a theatrical hall similar to or superior to the one demolished.

8) *Resolves:*

- a) To invite, through appropriate channels, the governments of the American countries, to improve and modernize their domestic legislation on copyright and to harmonize it with international agreements and treaties.
- b) To make known and to place at the disposal of the governments, by the most appropriate means, the studies submitted to this Meeting and the conclusions reached by it.

9) *Recommends:*

- a) That the societies of authors of the entire hemisphere concern themselves with restoring the concept of freedom of creation and opinion in radio and television, sponsoring laws that protect this right of the people, in their legitimate manifestations, so that it will not be limited, as generally occurs presently, to a small nucleus of licensees of radio stations and TV channels.
- b) That to this end there should be established, in an effective manner, that the use reserved today almost exclusively to licensees and certain political parties tends to restrict the other elements influencing the opinion, sensibility and spirit of the peoples, such as the great persuasive groups devoted to culture, labor and science.

10) *Declares:*

That freedom of opinion in radio and TV will only exist when the law guarantees access to the microphone to political, cultural, trade-union and social organizations, legally recognized, to debate problems that concern the public conscience or when they are the object of censorship, attacks, criticisms, etc.

11) *Resolves:*

- a) To support the project for the creation of the Argentine Institute of the Book, presented in 1958 to the Senate of the Nation with the inclusion of a representative of the SADE.
- b) To request the appropriate authorities to reconstitute the Inter-Trade Union Committee for the Defense of the Argentine Book, in which the corresponding author entities were represented.
- c) To recommend that in the other countries where institutes to promote the book do not exist that such organizations be established.

12) *Resolves:*

To address the Minister of Public Education of the United Mexican States, requesting his intervention on behalf of modifying the federal law on copyright and the rates for the collection of authors' fees, of December 29, 1956 and July 29, 1957, respectively, on the basis of the general standards adopted by the CISAC, with special reference to Articles 20, 42 (second paragraph), 89 (point II) and 131 of said law.

13) *Considering:*

That the complete protection of authors' rights demands from the State not only appropriate legislation on the so-called "rights of the author" or "intellectual property", but also the compliance with other prior or concurrent duties, all of which indirectly or directly affect the financial security of the author;

Such duties of the State can be summarized in the following principles:

- a) Ensure the absolute freedom of creation, of expression and dissemination of the work produced, and the related freedoms of information and opinion, not only through declarations of constitutional rights and freedoms, but in practice, without regulatory or repressive laws or abuses justifying certain arbitrary interventions, and without administrative, police or municipal authorities abusing regulatory provisions.
- b) Abstain from all "directing" guardianship over intellectual creations.
- c) Support legally, morally, and materially the authors of literary, artistic and scientific works in all ways compatible with the freedom of creation and expression and with republican equality, that is to say, not as a privilege, but as a concern for the conditions of work, the nature and purpose of cultural production.

- d) Ensure by way of appropriate legislation recognition of copyright and its protection in the relationships of the author with impresarios, industrialists, merchants and other users.

*The Inter-American Meeting on Copyright  
Resolves:*

To recommend to the governments of the American nations the adoption of legislation affording complete protection to the authors of literary, artistic, and scientific works, which will take into consideration the principles set out in the preceding resolutions. Only in this way will the financial security of the author be completely ensured.

14) *Resolves:*

To take note of the reports on the status of legislation on the rights of authors in Argentina, Colombia, Chile and Brazil, presented by Dr. Carlos Mouchet, SAYCO, the Department of Copyright of the University of Chile and SBAT, respectively.

15) *Resolves:*

That the Executive Committee of the Inter-American Meeting on Copyright, the Pan American Council of the CISAC and every one of the author entities attending the Meeting address themselves to the official authorities of Colombia (Executive Power and Legislative Power), expressing their deep concern over the serious harm done to Colombian and American authors because of the deficiencies on the part of subordinate officials on applying the laws of intellectual property in that country, which place the authors of theatrical and musical works in a situation of abandonment.

16) *Recommends:*

That the societies of authors of America carry out the necessary efforts before the governments of the respective countries to obtain the modification of the provisions governing taxation so that they do not burden copyrights.

At the same time express the wish that the Director General of Culture of the Ministry of Education and Justice of the Argentine Government, as titular head of the organization that has sponsored this International Assembly, support the efforts made for this purpose by the ARGENTORES, SADAIC and SADE societies and assume the role of spokesman on behalf of this resolution before the high authorities of the Nation.

17) *Declares:*

The authors, writers, and composers of America, represented in this Inter-American Meeting, pray that the most ample freedom prevail in the countries of the hemisphere and that this freedom be for the creator of intellectual works an inalienable guarantee that will allow him to penetrate to the soul of his people and to interpret with emotion and truth their essential drama, agony, and aspirations.

## II

With respect to the topic of the Second Committee, "Status of international relations in the matter of copyright among the American countries and of these with the rest of the world", the reporter of which was Dr. Hector Della Costa, the Meeting:

1) *Resolves:*

To address itself, through the diplomatic representatives accredited in Buenos Aires, to the governments of the American nations that have not ratified or adhered to the Universal Copyright Convention, for the purpose of requesting that they consider the advisability of doing so as soon as possible.

2) *Resolves:*

To address itself to the governments of the American countries, through appropriate channels, requesting that efforts be made before UNESCO and the OAS to promote the convocation, in a capital city to be determined, of a Pan American Inter-Governmental Conference on Copyright, to study and discuss existing problems in America and to reach such agreements as may be necessary for the effective protection of copyright in all America.

3) *Resolves:*

*To suggest to the Pan American Council of CISAC the approval of a Regulation for the Granting of Authorizations or Exclusive Rights to Translate or Adapt Theatrical Works on the Following Bases*

1) The right to translate or adapt a theatrical work is acquired by a) "SIMPLE AUTHORIZATION", which does not exclude the right to grant it to other persons, and b) through "EXCLUSIVE RIGHT", which implies a single assignee.

2) The "simple authorization" as well as the "exclusive right" cannot cover, in any case, *more than one country*.

3) The translator or adapter must be a national of the country for which he is going to translate or adapt, or have been a resident of such country for at least five years.

4) "Simple authorization" or "exclusive right" will be granted to the translator or adaptor by the *Society* of his own country, as a right emanating from the original author himself, whose works it legally manages in its territory.

5) The right to translate shall therefore be requested from the Society that should grant it, that is to say, of the country of the translator or adaptor which will decide in each case the suitability of granting an "exclusive right" or a "simple authorization".

6) The theatrical companies of a country on tour through one or more countries of the same language shall enjoy insofar as concerns translations and adaptations a right of extra-territoriality, so that they can perform during their tour the work translated or adapted in their own country.

7) Where a translation or adaptation made in the country does not exist, the societies of authors should authorize the performance of foreign-translated works in their own territory.

8) Any authorization or exclusive right that does not comply with any of the requirements of the present regulation shall not be recognized by the societies of authors.

### III

With respect to the topic of the Third Committee, "Operation of societies of authors. General topics," the reporter of which was Mr. Manuel Ferradás Campos, the Meeting:

1) *Recommends:*

That the Pan American Council of CISAC establish a fund to stimulate recently established societies and to contribute to the formation of new societies of authors; and to regulate this assistance, establishing as a fundamental condition that such entities adjust their operations to traditional practices (distribution through programs, statements, etc., distribution of non-allotable funds or without corresponding statements).

2) *Resolves:*

To recommend to the Pan American Council of CISAC the creation of a technical organization and of public relations to make known in all the

American countries the significance and importance of copyright and the internal organization of societies of authors, etc., to edit bulletins, to exchange information, laws, judgments, and works on the subject. This organization will be able to extend its activities to any point of the hemisphere, wherever its assistance and/or counsel is needed.

3) *Resolves:*

a) To recommend to "Associated Paraguayan Authors (APA)" of Asuncion (Paraguay) to take measures for the amendment of its statutes for the purpose of eliminating from them everything foreign to the operation of authors' rights.

b) To recommend to entities that have statutory provisions similar to those of the APA or those which may be set up in the future, that they keep these principles in mind.

c) That, in any case, author entities can take charge of the collection of fees connected with copyright, for the sole purpose of preventing the operation of parallel collecting agencies that interfere with that collection, and also thereby reduce the cost of administration.

4) *Resolves:*

To recommend to the societies that administer phonographic rights that they aim at achieving the unification of royalties in force in their respective territories, in the form of a percentage on the price of sale to the public of phonographic records, which will not be inferior to that prevailing internationally.

5) *Recommends:*

That all the societies composing the Pan American Council exchange on a compulsory basis the statements and balances of their annual reports as well as other publications of an informative character on the operation and progress on administrative and general society activity; and that this procedure be supported by the Pan American Council before the next Congress of the CISAC, for the purpose of making it acceptable on a more general basis.

6) *Resolves:*

That the Pan American Council gather and adopt as its own the conclusions of general interest reached by this Meeting and present them before the next Confederal Congress as an expression of American desire to improve the protection of copyright in this hemisphere.

7) *Declares:*

1) That it is necessary that all the societies of authors existing in the American countries adjust their procedures of fees and control of the same to universal rules generally accepted in the countries where evolutionary development of societies of authors occurs.

2) That because of reasons of moral and juridical order it is necessary that the distribution of author fees received by the societies organized for that purpose do not exclude any sector of the authors represented in the organization, because of administrative or financial arrangements related to the internal organization of these institutions.

8) *Recommends:*

1) That societies that administer phonographic fees grant a reciprocal representation in their respective territories, either directly or by agreement with the BIEM.

2) That the Pan American Council adopt as its own this recommendation and support it at the next Confederal Congress of the CISAC.

9) *Recommends:*

That the societies which are not active in the phonographic field incorporate this activity in their administration, thereby giving it a more complete defense of the rights of authors.

10) *Recommends:*

That all of the societies composing the Pan American Council make uniform their criteria in regard to the denomination of fees appearing in their accounting. For this purpose it is necessary to establish a "Table or Nomenclature of Fees."

11) *Recommends:*

That the Pan American Council request from the CISAC the taking of an urgent survey among the societies of authors so that they, taking account of the high purposes followed, consider the possibility of accommodating the accounting standards to those contained in the following rules:

- a) *Registration of receipts.* The fiscal period to which it corresponds will be specified in numerical form below the heading that the item represents. The fiscal periods shall be annual and shall have for all societies the same date for opening and closing, adjusting themselves for such purpose to the calendar year.

- b) *Registration of the evidence of receipts.* All of the societies undertake to maintain their registries by means of special books that summarize faithfully those elements, such as statements of performances, theater and radio programs, etc., that will remain filed in the manner and time indicated by confederal rules.
- c) *Receipts without the element of proof.* These will be retained during two fiscal periods at the end of which time they will be distributed in proportional form to the amount already liquidated, expending totally the item of income by way of distribution.
- d) *Presentation of balances.* To be recorded as a minimum: the general balance, the statement of income and expenses and an annex devoted to foreign rights detailing exchange drafts and liquidations received from abroad as well as payments made abroad, and pending payments in favor of other societies.

12) *Resolves:*

That the societies of authors grant among themselves, as soon as possible, appropriate powers for the defense in court of those rights guarded by them, with all of the securities that in each case the laws of the country of origin require and the standard of procedure of the society acting as agent.

13) *Resolves:*

That all of the societies of authors in America agree in the use of their own repertories and of the foreign ones they administer to the inclusion and/or compulsory use of the name of the author and/or composer in billboards and in all announcements and advertisements.

14) *Resolves:*

To promote inter-society pacts among analogous entities of the Fourth Federation of the American countries, for the reciprocal representation of the interests of their members.

15) *Recommends:*

That the societies of authors of the Fourth Federation of the American countries expressly recognize in their statutes or officially declare that the social prerogatives inherent in their status as members be extended to associates of other analogous entities existing in America.

16) *Recommends:*

That agreements between societies adopt a standard contract to regulate cinematographic adaptations of literary works, safeguarding the moral and financial rights of their respective authors.

17) *Recommends:*

1) That the societies of authors of the American countries, of the Fourth Federation, conclude an agreement with the respective Chamber of Books for the adoption of a standard contract for publication and that the contract govern the agreements on publishing carried out by their associates with such organizations.

2) That in those countries where Chambers of Books do not exist nor similar organizations, a standard contract for publication be adopted to which the members of such societies should be required to adjust in their relations with their private publishers.

3) That in order to put the present recommendation into practice a model be adopted of the project approved on November 17, 1944 by the inter-trade-union board of writers and publishers composed of representatives of the SADE and the Argentine Chamber of Books.

4) That discrepancies that may arise between the parties with respect to the interpretation and application of the standard contracts be resolved by arbitration tribunals with compulsory jurisdiction composed of representatives of the respective entities.

18) *Recommends:*

1) That the societies of authors of America regularly publish periodical bulletins of an informative nature through which may be announced the status of respective protective legislation of intellectual rights and its effective compliance, as well as any other news connected with this subject.

2) That such societies ensure the regular exchange of these bulletins with other similar entities existing in the hemisphere.

19) *Recommends:*

1) That all of the writers of America adopt for the control of issues of their works the system of the editorial stamp which must be attached to all copies before being put on sale.

2) That such stamps be issued by inter-trade-union boards composed of writers and publishers and that revenues produced independently of copyright

be wholly destined for the fund of the respective society of writers to be used for assistance purposes in benefit of the members.

20) *Recommends:*

1) That the mimeographed printing of radio and television scripts be considered as an edition for the purpose of its protection as a published work.

2) The creation of inter-society standards that will facilitate a reciprocal monthly flow of information among the entities on the works that are broadcast or televised, with specification of the publicity agents that sponsor the programs and the reciprocal assistance of the societies in the research that may be required in each case.

21) *Recommends:*

1) That each entity have in mind the results of the First Argentine Congress of Authors (Radio theater), held at Buenos Aires in the month of April in 1957, in order to adopt those resolutions and recommendations applicable to local necessities and requirements.

2) That for this purpose each delegate to this Meeting be given a copy of the resolutions and minutes of that Congress.

22) *Recommends:*

That the Pan American Council of the CISAC urgently make a survey on tariff rates, among the affiliated societies, for the purpose of making uniform the systems of fixing tariffs, which will tend to generalize the system of percentages.

23) *Resolves:*

To express the sympathy and acknowledgment of this Meeting to the agents, employees, officials and technicians of the societies of authors for their valuable and important contribution to the cause of the author.

24) *Recommends:*

1) That the societies of authors of the Fourth Federation of each American country adopt by common agreement a minimum statute contemplating the rights of the translators—duly authorized—for the reason that their version constitutes a creative work requiring appropriate ample legal and society protection as is the case with the originals.

2) That such entities promote the incorporation of these principles in the laws of their respective countries and supervise their strict compliance.

25) *Recommends:*

That the different societies of authors of America which administer rights protected by the Fourth Federation collect the fees owed to their members for their collaborations with the press, as well as for the reading or reciting of their works over radio, television or any other means of cultural diffusion.

26) *Recommends:*

That the Pan American Council designate regional subcommittees, especially in Central America, to make workable and effective an active diffusion of laws and conventions that protect intellectual rights and the efforts to be carried out before the governments of the countries of that jurisdiction, as well as to promote and stimulate the establishment of societies of authors.

27) *Resolves:*

- a) Acknowledge the report presented by the Department of Copyright of the University of Chile on its functions and its relations with the societies of authors of that country.
- b) Acknowledge the report presented by APA on the organization of authors in Paraguay.

28) *Resolves:*

- a) The corresponding societies of authors will give adequate publicity to the tariffs fixed for the use of literary material in radio, TV, lectures and recitals. Simultaneously with the diffusion of tariffs those societies of authors will carry out a campaign of explaining the principles that support the legal instruments in force and the trade union and legal sanctions that will be applied to the violators.
- b) Such societies of authors will establish tariffs for the literary collaborations in newspapers and magazines, classifying the publications by categories.
- c) The aforementioned societies should present to the CISAC through the Pan American Council, before December 31, 1960, a report on the manner in which they have complied with this resolution and the results thereof.

29) *Recommends:*

- a) That the societies of authors of the Fourth Federation affiliated with the Pan American Council sanction its members who do not comply

strictly with the principle that all creative artistic and literary work must be remunerated financially.

- b) That those author entities make efforts to secure the support of other publishing organizations, of radio broadcasting, television, etc., so that they will not allow literary collaborations nor lectures of a gratuitous nature.

#### IV

With respect to the topic of the Fourth Committee, "Situation of the countries in which societies of authors do not exist or where their organization is deficient," the reporter of which was Mr. Gerardo Ribas, the Meeting:

1) *Resolves:*

To address itself to the CISAC, requesting that it offer support by all means at its disposal, among them the awarding to the Pan American Council of an adequate financial contribution, in order to achieve the following ends:

- a) Make efforts to correct the deficiencies presented by certain laws on copyright in the American countries;
- b) Promote the establishment of societies of authors in those countries of America where they do not exist;
- c) Support and offer orientation to the existing societies of authors that request it, giving them moral and technical assistance.

2) *Recommends:*

- a) That the CISAC, with the international repertory, support the obligation of performing a percentage of local works in all of the theaters of each country.
- b) Extend the obligation referred to above to the rights of public performances of musical works in general.

3) *Recommends:*

That the different entities affiliated with the Pan American Council, in defense of national production, include, within the local repertories whose use is authorized, a minimum percentage at least of works with a Pan American character, in all and every one of the artistic fields.

4) *Resolves:*

To acknowledge the report presented by the observer Dr. Cristóbal Humberto Ibarra, Cultural Attache of the Embassy of El Salvador, on the

status of societies of authors of that country and of its intention to adhere to the Pan American Council and the CISAC.

5) *Resolves:*

- a) To address itself to the governments of the American countries in which duly organized societies of authors do not exist or where their organization is deficient, to take action before UNESCO for the inclusion in the projected plan of technical assistance and advice for the establishment of the basis of societies of authors or to improve the technical and administrative organization of those existing but which present shortcomings in their operation, for the purpose of adjusting them to the levels reached in other countries.
- b) To suggest that UNESCO might organize and finance, for the purposes already indicated, technical assistance missions composed of expert jurists on the subject as well as technical and administrative officials of societies of authors already existing, recognized for their efficient organization.

V

The Inter-American Meeting on Copyright agrees on the following votes and declarations:

- 1) To extend its appreciation to the Argentine Government and to the National Executive Committee of the 150th Anniversary of the May Revolution for the ample and generous support given to the organization of the Meeting.
- 2) To express its recognition to the Organizing Committee of the Meeting for the work carried out.
- 3) To congratulate the Executive Board of the Meeting, and to the chairmen, secretaries and reporters of the working committees for their work.
- 4) To express its appreciation to the press, radio and television for the support given for the success of the Meeting.
- 5) To congratulate the technical and administrative staff of the General Administration of Culture of the Nation, of the societies of authors and of the Pan American Council for their cooperation.

195. MEETING OF THE COMMITTEE OF EXPERTS CONCERNING  
EXTENSION OF COPYRIGHT PROTECTION

(Geneva, January 9-11, 1961)

By EDMOND MARTIN-ACHARD\*

At the invitation of the Director of the Berne Union, the Committee of Experts on the study of a Draft for "an additional protocol to extend the term of protection on literary and artistic works" held a series of meetings in Geneva, Switzerland, on January 9, 10, and 11, 1961. Dr. Valerio de Sanctis (Italy) was elected chairman of the meeting, and Professor Henri L. Desbois (France) rapporteur.

As a result of the suggestion made (July 3, 1959) by the Secretary General of the Council of Europe, the Permanent Copyright Committee of the Berne Union had previously passed two pertinent resolutions:

1. It was resolved at Munich, in October 1959, to investigate whether all member countries were willing to consider an extension of the term of copyright protection. (See 7 BULL. CR. SOC. 117, at 121 (February 1960).)

2. It was resolved at London, in November 1960, "to study a draft for an Additional Protocol of the Berne Convention which would be open to all member states of the Berne Union willing to ratify the extension of the term of protection." (See 8 BULL. CR. SOC. 71, at 78 (December 1960).)

Member states which had expressed willingness to study the question were invited to designate experts to give their opinions in a personal capacity concerning a draft of an international instrument prepared by the Bureau of the Union. These were: Belgium, Brazil, Finland, France, Greece, Israel, Italy, Lebanon, Luxembourg, Norway, Portugal, Spain, Sweden, Tunisia, and the Vatican. At the Geneva meeting, Finland, Israel, Lebanon, Luxembourg, Norway, Sweden and the Vatican had asked to be excused, and the experts designated by Belgium and Greece were unable to be present. Observers were present from the following international organizations: the Council of Europe, International Institute for the Unification of Private Law, International Law Association, International Commission of Jurists, Internationale Gesellschaft für Urheberrecht, UNESCO, Association littéraire et artistique internationale (ALAI), and Confédération internationale des sociétés d'auteurs et compositeurs (CISAC).

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\* Dr. Martin-Achard is Professor of Law at the University of Geneva. He acted as observer for the International Law Association at this meeting, and consented to render this report to The Copyright Society of the U.S.A.

The discussions revealed interest in the drafting of an instrument which may come into force as soon as possible. Therefore, the Committee proceeded to draft a Special Arrangement on the basis of Article 20 of the Convention. Taking into consideration all reasons which may justify the extension of the term, the longest term presently existing in the law of a member country (i.e., Spain: life of the author plus 80 years) was adopted. It was proposed that as an alternative for the extension of term of the absolute right, states should be allowed to substitute for this the granting of the right of compensation for a subsequent 30 years (Tunisia); and that the benefice of the extension should be preserved for the heirs of the author (ALAI).

Finally, the following Draft Project was adopted:

**DRAFT PROJECT OF AN ARRANGEMENT Concerning the Duration of Protection of Literary and Artistic Works.**

The contracting countries.

Members of the International Union for the Protection of Literary and Artistic Works,

Desirous of adopting a general term of protection of these works longer than that actually stipulated in Article 7 of the Berne Convention,

Recalling that the International Bureau received from the Council of Europe a proposition emanating from a Government member of the Council aiming at an extension of the term of copyright; that this proposition was approved after consultation of the Permanent Committee of the International Union for the Protection of Literary and Artistic Works;

In view of Article 20 of the Berne Convention as last revised at Brussels on 26th June, 1948;

Agree as follow:

*Article 1*

A term of eighty years after the death of the author will be substituted, in relations between the countries parties to the present Arrangement and in regard to the works originating from one of these countries, to the term of fifty years provided in paragraphs (1), (4) and (5) of Article 7 of the Berne Convention.

*Article 2*

The present Arrangement shall be ratified and the instruments of ratification deposited with the Government of . . . These ratifications, together with their dates and all declarations which may accompany them, shall be communicated by the Government of . . . to the Government of the Swiss Confederation and the latter shall communicate them to the other countries of the Union. It shall come into force one month after the deposit of the third ratification shall have been communicated by the Swiss Government to the other contracting countries.

*Article 3*

The present Arrangement shall be open for signature to the countries of the International Union for the Protection of Literary and Artistic Works until . . .

*Article 4*

The member countries of the International Union for the Protection of Literary and Artistic Works not signatories of the present Arrangement shall be admitted to adhere to it upon their request and in the form prescribed by Article 25 of the Berne Convention.

*Article 5*

The text of the Arrangement shall be deposited in the Archives of the Government of . . . A certified copy shall be remitted by the latter to each of the Governments of the countries who are parties to the Arrangement.

In Witness Whereof the undersigned Plenipotentiaries have set their hand to the present Arrangement.

Done at ..... this ..... day of ..... 196.....

The meetings of the Committee, held in an atmosphere of cordial cooperation, revealed a tendency on the part of those countries which already have a term of protection exceeding fifty years to consolidate their bilateral obligations into a multilateral agreement in the form of an international instrument setting forth the extended term of protection. Despite the small number of those countries, such an Arrangement for a term of eighty years would constitute significant progress in international copyright. In the opinion of this observer, such an agreement, limited at the beginning to three or four states, may come into existence at the occasion of the next diplomatic conference, even though the overwhelming majority of states regard a term of life plus fifty years as the maximum term for the foreseeable future.

In any event, the recent Geneva conference indicated a trend toward obtaining an extension of the fifty years term of the Berne Convention in the international law of copyright.

The Draft Project of the Arrangement was sent by the International Office to the interested Governments, together with the Desbois Report, and was published in 74 *Le Droit d'Auteur* 59 (February 1961). It will be submitted to the diplomatic conference to be held in the Fall of 1961.

## PART II.

**LEGISLATIVE AND ADMINISTRATIVE  
DEVELOPMENTS**

## 1. UNITED STATES OF AMERICA AND TERRITORIES

## 196. U. S. CONGRESS. HOUSE.

H.R. 4590. A bill to provide civil remedies to persons damaged by unfair commercial activities in or affecting commerce. Introduced by Mr. Lindsay, Feb. 20, 1961, and referred to the Committee on Interstate and Foreign Commerce. 6 p. (87th Cong., 1st sess.)

This bill, which provides for injunctive remedies, costs, and reasonable attorney's fees to persons damaged by unfair commercial activities, as defined therein, is identical with H.R. 7833 (86th Cong., 1st sess.), also introduced by Mr. Lindsay. The "explanatory statement" which was inserted by Mr. Lindsay in 106 Cong. Rec. 1808 (daily ed. Feb. 3, 1960) is repeated in 107 Cong. Rec. 2292 (daily ed. Feb. 20, 1961). See 7 BULL. CR. SOC. 168, Item 223 (1960).

## 197. U. S. CONGRESS. SENATE.

S. 1036. A bill to provide civil remedies to persons damaged by unfair commercial activities in or affecting commerce. Introduced by Mr. Javits, Feb. 22, 1961, and referred to the Committee on Interstate and Foreign Commerce. 6 p. (87th Cong., 1st sess.)

A companion bill to H.R. 4590. See Item 197, *supra*.

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

Loi portant amendement du titre 28 du Code des Etats-Unis quant aux violations du droit d'auteur par les Etats-Unis (74 Stat. 855) (Du 8 septembre 1960). (74 *Le Droit d'Auteur*, 29-31, no. 2, Feb. 1961.)

The text of the Government infringement law, P.L. 86-726, in French and English in parallel columns. See 8 BULL. CR. SOC. 27, Item 6 (1960).

## 199. U. S. BUREAU OF CUSTOMS.

Title 19—Customs Duties. Chapter 1—Bureau of Customs, Department of the Treasury. [T.D. 55334] Part 11—Packing and stamp-

ing; marking; trademarks and trade names; copyrights: trademarks and copyrights. (F.R. Doc. 61-2422). (26 *Federal Register* 2346-2347, no. 53, Mar. 21, 1961.)

Amendments to the customs regulations increasing from 500 to 700 the number of facsimiles of trademarks and the number of photographic likenesses of copyrighted works required to be submitted with applications for recordation of trademarks and copyrights "to meet the need of customs field officers to whom such facsimiles and likenesses are distributed." Also, the list of parties to the U.C.C. has been amended.

## 2. FOREIGN NATIONS

200. ARGENTINA. President of the Republic. (*From the Ministry of Education and Justice. National Registry of Intellectual Property. Translated.*) Decree No. 12170. In the Matter of Docket No. 6909/60, wherein the Argentine Society of Authors and Music Composers (S.A.D.A.I.C.) requests the amendment of articles 34 and 40 of Decree No. 41233 of May 3, 1934, which regulates intellectual property, because such regulatory provisions have proved to be insufficient and inadequate for the proper protection of the rights established by the law, after 25 years of experience under the law, and

### *Considering:*

That the Executive Branch of the Government is in accord that it is necessary to furnish means to prevent abuses of authors' rights due to the inadequacy of such regulatory provisions, contrary to the spirit of the law which was enacted precisely for their defense,

Therefore, and in accordance with the recommendations of the Direction of the National Registry of Intellectual Property,

### THE PRESIDENT OF THE REPUBLIC OF ARGENTINA DECREES:

*Article 1.*—Articles 34 and 40 of Decree N° 41,233, of May 3, 1934, regulating law N° 11,723, are amended as follows:

*Article 34.*—Whoever publicly presents and causes to be presented and whoever performs or causes to be performed at public concerts any musical or literary works, shall display in a visible place the corresponding program and shall deliver a copy of same to the authors of the works performed or presented or to their legal representatives.

*Article 40.*—Whoever operates public places wherein there are public performances of musical compositions of any kind, with or without lyrics, the entrepreneurs or organizers or orchestra conductors (or band

leaders) in each case must keep daily schedules in the strict order of performance, the titles of all the works played or performed and the name of the authors or composers of same. These daily schedules shall be dated and signed and placed at the disposal of the interested parties within the month following their performance.

The interested parties or their representatives, upon their own responsibility, shall be entitled to complain to the Director General of the National Registry of Intellectual Property concerning the total or partial noncompliance with this requirement, and the responsible party will be liable in each case to a fine of up to \$1,000 national currency in favor of the National Arts Fund which will be charged with the obligation to collect said fine.

Whoever shall substitute in the daily schedules the titles and/or names of authors or composers of the performed works shall be subject to the penalties provided for by Article 71 of the law.

*Article 2.*—To be published, notified, delivered to the Direction General of the Official Bulletin and Printing and filed.

Decree No. 12170

Frondizi  
L. R. MacKay

201. AUSTRALIA. *Copyright Law Review Committee.*

Report of the Committee appointed by the Attorney-General of the Commonwealth to consider what alterations are desirable in the copyright law of the Commonwealth [1959]. Canberra, A. J. Arthur, Commonwealth Govt. Print., 1960. 115 p.

Report of a committee appointed on September 15, 1958 and chaired by Mr. J. A. Spicer, "to examine the copyright law of Australia, and to advise which of the amendments recently made in the law of copyright in the United Kingdom should be incorporated into Australian copyright law and what other alterations or additions, if any, should be made to the copyright law of Australia."

Among the recommendations approved were adherence to the Brussels and Universal Copyright Conventions.

202. GREAT BRITAIN. *Privy Council.*

The Copyright (Gibraltar) Order, 1960. Made 11th May, 1960; laid before Parliament 17th May, 1960; coming into operation 1st June, 1960. [London, H. M. Stationery Off., 1960]. 4, [2] p. (Statutory instruments, 1960: no. 847: Copyright.)

"This Order extends the provisions of the Copyright Act, 1956, with certain exceptions and modifications, to form part of the law of Gibraltar.

"The Order also extends, with modifications, three Orders in Council made under the Act. The extension of two of these Orders (which are modified to take account of subsequent amending Orders) will afford protection in Gibraltar to works originating in countries party to certain international copyright conventions and works produced by certain international organisations, similar to that they now enjoy in the United Kingdom. One of the effects of the extension of the other Order, as modified, will be to afford protection in Gibraltar to certain broadcasts made locally."

203. GREAT BRITAIN. *Privy Council.*

The Copyright (International Conventions) (Amendment) Order, 1960. Made 8th February, 1960; laid before Parliament 12th February, 1960; coming into operation 19th February, 1960. [London, H. M. Stationery Off., 1960]. [2] p. (Statutory instruments, 1960, no. 200: Copyright.)

"This Order further amends the Copyright (International Conventions) Order, 1957.

"The Order terminates copyright protection in respect of works originating in Indonesia which has taken steps to withdraw from the Berne Copyright Union. It also takes formal note of further international convention obligations entered into by the Republic of Ireland, Brazil, Czechoslovakia and the Lebanon and of the accession of Ceylon in its own right to the "Rome Convention" of the Berne Copyright Union.

"This Order is extended to the Isle of Man and to Sarawak, countries to which the 1957 Order has been extended."

204. GREAT BRITAIN. *Privy Council.*

Ordonnance sur le droit d'auteur (Gibraltar) (No. 847, de 1960). *Le Droit d'Auteur*, vol. 74, no. 1 (Jan. 1961), pp. 4-10.

"The Copyright (Gibraltar) Order, 1960" in French and English in parallel columns. See Item 203, *supra*.

205. GREAT BRITAIN. *Privy Council.*

Ordonnance sur le droit d'auteur (Conventions internationales) (Amendement) (No. 200, de 1960). *Le Droit d'Auteur*, vol. 74, no. 1 (Jan. 1961), pp. 10-11.

"The Copyright (International Conventions) (Amendment) Order, 1960" in French and English in parallel columns. See Item 204, *supra*.

206. GREAT BRITAIN. *Laws, statutes, etc.*

Legge sul diritto d'autore del 5 novembre 1956. (31 *Il Diritto di Autore* 367-445, no. 3, July-Sept. 1960.)

An Italian translation of the U. K. Copyright Act, 1956, with the exception of the "Schedules," a translation of which will appear in the next following issue of *Diritto di Autore*.

207. SWEDEN. *Laws, statutes, etc.*

Nr 729: Lag om upphovsrätt till litterära och konstnärliga verk; given Stockholms slott den 30 december 1960. *Svensk Författningssamling* 1960, Nr. 729-731 (Dec. 30, 1960), pp. 1950-1960.

The text of the new Swedish Law on Copyright in Literary and Artistic Works which was promulgated by the King on Dec. 30, 1960 and becomes effective on July 1, 1961.

208. SWEDEN. *Laws, statutes, etc.*

Nr 730: Lag om rätt till fotografisk bild; given Stockholms slott den 30 december 1960. *Svensk Författningssamling* 1960, Nr 729-731 (Dec. 30, 1960), pp. 1960-1963.

The text of the new Swedish Law on Rights in Photographic Pictures which was promulgated by the King on Dec. 30, 1960 and becomes effective on July 1, 1961.

209. SWEDEN. *Riksdagen, 1960. Första Lagutskottet.*

Utlåtande i anledning av dels Kungl. Maj:ts proposition med förslag till lag om upphovsrätt till litterära och konstnärliga verk, m. m., dels Kungl. Maj:ts proposition rörande Sveriges anslutning till vissa internationella överenskommelser på upphovsrättens område, dels Kungl. Maj:ts proposition rörande godkännande av europeisk överenskommelse om skydd för televisionsutsändningar, dels ock i ämnet väckta motioner. [Stockholm, 1960] 116 p. (Utlåtande nr 41, 1960.)

Report, dated November 23, 1960, of the First Joint Legal Committee of the Swedish Riksdag on the Draft Law on Copyright in Literary and Artistic Works, the bill concerning Sweden's adherence to international copyright conventions, the bill concerning Sweden's ratification of the European Agreement for the Protection of Television Programs, and the motions made in connection therewith.

## PART III.

## CONVENTIONS, TREATIES AND PROCLAMATIONS

210. Comité d'experts chargé d'étudier l'avant-projet de Protocole additionnel à la Convention de Berne pour la prolongation de la durée de protection des oeuvres littéraires et artistiques (Genève, 9-11 janvier 1961). (74 *Le Droit d'Auteur* 56-62, no. 2, Feb. 1961.)

Records of the meeting in Geneva, Jan. 9-11, 1961, of a Committee of Experts charged with "studying" a draft additional protocol to the Berne Convention for the extension of the term of protection of literary and artistic works. The records include a list of participants, report of Professor Henri L. Desbois, Rapporteur, a draft arrangement, and in an "Annex" the Declaration of the Portuguese expert, Mr. José Galhardo, the latter three in French and English in parallel columns. (See report by Prof. Martin-Achard, item 195, *supra*.)

211. INTERNATIONAL COPYRIGHT UNION. État an 1<sup>er</sup> janvier 1961. (74 *Le Droit d'Auteur* 1-4, no. 1, Jan. 1961.)

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, 1961.

212. INTERGOVERNMENTAL COPYRIGHT COMMITTEE. 5th session, London, 1960.

[Actes du] Cinquième session (Londres, 31 octobre-4 novembre 1960). (74 *Le Droit d'Auteur* 46-55, no. 2, Feb. 1961.)

Contents.—Liste de participants, Rapport, Résolutions.

Records of the meeting including a list of participants, the report and resolutions. The report and resolutions are printed in French and English in parallel columns. See also 8 BULL. CR. SOC. 71, Item 70 (1960).

213. Conférence internationale pour la protection de la propriété industrielle. *The Hague*, 1960.

Agreement of The Hague concerning the International Deposit of Industrial Designs of 6th November, 1925, as revised at London on 2nd June, 1934, and at the Hague on 28th November, 1960. The Hague, 1960. 12, 7 p.

Includes the texts, in English, of the Agreement and Protocol thereto, the Regulations, Resolution concerning the constitution of a provisional Committee in charge of the preparatory work for establishing the International Design Classification, and Voeu.

## PART IV.

**JUDICIAL DEVELOPMENTS IN LITERARY  
AND ARTISTIC PROPERTY**

## A. DECISIONS OF U. S. COURTS

## 1. Federal Court Decisions

214. *Rickover v. Public Affairs Associates, Inc.*, 29 U. S. Law Week 3276 (U. S. Supreme Court Mar. 20, 1961).

Certiorari granted. For decisions in the lower courts, see 127 U.S.P.Q. 231, 8 BULL. CR. SOC. 47, Item 22 (1960); 123 U.S.P.Q. 252, 7 BULL. CR. SOC. 102, Item 110 (1959).

