COPYRIGHT LAW REVISION

**SEPTEMBER 3, 1976.--Committed to the Committee of the Whole House on the State of the Union and ordered to be printed**

**Mr. KASTENMEIER, from the Committee on the Judiciary, submitted the following**

**REPORT**
**together with**
**ADDITIONAL VIEWS**
**[To accompany S. 22]**

**The Committee on the Judiciary, to whom was referred the bill (S. 22) for the general revision of the copyright law, title 17 of the United States Code, and for other purposes, having considered the same, report favorably thereon with an amendment in the nature of a substitute and recommend that the bill as amended do pass.**

[Editor's note: At this point the entire copyright bill as reported out by the House Committee was set forth. Only those portions of the bill which are *not* identical to the Copyright Act as finally enacted are reproduced here.]

The amendments are as follows:

Strike all after the enacting clause and insert in lieu thereof the following:

SEC. 101. Title 17 of the United States Code, entitled "Copyrights", is hereby amended in its entirety to read as follows:

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**[5]** § 105. Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise: *Provided, however*, That the Secretary of Commerce may secure copyright for a limited term not to exceed five years, on behalf of the United States as author or copyright owner in any National Technical Information Service publication, which is disseminated pursuant to the provisions of *chapter 23* of title 15.

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**[8]** § 110. (5) communication of a transmission embodying a performance of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless--

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**[11]** § 111. (d)(2)(C) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement for the basic service of providing secondary transmissions of primary broadcast transmitters total less than $ 80,000, gross receipts of the cable system for the purpose of this subclause shall be computed by subtracting from such actual gross receipts the amount by which $ 80,000 exceeds such actual gross receipts, except that in no case shall a cable system's gross receipts be reduced to less than $ 3,000. The royalty fee payable under this subclause shall be 0.5 of 1 per centum, regardless of the number of distant signal equivalents, if any; and

(D) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement, for the basic service of providing secondary transmissions of primary broadcast transmitters, are more than $ 80,000 but less than $ 160,000, the royalty fee payable under this subclause shall be (i) 0.5 of 1 per centum of any gross receipts in excess of $ 80,000, and (ii) 1 per centrum of any gross receipts in excess of $ 80,000 but less than $ 160,000, regardless of the number of distant signal equivalents, if any.

(3) The Register of Copyrights shall receive all fees deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section, shall deposit the balance in the Treasury of the United States,

in such manner as the Secretary of the Treasury directs, for later distribution by the Copyright Royalty Commission as provided by this title. The Register shall submit to the Copyright Royalty Commission, on a semiannual basis, a compilation of all statements of account covering the relevant six-month period provided by clause (2) of this subsection.

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**[15]** § 112. (d) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance of a work under section 110(8) to make no more than one copy or phonorecord embodying the performance, if--

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**[16]** § 115. (c)(2) Except as provided by clause (1), the royalty under a compulsory license shall be payable for every phonorecord made and distributed in accordance with the license. For this purpose, a phonorecord is considered "distributed" if the person exercising the compulsory license has voluntarily and permanently parted with its possession. With respect to each work embodied in the phonorecord, the royalty shall be either two and three-fourth cents, or six-tenths of one cent per minute of playing time or fraction thereof, whichever amount is larger.

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**[18]** § 116. (c) DISTRIBUTION OF ROYALTIES.--

(1) The Register of Copyrights shall receive all fees deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs, for later distribution by the Copyright Royalty Commission as provided by this title. The Register shall submit to the Copyright Royalty Commission, on an annual basis, a detailed statement of account covering all fees received for the relevant period provided by subsection (b).

(2) During the month of January in each year, every person claiming to be entitled to compulsory license fees under this section for performances during the preceding twelve-month period shall file a claim with the Copyright Royalty Commission, in accordance with requirements that the Commission shall prescribe by regulation. Such claim shall include an agreement to accept as final, except as provided in section 809 of this title, the determination of the Copyright Royalty Commission in any controversy concerning the distribution of royalty fees deposited under subclause (A) of subsection (b)(1) of this section to which the claimant is a party. Notwithstanding any provisions of the antitrust laws (within the meaning of section 12 of title 15), for purposes of this subsection any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

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**[24]** § 301. (b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to--

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium or expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978; or

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106, including rights against misappropriation not equivalent to any of such exclusive rights, breaches of contract, breaches of trust, trespass, conversion, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation.

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**[35]** § 506. (6) SEIZURE, FORFEITURE, AND DESTRUCTION.--All copies or phonorecords manufactured, reproduced, distributed, sold, or otherwise used, intended for use, or possessed with intent to use in violation of subsection (a), and all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced, shall be seized and forfeited to the United States. When any person is convicted of any violation of subsection (a), the court in its judgment of conviction may, in addition to the penalty therein prescribed, order either the destruction or other disposition of all infringing copies or phonorecords and all

plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced. The applicable procedures relating to (1) the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in title 19, (2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof, (3) the remission or mitigation of such forfeiture, (4) the compromise of claims, and (5) the award of compensation to informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section; except that such duties are imposed upon any officer or employee of the Treasury Department or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the provisions of the customs laws contained in title 19 shall be performed with respect to seizure and forfeiture of all articles described in subsection (a) by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

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**[36]** n* **§ 509. Remedies for alteration of programming by cable systems**

(a) In any action filed pursuant to section 111(c)(3), the following remedies shall be available:

(1) Where an action is brought by a party identified in subsection (b) or (c) of section 501, the remedies provided by sections 502 through 505, and the remedy provided by subsection (b) of this section; and

(2) Where an action is brought by a party identified in subsection (d) of section 501, the remedies provided by sections 502 and 505, together with any actual damages suffered by such party as a result of the infringement, and the remedy provided by subsection (b) of this section.

(b) In any action filed pursuant to section 111(c)(3), the court may decree that, for a period not to exceed thirty days, the cable system shall be deprived of the benefit of a compulsory license for one or more distance signals carried by such cable system.

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**[41]** § 801. (a) There is hereby created a Copyright Royalty Commission.

(b) Subject to the provisions of this chapter, the purpose of the Commission shall be--

(1) to make determinations concerning the adjustment of reasonable copyright royalty rates as provided in sections 115 and 116, and to make determinations as to reasonable terms and rates of royalty payments as provided in section 118. Such determinations shall be based upon relevant factors occurring subsequent to the date of enactment of this Act;

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**[42]** § 801. (c) As soon as possible after the date of this enactment of this Act, and no later than six months following such date, the President shall publish a notice announcing the initial appointments provided in section 802.

§ 802. (a) The Commission shall be composed of three members appointed by the President for a term of five years each; of the first three members appointed, two shall be designated to serve for five years from the date of the notice specified in section 801(c), and one shall be designated to serve for three years from such date, respectively. Commissioners shall be compensated at the highest rate now or hereafter prescribed for grade 18 of the General Schedule pay rates *(5 U.S.C. 5332).*

(b) The President shall appoint a Chairman.

**[44]** § 805. (a) To assist in its work, the Commission may appoint a staff which shall be an administrative part of the Library of Congress, but which shall be responsible to the Commission for the administration of the duties entrusted to the staff.

(b) The Commission may procure temporary and intermittent services to the same extent as is authorized by section 3109 of title 5.

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**[46]** SEC. 114. There are hereby authorized to be appropriated such funds as may be necessary to carry out the purposes of this Act, except that no more than $ 500,000 shall be appropriated annually for the operations of the Copyright Royalty Commission.

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**[47]** PURPOSE

The purpose of the proposed legislation, as amended, is to provide for a general revision of the United States Copyright Law, title 17 of the United States Code.

STATEMENT

The first copyright law of the United States was enacted by the First Congress in 1790, in exercise of the constitutional 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. Constitution, Art. I, sec. 8). Comprehensive revisions were enacted, at intervals of about 40 years, in 1831, 1870, and 1909. The present copyright law, title 17 of the United States Code, is basically the same as the act of 1909.

Since that time significant changes in technology have affected the operation of the copyright law. Motion pictures and sound recordings had just made their appearance in 1909, and radio and television were still in the early stages of their development. During the past half century a wide range of new techniques for capturing and communicating printed matter, visual images, and recorded sounds have come into use, and the increasing use of information storage and retrieval devices, communications satellites, and laser technology promises even greater changes in the near future. The technical advances have generated new industries and new methods for the reproduction and dissemination of copyrighted works, and the business relations between authors and users have evolved new patterns.

Between 1924 and 1940 a number of copyright law revision measures were introduced. All these failed of enactment, partly because of controversy among private interests over differences between the Berne Convention and the U.S. law. After World War II, the United States participated in the development of the new Universal Copyright Convention, becoming a party in 1955.

In that year, the movement for general revision of the U.S. copyright law was revived and the legislative appropriations act for the next 3 years provided funds for a comprehensive program of research and studies by the Copyright Office as the groundwork for such revision. There followed a period of study which produced 35 published monographs on most of the major substantive issues in copyright revision, and culminated in 1961 in the "Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law."

Between 1961 and 1964 there were numerous meetings and discussions under the auspices of the Copyright Office, participated in by representatives of a wide range of interests affected by the copyright law. Gradually a draft bill for general revision took shape, and toward the end of the 88th Congress, on July 20, 1964, it was introduced in both Houses. The 1964 revision bill was introduced in the House of Representatives, as H.R. 11947, and in the Senate by request, as S. 3008.

No further legislative action was taken on the revision bill during the 88th Congress, but before the opening of the 89th Congress the **[48]** Copyright Office completely revised the bill in the light of the many comments that had been received. On February 4, 1965, the revised bill was introduced in both Houses: in the House as H.R. 4347, and in the Senate as S. 1006. The Copyright Office prepared a report to accompany the revised bill, and it was published in May, 1965 as "The Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill." Extensive hearings on the bill were held in both Houses during 1965, and the Senate hearings continued in 1966. H.R. 4347 was reported by the House Judiciary Committee on October 12, 1966 (H.R. Rep. No. 2237, 89th Cong., 2d Sess.), but the 89th Congress adjourned before further action could be taken.

At the beginning of the 90th Congress the bill, in the form in which it had been reported by the House Judiciary Committee, was again introduced in both Houses: in the House of Representatives on January 17, 1967 as H.R. 2512, and in the Senate on January 23, 1967, as S. 597. H.R. 2512 was reported by the House Judiciary Committee, without further amendment but with dissenting views, on March 8, 1967 (H.R. Rept. No. 83, 90th Cong., 1st Sess.). The bill was passed by the House of Representatives, with several important amendments, on April 11, 1967, by a vote of 379 to 29. The Senate Judiciary Subcommittee conducted further hearings on S. 597 in March and April of 1967. However, it was

not possible to complete action on copyright revision in the 90th Congress because of the emergence of certain major problems, notably that of cable television.

On January 22 (legislative day January 10), 1969, S. 543 was introduced in the 91st Congress. Title I of this bill, other than for technical amendments, was identical to S. 597 of the 90th Congress. Title II of the bill incorporated the provisions of S. 2216 providing for the establishment of a National Commission on New Technological Uses of Copyrighted Works. This title was a response to concerns as to the impact of the legislation on the use of copyrighted materials in computers and other forms of information storage and retrieval systems. The Senate had passed, on October 12, 1967, a bill establishing such a Commission for the study of this subject, but there had been no action by the House on this separate legislation.

On December 10, 1969, the Senate Judiciary Subcommittee favorably reported S. 543, with an amendment in the nature of a substitute. No further action was taken in the 91st Congress primarily because of the cable television issue.

On February 18, 1971, S. 644 was introduced in the 92nd Congress. Other than for minor amendments, the text of that bill was identical to the revision bill reported by the Subcommittee in the 91st Congress. No action was taken on general revision legislation during the 92nd Congress, pending the formulation and adoption by the Federal Communications Commission of new cable television rules.

While action on the general revision bill was necessarily delayed, the unauthorized duplication of sound recordings became widespread. It was accordingly determined that the creation of a limited copyright in sound recordings should not await action on the general revision bill. S. 646 of the 92nd Congress was introduced to amend title 17 of the U.S. Code to provide for the creation of a limited copyright in sound recordings. This bill passed the Senate on April 29, **[49]** 1971, and, following hearings in June 1971, a companion bill (H.R. 6927) passed the House with amendments on October 4, 1971 and was enacted as Public Law 92-140.

On March 26, 1973 S. 1361, for the general revision of the copyright law, was introduced in the 93rd Congress. Other than for technical amendments, this bill was identical to S. 644 of the 92d Congress. Additional copyright revision hearings were held in the Senate on July 31 and August 1, 1973.

The Senate Judiciary Subcommittee on April 19, 1974 reported S. 1361 with an amendment in the nature of a substitute. After adopting several amendments to the subcommittee bill, the Senate Judiciary Committee reported the legislation on July 8, 1974. On July 9 the measure was removed from the Senate calendar and referred to the Committee on Commerce. The Commerce Committee reported S. 1361 with additional amendments on July 29. After adopting several amendments the Senate on September 9 passed S. 1361 by a vote of 70 to 1.

Since it was doubtful that adequate time remained in the 93d Congress for consideration in the House of Representatives of S. 1361, on September 9, Senator McClellan introduced and obtained immediate consideration of S. 3976. That bill, passed on September 9, extended the renewal term of expiring copyrights, established on a permanent basis a limited copyright in sound recordings, and created in the Library of Congress a National Commission of New Technological Uses of Copyrighted Works. The House of Representatives passed the measure with amendments on December 19, 1974, and the Senate concurred in the House amendments on the same date. The President approved the bill on December 31, 1974, and it became Public Law 93-573.

At the beginning of the 94th Congress the revision bill, substantially identical to S. 1361 as passed by the Senate in 1974, was introduced in both Houses: Senator McClellan introduced S. 22 on January 15, 1975, and Chairman Robert W. Kastenmeier of the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice, introduced H.R. 2223 on January 28, 1975. S. 22 was reported, with additional views by the Senate Judiciary Committee on November 20 (legislative day, November 18), 1975, and passed the Senate unanimously, on February 19, 1976, by a vote of 97-0.

During 1975 the House Judiciary Subcommittee conducted extensive hearings on H.R. 2223, at which nearly 100 witnesses were heard. The Register of Copyrights also prepared a "Second Supplementary Report on General Revision of the U.S. Copyright Law," which discussed policy and technical issues of the revision legislation. Following some 22 days of public mark-up sessions in 1976 the House Subcommittee favorably reported S. 22, by a unanimous vote, on August 3, 1976 with an amendment in the nature of a substitute. The Committee on the Judiciary now reports that bill, as amended, without change.

Title II of S. 22, as passed by the Senate, represents a piece of legislation separate from the bill for general legislation. This measure was originally introduced by Chairman Edwin Willis of the House Judiciary Subcommittee in

1957, and received active consid-**[50]**eration in both Houses during the early 1960's. It passed the Senate as separate legislation on three occasions, in 1962, 1963, and 1966. It was reintroduced in the 90th and 91st Congresses, and on December 10, 1969, the Senate Subcommittee conjoined it with the general copyright revision bill, reporting it as Title III of S. 543. As a separate title of S. 1361 of the 93d Congress, and now of S. 22, the design legislation has passed the Senate on two additional occasions.

In reporting S. 22, the House Judiciary Committee has deleted Title II. Until 1954, designs for useful articles were not generally subject to copyright protection. The primary protection available was the design patent, which requires that the design be not only "original", the standard applied in copyright law, but also "novel", meaning that it has never before existed anywhere.

However, in 1954 the Supreme Court decided the case of *Mazer v. Stein , 347 U.S. 201,* in which it held that works of art which are incorporated into the design of useful articles, but which are capable of standing by themselves as art works separate from the useful article, are copyrightable. The example used in the *Mazer* case was an ornamental lamp base.

Title II of S. 22 as passed by the Senate would create a new limited form of copyright protection for "original" designs which are clearly a part of a useful article, regardless of whether such designs could stand by themselves, separate from the article itself. Thus designs of useful articles which do not meet the design patent standard of "novelty" would for the first time be protected.

S. 22 is a copyright revision bill. The Committee chose to delete Title II in part because the new form of design protection provided by Title II could not truly be considered copyright protection and therefore appropriately within the scope of copyright revision.

In addition, Title II left unanswered at least two fundamental issues which will require further study by the Congress. These are: first, what agency should administer this new design protection system and, second, should typeface designs be given the protections of the title?

Finally, the Committee will have to examine further the assertion of the Department of Justice, which testified in opposition to the Title, that Title II would create a new monopoly which has not been justified by a showing that its benefits will outweigh the disadvantage of removing such designs from free public use.

The issues raised by Title II have not been resolved by its deletion from the Copyright Revision Bill. Therefore, the Committee believes that it will be necessary to reconsider the question of design protection in new legislation during the first session of the 95th Congress. At that time more complete hearings on the subject may be held and, without the encumbrance of a general copyright revision bill, the issues raised in Title II of S. 22 may be resolved.

SECTIONAL ANALYSIS AND DISCUSSION

An analysis and discussion of the provisions of S. 22, as amended, follows:

SECTION 101. DEFINITIONS

The significant definitions in this section will be mentioned or summarized in connection with the provisions to which they are most relevant.

[51] SECTION 102. GENERAL SUBJECT MATTER OF COPYRIGHT

"*Original works of authorship*"

The two fundamental criteria of copyright protection--originality and fixation in tangible form--are restated in the first sentence of this cornerstone provision. The phrase "original works of authorship," which is purposely left undefined, is intended to incorporate without change the standard of originality established by the courts under the present copyright statute. This standard does not include requirements of novelty, ingenuity, or esthetic merit, and there is no intention to enlarge the standard of copyright protection to require them.

In using the phrase "original works of authorship," rather than "all the writings of an author" now in section 4 of the statute, the committee's purpose is to avoid exhausting the constitutional power of Congress to legislate in this field, and to eliminate the uncertainties arising from the latter phrase. Since the present statutory language is substantially the same as the empowering language of the Constitution, a recurring question has been whether the statutory and the

constitutional provisions are coextensive. If so, the courts would be faced with the alternative of holding copyrightable something that Congress clearly did not intend to protect, or of holding constitutionally incapable of copyright something that Congress might one day want to protect. To avoid these equally undesirable results, the courts have indicated that "all the writings of an author" under the present statute is narrower in scope than the "writings" of "authors" referred to in the Constitution. The bill avoids this dilemma by using a different phrase--"original works of authorship"--in characterizing the general subject matter of statutory copyright protection.

The history of copyright law has been one of gradual expansion in the types of works accorded protection, and the subject matter affected by this expansion has fallen into two general categories. In the first, scientific discoveries and technological developments have made possible new forms of creative expression that never existed before. In some of these cases the new expressive forms--electronic music, filmstrips, and computer programs, for example--could be regarded as an extension of copyrightable subject matter Congress had already intended to protect, and were thus considered copyrightable from the outset without the need of new legislation. In other cases, such as photographs, sound recordings, and motion pictures, statutory enactment was deemed necessary to give them full recognition as copyrightable works.

Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take. The bill does not intend either to freeze the scope of copyrightable subject matter at the present stage of communications technology or to allow unlimited expension [sic] into areas completely outside the present congressional intent. Section 102 implies neither that that subject matter is unlimited nor that new forms of expression within that general area of subject matter would necessarily be unprotected.

The historic expansion of copyright has also applied to forms of expression which, although in existence for generations or centuries, have only gradually come to be recognized as creative and worthy of protection. The first copyright statute in this country, enacted in 1790, **[52]** designated only "maps, charts, and books"; major forms of expression such as music, drama, and works of art achieved specific statutory recognition only in later enactments. Although the coverage of the present statute is very broad, and would be broadened further by the explicit recognition of all forms of choreography, there are unquestionably other areas of existing subject matter that this bill does not propose to protect but that future Congresses may want to.

*Fixation in tangible form*

As a basic condition of copyright protection, the bill perpetuates the existing requirement that a work be fixed in a "tangible medium of expression," and adds that this medium may be one "now known or later developed," and that the fixation is sufficient if the work "can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." This broad language is intended to avoid the artificial and largely unjustifiable distinctions, derived from cases such as *White-Smith Publishing Co. v. Apollo Co. , 209 U.S. 1 (1908),* under which statutory copyrightability in certain cases has been made to depend upon the form or medium in which the work is fixed. Under the bill it makes no difference what the form, manner, or medium of fixation may be--whether it is in words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other stable form, and whether it is capable of perception directly or by means of any machine or device "now known or later developed."