215. *Bradbury v. Columbia Broadcasting System, Inc.*, 128 U.S.P.Q. 376 (9th Cir. Jan. 20, 1961) (Foley, J.).

Action for copyright infringement in which plaintiff alleged that his book, "Fahrenheit 451," had been infringed by defendant's television production, "A Sound of Different Drummers." The trial court found for defendants, 123 U.S.P.Q. 10, 174 F. Supp. 733, 7 BULL. CR. SOC. 52, Item 32 (1959), and plaintiff appealed.

*Held*, reversed as to two defendants, affirmed as to a third.

The court reviewed the record with regard to similarities between plaintiff's and defendants' respective works and found clearly erroneous the trial court's findings that defendants CBS and Robert A. Aurthur did not have access to plaintiff's work and did not copy it. As to a third defendant, the record failed to disclose knowledge by him of plaintiff's work. The court commented as follows: "To constitute an invasion of copyright it is not necessary that the whole of a work should be copied, nor even a large part of it in form or substance, but that if so much is taken that the value of the original is sensibly diminished, or the labors of the original author are substantially, to an injurious extent, appropriated by another, that is sufficient to constitute an infringement. The test of infringement is whether the work is recognizable by an ordinary observer as having been taken from the copyrighted source. Slight differences and variations will not serve as a defense."

Judge Barnes, dissenting, criticized the majority for substituting its assessment of the evidence for that of the trial judge.

216. *Millworth Converting Corp. v. Slifka, et al., d/b/a Slifka Fabrics, et al.*, 128 U.S.P.Q. 143 (S.D.N.Y. Oct. 31, 1960) (McGohey, J.).

Two actions for copyright infringement of fabric designs. The district court had found the copyrights valid and infringed, 124 U.S.P.Q. 413, 180 F. Supp. 840, and the court of appeals had affirmed this finding as to validity but reversed as to infringement, 125 U.S.P.Q. 506, 276 F. 2d 443, 7 BULL. CR. SOC. 187, Item 245 (1960). Defendants, urging that no material facts remained to be tried, moved for summary judgment. Plaintiff offered new evidence of infringement, which the court here concluded would not be material.

*Held*, summary judgment granted.

The court commented as follows: "The plaintiff does not specify what other evidence it would offer to 'prove' that its 'expression' was in fact copied by the defendants. But it is clear that whatever this might be, it could not possibly outweigh the evidence of the samples of the respective fabrics themselves. These are part of the record which was before the Court of Appeals. That court was at pains to point out four respects in which the defendants' patterns clearly differ from the plaintiff's. The most significant and immediately observable difference is the lack, in the defendants' patterns, of the 'three-dimensional look' which constitutes the 'claimed originality and the distinctive feature' of the plaintiff's patterns. No amount of 'expert' testimony could possibly overcome this crucial difference."

217. *Morris v. Wilson, et al.*, 189 F. Supp. 565, 128 U.S.P.Q. 419 (S.D.N.Y. Dec. 30, 1960) (Weinfeld, J.).

Action for copyright infringement of plaintiff's play by defendants' musical comedy, "Bloomer Girl."

*Held*, after trial, for defendants.

The court found that plaintiff had failed to establish access and that plaintiff's work and the accused work were markedly dissimilar.

218. *Massapequa Publishing Co. v. The Observer, Inc., et al.*, 191 F. Supp. 261, 128 U.S.P.Q. 418 (E.D.N.Y. Feb. 15, 1961) (Bruchhausen, J.).

Action for copyright infringement of plaintiff's newspaper. Summary judgment was granted as to the corporate defendant, 126 U.S.P.Q. 229, reserving to trial the question whether the individual defendants were liable.

*Held*, after trial, for plaintiff.

The court noted that the individual defendants had testified that they were responsible for all publications by the corporate defendant, but did not intend to infringe. On this basis, the court concluded that "the individual defendants are jointly and severally liable together with the corporate defendant for any damages sustained by the plaintiff. It is immaterial whether a party is an innocent infringer." The minimum statutory damages of \$250 were imposed.

219. *Desclee & Cie., S.A. v. Nemmers, et al., d/b/a M. L. Nemmers Publishing Co.*, 190 F. Supp. 381, 128 U.S.P.Q. 186 (D.C., E.D. Wis. Jan. 20, 1961) (Grubb, J.).

Plaintiff published or licensed various editions of Gregorian chant, using rhythmic annotations developed at the Abbey of Solesmes. Defendant published a volume of Gregorian chant, a substantial part of which was photo-copied from one of plaintiff's editions. Expressly rejecting reliance on the copyright statute, plaintiff brought an action for unfair competition.

*Held*, after trial, for defendant.

The court first noted that, since this was a diversity action, the law of Wisconsin would apply. Plaintiff's property was analyzed as consisting of "the intellectual content or subject matter; that is, the Solesmes annotations, and the concrete, physical form employed to convey and publish this content; that is, the type characters, layout, and composition of the typography." Construing *International News Service v. The Associated Press*, 248 U.S. 215 (1918), the court concluded that plaintiff had "not shown that the property it seeks to protect is of such extraordinary nature that its taking under the circumstances of this case constitutes actionable misappropriation." The court remarked that "the evidence as to the claimed uniqueness and artistic competence of the Solesmes annotations does not suffice to endow this subject matter with such an exceptional character as to give it an additional inherent commercial value, different from that of other literary property of a scientific or artistic nature." Finally, the court pointed out that plaintiff had not established that defendant was making any competitive use of its publication as against any publication in which plaintiff had actual or equitable rights.

220. *Briggs v. New Hampshire Trotting and Breeding Ass'n, Inc., et al.*, 128 U.S.P.Q. 465 (D.C., D. N. Hamp. Dec. 29, 1960) (Connor, J.).

Action for copyright infringement of plaintiff's plan for betting on horse races. Plaintiff had obtained statutory copyright on a brochure

and certain I.B.M. cards to be used in connection with his plan. Defendants introduced a similar betting system, using a brochure and cards different from plaintiff's. Defendants moved to dismiss the complaint.

*Held*, motion granted.

The court, after citing *Baker v. Selden*, 101 U.S. 99 (1879), reasoned as follows: "In this field, the distinction should be drawn not between 'writings' and 'systems,' but between original, complex, unique systems, and elementary, ordinary systems. The critical test is whether the plaintiff is entitled to protection for his own original, creative work, or whether he is to be given a monopoly for ideas which are common and ordinary. . . . In the present case, the action should be dismissed in part for the legally necessary reason that the statutes and court decisions give no protection by copyright to sports, games, or similar systems as distinguished from publications describing them. Another reason for dismissal is that the sport here involved is so elementary and ordinary, that it is in the public domain and to afford protection would be to give to the author a monopoly way out of proportion to the originality and creativity involved."

## 2. State Court Decisions

221. *Red Wing Productions, Inc. v. American Broadcasting-Paramount Theatres, Inc.*, New York Law Journal, Mar. 20, 1961, p. 13, col. 4 (Sup. Ct., N. Y. Co.) (Capozzoli, J.).

Plaintiff was producer of the "Garry Moore Show," which had an exclusive-services contract with Carol Lawrence, an actress. On November 1, 1960, Miss Lawrence contracted with defendant to appear in one of its productions, which was thereafter prerecorded and scheduled for telecasting on March 20, 1961. Defendant first became aware of the contract between plaintiff and Miss Lawrence on January 16, 1961, after the prerecording of its production. Miss Lawrence was not a party to this action, in which plaintiff sought to enjoin defendant's telecast on March 20, 1961.

*Held*, injunction denied.

The theory of plaintiff's case was malicious interference with contract rights. But defendant first became aware of plaintiff's contract with Miss Lawrence on January 19, 1961, its rights vis-a-vis that lady having been fixed on November 1, 1960. Thus an essential element of plaintiff's case, knowledge by defendant of plaintiff's contract, was lacking. In any event, the court pointed out, the detriment which defendant would

sustain by an injunction was so much greater than any damage plaintiff might suffer through defendant's telecast that the granting of the requested injunction would be manifestly unfair.

222. *Brandon Films, Inc. v. Arjay Enterprises, Inc.* (Sup. Ct., N. Y. Co. Dec. 6, 1960) (Markewich, J.).

Action for copyright infringement through defendant's unauthorized exhibition of a German film, the rights to which had been obtained by plaintiff from the Alien Property Custodian. Defendant urged that the film is in the public domain. Plaintiff moved for a preliminary injunction.

*Held*, denied.

Counsel agreed that, in view of the short run of the film at defendant's theatre, a preliminary injunction would be futile. However, the case was set down for an early trial.

*Also of Interest*

223. *Dell Publishing Co. v. Stanley Publications, Inc.*, 128 U.S.P.Q. 493 (N. Y. Court of Appeals Jan. 19, 1961) (Burke, J.) [affirming judgment of appellate division setting aside injunction barring defendant from using word "Modern" in its magazine titles. See 126 U.S.P.Q. 305, 8 BULL. CR. SOC. 54, Item 30 (1960)].
224. *Denker v. Twentieth Century-Fox Film Corp., et al.*, 210 N.Y.S.2d 241 (Sup. Ct., N. Y. Co. Nov. 4, 1960) (Lupiano, J.) (denying motions to dismiss complaint in action for rescission of contract granting film rights to book, "The Greatest Story Ever Told").
225. *Nissen Trampoline Co. v. International Tram-Po-Line Mfgs., Inc.*, 127 U.S.P.Q. 449, 190 F. Supp. 238 (E.D.N.Y. Nov. 18, 1960) (Bartels, J.) (granting temporary injunction barring infringement of plaintiff's copyrighted brochure and use by defendant of mark "Tram-Po-Line," on theory of unfair competition).
226. *Peter Pan Fabrics, Inc., et al. v. Dixon Textile Corp.*, 128 U.S.P.Q. 144 (S.D.N.Y. Dec. 5, 1960) (Levet, J.) (affirming report of Special Master with regard to damages and costs in an action for copyright infringement of a textile design.) See 125 U.S.P.Q. 39, 7 BULL. CR. SOC. 188, Item 246 (1960); 125 U.S.P.Q. 426, 7 BULL. CR. SOC. 245, Item 321 (1960); 127 U.S.P.Q. 329, 8 BULL. CR. SOC. 117, Item 81 (1960).

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227. *Societe Comptoir de L'Industrie Cotonniere, Etablissements Boussac, et al. v. Alexander's Department Stores, Inc.*, 128 U.S.P.Q. 242 (S.D.N.Y. Jan. 20, 1961) (Dimock, J.) (denying defendant's motion for summary judgment and plaintiffs' motion for preliminary injunction in action for unfair competition based upon use by defendant of name "Dior" in connection with the sale of women's dresses).
228. *West v. Lind et al.*, 128 U.S.P.Q. 204 (Calif. D.C. of App. Nov. 22, 1960) (Kaufman, J.). Plaintiff, Mae West, appealed from an order denying a preliminary injunction to restrain respondents from using the name "Diamond Lil". Affirmed on the ground that the designation "Diamond Lil" involved words of common usage in the public domain not subject to appropriation by the individual plaintiff. Respondent found not guilty of unfair competition since the name "Diamond Lil" had not acquired secondary meaning.
229. *The Avalon Hill Company v. Gebhardt*, 128 U.S.P.Q. 207 (Maryland Ct. of App. Jan. 10, 1961). (Henderson, J.) Plaintiff denied an injunction and an accounting against a competitor marketing a game involving the Battle of Gettysburg, and sold under the name "Change-it". Held that the name "Gettsburg" as applied to plaintiff's game had not acquired secondary meaning and that the defendant was not guilty of deliberate and fraudulent copying of the box lid of plaintiff's game.
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## PART V.

**BIBLIOGRAPHY**

## A. BOOKS AND TREATISES

## 1. United States Publications

231. TAUBMAN, JOSEPH. Copyright and antitrust. New York, Federal Legal Publications, c. 1960. 217 p.

A commentary on the impact of antitrust laws upon the "copyright industries" (*i.e.*, publishing, radio, television, motion pictures, theatre, etc.), organized into the following chapter headings: 1. Creation, copyright, and the Constitution. 2. Contract, copyright and antitrust. 3. Pools, combinations, conspiracies and joint ventures. 4. The performing arts and the antitrust laws. 5. *U. S. v. Paramount* and the television gambit. 6. Conclusion.

The first chapter is a revision of the author's article of the same title which was published in 6 BULL. CR. SOC. 153, Item 164 (1959).

## 2. Foreign Publications

## (a) In French

- 231a. GAVIN, GÉRARD. Le droit moral de l'auteur dans la jurisprudence et la législation françaises. Pref. de Henri Desbois. Paris, Dalloz, 1960. 313 p. Essais et travaux, 14.

A comprehensive study of the moral right of the author in French law and jurisprudence under the Copyright Act of March 11, 1957.

## B. LAW REVIEW ARTICLES

## 1. United States

232. BRACKEN, THOMAS B. Misrepresentation and the Lindsay bill: a stab at uniformity in the law of unfair competition. (70 *Yale Law Journal* 406-440, no. 3, Jan. 1961.)

A review of the confused condition of state law and the "vestiges of federal common law" governing unfair practices in modern commercial relations, followed by an analysis of the Lindsay bill, H.R. 7833 (86th Cong., 1st sess.). The author indicates that "since most business

activities today will touch interstate commerce, the goal of uniformity will be substantially achieved by H.R. 7833." See Item 196, *supra*.

233. BRAUCHLI, C. R. Copyright protection for pictures. (33 *Rocky Mountain Law Review* 58-69, no. 1, Dec. 1960.)

This article, which has been entered in the Nathan Burkan Memorial Competition, 1961, purposes to "examine in some detail the various cases which have arisen in this field and analyze the decisions and the state of the law today." In his conclusion the writer offers some general suggestions for revision of the relevant provisions of the copyright law.

234. CONTRACTS: recording requirement of agreements involving motion picture and allied rights. (10 *Buffalo Law Review* 118-120, no. 1, Fall 1960.)

A case note on *Vidor v. Serlin*, 7 N.Y.2d 502, 199 N.Y.S.2d 669 (1960).

235. DERENBERG, WALTER J. Recent publications in the field of literary, artistic, and industrial property. (9 *The American Journal of Comparative Law* 522-533, no. 3, Summer 1960.)

Brief reviews of the many publications in the field of intellectual property of major interest to the student of comparative law covering the period since the author's previous review in this area of law was published in 7 *Am. J. Comp. L.* 289 (1958). See 6 *BULL. CR. SOC.* 87, Item 94 (1958).

236. DWAN, RALPH H. Patents and copyrights—continuing diversity of income tax treatment. (47 *American Bar Association Journal* 311-312, no. 3, Mar. 1961.)

A discussion of a recently revised ruling of the Internal Revenue Service, published on June 20, 1960 (Rev. Rul. 60-226). This ruling provides, *inter alia*, that the consideration for a transfer of the exclusive right to exploit a copyright in a medium of publication throughout the life of the copyright is to be treated as the proceeds from a sale of property "regardless of whether the consideration received is measured by a percentage of the receipts from the sale, performances given, or exhibitions made of the copyrighted work or whether such receipts are payable over a period generally coterminous with the grantee's use of the copyrighted work."

237. OWNBEY, LLOYD C., JR. The constitutional copyright system: some suggestions for congressional consideration. (34 *Southern California Law Review* 84-97, no. 1, Fall 1960.)

"This comment [which was awarded first prize Nathan Burkan Competition, 1960, University of Southern California] concerns itself with the chart of the laws dealing with the copyright clause, seeking more serviceable and useful laws in the form of future legislation . . . It will explore the underlying purposes behind the exceptions to the present statutory system . . . contained within the doctrine of 'fair use.' The article will further seek to correlate these purposes with the overall purposes of the copyright clause; particular attention will be given to the problem of rewarding creative endeavors in the field of academic research, without unduly hampering the progress of society."

238. RITTENHOUSE, JOHN, JR. Section 24—renewal rights, survivors and confusion. (37 *Dicta* 368-383, no. 6, Nov.-Dec. 1960.)

"The major purpose of this paper [which was awarded second prize in the latest, national Nathan Burkan Memorial Competition] will be to point out the shortcomings of current copyright laws of the United States in the area of survivorship and renewal rights." In his conclusions the author "attempt[s] to rough out the possible form of a replacement statutory provision for Section 24."

239. SULLIVAN, WILLIAM P. Copyright protection of original designs—absence of statutory notice. (2 *Boston College Industrial and Commercial Law Review* 153-157, no. 1, Fall 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).

240. T[UCKER], D[ALE]. Unfair competition—literary property—imitation of recorded musical arrangements. (25 *Albany Law Review* 167-171, no. 1, Jan. 1961.)

A case note on *Miller v. Universal Pictures Co.*, 11 App. Div. 2d 47, 201 N.Y.S.2d 632, 7 BULL. CR. SOC. 294, Item 395 (1960).

## 2. Foreign

### (a) English

241. Copyright in photographs. (231 *The Law Times* (London) 4-5, no. 6143, Jan. 6, 1961.)

A brief analysis of the relevant provisions of the U. K. Copyright Act, 1956.

242. PHELAN, ANDREW. Copyright and the photographer. (90 *The Law Journal* (London) 841-842, [n.s.], no. 4953, Dec. 30, 1960.)

Brief comments on several British court decisions involving copyright protection of photographs.

243. ROBBINS, E. C. The Performing Right Tribunal. *EBU Review*, no. 65B, Jan. 1961, pp. 35-37.

"As similar legislation may be under consideration in other countries it may be of interest to examine what the Performing Right Tribunal has achieved since it was set up in the United Kingdom by the Copyright Act, 1956, and to see whether it has fulfilled the hopes which were aroused by its establishment."

244. STRASCHNOV, GEORGES. European Agreement on the Protection of Television Broadcasts. *EBU Review*, no. 65B, Jan. 1961, pp. 37-42.

"The following commentary is intended to make . . . [the Agreement] easier to read and to throw light on certain provisions, the necessarily terse wording of which may lay them open to conflicting interpretations."

245. [S]TRASCHNOV, [G]EORGES. In memoriam: Arthur Fisher. *EBU Review*, no. 65B, Jan. 1961, p. 44.

A brief eulogy of the late Register of Copyrights.

246. COLLOVÀ, TADDEO. Des droits exclusifs de l'auteur et de l'utilisation radiophonique des disques du commerce. *Revue Internationale du Droit d'Auteur*, no. 30, Jan. 1961, pp. 2-67.

French and English translations, together with the original Italian text, of an article on "The author's sole rights and the radiophonic utilization of trade records" which first appeared in 31 *Rivista di Autore* 21 (1960). See 8 BULL. CR. SOC. 140, Item 112 (1960).

#### (b) French

247. COLLOVÀ, TADDEO. Des droit exclusifs de l'auteur et de l'utilisation radiophonique des disques du commerce. (74 *Le Droit d'Auteur* 31-41, no. 2 Feb. 1961.)

First appeared in Italian in 31 *Diritto di Autore* 21 (1960). See 8 BULL. CR. SOC. 140, Item 112 (1960).

248. DUCHEMIN, J. L. Le nouvelle arrangement de la Haye sur les dessins et models: arts appliqués, dessins et modèles. *Revue Internationale du Droit d'Auteur*, no. 30, Jan. 1961, pp. 110-139.

An analysis, in French, English and Spanish, of the new Agreement concerning the International Deposit of Industrial Designs or Models revised at The Hague on November 28, 1960, with particular reference to its economic aspects and the chief problems it raises.

249. JOUBERT, CLAUDE. Le droit moral et les oeuvres posthumes; étude de droit francois. *Revue Internationale du Droit d'Auteur*, no. 30, Jan. 1961, pp. 68-109.

A discussion, in French, English and Spanish, of the moral right of the author, under French law, with respect to posthumous works.

250. POINTET, PIERRE JEAN. La protection des informations de presse. (76 *La Propriété Industrielle* 247-253, no. 12, Dec. 1960.)

A German translation of this study on the international protection of press news previously appeared in 1960 GRUR, Ausl. 537.

251. REVUE INTERNATIONALE DU DROIT D'AUTEUR. *Comité de Redaction*. La protection des oeuvres posthumes dans la législation des pays appartenant à la Convention de Berne. (Supplément à la *Revue Internationale du Droit d'Auteur*, No. XXX, janvier 1961.)

The texts, in French, of the provisions with respect to the protection of photographs which appear in the laws of the Berne member countries. The texts are given on two folded sheets and an erratum slip and are issued as a supplement to the January 1961 issue of the *Revue*.

252. STRASCHNOV, GEORGES. Traitement national et "droits voisins." (74 *Le Droit d'Auteur* 41-45, no. 2, Feb. 1961.)

A discussion of the principle of national treatment with respect to an international convention for the protection of neighboring rights.

253. ULMER, EUGEN. Lettre d'Allemagne. (74 *Le Droit d'Auteur* 12-18, no. 1, Jan. 1961.)

In a review of recent developments in the field of copyright in West Germany, the Ministry of Justice Draft Copyright Law and four court decisions involving important problems concerning rights of performing artists are discussed. Highlights of the Draft are followed by

an appraisal of the court decisions under the present law and pertinent provisions of the draft. In conclusion, the particular nature of the performing rights is contrasted with that of copyright.

(c) German

254. BRIEGER, HANS RICHARD. Der Ministerialentwurf zum Urheberrechtsgesetz in seiner neuen Wertung unter dem Gesichtspunkt des Architekten-Kunsturheberrechts. (62 *Gewerblicher Rechtsschutz und Urheberrecht* 585-592, no. 12, Dec. 1960.)

"The [West German] Ministerial Draft Copyright Law as evaluated from the point of view of artistic copyright in architectural works."

255. COLBY, RICHARD. Die Dauer des Urheberrechtsschutzes in den Vereinigten Staaten; die Rechtslage bei Übertragung des Erneuerungsrechts: der Billy-Rose-Fall. (32 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 1-16, no. 1/2, Sept. 1, 1960.)

An authorized German translation, by Dr. Manfred Bohlig, of the author's "Duration of Copyright in the United States," which appeared in 7 BULL. CR. SOC. 203, Item 290 (1960).

256. CONRADT, JOACHIM. Das Überspielen auf Tonträger zur privaten Nutzung. (62 *Gewerblicher Rechtsschutz und Urheberrecht* 592-597, no. 12, Dec. 1960.)

A discussion of the question whether unauthorized recordings for private use are permissible under the West German copyright law.

257. HAEGER, SIEGFRIED. Der Film im Vertragsrecht, erläutert am Beispiel der Coproduktion. (32 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 33-53, no. 1/2, Sept. 1, 1960.)

A discussion of copyright problems arising from co-production agreements in the motion picture industry, with particular reference to co-producers in different countries.

258. HIRSCH BALLIN, ERNST D. Schutz der Lichtbilder. (32 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 129-147, no. 3/4, Nov. 1, 1960; 279-301, no. 5/6, Dec. 1, 1960.)

A thorough investigation of the nature of copyright in motion pictures, suggesting that the proposed new German Copyright Act should

treat motion pictures as protected works to the full extent to which they are treated under Article 2 of the Berne Convention.

259. KALKBRENNER, HELMUT. Bundeszuständigkeit für eine Urhebernachfolgevergütung? (62 *Gewerblicher Rechtsschutz und Urheberrecht* 598-599, no. 12, Dec. 1960.)

A discussion of the question whether, under the German Federal Constitution, the creation of a so-called "Cultural Fund" in the nature of the *droit de suite* to be imposed upon works which have fallen into the public domain, would come within the jurisdiction of the federal government. The question is answered in the negative.

260. KLEINE, HEINZ. Die Urteile des Bundesgerichtshofs zum Leistungsschutz für die ausübenden Künstler. (62 *Gewerblicher Rechtsschutz und Urheberrecht* 577-582, no. 12, Dec. 1960.)

Comments on four West German Supreme Court opinions of May 31, 1960 dealing with the protection of the rights of the performing artist in his performances. The opinions are reproduced in the same issue of GRUR, pp. 614 *et seq.*

261. KRÜGER-NIELAND, GERDA. Die Rechtsprechung des Bundesgerichtshofes in Filmsachen. (32 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 148-169, no. 3/4, Nov. 1, 1960.)

A review of the decisions of the last few years of the highest West German Court in matters of motion picture copyright.

262. LEINVEBER, GERHARD. Orchester und Urheberrecht. (62 *Gewerblicher Rechtsschutz und Urheberrecht* 599-603, no. 12, Dec. 1960.)

A study of the significance, in regard to the protection of performing artists both for the legislative future and present practice, of a recent landmark decision of the West German Supreme Court involving the question whether members of an orchestra must submit to recordings of their orchestral performances when made with the consent of the orchestra leader or management.

263. MÜNZER, GEORG. Grundsätze des sozialistischen Urhebervertragsrecht. (10 *Erfindungs- und Vorschlagswesen*, Ausg. B. 15-20, no. 1, Jan. 1961.)

A discussion of the fundamental principles of contractual relationships in the area of copyright in a socialist society. The author concludes

that now is the time to discuss, in East Germany, the proper form and content of the publishing contract, the contract for a dramatic performance, the motion picture contract, etc., before a new law is enacted.

264. REICHEL, WERNER. Zur Problematik des Gruppenwerks und des Rechts der Arbeitnehmer im Verlag in der Urheberrechtsreform. (62 *Gewerblicher Rechtsschutz und Urheberrecht* 582-585, no. 12, Dec. 1960.)

A discussion of perplexing problems of the collective work and of the law concerning editorial employees in connection with West German copyright law revision.

265. STACKELBERG, CURT FERDINAND FREIHERR VON. Fragen der Prozessführung in Filmsachen. (32 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 301-319, no. 5/6, Dec. 1, 1960.)

A review of a number of procedural and jurisdictional problems in connection with litigation concerning motion pictures.

266. STRAUSS, WALTER. Fragen der Urheberrechtsreform. (32 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 259-278, no. 5/6, Dec. 1, 1960.)

A survey of problems of copyright law revision in West Germany with particular reference to the Ministry of Justice Draft Copyright Law. The author concludes that there is still much work to be done on such revision but expresses the hope that the 4th Bundestag will enact a new law and thereby bring to completion a reform project begun more than thirty years ago.

(d) Italian

267. CORRAO, ANTONIO. Tutela in Italia di opere di autori sovietici. (31 *Il Diritto di Autore* 305-315, no. 3, July-Sept. 1960.)

A discussion of the protection in Italy of works of Soviet authors.

268. MARIOTTI, PAOLO. Sui diritti relativi alla corrispondenza epistolare. (31 *Il Diritto di Autore* 316-326, no. 3, July-Sept. 1960.)

An analysis of articles 93 and 95 of the Italian copyright law which deal with rights relating to letters.

269. SANCTIS, VITTORIO M. DE. Opere dell'ingegno e diritti connessi nei programmi televisivi; appunti sulla legislazione e giurisprudenza degli Stati Uniti. (31 *Il Diritto di Autore* 446-475, no. 3, July-Sept. 1960.)

A discussion of United States statute and case law dealing with questions of copyright, protection of ideas, and neighboring rights, in regard to television programs.

#### NEWS BRIEFS

270. INTERNATIONAL ASSOCIATION OF PLASTIC ARTS.

The Third International Congress of Plastic Arts meeting in Vienna, Sept. 1-Oct. 1, 1960, adopted the following resolution:

The Third International Congress of Plastic Arts recommends that at the beginning of the next preparatory work on the revision of the Berne and Universal Copyright Conventions, the exact meaning of the word "publication" be internationally defined in a precise and concrete fashion insofar as it concerns works of figurative art;

And earnestly recommends to all the national committees of the Association that they urge the appropriate authorities of their respective governments to give to their official representatives all the necessary instructions with a view toward acting to this effect on all occasions;

It requests the Director General of UNESCO to support this recommendation with all his authority. Cf. 74 *Le Droit d'Auteur* 45, no. 2, Feb. 1961.

271. ALAI TO MEET IN FLORENCE IN SEPTEMBER.

The 49th Congress of l'Association Littéraire et Artistique Internationale will be held at Florence from September 11 to 16, 1961. A comprehensive program of work proposes to examine many questions of current interest in the field of copyright, as applied to designs, models, motion pictures, and television, and the questions of extension of copyright, and rights of producers of records and broadcasters. Host of the Congress in Florence is the Italian S.I.A.E.



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## PART I.

## ARTICLES

## 272. EUROPEAN AGREEMENT ON THE PROTECTION OF TELEVISION BROADCASTS\*

By G. STRASCHNOV\*\*

1. The Committee of Legal Experts of the Council of Europe, which already had among its achievements the drafting of the European Agreement on Programme Exchanges by means of Television Films<sup>1</sup>, has now finalised a new regional instrument which will probably come into force in the near future. It took Professor Bodenhausen (Netherlands), the Chairman of the Committee, assisted by Mr. H. T. Adam, of the Council of Europe, less than a year to bring the preparation of this instrument, the European Agreement on the Protection of Television Broadcasts<sup>2</sup>, to a successful issue and to submit it to the Committee of Ministers as an appendix to the General Report by Mr. Lenoble, the French Government expert. To date it has received eleven signatures, one of which is not subject to ratification. The Committee and its Officers—consisting of the Chairman, the two Vice-Chairmen, Mr. Filippo Pasquera (Italy) and Mr. Torwald Hesser (Sweden), and the Rapporteur—have thus shown themselves to be an efficient and well-assorted team of experts whose legal learning and practical competence are deserving of the highest praise. Yet their task was not an easy one. They had to take into account enactments and draft legislation that had already “firmed”, to bear in mind the relative nearness of a more comprehensive instrument governing “neighbouring rights”, to avoid trampling on vested rights and legitimate though opposing interests. Admittedly, the instrument still bears traces of the compromises that could not be avoided, but for all that it is a treaty that should do much to foster the growth of television in Europe. As such, if for no other reason, it deserves to be analysed, understood and widely ratified. The following commentary is intended

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\* Reprinted with permission from *E.B.U. Review*, January 1961, 37-42, a translation of an article which appeared in French in *Le Droit d'Auteur*, October 1960.

\*\* Dr. George Straschnov is legal advisor to the European Broadcasting Union and the author of several books on copyright and neighboring rights. He served as expert of the Monaco delegation at the Brussels Conference for the Revision of the Berne Convention, and acts as expert of the Council of Europe.

1. Cf. *EBU Review*, No. 53 B, p. 40.

2. Cf. *EBU Review*, No. 62 B, p. 34.

to make it easier to read and to throw light on certain provisions, the necessarily terse wording of which may lay them open to conflicting interpretations.

2. To dispel at the very outset the apprehension that may be felt in some quarters as to the impact of the Agreement on their own rights, it is fitting to begin by referring to Article 6 which should provide the needed reassurance. The protection provided by the Agreement does not affect any rights in a television broadcast that may accrue to third parties, whether they be authors, performers, film makers, producers of phonograms, or entertainment promoters. The new protection is merely additional to that enjoyed by others, but it does not diminish or take precedence over it. It is only logical that this should be so, for whereas the rights expressed to be reserved are rights in the contents of the broadcast only, the protection conferred by the Agreement is directed much more to the vehicle, the medium by which the programme is brought to the audience.

This same Article 6 leaves intact any protection of broadcasts stemming from other sources of law. The instrument must not be construed according to the maxim *specialia generalibus derogant*, and the Courts will not, for instance, be able to withhold protection under the law on unfair competition, to which no time-limit attaches, on the pretext that the specific protection afforded by the instrument has already lapsed. This saving "of other sources of law" takes on real meaning when it is remembered that the Hanseatic Court of Appeal in Hamburg recently ruled that the showing of televised images in a cinema without permission from the broadcaster was an act of unfair competition<sup>3</sup>. In passing, it is a pity that the Committee of Experts in The Hague did not think fit to insert a similar saving clause in its draft Convention for the protection of "neighbouring rights"<sup>4</sup>.

3. To return to the substantive clauses of the Agreement, it may fairly be asked at once who the beneficiaries of the protection thus instituted will be. The protection vests in the broadcasting organisation, which is brought within the ambit of the treaty either by the fact of being properly constituted on the territory of a contracting State, or by the fact of transmitting from such territory (Article 1 (1)). Either of the tests suffices to confer protection, but it is open to States to require that both tests be satisfied on the territory of one and the same contracting party (Article 3 (1) (f)). This option of cumulating the two tests is a concession to the United Kingdom, where the Copyright Act, 1956, permits the application of national protection to broadcasts made in another country by organisations constituted in, or under the laws of, that

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3. Judgment of 7th July 1960 in *Nord- und Westdeutscher Rundfunkverband v. Aktuali-*

4. Cf. text in *EBU Review*, No. 63 B, p. 33.  
*säsen-Kino Theater (AKI)*. Cf. *EBU Review*, No. 63 B, p. 35.

country (section 32 (1) (e)). On the other hand, this dual test, if prescribed *jure conventionis*, would have been rather clumsy, as it would automatically have excluded from protection those organisations whose transmitters are not located in the country where they have their legal domicile (for instance, the case of Monaco). It will be noted that the same solution was adopted in the draft at The Hague, where it appears in altered form in Article 4 (c). One inherent drawback in this system has to do with the problem of comparison of terms and will be discussed below in connection with Article 2.

4. The subject of protection is the television broadcast. In this respect Article 5 specifies that the expression "television broadcast" embraces both the visual and the sound element, except where the latter is broadcast separately, as may happen when the sound element of a television broadcast is also transmitted either simultaneously or later by a sound radio station. A person using the sound element of a broadcast in a manner reserved to the organisation as part of its exclusive prerogative will have a defence to an action brought by the right-holder only if the use in question is not based on a sound element broadcast solely as the complement to the television image. The definition of "copyright television broadcast" given in section 14 (10) of the United Kingdom Copyright Act is not materially different.

Article 1 (1) of the Agreement institutes protection for "all" the television broadcasts of an organisation to which the Agreement extends. The word in inverted commas means a great deal, and is a pointer to the philosophy behind the instrument. One possibility would have been to grant protection to every *original* broadcast and to make the beneficiary the organisation which produced it through the ingenuity of its staff and the initiative displayed by its administration, with the aid of its funds and its technical studio facilities. The protection thus built up would have resembled copyright in that it would have been the appurtenance of a "creative" effort. Such an approach would have produced a two-fold effect. In the first place, only the originating organisation would have been the right-holder *ex conventionis*; relaying organisations would only be able to secure it via an assignment. In the second place, if the originating organisation, being situated outside contracting territory, did not qualify for protection, its broadcast would be *res communis* wherever it went from then on, including when it was relayed by organisations covered by the Agreement. The result would have been that many European broadcasts, even assuming wide ratification of the Agreement, would have no claim to protection on account of their extra-European origin.

The Committee of Experts could not go along with these consequences, and it therefore had to approach the treaty on a different tack. By protecting "all" the broadcasts of each organisation to which the Agreement applies, it provided protection even for relayed broadcasts, without concerning itself as

to whether the broadcast *at its origin* was eligible under the Agreement or not. This solution is unquestionably the only one that is in keeping with reality, particularly the reality of Eurovision, in which it may well happen that a broadcast passing from one organisation to another may not be protected at the source. But this approach in turn raises some difficult issues, the basic one being this: does an organisation which is the source of a series of relays retain protection through these relays, or in other words does it control such uses as may be made of its broadcast not directly but from a relay? If this were so, the situation would be extremely complicated. When a broadcast from Rome, routed through Paris, Brussels and Cologne, was used for public exhibition in Germany, the user would have to seek not only the permission of the German organisation, since he would be using its broadcast, but also the permission of the Italian organisation from which the programme originated, and perhaps also of the French and Belgian stations which acted as feeders to the German station. There would be several authorisations to be secured, which in practice is almost out of the question.

The writer is persuaded that this is not the proper construction to be placed upon the Agreement. In his view the treaty gives each organisation to which it applies a measure of protection in its own right, independently of any protection which may attach to any other organisation in respect of the same broadcast, and sees it as giving each organisation *sole* control over the uses made of its broadcast. To put this idea in another way, it may be said that for the purposes of the Agreement, a broadcast does not keep its identity through the relays, and that each time it is rebroadcast or repeated it becomes a "new" broadcast made by the organisation which puts it out over the air. The protection, which is always "new" and non-derived, belongs outright to the transmitting organisation, which exercises it alone, to the exclusion of all others, in respect of its broadcast. On this view, the protection relates less, in a sense, to the contents of the broadcast, which clearly remain the same from one relay to the next but to which the relaying organisation has contributed nothing, than to the broadcast as such, at once the container and the contents, the mode of conveyance and the image conveyed. Let us return to the example given, where a broadcast from Rome is relayed by Paris, Brussels and Cologne, and look at it from the angle of this interpretation. Presuming that all the organisations concerned are entitled to the benefit of the Agreement, any person wishing to use the broadcast in a manner for which permission is required will not have to apply to all these organisations for it, nor in any event to the originating organisation, but merely to the one whose broadcast *in concreto* he desires to use. There will accordingly never be the need for several authorisations, the only authorisation necessary being that given by the organisation whose broadcast is actually exploited. Such authorisation will also be sufficient.