Under the bill, the concept of fixation is important since is not only determines whether the provisions of the statute apply to a work, but it also represents the dividing line between common law and statutory protection. As will be noted in more detail in connection with section 301, an unfixed work of authorship, such as an improvisation or an unrecorded choreographic work, performance, or broadcast, would continue to be subject to protection under State common law or statute, but would not be eligible for Federal statutory protection under section 102.

The bill seeks to resolve, through the definition of "fixation" in section 101, the status of live broadcasts--sports, news coverage, live performances of music, etc.--that are reaching the public in unfixed form but that are simultaneously being recorded. When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent out to the public and in what order, there is little doubt that what the cameramen and the director are doing constitutes "authorship." The further question to be considered is whether there has been a fixation. If the images and sounds to be broadcast are first recorded (on a video tape, film, etc.) and then transmitted, the recorded work would be considered a "motion picture" subject to statutory protection against unauthorized reproduction or retransmission of the broadcast. If the program content is transmitted live to the public while being recorded at the same time, the case would be treated the same; the

copyright owner would not be forced to rely on common law rather than statutory rights in proceeding against an infringing user of the live broadcast.

Thus, assuming it is copyrightable--as a "motion picture" or "sound recording," for example--the content of a live transmission should be regarded as fixed and should be accorded statutory **[53]** protection if it is being recorded simultaneously with its transmission. On the other hand, the definition of "fixation" would exclude from the concept purely evanescent or transient reproductions such as those projected briefly on a screen, shown electronically on a television or other cathode ray tube, or captured momentarily in the "memory" of a computer.

Under the first sentence of the definition of "fixed" in section 101, a work would be considered "fixed in a tangible medium of expression" if there has been an authorized embodiment in a copy or phonorecord and if that embodiment "is sufficiently permanent or stable" to permit the work "to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." The second sentence makes clear that, in the case of "a work consisting of sounds, images, or both, that are being transmitted," the work is regarded as "fixed" if a fixation is being made at the same time as the transmission.

Under this definition "copies" and "phonorecords" together will comprise all of the material objects in which copyrightable works are capable of being fixed. The definitions of these terms in section 101, together with their usage in section 102 and throughout the bill, reflect a fundamental distinction between the "original work" which is the product of "authorship" and the multitude of material objects in which it can be embodied. Thus, in the sense of the bill, a "book" is not a work of authorship, but is a particular kind of "copy." Instead, the author may write a "literary work," which in turn can be embodied in a wide range of "copies" and "phonorecords," including books, periodicals, computer punch cards, microfilm, tape recordings, and so forth. It is possible to have an "original work of authorship" without having a "copy" or "phonorecord" embodying it, and it is also possible to have a "copy" or "phonorecord" embodying something that does not qualify as an "original work of authorship." The two essential elements--original work and tangible object--must merge through fixation in order to produce subject matter copyrightable under the statute.

*Categories of copyrightable works*

The second sentence of section 102 lists seven broad categories which the concept of "works of authorship" is said to "include." The use of the word "include," as defined in section 101, makes clear that the listing is "illustrative and not limitative," and that the seven categories do not necessarily exhaust the scope of "original works of authorship" that the bill is intended to protect. Rather, the list sets out the general area of copyrightable subject matter, but with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories. The items are also overlapping in the sense that a work falling within one class may encompass works coming within some or all of the other categories. In the aggregate, the list covers all classes of works now specified in section 5 of title 17; in addition, it specifically enumerates "pantomimes and choreographic works".

Of the seven items listed, four are defined in section 101. The three undefined categories--"musical works," "dramatic works," and "pantomimes and choreographic works"--have fairly settled meanings. There is no need, for example, to specify the copyrightability of electronic or concrete music in the statute since the form of a work would no longer be of any importance, nor is it necessary to specify that **[54]** "choreographic works" do not include social dance steps and simple routines.

The four items defined in section 101 are "literary works," "pictorial, graphic, and sculptural works," "motion pictures and audiovisual works", and "sound recordings." In each of these cases, definitions are needed not only because the meaning of the term itself is unsettled but also because the distinction between "work" and "material object" requires clarification. The term "literary works" does not connote any criterion of literary merit or qualitative value: it includes catalogs, directories, and similar factual, reference, or instructional works and compilations of data. It also includes computer data bases, and computer programs to the extent that they incorporate authorship in the programmer's expression of original ideas, as distinguished from the ideas themselves.

Correspondingly, the definition of "pictorial, graphic, and sculptural works" carries with it no implied criterion of artistic taste, aesthetic value, or intrinsic quality. The term is intended to comprise not only "works of art" in the traditional sense but also works of graphic art and illustration, art reproductions, plans and drawings, photographs and reproductions of them, maps, charts, globes, and other cartographic works, works of these kinds intended for use in advertising and commerce, and works of "applied art." There is no intention whatever to narrow the scope of the subject matter now characterized in section 5(k) as "prints or labels used for articles of merchandise." However, since this

terminology suggests the material object in which a work is embodied rather than the work itself, the bill does not mention this category separately.

In accordance with the Supreme Court's decision in *Mazer v. Stein , 347 U.S. 201 (1954),* works of "applied art" encompass all original pictorial, graphic, and sculptural works that are intended to be or have been embodied in useful articles, regardless of factors such as mass production, commercial exploitation, and the potential availability of design patent protection. The scope of exclusive rights in these works is given special treatment in section 113, to be discussed below.

The Committee has added language to the definition of "pictorial, graphic, and sculptural works" in an effort to make clearer the distinction between works of applied art protectable under the bill and industrial designs not subject to copyright protection. The declaration that "pictorial, graphic, and sculptural works" include "works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned" is classic language: it is drawn from Copyright Office regulations promulgated in the 1940's and expressly endorsed by the Supreme Court in the *Mazer* case.

The second part of the amendment states that "the design of a useful article ... shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently, of the utilitarian aspects of the article." A "useful article" is defined as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." This part of the amendment is an adaptation of language added to the Copy**[55]**right Office Regulations in the mid-1950's in an effort to implement the Supreme Court's decision in the *Mazer* case.

In adopting this amendatory language, the Committee is seeking to draw as clear a line as possible between copyrightable works of applied art and uncopyrighted works of industrial design. A two-dimensional painting, drawing, or graphic work is still capable of being identified as such when it is printed on or applied to utilitarian articles such as textile fabrics, wallpaper, containers, and the like. The same is true when a statue or carving is used to embellish an industrial product or, as in the *Mazer* case, is incorporated into a product without losing its ability to exist independently as a work of art. On the other hand, although the shape of an industrial product may be aesthetically satisfying and valuable, the Committee's intention is not to offer it copyright protection under the bill. Unless the shape of an automobile, airplane, ladies' dress, food processor, television set, or any other industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill. The test of separability and independence from "the utilitarian aspects of the article" does not depend upon the nature of the design--that is, even if the appearance of an article is determined by esthetic (as opposed to functional) considerations, only elements, if any, which can be identified separately from the useful article as such are copyrightable. And, even if the three-dimensional design contains some such element (for example, a carving on the back of a chair or a floral relief design on silver flatware), copyright protection would extend only to that element, and would not cover the over-all configuration of the utilitarian article as such.

A special situation is presented by architectural works. An architect's plans and drawings would, of course, be protected by copyright, but the extent to which that protection would extend to the structure depicted would depend on the circumstances. Purely nonfunctional or monumental structures would be subject to full copyright protection under the bill, and the same would be true of artistic sculpture or decorative ornamentation or embellishment added to a structure. On the other hand, where the only elements of shape in an architectural design are conceptually inseparable from the utilitarian aspects of the structure, copyright protection for the design would not be available.

The Committee has considered, but chosen to defer, the possibility of protecting the design of typefaces. A "typeface" can be defined as a set of letters, numbers, or other symbolic characters, whose forms are related by repeating design elements consistently applied in a notational system and are intended to be embodied in articles whose intrinsic utilitarian function is for use in composing text or other cognizable combinations of characters. The Committee does not regard the design of typeface, as thus defined, to be a copyrightable "pictorial, graphic, or sculptural work" within the meaning of this bill and the application of the dividing line in section 101.

Enactment of Public Law 92-140 in 1971 marked the first recognition in American copyright law of sound recordings as copyrightable works. As defined in section 101, copyrightable "sound recordings" are original works of authorship comprising an aggregate of **[56]** musical, spoken, or other sounds that have been fixed in tangible form. The copyrightable work comprises the aggregation of sounds and not the tangible medium of fixation. Thus, "sound recordings" as copyrightable subject matter are distinguished from "phonorecords," the latter being physical objects in

which sounds are fixed. They are also distinguished from any copyrighted literary, dramatic, or musical works that may be reproduced on a "phonorecord."

As a class of subject matter sound recordings are clearly within the scope of the "writings of an author" capable of protection under the Constitution, and the extension of limited statutory protection to them was too long delayed. Aside from cases in which sounds are fixed by some purely mechanical means without originality of any kind, the copyright protection that would prevent the reproduction and distribution of unauthorized phonorecords of sound recordings is clearly justified.

The copyrightable elements in a sound recording will usually, though not always, involve "authorship" both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording. There may, however, be cases where the record producer's contribution is so minimal that the performance is the only copyrightable element in the work, and there may be cases (for example, recordings of birdcalls, sounds of racing cars, et cetera) where only the record producer's contribution is copyrightable.

Sound tracks of motion pictures, long a nebulous area in American copyright law, are specifically included in the definition of "motion pictures," and excluded in the definition of "sound recordings." To be a "motion picture," as defined, requires three elements: (1) a series of images, (2) the capability of showing the images in certain successive order, and (3) an impression of motion when the images are thus shown. Coupled with the basic requirements of original authorship and fixation in tangible form, this definition encompasses a wide range of cinematographic works embodied in films, tapes, video disks, and other media. However, it would not include: (1) unauthorized fixations of live performances or telecasts, (2) live telecasts that are not fixed simultaneously with their transmission, or (3) filmstrips and slide sets which, although consisting of a series of images intended to be shown in succession, are not capable of conveying an impression of motion.

On the other hand, the bill equates audiovisual materials such as filmstrips, slide sets, and sets of transparencies with "motion pictures" rather than with "pictorial, graphic, and sculptural works." Their sequential showing is closer to a "performance" than to a "display," and the definition of "audiovisual works," which applies also to "motion pictures," embraces works consisting of a series of related images that are by their nature, intended for showing by means of projectors or other devices.

*Nature of copyright*

Copyright does not preclude others from using the ideas or information revealed by the author's work. It pertains to the literary musical, graphic, or artistic form in which the author expressed intellectual concepts. Section 102(b) makes clear that copyright protection does not extend to any idea, procedure, process, system, method of opera**[57]**tion, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Some concern has been expressed lest copyright in computer programs should extend protection to the methodology or processes adopted by the programmer, rather than merely to the "writing" expressing his ideas. Section 102(b) is intended, among other things, to make clear that the expression adopted by the programmer is the copyrightable element in a computer program, and that the actual processes or methods embodied in the program are not within the scope of the copyright law.

Section 102(b) in no way enlarges or contracts the scope of copyright protection under the present law. Its purpose is to restate, in the context of the new single Federal system of copyright, that the basic dichotomy between expression and idea remains unchanged.

SECTION 103. COMPILATIONS AND DERIVATIVE WORKS

Section 103 complements section 102: A compilation or derivative work is copyrightable if it represents an "original work of authorship" and falls within one or more of the categories listed in section 102. Read together, the two sections make plain that the criteria of copyrightable subject matter stated in section 102 apply with full force to works that are entirely original and to those containing preexisting material. Section 103(b) is also intended to define, more sharply and clearly than does section 7 of the present law, the important interrelationship and correlation between protection of preexisting and of "new" material in a particular work. The most important point here is one that is

commonly misunderstood today: copyright in a "new version" covers only the material added by the later author, and has no effect one way or the other on the copyright or public domain status of the preexisting material.

Between them the terms "compilations" and "derivative works" which are defined in section 101, comprehend every copyrightable work that employs preexisting material or data of any kind. There is necessarily some overlapping between the two, but they basically represent different concepts. A "compilation" results from a process of selecting, bringing together, organizing, and arranging previously existing material of all kinds, regardless of whether the individual items in the material have been or ever could have been subject to copyright. A "derivative work," on the other hand, requires a process of recasting, transforming, or adapting "one or more preexisting works"; the "preexisting work" must come within the general subject matter of copyright set forth in section 102, regardless of whether it is or was ever copyrighted.

The second part of the sentence that makes up section 103(a) deals with the status of a compilation or derivative work unlawfully employing preexisting copyrighted material. In providing that protection does not extend to "any part of the work in which such material has been used unlawfully," the bill prevents an infringer from benefiting, through copyright protection, from committing an unlawful act, but preserves protection for those parts of the work that do not employ the preexisting work. Thus, an unauthorized translation of a novel could not be copyrighted at all, but the owner of copyright in an anthology of poetry could sue someone who infringed the whole **[58]** anthology, even though the infringer proves that publication of one of the poems was unauthorized. Under this provision, copyright could be obtained as long as the use of the preexisting work was not "unlawful," even though the consent of the copyright owner had not been obtained. For instance, the unauthorized reproduction of a work might be "lawful" under the doctrine of fair use or an applicable foreign law, and if so the work incorporating it could be copyrighted.

SECTION 104. NATIONAL ORIGIN

Section 104 of the bill, which sets forth the basic criteria under which works of foreign origin can be protected under the U.S. copyright law, divides all works coming within the scope of sections 102 and 103 into two categories: unpublished and published. Subsection (a) imposes no qualifications of nationality and domicile with respect to unpublished works. Subsection (b) would make published works subject to protection under any one of four conditions:

(1) The author is a national or domiciliary of the United States or a country with which the United States has copyright relations under a treaty, or is a stateless person;

(2) The work is first published in the United States or in a country that is a party to the Universal Copyright Convention;

(3) The work is first published by the United Nations, by any of its specialized agencies, or by the Organization of American States; or

(4) The work is covered by a Presidential proclamation extending protection to works originating in a specified country which extends protection to U.S. works "on substantially the same basis" as to its own works.

The third of these conditions represents a treaty obligation of the United States. Under the Second Protocol of the Universal Copyright Convention, protection under U.S. Copyright law is expressly required for works published by the United Nations, by U.N. specialized agencies, and by the Organization of American States.

SECTION 105. U.S. GOVERNMENT WORKS

*Scope of the prohibition*

The basic premise of section 105 of the bill is the same as that of section 8 of the present law--that works produced for the U.S. Government by its officers and employees should not be subject to copyright. The provision applies the principle equally to unpublished and published works.

The general prohibition against copyright in section 105 applies to "any work of the United States Government," which is defined in section 101 as "a work prepared by an officer or employee of the United States Government as part of that person's official duties." Under this definition a Government official or employee would not be prevented from securing copyright in a work written at that person's own volition and outside his or her duties, even though the subject matter involves the Government work or professional field of the official or employee. Although the wording of the

definition of "work of the United States Government" differs somewhat from that of the definition of "work made for hire," the concepts are intended to be construed in the same way.

**[59]** A more difficult and far-reaching problem is whether the definition should be broadened to prohibit copyright in works prepared under U.S. Government contract or grant. As the bill is written, the Government agency concerned could determine in each case whether to allow an independent contractor or grantee to secure copyright in works prepared in whole or in part with the use of Government funds. The argument that has been made against allowing copyright in this situation is that the public should not be required to pay a "double subsidy," and that it is inconsistent to prohibit copyright in works by Government employees while permitting private copyrights in a growing body of works created by persons who are paid with Government funds. Those arguing in favor of potention [sic] copyright protection have stressed the importance of copyright as an incentive to creation and dissemination in this situation and the basically different policy considerations applicable to works written by Government employees and those applicable to works prepared by private organizations with the use of Federal funds.

The bill deliberately avoids making any sort of outright, unqualified prohibition against copyright in works prepared under Government contract or grant. There may well be cases where it would be in the public interest to deny copyright in the writings generated by Government research contracts and the like; it can be assumed that, where a Government agency commissions a work for its own use merely as an alternative to having one of its own employees prepare the work, the right to secure a private copyright would be withheld. However, there are almost certainly many other cases where the denial of copyright protection would be unfair or would hamper the production and publication of important works. Where, under the particular circumstances, Congress or the agency involved finds that the need to have a work freely available outweighs the need of the private author to secure copyright, the problem can be dealt with by specific legislation, agency regulations, or contractual restrictions.

The prohibition on copyright protection for United States Government works is not intended to have any effect on protection of these works abroad. Works of the governments of most other countries are copyrighted. There are no valid policy reasons for denying such protection to United States Government works in foreign countries, or for precluding the Government from making licenses for the use of its works abroad.

The effect of section 105 is intended to place all works of the United States Government, published or unpublished, in the public domain. This means that the individual Government official or employee who wrote the work could not secure copyright in it or restrain its dissemination by the Government or anyone else, but it also means that, as far as the copyright law is concerned, the Government could not restrain the employee or official from disseminating the work if he or she chooses to do so. The use of the term "work of the United States Government" does not mean that a work falling within the definition of that term is the property of the U.S. Government.

LIMITED EXCEPTION FOR NATIONAL TECHNICAL INFORMATION SERVICE

At the House hearings in 1975 the U.S Department of Commerce called attention to its National Technical Information Service (NTIS), which has a statutory mandate, under Chapter 23 of Title 15 **[60]** of the U.S. Code, to operate a clearinghouse for the collection and dissemination of scientific, technical and engineering information. Under its statute, NTIS is required to be as self-sustaining as posisble, [sic] and not to force the general public to bear publishing costs that are for private benefit. The Department urged an amendment to section 105 that would allow it to secure copyright in NTIS publications both in the United States and abroad, noting that a precedent exists in the Standard Reference Data Act *(15 USC § 290*(e) ).

In response to this request the Committee adopted a limited exception to the general prohibition in section 105, permitting the Secretary of Commerce to "secure copyright for a limited term not to exceed five years, on behalf of the United States as author or copyright owner" in any NTIS publication disseminated pursuant to 15 U.S.C. Chapter 23. In order to "secure copyright" in a work under this amendment the Secretary would be required to publish the work with a copyright notice, and the five-year term would begin upon the date of first publication.

*Proposed saving clause*

Section 8 of the statute now in effect includes a saving clause intended to make clear that the copyright protection of a private work is not affected if the work is published by the Government. This provision serves a real purpose in the present law because of the ambiguity of the undefined term "any publication of the United States Government." Section 105 of the bill, however, uses the operative term "work of the United States Government" and defines it in such a way

that privately written works are clearly excluded from the prohibition; accordingly, a saving clause becomes superfluous.

Retention of a saving clause has been urged on the ground that the present statutory provision is frequently cited, and that having the provision expressly stated in the law would avoid questions and explanations. The committee here observes: (1) there is nothing in section 105 that would relieve the Government of its obligation to secure permission in order to publish a copyrighted work; and (2) publication or other use by the Government of a private work would not affect its copyright protection in any way. The question of use of copyrighted material in documents published by the Congress and its Committees is discussed below in connection with section 107.

*Works of the United States Postal Service*

The intent of section 105 is to restrict the prohibition against Government copyright to works written by employees of the United States Government within the scope of their official duties. In accordance with the objectives of the Postal Reorganization Act of 1970, this section does not apply to works created by employees of the United States Postal Service. In addition to enforcing the criminal statutes proscribing the forgery or counterfeiting of postage stamps, the Postal Service could, if it chooses, use the copyright law to prevent the reproduction of postage stamp designs for private or commercial non-postal services (for example, in philatelic publications and catalogs, in general advertising, in art reproductions, in textile designs, and so forth). However, any copyright claimed by the Postal Service in its works, including postage stamp designs, would be subject to the same conditions, formalities, and time limits as other copyrightable works.

[61] SECTION 106. EXCLUSIVE RIGHTS IN COPYRIGHTED WORKS

*General scope of copyright*

The five fundamental rights that the bill gives to copyright owners--the exclusive rights of reproduction, adaptation, publication, performance, and display--are stated generally in section 106. These exclusive rights, which comprise the so-called "bundle of rights" that is a copyright, are cumulative and may overlap in some cases. Each of the five enumerated rights may be subdivided indefinitely and, as discussed below in connection with section 201, each subdivision of an exclusive right may be owned and enforced separately.

The approach of the bill is to set forth the copyright owner's exclusive rights in broad terms in section 106, and then to provide various limitations, qualifications, or exemptions in the 12 sections that follow. Thus, everything in section 106 is made "subject to sections 107 through 118," and must be read in conjunction with those provisions.