This system, which, it is submitted, is that intended by the authors of the Agreement, naturally implies that the converse is also true. If in the above example, only the Rome, Brussels and Cologne transmitters are situated in territory to which the Agreement applies, while the Paris station is not, a person using the broadcast in a manner that would normally be prohibited may in certain geographical conditions take refuge in the excuse that he made use of the Paris broadcast, which is unprotected, although it has also been radiated by other stations eligible under the Agreement. This is because, as stated above, each broadcast in the technical sense of the word constitutes an independent subject of protection, and because the contents of the programme as such are not covered by the Agreement. To close this loophole the network of ratifications will have to be as dense as possible, so that no one can claim to have taken the broadcast direct from one of the neighbouring countries that are not covered by the Agreement.

5. The instrument's geographical scope is a double one. The *jus conventionis* is enjoyed by organisations even in their countries of origin (Article 1 (1)), and in the other contracting States they may likewise claim any residual protection granted to what those States deem to be home or "national" organisations (Article 1 (2)). Operation of the Agreement in the country of origin is subject to an optional saving clause, whereby under the provisions of Article 3 (1) (*e*) States may withhold protection from home broadcasts, on condition, however, that such broadcasts enjoy domestic protection. The Agreement does not stipulate that the latter protection must be at least equivalent to the conventional standard, so that the exception can be used even if the domestic standard of protection is lower. There is, however, little likelihood that States will protect aliens better than their own nationals, with the result that the question of equivalence is more academic than anything else.

6. What is the country of origin of a broadcast within the meaning of the Agreement? The question arises primarily in relation to the problem of comparison of terms. The Agreement defines the country of origin only by implication, as does the Universal Copyright Convention. Undoubtedly the country of origin is that in which the organisation satisfies one or other of the eligibility criteria of the instrument, each State being at liberty to define the country of origin by reference to both criteria at once. Subject to this reservation a broadcast may have two countries of origin, in the event of the transmitter being situated in a different contracting country from the headquarters. From the standpoint of comparison of terms, this duality of origin may entail certain difficulties which will be discussed below.

7. The minimum standard of protection, which is compulsory on all contracting countries including the country of origin if it has not availed itself of the proviso mentioned above, is laid down in Article 1 (1). It comprises

the right of the organisation to authorise or prohibit rebroadcasting, wire diffusion to the public and public showing, whether such uses are simultaneous with or subsequent to the broadcast, together with fixation and reproduction of a fixation. An exception to this protection is provided *jure conventionis*: certain uses subsequent to the broadcast may not be prohibited if the fixation or reproduction of a fixation have been lawfully put on sale. This exception is justified. If the organisation markets copies of its broadcast or causes them to be marketed, it is bound to expect that they will be used in one or other of the first three ways referred to in Article 1 (1), and should therefore no longer exercise a "*droit de suite*" or residual control over them, by analogy with the case of the proprietor of the reproduction right in copyright, who, once he has permitted the sale of copies, can no longer exercise that right against each purchaser to prevent him from broadcasting or performing in public the work so reproduced. It will be noted, however, that this exception holds good only in respect of fixations and reproductions that are sold to the public, with the result that the mere hiring out of a telefilm will not *eo ipso* cause the broadcast to fall into the public domain.

In addition to this *ex conventionione* exception, Article 3 provides for others which become applicable only if the contracting State makes them operative by a declaration made when it becomes a party to the Agreement, or by its domestic law. The former include, in addition to those already mentioned, the faculty which each contracting State has of withholding protection of broadcasts against wire diffusion, public performance otherwise than to a paying audience, fixation or reproduction for private purposes or solely for educational use, and against still photography. This latter optional derogation was inserted to accommodate the United Kingdom Copyright Act, which only protects television broadcasts in so far as the unauthorised use relates to "any sequence of images sufficient to be seen as a moving picture" (section 14 (6)). The provisions in respect of reciprocity with a State which has reserved on this point will be dealt with below.

The exceptions to the conventional standard which States may introduce by domestic legislation without declaring them at the time of accession are two in number: the first relates to the use of short extracts from a broadcast constituting all or part of the news event reported on (by analogy with Article 10*bis* of the Berne Convention as revised at Brussels); the second relates to ephemeral recordings (by analogy with Article 11*bis* (3) of the same Convention). The latter optional exception does not call for comment, but the peculiarity of the former is that to make the borrowing lawful the broadcast itself must be the news event in question, and it is thus not enough for it to be a report on current events of an outside character, like the usual television newsreel. In other words, the exception must not allow cinemas to exhibit in public the television newsreel or sports programmes of the broadcaster without

his consent, on the pretext that they are reports on current events. At a time when the cinemas are tending to make free with this type of broadcast, as witness the Hamburg case cited above, it would be unthinkable for an international treaty directed to the protection of broadcasts to aid and abet them in this nefarious deed.

It goes without saying that all these exceptions obtain only in the territory of the State which introduces them. Article 3 says so in terms, to make assurance doubly sure.

8. The right of communication to the public carries another and rather more special option, which is to be found in Article 3 (3). States may provide for a body with jurisdiction over cases on which this right has been unreasonably refused or granted on unreasonable terms. Once again, we have here a provision prompted by the United Kingdom Copyright Act in sections 23 ff. The Performing Right Tribunal may be seized of disputes of this kind and may either vary the terms demanded for the authorisation or grant the authorisation if it has been withheld on what it considers to be unreasonable grounds. However, refusal to grant a license will not be held to be unreasonable if it is based on conditions imposed on the broadcasting organisation by the promoter of the event comprised in the broadcast (section 29 (4)).

The body contemplated in the Agreement would have similar jurisdiction, particularly because it could only review cases where refusal of the license is "unreasonable". Now, it is obvious that a commitment entered into by a broadcasting organisation with a promoter, a performer or a publisher, for instance, not to allow the public showing of its broadcast is a sufficient ground on which the license may legitimately be refused. It should not be forgotten that the demands of sports promoters in relation to public exhibition were one of the main reasons for the Agreement's existence.

9. The term of protection is governed by Article 2. It is a minimum of ten calendar years from "the first broadcast from the territory of a party to the Agreement". It follows that—

- (a) broadcasts previously scheduled outside the contracting territories have no legal effects, either in the positive sense by causing the term of protection to run, or in the negative sense by making subsequent broadcasts fall into the public domain;
- (b) though each broadcast, whether or not it be the first, is protected by virtue of the language already mentioned of Article 1, it does not always carry a term of protection of its own; and that if it is a repeat broadcast of a programme already shown in a contracting country, it will only qualify for the remainder of the term calculated from such first broadcast<sup>5</sup>:

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5. A similar provision is to be found in Section 14 (3) of the British Copyright Act.

(c) the first broadcast, from which the calculation starts, is that made in a contracting territory and not that which may have been made outside such territory, though by an organisation constituted in or under the laws of a contracting State. In other words, the Agreement (intentionally or otherwise) relinquishes one of the two alternatives on this point.

Running right through this system, which in itself is perfectly logical, there appears to be an anomaly that only an analysis in depth will dispose of. Take the example of a broadcast televised in Italy at a time when that country has not yet become a party to the Agreement. The broadcast will not qualify for protection, and may therefore be recorded and the recording reproduced. If it is later given as a repeat broadcast in a contracting country—which itself is unquestionably protected—would this not amount to retrieving the broadcast from the public domain into copyright, a retrogression which is repugnant to the Conventions and laws and may in addition conflict with acquired rights? In order to find the answer to this question, one must thoroughly get into one's mind the idea explained above that protection is not granted to the contents properly so called of the broadcast, which reappear in identical form at each subsequent broadcast, but rather to the broadcast itself, which is always "new" and an independent subject of protection, without any connection with earlier broadcasts having the same contents except as regards the term. This being so, there is and can be no retrogression in the sense referred to, nor any impairment of acquired rights. A broadcast televised in a non-contracting territory is and remains devoid of protection, and fixations and reproductions are and remain lawful. Each repetition of such broadcast under the conditions specified in Article 1 of the Agreement acquires its own protection, independent of that given to the earlier ones. The one and only link between the first broadcast and the repeat broadcasts has to do with the term, and not the existence, of protection. And it is only in this respect that the repetition of a broadcast can be regarded as being "the same" as the earlier transmission. The "anomaly" in question is thus not an anomaly at all unless the whole conception of the Agreement has not been understood.

10. Apart from being based on a conventional minimum, the provisions governing the term of protection include the grant of national treatment conditioned by comparison of the terms. While the general rule in Article 1 (2) requires that foreign broadcasts be entitled to the protection accorded to home broadcasts, the right is reserved to tailor the national term of further protection to that granted in the country of origin. This possible comparison, which is not by any means compulsory, has a built-in difficulty: where a broadcast has two countries of origin, as in the case where headquarters and transmitter are in two different contracting countries, which country's term will be taken for

purposes of comparison? In the sphere of the Berne Convention, where a work may also have two countries of origin through being published simultaneously in two countries of the Union, the problem is solved by taking as the country of origin the country which grants the shorter term of protection (Article 4 (3)). The Agreement leaves the question open. Considering, however, that the dual country of origin is an extremely rare case, and that the difficulty arises only if the term of protection is different in the two countries, this omission may be dismissed as being negligible.

11. While Article 2 is the *sedes materiae* in regard to the term of protection, the reader must also turn to one of the final clauses, Article 13, to have the whole picture before him. Under this provision the life of the Agreement hangs, so to speak, on the coming into force of the Convention on "neighbouring rights", which in this context is a sort of resolute condition "except in regard to fixations already made".

The Agreement comes to an end when duly declared to terminate by the Committee of Ministers, whereas fixations (and doubtless also reproductions of fixations) of broadcasts hitherto protected by the instrument and "already made" at that time continue to enjoy the acquired protection until such time as it would ordinarily lapse within the meaning of Article 2. Probably these fixations will not qualify for double protection, once under the Agreement and again under the new Convention, because the latter will almost certainly not be retroactive and will not apply to recordings of broadcasts made before it comes into force. But it will likewise not influence the continuity of the protection afforded under the terms of the Agreement, although it will then be terminated, particularly as the Convention will doubtless include a saving of rights previously acquired, as is foreshadowed in Article 17 of The Hague draft.

12. Acts which Article 1 (1) of the instrument makes subject to the right of authorisation or prohibition vested in the transmitting organisation will be unlawful if they are performed in the territory of a contracting State without the consent of such organisation. But what about the same acts when performed outside such territory? So long as they do not enter such territory, the lawfulness of those acts in the eyes of the Agreement cannot be challenged. This will not hold good in cases where from territories not covered by the Agreement they have certain extensions or repercussions on a contracting territory. These cases are governed by Article 4 (1), which stipulates that fixations of a broadcast in which protection under the Agreement subsists, as well as reproductions of such fixations, made in a territory to which the Treaty does not apply and subsequently imported into a territory bound by the Agreement will be liable to seizure in that territory at the suit of the organisation in which the right vests. This situation must be clearly distinguished from another where seizure does not apply: if a broadcast by organisation A, which qualifies under

the Agreement, is relayed by organisation B, which does not so qualify, and if the *latter's* broadcast is recorded and the fixation is subsequently imported into a territory to which the Agreement applies, it will there be lawful since it will be a reproduction of an unprotected broadcast. Such are the theoretical consequences of the principle of independent grants of protection, to which reference has been made on several occasions in this article. Seizure will be permissible only if the fixation relates *directly* to a protected broadcast.

Even in the latter event, however, recourse to seizure will not always be open. A further requirement is that the fixation or reproduction originating from a non-contracting country should be such that want of consent on the part of the organisation whose broadcast is involved suffices to make that fixation or reproduction a piracy in the contracting territory into which it is imported. This mechanism can only be illustrated by an example. Suppose that France and the United Kingdom are contracting countries and that Germany is a non-contracting country. A French broadcast, which will thus be protected under the Agreement, may have still photographs made of it in Germany, which photographs will obviously be lawful in that country as far as the Agreement is concerned. Suppose now that these stills are taken into the United Kingdom. As the latter country does not protect broadcasts against still photography, owing to the fact that it has availed itself, so to speak by anticipation, of the exception provided for in Article 3 (1) (*d*), the photographs imported from Germany will continue to be lawful in that country and the French organisation will not be able to procure their seizure. If however, these same photographs turn up in another contracting country which has not made use of the said exception, seizure will be admissible and liability to such seizure will extend to all reproductions of the imported photographs, including any newspapers, magazines, etc., in which they may be published.

13. The provisions discussed above close the frontiers of contracting countries to piracies in a fairly effective manner. Acts which take place within those frontiers from beginning to end are, as has been seen above, clearly under the control of the organisations entitled to protection, and accordingly movements of fixations from one contracting country to another do not call for any special provisions. One particular case of such movements within the area constituted by the Agreement did however claim the attention of the Committee of Experts. What will happen in the case of still photographs of a protected broadcast which are made in a State that has reserved on photographic protection, when those stills are taken into another contracting State? The answer is given in Article 4 (2). If the importing country has also reserved, the stills will continue to be lawful therein. Where the opposite is the case, seizure is permissible because their original lawful character has ceased to exist.

14. It is clear that the exception relating to still photographs necessitated by the existing law in the United Kingdom has to a certain extent complicated the general pattern of the Agreement. The Council of Europe Experts realised this, and while recognising the need for such an exception, the majority of them desired to prevent it from being used to excess. It is for this reason that Article 4 (4) of the Agreement is designed to place a brake on States which might otherwise wish to withhold protection against still photography. This provision permits of reciprocity in dealings with a State that has availed itself of the exception. States that have not reserved will not be required to give protection against photography to broadcasts originating in a State that has.

15. Hitherto only the substantive provisions of the Agreement have been discussed, as the diplomatic clauses contain neither difficulties of interpretation nor peculiarities that are worthy of mention. It would however be well to amplify the remarks already made concerning the relationship between the Agreement and the future Convention on "neighbouring rights".

At the Eighth Session of the Permanent Committee and Fourth Session of the Inter-governmental Copyright Committee in 1959 an identical resolution was adopted expressing the hope that the Agreement—at that time only a proposed Agreement—would be restricted "in regard to its purpose, duration and territorial applicability" and that it would remain effective "only until the entry into force of an instrument of universal scope"<sup>6</sup>. The Committee of Experts of the Council of Europe deferred to this desire. The Agreement concerns television broadcasts only and does not deal with sound broadcasts as such. It is not an "open" instrument, and only the European States and non-European countries having political ties with a member of the Council of Europe (e.g. the countries of the French Community and of the British Commonwealth in particular) may accede to it. Lastly it is not of indeterminate duration; it will cease to have effect, except in relation to fixations already made, when the universal instrument on "neighbouring rights" shall have entered into force for at least a majority of the members of the Council of Europe that are parties to the Agreement. So long as this resolute condition remains unfulfilled, the two treaties will overlap in relations between States that are parties to both. Will this result in serious complications? It would not seem so, to judge by Article 12 of the Hague draft, the drift of which is somewhat similar to that of Article 1 of the Agreement. It is more likely that the two forms of protection will supplement one another and that their existence side by side, for as long as it lasts, will not give rise to any serious difficulties. It is rather when the one supersedes the other that a complication or, better, a vacuum may occur. Let us assume that ten members of the Council

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6. See *EBU Review*, No. 59 B, p. 32.

of Europe have become parties to the Agreement. When the instrument on "neighbouring rights" has come into force for six of them, the Agreement will cease to exist, even in relation to those four States which were previously parties to the Agreement but which have not—or have not yet—ratified the universal instrument. Is it conceivable that such a hiatus should occur, that long-established international protection should be interrupted, and that the States should put up with such an anomalous situation? When the time comes an appeal must be made to the wisdom of governments to reach agreement on ways of avoiding this extreme consequence of Article 13 of the Agreement.

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## 273. RIGHTS IN PRIVATE LETTERS

by MICHAEL COHN\*

*Editor's Note:* In view of the most recent case involving the "John Quinn Letters" (see *New York Times*, April 23, 1961, pp. 1, 84), the following article specifically dealing with the problems of private letters is particularly timely.

The Anglo-American law relating to letters has evolved into what some commentators consider a highly unsatisfactory state. It is my purpose to examine the existing law and to suggest changes.

As will be seen below, authorities consider private letters products of the mind, entitled to protection as literary works, rights to which are dichotomized: the physical object is distinct from the incorporeal right of ownership in the intellectual creation. This principle is clearly set forth in the United States Copyright Act:

"The copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of the title to the material object; but nothing in this title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained."<sup>1</sup>

The same precept applies to unpublished works subject to the common law.<sup>2</sup> With respect to the physical property right in the recipient of a letter, theoreticians differ as to the precise nature thereof, one judge calling the recipient a "trustee or bailee";<sup>3</sup> another deeming the receiver to have a "special property" in the letter, constituting him a "joint" owner with the writer.<sup>4</sup> Some commentators state that the recipient could not be a bailee or a joint owner. Otherwise, they contend, the writer would have a right to possession, would be able to prevent destruction of the letter by the recipient and would

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1. 17 U.S.C. Sec. 27.

2. *Chamberlain v. Feldman*, 300 N.Y. 135 (1949); see *Werckmeister v. American Lithographic Co.*, 142 Fed. 827 (1905); see also *Duke of Queensberry v. Shebbeare*, 2 Eden 329 (1758).

3. *Folsom v. Marsh*, 9 Fed. Cas. 342, 346, No. 4901 (1841).

4. *Pope v. Curl*, 2 Atk. 342 (1741).

be entitled, at the very least, to an accounting by the seller from any sale of the letter.<sup>5</sup>

Despite the lack of uniformity as to what to call the recipient's property interest, it is not too difficult to ascertain its attributes.

It is quite clear that the right to the physical property in a letter vests in the recipient.<sup>6</sup> This physical property includes the paper, ink, envelope and stamp.<sup>7</sup> Moreover, the recipient has the right to read the letter,<sup>8</sup> and to show it to his friends<sup>9</sup> unless, perhaps, there is a fiduciary relation with the writer.<sup>10</sup> He may also sell or transfer the document, unless he is again restricted because of a confidential relation.<sup>11</sup>

Additionally, the recipient may, if he wishes, destroy the letter without recourse in the writer.<sup>12</sup> Further, he is under no compulsion to return the letter to the writer.<sup>13</sup> Probably, however, the writer has the right to inspect or make copies of the letter, if it is still in the recipient's possession, although there are comments to the contrary.<sup>14</sup>

It has also been held that the recipient can recover damages from a third person, who wrongfully obtained the letters from him, for showing them to others.<sup>15</sup> Probably, the recipient can even compel return of the letter if it falls

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5. Parker, *The Jurisdiction of the Court of Chancery to Restrain the Publication of Letters*, 1 Am. L. Reg. 449, 457 (1853).
  6. *Ipswich Mills v. Dillon*, 260 Mass. 453, 457 (1927); *Baker v. Libbie*, 210 Mass. 599, 607 (1912); *Oliver v. Oliver*, 11 C.B.N.S. 139 (1861); *Pope v. Curl*, 2 Atk. 342 (1741); *Drone*, *The Law of Property in Intellectual Productions*, 134 (1879); *Weil*, *American Copyright Law*, 132 (1917); *Parker*, *supra*, note 5 at 458.
  7. 46 Yale L.J. 493 (1937); *Parker*, *supra*, note 5.
  8. *Drone*, *op. cit. supra*, note 6 at 136; *Parker*, *supra*, note 5 at 458.
  9. *Baker v. Libbie*, 210 Mass. 599, 606 (1912); *Grigsby v. Breckinridge*, 65 Ky. (2 Bush) 480, 488 (1867); *Parker*, *supra*, note 9.
  10. *Baker v. Libbie*, *supra*, note 9.
  11. *Ibid.*; *Grigsby v. Breckinridge*, 65 Ky. (2 Bush) 480, 491 (1867); *Drone*, *op. cit. supra*, note 6; but see *Rice v. Williams*, 32 Fed. 437, 440 (1887) where it is said that letters may not be sold without the consent of the writer.
  12. See note 11, *supra*; *Bowker*, *Copyright, Its History and Its Law*, 93 (1912); *MacGillivray*, *A Treatise Upon the Law of Copyright*, 244 (1902); 1 *Morgan*, *The Law of Literature*, 499 (1875).
  13. *Ipswich Mills v. Dillon*, 260 Mass. 453, 457 (1927).
  14. See 46 Yale L.J. 493, 496 (1937); *MacGillivray*, *op. cit. supra*, note 12; 1 *Morgan*, *op. cit. supra*, note 12 at 450.
  15. *Thurston v. Charles*, 21 T.L.R. 659 (1905).

into the hands of the writer.<sup>16</sup> Upon the death of the recipient, all his rights in the document pass to his personal representatives.<sup>17</sup>

Apparently, the recipient's right to transfer a letter is personal to him, or his estate, and letters are not deemed assets of a bankrupt or decedent to be used in an insolvency or probate proceeding to satisfy his debts.<sup>18</sup>

All the authorities previously referred to are decisional. There are, however, statutory provisions in the states of California, Montana, North Dakota, South Dakota and the Territory of Guam.<sup>19</sup> Under these enactments, each of whose wordings are virtually the same, letters belong to the recipient, except as to the publication right which is vested in the writer. An exception to the writer's publication right authorizes publication by the recipient "by authority of law". As we shall see below, the statutes follow the common law. Although the first of the statutes was promulgated in 1872, there does not appear to be any cases interpreting or applying any of them.

Thus far we have dealt primarily with tangible rights in the physical document, noting however that the five statutes recognize the writer as the proprietor of the publication right in a letter. This view coincides with the common law under which a writer possesses the publication right in his work.<sup>20</sup> The principle has been applied in the case of letters.<sup>21</sup> The rule was first

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16. *Oliver v. Oliver*, 11 C.B.N.S. 139 (1861); Weil, *American Copyright Law*, 132 (1917).
  17. *Grigsby v. Breckinridge*, 65 Ky. (2 Bush) 480, 488 (1867); *Eyre v. Higbee*, 35 Barb. (N.Y.) 502 (1861); *Earl of Lytton v. Devey*, 52 L.T. 121, 122 (1884); 46 Yale L.J. 493, 503-505 (1937).
  18. *Baker v. Libbie*, 210 Mass. 599, 607 (1912); *Eyre v. Higbee*, *supra*, note 17; *Matter of Joseph J. Ryan*, 115 Misc. (N.Y.) 472 (1921); *Amdur*, *Copyright Law and Practice*, 49 (1936); *Ball*, *The Law of Copyright and Literary Property*, 497 (1944); 46 Yale L.J. 493, 503-505 (1937). With respect to manuscripts in the hands of their author, see *Banker v. Caldwell*, 3 Minn. 94 (1859) and *Bartlett v. Crittenden*, 2 Fed. Cas. 967, 968, No. 1076 (1849).
  19. Cal. Civ. Code, Div. 2, Pt. III, Tit. 2, C. 3, Sec. 985, reads as follows: "*Private Writings*. Letters and other private communications in writing belong to the person to whom they are addressed and delivered; but they cannot be published against the will of the writer, except by authority of law." See also Mont. Codes, Ann., Tit. 67, C. 11, Sec. 1109; N.D. Century Code, C. 47-07, Secs. 47-0709; S.D. Code, Tit. 51, Secs. 51-0809; Guam Civ. Code, Sec. 985.
  20. *Palmer v. DeWitt*, 47 N.Y. 532, 536 (1872); 18 C.J.S., *Copyright and Literary Property*, Sec. 5.
  21. *Folsom v. Marsh*, 9 Fed. Cas. 342, 346, No. 4901 (1841); *Roberts v. McKee*, 29 Ga. 161, 166 (1959); *Schwartz v. Edrington*, 133 La. 235, 239 (1913); *Baker v. Libbie*, 210 Mass. 599, 607 (1912); *Woolsey v. Judd*, 4 Duer (N.Y.) 379, 386, 396-398 (1855); *Thompson v. Stanhope*, Amb. 737 (1774); *Pope v. Curl*, 2 Atk. 342 (1741); *Drone*, *op. cit. supra*, note 6; 1 *Morgan*, *op. cit. supra*, note 12 at 455; *Curtis*, *A Treatise on the Law of Copyright*, 95 (1847).

proclaimed in 1741 in a case in which the defendant bookseller attempted to market a book entitled "Letters from Swift, Pope and Others". Pope sued because his consent had not been obtained. The court dismissed summarily defendant's argument that the prohibition against unauthorized publication applied only to works of recognizable literary quality.<sup>22</sup> The court's view was sustained in the next case.<sup>23</sup> In the third case, the judge, distinguishing the two earlier cases as involving "literary" letters, stated that ordinary letters should not be protected under copyright principles.<sup>24</sup> Two other early decisions espoused the doctrine of "no literary merit, no protection".<sup>25</sup> Since 1848, however, there have been no cases to this writer's knowledge in support of the doctrine. On the contrary, the reports and texts are replete with authority sustaining the initial cases, often containing vehement language to the effect that each man's labor no matter how humble must not be misappropriated, and moreover that it is well nigh impossible for judges to make scholarly appraisals as to what is "literary" and what is not.<sup>26</sup>

The writer's publication right, which consists of the exclusive right to publish and not to publish,<sup>27</sup> is independent of his intention at the time of writing.<sup>28</sup>

The recipient, generally, is not allowed to disseminate the contents of the letter in its particular form of expression or arrangement of words.<sup>29</sup> This prohibition includes printing or multiplication of copies<sup>30</sup> and would appear to encompass a public reading<sup>31</sup> or a radio or television broadcast.<sup>32</sup> The profit motive is immaterial<sup>33</sup> and it does not matter whether the proposed disseminator

22. Pope v. Curl, 2 Atk. 342, 343 (1741).

23. Thompson v. Stanhope, Amb. 737 (1774).

24. Percival v. Phipps, 2 V. & B. 19 (1813).

25. Hoyt v. MacKenzie, 3 Barb. Ch. 320 (N.Y. 1848); Wetmore v. Scovell, 3 Edw. Ch. 515 (N.Y. 1842).

26. See note 21, *supra*.

27. Bartlett v. Crittenden, 2 Fed. Cas. 967, 968, No. 1076 (1849); Baker v. Libbie, 210 Mass. 599, 607 (1912); Drone, *op. cit. supra*, note 6 at 128.

28. Baker v. Libbie, *supra*, note 27 at 605; Gee v. Pritchard, 2 Swans. 402, 425 (1818).

29. Grigsby v. Breckinridge, 65 Ky. (2 Bush) 480, 488 (1867); Denis v. Leclerc, 1 Mart. 159, 161 (La., 1811); Baker v. Libbie, 210 Mass. 599, 607 (1912); Earl of Granard v. Dunkin, 1 Ball & B. 207 (1809); Fox, *The Canadian Law of Copyright*, 76 (1944); MacGillivray, *op. cit. supra*, note 12 at 128; 46 Yale L.J. 493, 503-505 (1937).

30. Grigsby v. Breckinridge, *supra*, note 29; Baker v. Libbie, *supra*, note 29.

31. Drone, *op. cit. supra*, note 6.

32. Nicholson, *A Manual of Copyright Practice*, 115 (1956).

33. Denis v. Leclerc, 1 Mart. 159, 161 (La., 1811); MacGillivray, *op. cit. supra*, note 12; Drone, *op. cit. supra*, note 6.

is the recipient,<sup>34</sup> a transferee of the recipient<sup>35</sup> or a person who has obtained the letter unlawfully.<sup>36</sup>

One case decided in 1906 held that, at least as to letters published posthumously, the copyright belonged to the successors in interest of the recipient.<sup>37</sup> The court acknowledged that under common law the result would have been different; however, it relied upon the British Copyright Act of 1842. A commentator states that the holding was overruled by the British Copyright Act of 1911 which provided for posthumous copyright in the authors' representatives.<sup>38</sup>

Despite the existence of the writer's right of publication, since general unrestricted publication terminates common law protection,<sup>39</sup> for the writer to preserve his rights in the United States after the first such publication he must comply with the requirements of the Copyright Act (Title 17, United States Code). The scope of rights possessed by the owner changes when the protection shifts from common law to statute.<sup>40</sup>

Whereas the right to the physical property in a letter vests in the recipient, the prevalent view has been that the writer has a property interest in the intellectual content of the letter.<sup>41</sup> One basis for the writer's interest has been the notion that every man is entitled to the fruits of his labor, be it physical or intellectual, and that the time, effort, thought and energy an individual devotes to his product may not be misappropriated. This rationale may, however, be colored by the determination by some courts that (1) injunctive relief was unavailable unless the writer had a property interest, and (2) injunctive relief was warranted.<sup>42</sup>

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34. *Earl of Granard v. Dunkin*, 1 Ball & B. 207 (1809); 46 Yale L.J. 493, 503-505 (1937).

35. *Ibid.*

36. See Fox, *The Canadian Law of Copyright*, 76 (1944).

37. *Macmillan v. Dent*, 1 Ch. 107 (1906).

38. Oldfield, *The Law of Copyright*, 24 (1912).

39. *Holmes v. Hurst*, 174 U.S. 82 (1899); *Jewelers Mercantile Agency v. Jewelers' Weekly Pub.*, 155 N.Y. 241 (1898); *Palmer v. DeWitt*, 47 N.Y. 532, 536 (1872); *Wright v. Eisle*, 86 App. Div. 356 (N.Y. 1903).

40. See Howell, *The Copyright Law*, 106 (1952).

41. *Bartlett v. Crittenden*, 2 Fed. Cas. 967, 970, No. 1076 (1849); *Folsom v. Marsh*, 9 Fed. Cas. 342, 345, No. 4901 (1841); *Grigsby v. Breckinridge*, 65 Ky. (2 Bush) 480, 486, 491 (1867); *Baker v. Libbie*, 210 Mass. 599, 607 (1912); *Matter of Joseph J. Ryan*, 115 Misc. 472, 474 (N.Y. 1921); Ball, *op. cit. supra*, note 18 at 496-497; Drone, *op. cit. supra*, note 6 at 127.

42. *Grigsby v. Breckinridge*, *supra*, note 41 at 486; *Gee v. Pritchard*, 2 Swans. 402, 426 (1818).

The writer's interest has also been predicated upon the existence of an implied contract or trust between the writer and recipient.<sup>43</sup> Usually, the courts have been luke-warm to this approach, seemingly inserting it simply to support their decisions founded primarily on the property concept. Occasionally, there has been very strong feeling one way or the other. At least one court has flatly rejected it.<sup>44</sup> On the other hand, one commentator asserts that it is the only possible justification for restraining publication of letters on business subjects and the like which were never intended to be published.<sup>45</sup> This theory appears to be of dubious validity when the letter is, as is often the case, in the hands of a third party with whom the sender has no relationship whatsoever.

The most controversy is raised by the view that the only true basis for protecting private, non-literary letters is the right of privacy.<sup>46</sup> It is contended that such personal communications do not have the characteristics of property, and that treating the letters as property does not fully protect the privacy of the contents since, speaking generally, under copyright precepts there is no restriction on disseminating the information, as distinct from the means of expression.<sup>47</sup> To this writer's knowledge, no court has accepted this theory and it (or something closely analogous) has been roundly denounced on occasion.<sup>48</sup>

Acknowledging that the writer has the sole authority to publish the letter, may the recipient make any use of it, other than that arising out of his ownership of the physical property? That is, what can he do with the informational content? It is generally thought that the "fair use" doctrine of statutory copyright is inapplicable to common law copyright.<sup>49</sup> Therefore, the use of any component of the work which is susceptible of copyright protection is reserved to the copyright proprietor. There are, however, large segments of a copyrighted work which are not so protected. Two of the prime exceptions relate to the ideas and information contained in the work, as distinguished from the

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43. *Rice v. Williams*, 32 Fed. 437, 440 (1887); *Folsom v. Marsh*, 9 Fed. Cas. 342, 346, No. 4901 (1841); *Baker v. Libbie*, 210 Mass. 599, 606 (1912); *Laidlaw v. Lear*, 30 O.R. (Can.) 26 (1898).

44. *Gee v. Pritchard*, 2 Swans. 402, 426 (1818).

45. *Curtis*, *op. cit. supra*, note 21.

46. *Shaw*, *Literary Property in the United States*, 16 (1950); *Ball*, *op. cit. supra*, note 18 at 498; *Warren & Brandeis*, *The Right to Privacy*, 4 Harv. L. Rev. 200, 201 (1890); *Note*, 12 Va. L. Rev. 656, 657 (1927); *Note*, 31 Harv. L. Rev. 1030, 1031 (1918).

47. *Nizer*, *The Right of Privacy—A Half Century's Developments*, 39 Mich. L. Rev. 526, 537 (1941); *Warren & Brandeis*, *supra*, note 46.

48. *Brandreth v. Lance*, 8 Paige (N.Y.) 24, 28 (1839).

49. *Golding v. Radio Pictures, Inc.*, 193 P.2d 153, 193 (Cal. 1948); *Ball*, *op. cit. supra*, note 18 at 260; 18 C.J.S., *Copyright and Literary Property*, Sec. 5.

literary expression.<sup>50</sup> Thus, in the sphere of letters, such use may be made,<sup>51</sup> unless, perhaps, the letter is marked confidential or appears as such.<sup>52</sup>

Aside from the use that may be made by the recipient of the information and ideas, under certain limited circumstances the writer may be unable to prevent the publication or other general use of the letter. The first such circumstance involves the use of the letter in legal proceedings.<sup>53</sup> This exception covers the situations where the recipient or possessor voluntarily offers the letter in evidence,<sup>54</sup> or is compelled to do so by order of the court.<sup>55</sup> The proceedings must be those of a legally constituted tribunal of a governmental body.<sup>56</sup> If the possessor has obtained the letter unlawfully it probably cannot be used by him in court.<sup>57</sup> Notwithstanding the permissible uses in court proceedings, such use cannot be made if the letter might tend to incriminate the person required to produce it<sup>58</sup> or if the letter is a privileged communication.<sup>59</sup>

The second circumstance under which the writer cannot prevent publication arises when the writer is an employee of the government or when the letter is written to the government.<sup>60</sup> When the writer is an employee of the government and the letter is sent in an official capacity, it has been said that the letter is a public document in which there can be no copyright.<sup>61</sup> If there is

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50. *Baker v. Selden*, 101 U.S. 99 (1879); *Chicago Record v. Tribune Association*, 275 Fed. 797 (1921).
  51. *Philip v. Pennell*, 2 Ch. 577 (1907); *Labouchere v. Hess*, 77 L.T. 559 (1897); Copinger and Skone James, *Law of Copyright*, 37 (1958); Shaw, *op. cit. supra*, note 46 at 111, 112; Fox, *op. cit. supra*, note 29 at 118; Ladas, *The International Protection of Literary and Artistic Property*, 712 (1938); Weil, *American Copyright Law*, 132 (1917).
  52. *Philip v. Pennell*, *supra*, note 51.
  53. *Folsom v. Marsh*, 9 Fed. Cas. 342, 346, No. 4901 (1841); *State ex rel. Clemens*, 360 Mo. 274 (1950); *Baldwin v. Von Micheroux*, 83 Hun. (N.Y.) 43 (1894); *Dock v. Dock*, 180 Pa. 14 (1897); *Barrett v. Fish*, 72 Vt. 18 (1899); *Amdur*, *op. cit. supra*, note 18 at 46; *Bowker*, *op. cit. supra*, note 12; *Oldfield*, *The Law of Copyright*, 24 (1912).
  54. *Barrett v. Fish*, *supra*, note 53.
  55. *State ex rel. Clemens*, 360 Mo. 274 (1950).
  56. *King v. King*, 25 Wyo. 275 (1917).
  57. Fox, *op. cit. supra*, note 36.
  58. *Barrett v. Fish*, 72 Vt. 18 (1899).
  59. *Bowker*, *op. cit. supra*, note 12.
  60. *Folsom v. Marsh*, 9 Fed. Cas. 342, 347, No. 4901 (1841); Copinger and Skone James, *Law of Copyright*, 28 (1958); Spring, *Risks & Rights in Publishing, Television, Radio, Motion Pictures, Advertising and the Theater*, 80 (1956); *Drone*, *op. cit. supra*, note 6 at 132.
  61. Spring, *op. cit. supra*, note 60; see 17 U.S.C. Sec. 8 with respect to statutory copyright in public documents.

no copyright then it would seem that anyone could publish the letter, unless the aforementioned "implied trust or contract" doctrine were applicable.

It has been suggested that in certain instances the government may have the right to publish, or suppress the publication of, non-public documents on the broad ground of "public policy".<sup>62</sup> Thus far no court has, in so many words, adopted this position.