The exclusive rights accorded to a copyright owner under section 106 are "to do and to authorize" any of the activities specified in the five numbered clauses. Use of the phrase "to authorize" is intended to avoid any questions as to the liability of contributory infringers. For example, a person who lawfully acquires an authorized copy of a motion picture would be an infringer if he or she engages in the business of renting it to others for purposes of unauthorized public performance.

*Rights of reproduction, adaptation, and publication*

The first three clauses of section 106, which cover all rights under a copyright except those of performance and display, extend to every kind of copyrighted work. The exclusive rights encompassed by these clauses, though closely related, are independent; they can generally be characterized as rights of copying, recording, adaptation, and publishing. A single act of infringement may violate all of these rights at once, as where a publisher reproduces, adapts, and sells copies of a person's copyrighted work as part of a publishing venture. Infringement takes place when any one of the rights is violated: where, for example, a printer reproduces copies without selling them or a retailer sells copies without having anything to do with their reproduction. The references to "copies or phonorecords," although in the plural, are intended here and throughout the bill to include the singular *(1 U.S.C. § 1)*.

*Reproduction*.--Read together with the relevant definitions in section 101, the right "to reproduce the copyrighted work in copies or phonorecords" means the right to produce a material object in which the work is duplicated, transcribed, imitated, or simulated in a fixed form from which it can be "perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." As under the present law, a copyrighted work

would be infringed by reproducing it in whole or in any substantial part, and by duplicating it exactly or by imitation or simulation. Wide departures or variations from the copyrighted work would still be an infringement as long as the author's "expression" rather than merely the author's "ideas" are taken. An exception to this general principle, applicable to the reproduction of copyrighted sound recordings, is specified in section 114.

**[62]** "Reproduction" under clause (1) of section 106 is to be distinguished from "display" under clause (5). For a work to be "reproduced," its fixation in tangible form must be "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." Thus, the showing of images on a screen or tube would not be a violation of clause (1), although it might come within the scope of clause (5).

*Preparation of derivative works*.--The exclusive right to prepare derivative works, specified separately in clause (2) of section 106, overlaps the exclusive right of reproduction to some extent. It is broader than that right, however, in the sense that reproduction requires fixation in copies or phonorecords, whereas the preparation of a derivative work, such as a ballet, pantomime, or improvised performance, may be an infringement even though nothing is ever fixed in tangible form.

To be an infringement the "derivative work" must be "based upon the copyrighted work," and the definition in section 101 refers to "a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." Thus, to constitute a violation of section 106(2), the infringing work must incorporate a portion of the copyrighted work in some form; for example, a detailed commentary on a work or a programmatic musical composition inspired by a novel would not normally constitute infringements under this clause.

*Use in information storage and retrieval systems*.-- As section 117 declares explicitly, the bill is not intended to alter the present law with respect to the use of copyrighted works in computer systems.

*Public distribution*.-- Clause (3) of section 106 establishes the exclusive right of publication: The right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." Under this provision the copyright owner would have the right to control the first public distribution of an authorized copy or phonorecord of his work, whether by sale, gift, loan, or some rental or lease arrangement. Likewise, any unauthorized public distribution of copies or phonorecords that were unlawfully made would be an infringement. As section 109 makes clear, however, the copyright owner's rights under section 106(3) cease with respect to a particular copy or phonorecord once he has parted with ownership of it.

*Rights of public performance and display*

*Performing rights and the "for profit" limitation*.-- The right of public performance under section 106(4) extends to "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works and sound recordings" and, unlike the equivalent provisions now in effect, is not limited by any "for profit" requirement. The approach of the bill, as in many foreign laws, is first to state the public performance right in broad terms, and then to provide specific exemptions for educational and other nonprofit uses.

This approach is more reasonable than the outright exemption of the 1909 statute. The line between commercial and "nonprofit" organizations is increasingly difficult to draw. Many "non-profit" organizations are highly subsidized and capable of paying royalties, and **[63]** the widespread public exploitation of copyrighted works by public broadcasters and other noncommercial organizations is likely to grow. In addition to these trends, it is worth noting that performances and displays are continuing to supplant markets for printed copies and that in the future a broad "not for profit" exemption could not only hurt authors but could dry up their incentive to write.

The exclusive right of public performance is expanded to include not only motion pictures, including works recorded on film, video tape, and video disks, but also audiovisual works such as filmstrips and sets of slides. This provision of section 106(4), which is consistent with the assimilation of motion pictures to audiovisual works throughout the bill, is also related to amendments of the definitions of "display" and "perform" discussed below. The important issue of performing rights in sound recordings is discussed in connection with section 114.

*Right of public display*.--Clause (5) of section 106 represents the first explicit statutory recognition in American copyright law of an exclusive right to show a copyrighted work, or an image of it, to the public. The existence or extent of this right under the present statute is uncertain and subject to challenge. The bill would give the owners of copyright in "literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works",

including the individual images of a motion picture or other audiovisual work, the exclusive right "to display the copyrighted work publicly."

*Definitions*

Under the definitions of "perform," "display," "publicly," and "transmit" in section 101, the concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public. Thus, for example: a singer is performing when he or she sings a song; a broadcasting network is performing when it transmits his or her performance (whether simultaneously or from records); a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it retransmits the broadcast to its subscribers; and any individual is performing whenever he or she plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set. Although any act by which the initial performance or display is transmitted, repeated, or made to recur would itself be a "performance" or "display" under the bill, it would not be actionable as an infringement unless it were done "publicly," as defined in section 101. Certain other performances and displays, in addition to those that are "private," are exempted or given qualified copyright control under sections 107 through 118.

To "perform' " a work, under the definition in section 101, includes reading a literary work aloud, singing or playing music, dancing a ballet or other choreographic work, and acting out a dramatic work or pantomime. A performance may be accomplished "either directly or by means of any device or process," including all kinds of equipment for reproducing or amplifying sounds or visual images, any sort of transmitting apparatus, any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented.

The definition of "perform" in relation to "a motion picture or other audio visual work" is "to show its images in any sequence or to make **[64]** the sounds accompanying it audible." The showing of portions of a motion picture, filmstrip, or slide set must therefore be sequential to constitute a "performance" rather than a "display", but no particular order need be maintained. The purely aural performance of a motion picture sound track, or of the sound portions of an audiovisual work, would constitute a performance of the "motion picture or other audiovisual work"; but, where some of the sounds have been reproduced separately on phonorecords, a performance from the phonorecord would not constitute performance of the motion picture or audiovisual work.

The corresponding definition of "display" covers any showing of a "copy" of the work, "either directly or by means of a film, slide, television image, or any other device or process." Since "copies" are defined as including the material object "in which the work is first fixed," the right of public display applies to original works of art as well as to reproductions of them. With respect to motion pictures and other audiovisual works, it is a "display" (rather than a "performance") to show their "individual images nonsequentially." In addition to the direct showings of a copy of a work, "display" would include the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube, or similar viewing apparatus connected with any sort of information storage and retrieval system.

Under clause (1) of the definition of "publicly" in section 101, a performance or display is "public" if it takes place "at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." One of the principal purposes of the definition was to make clear that, contrary to the decision in *Metro-Goldwyn-Mayer Distributing Corp. v. Wyatt* , 21 C.O. Bull. 203 (D. Md. 1932), performances in "semipublic" places such as clubs, lodges, factories, summer camps, and schools are "public performances" subject to copyright control. The term "a family" in this context would include an individual living alone, so that a gathering confined to the individual's social acquaintances would normally be regarded as private. Routine meetings of businesses and governmental personnel would be excluded because they do not represent the gathering of a "substantial number of persons."

Clause (2) of the definition of "publicly" in section 101 makes clear that the concepts of public performance and public display include not only performances and displays that occur initially in a public place, but also acts that transmit or otherwise communicate a performance or display of the work to the public by means of any device or process. The definition of "transmit"--to communicate a performance or display "by any device or process whereby images or sound are received beyond the place from which they are sent"--is broad enough to include all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them. Each and every method by which the images or sounds comprising a

performance or display are picked up and conveyed is a "transmission," and if the transmission reaches the public in my [sic] form, the case comes within the scope of clauses (4) or (5) of section 106.

Under the bill, as under the present law, a performance made available by transmission to the public at large is "public" even though the **[65]** recipients are not gathered in a single place, and even if there is no proof that any of the potential recipients was operating his receiving apparatus at the time of the transmission. The same principles apply whenever the potential recipients of the transmission represent a limited segment of the public, such as the occupants of hotel rooms or the subscribers of a cable television service. Clause (2) of the definition of "publicly" is applicable "whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."

## SECTION 107. FAIR USE

*General background of the problem*

The judicial doctrine of fair use, one of the most important and well-established limitations on the exclusive right of copyright owners, would be given express statutory recognition for the first time in section 107. The claim that a defendant's acts constituted a fair use rather than an infringement has been raised as a defense in innumerable copyright actions over the years, and there is ample case law recognizing the existence of the doctrine and applying it. The examples enumerated at page 24 of the Register's 1961 Report, while by no means exhaustive, give some idea of the sort of activities the courts might regard as fair use under the circumstances: "quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported."

Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. On the other hand, the courts have evolved a set of criteria which, though in no case definitive or determinative, provide some gauge for balancing the equities. These criteria have been stated in various ways, but essentially they can all be reduced to the four standards which have been adopted in section 107: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work."

These criteria are relevant in determining whether the basic doctrine of fair use, as stated in the first sentence of section 107, applies in a particular case: "Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, **[66]** for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."

The specific wording of section 107 as it now stands is the result of a process of accretion, resulting from the long controversy over the related problems of fair use and the reproduction (mostly by photocopying) of copyrighted material for educational and scholarly purposes. For example, the reference to fair use "by reproduction in copies or phonorecords or by any other means" is mainly intended to make clear that the doctrine has as much application to photocopying and taping as to older forms of use; it is not intended to give these kinds of reproduction any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use. Similarly, the newly-added reference to "multiple copies for classroom use" is a recognition that, under the proper circumstances of fairness, the doctrine can be applied to reproductions of multiple copies for the members of a class.

The Committee has amended the first of the criteria to be considered--"the purpose and character of the use"--to state explicitly that this factor includes a consideration of "whether such use is of a commercial nature or is for non-profit educational purposes." This amendment is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works. It is an express recognition that, as under the present law, the commercial or

non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions.

*General intention behind the provision*

The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.

*Intention as to classroom reproduction*

Although the works and uses to which the doctrine of fair use is applicable are as broad as the copyright law itself, most of the discussion of section 107 has centered around questions of classroom reproduction, particularly photocopying. The arguments on the question are summarized at pp. 30-31 of this Committee's 1967 report (H.R. Rep. No. 83, 90th Cong., 1st Sess.), and have not changed materially in the intervening years.

The Committee also adheres to its earlier conclusion, that "a specific exemption freeing certain reproductions of copyrighted works for **[67]** educational and scholarly purposes from copyright control is not justified." At the same time the Committee recognizes, as it did in 1967, that there is a "need for greater certainty and protection for teachers." In an effort to meet this need the Committee has not only adopted further amendments to section 107, but has also amended section 504(c) to provide innocent teachers and other non-profit users of copyrighted material with broad insulation against unwarranted liability for infringement. The latter amendments are discussed below in connection with Chapter 5 of the bill.

In 1967 the Committee also sought to approach this problem by including, in its report, a very thorough discussion of "the considerations lying behind the four criteria listed in the amended section 107, in the context of typical classroom situations arising today." This discussion appeared on pp. 32-35 of the 1967 report, and with some changes has been retained in the Senate report on S. 22 (S. Rep. No. 94-473, pp. 63-65). The Committee has reviewed this discussion, and considers that it still has value as an analysis of various aspects of the problem.

At the Judiciary Subcommittee hearings in June 1975, Chairman Kastenmeier and other members urged the parties to meet together independently in an effort to achieve a meeting of the minds as to permissible educational uses of copyrighted material. The response to these suggestions was positive, and a number of meetings of three groups, dealing respectively with classroom reproduction of printed material, music, and audio-visual material, were held beginning in September 1975.

In a joint letter to Chairman Kastenmeier, dated March 19, 1976, the representatives of the Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision, and of the Authors League of America, Inc., and the Association of American Publishers, Inc., stated:

You may remember that in our letter of March 8, 1976 we told you that the negotiating teams representing authors and publishers and the Ad Hoc Group had reached tentative agreement on guidelines to insert in the Committee Report covering educational copying from books and periodicals under Section 107 of H.R. 2223 and S. 22, and that as part of that tentative agreement each side would accept the amendments to Sections 107 and 504 which were adopted by your Subcommittee on March 3, 1976.

We are now happy to tell you that the agreement has been approved by the principals and we enclose a copy herewith. We had originally intended to translate the agreement into language suitable for inclusion in the legislative report dealing with Section 107, but we have since been advised by committee staff that this will not be necessary.

As stated above, the agreement refers only to copying from books and periodicals, and it is not intended to apply to musical or audiovisual works.

The full text of the agreement is as follows:

**[68]** AGREEMENT ON GUIDELINES FOR CLASSROOM COPYING IN NOT-FOR-PROFIT EDUCATIONAL INSTITUTIONS

WITH RESPECT TO BOOKS AND PERIODICALS

The purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under Section 107 of H.R. 2223. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future; and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the Copyright Revision Bill. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

GUIDELINES

I. *Single Copying for Teachers*

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

A. A chapter from a book;

B. An article from a periodical or newspaper;

C. A short story, short essay or short poem, whether or not from a collective work;

D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper;

II. *Multiple Copies for Classroom Use*

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; *provided that:*

A. The copying meets the tests of brevity and spontaneity as defined below; *and*,

B. Meets the cumulative effect test as defined below; *and*,

C. Each copy includes a notice of copyright

*Definitions*

*Brevity*

(*i*) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.

(*ii*) Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.

**[69]** [Each of the numerical limits stated in "i" and "ii" above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.]

(*iii*) Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

(*iv*) "Special" works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph "ii" above notwithstanding such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced.

*Spontaneity*

(*i*) The copying is at the instance and inspiration of the individual teacher, and

(*ii*) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

*Cumulative Effect*

(*i*) The copying of the material is for only one course in the school in which the copies are made.

(*ii*) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.

(*iii*) There shall not be more than nine instances of such multiple copying for one course during one class term.

[The limitations stated in "ii" and "iii" above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]

III. *Prohibitions as to I and II Above*

Notwithstanding any of the above, the following shall be prohibited:

(A) Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or reproduced and used separately.

(B) There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.

(C) Copying shall not:

(a) substitute for the purchase of books, publishers' reprints or periodicals;

(b) be directed by higher authority;

(c) be repeated with respect to the same item by the same teacher from term to term.

**[70]** (D) No charge shall be made to the student beyond the actual cost of the photocopying.

Agreed MARCH 19, 1976.

Ad Hoc Committee on Copyright Law Revision:

By SHELDON ELLIOT STEINBACH.
Author-Publisher Group:
Authors League of America:

By IRWIN KARP, *Counsel*.
Association of American Publishers, Inc.:

By ALEXANDER C. HOFFMAN,
*Chairman, Copyright Committee.*

In a joint letter dated April 30, 1976, representatives of the Music Publishers' Association of the United States, Inc., the National Music Publishers' Association, Inc., the Music Teachers National Association, the Music Educators National Conference, the National Association of Schools of Music, and the Ad Hoc Committee on Copyright Law Revision, wrote to Chairman Kastenmeier as follows:

During the hearings on H.R. 2223 in June 1975, you and several of your subcommittee members suggested that concerned groups should work together in developing guidelines which would be helpful to clarify Section 107 of the bill.

Representatives of music educators and music publishers delayed their meetings until guidelines had been developed relative to books and periodicals. Shortly after that work was completed and those guidelines were forwarded to your subcommittee, representatives of the undersigned music organizations met together with representatives of the Ad Hoc Committee on Copyright Law Revision to draft guidelines relative to music.

We are very pleased to inform you that the discussions thus have been fruitful on the guidelines which have been developed. Since private music teachers are an important factor in music education, due consideration has been given to the concerns of that group.

We trust that this will be helpful in the report on the bill to clarify Fair Use as it applies to music.

The text of the guidelines accompanying this letter is as follows:

GUIDELINES FOR EDUCATIONAL USES OF MUSIC

The purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under Section 107 of HR 2223. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future, and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the Copyright Revision Bill. There **[71]** may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

*A. Permissible Uses*

1. Emergency copying to replace purchased copies which for any reason are not available for an imminent performance provided purchased replacement copies shall be substituted in due course.

2.n* (a) For academic purposes other than performance, single or multiple copies of excerpts of works may be made, provided that the excerpts do not compromise a part of the whole which would constitute a performance unit such as a selection, movement or aria, but in no case more than 10% of the whole work. The number of copies shall not exceed one copy per pupil.

(b) For academic purposes other than performance, a single copy of an entire performable unit (section, movement, aria, etc.) that is, (1) confirmed by the copyright proprietor to be out of print or (2) unavailable except in a larger work, may be made by or for a teacher solely for the purpose of his or her scholarly research or in preparation to teach a class.

3. Printed copies which have been purchased may be edited or simplified provided that the fundamental character of the work is not distorted or the lyrics, if any, altered or lyrics added if none exist.

4. A single copy of recordings of performances by students may be made for evaluation or rehearsal purposes and may be retained by the educational institution or individual teacher.

5. A single copy of a sound recording (such as a tape, disc or cassette) or copyrighted music may be made from sound recordings owned by an educational institution or an individual teacher for the purpose of constructing aural exercises or examinations and may be retained by the educational institution or individual teacher. (This pertains only to the copyright of the music itself and not to any copyright which may exist in the sound recording.)

*B. Prohibitions*

1. Copying to create or replace or substitute for anthologies, compilations or collective works.

2. Copying of or from works intended to be "consumable" in the course of study or of teaching such as workbooks, exercises, standardized tests and answer sheets and like material.

3. Copying for the purpose of performance, except as in A(1) above.

4. Copying for the purpose of substituting for the purchase of music, except as in A(1) and A(2) above.

5. Copying without inclusion of the copyright notice which appears on the printed copy.

The problem of off-the-air taping for nonprofit classroom use of copyrighted audiovisual works incorporated in radio and television broadcasts has proved to be difficult to resolve. The Committee believes that the fair use doctrine has some limited application in this area, **[72]** but it appears that the development of detailed guidelines will require a more thorough exploration than has so far been possible of the needs and problems of a number of different interests affected, and of the various legal problems presented. Nothing in section 107 or elsewhere in the bill is intended to change or prejudge the law on the point. On the other hand, the Committee is sensitive to the importance of the problem, and urges the representatives of the various interests, if possible under the leadership of the Register of Copyrights, to continue their discussions actively and in a constructive spirit. If it would be helpful to a solution, the Committee is receptive to undertaking further consideration of the problem in a future Congress.

The Committee appreciates and commends the efforts and the cooperative and reasonable spirit of the parties who achieved the agreed guidelines on books and periodicals and on music. Representatives of the American Association of University Professors and of the Association of American Law Schools have written to the Committee strongly criticizing the guidelines, particularly with respect to multiple copying, as being too restrictive with respect to classroom situations at the university and graduate level. However, the Committee notes that the Ad Hoc group did include representatives of higher education, that the stated "purpose of the ... guidelines is to state the minimum and not the maximum standards of educational fair use" and that the agreement acknowledges "there may be instances in which copying which does not fall within the guidelines ... may nonetheless be permitted under the criteria of fair use."

The Committee believes the guidelines are a reasonable interpretation of the minimum standards of fair use. Teachers will know that copying within the guidelines is fair use. Thus, the guidelines serve the purpose of fulfilling the need for greater certainty and protection for teachers. The Committee expresses the hope that if there are areas where standards other than these guidelines may be appropriate, the parties will continue their efforts to provide addtional [sic] specific guidelines in the same spirit of god [sic] will and give and take that has marked the discussion of this subject in recent months.

*Reproduction and uses for other purposes*

The concentrated attention given the fair use provision in the context of classroom teaching activities should not obscure its application in other areas. It must be emphasized again that the same general standards of fair use are applicable to all kinds of uses of copyrighted material, although the relative weight to be given them will differ from case to case.

The fair use doctrine would be relevant to the use of excerpts from copyrighted works in educational broadcasting activities not exempted under section 110(2) or 112, and not covered by the licensing provisions of section 118. In these cases the factors to be weighed in applying the criteria of this section would include whether the performers, producers, directors, and others responsible for the broadcast were paid, the size and nature of the audience, the size and number of excerpts taken and, in the case of recordings made for broadcast, the number of copies reproduced and the extent of their reuse or exchange. The availability of the fair use doctrine to educational broadcasters would be narrowly circumscribed in the case of motion pictures and other audiovisual works, but under appropriate circum**[73]**stances it could apply to the nonsequential showing of an individual still or slide, or to the performance of a short excerpt from a motion picture for criticism or comment.