When a letter is written by a servant or agent in the course of his employment or agency, the property in the letter belongs to the master or principal and the writer does not have the right to prevent publication nor does he have the right to publish it himself.<sup>63</sup> Where a letter appears to have been written on behalf of a principal, it does not lie with the writer to contend it was written in a private capacity.<sup>64</sup> Where, however, the writer is an independent contractor (such as an attorney or accountant writing to a client) the converse is true.<sup>65</sup>

It has often been said that a recipient of a letter may use it in any way necessary to effect the vindication of his character.<sup>66</sup> This privilege has been limited to a prohibition of publication merely for revenge or to gratify personal enmity.<sup>67</sup> With such a vague conception as vindication of character, it would seem that this restriction increases the difficulty surrounding application of the principle. For this reason, and in view of the possibility of disproportionate injury to the writer from often-fancied grievances, the vindication doctrine has been vigorously attacked.<sup>68</sup> If the recipient has been unjustly harmed by the writer's exposure of the letter to others he may have a remedy in libel or right of privacy.

The fact that a letter might be written for an unlawful purpose or contains unlawful material has been set forth as another basis for denying the writer exclusivity in publication.<sup>69</sup> The generality of this view has been challenged<sup>70</sup> and in at least one case it has been held inapposite.<sup>71</sup>

62. Copinger and Skone James, *Law of Copyright*, 28 (1958); Curtis, *op. cit. supra*, note 21 at 98.

63. Baker v. Libbie, 210 Mass. 599, 605 (1912); Howard v. Gunn, 32 Beav. 462 (1863); MacGillivray, *op. cit. supra*, note 12; Drone, *op. cit. supra*, note 6 at 134.

64. Howard v. Gunn, *supra*, note 63.

65. Ipswich Mills v. Dillon, 260 Mass. 453, 457 (1927).

66. Folsom v. Marsh, 9 Fed. Cas. 342, 346, No. 4901 (1841); Widdemer v. Hubbard, 19 Phila. (Pa.) 263 (1887); Labouchere v. Hess, 77 L.T. 559 (1897); Earl of Lytton v. Devey, 52 L.T. 121, 122 (1884).

67. Roberts v. McKee, 29 Ga. 161, 164 (1959).

68. Drone, *op. cit. supra*, note 6 at 138; 46 Yale L.J. 493, 503-505 (1937).

69. Knights of the Ku Klux Klan v. International Magazine Co., 294 Fed. 661 (1923); see Southey v. Sherwood, 2 Mer. 434 (1817); Ball, *op. cit. supra*, note 18 at 496; Fox, *The Canadian Law of Copyright*, 77 (1944).

70. Cookson v. Poutney, 81 Solicitors Journal 528.

71. British Oxygen Company, Ltd. v. Liquid Air, Ltd., 1 Ch. 383 (1925).

Finally, the recipient of a letter is not prohibited from publishing it where publication would seem reasonable due to the relationship between the parties, such as letters written to newspapers.<sup>72</sup>

It has further been said that not only does the newspaper have the right to publish the letter but that it may also alter it as long as the alterations do not affect the credit or literary reputation of the writer.<sup>73</sup>

Previously we noted alienability aspects of the recipient's physical property interest in the letter. Similarly, the writer can convey freely his interest during his life or by bequest,<sup>74</sup> but creditors cannot cause an involuntary alienation.<sup>75</sup> This writer thinks such treatment is inconsistent with the treatment of letters as property. The involuntary inalienability approach is especially difficult to justify to creditors of the writer and/or recipient where the letters have undeniable value as literary works and/or collectors' items.

The primary concern of those finding fault with existing law is the protection afforded "non-literary" compositions which might well be of paramount public interest. It is thought that perpetual copyright in unpublished works, when extended to private letters containing information of historical and biographical value, tends to stultify the educational processes of mankind. Writers who would change the present law look to the doctrine of the "right of privacy".<sup>76</sup> They claim that it is actually a right of personality rather than property, a right to be left alone, that is at stake. As soon as the need for protecting such interest subsides, so should the inviolability of the letters, which are after all, it is said, only manifestations of the personality. Does this thesis withstand close scrutiny? Long ago, as was pointed out above, it was decided that letters which on their face might not have appeared "literary" should be accorded protection largely due to the inability of judges to make esthetic determinations. This pitfall stands in the path of the applicability of a right of privacy concept to letters.

Manifestly, acknowledged literary works in letter form should be susceptible of protection as property. If, as would seem to be the case, "literary" letters are to fall under the aegis of the copyright law as property and "non-literary" letters are to be in the tort law province of the right of privacy, will not the same impossible literary appraisal be demanded of judges? The practical

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72. Copinger and Skone James, *Law of Copyright*, 27 (1958); Ball, *op. cit. supra*, note 18 at 498; Amdur, *op. cit. supra*, note 18 at 46.

73. Copinger and Skone James, *op. cit. supra*, note 72.

74. *Bartlett v. Crittenden*, 2 Fed. Cas. 967, 968, No. 1076 (1849); *Denis v. Leclerc*, 1 Mart. (La.) 159, 161 (1811); *Baker v. Libbie*, 210 Mass. 599, 607 (1912).

75. *Bartlett v. Crittenden*, *supra*, note 74. *Contra*, *Banker v. Caldwell*, 3 Minn. 94 (1859).

76. Shaw, *op. cit. supra*, note 46 at 16-18, 107-108; Warren & Brandeis, *op. cit. supra*, note 46; Note, 44 Iowa L. Rev. 705, 711-715 (1959).

effect of treating one item as property and another as simply an "extension of the personality" is staggering. Under present law, common law copyright is perpetual while privacy protection usually ceases upon death.<sup>77</sup> One commentator recognizes this problem but asserts that the way out is for the writer of the letter to secure statutory copyright protection.<sup>78</sup> This, however, is begging the question. If it is felt so strongly that privacy is the only proper concept, does it not do an injustice to that concept to suggest a manner under which the whole fervently sought principle of privacy might be circumvented? The commentator is suggesting that in order to protect the property interests of those whose letters are "literary" the gate should be opened to all letters, since there is little doubt that all letters are entitled to statutory protection.<sup>79</sup> This is the dilemma faced by those who would embrace the privacy viewpoint.

Furthermore, fairness would require that all non-artistic "private" creations should be removed beyond the pale of protectibility. Thus the same esthetic appraisal would be necessary in the case of paintings, drawings, etchings and photographs. Since most of these presumably could not be secured solely to the author under privacy principles (unless they be stretched to the breaking point), they would be totally unprotected.

Consistency would also demand that writings in non-letter form, such as memoirs and diaries, which candidly and graphically reveal personal characteristics, be subsumed in the privacy category, rather than be classed as true literary creations.

Therefore, this writer believes that the present copyright or property concept in the area of letters is the most workable. It is also the most predictable, which is no mean accomplishment. In dealing with manuscripts and paintings, the highest court of New York has had difficulty in determining ownership of the copyright when the physical object had been transferred. It has held that the copyright in a manuscript belongs to the representatives of the writer,<sup>80</sup> but that the copyright in a painting belonged to the owner of the work.<sup>81</sup> Oddly enough, although both decisions were unanimous, four of the judges participating in the first case participated in the second case.

As to the *duration* of copyright protection, this writer believes that forever is too long in the case of any unpublished works, including letters. One of the two primary purposes of copyright (other than the encouragement of

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77. Prosser, Privacy, 48 Cal. L. Rev. 383, 408 (1960); Nizer, *op. cit. supra*, note 47 at 553; N. Y. Civil Rights Law, Secs. 50, 51; see *In re McCormick*, 80 D. & C. (Pa.) 413 (1952).

78. Note, 44 Iowa L. Rev. 705, 712 (1959).

79. See *Bleistein v. Donaldson*, 188 U.S. 239 (1903).

80. *Chamberlain v. Feldman*, 300 N.Y. 135 (1949).

81. *Pushman v. New York Graphic Society, Inc.*, 287 N.Y. 302 (1942).

intellectual creativity) is to provide rewards to the author and benefits to his family. It is elemental that monopoly in perpetuity is not necessary to assist such persons. It is the unusual man who is concerned about his descendants in centuries to come. Perpetual common law copyright cannot help an author to make a better deal for his work since any disposition made by him would undoubtedly contemplate publications which would destroy the perpetual monopoly.

Since there is no benefit to the author or his family from an unlimited term of copyright, we must ask about harm to the public. No extended discussion is needed on this point. It is evident that scholarly, scientific and literary research may be thwarted by failure either to find legal representatives of long dead writers or to obtain the consent to publication from representatives to whom the writer may be little more than a name or the subject of family stories.

Although it would appear correct to limit the length of the protection, the problem of duration remains. In a concurring opinion in *Eyre v. Higbee*, 35 Barb. (N.Y.) 512 (1861), the judge suggested "a reasonable length of time". However, for administration purposes, as has been recognized in all copyright statutes, a cut-off date is needed.

The new British Copyright Act of 1956 has taken limited cognizance of the problem of unpublished manuscripts,<sup>82</sup> including letters,<sup>83</sup> by providing, in the case of such works reposing in libraries or museums, that fifty years after the author's death, provided one hundred years has elapsed from the date of the completion of the work, if the copyright proprietor cannot be ascertained, the work may be published. This halting step in the right direction is of limited utility, largely due to the possibility of remote descendants preventing publication.

Another suggestion, further along on the proper path, is that, for letters of literary or historical interest, the recipient should be granted a compulsory license to publish unless the heirs can demonstrate in court why such should not be allowed.<sup>84</sup>

This writer prefers the standard European approach for published works. The life of the author plus fifty years should adequately balance the competing interests in all classes of unpublished works. Urgent, immediate demands of scholarship would be met by the privilege of using the information, if not the exact language,<sup>85</sup> while those to whom the writer owed the closest loyalty should have passed off the scene by the termination of the suggested period.

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82. 4 & 5 Eliz. 2, C. 74.

83. Copinger and Skone James, *Law of Copyright*, 29 (1958).

84. Note, 46 *Yale L.J.* 493, 504-505 (1937).

85. See text at footnote 50.

**PART II.****LEGISLATIVE AND ADMINISTRATIVE  
DEVELOPMENTS****1. UNITED STATES OF AMERICA AND TERRITORIES****274. U. S. CONGRESS. HOUSE.**

H.R. 6354. A bill to provide (1) criminal penalties for the counterfeiting of phonograph records and (2) civil remedies for infringement of mechanical rights in copyrighted music. Introduced by Mr. Celler, April 17, 1961, and referred to the Committee on the Judiciary. 2 p. (87th Cong., 1st sess.).

A bill which would amend the criminal provisions of the United States Code by providing a \$10,000 fine or 10-year imprisonment, or both, for transporting or receiving in interstate or foreign commerce, any type of recording upon which a counterfeit label appears, or upon which a sound recording is reproduced without the authorization of the owner of the master recording. In addition, the bill would amend the copyright law to provide that the copyright proprietor may, in lieu of the triple damage provisions of section 101(e), have the remedies set forth in section 101(b).

**275. U. S. CONGRESS. HOUSE.**

H.R. 6776. A bill to encourage the creation of original ornamental designs of useful articles by protecting the authors of such designs for a limited time against unauthorized copying. Introduced by Mr. Flynt on May 3, 1961, and referred to the Committee on the Judiciary. 23 p. (87th Cong., 1st sess.).

Similar in most respects, but containing several important differences to bills on the same subject introduced in the 86th Congress.

**276. U. S. CONGRESS. HOUSE.**

H.R. 6777. A bill to encourage the creation of original ornamental designs of useful articles by protecting the authors of such designs for a limited time against unauthorized copying. Introduced by Mr. Ford on May 3, 1961, and referred to the Committee on the Judiciary. 23 p. (87th Cong., 1st sess.).

Identical with H.R. 6776, *supra*.

## 277. U. S. CONGRESS. SENATE.

S. 1884. 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. Hart (for himself, Mr. Wiley, and Mr. Talmadge) May 16, 1961, and referred to the Committee on the Judiciary. 23 p. (87th Cong., 1st sess.).

Companion bill to H.R. 6776 and H.R. 6777. See Items 275, 276, *supra*.

## 278. U. S. CONGRESS. SENATE.

Hart, Philip A. Protection against unauthorized copying of original ornamental designs of useful articles. *Congressional Record*, vol. 107, no. 81, daily ed. May 16, 1961, p. 7479.

Remarks of Senator Hart when he introduced S. 1884. See Item 277, *supra*.

279. 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. 240, Eighty-sixth Congress, second session, as extended, together with individual views. Washington, U. S. Govt. Print. Off., April 3, 1961. 28 p. (87th Cong., 1st sess. Senate. Report no. 143).

The annual report of the Subcommittee includes a review of copyright hearings and legislation of the 86th Congress. In addition to mention of the design bills, S. 2075 and S. 2852, the new Government infringement law, P.L. 86-726, and the completion of the committee prints of the copyright law revision studies, the report stresses "the need for a more specific legislative definition of Government publications which may not be copyrighted," with reference to the court of appeals decision in the *Rickover* case.

## 280. U. S. COPYRIGHT OFFICE.

The copyright notice. Washington, Apr. 1961. 2 p. (Cir. 3.)

A substantially revised circular which describes the proper form and position of the copyright notice, under the U. S. Copyright Act and the Universal Copyright Convention, for the various classes of copyrightable works.

## 281. U. S. COPYRIGHT OFFICE.

Copyright protection in foreign countries for United States citizens. Washington, Mar. 1961. 2 p. (Cir. 37.)

A completely revised circular giving brief and general descriptions of some of the main characteristics of arrangements under which protection abroad is available to works of American citizens.

## 282. U. S. COPYRIGHT OFFICE.

Notice of use of music on mechanical instruments. Washington, Apr. 1961. 2 p. (Cir. 5.)

A substantially revised circular which explains the steps a copyright owner should take in the Copyright Office to protect the mechanical reproduction rights in his musical compositions under the compulsory licensing provisions of the Copyright Act, the texts of which appear at end.

## 283. U. S. COPYRIGHT OFFICE.

Securing copyright for motion pictures. Washington, Mar. 1961. 2 p. (Cir. 7.)

A substantially revised circular outlining the classes of motion pictures registrable for copyright and the formalities required for securing copyright and registration of claims thereto. The texts of the relevant provisions of the Copyright Act appear at end.

## 284. U. S. COPYRIGHT OFFICE.

Sixty-third annual report of the Register of Copyrights for the fiscal year ending June 30, 1960. Washington, 1961. 19 p.

"Reprinted from the Annual report of the Librarian of Congress for the fiscal year ending June 30, 1960."

In addition to a narrative account of copyright developments during the fiscal year, this last report of the late Register of Copyrights includes a brief survey of Copyright Office activities in the field of domestic and international copyright during the decade covered by fiscal years 1951-60. Tabular statements of the copyright business for the fiscal years 1956-60 and a list of copyright law revision studies are appended.

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## 2. FOREIGN NATIONS

### 285. GERMANY (FEDERAL REPUBLIC 1949- ) *Laws, statutes, etc.*

Gesetz über den Vertrag vom 11. Mai 1959 zwischen der Bundesrepublik Deutschland und der Republik Kolumbien über den gegenseitigen Schutz von Werken der Wissenschaft, Literatur und Kunst vom 16. Januar 1961. (63 *Blatt für Patent-, Muster- und Zeichenwesen* 119-120, no. 3, Mar. 1961.)

The law of January 16, 1961 ratifying the Treaty of May 11, 1959, between West Germany and Colombia concerning the reciprocal protection of scientific, literary and artistic works, followed by the text of the Treaty.

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## PART III.

CONVENTIONS, TREATIES AND  
PROCLAMATIONS286. DIPLOMATIC CONFERENCE ON THE INTERNATIONAL PROTECTION OF  
PERFORMERS, PRODUCERS OF PHONOGRAMS AND BROADCASTERS

*Editor's Note:* The Draft Final Clauses of the International Convention concerning the Protection of Performers, Makers of Phonograms, and Broadcasters, prepared for the Diplomatic Conference as a result of the meeting and resolutions adopted at The Hague, May 9-20, 1960 (reported 8 BULL. CR. SOC. 31, Item 15, October 1960), are here set forth in entirety:

## DRAFT FINAL CLAUSES

*(Submitted jointly by the International Labour Office, the Secretariat of the United Nations Educational, Scientific and Cultural Organization, and the Bureau of the International Union for the Protection of Literary and Artistic Works.)*

*Note*

During the meeting of the Committee of Experts held at The Hague from 9th to 20th May, 1960, it was agreed that the Secretariats of the three organizations would prepare jointly draft final clauses, and would report on this subject to the Diplomatic Conference convened for the adoption of an international Convention concerning the Protection of Performers, Producers of Phonograms and Broadcasters.

In preparing the draft final clauses set out below, the three Secretariats acknowledged that they were not concerned with an instrument prepared under the auspices of one or another of the interested organizations, but rather an instrument of a special character for which provisions likely to provide a common denominator ought to be secured. They were accordingly obliged to forego the adoption of particular systems, such as the provision contained in Article 24, paragraph (3), of the Berne Convention.

The Draft Convention adopted by the Committee of Experts at The Hague consisted of 17 articles. Accordingly, the draft final clauses jointly submitted by the three Secretariats to the Diplomatic Conference are numbered from 18 to 29.

*Article 18*

## Date, Signature and Deposit

The present Convention, which shall bear the date of ..... 1961, shall be deposited with the Secretary-General of the United Nations and shall

remain open until 31st December, 1961, for signature by all States invited to the Conference (which adopted it).

#### *Article 19*

##### Ratification, Acceptance, Accession

1. The present Convention shall be subject to ratification or acceptance by the signatory States.

2. The present Convention shall be open for accession by all States mentioned in Article 18 which have not signed it, as well as any other State which shall become a member of the United Nations.

3. Ratification, acceptance or accession shall be effected by the deposit of an instrument to that effect with the Secretary-General of the United Nations.

#### *Article 20*

##### Entry into force

1. The present Convention shall enter into force three months after the date of deposit of the third instrument of ratification, acceptance or accession.

2. Thereafter, it shall enter into force for each State three months after the deposit of its instrument of ratification, acceptance or accession.

#### *Article 21*

##### Effective Application

1. Each Contracting State undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of the present Convention.

2. At the time of deposit of its instrument of ratification, acceptance or accession, each State must be in a position under its domestic law to give effect to the terms of the present Convention.

#### *Article 22*

##### Denunciation

1. Any Contracting State may denounce the present Convention, on its own behalf, or on behalf of all or any of the territories for whose international relations it is responsible.

2. The denunciation shall be effected by a notification addressed to the Secretary-General of the United Nations and shall take effect twelve months after the date of receipt of the notification.

3. The right of denunciation contemplated by the present Article shall not be exercised by a Contracting State before the expiration of a period of five years from the date on which such State became a party to the Convention.

4. Each Contracting State which does not, within a year following the expiration of the period of five years mentioned in the preceding paragraph, exercise the right of denunciation provided for in the present Article, shall be bound for another period of five years and, thereafter, may denounce this Convention at the expiration of each period of five years under the conditions of this Article.

### *Article 23*

#### Revision

1. After the present Convention has been in force for five years, any Contracting State may, by notification addressed to the Secretary-General of the United Nations, request that a conference be convened for the purpose of revising the present Convention. The Secretary-General shall notify all Contracting States of this request. If, within a period of six months following the date of notification by the Secretary-General of the United Nations, not less than one half of the Contracting States notify him of their concurrence with the request, the Secretary-General shall inform the Directors-General of the International Labour Office and the United Nations Educational, Scientific and Cultural Organization and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works, who shall convene a conference of revision.

2. In the event of adoption of a new Convention revising the present Convention in whole or in part, and unless the revising Convention provides otherwise—

- (a) this Convention shall cease to be open to ratification, acceptance or accession as from the date of entry into force of the revising Convention;
- (b) the present Convention shall remain in force in relations with the Contracting States which have not become parties to the new Convention.

3. Such revision shall bind only those States which become parties to the revising Convention.

### *Article 24*

#### Disputes

A dispute between two or more Contracting States concerning the interpretation or application of the present Convention which is not settled by negotiation shall, unless the States concerned agree on some other method of

settlement, be brought before the International Court of Justice for determination by it.

#### *Article 25*

##### Territorial Extension of the Convention

Any Contracting State may, at the time of ratification, acceptance or accession, or at any time thereafter, declare by notification addressed to the Secretary-General of the United Nations that the present Convention shall extend to all or any of the territories for whose international relations it is responsible. The said notification shall take effect three months after the date of its receipt.

#### *Variant*

#### *Article 25*

##### Territorial Extension of the Convention

1. The present Convention shall apply to all non-self-governing, trust, colonial and other non-metropolitan territories for the international relations of which any Contracting State is responsible; the Contracting State concerned shall, subject to the provisions of paragraph 2 of this Article, at the time of ratification or acceptance of, or accession to, the present Convention, declare the non-metropolitan territory or territories to which the present Convention shall apply "ipso facto" as a result of such ratification, acceptance or accession.

2. In any case in which the previous consent of a non-metropolitan territory is required by the constitutional laws or practices of the Contracting State or of the non-metropolitan territory, that State shall endeavour to secure the needed consent of the non-metropolitan territory within the period of twelve months from the date of ratification, acceptance or accession, and when such consent has been obtained, notify the Secretary-General of the United Nations. This Convention shall apply to the territory or territories named in such notification three months after the date of its receipt by the Secretary-General.

3. After the expiry of the twelve month period mentioned in the preceding paragraph, the Contracting States concerned shall inform the Secretary-General of the United Nations of the results of the consultations with those non-metropolitan territories for whose international relations they are responsible and whose consent to the application of the present Convention may have been withheld.

#### *Article 26*

##### Reservations

Without prejudice to the provisions of Article 15, no reservation may be made to this Convention.

*Article 27*

## Control of the Application of the Convention

1. Each Contracting State shall prepare every ..... years a report containing information concerning any measures taken, under preparation, or contemplated by its administration in fulfilment of the present Convention. This report shall be communicated to the Directors-General of the International Labour Office and the United Nations Educational, Scientific and Cultural Organization, and to the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works.

2. The reports thus received shall be submitted to a Committee composed of twelve experts, of whom four shall be designated by the International Labour Organization, four by the United Nations Educational, Scientific and Cultural Organization and four by the International Union for the Protection of Literary and Artistic Works.

3. Officials of the three organizations concerned, designated by them, shall constitute the Secretariat of the Committee of Experts.

4. The Committee shall establish its own rules of procedure.

5. The Committee shall adopt at the end of each of its sessions, a report which shall be addressed to the three organizations with a view to its consideration by the competent bodies of the said organizations.

*Article 28*

## Languages

The present Convention is drawn up in English, French and Spanish, the three texts being equally authoritative.

*Article 29*

## Notification

1. The Secretary-General of the United Nations shall notify the States referred to in Articles 18 and 19, as well as the Directors-General of the International Labour Office, the United Nations Educational, Scientific and Cultural Organization and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works, of the deposit of each instrument of ratification, acceptance or accession mentioned in Article 19, as well as of notifications contemplated by Articles 22 and 25.

2. The Secretary-General of the United Nations shall also notify the Directors-General of the International Labour Office and the United Nations

Educational, Scientific and Cultural Organization, and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works, of the requests communicated to him in accordance with Article 23, as well as of any communication received from the Contracting States on this subject.

IN FAITH WHEREOF, the undersigned, duly authorized, have signed the present Convention.

Done at ....., the ..... 1961, in a single copy. Certified true copies shall be delivered by the Secretary-General of the United Nations to all the States referred to in Articles 18 and 19, as well as to the Directors-General of the International Labour Office and the United Nations Educational, Scientific and Cultural Organization and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works.

287. DAHOMEY.

Déclaration de continuité à la Convention de Berne pour la protection des oeuvres littéraires et artistiques, révisée à Bruxelles le 26 juin 1948 (sans interruption à partir du 26 mai 1930). (14 *Le Droit d'Auteur* 69-70, no. 3, Mar. 1961.)

Notification of February 28, 1961, by the Swiss Government to the Governments of the Berne Union countries, of the declaration of continuity, by the new Republic of Dahomey, of its adherence to the Brussels revision of the Berne Convention, thus reaffirming the French ratification of the Convention with respect to Dahomey and certain other French colonies on October 23, 1951. The text of the note of continuity, dated January 3, 1961, from the Prime Minister of the new republic to the Swiss Government, is appended.

288. Intergovernmental Copyright Committee. *5th session, London, 1960.*

Records. (13 *UNESCO Copyright Bulletin* 227-354, no. 2, 1960.)

Contents.—Records: A. Report. B. Resolutions. C. List of participants.—Annexes: Criminal proceedings in cases of copyright infringement (report of the Secretariat). Translators' copyright (report of the International Federation of Translators).

In English, French and Spanish.

289. International Copyright Union.

La protection des oeuvres cinématographiques. The protection of cinematographic works. (74 *Le Droit d'Auteur* no. 1, Jan. 1961, pp. 19-25; no. 2, Feb. 1961, pp. 62-68; no. 3, Mar. 1961, pp. 86-104.)

A report, in French and English in parallel columns, submitted pursuant to a resolution of the Permanent Committee of the Berne Union requesting 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.' In view of the fact that the protection system adopted by the Berne Convention differs from that of the Universal Convention of Geneva—which confines itself to include cinematographic works in the list of protected works (Article I)— . . . [the report takes] into consideration certain legal problems which pose themselves within the framework of the first Convention . . . Thus . . . [the first part of the report] is limited to emphasising the points in regard to which the Berne Convention could be revised . . ." The second part summarizes the national legislation of the Berne Union member countries.

290. SWEDEN.

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 1<sup>er</sup> juillet 1961). (74 *Le Droit d'Auteur* 137, no. 5, May 1961.)

Letter of notification, by the Swiss Government to the member countries of the Berne Union, of receipt of a note, dated Feb. 21, 1961, from the Swedish Ambassador at Berne, telling of Sweden's adherence, on Feb. 10, 1961, to the Brussels revision of the Berne Convention, effective July 1, 1961. The text of the note, which includes a statement that Sweden has enacted legislation providing for a term of protection of fifty years plus life of the author, also effective July 1, 1961, appears at end of the letter of notification.

291. UNITED ARAB REPUBLIC (Province of Syria).

Dénonciation de la Convention de Berne pour la protection des oeuvres littéraires et artistiques, révisée à Rome le 2 juin 1928 (avec effet à partir du 12 janvier 1962). (74 *Le Droit d'Auteur* 70, no. 3, Mar. 1961.)

Notification, by the Swiss Government to the Governments of the Berne Union countries, of the denunciation by Syria, as a province of the United Arab Republic, of the Rome Revision of the Berne Convention, to take effect on January 12, 1962. The text of the note of denunciation, dated January 12, 1961, from the Ambassador of the United Arab Republic to the Swiss Government, is appended.

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## PART IV.

**JUDICIAL DEVELOPMENTS IN LITERARY  
AND ARTISTIC PROPERTY**

## A. DECISIONS OF U. S. COURTS

## 1. Federal Court Decisions

292. *Norbay Music, Inc. v. King Records, Inc., not yet reported*, Docket No. 26552 (2d Cir., May 25, 1961).

*Editor's Note:* The decision of the lower court (*Edelstein, J.*) was digested at 7 BULL. CR. SOC. 293, Item 391 (August 1960).

Norbay Music, Inc., appeals from a decision, D. C. S. D. N. Y., 185 F. Supp. 253, and summary judgment dismissing its action for infringement of a copyrighted musical composition by phonograph records manufactured by defendant King Records, Inc. Reversed and remanded.

*CLARK, Circuit Judge:*

Plaintiff Norbay Music, Inc., appeals from a summary judgment granted defendant King Records, Inc., in an action for infringement of plaintiff's copyrighted musical composition. Plaintiff, a music publisher, copyrighted the musical composition "Slow Walk" in 1956, and on October 2, 1956, licensed Mercury Records to manufacture and distribute phonograph records of it. Shortly thereafter, defendant recorded this same composition without first obtaining a license from plaintiff, and without serving upon it a notice of intention to use, in compliance with 17 U. S. C. §101(e).<sup>1</sup> The complaint in this action seeks the statutory royalty of two cents per record for each infringing record manufactured by defendant. The complaint further alleges in a second count that defendant rejected plaintiff's demands for royalties due, and that plaintiff is therefore entitled to treble the amount of such royalties under 17 U. S. C. §1(e).

The district court gave summary judgment for the defendant on the ground that plaintiff failed to file a "notice of use" in the copyright office until November 26, 1957, long after the initial license to Mercury Records. In a reasoned opinion, D. C. S. D. N. Y., 185 F. Supp. 253,

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1. While the complaint suggests that defendant may have manufactured records of "Slow Walk" in late September 1956, plaintiff's affidavits on summary judgment make no bona fide effort to show that defendant's infringement predated the license to Mercury Records.

Judge Edelstein ruled that such a delay in filing barred all relief, pursuant to the following provisions of 17 U. S. C. §1(e): "It shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright."

The problem here arises from the statutory provisions of the Act of 1909 designed to negate the effect of the decision in *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U. S. 1, 14 Ann. Cas. 628, that a music roll was not a "copy" of a copyrighted musical composition. But the distrust of monopoly was so great that the form of remedy chosen was that of the famous compulsory license to all others at two cents a record, once the owner of a musical copyright has made or allowed others to make a mechanical reproduction of the work. 17 U. S. C. §1(e), *supra*. This has been the subject of sharp debate practically ever since. See Henn, *The Compulsory License Provisions of the United States Copyright Law 9-14 (1957)*, a study prepared for the United States Copyright Office; Kaplan, *Performer's Right and Copyright: The Capitol Records Case*, 69 Harv. L. Rev. 409 (1956); Chafee, *Reflections on the Law of Copyright: II*, 45 Col. L. Rev. 719, 735-737 (1945). But against this background the function of the special defense here relied on seems reasonably clear. The "notice of use" provision is designed to notify all other persons that a musical composition has become available for mechanical reproduction. See *Leo Feist, Inc. v. American Music Roll Co.*, 3 Cir., 251 Fed. 245, 247. The statute is quite silent, however, as to when the notice shall be filed beyond the necessary implication that it must be done before suit is instituted if a successful defense is to be avoided. The Copyright Office's Information Circular No. 5, "Notice of Use of Music on Mechanical Instruments," directs the proprietor to file the notice "[a]s soon as the copyright owner has recorded his work or licensed someone else to make the first recordings."<sup>2</sup> But this admonition does not tell us what happens in the event of a delayed filing. Analogy might be sought in the general provisions for copyright which require the owner to deposit copies of the copyrighted work "promptly" after publication

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2. Two bills considered in connection with the enactment of §1(e) contained the even stricter requirement that notice of use be filed before the copyright proprietor permits manufacture. H. R. 24782, 60th Cong., 2d Sess. (1908), and H. R. 25162, 60th Cong., 2d Sess. (1909), set forth in Henn, *The Compulsory License Provisions of the United States Copyright Law 9-14 (1957)*, *supra*. The reason for deletion of this express language setting forth the time for filing notice does not appear.

with the Register of Copyrights. In *Washingtonian Pub. Co. v. Pearson*, 306 U. S. 30, it was held that, once the deposit had been made, even though belatedly, the owner may recover for earlier infringements. But the statute 17 U. S. C. §13 is somewhat clearer than 17 U. S. C. §1(e), since it forbids suit merely *until* its provisions are complied with.

Upon the decisive issue before us, the court below concluded that a tardy filing would bar suit for all acts of infringement, including infringement occurring after the tardy filing. Truly this permanent forfeiture of the semi-exclusive right to mechanical reproduction is a drastic method of punishing the late filer. The statutory language does not compel such a result, since the "complete defense" referred to could well apply only to actions for infringement occurring prior to filing. Such a construction would seem the more reasonable one, since it retains a powerful incentive to file early, but does not impose a sanction more severe than is necessary to accomplish the intended result. A substantial amount of the profits derived from a song will be made during the period of initial popularity, shortly after the release of the first recordings. If the copyright proprietor is denied protection against infringers until it files, it will surely file promptly if given proper legal advice. Otherwise it forfeits the right to recover much, and possibly most, of the damages it would be entitled to collect from infringers. The drastic view accepted below furnishes no extra incentive to file promptly. It will only increase, for no useful purpose, the penalty imposed upon the small operator who lacks the finances or good sense to secure proper legal advice.

We therefore hold that the plaintiff's failure to file a timely notice of use bars suit for acts of infringement occurring prior to the time notice was filed, but not for acts occurring afterwards. Our decision is quite consistent with *Stasny Music Corp. v. Santly-Joy, Inc.*, 2 Cir., 249 F. 2d 957, affirming on opinion below, D. C. S. D. N. Y., 156 F. Supp. 795, where no notice of use was filed prior to the commencement of suit, and the complaint apparently sought relief only for acts of infringement occurring prior to filing. In *Biltmore Music Corp. v. Kittinger*, 9 Cir., 238 F. 2d 373, certiorari denied 352 U. S. 954, also cited below, it is unclear whether or when notice was filed; and the opinion does not discuss the exact point. As Judge Edelstein conceded, there is no controlling precedent for his decision.<sup>3</sup> We feel at liberty to accept the more moderate construction of the statute as indicated.

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3. Some text writers hold that notice may be filed at any time before suit. 2 Ladas, *The International Protection of Literary and Artistic Property* 792 (1938); Weil, *American Copyright Law* 97 (1917); Derenberg, *Copyright Law*, 36 N. Y. U. L. Rev. 585, 598-599 (1961). Authorities cited by defendant as opposing seem only to advise

Since the "complete defense" provision applies by its terms only to actions for "infringement," plaintiff attempts to avoid the bar of that provision by suing for "royalties" under 17 U. S. C. §1(e), rather than for infringement under 17 U. S. C. §101(e). We do not think this change of nomenclature can have the effect thus contended for. Section 101(e) clearly treats the term "infringement" as embracing "unauthorized manufacture" occurring after the copyright proprietor has licensed mechanical reproduction. Since a once-recorded composition is available to all third parties "upon the payment" of a two-cent royalty, manufacture at this point can be "unauthorized" only in that the third party fails to make the required payments. Thus §101(e), in treating "unauthorized manufacture" as infringement, treats nonpayment of the statutory royalty as an act of infringement. We conclude, therefore, that the "complete defense" provision, in barring actions for infringement, applies to all actions for unpaid statutory royalties, however they may be named.

Section 101(e) provides that any person intending to use mechanical reproductions of musical compositions in the absence of a license agreement and under the compulsory license provisions of §1(e) shall serve notice of such intention, by registered mail, upon the copyright proprietor, sending a duplicate to the copyright office. Defendant served no such notice here, and it might be claimed that for this violation of a statutory duty it lost its immunity from suit for infringement for the copying it did even before plaintiff filed its notice of use. But the same statute, 17 U. S. C. §101(e), itself provides a definite sanction thus: "and in case of his failure so to do the court may, in its discretion," award a further sum to the complainant, not to exceed three times the royalties provided in §1(e), with a temporary injunction until the full award is paid. We cannot well extend this statutory provision, to make it applicable to copying before the notice. It is applicable, however, thereafter. Hence, under the view we have taken, plaintiff is entitled to recover the statutory royalty of two cents for each record manufactured after the filing of the plaintiff's notice of use; and the district court may, in its discretion, grant plaintiff an additional award not to exceed three times the royalties found to be due, together with costs and a reasonable attorney's fee.

Reversed and remanded for the computation of damages.

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prompt compliance with the statutory requirement. See, e.g., DeWolf, *An Outline of Copyright Law* 154-155 (1925); Shafter, *Musical Copyright* 235 (1932); Rothenberg, *Legal Protection of Literature, Art and Music* 185 (1960).

293. *Coventry Ware, Inc. v. Reliance Picture Frame Co.*, 129 U.S.P.Q. 83 (2d Cir. Apr. 3, 1961) (Clark, J.).

Action for copyright infringement of certain wall plaques manufactured by plaintiff and bearing copyright notice on the backs thereof. Defendant admitted copying, but urged the invalidity of plaintiff's copyright through faulty notice. The district court had granted summary judgment for defendant, 186 F. Supp. 798, 127 U.S.P.Q. 46, 8 BULL. CR. SOC. 50, Item 25 (1960), and plaintiff appealed.

*Held*, on appeal, reversed.

The Court reasoned as follows: "Section 20 prescribes the place where the notice is to appear in the case of books or other printed publications, periodicals, and musical compositions. It places no limitations on the possible location of notice in the case of works of art and kindred items, provided that the notice complies with the general requirement of section 10 that the notice be affixed to each copy. \* \* \* It should be noted that section 20 is the culmination of a long history of increasing liberalization of restrictions on the placement of notice." The Court went on to review the legislative history of the copyright statute's notice provisions, rejecting defendant's argument that section 19—with its short-form notice—implies that such notice must appear on the front of the protected work. "Defendant's restrictive view of section 19 is also inconsistent with a large body of judicial authority upholding notices which are not on the 'front' of the work of art. . . . Perhaps the best summary of the applicable principle may be found in the decision of Judge Bicks in *Trifari, Krussman & Fishel, Inc. v. Charel Co.*, D.C.S.D.N.Y., 134 F. Supp. 551, 554, 107 U.S.P.Q. 48, 50, enjoining the copying of costume jewelry, copyrighted as a work of art, where the notice appeared on the clasp. He stated: 'It is so located, however, as to apprise anyone seeking to copy the article, of the existence of the copyright and is, therefore, sufficient to satisfy the statutory requirements.' "

294. *Walters v. Shari Music Publishing Corp., et al.*, 129 U.S.P.Q. 145 (S.D. N.Y. Apr. 13, 1961) (Palmieri, J.).

Action for copyright infringement and abuse of confidential relationship. On defendants' motion for summary judgment, the copyright claim had been dismissed on the merits. [For an earlier opinion in this case on a different point, see 126 U.S.P.Q. 268, 7 BULL. CR. SOC. 242, Item 311 (1960).] Defendants now moved to dismiss the remaining claim for lack of jurisdiction over the subject matter.

*Held*, motion granted.

The Court pointed out that the doctrine of pendent jurisdiction serves the interests of judicial economy, and went on as follows: "Thus, it is entirely proper for a federal court to proceed with the determination of the state claim when, in the course of trial, and after the expenditure of considerable judicial effort, the supporting federal claim is found to be wanting in merit. . . . However, there is a considerable difference between a federal claim which fails during trial and one which has been dismissed on pre-trial motion. In the latter situation—the one presented in this case—there has been no substantial commitment of federal judicial resources to the state claim at the time the federal claim is rejected. Since a federal court should not be eager to offer its facilities for the trial of a case which has lost its federal character, the appropriate course . . . is to dismiss the action without prejudice."

## 2. State Court Decisions

295. *Denker v. Twentieth Century-Fox Corp.*, N.Y. Law Journal, April 12, 1961, p. 11, col. 6 (App. Div., 1st Dep't Apr. 11, 1961) (Valente, J.).

Action for breach of contract to film a motion picture based on "The Greatest Story Ever Told," a work by plaintiff and the Ourslers, joined as defendants. The trial court had denied defendants' motion for judgment on the pleadings and to dismiss the first cause of action as insufficient in law, 210 N.Y.S. 2d 241, 8 BULL. CR. SOC. 268, Item 224 (1961), and defendants appealed.

*Held*, on appeal, trial court's order unanimously modified to grant defendants' motion to dismiss the first cause of action.

The first cause of action sought rescission of the contract in question by reason of Fox's failure to complete the motion picture within five years, the time provided in the contract. Plaintiff alleged that the Ourslers refused to join as plaintiffs, and hence were joined as defendants. The Court reasoned as follows: "It serves no useful purpose to attempt to label the relationship between plaintiff and the Ourslers in the contract. . . . But one salient fact emerges from the relationship and that is that plaintiff and the Ourslers contracted as an entity with Fox Film. Plaintiff may not unilaterally sever that legal entity, without the assent and against the will of the Ourslers by any step which would contemplate the destruction of the contractual rights of the Ourslers. This is particularly so where it is not alleged that the Ourslers have wronged plaintiff, and where it appears that the Ourslers desire to preserve their rights under the contract and wish the contract to be performed. Rescission may not be sought by one of several parties joined as an entity in a contract without the consent or against the objection of the others. . . .

Apart from the objection above noted, some of the members of the court would hold that the first cause of action is defective on the additional ground that it fails to allege a tender, or willingness or ability to tender, all or any part of the minimum royalty payment made by Fox Film to plaintiff and the Ourslers; and that section 112(g) of the Civil Practice Act does not apply because the complaint is based upon a material breach or repudiation of the contract rather than on a claim of fraud, misrepresentation, mistake or duress. . . .”

296. *Estate of Bela Bartok*, N.Y. Law Journal, May 3, 1961, p. 14, col. 8 (Surr. Ct., N.Y. Co. May 2, 1961) (DiFalco, S.).

Proceeding by remainderman to vacate decree settling accounts of executors and trustees of estate of Bela Bartok, on ground of fraud and misrepresentation by the executors and trustees.

*Held*, after hearing, application denied.

The Court found no merit to petitioner's assertions of fraud and misrepresentation, remarking, *inter alia*, "The sole asset of this estate at the time of the decedent's death consisted of his musical compositions. All of the moneys collected by the fiduciaries consisted of royalties on the musical compositions and other payments for the use of the compositions. Under the terms of the will, the widow is entitled to all of the income of the trust fund. There has never been any judicial determinations as to whether there should be an apportionment of the royalties and as to the portion, if any, that constitutes principal and the portion that belongs to income. The widow is entitled only to such moneys as are allocable to income. Hence the refusal of the respondent [executor and trustee] to disburse all of the receipts cannot be said at this time to contravene the will."

*Also of Interest:*

297. *Fleischer v. W.P.I.X. Inc.; Fleischer v. N.T.A. Pictures, Inc., et al.*, N.Y. Law Journal, April 6, 1941, p. 14, col. 4 (Sup. Ct., N.Y. Co. April 3, 1961) (Baer, J.) (actions tried together in which plaintiff sought accounting, injunction, declaratory relief, and damages for allegedly unauthorized sale and TV exhibition of certain cartoon films; rights of parties turned on question whether plaintiff had disposed of his entire interest in the films by written contract; held, after trial, for defendants, and complaints dismissed).
298. *Metropolitan Opera Association, Inc. v. Metropolitan Artists, Inc.*, 128 U.S.P.Q. 556 (Sup. Ct., N.Y. Co. Feb. 9, 1961) (Fine, J.) (granting preliminary injunction in action for unfair competition).

299. *Orgel, et al. v. Clark Boardman Co. Ltd., et al.*, 128 U.S.P.Q. 520 (S.D.N.Y. Mar. 30, 1960) (Dimock, J.), 128 U.S.P.Q. 531 (S.D.N.Y. Nov. 22, 1960) (Dimock, J.) [two opinions digested at 8 BULL. CR. SOC. 188, Item 144 (1961)].
300. *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Acme Circus Operating Co.*, 129 U.S.P.Q. 77 (Sup. Ct., N.Y. Co. Mar. 23, 1961) (Aurelio, J.) (granting preliminary injunction in action for unfair competition).
301. *United States Pencil Co. v. The Union Pencil Co.*, 129 U.S.P.Q. 77 (Sup. Ct., N.Y. Co. Mar. 23, 1961) (granting preliminary injunction in action for unfair competition).
302. CRIMINAL PROSECUTION OF RECORD COUNTERFEITERS

The New York Times, May 3, 1961, p. 33, reports the arrest by Long Island police of four men engaged in the counterfeiting of popular phonograph records. The same newspaper, May 4, 1961, p. 34, reports the entry of not-guilty pleas by the alleged counterfeiters to an indictment charging grand larceny, conspiracy, and violation of trademark laws. The possibility in such situations of federal criminal prosecution under the copyright statute should be a matter of interest to readers of the Bulletin.

A phonograph record consists generally of three constituent parts: the wax or plastic disk; the label; and the sleeve or jacket. Each part is amenable to separate protection under the Copyright Act. The making of disks is included among the "bundle of rights" guaranteed by the Act, 17 U.S.C. §1(d), while the printing of labels and sleeves is covered by 17 U.S.C. §1(a). See also Regulations of the Copyright Office, Title 17, App., U.S.C. §202.14.

Criminal prosecution for copyright infringement will lie under 17 U.S.C. §104. It appears, however, that prosecution for counterfeiting of record disks is barred by section 101(e) of Title 17:

"Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, *no criminal action shall be brought*, but in a civil action an injunction may be granted upon such terms as the court may impose . . ." (Emphasis supplied.)

This section seems to contemplate the independent performance and recording of a protected work rather than the counterfeiting of the disk. It is therefore conceivable that a court might be persuaded to disregard the emphasized language. But be that as it may, there is no statutory obstacle to prosecution for infringement of the label and sleeve of particular records.<sup>1</sup> Indeed, Congress appears to have contemplated the use of criminal prosecutions in the administration of the copyright laws. See *Hearings Before Committees on Patents of the Senate and House of Representatives on Bills to Amend and Consolidate the Acts Respecting Copyright*, March 27, 1908, pp. 116 *et seq.* Insofar as the law reports bear witness, however, effectuation of the legislative purpose has been less than vigorous.

Reported cases of criminal prosecution for copyright infringement are rare. The following list appears to be exhaustive: *United States v. Backer*, 134 F.2d 533 (2d Cir. 1943) (affirming conviction for infringement of certain statutes); *Marx v. United States*, 96 F.2d 204 (9th Cir. 1938) (affirming conviction for infringement of radio script); *United States v. Wells*, 176 F. Supp. 630, 123 U.S.P.Q. 65, 7 BULL. CR. SOC. 103, Item 111 (S.D. Texas 1959) (granting judgment of acquittal in prosecution for infringement of maps); *United States v. Schmidt*, 15 F. Supp. 804 (M.D. Pa. 1936) (denying motions to quash indictment for infringement of song lyrics). See also *Cortley Fabrics Co. v. Slifka*, 175 F. Supp. 66, 122 U.S.P.Q. 321, 7 BULL. CR. SOC. 49, Item 29 (S.D.N.Y. 1959), in which the District Court granted a preliminary injunction barring infringement of a textile design, and referred the matter to the United States Attorney "for such action as he may care to take in the circumstances."<sup>2</sup>

I. Y.

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1. We are assuming that each constituent part of the infringed record has been appropriately copyrighted.
  2. See also, Mitchell Gordon, Phonograph Record Makers Spur Drive Against Counterfeits, *The Wall Street Journal*, Thursday, April 20, 1961, p. 1.

## PART V.

**BIBLIOGRAPHY**

## A. BOOKS AND TREATISES

## 1. United States Publications

303. DESIGN LAWS AND TREATIES OF THE WORLD. Washington, The Bureau of National Affairs, Inc. (with A. W. Sythoff, Leyden, The Netherlands). 1961. Looseleaf.

This companion work to COPYRIGHT LAWS AND TREATIES OF THE WORLD was prepared in cooperation with UNESCO and the United International Bureaus for the Protection of Industrial Property and Literary and Artistic Works, under the editorial direction of Dr. Arpad Bogsch, Legal Advisor, United States Copyright Office. It includes the texts in English of the national laws, decrees, and ordinances of France, Italy, Belgium, Germany, Switzerland, Mexico, the U.S.A., Great Britain, Canada, India, Australia, and South Africa, and of international multi-lateral conventions (The Hague, Paris, Berne, and Universal) which regulate the legal protection of designs against unauthorized copying and exploitation.

It is planned to supplement the volume as new or amended laws relating to design protection are adopted.

## B. LAW REVIEW ARTICLES

## 1. United States

304. ALLEN, MERLE M. Advertising protection through copyright. (2 ARIZONA LAW REVIEW 230-240, no. 2, Winter 1960.)

This article, which was awarded first prize in the 1960 Nathan Burkan Memorial Competition at the University of Arizona College of Law, traces the development of case law concerning advertisement protection in order to present "an insight as to the present status of the law and a glimpse as to what the future trends will be in this area."

305. BECKER, BRUCE. Charlie Chan: Public Eye? (16 Intramural Law Review 273, New York Univ. May 1961.)

A note on *Cole v. Benny*, 60 Civil Doc. No. 4170 (S.D.N.Y. 1960).

306. Copyright—design copyrights—requirement of notice. (36 *New York University Law Review* 745-752, no. 3, Mar. 1961.)

Comments on *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 7 BULL. CR. SOC. 182, Item 243 (2d Cir. 1960), and *H. M. Kolbe Co. v. Armigus Textile Co.*, 279 F.2d 555, 7 BULL. CR. SOC. 292, Item 389 (2d Cir. 1960). The commentator concludes that "though the result of the *Peter Pan* and *Kolbe* holdings as a weapon against design piracy is desirable, it is submitted that it was achieved by an unjustifiably liberal interpretation of [the notice requirements of] the copyright law."

307. DERENBERG, WALTER J. Copyright law. New York, New York University School of Law, c1961. Reprinted from 36 *New York University Law Review*, 1960 *Annual Survey of American Law* 585-600, March 1961, no. 3.

The 1960 annual survey of legislative and judicial copyright developments in the United States.

308. HINES, JOSEPH E. Copyright—general publication—loss of rights in literary property. (13 *South Carolina Law Quarterly* 134-137, no. 1, Fall 1960.)

A case note on the court of appeals decision in the *Rickover* case, 284 F.2d 262, 8 BULL. CR. SOC. 47, Item 22 (D.C. Cir. 1960).

309. LOCKHART, WILLIAM B., and ROBERT C. McCLURE. Censorship of obscenity: the developing constitutional standards. (45 *Minnesota Law Review* 5-121, no. 1, Nov. 1960.)

"After examining the generally favorable turn that constitutional protection of literature has taken since 1957, as well as the newer techniques by which the attack on free expression is mounted . . . [the authors] point the way to a practical resolution of the problem by formulating workable constitutional standards which comport favorably with the approach to 'obscenity' problems taken by the United States Supreme Court."

310. MCKENZIE, JOHN JAMES. Copyright—renewal rights—executor's right to renew where author has assigned renewal rights. (63 *West Virginia Law Review* 173-177, no. 2, Feb. 1961.)

A note on the Supreme Court decision in *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373, 7 BULL. CR. SOC. 174, Item 242 (1960).

311. MCPETERS, THOMAS H. Creditors and copyrights. (12 *Mercer Law Review* 239-259, no. 1, Fall 1960.)

This paper, which was entered in the 1960 Nathan Burkan Competition, discusses the rights of creditors in common law and statutory copyrights.

312. NEFF, GREGOR N. Copyright—notice requirements—pitfalls for the unwary. (59 *Michigan Law Review* 616-637, no. 4, Feb. 1961.)

This article, which is a revision of an essay awarded first prize in the 1960 Nathan Burkan Memorial Competition at the University of Michigan Law School, discusses the shortcomings of the statutory requirements of copyright notice and indicates present judicial trends in their interpretation. Proposed remedies, both legislative and judicial, are "listed and evaluated where possible."

313. Persons entitled to renewal of copyright following author's death. U.S. Digest, Anno. Volume 4, 2069, supplementing 100 L. ed. 1430. 4 p. U.S. Supreme Court Reports, Lawyers' Edition, Second Series, Lawyers Co-Operative Publishing Company, Rochester.

Annotation based on *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960). See 7 BULL. CR. SOC. 174, Item 242 (April 1960).

## 2. Foreign

### (a) English

314. NAMUROIS, ALBERT. The problem of "neighbouring rights"; a review of the draft adopted at The Hague (May 1960). *EBU Review*, no. 66B (Mar. 1961), pp. 31-43.

"It is the opinion of the writer that the Hague text, accompanied by the observations of governments, should constitute a satisfactory basis for discussion at the Diplomatic Conference in the autumn of 1961."

315. POINTET, PIERRE JEAN. Protection of news. (6 *Industrial Property Quarterly* 82-103, no. 2, Apr. 1961.)

An English translation of the author's "La protection des informations de presse" which appeared in 76 *La Propriété Industrielle* 247 (Dec. 1960). See 8 BULL. CR. SOC. 274, Item 250 (1961).

## (b) French

316. ABEL, PAUL. Lettre de Grande-Bretagne. (74 *Le Droit d'Auteur* 105-131, no. 4, Apr. 1961.)

A survey, in French and English in parallel columns, of legislative and judicial developments in the field of copyright and related matters in Great Britain during 1960.

317. BLUTS, ANDRÉ DE. Le droit d'auteur et l'évolution des arts graphiques. (50 *Revue de Droit Intellectuel: L'Ingenieur-Conseil* 131-134, nos. 3-4, Mar.-Apr. 1960.)

A brief survey of the development of reproduction techniques with special reference to works of graphic art, and of the copyright problem arising from reproduction of such works for private use. In this regard, a suggestion is made that the courts should resort more and more to the Anglo-Saxon concept of "fair use."

318. Bureau International de l'Édition Mécanique. Contrat-type pour l'industrie phonographique 1961. Paris, 1961. 79 p. (Bulletin no. 6, Mar. 1961).

An analysis of the new provisions of the B.I.E.M. 1961 standard contract for the phonographic industry followed by a synoptic comparison of the new provisions with those of the 1956 standard contract which are replaced or modified.

319. HEPP, FRANÇOIS. Application de la "clause de sauvegarde" de la Convention de Berne. *Interauteurs*, no. 141 (4th quarter, 1960), pp. 322-326.

A report submitted to the Legal Committee of CISAC on the question of the application of article XVII of the U.C.C., and of the Appendix Declaration thereto, to countries having become newly independent and to which the Berne Convention formerly applied as declared territories of a Berne Union member country.

320. HEPP, FRANÇOIS. Observations sur la notion internationale de "publication" en matière d'œuvres des arts plastiques. (33 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 81-85, no. 1/2, Jan. 1, 1961.)

An exploration of the problem of determining what constitutes publication of a work of plastic art within the framework of the Berne and Universal Copyright Conventions.

321. LASSEN, BIRGER STUEVOLD. Lettre de Norvège. (74 *Le Droit d'Auteur* 76-82, no. 3, March 1961.)

A survey of legislative and judicial developments in Norway involving copyright and related subjects during the past ten or fifteen years.

(c) German

322. BRUGGER, GUSTAV. Zur Abgrenzung zwischen Fernsehnutzungsrechten und Verfilmungsrechten. (33 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 308-327, no. 5/6, Mar. 1, 1961.)

A case is made for a clear demarcation between motion picture and television broadcasting rights in West Germany by an analysis of the problem in the light of recent literature, Supreme Court decisions, actual contracts between performing rights societies and television broadcasters, and relevant provisions of the Federal Ministry of Justice Draft Copyright Law of 1959.

323. DITTRICH, ROBERT. Die Weiterentwicklung des österreichischen Urheberrechts. *Gewerblicher Rechtsschutz und Urheberrecht, Auslands- und internationaler Teil*, no. 3 (March 1961), pp. 124-133.

Original German text of a survey of Austrian copyright legislation which appeared in French translation under the title "Lettre d'Autriche" in 73 *Le Droit d'Auteur* 279 (1960). See 8 BULL. CR. SOC. 197, Item 171 (1961).

324. FRIEBERGER, KURT. Der Stand des internationalen Urheberrechtsschutzes. (33 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 257-287, no. 5/6, Mar. 1, 1961.)

A historical survey of the struggle to achieve international copyright protection with special reference to the Berne and Universal Copyright Conventions. The fundamental issues of international copyright, the areas of greatest danger to the creative activity of the human mind, and the difficulties in finding a common formula for adequate legal protection of the multitude of interests are pointed out.

325. GRÜTTNER, HANS. Urheberrechtliche Fragen der Wiederverwendung von Projekten. (9 *Erfindungs- und Vorschlagswesen* 219-221, no. 11, Aug. B.)

A discussion of copyright problems arising from reuse of construction plans in East Germany. Some of the questions treated are whether such reuse requires the consent of, and payment of additional compensation

to the original copyright proprietor and whether a legal entity other than a natural person can be an original proprietor.

326. HAENSEL, CARL. Die Verankerung der Verwertungsgesellschaften im neuen Urheberrecht. (33 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 288-307, no. 5/6, Mar. 1, 1961.)

A survey of the development and regulation of performing rights societies in Germany and a critical examination of the pertinent provisions of the Federal Ministry of Justice draft laws of 1959 with suggestions for changes therein.

327. LEINVEBER, GERHARD. Filmrecht und urheberrechtlicher Ministerialentwurf 1959. (33 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 328-349, no. 5/6, March 1, 1961.)

A critical analysis of the pertinent provisions of the Federal Ministry of Justice Draft Copyright Law of 1959 from the point of view of motion picture copyright, with some suggestions for a more extensive protection of the rights of performing artists, and other improvements. A recommendation is made that the Draft provide specifically for a term of protection for motion pictures of fifty years from date of first publication.

328. MÜNZER, GEORG. Urheberrechtliche Fragen der Wiederverwendung von Projekten. (10 *Erfindungs- und Vorschlagswesen* 33-35, no. 2, 1961.)

A critical analysis of Grüttner's article of the same title. See Item 325, *supra*.

329. PETER, WILHELM. Der Haager Entwurf (1960) eines internationalen Leistungsschutzabkommens. (33 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 18-80, 129-169, nos. 1/2, Jan. 1, 1961 and 3/4, Feb. 1, 1961.)

An article-by-article commentary on the Hague Draft Convention on Neighboring Rights and on the General Report issued in connection therewith, including the original French text of the Draft and a German translation thereof by the commentator in parallel columns. Various aspects of international protection of neighboring rights are examined with special reference to existing or proposed law in West Germany, Austria and Switzerland.

330. POHLMANN, HANSJÖRG. Privilegienwesen und Urheber-Recht; ein Beitrag zur Frühgeschichte des deutschen Urheberschutzes im 16. Jahrhun-

dert. (33 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 169-204, no. 3/4, Feb. 1, 1961.)

A study of the early development of German copyright protection, based on newly discovered archival material of the 16th and 17th centuries, with special reference to the evolution of the concept of legal protection for author's rights from that of royal privilege.

331. ROEBER, GEORG. Der Richter als Gesetzgeber; Anmerkungen zu den BGH-Urteilen vom 31. Mai 1960. (4 *Film und Recht* 3-9, no. 3, Mar. 15, 1961.)

An analysis of four West German Supreme Court decisions of May 31, 1960 dealing with the protection of the rights of the performing artist, and their appraisal in the light of the pertinent provisions of the Ministerial Draft Copyright Law of 1959.

332. STAAT, F. Zu einigen Fragen des Filmurheberrechts. (10 *Erfindungs- und Vorschlagswesen* 36-38, Ausg. B., no. 2, 1961.)

An examination, from the East German point of view, of certain aspects of copyright law in the field of motion pictures, with special reference to the rights of producers, cameramen, architects, choreographers, etc., in the light of existing or proposed law. Legal problems involved in the dubbing of motion pictures, and in the publication and distribution of actors' photographs are also discussed.

333. ULMER, EUGEN. Rechtsgutachten über die Musiksendungen des American Forces Network. *GEMA Nachrichten*, no. 49 (Feb. 1961), pp. 17-20.

A legal expert opinion concerning claims of GEMA, the West German performing rights society, against the American Forces Network (AFN). Dr. Ulmer concludes that, under the German copyright law, AFN must obtain the permission of GEMA to broadcast protected music included in GEMA's repertory, and that to the extent that GEMA holds the right of mechanical reproduction, its permission is necessary also for the making of recordings on tape.

334. ULMER, EUGEN. Vom deutschen Urheberrecht und seiner Entwicklung. (33 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 1-17, no. 1/2, Jan. 1, 1961.)

A French version of this article on recent legislative and judicial developments in West German copyright law appeared under the title "Lettre d'Allemagne" in 74 *Le Droit d'Auteur* 12 (1961). See 8 BULL. CR. SOC. 274, Item 253 (1961).

335. WERHAHN, JÜRGEN W. Nochmals: Persönlichkeitsrecht und Tonbandproblem. (33 *Archiv für Urheber-, Film-, Funk- und Theaterrecht* 205-232, no. 3/4, Feb. 1, 1961.)

A further study of the legal problems posed by the use of tape-recordings in West Germany in the light of Supreme Court decisions handed down since the author's previous article on the same subject was published in 24 *UFITA* 196 (1957). See 5 *BULL. CR. SOC.* 314, Item 406 (1958).

(d) Italian

336. ABEL, PAUL. La giurisprudenza austriaca in materia di diritto di autore dopo l'emanazione della Legge sul diritto du autore del 1936. (31 *Il Diritto di Autore* 569-586, no. 4, Oct.-Dec. 1960.)

A survey of important decisions in the field of copyright and neighboring rights handed down by Austrian courts since the promulgation of the Austrian Copyright Law of 1936.

337. NAPOLITANO, GAETANO. Incontri con Amedeo Giannini. (31 *Il Diritto di Autore* 506-512, no. 4, Oct.-Dec. 1960.)

A eulogy, in form of personal recollections, of the late Amedeo Giannini, prominent international copyright jurist and vice-president of the Legal Council of the Italian Society of Authors and Publishers (S.I.A.E.).

338. SORDELLI, LUIGI. Il progetto dell'Aja di Convenzione internazionale dei diritti degli artisti interpreti, dei produttori dei dischi e delle emittenti radiofoniche. (31 *Il Diritto di Autore* 547-568, no. 4, Oct.-Dec. 1960.)

An analysis of the Hague Draft Convention on Neighboring Rights of 1960 with special attention to those provisions which differ from ILO and Monaco drafts.

C. ARTICLES PERTAINING TO COPYRIGHT  
FROM TRADE MAGAZINES

1. United States

339. Appellate Ct. Reverses Technical KO of Publishers' Rights to Disk Coin, *Variety*, 45, May 31, 1961.

A report of the decision by the Court of Appeals for the Second Circuit in *Norbay Music, Inc. v. King Records, Inc.*, supra, item 292.

340. KOWNATSKY, HARRY. Copyright law revision; the zero hour approaches. *Notes*, 2d ser., vol. 18, no. 2 (Mar. 1961), pp. 197-208.

A brief survey of some of the problems of interest to the music librarian in connection with the forthcoming general revision of the copyright law, and of possible solutions thereto.

341. MARKE, JULIUS J. [Review of] . . . Rogers, Joseph W. U. S. national bibliography and the copyright law: an historical study . . . N. Y.: R. R. Bowker Co., 1960. (86 *Library Journal* 979, 981, no. 5, Mar. 1, 1961.)

"[Mr. Rogers'] study should prove of significant value in the drafting of the 'cataloging provisions' of the new Copyright Law."

342. WAGMAN, FREDERICK H. [Review of] U. S. national bibliography and the copyright law . . . by Joseph W. Rogers. *Information Bulletin* (20 Library of Congress 51-52, no. 4, Jan. 23, 1961).

"[A] careful and fascinating study . . . of the role of . . . [the *Catalog of Copyright Entries*] in our national intellectual history."

343. Pubbers charge ASCAP, Justice Dept. of failure to block "unfair procedures"; Sam Fox, Pleasant, Jefferson send detailed bid to Supreme Court to reopen consent moves. (73 *Billboard Music Week* 3, 8, Feb. 13, 1961.)

An article on a brief filed Feb. 8, 1961 in the U. S. Supreme Court seeking a reversal of a ruling of the federal district court in New York which denied the appellants the right to intervene as parties in interest.

## 2. England

344. HERBERT, SIR ALAN. A letter to an M. P. *The Bookseller*, no. 2870 (Dec. 24, 1960), p. 2372.

A letter to Dr. Barnett Stross, Labor M.P., in which Sir Alan attempts to "correct" some things Dr. Stross said "or seemed to say" about publishers in his speech, as reflected in Hansard, on the Libraries (previously the Public Lending Right) Bill on December 9th.

345. SNAPE, W. HANLEY. Libraries and the lending right. *The Bookseller*, no. 2884 (Apr. 1, 1961), pp. 1505-1506.

In a rebuttal of the argument that "libraries cannot easily provide the necessary records for a public lending right scheme," the writer gives a brief outline of the history and operations of the Performing Right Society as "some indication of what can be done by a well-managed and persistent organisation convinced of the rightness of its cause."

## NEWS NOTES

## 346. NEW ADHERENCES TO THE UNIVERSAL COPYRIGHT CONVENTION.

We have been informed by UNESCO of the ratification of the Universal Copyright Convention by Sweden on April 1, 1961, and by Nicaragua on May 16, 1961.

Under Article IX, paragraph 2, of the Convention, the latter will come into force three months after the deposit of the instrument of ratification; i.e., with respect to Sweden on July 1, 1961, and with respect to Nicaragua on August 16, 1961. Sweden and Nicaragua are the thirty-sixth and thirty-seventh countries, respectively, to adhere to the Convention.

\* \* \*

347. COPYRIGHT LAW REVISION STUDIES. *Twelfth COMMITTEE PRINT Now Available.*

The Twelfth Committee Print, Subject Index to Studies 1-34, is the twelfth of a series of Committee Prints published by the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, pursuant to Senate Resolution 240, 86th Congress, Second Session. The print is available from the Superintendent of Documents, U. S. Government Printing Office, Washington 25, D. C., for 15 cents.

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## PART I.

## ARTICLES

## 348. THE REPORT OF THE REGISTER ON THE GENERAL REVISION OF THE COPYRIGHT LAW

The "Report of the Register of Copyrights on the General Revision of the Copyright Law" was submitted to Congress on July 10, 1961. It is the culmination of the study program conducted by the Copyright Office during the past five years. Thirty-four studies have been issued in a series of Senate Committee Prints. The report, which is based on the studies and contains the tentative recommendations of the Copyright Office for revision of the law, has been printed by the House Committee on the Judiciary. Copies are available from the U. S. Government Printing Office at 45 cents.

The Register of Copyrights urges all interested persons to submit comments and suggestions on the report. Comments should be sent to Abe A. Goldman, General Counsel of the Copyright Office, Library of Congress, Washington 25, D. C. These will be given serious consideration in the next step in the general revision program—the drafting of a revision bill.

## THE REPORT IN SUMMARY

*The following summary is intended to highlight some of the principal recommendations of the report without analyzing their background or describing how they would work. The explanation will necessarily be oversimplified.*

## Works and Rights Protected

*Scope of works protected.* The report proposes that the statute drop the present reference to "all the writings of an author." Instead, the kinds of works to be protected would be specified in terms broad enough to cover everything now considered copyrightable, including future works presented in newly-developed forms or media.

*Architecture and applied art.* The report recommends that the copyright statute should not be extended to functional architectural structures or industrial designs as such, but that they should be given more limited protection under separate design legislation. However, when a pictorial, graphic, or sculptural work is used as a design or decoration of a useful article, it would continue to have all the protection now afforded by the copyright law.

*Choreography and sound recordings.* The report recommends that the statute expressly cover choreographic works prepared for presentation to an audience. It also favors the principle of protecting sound recordings against unauthorized duplication, but makes no specific proposals pending further study.

*Rights protected and "fair use."* In general the report proposes to retain the exclusive rights given to copyright owners under the present law—to make and publish copies, to make new versions, to give public performances, and to make recordings. It would, however, add a provision to the statute specifically recognizing the doctrine of fair use.

*Library Photocopying.* The report would permit a library to make a single photocopy of material in its collections for research purposes under explicit conditions.

*Performing rights.* As under the present law, the copyright owner of a dramatic work would have the exclusive right to perform it in public, and this right would be extended to all choreographic works and motion pictures. The performing right in nondramatic literary and musical works would continue to be limited to public performances "for profit." The mere reception of a broadcast of copyrighted material at no charge to the public should be excluded from the public performance right.

*Jukebox exemption.* The report favors enactment, in advance of the general revision, of proposed legislation to repeal or modify the provision exempting jukebox operators from payment of performance royalties.

*Compulsory license.* The present law provides that, when the copyright owner of music once permits it to be recorded, anyone else may record it upon payment of a statutory royalty. It is recommended that this "compulsory license" be eliminated.

### Beginning and Length of Copyright Term

*"Public dissemination."* Works are now protected by the common law until they are either published in copies or registered voluntarily in unpublished form. The report proposes that common law protection should end, and the term of statutory copyright should begin, when a work has been "publicly disseminated" in any of the following ways: (1) publication of copies, (2) registration, (3) public performance, or (4) public distribution of sound recordings.

*Voluntary registration.* The privilege of securing statutory copyright by voluntary registration—now available for some classes of unpublished works only—would be extended to all classes of undissemated works.

*Manuscripts in libraries.* The report also proposes to terminate common law rights, after a period of time, in manuscripts made available to the public in a library.

*Duration of term.* The present term of copyright is 28 years from first publication or registration, renewable by certain persons for a second period of 28 years. The report recommends that the maximum term be increased from 56 to 76 years. With certain exceptions, the basic term would run for 28 years from first public dissemination, and would be renewable for a second term of 48 years. Unlike the present law, the second term would merely be an extension of existing rights. Any person claiming an interest in the copyright could submit the renewal application, and the longer term would accrue to the benefit of everyone holding any interest under the copyright.

*Limitation on lump-sum assignments.* Under the present law the renewal copyright reverts in certain situations to the author or other specified beneficiaries. The report proposes to drop this reversion and to substitute a limitation on the duration of lump-sum assignments. Any assignment by an author or his heirs would not be effective after 20 years unless it provided for continuing royalties based on use or revenue from the work.

### Formal Requirements of Copyright Protection

*Notice of copyright.* The statute now requires, as a condition of copyright protection, that the published copies of a work bear a copyright notice. The report recommends that the requirement of notice on published copies be retained, but that inadvertent omission or errors in the notice should not forfeit the copyright. However, innocent infringers misled by the omission or error would be shielded from liability.

*Deposit and registration.* For works published with a copyright notice, the present law also requires registration in the Copyright Office, including the deposit of copies for the Library of Congress. The report proposes that deposit of copies wanted for the Library should be mandatory, but that failure to register should not forfeit the copyright. However, application for registration would still be a prerequisite to bringing an infringement suit. And, unless registration is made within three months of first public dissemination, certain special remedies could not be recovered for infringements begun before registration.

### Ownership of Copyright

*Ownership and divisibility.* The report would leave unchanged in most respects the present law regarding the ownership of copyright. However, copyright would be made divisible, so that ownership of the various rights

comprised in a copyright could be assigned separately. Under the present law an assignment is not effective against third persons without notice unless it is recorded, and this provision would be extended to exclusive licenses and partial assignments.

*Contributions to periodicals.* The report proposes that the copyright secured by the publisher in a periodical or other composite work would cover all contributions not separately copyrighted. However, in the absence of an express assignment, the publisher would hold in trust for the author all rights in the contribution except the right to publish it in a similar composite work.

#### Remedies for Infringement

*Actual damages or profits.* Infringers are now liable for the actual damages suffered by the copyright owner "as well as" the infringer's profits. The report recommends clarifying the statute to provide for recovery either of actual damages or of profits, whichever is higher.

*Statutory damages.* If actual damages and profits are smaller than \$250, the court must now award statutory damages of at least \$250. The report recommends that the court should not be required to award the minimum of \$250 against an innocent infringer. It also proposes that the court be given discretion to award up to \$10,000 as the total sum of statutory damages against any infringer.

#### International Aspects of Copyright

*Copyright in foreign works.* At present statutory protection is available to foreign works only if the author's country is covered by a copyright treaty or Presidential proclamation. The report proposes to extend the copyright statute to all foreign works but the President could restrict or withhold the application of the statute in the case of works originating in any particular country.

*Manufacturing clause.* Certain works must now be manufactured in the United States to have copyright protection here. The report recommends elimination of the manufacturing requirement and related import limitations.

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### 349. COPYRIGHT PROBLEMS OF THE PHONOGRAPH RECORD INDUSTRY\*

By SIDNEY A. DIAMOND\*\*

#### I.

The phonograph record is a paradox in copyright law. Business practices in the record industry are built largely on a single clause of the Copyright Act;<sup>1</sup> yet phonograph records themselves are not copyrightable and derive no protection whatever from the statute.<sup>2</sup> Another paradox: A phonograph record is not a copy of the musical work embodied in the recording,<sup>3</sup> but if the recorded musical work is copyrighted, then the unauthorized manufacture or sale of the phonograph record is an infringement of the copyright in that musical work.<sup>4</sup>

The explanation for this unusual set of conditions in the phonograph record industry is to be found in the history of the Copyright Act of 1909.<sup>5</sup> During the years 1905 to 1908, the copyright bar was very much concerned with the question of federal statutory revision. One of the undecided questions under the current law at that time was the status of mechanical reproductions of musical works.

Business conditions then were vastly different from what they are today. The phonograph record industry was still in its infancy in the early 1900's. Record manufacturers were concerned not with such questions as whether the "compact 33" would finally make the 45 r.p.m. speed obsolete or whether stereo would completely replace monophonic recording, but rather with the question of whether the flat disk record invented by Emil Berliner would replace the more familiar cylinder record of Thomas A. Edison.<sup>6</sup>

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1. Copyright Act, § 1(e), 17 U.S.C. § 1(e) (1958).

2. *Capitol Records Inc. v. Mercury Records Corp.*, 221 F. 2d 657 (2d Cir. 1955).

3. *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 17-18 (dictum) (1908).

4. *Shapiro, Bernstein & Co. v. Goody*, 248 F. 2d 260 (2d Cir. 1957), *cert. denied*, 355 U.S. 952 (1958); Ball, *Law of Copyright and Literary Property* §§ 211-12 (1944).

5. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075.

6. Gelatt, *The Fabulous Phonograph* 58-68, 158-71 (1955).

Meanwhile, a device that is almost forgotten today—the player piano roll—remained a highly popular mechanical means for the reproduction of music.<sup>7</sup> In 1908, a test case was pending in the United States Supreme Court to settle the question of whether the manufacture and sale of a perforated paper roll constituted an infringement of the copyrighted musical composition that it would reproduce when inserted in a properly operated player piano. The Supreme Court held<sup>8</sup> (1) that only a copy of a musical work could infringe; (2) that a copy properly was defined as “a written or printed record . . . in intelligible notation”;<sup>9</sup> and (3) that a piano roll therefore was not an infringement under the law as it then stood. As a result of this decision, the piano roll manufacturers were free to use copyrighted music without having to pay any royalties. There was no need for them to deal with the music publishers at all. It seemed clear that the same principle applied to the infant phonograph record industry, for the grooves of a phonograph record *a fortiori* are unintelligible as compared with the perforations in a player piano roll.