Another special instance illustrating the application of the fair use doctrine pertains to the making of copies or phonorecords of works in the special forms needed for the use of blind persons. These special forms, such as copies in Braille and phonorecords of oral reading (talking books), are not usually made by the publishers for commercial distribution. For the most part, such copies and phonorecords are made by the Library of Congress' Division for the Blind and Physically Handicapped with permission obtained from the copyright owners, and are circulated to blind persons through regional libraries covering the nation. In addition, such copies and phonorecords are made locally by individual volunteers for the use of blind persons in their communities, and the Library of Congress conducts a program for training such volunteers. While the making of multiple copies or phonorecords of a work for general circulation requires the permission of the copyright owner, a problem addressed in section 710 of the bill, the making of a single copy or phonorecord by an individual as a free service for a blind persons [sic] would properly be considered a fair use under section 107.

A problem of particular urgency is that of preserving for posterity prints of motion pictures made before 1942. Aside from the deplorable fact that in a great many cases the only existing copy of a film has been deliberately destroyed, those that remain are in immediate danger of disintegration; they were printed on film stock with a nitrate base that will inevitably decompose in time. The efforts of the Library of Congress, the American Film Institute, and other organizations to rescue and preserve this irreplaceable contribution to our cultural life are to be applauded, and the making of duplicate copies for purposes of archival preservation certainly falls within the scope of "fair use."

When a copyrighted work contains unfair, inaccurate, or derogatory information concerning an individual or institution, the individual or institution may copy and reproduce such parts of the work as are necessary to permit understandable comment on the statements made in the work.

The Committee has considered the question of publication, in Congressional hearings and documents, of copyrighted material. Where the length of the work or excerpt published and the number of copies authorized are reasonable under the circumstances, and the work itself is directly relevant to a matter of legitimate legislative concern, the Committee believes that the publication would constitute fair use.

During the consideration of the revision bill in the 94th Congress it was proposed that independent newsletters, as distinguished from house organs and publicity or advertising publications, be given separate treatment. It is argued that newsletters are particularly vulnerable to mass photocopying, and that most newsletters have fairly modest circulations. Whether the copying of portions of a newsletter is an act of infringement or a fair use will necessarily turn on the facts of the individual case. However, as a general principle, it seems clear that the scope of the fair use doctrine should be considerably narrower in the case of newsletters than in that of either mass-circulation periodicals or scientific journals. The com-**[74]**mercial nature of the user is a significant factor in such cases: Copying by a profit-making user of even a small portion of a newsletter may have a significant impact on the commercial market for the work.

The Committee has examined the use of excerpts from copyrighted works in the art work of calligraphers. The committee believes that a single copy reproduction of an excerpt from a copyrighted work by a calligrapher for a single client does not represent an infringement of copyright. Likewise, a single reproduction of excerpts from a copyrighted work by a student calligrapher or teacher in a learning situation would be a fair use of the copyrighted work.

The Register of Copyrights has recommended that the committee report describe the relationship between this section and the provisions of section 108 relating to reproduction by libraries and archives. The doctrine of fair use applies to library photocopying, and nothing contained in section 108 "in any way affects the right of fair use." No provision of section 108 is intended to take away any rights existing under the fair use doctrine. To the contrary, section 108 authorizes certain photocopying practices which may not qualify as a fair use.

The criteria of fair use are necessarily set forth in general terms. In the application of the criteria of fair use to specific photocopying practices of libraries, it is the intent of this legislation to provide an appropriate balancing of the rights of creators, and the needs of users.

SECTION 108. REPRODUCTION BY LIBRARIES AND ARCHIVES

Notwithstanding the exclusive rights of the owners of copyright, section 108 provides that under certain conditions it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce or distribute not more than one copy or phonorecord of a work, provided (1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage and (2) the collections of the library or archives are open to the public or available not only to researchers affiliated with the library or archives, but also to other persons doing research in a specialized field, and (3) the reproduction or distribution of the work includes a notice of copyright.

Under this provision, a purely commercial enterprise could not establish a collection of copyrighted works, call itself a library or archive, and engage in for-profit reproduction and distribution of photocopies. Similarly, it would not be possible for a non-profit institution, by means of contractual arrangements with a commercial copying enterprise, to authorize the enterprise to carry out copying and distribution functions that would be exempt if conducted by the non-profit institution itself.

The reference to "indirect commercial advantage" has raised questions as to the status of photocopying done by or for libraries or archival collections within industrial, profitmaking, or proprietary institutions (such as the research and development departments of chemical, pharmaceutical, automobile, and oil corporations, the library of a proprietary hospital, the collections owned by a law or medical partnership, etc.).

There is a direct interrelationship between this problem and the prohibitions against "multiple" and "systematic" photocopying in section 108(g) (1) and (2). Under section 108, a library in a profit-making organization would not be authorized to:

**[75]** (a) use a single subscription or copy to supply its employees with multiple copies of material relevant to their work; or

(b) use a single subscription or copy to supply its employees, on request, with single copies of material relevant to their work, where the arrangement is "systematic" in the sense of deliberately substituting photocopying for subscription or purchase; or

(c) use "interlibrary loan" arrangements for obtaining photocopies in such aggregate quantities as to substitute for subscriptions or purchase of material needed by employees in their work.

Moreover, a library in a profit-making organization could not evade these obligations by installing reproducing equipment on its premises for unsupervised use by the organization's staff.

Isolated, spontaneous making of single photocopies by a library in a for-profit organization, without any systematic effort to substitute photocopying for subscriptions or purchases, would be covered by section 108, even though the copies are furnished to the employees of the organization for use in their work. Similarly, for-profit libraries could participate in interlibrary arrangements for exchange of photocopies, as long as the reproduction or distribution was not "systematic." These activities, by themselves, would ordinarily not be considered "for direct or indirect commercial advantage," since the "advantage" referred to in this clause must attach to the immediate commercial motivation behind the reproduction or distribution itself, rather than to the ultimate profit-making motivation behind the enterprise in which the library is located. On the other hand, section 108 would not excuse reproduction or distribution if there were a commercial motive behind the actual making or distributing of the copies, if multiple copies were made or distributed, or if the photocopying activities were "systematic" in the sense that their aim was to substitute for subscriptions or purchases.

The rights of reproduction and distribution under section 108 apply in the following circumstances:

*Archival reproduction*

Subsection (b) authorizes the reproduction and distribution of a copy or phonorecord of an unpublished work duplicated in facsimile form solely for purposes of preservation and security, or for deposit for research use in another library or archives, if the copy or phonorecord reproduced is currently in the collections of the first library or archives. Only unpublished works could be reproduced under this exemption, but the right would extend to any type of work, including photographs, motion pictures and sound recordings. Under this exemption, for example, a repository could make photocopies of manuscripts by microfilm or electrostatic process, but could not reproduce the work in "machine-readable" language for storage in an information system.

*Replacement of damaged copy*

Subsection (c) authorizes the reproduction of a published work duplicated in facsimile form solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost or stolen, if the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price. The scope and nature of a reasonable investigation to determine that an unused replacement cannot be obtained will vary according to the circum[76]stances of a particular situation. It will always require recourse to commonly-known trade sources in the United States, and in the normal situation also to the publisher or other copyright owner (if such owner can be located at the address listed in the copyright registration), or an authorized reproducing service.

*Articles and small excerpts*

Subsection (d) authorizes the reproduction and distribution of a copy of not more than one article or other contribution to a copyrighted collection or periodical issue, or of a copy or phonorecord of a small part of any other copyrighted work. The copy or phonorecord may be made by the library where the user makes his request or by another library pursuant to an interlibrary loan. It is further required that the copy become the property of the user, that the

library or archives have no notice that the copy would be used for any purposes other than private study, scholarship or research, and that the library or archives display prominently at the place where reproduction requests are accepted, and includes in its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

*Out-of-print works*

Subsection (e) authorizes the reproduction and distribution of a copy or phonorecord of an entire work under certain circumstances, if it has been established that a copy cannot be obtained at a fair price. The copy may be made by the library where the user makes his request or by another library pursuant to an interlibrary loan. The scope and nature of a reasonable investigation to determine that an unused copy cannot be obtained will vary according to the circumstances of a particular situation. It will always require recourse to commonly-known trade sources in the United States, and in the normal situation also to the publisher or other copyright owner (if the owner can be located at the address listed in the copyright registration), or an authorized reproducing service. It is further required that the copy become the property of the user, that the library or archives have no notice that the copy would be used for any purpose other than private study, scholarship, or research, and that the library or archives display prominently at the place where reproduction requests are accepted, and include on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

*General exemptions*

Clause (1) of subsection (f) specifically exempts a library or archives or its employees from liability for the unsupervised use of reproducing equipment located on its premises, provided that the reproducing equipment displays a notice that the making of a copy may be subject to the copyright law. Clause (2) of subsection (f) makes clear that this exemption of the library or archives does not extend to the person using such equipment or requesting such copy if the use exceeds fair use. Insofar as such person is concerned the copy or phonorecord made is not considered "lawfully" made for purposes of sections 109, 110 or other provisions of the title.

Clause (3) provides that nothing in section 108 is intended to limit the reproduction and distribution by lending of a limited num-**[77]**ber of copies and excerpts of an audiovisual news program. This exemption is intended to apply to the daily newscasts of the national television networks, which report the major events of the day. It does not apply to documentary (except documentary programs involving news reporting as that term is used in section 107), magazine-format or other public affairs broadcasts dealing with subjects of general interest to the viewing public.

The clause was first added to the revision bill in 1974 by the adoption of an amendment proposed by Senator Baker. It is intended to permit libraries and archives, subject to the general conditions of this section, to make off-the-air videotape recordings of daily network newscasts for limited distribution to scholars and researchers for use in research purposes. As such, it is an adjunct to the American Television and Radio Archive established in Section 113 of the Act which will be the principal repository for television broadcast material, including news broadcasts. The inclusion of language indicating that such material may only be distributed by lending by the library or archive is intended to preclude performance, copying, or sale, whether or not for profit, by the recipient of a copy of a television broadcast taped off-the-air pursuant to this clause.