Composers and publishers of music took steps to ensure that this situation would not continue under the revised copyright act on which Congress was working at the time. The new law was enacted on March 4, 1909<sup>10</sup> and became effective on July 1 of that year.

## II.

Section 1 of the Act of 1909<sup>11</sup> enumerates, in a series of subparagraphs, the specific exclusive rights that attach to each of the various types of works which are subject to copyright. Section 1(e) grants to the proprietor of the copyright in a musical composition the exclusive right to perform it publicly for profit. At that point, Congress inserted some additional language, establishing the right:

“to make any arrangement or setting of it . . . in any system of notation or *any form of record* in which the thought of an author may be recorded and from which it may be read or reproduced . . .”  
(Emphasis added.)

This provision gives the copyright proprietor control over recordings of a musical work, because an unauthorized recording would be an infringement of one of the copyright owner's exclusive rights in the musical composition. However,

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7. There is still a small but active business in player piano rolls at the present time. See, *e.g.*, *New Yorker*, April 15, 1961, p. 62 (advertisement).

8. *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908).

9. *Id.* at 17.

10. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075.

11. 17 U.S.C. § 1 (1958).

the new law did not make records themselves the subject of an independent copyright. This was deliberate—Congress did not intend to extend copyright protection to piano rolls, phonograph records, or other mechanical devices.<sup>12</sup> They were considered merely parts of the reproducing instruments that were equipped to play the music mechanically and thus make the recorded performance audible. The omission of any copyright in the records themselves is not as unusual as it might appear. For example, the unlicensed performance of a copyrighted dramatic work clearly is an infringement,<sup>13</sup> but a dramatic performance itself is not copyrightable.<sup>14</sup> Presumably, some doubt was felt about the constitutionality of providing for copyright in devices that the Supreme Court had said were not copies.<sup>15</sup>

Congress was not satisfied simply to grant the mechanical reproduction right in music to copyright owners. While the new copyright bill was under consideration, information came to light that the Aeolian Company, the largest by far of all the piano roll manufacturers, had entered into long-term contracts with eighty leading music publishers for the exclusive piano roll rights in their entire catalogues of copyrighted compositions.<sup>16</sup> Fears were expressed about the creation of gigantic musical monopolies in the piano roll and phonograph record industries, with the leading manufacturers tying up the sources of musical material and thus making it impossible for others to exist in the recording field.<sup>17</sup> To meet these fears, Congress devised the so-called compulsory license clause, which was inserted as another addendum to Section 1(e).

The basic portion of the compulsory license clause reads as follows:

“. . . as a condition of extending the copyright control to . . . mechanical reproductions, . . . whenever the owner of a musical copyright has *used* or *permitted* or *knowingly acquiesced* in the use of

12. H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7-9 (1909) [hereinafter cited as 1909 Report], reprinted in Howell, *The Copyright Law* 253, 260-63 (3d ed. 1952) [hereinafter cited as Howell].
13. 17 U.S.C. § 1(d) (1958).
14. Not being a "writing," a dramatic performance falls outside the statute, 17 U.S.C. § 4 (1958), and the constitutional grant of congressional power. U.S. Const. art. I, § 8, cl. 8.
15. Ringer, *Copyright Law Revision Study No. 26, Unauthorized Duplication of Sound Recordings*, 4-5, in Senate Comm. on the Judiciary, 86th Cong., 2d Sess., Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights, Studies 26-28 (Comm. Print 1961) [hereinafter cited as Ringer].
16. 1909 Report 7-8, reprinted in Howell 253, 261; Henn, *Copyright Law Revision Study No. 5, Compulsory License Provisions of the U.S. Copyright Law*, 11-12, in Senate Comm. on the Judiciary, 86th Cong., 1st Sess., Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights, Studies 5-6 (Comm. Print 1960).
17. *Ibid.*

the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, *any other person* may make *similar* use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured . . .” (Emphasis added.)

Accordingly, no phonograph record manufacturer—or piano roll manufacturer—can be given the *exclusive* right to record a given musical composition. Any competitor has the absolute right to issue a recording of the same composition, subject to the payment of the statutory royalty.<sup>18</sup> The statute also prescribes certain formalities to be followed by a manufacturer who wishes to invoke the compulsory license clause,<sup>19</sup> but these rarely are carried out in practice. Both the music publisher and the record manufacturer know that the publisher cannot prevent subsequent recordings because of the compulsory license clause. As a result, the record manufacturer ordinarily goes ahead with the release of his record and then requests a license from the publisher, who generally issues it as a matter of routine. If for some reason the publisher fails to do so, the manufacturer can use the procedure spelled out in the compulsory license clause to protect himself from a claim of infringement; provided, of course, that he pays the prescribed two-cent royalty.

This leads to the question of when the compulsory license clause goes into effect. Although the Act has been on the books for more than half a century, this is one of the numerous questions of construction that still remain unanswered. The statute says that any other person may make similar use of the copyrighted work whenever the copyright proprietor has “permitted” or “knowingly acquiesced” in its use by others for mechanical reproduction purposes. Clearly, if a license is granted to a record manufacturer, the use of the musical work has been “permitted.” But acquiescence is a little more difficult to identify and define. When a publisher submits a copy of a new musical composition to a record company—or even to a recording artist—it is either expressly stated or at least clearly implied that the music publisher hopes the

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18. The two-cent royalty rate in the compulsory license clause acts as a ceiling in any negotiations for mechanical license royalties. It has been argued that the two-cent rate has become obsolete, and proponents of this view cite the drop in the value of the dollar since 1909. However, it has been pointed out that, in terms of playing time, the dollar buys more music on a phonograph record today than it did in 1909; and the quality of the recording has been vastly improved. Furthermore, the record industry has expanded enormously in terms of units sold since 1909, so that total mechanical royalty payments to copyright proprietors are far in excess of anything dreamt of in 1909. It may be noted, also, that the mechanical royalty remains a significant component in the manufacturer's cost of producing a record. See Comments of Ernest S. Meyers in Henn, *supra* note 16, at 77, 79-80.

19. 17 U.S.C. §§ 1(e), 101(e) (1958).

work will be recorded. Perhaps knowing acquiescence starts at the point when the music is submitted for consideration, so that the compulsory license clause could be invoked immediately by a competing record manufacturer.

Because of the compulsory license provision, it may be futile for a music publisher to attempt to fix a release date for phonograph records of a new piece of music. The publisher no doubt could sign an agreement with one record company granting a mechanical license and providing that the record would not be placed on public sale until a specified date. The restriction would be binding upon that particular record company as a matter of contract. But suppose another record manufacturer learned that the work had been recorded, and invoked the compulsory license clause? Did the release date restriction prevent the compulsory license provision from taking effect immediately when permission was granted by the music publisher for the first recording? This question has not been litigated and the answer is unclear. Music publishers from time to time do impose restrictions of this nature, and sometimes the whole recording industry obeys them. But on other occasions the restriction has been ignored—a practice known in the vernacular of the industry as “jumping the release date.” Music publishers have threatened to sue under such circumstances, but the question seems never to have been adjudicated.

The right to record under the compulsory license provision would be meaningless unless the competing manufacturer had some way of learning about its availability. Congress was concerned with this problem, and another part of Section 1(e) specifically makes it:

“ . . . the *duty* of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to *file notice thereof . . . in the copyright office.*” (Emphasis added.)

There is a very severe penalty for overlooking this requirement. Section 1(e) goes on to say:

“ . . . any failure to file such notice shall be a *complete defense* to any . . . action . . . for any infringement of such copyright.” (Emphasis added.)

The proper interpretation of this language has been clarified by a very recent decision. The United States District Court for the Southern District of New York had held that failure to file a notice of use at the time of the first recording was a complete bar to the collection of any phonograph record royalties, and that this could not be rectified by filing at a later date.<sup>20</sup> Even

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20. *Norbay Music, Inc. v. King Records, Inc.*, 185 F. Supp. 253 (S.D.N.Y., 1960).

a new recording, made deliberately and with full knowledge, after the filing of the notice of use by the copyright proprietor would be exempt from royalty under the District Court's view of the law. However, the Court of Appeals considered this too drastic a punishment and reversed, holding that the copyright proprietor could recover for all acts of infringement that occurred subsequent to the filing.<sup>21</sup>

There are some works that are not subject to the compulsory license clause at all. Of course, works in the public domain can be used for recording or any other purpose—they are not protected by copyright in any way. But there is a different category: Works that are in copyright for other purposes but are not affected by the compulsory license clause.

Several types of works fall into this category. To begin with, Section 1(e) applies only to musical compositions. There are various other kinds of copyrightable works that are suitable for recording: Dramatic works, dramatic-musical works and non-dramatic literary works. The copyright proprietors of these works also possess mechanical recording rights,<sup>22</sup> but they are at liberty to grant exclusive mechanical licenses if they wish to do so. For example, recording licenses for so-called show albums of some musical plays are carefully drawn under Section 1(d) rather than Section 1(e). Section 1(d) applies to all dramatic works and it provides, among other things, for the exclusive right "to procure the making of any transcription or record thereof." If the copyright owner is correct in his analysis of what he is granting, this is an effective way of preventing the issuance of recordings of individual compositions from the production until after the show album has had an opportunity to establish itself on the market. The right to record the dramatic work can be exclusive; the separate musical numbers that are subject to the compulsory license provision can be released for recording purposes at a later date. Once again, there is an open question here: When does a show album cease being a dramatic work and become just a collection of individual musical compositions? There is no decision on the point.

The copyright in non-dramatic literary works (stories, poems and the like) did not include a recording right until 1953, when one of the few amendments ever made to the Act of 1909 went into effect.<sup>23</sup> The spoken word has taken on a considerable degree of commercial importance in the phonograph record industry in recent years. This kind of material clearly can be the subject of an exclusive recording license. There is no possibility of it being affected by the compulsory license clause, because no music is involved.

21. *Norbay Music, Inc. v. King Records, Inc.*, 290 F. 2d 617, 129 U.S.P.Q. 336 (2d Cir. 1961), cf. *Washingtonian Publishing Co. v. Pearson*, 306 U.S. 30 (1939).

22. 17 U.S.C. §§ 1(c), (d) (1958).

23. Act of July 17, 1952, ch. 923, 66 Stat. 752, amending 17 U.S.C. § 1(c).

There is another group of works which in a different sense is not subject to the compulsory license clause. These are the musical compositions which are exempt from the payment of any mechanical royalty because no recording right exists in them, although they are protected by copyright in other respects. A phonograph record manufacturer may use works in this category without a license—compulsory or otherwise—because records of these works are not infringements. They are referred to as “mechanically free.”

Section 1(e) by its terms applies only to “compositions published and copyrighted after July 1, 1909,” so that any music published<sup>24</sup> on or before that date necessarily is mechanically free. By now, all such music either has fallen into the public domain or is in its renewal period. Since a copyright renewal creates a new estate,<sup>25</sup> it might be thought that renewal under the Act of 1909 would include control over mechanical reproduction. However, this question has been litigated and the court held that any work originally copyrighted prior to July 1, 1909 remains mechanically free.<sup>26</sup> The total copyright term plus renewal equals 56 years,<sup>27</sup> so that the oldest musical compositions affected by this principle will fall into the public domain on June 30, 1965; and the point of law thereupon will become obsolete. In the meantime, a steadily diminishing—but still important—body of musical literature remains in this strange category.<sup>28</sup> The publisher can collect performing fees, for example, because the work is still in copyright, but cannot collect mechanical royalties.

If the musical composition is of foreign origin, it must meet still another requirement. Section 1(e) does not grant mechanical rights in the works of a foreign author or composer “unless the foreign state or nation of which such author or composer is a citizen . . . grants . . . to citizens of the United States similar rights.” The existence of this special kind of reciprocity must be reflected in a Presidential proclamation that refers specifically to the rights

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24. Or deposited for copyright as an unpublished work under Section 12 of the Act, 17 U.S.C. § 12 (1958). *Shilkret v. Musicraft Records, Inc.*, 131 F. 2d 929 (1st Cir. 1942), *cert. denied*, 319 U.S. 742 (1943).

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

26. *Edward B. Marks Music Corp. v. Continental Record Co.*, 222 F. 2d 488 (2d Cir.), *cert. denied*, 350 U.S. 861 (1955).

27. 17 U.S.C. § 24 (1958).

28. Some of the composers writing during the period in question were Victor Herbert, John Philip Sousa and George M. Cohan. “School Days” dates from 1907. “Take Me Out to the Ball Game” and “Shine On, Harvest Moon” both came out in 1908. See generally Spaeth, *History of Popular Music in America*, ch. 8, “The Turn of the Century,” pp. 302-68 (1948).

granted under Section 1(e);<sup>29</sup> and anyone concerned with the status of foreign music in the United States thus finds it necessary to consult these proclamations. A work first published in a foreign country prior to the proclamation date is mechanically free in the United States. The Universal Copyright Convention has suspended this rule with respect to those countries which have become signatories,<sup>30</sup> but the Convention has no retroactive effect<sup>31</sup> and the proclamation dates thus will retain their importance for many years to come.

When the compulsory license clause is invoked, what rights has the copyright proprietor involuntarily granted? Section 1(e) states: "any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part . . ." The expression "similar use" has been the topic of a good deal of speculation. For example, if the copyright proprietor permits the use of the work on phonograph records, does that release it for tape recording purposes also? Or, if the copyright proprietor issues a license covering a phonograph record of a two-piano arrangement of a musical composition, does that permit another record manufacturer to record a full orchestral version? There are many possible variations on this theme. Suppose an instrumental recording of a popular song is licensed, does that release the lyrics so that a vocalist can perform under the protection of the compulsory license clause?<sup>32</sup> And would it make any difference for this purpose if the music publisher had secured separate copyrights on both an instrumental and a vocal version of the song, but filed a notice of use on the instrumental version only?

There is very little authoritative information about the rights of the copyright proprietor or the phonograph record manufacturer in situations like these. It has been said that a compulsory licensee is permitted some latitude in preparing his own adaptation of the composition for recording purposes,<sup>33</sup> but this generalization is not very helpful. In practice, the latitude is very wide. Music publishers do not seem at all anxious to restrict the freedom of record manufacturers to adapt the work in whatever way they think best for the particular artists they are planning to use. It has been held specifically that a license to reproduce music on a piano roll does not carry with it the right to

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29. 17 U.S.C. § 9(b) (1958); *Todamerica Musica, Ltd. v. Radio Corp. of America*, 171 F. 2d 369 (2d Cir. 1948).

30. See Universal Copyright Convention, art. II, Sept. 6, 1952, [1955] U.S.T. & O.I.A. 2731, 2733-34, T.I.A.S. No. 3324 (effective Sept. 16, 1955).

31. See Universal Copyright Convention, art. VII, Sept. 6, 1952, [1955] U.S.T. & O.I.A. 2731, 2740, T.I.A.S. No. 3324 (effective Sept 16, 1955).

32. See Shafter, *Musical Copyright* 335 (2d ed. 1939); cf. *G. Ricordi & Co. v. Columbia Graphophone Co.*, 263 Fed. 354 (2d Cir. 1920).

33. *Edward B. Marks Music Corp. v. Foullon*, 79 F. Supp. 664, 667 (S.D.N.Y. 1948), *aff'd*, 171 F. 2d 905 (2d Cir. 1949).

print the lyrics of the song for the convenience of the purchaser of the roll.<sup>34</sup> But this is not really a question under the compulsory license clause. The right to print words is not covered by Section 1(e); it must be acquired separately by means of a license under Section 1(a).<sup>35</sup>

Perhaps it should be pointed out that Section 1(e) does not give the compulsory licensee the right to re-record the first manufacturer's recording<sup>36</sup>—a process the industry calls "dubbing." Anyone who wants to rely on the compulsory license clause must hire some musicians, take them into a studio, and make his own recording. Under the *Supreme Records*<sup>37</sup> decision, the style and sound of the particular arrangement of a work recorded by one phonograph record manufacturer can be imitated by a competitor on a so-called "mirror record" with impunity. In the cited case, however, Judge Yankwich left open the possibility of equitable relief for the first manufacturer if his recording possessed "a distinctive characteristic, aside from the composition itself, of such character that any person hearing it played would become aware of the distinctiveness of the arrangement."<sup>38</sup>

Now let us suppose that the musical work which has been recorded is unpublished and uncopyrighted. From the proprietor's standpoint, it is perfectly safe to perform such a work publicly, because performance of a musical composition does not constitute publication,<sup>39</sup> and performing an unpublished work therefore does not throw it into the public domain. It also is clear that a mechanical reproduction is not a copy of the musical composition embodied in it; the Supreme Court decided that in 1908.<sup>40</sup> There should be no reason, then, to be concerned about inadvertently publishing the musical work by selling phonograph records of it. That was the general opinion in the music industry until a federal district judge stated otherwise. Judge Igoe in the *Miracle Record*<sup>41</sup> case expressed the view that the sale of an unpublished musical work

34. *Standard Music Roll Co. v. F. A. Mills, Inc.*, 241 Fed. 360 (3d Cir. 1917).

35. But cf. 2 Ladas, *International Protection of Literary and Artistic Property* 791 (1938), relying upon dictum in *Standard Music Roll Co. v. F. A. Mills, Inc.*, 241 Fed. 360, 363 (3d Cir. 1917). It is believed that the cited case did not mean to suggest that the compulsory license clause extended to the reproduction of lyrics in printed form.

36. Cf. *Aeolian Co. v. Royal Music Roll Co.*, 196 Fed. 926 (W.D.N.Y. 1912).

37. *Supreme Records, Inc. v. Decca Records, Inc.*, 90 F. Supp. 904 (S.D. Cal. 1950). See also *Glory Records, Inc. v. Radio Corp. of America*, — Misc. 2d —, 213 N.Y.S. 2d 875 (Sup. Ct. 1961).

38. *Supreme Records, Inc. v. Decca Records, Inc.*, 90 F. Supp. 904, 908 (S.D. Cal. 1950) (italics in original omitted).

39. *McCarthy & Fischer, Inc. v. White*, 259 Fed. 364 (S.D.N.Y. 1919); *Waring v. Dunlea*, 26 F. Supp. 338, 340 (E.D.N.C. 1939) (dictum); Shafter, *Musical Copyright* 130-31 (2d ed. 1939); cf. *Ferris v. Frohman*, 233 U.S. 424 (1912).

40. *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908).

41. *Shapiro, Bernstein & Co. v. Miracle Record Co.*, 91 F. Supp. 473 (N.D. Ill. 1950).

in the form of phonograph records was a publication and therefore threw the work into the public domain.<sup>42</sup>

The rule of the *Miracle Record* case creates very difficult practical problems because the phonograph record manufacturer cannot do anything to avoid it.<sup>43</sup> There is no provision for putting a copyright notice on phonograph records, and they are not acceptable as "copies" for deposit in the Copyright Office.<sup>44</sup> Accordingly, the musical composition is irretrievably lost if its first public appearance is in the form of a phonograph record. This ruling seems so illogical that, by and large, neither the music publishers nor the record manufacturers pay any attention to it in the normal conduct of their businesses. However, this is a dangerous practice, for it would be too much to expect any defendant not to raise the issue in an infringement suit if the facts supported it. And there now are two additional cases to the same effect.<sup>45</sup>

The music publisher can protect himself against the dire results of the *Miracle Record* rule by securing copyright in the musical composition as an unpublished work under Section 12<sup>46</sup> of the Act. One question raised by this case is whether the music publisher should be forced to take such a step as a condition to having the work recorded. Another question is whether this protection always will be available to the publisher. Today, music can be created directly in the form of magnetic tape; and some "musique concrète" and electronic music apparently is incapable of expression in any known form of written notation.<sup>47</sup> If the decision in the *Miracle Record* case is correct, music of this type cannot be reproduced and sold in the form of phonograph records (or duplicate "pre-recorded tapes") without throwing it into the public domain.

The final sentence of Section 1(e) introduces another complication. It reads:

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42. *Id.* at 475 (dictum, since Judge Igoe found that the plaintiff's work had not been infringed).

43. See generally McDonald, *Law of Broadcasting*, in 7 Copyright Problems Analyzed 31, 45-46 (C.C.H. 1952), and Burton, *Business Practices in the Copyright Field*, in *Id.* at 87, 102-04.

44. 37 C.F.R. § 202.8(b) (1960).

45. *McIntyre v. Double-A Music Corp.*, 166 F. Supp. 681, 682-83 (S.D. Cal. 1958) (dictum); *Mills Music, Inc. v. Cromwell Music, Inc.*, 126 F. Supp. 54, 69-70 (S.D. N.Y. 1954) (dictum); but cf. *Yacoubian v. Carroll*, 74 U.S.P.Q. 257 (S.D. Cal. 1947).

46. 17 U.S.C. § 12 (1958).

47. See generally Kaplan and Brown, *Cases on Copyright* 86 (1960); Renaud, *Concrete Music, Electronic Music, and Copyright*, translated from *Inter-Auteurs*, No. 131, 2d Trimestre 1958, pp. 42-47, distributed to sustaining members and sustaining subscribers by The Copyright Society of the U.S.A. (1958).

"The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs."

There is a widespread feeling that this provision is an anachronism which ought to be removed from the statute.<sup>48</sup> In 1909, when the Act was passed, Congress was concerned primarily with the so-called "penny parlor,"<sup>49</sup> where it was possible for an individual to listen to a cylindrical phonograph record through ear-pieces like those of a doctor's stethoscope by depositing a one-cent piece in his choice of a large bank of machines. At the time, the mechanical player piano also fit the definition of a coin-operated machine. Today, these devices have been superseded by the juke-box, a contraption that probably was far beyond the imagination of the Congressmen who enacted Section 1(e).

The trouble with the juke-box exemption (as this provision is now known) is that it is discriminatory. When music is played in a restaurant or dance-hall by means of a phonograph record in a juke-box, no payment for the right of performance is made. But if that same music is played in the same location by a live orchestra,<sup>50</sup> by wired music<sup>51</sup> or even by a radio receiver,<sup>52</sup> the rendition is a public performance for profit for which compensation must be paid. Accordingly, efforts have been going on for some time to eliminate this exemption from the Act.

### III.

A phonograph record, though not a copy of a musical composition, can be an infringement of the copyright in a musical composition.<sup>53</sup> Indeed, each person who takes part in the manufacturing and distributing function is independently liable as an infringer, including, for example, the independent contractor who merely performs the mechanical processes of manufacturing the record<sup>54</sup> and the retailer who merely sells it to the public.<sup>55</sup> Infringement

48. See generally S. Rep. No. 2414, 85th Cong., 2d Sess. (1958).

49. 1909 Report 9, reprinted in Howell 263.

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

51. *Leo Feist, Inc. v. Lew Tendler Tavern, Inc.*, 267 F. 2d 494 (3d Cir. 1959).

52. *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931); *Society of European Stage Authors and Composers, Inc. v. New York Hotel Statler Co.*, 19 F. Supp. 1 (S.D. N.Y. 1937).

53. 17 U.S.C. § 1(e) (1958)

54. *Reeve Music Co. v. Crest Records, Inc.*, 285 F. 2d 546 (2d Cir. 1960).

55. *Shapiro, Bernstein & Co. v. Goody*, 248 F. 2d 260 (2d Cir. 1957), *cert. denied*, 355 U.S. 952 (1958); *Harms, Inc. v. F. W. Woolworth Co.*, 163 F. Supp. 484 (S.D. Cal. 1958).

is outside the scope of this article and it should be noted only that there is a special rule of damages for phonograph record infringements. The Act provides that recovery shall be at the statutory royalty rate of two cents per record; and, as to the infringing manufacturer, the court has discretion to add a further sum up to three times the amount of the royalty, i.e., an additional six cents.<sup>56</sup> Therefore, the maximum amount recoverable in an aggravated case is at the rate of eight cents per infringing record.<sup>57</sup>

Let us turn now to the question of how a phonograph record can be protected against infringement. It should be borne in mind that we are considering the recorded performance itself, not (as in the preceding paragraph) the musical work embodied in the record. It was stated at the outset that a phonograph record is not covered by the Copyright Act. It also has been noted that a record manufacturer cannot protect the style of his performance against copying by another. But does the producer of a record have any protectible rights in the actual recording itself, i.e., the particular performance that his artists put on tape that was then transferred to phonograph records?

It is generally assumed today that the answer is in the affirmative, so that a phonograph record manufacturer at least can stop the unauthorized duplication of his recordings. The basis for this result is not copyright; it is to be found primarily in the law of unfair competition and, more specifically, in the doctrine of misappropriation, sometimes referred to as the "free ride" doctrine.<sup>58</sup> The theory is that it would be unfair to permit anyone to get the benefit of the record manufacturer's expenditure of time, skill and money—all of which are represented by the finished recording—merely by dubbing the record and selling copies of it in competition with the original manufacturer. Some courts have talked alternatively in terms of a common-law copyright in the recorded performance,<sup>59</sup> but this seems a more difficult theory to rely on because it involves the concept of a common-law copyright that survives publication, i.e., putting the record on public sale.

As stated above, it is generally assumed that a record manufacturer has protectible rights in his recording. When the authorities are examined critically, however, they turn out to be pitifully small in number and none of the cases

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56. 17 U.S.C. § 101(e) (1958); see *Shapiro, Bernstein & Co. v. Goody*, 248 F. 2d 260 (2d Cir. 1957), *cert. denied*, 355 U.S. 952 (1958).

57. *Shapiro, Bernstein & Co. v. Remington Records, Inc.*, 265 F. 2d 263 (2d Cir. 1959); *Miller v. Goody*, 125 F. Supp. 348 (S.D.N.Y. 1954).

58. *Desclee & Cie. v. Nemmers*, 190 F. Supp. 381, 386 (E.D. Wis. 1961); *Developments in the Law—Unfair Competition—1932*, 46 Harv. L. Rev. 1171, 1173-75 (1933).

59. See, e.g., *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S. 2d 483 (Sup. Ct. 1950), *aff'd*, 279 App. Div. 632, 107 N.Y.S. 2d 795 (1951); *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 Atl. 631 (1937).

really deals clearly and specifically with the basic point of just what the record manufacturer's rights are and how far they may be protected. In addition, whatever rights do exist must be found in the common law of the individual states and most of the states never have passed on the question.

A brief review of the leading cases will provide some idea of the condition of the law on this important point. They will be discussed in chronological order since that obviously is the way in which the law has developed.

The first case, and the only one which actually passed on the legality of dubbing phonograph records, is *Fonotipia Limited v. Bradley*,<sup>60</sup> a decision of the old Federal Circuit Court for the Eastern District of New York in 1909. The plaintiff was granted an injunction against dubbing on broad general principles of unfair competition. The court's approach was ahead of its time; the *Fonotipia* case came even earlier than the decision of the United States Supreme Court in the *International News Service*<sup>61</sup> case, which is generally considered to be the starting point for the entire misappropriation theory in unfair competition law. However, there is a striking error in the *Fonotipia* opinion which some commentators feel seriously invalidates its reasoning.<sup>62</sup> The judge was under the misapprehension that the new Copyright Act of 1909, which had just been passed, provided for a copyright in recorded performances,<sup>63</sup> which of course was not so. He expressed his concern over the inability of phonograph record companies to protect their ownership of recordings by great artists which had been made prior to the effective date of the Copyright Act of 1909, and the decision may have been influenced by his misunderstanding of the statute.

The *Fonotipia* case stood alone for many years. Apparently nobody found it necessary to litigate any similar issue. In the middle 1930's, however, considerable irritation developed over the use of phonograph records as substitutes for live musicians for radio broadcast purposes and an organization called the National Association of Performing Artists deliberately started some test cases. Fred Waring was the spearhead of this group and it was specially arranged that he, as the orchestra leader, would reserve in his phonograph record contracts whatever legal rights might exist in the recorded performances of the orchestra.

Waring then brought an action in the state courts of Pennsylvania to enjoin the unauthorized broadcasting of commercial phonograph records embodying

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60. 171 Fed. 951 (C.C.E.D.N.Y. 1909). Cf. *Victor Talking Mach. Co. v. Armstrong*, 132 Fed. 711 (C.C.S.D.N.Y. 1904), where the court noted this "novel and interesting question" but found no need to discuss it. *Id.*, at 712.

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

62. Ringer 5. See also Homburg, *Legal Rights of Performing Artists* 143-45 (Speiser's addendum 1934).

63. *Fonotipia Limited v. Bradley*, 171 Fed. 951, 963 (C.C.E.D.N.Y. 1909).

his orchestra's performances. In 1937, the Supreme Court of Pennsylvania decided that Waring did have protectible rights in the performances; and radio station WDAS was enjoined from broadcasting the records without his consent.<sup>64</sup>

Waring also was the plaintiff when a similar result was reached in a Federal District Court in North Carolina in 1939.<sup>65</sup> Apparently this campaign was a bit too successful, because North Carolina, South Carolina and Florida all proceeded to pass statutes specifically abolishing any common law rights in recorded performances that might otherwise have survived the sale of the phonograph record.<sup>66</sup>

The next case was *RCA Mfg. Co. v. Whiteman*,<sup>67</sup> decided by the United States Court of Appeals for the Second Circuit in 1940. This action also was an attack on unauthorized broadcasting of phonograph records. The Second Circuit decided that the public sale of the record destroyed any rights that the performer or the record manufacturer might have in the recorded performance. Accordingly, the complaint was dismissed; and the United States Supreme Court denied certiorari.

Although *Waring v. WDAS* remains on the books in Pennsylvania, it is the *Whiteman* case that has had the most influence as a practical matter. No attempts ever have been made to set up a licensing system to collect fees for the performance of phonograph records on the air in the State of Pennsylvania, or any other state.

In 1950, the Metropolitan Opera Association brought an action in the New York State courts and Columbia Records joined as a plaintiff. The defendant had made off-the-air tape recordings of live radio broadcasts by the Metropolitan Opera Association and produced phonograph records from those tapes. The Metropolitan Opera Association had an exclusive recording contract with Columbia Records and two of the operas involved actually had been recorded by Columbia and sold in that form.

The New York court held that the rights of the recording artists and the record manufacturer both had been invaded and granted an injunction.<sup>68</sup> The decision was affirmed on appeal in 1951<sup>69</sup> and this case has become one of the leading authorities in the general area of unfair competition by misappropriation.

64. *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 Atl. 631 (1937).

65. *Waring v. Dunlea*, 26 F. Supp. 338 (E.D.N.C. 1939).

66. N.C. Gen. Stat. § 66-28 (1960); S.C. Code § 66-101 (1952); Fla. Stat. §§ 543.02-.03 (1959).

67. 114 F. 2d 86 (2d Cir.), *cert. denied*, 311 U.S. 712 (1940).

68. *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 199 Misc. 786, 101 N.Y.S. 2d 483 (Sup. Ct. 1950), *aff'd*, 279 App. Div. 632, 107 N.Y.S. 2d 795 (1951).

69. *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 279 App. Div. 632, 107 N.Y.S. 2d 795 (1951).

In 1951, the same year that the *Metropolitan Opera* off-the-air decision was affirmed, the case of *Granz v. Harris*<sup>70</sup> was decided by the United States District Court for the Southern District of New York. That litigation involved an attempt by Norman Granz, the "Jazz-at-the-Philharmonic" impresario, to control the way in which the master recordings of certain jazz concerts were used by his own assignee. Specifically, Granz was complaining about the fact that his twelve-inch 78 r.p.m. records had been edited down to ten-inch size and, subsequently, after the introduction of the 33 $\frac{1}{3}$  r.p.m. speed, had been re-recorded and released as long-playing records. The Federal court held that any property right Granz might have had in the recordings was lost when he sold the masters. The court cited *RCA Mfg. Co. v. Whiteman* as its authority for this proposition, making no distinction between the placing of a phonograph record on general sale to the public and a contract dealing with rights in the master recording itself.

This decision was approved on appeal by the Second Circuit in 1952.<sup>71</sup> Strangely enough, a footnote to the opinion of the Court of Appeals includes a citation of the *Metropolitan Opera* off-the-air case on a different point of law.<sup>72</sup> The opinion does not discuss the *Metropolitan Opera* case at all in connection with the basic issue of protectible rights in recordings.

Also in 1952, the Second Circuit Court of Appeals decided the case of *G. Ricordi & Co. v. Haendler*.<sup>73</sup> That action involved an attempt to protect the plaintiff's investment in the hand-engraved plates of an operatic score. The copyright in the opera itself had expired and the defendant reproduced the score by a photo-offset process. The plaintiff took the position that this was misappropriation and constituted unfair competition. The Second Circuit disagreed. The court held that since the copyright on the basic work had expired, there was no intangible right left in the printing plates to be protected. This case obviously did not involve phonograph records as such. The reason for mentioning it here is that, at the very end of the opinion,<sup>74</sup> the Second Circuit said that it was overruling *Fonotipia Limited v. Bradley*,<sup>75</sup> the dubbing case with which this discussion started.

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70. 98 F. Supp. 906 (S.D.N.Y. 1951), *aff'd in part and rev'd in part on other grounds*, 198 F. 2d 585 (2d Cir. 1952).

71. *Granz v. Harris*, 198 F. 2d 585 (2d Cir. 1952). However, as to the ten-inch records, the Court of Appeals held that the plaintiff might be entitled to an injunction to prevent a representation attributing the abridged music to the plaintiff. The court remanded for a finding on the issue of whether there had been a waiver of this cause of action.

72. *Id.* at 588 n. 6.

73. 194 F. 2d 914 (2d Cir. 1952).

74. *Id.* at 916.

75. 171 Fed. 951 (C.C.E.D.N.Y. 1909).

In 1955, the Second Circuit decided *Capitol Records, Inc. v. Mercury Records Corp.*<sup>76</sup> This case dealt with rights in master recordings. The defendant had secured from a third party copies of the same masters that the plaintiff was licensed exclusively to use in the United States. This time the Second Circuit applied New York State law. The court analyzed the *Metropolitan Opera* off-the-air case to the extent of citing portions of the record on appeal which never were mentioned in the New York State court opinions, and held that there were protectible rights in recorded performances that were not lost by putting the phonograph records on sale. Accordingly, the defendant was enjoined.

Finally, the most recent case is another New York State decision entitled *Gieseeking v. Urania Records, Inc.*,<sup>77</sup> decided in 1956. The facts there were very similar to those in the *Metropolitan Opera* case. Tape recordings of radio broadcasts of performances by the virtuoso pianist Walter Gieseeking had been taken off the air and used for the production of phonograph records. The decision was on a motion to dismiss the complaint and the plaintiff was upheld. The New York State court cited both *Metropolitan Opera* and *Capitol Records* and wrote, among other things: "The originator or his assignee of records of performances of an artist does not, by putting such records on public sale, dedicate the right to copy or sell the record."<sup>78</sup>

Although it is not immediately apparent, there is one consistent position that has been maintained throughout this entire series of cases: the position of Judge Learned Hand. He wrote the decision in *RCA v. Whiteman*; he dissented in *Capitol v. Mercury*; and he wrote the decision in *Ricordi v. Haendler* which overruled *Fonotipia v. Bradley*.<sup>79</sup> The late Judge Hand made it clear that he was very much concerned about the possibility that recognizing intangible property rights in cases of this sort would have the effect of granting a perpetual monopoly, which is even more than the Copyright Act itself can provide. His view appears to have been that any property right which ever was, or ever could be, the subject of statutory copyright must be evaluated under Federal law. This explains Judge Hand's emphasis on dedication of the property right by public sale of the record in *RCA v. Whiteman*. It explains his dissent in *Capitol v. Mercury* because he felt that Federal rather than New York law should apply. And it explains his position in *Ricordi v. Haendler*, where he reasoned from Federal copyright law and did not apply New York State principles of unfair competition.

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76. 221 F. 2d 657 (2d Cir. 1955).

77. 17 Misc. 2d 1034, 155 N.Y.S. 2d 171 (Sup. Ct. 1956).

78. *Id.* at 1035, 155 N.Y.S. 2d at 172-73.

79. He did not participate in *Granz v. Harris*, but his influence was persuasive there through the authority of *RCA v. Whiteman*.

This rather abstruse legal topic has considerable practical significance. Dubbing is a serious commercial problem in the phonograph record industry today.<sup>80</sup> When someone transcribes a record and issues it on his own label, or uses it in a wired music service, the practice is called "piracy." When someone copies both the record and the label, and sells a product that is virtually indistinguishable from the original, the practice is called "counterfeiting." This is merely industry terminology; in both cases, the essential element of the offense is the unauthorized duplication of the recording. This is generally accomplished simply by buying an ordinary commercial phonograph record at a retail store, re-recording it on magnetic tape, and then using the tape to produce master records and finished pressings just as if it were an original tape made by live artists in the recording studio. These practices are difficult to detect and, as noted above, the manufacturer's legal tools for enforcing his rights against infringers are tenuous.<sup>81</sup> Is there any solution for this problem?

One obvious possibility is to provide for a statutory copyright in phonograph records. The mere fact of having the copyright law specifically cover phonograph records would tend to deter infringement. Many foreign countries have such provisions in their laws.<sup>82</sup> In England, for example, copyright in phonograph records has been recognized by statute since 1911.<sup>83</sup> But England and these other countries are not limited in their legislation by constitutional provisions such as we have.

#### IV.

This brings us finally to the question of whether phonograph records could constitutionally be made copyrightable in the United States. Article I,

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80. See, e.g., N.Y. Times, May 3, 1961, p. 33, col. 1; Wall Street Journal, April 20, 1961, p. 1, col. 4.

81. However, where record labels are imitated, there is a cause of action for passing off. See *Victor Talking Mach. Co. v. Armstrong*, 132 Fed. 711 (C.C.S.D.N.Y. 1904); cf. *Granz v. Harris*, 198 F. 2d 585 (2d Cir. 1952). And there is very little doubt, despite the absence of direct authority, that dubbing would be enjoined by the courts of any state that accepts misappropriation as a basis for a cause of action.

A civil cause of action for dubbing apparently would be created by the "Lindsay Bill" to Provide Civil Remedies to Persons Damaged by Unfair Commercial Activities in or Affecting Commerce, H.R. 4590, 87th Cong., 1st Sess. (1961), originally introduced as H.R. 7833, 86th Cong., 1st Sess. (1959). A bill introduced by Congressman Celler would provide criminal penalties for interstate transportation of dubbed records or records bearing counterfeited labels. H.R. 6354, 87th Cong., 1st Sess. (1961).

82. See generally Ringer 38-44.

83. Copyright Act, 1911, 1 & 2 Geo. 5, c. 46, superseded by Copyright Act, 1956, 4 & 5 Eliz. 2, c. 74.

Section 8, of the Constitution<sup>84</sup> is the source of the copyright power of Congress. This clause speaks in terms of "authors" and their "writings." If the Copyright Act were amended to include phonograph records, would that be within the Congressional power to grant exclusive rights to "authors" in their "writings"?

The question of authorship can be disposed of fairly quickly. For the purposes of this discussion, perhaps the best analogy to the manufacture of phonograph records is the production of motion pictures. They both are enterprises involving at least some minimum degree of artistic endeavor, contributed by a number of different individuals, who typically are employed for the purpose by a corporation or other business entity. In the United States, there has been no difficulty with the concept that a company producing motion pictures is the "author" of the film in the constitutional sense,<sup>85</sup> and a company producing phonograph records similarly should be able to qualify as an "author."<sup>86</sup>

Whether or not a phonograph record is a "writing" in the constitutional sense is a much more difficult question. The word "writing" connotes something intelligible to the eye, and a phonograph record cannot fulfill that test. On one of the few occasions when the United States Supreme Court considered the scope of the term "writing," the Court said that it included a variety of methods "by which the ideas in the mind of the author are given *visible* expression."<sup>87</sup> Strictly speaking, that statement was dictum because the case dealt with photographs, which *are* intelligible to the eye; also, the decision just quoted dates back to 1884, and times certainly have changed since then. On the other hand, the Universal Copyright Convention, which went into effect only a few years ago, takes pains to define "publication" in terms of "copies of a work from which it can be *read* or otherwise visually *perceived*."<sup>88</sup>

Where does all this leave phonograph records? Will it take a constitutional amendment to cover them under the Copyright Act? Perhaps not.

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84. "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8.

85. This is admittedly an oversimplification, which avoids the question of whether a film producer or record manufacturer itself makes an artistic contribution to the finished product. The producer of a motion picture customarily hires the screenwriter, director, designers, performers and technicians as employees, and, under the statute, becomes an "author" because it is an "employer . . . for hire." 17 U.S.C. §§ 5, 26 (1958).

86. See 17 U.S.C. § 26 (1958).

87. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (emphasis added).

88. Universal Copyright Convention, art. VI, Sept. 6, 1952, [1955] U.S.T. & O.I.A. 2731, 2740, T.I.A.S. No. 3324 (effective Sept. 16, 1955) (emphasis added). See Bogsch, Universal Copyright Convention 85-86, 88-90 (1958).

There is a substantial body of opinion to the effect that a word in the Constitution can be given a breadth of interpretation that exceeds even the meaning of the identical word when it is used in a statute.<sup>89</sup> And the *Capitol Records* case in the Second Circuit in 1955 found both the majority<sup>90</sup> and the dissenting<sup>91</sup> judges in agreement on one principle: That phonograph records, although clearly not covered by the existing statute, could constitutionally be made copyrightable.<sup>92</sup> To be sure, these statements were dicta. There can be no definite conclusion until the statute is amended and the issue is tested directly in litigation. The proposed new revision of the Copyright Act may add phonograph records to the list of works eligible for copyright protection and thus create the opportunity for the courts to pass upon this crucial point of constitutional law.

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89. Chafee, *Reflections on the Law of Copyright: II*, 45 Colum. L. Rev. 719, 735-36 (1945), and cases cited.

90. *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F. 2d 657, 660 (2d Cir. 1955) (Dimock, D.J.).

91. *Id.* at 664 (L. Hand, J.).

92. See Kaplan, *Performer's Right and Copyright: The Capitol Records Case*, 69 Harv. L. Rev. 409, 413-15 (1956).

### 350. THE NEW DESIGN PROTECTION PROPOSALS BEFORE CONGRESS

By ALAN LATMAN\*

Increased momentum in the recent drive for new federal legislation protecting the appearance of useful articles has been reflected in the pages of this BULLETIN. Among the articles covering many facets of this domestic and international problem was an analysis by the writer of the more important provisions of S. 2075 sponsored by Senators O'Mahoney, Wiley and Hart in the 86th Congress.<sup>1</sup> These provisions insofar as they interrelated with the existing copyright law were further analyzed and were contrasted with the corresponding provisions of the Talmadge bill (S. 2852, 86th Congress) by Franklin Waldheim of the New York bar.<sup>2</sup> Both of these articles were inserted in the record of a constructive preliminary hearing held on the two Senate design proposals on June 29, 1960.<sup>3</sup> This preliminary hearing, as well as ensuing bar and industry group study have further refined the earlier bills, producing, in May 1961, three identical design proposals, H.R. 6776, H.R. 6777 and S. 1884, 87th Congress. The House bills were introduced by Congressmen Ford and Flynt, who had sponsored legislation last year which paralleled the differences between the O'Mahoney-Wiley-Hart bill and the Talmadge bill. The identity of these new House bills, as well as the sponsorship of the Senate bill by Senators Hart, Wiley and Talmadge, emphasizes the general view that the new bills not only provide for effective and equitable design legislation but do so without maiming copyrights.

The basic status quo with respect to copyright for works of art applied to or embodied in useful articles is thus preserved by the new bills. The only modifications on present law are:

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1. Latman, *A Proposal for Effective Design Legislation: S. 2075 Examined*, 6 BULL. CR. SOC. 279, item 322 (1959).
2. See Waldheim, *Don't Maim Our Copyrights!* 7 BULL. CR. SOC. 160, item 217 (1960). See also, *infra*, item 351.
3. See *Hearing before Subcommittee on Patents, Trademarks and Copyrights of the Senate Committee on the Judiciary* on S. 2075 and S. 2852, 86th Cong., 2d Sess. 24, 72 (1960).

(a) "Useful articles" cannot be deposited in the Copyright Office.

(b) The proprietor of a copyright in a work later embodied in a useful article *who obtains registration* for the resulting design under the design law cannot thereafter claim copyright protection in useful applications of his work.

The first modification is based upon the difficult burden on the Copyright Office which is administering a law historically concerned with books and music. Expansion of administrative jurisdiction to art, including commercial and industrial art, has resulted not only in the deposit of cumbersome items but in difficult interpretative questions. It is generally believed that the Copyright Office should not be called upon to determine these questions.

In view of these considerations, useful articles are rendered not subject to deposit under Sections 12 and 13 of the Copyright Act of 1909. It must be emphasized that the new bill does not purport to define, limit or expand the concept of "work of art" under Section 5(g) of the Copyright Act or the scope of protection received. The statuette of a human figure would remain a work of art and, under *Mazer v. Stein*,<sup>4</sup> would be protected as to its embodiment in a lamp. A comic strip character would continue to enjoy protection as embodied in a T-shirt or a bar of soap.<sup>5</sup> But neither the lamp, shirt or soap would be subject to copyright deposit.

Since the only limitation introduced by this provision affects the *deposit* of "useful articles" (as defined in Section 32 itself), sketches and pictures portraying useful articles would remain subject to deposit. The same would be true of a work of sculpture even if intended for utilization in a useful article. But it must be emphasized that this is merely the result of prevailing court decisions. In view of the provision that "nothing in this section shall be deemed to create any additional rights or protection" under the Copyright Law, it would seem clear that copyright in a sketch of a dress or automobile or the photograph of a lamp would afford no protection against manufacture of the article portrayed.<sup>6</sup>

The modification discussed in (b) is based on the premise that one who voluntarily elects the benefits of the design law should not be entitled to retain the longer term protection of copyright. Despite such longer term and the broad remedies against innocent infringers afforded by copyright, a proprietor might well choose the design route for any one of a number of reasons. First,

4. 347 U.S. 201 (1954).

5. See *King Features Syndicate, Inc. v. Fleischer*, 299 Fed. 533 (2d Cir. 1924).

6. See *Adelman v. Sonners & Gordon, Inc.*, 112 F. Supp. 187 (S.D.N.Y. 1934); *Kashins v. Lightmakers, Inc.*, 155 F. Supp. 202 (S.D.N.Y. 1956); *Muller v. Triborough Bridge Authority*, 43 F. Supp. 298 (S.D.N.Y. 1942) Cf. *Baker v. Selden*, 101 U.S. 99 (1880); *Lamb v. Grand Rapids Furniture Co.*, 29 Fed. 474 (W.D. Mich. 1889).

he need not qualify his work under the uncertain category of "works of art." Second, he can enjoy much more flexible notice provisions. Third, he is not troubled by the prohibition against deposit of useful articles discussed above.

The other principal changes introduced in the new bills may be briefly summarized as follows:

- (1) A second five year term of protection is available (Section 5).
- (2) The screening or "limited opposition" procedure of Section 12 has been replaced by a provision for administrative cancellation.
- (3) The definitions of excluded designs (Section 2) and the burden of proving originality (Section 8(e)) have been refined.

It is anticipated that Senate hearings will be held on S. 1884 in the late summer.<sup>7</sup> Against the back-drop of the preliminary hearing of June, 1960, one can expect industry testimony indicating through specific examples economic, cultural and moral harm being inflicted by design piracy. In all likelihood, the language of S. 1884 will be further refined. Nevertheless, it is the feeling of many close observers that the momentum gained during recent years will ultimately produce for this country a new law fairly and sensibly rewarding creativity in the field of design.

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7. Senate hearings were scheduled for August 15 through 17, 1961, by the Subcommittee on Patents, Trademarks and Copyrights of the Senate Judiciary Committee.

351. THE "ANTI-MAIM" RULE—*New Design Bill*  
*Shares Majority View Among Nations*

By FRANKLIN WALDHEIM\*

The writer, in an article published in this BULLETIN<sup>1</sup> and entitled "Don't Maim Our Copyrights", urged that in any law enacted for the protection of designs there should be no impairment of any of the rights afforded under the Copyright Law. This viewpoint has been adopted in three identical bills now pending in the Congress of the United States: S. 1884 (introduced by Senators Hart, Wiley, and Talmadge), H.R. 6776 (introduced by Congressman Flynt), and H.R. 6777 (introduced by Congressman Ford). These bills will be referred to as the "Hart Bill".

The Hart bill provides for the protection of designs of useful articles but it specifies that the use of a copyrighted work upon a useful article shall in no way impair the protection afforded under the Copyright Law. This bill enunciates a principle which is recognized by the great majority of the industrial nations of the world and passage of the bill would place the United States in harmony with the dominant theme of international thought. The generally accepted doctrine is that copyright protection is not affected by the industrial application of a copyrighted work. In protecting designs the great majority of nations do not find it necessary to maim the totality of copyright protection. Perhaps we might refer to this position as the "Anti-Maim Rule". Let us note how strongly this rule is favored among nations.

Under Italian law new designs for industrial products can be patented as ornamental designs. The Italian copyright law protects sculpture, paintings and designs "even if applied to industry provided their artistic value can be separated from the industrial character of the product to which they are connected". The difference between the two forms of protection is based upon the possibility of dissociating the art work from the product itself. If this dissociation can be conceived, the art work (even though it is applied to an industrial product) is subject to protection under copyright. This, in its essence, is no different from the law which would apply under the Hart bill. Although the creator of a design may claim copyright protection in it, the burden will always be upon him to prove that his design is a work of art susceptible to copyright protection. Essential to the accomplishment of this end would be a conception of the art inherent in the design dissociated from the industrial character of the article.

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\* Member of the New York Bar; Eastern Counsel for Walt Disney Productions.

1. 7 BULL. CR. SOC. 160, item 217 (1960).

In Germany a work of art is protected as a copyrighted work even though such work has been or could be registered as a design. Here again the question arises whether the copyrighted matter constitutes a work of art. German judicial opinions require that the work be of such rank, in the view of educated circles possessing some acquaintance with and a sense for questions of art, that it is possible to refer to the work in question as a "work of art". The Supreme Court, in its decision of May 30, 1958,<sup>2</sup> said: "The difference between a work of art and a mere design is purely gradual. What is decisive is the greater or smaller aesthetical value. The character as a work of art depends upon whether an 'aesthetic surplus' can be found in it. In making this finding high standards have to be applied."

Thus it will be seen that the German philosophy is not materially different from that which is implicit in the Hart bill. The experience of Germany furnishes an interesting answer to the fears of some thinkers that the Hart bill (in preserving copyright protection in its totality) will give rise to much litigation stemming from attempts to describe designs as works of art and to claim copyright protection for them. Germany is a litigious country. There are more than 13,000 judges and magistrates in Western Germany and Western Berlin. In all the volume of German litigation, the published decisions reveal only five cases involving this issue decided by the former German Supreme Court, five such cases decided by the present Federal Supreme Court and five such cases decided by the inferior courts. It is interesting to note that in almost all of these cases the courts held that the designs lacked the "aesthetic surplus" required to justify copyright protection as a "work of art".

France has a law for the protection of designs but this law expressly reserves to the creator of a design such rights as may accrue under the laws relating to copyright. This, in effect, is the same provision as is contained in the Hart bill.

There are laws for the registration of designs in Austria, Belgium, Denmark, Norway, Sweden (limited to metal goods), and Switzerland. In all of these countries, however, the copyright law protects industrial designs, assuming that they have a sufficient degree of artistic quality. There are no laws for the registration of designs in Greece, Luxembourg, the Netherlands, and Turkey—but in all of them industrial designs are subject to protection by the copyright law.

This basic principle, with one fine distinction, was the law in the United Kingdom until the passage of its 1956 Copyright Act. The Copyright Act 1911 had provided, in effect, that designs were not entitled to copyright protection at all if they were intended for industrial application. In the famous "Popeye"

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2. IZR 21/57—Schulze, BGHZ 44.

case,<sup>3</sup> the House of Lords held that a design or work of art is protected by copyright, even though it is used industrially, unless there is established an intention, *at the time of its creation*, to use it for industrial purposes. If such an intention is established, there would be, by virtue of the statute, no copyright in the work at all. But once copyright inheres, it is good no matter what use is subsequently made of the copyrighted work. This, in principle, is similar to the holding of the United States Supreme Court in *Mazer v. Stein*.<sup>4</sup>

In its Copyright Act, 1956, the United Kingdom omitted the intention provision above referred to, but it provided for removing copyright protection from certain areas in which the copyrighted work is used industrially. This provision, in effect, relegates a copyright owner to the protection of the Design Act to the extent that the work is so applied. This provision, however, is now the subject of further consideration. The Board of Trade has appointed a Departmental Committee to review the law relating to the protection of industrial designs and, in framing their recommendations, if any, as to changes in the law, to consider the desirability of enabling United Kingdom designs to receive cheap and effective protection in other countries on the basis of reciprocity. Hearings have been held by the Committee and it is now engaging in its deliberations.

The rule established by the "Popeye" case, which recognizes the protection of copyright whatever the subsequent form of use of the copyrighted work, is still the law in Canada, Australia, and New Zealand. In fact, a committee appointed to study the subject in New Zealand, has recommended the outright repeal of Section 30 of its Copyright Act (which is similar to the intention provision, above referred to, of the former copyright law of the United Kingdom). In making this recommendation the Committee said:

The law in other Commonwealth countries follows the English law prior to the passing of the 1956 United Kingdom Act. On the other hand there is no provision corresponding to section 30 in the law of most European countries, although these countries have legislation for the registration of industrial designs and models. Artistic works receive the protection of the copyright law whatever their field of application. The coexistence of copyright and design protection for the same works appears to have created no difficulties in these countries. It would appear from the decision of the United States Supreme Court in *Mazer v. Stein* (1953) 347 U.S. 201, that in the United States where an artistic work has copyright protection it retains that copyright

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3. *King Features Syndicate v. Kleeman*, 1941 A.C. 417; 2 All E.R. 403.

4. 347 U.S. 201 (1954).

protection although it was intended to be industrially reproduced when made and although it is in fact so reproduced in quantity.<sup>5</sup>

Thus it will be seen that almost all the major industrial countries share the viewpoint manifested in the Hart bill. That viewpoint is that a work of art is entitled to full copyright protection no matter where or how it is used. It is highly desirable that the countries of the world should, so far as possible, have a unity of attitude on this subject. This unity makes possible the reciprocal protection of designs as well as copyrighted works—and this reciprocity in turn will serve to encourage the flow of commerce, trade, and prosperity among the nations.

Efforts to provide for the international protection of designs must, of necessity, result in very limited accomplishment when the various participants in a plan have conflicting methods of dealing with the overlap between works of art and designs. The *London Times* (January 25, 1961), commenting upon the Hague Arrangement for the international deposit of designs, said: "Until the policies of various countries on protecting designs can be brought closer together, the Hague Arrangement is unlikely to attract many more adherents."

It would be a wholesome step in establishing a uniform policy among nations if the United States remained in tune with the prevailing attitude by passage of the Hart bill. This bill, while providing the machinery for the protection of designs, preserves the invulnerability of copyright as enunciated in *Mazer v. Stein*. If the weight of this country is added to the weight of the impressive majority, there is reason to hope that the United Kingdom, which is now deliberating upon this policy, may find the possibility of international reciprocity an added reason for conforming its laws to the prevailing laws of nations.

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5. Report of Committee on Copyrights and Industrial Designs, 1959 (Part XI).

## 352. "NO PHOTOGRAPHS"

By STANLEY RUBINSTEIN\*

A recent leader in *The Times* (London) wound up a correspondence on the right to take photographs in picture galleries with the conclusion that "In most cases where the prohibition still stands it derives rather from the inertia of custom than from reasoned policy," preceded by the observation "It has been suggested that every copy, by trespassing upon the uniqueness of the original, *pro tanto* diminishes its value. But the reduction is infinitesimal: originally the photograph is only for private view, and if there are any reproduction rights they remain unaffected."

It is strange that apart from this reference to an infinitesimal reduction in value and the appearance of the word "copyright" only once in the correspondence, nobody seemed to think it worth while considering the position of the artists who painted the pictures, and to whom Parliament has thought fit to give certain rights in copyright. It may well be that no painter thought it worth his while to write to *The Times*, realizing, with a shrug of the shoulder, that he has always been regarded as the Cinderella of the creative artists, and that it's too late to start complaining now.

The painter was the last of all the practitioners of the fine arts to be recognized by Parliament as worthy of copyright protection. Engravings had been protected since 1734; prints since 1777; busts and sculptures since 1798; but when it was proposed, as late as 1862, that the pictures from which the engravings were taken were worthy also of protection a cry was raised that it was derogatory on the part of jurisprudence to protect the works of those who contributed by their art to the honour of their country, the elevation of national taste, and the amusement, instruction and delight of the community at large. However, common sense prevailed and by The Fine Arts Copyright Act, 1862, a measure of protection was given to artists.

Before we can ascertain what rights a person has to take a photograph of a picture we must first know what the copyright owners' rights are. They must take precedence to the photographer's. Of course, these considerations do not arise if the picture is "out of" copyright.

Copyright is purely an artificial man-made right, and it is to the current [British] Copyright Act of 1956 that we must look for this information.

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\* Senior partner, Messrs. Rubinstein, Nask & Co., London. This article is reprinted with the permission of the author, a distinguished English expert on copyright law, and of the Museums Association, publishers of the quarterly, *Museums Journal* (London), where it appeared in June, 1961.

Section 3 of the Act deals with both unpublished and published "paintings, sculptures, drawings, engravings and photographs," all of which "irrespective of artistic quality" are included in the term "artistic work," which term also includes "works of architecture, being either buildings or models for buildings," and "works of artistic craftsmanship" not falling within either of the above quoted works.

The benefit of the Act can only be claimed for an original "artistic work" which is unpublished when the "Author" (so called, and for the purpose of the Act meaning the artist) was, at the time when the artistic work was made, a "Qualified Person," (Sec. 3(2)), in which term is included (Sec. 1(5) (a)) "a British subject or British protected person or a citizen of the Republic of Ireland" or, not being one of those, a person "domiciled or resident in the United Kingdom or in another country" to the nationals of which the provisions of the Act apply, because it is one of the countries of the Berne Copyright Union or is a party to the Universal Copyright Convention. If the making of the artistic work extended over a period, the author must have been a "Qualified Person" for a substantial part of that period.

Copyright in an artistic work by a "Qualified Person," which is first published in the United Kingdom (or in a country of the Berne Copyright Union or which is a party to the Universal Copyright Convention) runs for the period of fifty years from the end of the calendar year in which the author died (Sec. 3(4)). Copyright in such a work which is unpublished runs for the same period, except that in the case of an engraving which has not been published before the death of the author, the period of fifty years runs from the end of the calendar year in which it is first published (Sec. 3(4) (a)), and that copyright in a photograph runs for the period of fifty years from the end of the calendar year in which the photograph is first published, and shall then expire (Sec. 3(4) (b)). Thus an enthusiastic schoolboy whose snapshots are published in photographic periodicals may well live to see those snapshots go "out of" copyright.

Under the Copyright Act 1911 the copyright in a photograph ran for fifty years from the making of the original negative from which the photograph was directly or indirectly derived—which might have enabled the highly organized professional photographer to prove copyright in his photographs, but could only have proved a nightmare to the unorganized elderly amateur—if he ever thought about it at all.

The rights of the copyright owner are "restricted" (Sec. 3 (5)) to "reproducing the work in any material form," "publishing it" and entitling the work to be included in a television broadcast, including its transmission to subscribers to a diffusion service.

Having provided that the exhibition of an artistic work, or the issue of photographs or engravings of a sculpture, do not constitute publication of the

work (Sec. 49(2) (a)) the Act provides that an artistic work "shall be taken to have been published if, but only if, reproductions" of it "have been issued to the public" (Sec. 49(2) (c)), unless such publication constitutes an infringement of copyright, or is "merely colourable." Presumably the sending by an artist of a Christmas card reproducing one of his unpublished pictures to five hundred friends and clients would not constitute an issue to the public of the picture, which would therefore remain unpublished. But the reproduction of a snapshot in a school magazine which can be bought by any member of the public who may happen to have heard of its existence would constitute publication of it.

So much for the artist's rights. Section 9 of the Act proceeds to qualify them: no fair dealing with an artistic work shall constitute an infringement of copyright if it is for purposes of research or private study (Sec. 9(1)), or of criticism or review, whether of that work or of another work, if it is accompanied by "a sufficient acknowledgement" (as defined in Sec. 6(10)), (Sec. 9(2)).

And copyright is not infringed by the "making of a painting, drawing, engraving or photograph" or by the inclusion in a "cinematograph film or a television broadcast" of sculptures and works of artistic craftsmanship, other than paintings, drawings, engravings, photographs and works of architecture, being either buildings or models for buildings, "permanently situated in a public place, or in premises open to the public" (Sec. 9(3)), or by the publication of a "painting, drawing, engraving, photograph or cinematograph film" of such works (Sec. 9(6)).

Thus the right to take and publish photographs of sculptures and works of artistic craftsmanship (except as aforesaid) "permanently situated in a public place or in premises open to the public" is clear, but the words "permanent" and "permanently" do not appear to have been judicially defined, and a judge might not find it easy to ignore the dictionary meaning of the words and accept what would seem to be the common-sense point of view that "permanently" does not mean that the work is fixed in one place until Kingdom-come, but may be shifted, from time to time, from one wall to another, and may even be retired to a storehouse or cellar to "rest" it.

A facetious questioner might be tempted to wonder whether a lady could sue her hairdresser on the ground that her "permanent wave" had come "unstuck" after six months.

There should not be any difficulty in understanding what "a public place" is: Trafalgar Square would seem obviously to be a public place, and so would any public highway, notwithstanding the fact that the police can on occasions close them to members of the public. On such occasions they would presumably

cease to be public places, and what would appear to be everybody's statutory right to take photographs of sculptures and works of artistic craftsmanship (except as aforesaid) placed on the outside of buildings of such closed places obviously could not then be exercised. It may seem curious that a place may be a public place at one time and not at another time, but it was held (*Langrisch & Archer*, 1882—10 Q.B.D. 44) that a railway carriage is a public place while being used for the reception and conveyance of passengers, but not while it lies empty in a siding.

One is entitled to assume that in referring to works "permanently situated in a public place" Parliament intended to give to the photographer a right which he could be certain of being able to exercise whenever he wished to do so, whether by day or by night. Presumably the right extends to taking photographs of sculptures in a courtyard in which the public are allowed to wander at will, and which would seem to include the (private) forecourt of a railway station; but a photograph taken from an aeroplane, or from the road (by means of a telescopic lens) of a statue in a private park, would not seem to fall within the contemplation of the section.

"Premises open to the public" may not be easy to define; the words appear in the 1956 Act in place of the one word "building" in the Copyright Act of 1911. It has been suggested that the new words may have extended the right to premises to which the public are admitted only on licence or on payment, but it would seem more likely that by the new words Parliament did not intend to do more than attempt to explain that the right to photograph certain permanently situated works is to be enjoyed wherever the public have the right to be, indoors as well as out of doors. This would certainly appear to have been in the mind of the Parliamentary Secretary to the Board of Trade when the Bill was being discussed in Committee; he expressed the view that a municipal art gallery would come within the terms of subsection (3) of Clause 9 "because, whether or not it is a public place," which he pointed out was not defined in the Bill, "it would appear in any event to be 'premises open to the public.'"

Whether the artist, or the owner of the copyright in the works referred to has the right to deprive the photographer of his statutory right is an important question. It has been suggested that the owner of a gallery can insist that it may only be visited by those members of the public willing to comply with certain conditions, which may include one which requires him to deposit his camera with his hat and stick at the door.

Certainly people have no statutory right to take photographs of artistic works whether published or unpublished by an artist who has not been dead for at least fifty years (and in the case of an engraving not published during the life-time of the artist for fifty years from the end of the year in which it is published), and which are therefore still "in copyright." It is to be noted that the purchase of an artistic work which is still "in copyright" does not, of itself,

entitle the purchaser to reproduce it; only an assignment, in writing, of the copyright or a license, in writing, so to do, will entitle anyone other than the copyright owner to reproduce an artistic work.

The right of a person to take photographs of "out of" copyright works depends upon the good-will of the owner of them, who must be allowed to gloat over them in secret if that is what he wants to do, and who may therefore dictate the terms upon which his works may be seen, and which may include a prohibition against photographing them.

Briefly to sum up: whether the Trustees, Keepers or Curators of Museums and Galleries have the right to prevent visitors from taking photographs of non-copyright artistic works will depend, in each case, upon the provisions of the Act or Trust Deed under which they operate; but this cannot, in any case entitle them to permit visitors to take photographs of copyright artistic works without the consent of the owners of the copyright in such works.

It will thus be realized that no hard and fast rule can be laid down for the aspiring photographer, who, during his career, will probably be faced with many problems, *vis-à-vis* the artistic works which he wishes to photograph, and which can only be resolved, even if they cannot be solved, by the simultaneous examination of the facts in each particular case and the provisions of the Copyright Act 1956.

What is sauce for the goose is, of course, sauce for the gander, and these same Trustees, Keepers and Curators who have proudly purchased a picture, which is still in copyright, for their gallery must remember that they are not entitled to reproduce it in their catalogue (or otherwise) unless they can produce written evidence that they have also acquired the right to do so.

And their vigilance does not end there: not only must they be careful to see that they have the right to reproduce the picture, but also the right to reproduce the photograph of that picture. Here the Act comes to their assistance in a positive manner (Sec. 4(3)) by providing that "where a person commissions the taking of a photograph, or the painting or drawing of a portrait, or the making of an engraving, and pays or agrees to pay for it in money or money's worth, and the work is made in pursuance of that commission, the person who so commissioned the work shall be entitled to any copyright subsisting therein . . ." but it is to be noted that the following sub-section provides that this "automatic" vesting of the copyright in the commissioner can be avoided by agreement between the parties. Prudence insists that such an agreement should be in writing. In the absence of confirmation in writing of such an agreement an artist, commissioned to paint a portrait and paid for doing so, would find it hard to satisfy a judge that he only intended to sell the canvas on which the portrait was painted, and that his subject (or the latter's heirs) did not own the copyright, with the right to reproduce, and the right to prevent the artist from reproducing, the portrait.

## PART II.

**LEGISLATIVE AND ADMINISTRATIVE  
DEVELOPMENTS**

## 1. UNITED STATES OF AMERICA AND TERRITORIES

## 353. U. S. COPYRIGHT OFFICE.

Cartoons and comic strips. Washington, July 1961. 2 p. (Cir. 55.)

A revised circular which explains the procedure for securing copyright protection in, and the appropriate classification and application forms for registration of, cartoons and comic strips.

## 354. U. S. COPYRIGHT OFFICE.

Copyright for periodicals. Washington, June 1961. 2 p. (Cir. 42.)

A revised circular which provides general information concerning the copyright protection and registration of issues of periodicals.

## 355. U. S. COPYRIGHT OFFICE.

Copyright law revision; report of the Register of Copyrights on the general revision of the U. S. copyright law. Printed for the use of the House Committee on the Judiciary. Washington, U. S. Govt. Print. Off., July 1961. 160 p.

At head of title: 87th Congress, 1st session. House committee print.

"The culmination of a program of studies by the Copyright Office preparatory to a general revision of the copyright law . . . Contains the tentative recommendations of the Copyright Office for revision of the law." (See *supra*, item 348.)

## 356. U. S. COPYRIGHT OFFICE.

The Copyright Office of the United States of America; what it is, and what it does. [3d ed., rev. Washington, 1961] 29 p.

A new edition of the pamphlet devoted to the general description of the organization and functions of the Copyright Office. Includes brief answers to some common questions about copyright, a listing of important dates, a chart showing registration trends, as well as lists of Copyright Office publications and application forms.

## 357. U. S. COPYRIGHT OFFICE.

Dramatico-musical works. Washington, July 1961. 1 p. (Cir. 8.)

A circular which explains briefly the procedures in registering claims to copyright in dramatico-musical works.

## 358. U. S. COPYRIGHT OFFICE.

Universal Copyright Convention: list of accessions and ratifications (as of July 1, 1961) Washington, June 1961. 1 p. (Cir. 37, Annex A.)

## 2. FOREIGN NATIONS

359. ARGENTINE REPUBLIC. *Laws, statutes, etc.*

Règlement du Registre national de la propriété intellectuelle. Décret No. 41.233 du Président de la République argentine (avec les modifications adoptées jusqu'au 3 octobre 1960). (74 *Le Droit d'Auteur* 138-140, no. 5, May 1961.)

French translation of the Regulations of the Argentine National Copyright Registry as amended up to October 3, 1960.

360. ECUADOR. *Laws, statutes, etc.*

Gesetz über das geistige Eigentum vom 24. Oktober 1957 und 22. Januar 1958. (63 *Blatt für Patent-, Muster- und Zeichenwesen*, 115-118, no. 3, Mar. 1961.)

A German translation of the copyright law of Ecuador.

361. SWEDEN. *Laws, statutes, etc.*

Loi relative au droit d'auteur sur les œuvres littéraires et artistiques, du 30 décembre 1960. (74 *Le Droit d'Auteur* 156-163, no. 6, June 1961.)

Official French translation of the new Swedish Law on Copyright in Literary and Artistic works promulgated on Dec. 30, 1960 and effective on July 1, 1961.

362. SWEDEN. *Laws, statutes, etc.*

Loi relative au droit sur les images photographiques, du 30 décembre 1960. (74 *Le Droit d'Auteur* 163-165, no. 6, June 1961.)

Official French translation of the new Swedish Law on Rights in Photographic Pictures promulgated on December 30, 1960 and effective on July 1, 1961.

## PART III.

**CONVENTIONS, TREATIES AND PROCLAMATIONS****363. DIPLOMATIC CONFERENCE ON THE INTERNATIONAL PROTECTION OF PERFORMERS, PRODUCERS OF PHONOGRAMS AND BROADCASTERS**

The international diplomatic conference on The Hague Draft International Convention concerning the Protection of Performers, Makers of Phonograms, and Broadcasters,<sup>1</sup> will be held at Rome from October 10-26, 1961. The United States delegation will include Government officials of the State and Labor Departments, officials of the Copyright Office, and representatives of the various private interests who may accompany the delegation as experts or advisors.

At a meeting of the U. S. panel of experts on the Draft Convention, held at the State Department on June 8, 1961, at which the Register of Copyrights, A. L. Kaminstein, was Chairman, it was stated that the United States would be represented by an "instructed U. S. Government delegation," which would operate within the framework of a specific position paper to be formulated by the interested Government agencies after taking into account all of the views of the various private groups. Written comments were submitted to the panel meeting by the American Federation of Musicians, the American Federation of Television and Radio Artists & American Guild of Musical Artists, London Records, National Broadcasting Company, and others. In addition to Mr. Brickfield of the House Judiciary Committee and members of the State, Labor and Commerce Departments, and Copyright Office experts, participants included representatives of ASCAP, BMI, CBS, the American Bar Association and the Screen Actors Guild.

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1. The records of The Hague meeting were reported 8 BULL. CR. SOC. 31, item 15 (October 1960); the Draft Final Clauses were reported 8 BULL. CR. SOC. 306, item 286 (June 1961).

364. UNIVERSAL COPYRIGHT CONVENTION  
LIST OF ACCESSIONS AND RATIFICATIONS

(As of July 1, 1961)\*

<i>Country</i>	<i>Effective Date</i>	<i>Country</i>	<i>Effective Date</i>
Andorra	Sept. 16, 1955	Italy	Jan. 24, 1957
Argentina	Feb. 13, 1958	Japan	Apr. 28, 1956
Austria	July 2, 1957	Laos	Sept. 16, 1955
Belgium	Aug. 31, 1960	Lebanon	Oct. 17, 1959
Brazil	Jan. 13, 1960	Liberia	July 27, 1956
Cambodia	Sept. 16, 1955	Liechtenstein	Jan. 22, 1959
Chile	Sept. 16, 1955	Luxembourg	Oct. 15, 1955
Costa Rica	Sept. 16, 1955	Mexico	May 12, 1957
Cuba	June 18, 1957	Monaco	Sept. 16, 1955
Czechoslovakia	Jan. 6, 1960	Nicaragua	Aug. 16, 1961
Ecuador	June 5, 1957	Pakistan	Sept. 16, 1955
France	Jan. 14, 1956	**Philippines	Nov. 19, 1955
German Federal Republic	Sept. 16, 1955	Portugal	Dec. 25, 1956
Haiti	Sept. 16, 1955	Spain	Sept. 16, 1955
Holy See	Oct. 5, 1955	Sweden	July 1, 1961
Iceland	Dec. 18, 1956	Switzerland	Mar. 30, 1956
India	Jan. 21, 1958	United Kingdom	Sept. 27, 1957
Ireland	Jan. 20, 1959	United States of America	Sept. 16, 1955
Israel	Sept. 16, 1955		

\* As of August 20, 1961 no further changes.

\*\* UNESCO has advised the U. S. Government that on November 14, 1955, a letter was received from the Philippine Minister in Paris stating that the Philippine President had directed the withdrawal of the instrument of accession prior to November 19, 1955, the date on which the Convention would become effective in respect of the Philippines. No determination has been made as to the legal effect of this communication.

## PART IV.

**JUDICIAL DEVELOPMENTS IN LITERARY  
AND ARTISTIC PROPERTY**

## A. DECISIONS OF U. S. COURTS

## 1. Federal Court Decisions

365. *Ideal Toy Corp. v. J-Cey Doll Co.*, 129 U.S.P.Q. 241 (2d Cir. May 15, 1961) (per curiam).

Action for copyright infringement in which plaintiff had obtained a preliminary injunction barring defendant from copying its "Saucy Walker" doll.

*Held*, on appeal, affirmed.

The Court pointed out that plaintiff had placed two notices of copyright on its doll—one at the nape of the neck, and the other between the shoulder-blades—and observed that the body of the doll had previously been published without notice. Relying upon these facts, defendant argued that plaintiff was seeking to extend copyright protection to the doll's torso, that since the torso had been dedicated to the public this was a fraudulent act, and hence that plaintiff had unclean hands. The Court summarily rejected this argument as insufficient to warrant denying plaintiff access to a court of equity.

366. *Independent News Co., et al. v. Williams*, 129 U.S.P.Q. 377 (3d Cir. June 6, 1961) (McLaughlin, J.), *affirming* 126 U.S.P.Q. 181 (June 28, 1960).

Action for copyright and trademark infringement and unfair competition by publisher, copyright and trademark proprietor and distributor of comics, based on marketing by second-hand periodical dealer of cover-removed comics purchased by him from waste paper dealers. The district court denied preliminary injunctive relief.

*Held*, on appeal, affirmed.

The Court reasoned that when plaintiffs parted with title to the copyrighted comics, in spite of contractual restrictions between them and wholesaler (who sold to waste paper dealers from whom defendant purchased cover-removed comics), subsequent purchasers were free to sell the comics without restriction. The Court held, moreover, that, under 17 U.S.C. § 27, "once there is lawful ownership transferred to a first purchaser, the copyright holder's power of control in the sale of the copy ceases. This aptly fits the present situation. Plaintiffs could have destroyed the coverless comics or retained them. They

had a legitimate interest to protect and the power to effectuate this aim. See *Butterick Publishing Co. v. F.T.C.*, 85 F.2d 522, 526 (2 Cir. 1936). Actually there is testimony in the record by plaintiffs' own witness that other methods to destroy the coverless comics are being used. Instead, they allowed them to be sold to waste paper dealers. Having made this sale, the rights conferred by the Copyright Act are no longer operative."

367. *Consolidated Music Publishers, Inc. v. Ashley Publications, Inc.*, 61 Civ. 1515 (S.D. N.Y. May 25, 1961) (Murphy, J.).

Action for copyright infringement and unfair competition. Plaintiff was the publisher of a compilation of piano music in the public domain under the title "Easy Classics to Moderns," with original editorial matter such as fingering, phrasing, and expression marks. Plaintiff here alleged that defendant's publication, "World's Favorite Classic to Contemporary Piano Music," infringed its work and moved for a preliminary injunction.

*Held*, preliminary injunction granted in part.

With regard to a number of the selections in plaintiff's compilation, the Court pointed out certain common errors and other indicia of copying, and then went on to address itself to the issue whether plaintiff's work was subject to copyright protection: "The criterion here is originality which amounts to a little more than a mere trivial variation. *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F. 2d 99, 102-103 (2d Cir., 1951). We think that there is present in plaintiff's work 'at least a modicum of creativity.' *Andrews v. Guenther Pub. Co.*, 60 F. 2d 555, 557 (S.D.N.Y., 1932). Cf. *Shulsinger v. Grossman*, 119 F. Supp. 691 (S.D.N.Y., 1954). Cf. also, *Desclee & Cie, S.A. v. Nemmers*, 190 F. Supp. 381, 388 (E.D.Wisc.1961)." To this extent, therefore, plaintiff's motion for a preliminary injunction was granted. With regard to the other selections in plaintiff's compilation and the compilation's cover, there was an insufficient showing, respectively, of originality and of copying to warrant equitable relief.

368. *Intermountain Broadcasting & Television Corp. v. Idaho Microwave, Inc., et al.*, 130 U.S.P.Q. 127 (S.D. Idaho June 26, 1961) (Sweigert, J.).

Action for unfair competition and infringement of common law copyright by three broadcasters against community antenna owner. In this declaratory judgment action, plaintiffs, owners of three television stations in Salt Lake City, relying on *International News Service v. Associated Press*, 248 U.S. 215 (1918), charge that a community antenna would unlawfully appropriate plaintiffs' rights

in the programs they broadcast by enabling people in Twin Falls, Idaho, to receive the programs. On plaintiffs' motions for summary judgment.

*Held*, motions denied.

The Court concluded that plaintiffs have no property rights "quasi or otherwise" to justify invocation of the *Associated Press* doctrine. The Court reasoned that antennas are a necessary element of all television receivers; that, as plaintiffs conceded, any person in Twin Falls is free to erect an antenna capable of receiving plaintiffs' broadcasts and that such antennas can be built; that defendants' antenna would be substantially similar to any privately erected antenna; that, by the nature of the broadcast process, plaintiffs cannot control the area of reception; that, far from injuring plaintiffs, an extended reception area might benefit plaintiffs; that, in any event, since plaintiffs may, under the Communications Act of 1934 and the relevant regulations, make no charge to the receiving public, while defendants furnish their equipment solely to the public, there is neither competition between the parties nor the interference by defendants with any legitimate profit of plaintiffs.

The Court particularly declined to find a new "property right" in broadcasts of programs, particularly programs owned by others. In general the Court adopted the position of Mr. Justice Brandeis' *Associated Press* dissent, that such new rights should be created, if at all, by Congress after an investigation of the public interest which the courts are ill equipped to make.

The Court indicated that *Associated Press* might apply if a broadcaster had exclusive rights, presumably both from the Federal Communications Commission and the program owner, in the reception territory. This would assume a state of facts virtually impossible in present-day broadcasting and presumably applicable only in a pay or closed circuit broadcast situation.

After noting that no relevant precedent existed in the law of Idaho, the Court followed the line of cases tending to limit the *Associated Press* case severely.

The Court stressed that its decision did not preclude a claim for infringement of statutory or common law copyright but did not indicate whether a community antenna could be an infringer.

The claim for infringement of common law copyright was based on "locally produced programs" not otherwise identified. The Court therefore declined to pass on this subsidiary issue.

369. *Norbay Music, Inc. v. King Records, Inc.*, now reported, 290 F.2d 617, 129 U.S.P.Q. 336 (2d Cir. 1961). For digest, see 8 BULL. CR. SOC. 313, Item 292 (June 1961). See also discussion in Diamond, "Copyright Problems of the Phonograph Record Industry", *supra*, item 349.

## 2. State Court Decisions

370. *Glory Records, Inc. v. Radio Corporation of America, et al.*, 213 N.Y.S. 2d 875, 129 U.S.P.Q. 198 (Sup. Ct., N. Y. Co. April 6, 1961) (Epstein, J.).

Action for unfair competition based on release by defendant of Harry Belafonte record called "Banana Boat (Day-O)," based on an old calypso song, and Eddie Fisher's recording of "Cindy-Oh-Cindy." Plaintiff claimed these interfered with its recordings, "Banana Boat Song" and "Cindy-Oh-Cindy" sung by different artists. The defendant moved to dismiss the complaint.

*Held*, motion granted and complaint dismissed on the merits with costs.

With regard to "Banana Boat Song," the Court reasoned as follows: "The title, which is the sole possible basis for plaintiff's case in 'Banana Boat Song' is without merit. It was not plaintiff's creation; was not 'original'; was not a right recognized under copyright law (nor so claimed by counsel for plaintiff)—but was in the public domain and so recognized for years. Monopolies of words and phrases in the English language are frowned upon by the law. *Underhill v. Schenck*, 238 N. Y. 7, 20; *Futter v. Paramount Pictures, Inc.*, 69 N.Y.S.2d 438; *Brandfield v. Paramount Pictures Corporation, &c.*, 200 Misc. 883. Plaintiff Glory is at best only a non-exclusive licensee of the copyright proprietor of an arrangement of a song long in the public domain. The proprietor, Bryden Music, Inc., has its name on the label of the record. No property right, as claimed, exists. *Supreme Records v. Decca Records*, 90 F.Supp. 904, 909, 85 USPQ 405, 409. Nor has plaintiff shown any secondary meaning in its title 'Banana Boat Song' in the public to warrant the relief sought. Its origin was not with plaintiff Glory. No imitation is shown."

With respect to "Cindy-Oh-Cindy," the Court said: "In the case of this record, both plaintiff Glory and defendant R.C.A. had obtained a license from the same publisher. Here there is not the slightest case for any infringement or unfair competition. 'Covering' the release of another company's record by a different and better known artist is a well established method of competition in this highly competitive field of the music business. The copyright act itself encourages this competition of an identical song 17 U.S.C., sec. 1(e); Report of House Committee on Patents, (H. R. Rep. 2222, 60th Congress, 2d Session—1909). The fact that R.C.A. sought to purchase Glory's recording of 'Cindy-Oh-Cindy' does not create a cause of action based on its own record of the same song. There is no property right in a style, sound or form of rendition. *Supreme Records v. Decca*, 90 F.Supp. 904, 906-7, 85 USPQ 405, 406-407; *Kaplan-Performer's right, &c.*, 69 Harvard Law Review, 409, 427. Glory by releasing its version of 'Cindy-Oh-Cindy' could not bar a competitor from releasing another version of another singer for the consuming public. No such novel property right by the first public marketing

of a song can be recognized. The public interest, recognized by the Congress of the United States in statutory form, will not be permitted to be undermined."

371. *Neely v. Ferrin*, 129 U.S.P.Q. 189 (Calif. Superior Ct., L. A. Co. Mar. 6, 1961) (Fleming, J.).

Unfair competition action in which plaintiff-employer alleged that ex-employee-defendant had used secret processes acquired confidentially from plaintiff and had utilized in his own business knowledge of plaintiff's customer's requirements acquired while in plaintiff's employ. No restrictive covenant was involved. Defendant moved for summary judgment.

*Held*, granted in part.

With regard to the alleged secret processes, the Court found that there were issues of fact to be determined by trial. With regard to customer's requirements, the Court reasoned as follows: "A salesman necessarily becomes acquainted with the particular requirements of his customers but the knowledge he obtains in this manner is not in and of itself confidential information which is the property of the employer." As to this aspect of the complaint, therefore, summary judgment was granted in defendant's favor.

*Also of Interest:*

372. *Ball, et al. v. United Artists Corp., et al.*, 129 U.S.P.Q. 192 (App. Div. 1st Dep't April 25, 1961) (Eager, J.) (action for damages for wrongful use of title "China Doll"; trial court had denied defendant's motion for summary judgment; on appeal, reversed).
373. *Budget System, Inc. v. Budget Loan and Finance Plan*, 129 U.S.P.Q. 201 (Utah Sup. Ct. April 6, 1961) (Faux, J.) (unfair competition action affirming grant of injunction to bar defendant from using word "budget" in its name on ground plaintiff had established secondary meaning in word).
374. *Edgar Rice Burroughs, Inc. v. Metro-Goldwyn-Mayer, Inc., et al.*, 130 U.S.P.Q. 245 (Calif. Superior Ct., L. A. Co. June 30, 1961) (Balthis, J.) (action for breach of contract under which defendant had right to make a "remake" of "Tarzan, the Ape Man" in which court construes section 426 of California Code of Civil Procedure and sustains demurrer to complaint).
375. *Fabrex Corporation v. Scarves By Vera, Inc.*, 129 U.S.P.Q. 392 (S.D.N.Y. April 14, 1961) (Palmieri, J.) and *Scarves By Vera, Inc. v. Fabrex Corporation*, 129 U.S.P.Q. 395 (S.D.N.Y. April 14, 1961) (Palmieri, J.) (action for declaratory judgment and action for copyright infringement in which copyright notices on scarves were held sufficient since no one could be misled by failure to include full corporate name of copyright proprietor).

376. *Ideal Toy Corp. v. Newman Premier Corp., et al.*, 129 U.S.P.Q. 437 (Sup. Ct., Queens Co. May 31, 1961) (Latham, J.) (question whether subject matter of action was covered by plaintiff's copyrights and action therefore could be brought in federal court only could not be determined summarily on affidavits alone but must await trial).
377. *Ross Jungnickel, Inc., et al. v. Joy Music, Inc., et al.*, 129 U.S.P.Q. 373 (Sup. Ct., N. Y. Co. May 4, 1961) (Greenberg, J.) (action involving question who is "child" of composer so as to qualify for renewal copyright is exclusively within federal jurisdiction, and hence must be dismissed in state court).
378. *Simplex Wire & Cable Co. v. Dulon, Inc., et al.*, 130 U.S.P.Q. 143 (E.D.N.Y. July 10, 1961) (Rayfiel, J.) (action for injunction restraining disclosure of trade secrets; court defines "trade secrets" and discusses factors to be considered in determining whether information comes within definition).
379. *The 88¢ Stores, Inc. v. Martinez*, 129 U.S.P.Q. 491 (Ore. Sup. Ct. May 10, 1961) (O'Connell, J.) (action for unfair competition reversing judgment for plaintiff on ground that plaintiff had not established secondary meaning in descriptive term "88¢ Store").

## 2. England

EDITOR'S NOTE: For the following note, we are indebted to Mr. R. C. Whale, Secretary, The Performing Right Society, Ltd., London. An earlier decision was reported in 8 BULL. CR. SOC. 127, item 88 (December 1960).

380. *Barrington Electronics Limited (and Sales Agencies Limited, which "dropped out" of the proceedings), Referors, Phonograph Operators Associated Limited, Interested Party, and Performing Right Society Limited*, Licensing Body. (PRT. 5/60) December 21, 1960. Reference under Section 25, Copyright Act, 1956.

Barrington Electronics Ltd. is a private limited company which, among other activities, carries on a business of placing on suitable sites coin-operated record-players, commonly known as juke boxes.

The Phonograph Operators Association Ltd. is a company limited by guarantee formed to protect the rights and interests of manufacturers, distributors and operators of coin-operated musical instruments.

The Performing Right Society is a company limited by guarantee, licensing, on behalf of composers, lyric writers and publishers of music, the performing right in non-dramatic musical works, in most cases by means of blanket licences granted to the proprietors or responsible managers of premises where music

is publicly performed, authorizing the performance of any and every work in the Society's repertoire in accordance with tariffs appropriate to different categories of premises and means of performance.

*Short particulars.*

Section 48(6) of the (British) Copyright Act, 1956 makes the occupier of premises where coin-operated record-playing apparatus is sited liable in respect of public performance by means of the apparatus because he is deemed to be the person who gives the performance, even though he will not usually himself operate the apparatus by inserting the coins. It is submitted, however, that the person operating a service for the supply of juke boxes on sharing terms with the occupiers of the premises is, because he authorizes the performance, himself liable in respect of public performance under Section I(1) of the Copyright Act 1956, and it was on this basis that the Tribunal considered the Reference before it.

Public performance by means of juke boxes is not exempted from liability under British copyright law as it is in the U.S.A.

Juke box operators nearly always take upon themselves not only their own liabilities under the copyright law but also those of the occupiers of the premises on which the record-players are installed, the arrangements between operator and occupier providing that the latter does nothing but allow his premises to be used as a site for the apparatus, the operator undertaking responsibility for servicing, licences, etc. The monetary proceeds are shared.

The Licensing Body's tariff for public performances by means of juke boxes provides for payment at the rate of £13.13.0 per annum per machine with a single play price of 4d. or more, and £10.10.0d. per annum per machine if the single play price is less than 4d. There is a system of rebates for multiple juke box operators which increases proportionally with the number of machines operated by a single operator.

In April 1960 the Referors referred the Licensing Body's juke box tariff to the Performing Right Tribunal, complaining that the charges were excessive and ought to be related to the record-holding capacity of each machine.

The Interested Party, representing, it was stated, about 65% of all the juke box operators in the United Kingdom, joined itself to the Reference, but though it also complained that the Licensing Body's charges were excessive it did not agree with the Referors that the charges should be related to the record-holding capacity of each machine. The Interested Party objected to the system of relating the fees to the per play price of the machine, and put forward two alternative proposals as a basis for the Licensing Body's tariff:—

- (a) A charge of  $6\frac{1}{4}\%$  of 52 times the retail price of three records, the basis of this proposal being that  $6\frac{1}{4}\%$  is the statutory royalty

paid by gramophone record *manufacturers* pursuant to Section 8(2) of the Copyright Act 1956 (compulsory recording right) and three records per week being (it was alleged) the number of new records which on the average the operators put into each machine each week. On this basis the Licensing Body's charge would be only £2.6.4d. per machine per annum.

- (b) The Licensing Body's charge should be the same as the fee charged by Phonographic Performance Ltd. (a licensing body acting for record manufacturers in respect of the performing right in their records granted them under British copyright law). This fee—£4.2.6d. per machine per annum—had been confirmed by the Tribunal on the 10th October 1960 (See this BULLETIN, Vol. 8, No. 2, December 1960, page 127).

The hearings before the Tribunal took place on 1st, 2nd, 3rd and 4th November and 14th December 1960. The decision of the Tribunal rendered on the 21st December 1960 was against the proposal of the Referors that the tariff should be based on the record-holding capacity of each machine, on the ground that as there was a wide range of capacities varying from 30 to 100 records per machine the introduction of this variable factor would be an unnecessary and undesirable complication. Furthermore, the Referors as operators of machines almost entirely of a single type presented an exceptional case which did not justify any adaptation of the tariff to meet their peculiar requirements.

In regard to the first of the alternative proposals put forward by the Interested Party, the Tribunal accepted the Licensing Body's contention that there is no true relation between the fees paid by record manufacturers for the right to record copyright music and the fees charged by the Licensing Body on behalf of performing right owners. The Tribunal referred with approval to the Licensing Body's argument that, if there was any merit in this proposal, the proper method of applying it would be for the Licensing Body to charge  $6\frac{1}{4}\%$  of the price paid by the public for listening to the music, that is to say  $6\frac{1}{4}\%$  on the gross takings of the machines, which could be expected to produce a very much larger fee than that provided by the Tariff.

The Tribunal also rejected the Interested Party's alternative proposal, on the grounds that there was no reason why the Licensing Body's charge for the exercise of the performing right should be related to the charge made by Phonographic Performance Ltd. for the exercise of a different right, particularly as the Licensing Body had no part in fixing Phonographic Performance Ltd.'s fee.

The Tribunal decided, accordingly, to confirm the Licensing Body's tariff, subject to a modification of detail not affecting the fee chargeable.

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## PART V.

## BIBLIOGRAPHY

## B. LAW REVIEW ARTICLES

## 1. United States Publications

381. DUBIN, JOSEPH S. Extension of copyright in Europe. (8 *UCLA Law Review* 682-702, no. 3, May 1961.)

"Noting that the general trend of European copyright legislation has been to extend the protection period, the author examines the various forms such extensions have taken. The domaine public payant doctrine, wartime, and other extensions are considered in their various applications as well as for the morass of legislation resulting therefrom. The author concludes that the beneficent purposes of the extensions have not been accomplished, and considers alternative measures."

382. GORDON, HAROLD R. Right of property in name, likeness, personality and history. (55 *Northwestern University Law Review* 553-613, no. 5, Nov.-Dec. 1960.)

After a brief introduction, this article is devoted to a survey of the decisions involving the "appropriation of some element of the plaintiff's personality for commercial use." Related cases outside the area of privacy are also surveyed "so as to trace the thread of 'property rights' throughout and to point out pertinent instances where the filing of suits on the basis of appropriation of property rights alone (without the additional elements of privacy and injured feelings) might have avoided some of the confusion and conflict in the decisions and provided a firmer basis for measuring damages."

383. GREEN, LEON. Protection of trade relations under tort law. (47 *Virginia Law Review* 559-582, no. 4, May 1961.)

An examination of "the protection given to trade relations by tort law. Noting that tort law is constantly 'in the making' the author discusses the remedies, or lack of such, which an injured trader has under the theories of inducement of breach of contract, unfair competition, and the prima facie tort."

384. KESSLER, ARTHUR. Reappraisal of the notice requirement in copyright. (8 *UCLA Law Review* 703-724, no. 3, May 1961.)

An examination of the historical background, judicial interpretation, and statutory modification of the notice provisions of the present copyright statute in order to "present the basis for an evaluation of proposed solutions to a revision of the copyright notice law."

385. S[TEWART], C. V[AN] L. The Federal law of unfair competition [by C. Van L. Stewart and Thomas W. Thagard, Jr.] (47 *Virginia Law Review* 600-625, no. 4, May 1961.)

A discussion of the "impact of Lanham Act on unfair competition in the federal system . . . [with the conclusion] that there is a need for definitive congressional action."

386. VON KALINOWSKI, JULIAN O. Key employees and trade secrets. (47 *Virginia Law Review* 583-599, no. 4, May 1961.)

"This article will explore the shifting tides of judicial pronouncements in this area with the ultimate hope of delineating the existing boundaries of protection as afforded between employer and employee."

387. WATTERS, WALKER L. Taxation of profits realized from the transfer of a right under the Copyright Act. (32 *Mississippi Law Journal* 291-305, no. 3, May 1961.)

An article, entered in the Nathan Burkan Competition, which examines the case law involving the question whether profits realized from a transfer of one of the rights comprising a copyright are taxable as capital gains or ordinary income.

## 2. Foreign

### (a) English

388. ZINI LAMBERTI, C. Further considerations on the author's exclusive rights in relation to the use of works in broadcasting by means of commercial records. *EBU Review*, no. 67 B (May 1961), pp. 26-30.

An examination of "sections 13, 16 and 61 in relation to section 19 . . . [of the Italian Copyright Act of 1941] . . . [in order] to determine which of the author's exclusive rights may be affected by the broadcasting of a work by means of the use of a mechanical instrument."

389. LJUNGMAN, SEVE. The interpretation of the concept "applied arts" in Swedish law and pra[c]tice. *Revue Internationale du Droit d'Auteur*, no. 31 (Apr. 1961), pp. 18-37.

A discussion, in English, French and Spanish, of some difficulties encountered in Swedish practice in connection with the legal protection of works of applied art, particularly the problem of defining the object of such protection. Also discussed are attempts at solving some of the difficulties by a special expert body which was set up by the Swedish Industrial Designs Association.

390. WAGNER, EGON. Report from the Federal Republic of Germany. *EBU Review*, no. 67 B (May 1961), pp. 23-26.

Discussion of (1) proposals "at the present stage of deliberations" on the Ministerial Draft Copyright Law of 1959, with particular reference to provisions relevant to broadcasting; (2) recent decisions of the Federal Court of Justice on the rights of performers; and (3) a recent judgment of the Federal Constitutional Court on the question of the authority competent to pass institutional legislation on the organization of broadcasting services.

(b) French

391. AROZAMENA, JESÚS MARIA DE. La Société Générale des Auteurs d'Espagne. *Interauteurs*, no. 142 (1. trimestre 1961), pp. 11-22.

An article on the history, present activities, and achievements of the Society of Spanish Authors (Sociedad General de Autores de España).

392. BECQUET, GEORGES. Le droit d'auteur des photographes en Belgique et en France. (51 *Revue de Droit Intellectuel, l'Ingenieur-Conseil* 1-24, no. 1-3, Jan.-Mar. 1961.)

A survey of the development of the Belgian and French law of copyright in photographs, with suggestions for special legislation in Belgium.

393. DERENBERG, WALTER J. Lettre des États-Unis. (74 *Le Droit d'Auteur* 165-179, no. 6, June 1961.)

An enlarged version of the author's 1960 annual survey of legislative and judicial copyright developments in the United States; in French and English in parallel columns.

394. GAVIN, GÉRARD. Vers une sanction pénale du droit moral. (31 *Revue Internationale du Droit d'Auteur* 2-17, Apr. 1961.)

A brief study, in French, English and Spanish, of the protection of the moral right of the author in French law and jurisprudence with special reference to the penal sanction of seizure.

395. MALAPLATE, LÉON. Echos du Moyen-Orient. *Interauteurs*, no. 142 (1. trimestre 1961), pp. 23-26.

A brief, critical examination of present copyright protection in Lebanon and Turkey with some suggestions for improvements.

396. MATTHYSSENS, JEAN. La limitation dans le temps des droits exclusifs de représentation; étude de droit français. *Revue Internationale du Droit d'Auteur*, no. 31 (Apr. 1961), pp. 38-57.

A discussion, in French, English and Spanish, of the application and effect of article 44 of the French Copyright Law of 1957 which, *inter alia*, imposes time limitations on exclusive performing contracts granted by authors of dramatic works.

397. VAUNOIS, LOUIS. Lettre de France. (74 *Le Droit d'Auteur* 144-149, no. 5, May 1961.)

A survey of recent French court decisions in the field of copyright and related subjects.

398. VILBOIS, JEAN. Nouvelles de La Haye. *Revue Internationale du Droit d'Auteur*, no. 29 (Oct. 1960), pp. 112-118; no. 31 (Apr. 1961), pp. 58-68.

A report, by the Permanent Secretary of the International Literary and Artistic Association (A.L.A.I.), on the proceedings of the conference of the Committee of Experts on Neighboring Rights held at The Hague, May 9-20, 1960.

399. WHALE, ROYCE F. Revision du droit d'auteur en Australie. *Interauteurs*, no. 142 (1. trimestre 1961), pp. 27-28.

A brief note on some of the principal recommendations of the Australian Copyright Committee which appeared in its *Report* issued in 1960.

## (c) German

400. BRIEGER, HANS RICHARD. Geschützte Bauwerke des geltenden Rechtes im Vergleich zum kommenden Recht. (63 *Gewerblicher Rechtsschutz und Urheberrecht* 174-178, no. 4, Apr. 1961.)

A comparative analysis of present copyright protection of architectural works in West Germany and that offered by the relevant provisions of the Federal Ministry of Justice Draft Copyright Law of 1959.

401. GEMA KEIN KARTELL. *GEMA Nachrichten*, no. 49 (Feb. 1961), pp. 3-5.

A discussion of the question whether, from the point of view of West German antitrust law, the West German performing rights society, GEMA (Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte) as well as BIEM (Bureau International de l'Édition Mécanique) and IFPI (International Federation of the Phonographic Industry) are cartels. Includes an examination of the relationship of GEMA to BIEM and IFPI.

402. GLUCKSMANN, ANSELM. Vorbereitende Vereinbarungen und Vorverträge zwischen Autor und Verlag. (10 *Erfindungs- und Vorschlagswesen*, Ausg. B, 74-76, no. 4, Apr. 1961.)

A discussion of the proper form and content of preliminary contracts concluded in East Germany between author and publisher prior to the completion of the manuscript, with a suggestion that some of the principles discussed by the author be incorporated into the standard contracts to be issued by the East German Ministry of Culture.

403. Kartellrechtliche Bedenken gegen das BIEM, die IFPI und den Normalvertrag BIEM/Deutsche Schallplattenindustrie. *GEMA Nachrichten*, no. 50 (May 1961), pp. 3-12.

A continuation of the article "GEMA kein Kartell" which appeared in *GEMA Nachrichten*, no. 49 (Feb. 1961), pp. 3-5, with special reference to the restrictions imposed upon West German phonograph record producers by the provisions of the BIEM standard contract and by the practices of IFPI. See Item 401, *supra*.

404. PINNER, H. L. Vorbehalt des Urheberrechtes und copyright notice; Betrachtungen über den Schutz deutscher Werke in den USA. (17 *Börsenblatt für den deutschen Buchhandel* 333-338, Frankfurter Ausg., no. 19 (Mar. 7, 1961.)

Critical comments on the protection of German works in the United States with reference to the conflicts between the formalities, particularly notice requirements, under the U. C. C. and the U. S. Copyright law.

405. POHLMANN, HANSJÖRG. Das neue Geschichtsbild der deutschen Urheberrechtsentwicklung. Baden-Baden, Verlag für angewandte Wissenschaften, 1961. 48 p. (Schriftenreihe der UFITA, Heft 20).

A slightly revised version of the author's study which appeared in 169 UFITA 33 (1961) under the title "Privilegienwesen und Urheber-Recht." See 8 BULL. CR. SOC. 327, Item 330 (1961).

406. POHLMANN, HANSJÖRG. Neue Materialien zum deutschen Urheberschutz im 16. Jahrhundert. [Frankfurt] 1961. 761-802 p. (Börsenblatt für den deutschen Buchhandel, Frankfurter Ausg., vol. 17, no. 41a (May 25, 1961).

"Archiv für Geschichte des Buchwesens, 26."

Another study of the early development of German copyright protection based in part on the author's earlier work published in 169 UFITA 33 (1961) under the title "Privilegienwesen und Urheber-Recht." See 8 BULL. CR. SOC. 327, Item 330 (1961).

#### (d) Hungarian

407. BENÁRD, AURÉL. Zenemű átdolgozásának szerzői jogi védelme. *Magyar Jog* (Mar. 1961), pp. 115-118.

A discussion of copyright protection of musical arrangements in Hungary.

### C. ARTICLES PERTAINING TO COPYRIGHT FROM TRADE MAGAZINES

#### 1. United States

408. Joint Libraries Committee on Fair Use in Photocopying. Report on single copies. (52 *Special Libraries* 231-255, no. 5, May-June 1961.)

The Joint Committee consisting of the representatives of various library associations, with representatives of the Council on Library Resources and the Copyright Office serving as consultants, recommends in its report of May 17, 1961, "that it be library policy to fill an order for a single photocopy of any published work or any part thereof," as such demand can be satisfied without inflicting measurable damage on publishers and copyright owners. Appended are: "Counsel Opinion" and "Summary of Committee Studies."

409. MEYER, BARBARA L. The copyright question: some words to the wise. (35 *Dance Magazine* 44-45, 60-61, no. 4, Apr. 1961.)

An article which draws attention to the existence and purpose of copyright protection, and makes some suggestions about dealing with it particularly in its application to the dance field.

410. PILPEL, HARRIET F. But Can You Do That? (178 *Publishers' Weekly* 38 (Aug. 22, 1960). Discussions of *Consumers Union of United States, Inc. v. Hobart Mfg. Co. and Speed Queen Atlantic Company, Inc.* (S.D. N.Y. April 1960); *Albert v. N. Y. Telephone Co.* (N.Y.Sup.Ct. April 1960); *McGovern v. Martz et ano.* (D.C. D.C. March 1960); and *Michaels v. Gannet Co.* (N.Y.App.Div. 4th Dept. May 1960). The first case raised questions of copyright infringement and unfair competition, the second involved use of a photograph without consent, and the last mentioned cases were concerned with libel.
411. PILPEL, HARRIET F. But Can You Do That? (178 *Publishers' Weekly* 24 (Sept. 26, 1960). Discussions of *Talley v. California* (1960) "Freedom of the Press Extended to Cover the Anonymous Author"; and *Clevenger v. Baker Voorhis & Co.* (N.Y.Ct.App. 1960) "What Happens When Another Revises the Original Text?"
412. PILPEL, HARRIET F. But Can You Do That? (178 *Publishers' Weekly* 27 (Oct. 31, 1960). Discussions of an "idea" case, *Walters v. Shari Music Publishing Corp.* (S.D. N.Y. 1960); and Judge Dimock's decision in *Huie v. National Broadcasting Company* (S.D. N.Y. 1960).
413. PILPEL, HARRIET F. But Can You Do That? (178 *Publishers' Weekly* 17 (Nov. 28, 1960). *Miller Music Corp. v. Charles N. Daniels, Inc.* (1960); *Rose v. Bourne*, cert. den. 1960, and *Independent News Co. Inc. v. Williams* (E.D. Pa. 1960) are reviewed.
414. PILPEL, HARRIET F. But Can You Do That? (179 *Publishers' Weekly* 32 (Feb. 27, 1961). *Orgel and The Michie Company v. Clark Boardman Co. Ltd. and Alfred D. Jabr*, (S.D. N.Y. 1960); *Henkin v. News Syndicate Co., Inc.* (N.Y.Sup.Ct. 1960); and *Fabian v. Amerikai, Magyar Szo* (N.Y.Sup.Ct. 1960), the two last-mentioned cases involving questions of libel, are discussed.
415. PILPEL, HARRIET F. But Can You Do That? (179 *Publishers' Weekly* 29 (Mar. 27, 1961). "The Legal Situation of the Bookseller Is Better" discusses *People v. Douglas* (N.Y.Sup.Ct. App. Div. 3d Dept. 1961)

involving prosecution for selling obscene magazines; "To Say It's a Non-Book Is Not Libelous" is based on *Geis v. Time* (N.Y.Sup.Ct. 1960).

416. PILPEL, HARRIET F. But Can You Do That? (179 *Publishers' Weekly* 44 (Apr. 24, 1961). *People v. Finkelstein* (N.Y.Ct.App. 1961), based on the sale of an obscene publication, and *Krendell v. Moscow* (N.Y. Sup.Ct. 1960), on breach of contract, provide the subject matter.
417. PILPEL, HARRIET F. But Can You Do That? (179 *Publishers' Weekly* 35 (May 29, 1961). Defamatory words about a product, *Harwood Pharmacal Co. v. National Broadcasting Co.* (N.Y.Ct.App. 1961); rights of a photographer in negatives, *Manning v. The Curtis Publishing Co.* (S.D. N.Y. 1961); and two tax cases, *Commissioner v. Starrels* (U.S. Tax Court Jan. 1961), and *Commissioner v. Ferrer* (U.S. Tax Court Jan. 1961), are briefly discussed.
418. PILPEL, HARRIET F. But Can You Do That? (179 *Publishers' Weekly* 57 (June 26, 1961). The "Modern Romances"—"Modern Confessions" case, *Dell Publishing Co. v. Stanley Publications, Inc.* (N.Y.Ct.App. 1961), and *People v. Richmond County News, Inc.* (N.Y.Ct.App. 1961), another obscenity case, are reviewed.
419. PILPEL, HARRIET F. But Can You Do That? (180 *Publishers' Weekly* 21 (July 31, 1961). Under the subhead "What will they think of next?", Mrs. Pilpel comments on recent right of privacy cases, particularly *Moglen v. Varsity Pajamas, Inc.* (N.Y.App.Div. 1961) in which underwear, pajamas and sport togs had been made of fabric reproducing a portion of a newspaper article containing plaintiff's name.
420. RIE, ROBERT. Legal rights of the artist. (20 *The Art Journal* 151-154, no. 3, Spring 1961.)  
"This article [on droit de suite] has been adapted to the American situation from its German original in the *Archiv für Urheber-, Film-, Funk-, und Theaterrecht* . . . April, 1957." See 5 BULL. CR. SOC. 106, Item 175 (1957).
421. U. S. Report Asks Major Change in Copyright Law. *Billboard Music Week*, 1, 48 (July 17, 1961).

Under the by-line of Mildred Hall, its Washington correspondent, this publication surveys the studies and the report of the Register of Copyrights on the program for the Revision of the Copyright Law.

## NEWS BRIEFS

422. AMERICAN LIBRARY ASSOCIATION'S 80th ANNUAL CONVENTION (*Cleveland, July 9-15, 1961*)

Copyright law revision received recurring mention at a number of sessions of the meeting, by virtue both of scheduled reports and of discussions of certain related topics.

A report of the ALA Copyright Law Revision Committee was presented at the meeting of the Library Administration Division on Monday afternoon by its chairman, Richard E. Chapin, director of Michigan State University Libraries. Mr. Chapin outlined very briefly a few of the recommendations of the Copyright Office with regard to the content of a new law and referred to the availability at the Library of Congress booth of a summary, prepared by the Copyright Office for distribution to librarians, of some of the recommendations contained in the just released *Report of the Register of Copyrights on General Revision of the U. S. Copyright Law*.

The summary, *Recommended Revisions of the U. S. Copyright Law of Special Interest to Libraries*, was also mentioned, and copies distributed, at the meeting of the RTSD Copying Methods Section. Largely as the result of these two announcements the stock available at the library booth was exhausted on Wednesday.

The photocopying by libraries of copyrighted works was introduced in at least one of the discussion groups organized for the joint meeting of the RTSD Acquisitions and Serials Sections. With Charles G. LaHood as discussion leader, this group was concerned with photoduplication activities performed in connection with the interlibrary loan of serials.

The Federal Relations Committee, at its request, was briefed twice on copyright law revision matters, by Mr. Chapin and by this writer.

As ALA representative on the Joint Committee on Fair Use in Photocopying, Mr. Chapin presented the report of that committee to Council for formal action at its meeting on Thursday morning. This committee, formed of representatives of the Association of Research Libraries, Special Libraries Association, and American Association of Law Libraries in addition to ALA, had issued its recommendation as to a working policy for libraries in supplying requests for single photocopies in a report which had appeared in the May-June issue of *Special Libraries* and the June issue of the *ALA Bulletin*. Previous to this meeting the committee recommendation had received the endorsement of SLA and AALL at their respective annual meetings in June, and of ARL at its meeting in Cleveland on July 8. The report of the Joint Committee was approved without opposition or discussion.

On Thursday afternoon this writer presented in some detail some of the Copyright Office recommendations regarding a new law at a meeting of the Music Library Association. Each topic presented—including the possible extension of protection to sound recordings, elimination of the compulsory license, extension of the maximum term of copyright to 76 years, the relaxation of the notice provision as to location, and various aspects of registration, deposit, and photocopying—was actively discussed, with a majority of those present participating. [Joseph W. Rogers, Chief, Copyright Cataloging Division, Library of Congress.]

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