Clause (4), in addition to asserting that nothing contained in section 108 "affects the right of fair use as provided by section 107," also provides that the right of reproduction granted by this section does not override any contractual arrangements assumed by a library or archives when it obtained a work for its collections. For example, if there is an express contractual prohibition against reproduction for any purpose, this legislation shall not be construed as justifying a violation of the contract. This clause is intended to encompass the situation where an individual makes papers, manuscripts or other works available to a library with the understanding that they will not be reproduced.

It is the intent of this legislation that a subsequent unlawful use by a user of a copy or phonorecord of a work lawfully made by a library, shall not make the library liable for such improper use.

*Multiple copies and systematic reproduction*

Subsection (g) provides that the rights granted by this section extend only to the "isolated and unrelated reproduction of a single copy or phonorecord of the same material on separate occasions." However, this section does

not authorize the related or concerted reproduction of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one individual or for separate use by the individual members of a group.

With respect to material described in subsection (d)--articles or other contributions to periodicals or collections, and small parts of other copyrighted works--subsection (g)(2) provides that the exemptions of section 108 do not apply if the library or archive engages in "systematic reproduction or distribution of single or multiple copies or phonorecords." This provision in S. 22 provoked a storm of controversy, centering around the extent to which the restrictions on "systematic" activities would prevent the continuation and development of interlibrary networks and other arrangements involving the exchange **[78]** of photocopies. After thorough consideration, the Committee amended section 108(g)(2) to add the following proviso:

*Provided*, that nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.

In addition, the Committee added a new subsection (i) to section 108, requiring the Register of Copyrights, five years from the effective date of the new Act and at five-year intervals thereafter, to report to Congress upon "the extent to which this section has achieved the intended statutory balancing of the rights of creators, and the needs of users," and to make appropriate legislative or other recommendations. As noted in connection with section 107, the Committee also amended section 504(c) in a way that would insulate librarians from unwarranted liability for copyright infringement; this amendment is discussed below.

The key phrases in the Committee's amendment of section 108(g)(2) are "aggregate quantities" and "substitute for a subscription to or purchase of" a work. To be implemented effectively in practice, these provisions will require the development and implementation of more-or-less specific guidelines establishing criteria to govern various situations.

The National Commission on New Technological Uses of Copyrighted Works (CONTU) offered to provide good offices in helping to develop these guidelines. This offer was accepted and, although the final text of guidelines has not yet been achieved, the Committee has reason to hope that, within the next month, some agreement can be reached on an initial set of guidelines covering practices under section 108(g)(2).

*Works excluded*

Subsection (h) provides that the rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than "an audiovisual work dealing with news." The latter term is intended as the equivalent in meaning of the phrase "audiovisual news program" in section 108(f)(3). The exclusions under subsection (h) do not apply to archival reproduction under subsection (b), to replacement of damaged or lost copies or phonorecords under subsection (c), or to "pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e)."

Although subsection (h) generally removes musical, graphic, and audiovisual works from the specific exemptions of section 108, it is important to recognize that the doctrine of fair use under section 107 remains fully applicable to the photocopying or other reproduction of such works. In the case of music, for example, it would be fair use for a scholar doing musicological research to have a library supply a copy of a portion of a score or to reproduce portions of a phonorecord of a work. Nothing in section 108 impairs the applicability of the fair use doctrine to a wide variety of situations involving photocopying or **[79]** other reproduction by a library of copyrighted material in its collections, where the user requests the reproduction for legitimate scholarly or research purposes.

SECTION 109. EFFECT OF TRANSFER OF PARTICULAR COPY OR PHONORECORD

*Effect on further disposition of copy or phonorecord*

Section 109(a) restates and confirms the principle that, where the copyright owner has transferred ownership of a particular copy or phonorecord of a work, the person to whom the copy or phonorecord is transferred is entitled to dispose of it by sale, rental, or any other means. Under this principle, which has been established by the court decisions and section 27 of the present law, the copyright owner's exclusive right of public distribution would have no effect upon

anyone who owns "a particular copy or phonorecord lawfully made under this title" and who wishes to transfer it to someone else or to destroy it.

Thus, for example, the outright sale of an authorized copy of a book frees it from any copyright control over its resale price or other conditions of its future disposition. A library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose. This does not mean that conditions on future disposition of copies or phonorecords, imposed by a contract between their buyer and seller, would be unenforceable between the parties as a breach of contract, but it does mean that they could not be enforced by an action for infringement of copyright. Under section 202 however, the owner of the physical copy or phonorecord cannot reproduce or perform the copyrighted work publicly without the copyright owner's consent.

To come within the scope of section 109(a), a copy or phonorecord must have been "lawfully made under this title," though not necessarily with the copyright owner's authorization. For example, any resale of an illegally "pirated" phonorecord would be an infringement, but the disposition of a phonorecord legally made under the compulsory licensing provisions of section 115 would not.

*Effect on display of copy*

Subsection (b) of section 109 deals with the scope of the copyright owner's exclusive right to control the public display of a particular "copy" of a work (including the original or prototype copy in which the work was first fixed). Assuming, for example, that a painter has sold the only copy of an original work of art without restrictions, would it be possible for him to restrain the new owner from displaying it publicly in galleries, shop windows, on a projector, or on television?

Section 109(b) adopts the general principle that the lawful owner of a copy of a work should be able to put his copy on public display without the consent of the copyright owner. As in cases arising under section 109(a), this does not mean that contractual restrictions on display between a buyer and seller would be unenforceable as a matter of contract law.

The exclusive right of public display granted by section 106(5) would not apply where the owner of a copy wishes to show it directly to the public, as in a gallery or display case, or indirectly, as through an opaque projector. Where the copy itself is intended for projection, as in the case of a photographic slide, negative, or transparency, the public projection of a single image would be permitted as long as the viewers are "present at the place where the copy is located."

**[80]** On the other hand, section 109(b) takes account of the potentialities of the new communications media, notably television, cable and optical transmission devices, and information storage and retrieval devices, for replacing printed copies with visual images. First of all, the public display of an image of a copyrighted work would not be exempted from copyright control if the copy from which the image was derived were outside the presence of the viewers. In other words, the display of a visual image of a copyrighted work would be an infringement if the image were transmitted by any method (by closed or open circuit television, for example, or by a computer system) from one place to members of the public located elsewhere.

Moreover, the exemption would extend only to public displays that are made "either directly or by the projection of no more than one image at a time." Thus, even where the copy and the viewers are located at the same place, the simultaneous projection of multiple images of the work would not be exempted. For example, where each person in a lecture hall is supplied with a separate viewing apparatus, the copyright owner's permission would generally be required in order to project an image of a work on each individual screen at the same time.

The committee's intention is to preserve the traditional privilege of the owner of a copy to display it directly, but to place reasonable restrictions on the ability to display it indirectly in such a way that the copyright owner's market for reproduction and distribution of copies would be affected. Unless it constitutes a fair use under section 107, or unless one of the special provisions of section 110 or 111 is applicable, projection of more than one image at a time, or transmission of an image to the public over television or other communication channels, would be an infringement for the same reasons that reproduction in copies would be. The concept of "the place where the copy is located" is generally intended to refer to a situation in which the viewers are present in the same physical surroundings as the copy, even though they cannot see the copy directly.

*Effect of mere possession of copy or phonorecord*

Subsection (c) of section 109 qualifies the privileges specified in subsections (a) and (b) by making clear that they do not apply to someone who merely possesses a copy or phonorecord without having acquired ownership of it. Acquisition of an object embodying a copyrighted work by rental, lease, loan, or bailment carries with it no privilege to dispose of the copy under section 109(a) or to display it publicly under section 109(b). To cite a familiar example, a person who has rented a print of a motion picture from the copyright owner would have no right to rent it to someone else without the owner's permission.

*Burden of proof in infringement actions*

During the course of its deliberations on this section, the Committee's attention was directed to a recent court decision holding that the plaintiff in an infringement action had the burden of establishing that the allegedly infringing copies in the defendant's possession were not lawfully made or acquired under section 27 of the present law. *American International Pictures, Inc. v. Foreman , 400 F. Supp. 928 (S.D. Alabama 1975).* The Committee believes that the court's decision, if followed, would place a virtually impossible burden on copyright owners. The decision is also inconsistent burden on copyright owners. The decision is also inconsistent with the established legal principle that the burden of proof should not be placed upon a litigant to establish facts particularly within the knowledge of his adversary. The defendant in such actions clearly has the particular knowledge of how possession of the particular copy was acquired, and should have the burden of providing this evidence to the court. It is the intent of the Committee, therefore, that in an action [to] determine whether a defendant is entitled to the privilege established by section 109(a) and (b), the burden of proving whether a particular copy was lawfully made or acquired should rest on the defendant.

[81] SECTION 110. EXEMPTIONS OF CERTAIN PERFORMANCES AND DISPLAYS

Clauses (1) through (4) of section 110 deal with performances and exhibitions that are now generally exempt under the "for profit" limitation or other provisions of the copyright law, and that are specifically exempted from copyright liability under this legislation. Clauses (1) and (2) between them are intended to cover all of the various methods by which performances or displays in the course of systematic instruction take place.

*Face-to-face teaching activities*

Clause (1) of section 110 is generally intended to set out the conditions under which performances or displays, in the course of instructional activities other than educational broadcasting, are to be exempted from copyright control. The clause covers all types of copyrighted works, and exempts their performance or display "by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution," where the activities take place "in a classroom or similar place devoted to instruction."

There appears to be no need for a statutory definition of "face-to-face" teaching activities to clarify the scope of the provision. "Face-to-face teaching activities" under clause (1) embrace instructional performances and displays that are not "transmitted." The concept does not require that the teacher and students be able to see each other, although it does require their simultaneous presence in the same general place. Use of the phrase "in the course of face-to-face teaching activities" is intended to exclude broadcasting or other transmissions from an outside location into classrooms, whether radio or television and whether open or closed circuit. However, as long as the instructor and pupils are in the same building or general area, the exemption would extend to the use of devices for amplifying or reproducing sound and for projecting visual images. The "teaching activities" exempted by the clause encompass systematic instruction of a very wide variety of subjects, but they do not include performances or displays, whatever their cultural value or intellectual appeal, that are given for the recreation or entertainment of any part of their audience.

*Works affected*.--Since there is no limitation on the types of works covered by the exemption, teachers or students would be free to perform or display anything in class as long as the other conditions of **[82]** the clause are met. They could read aloud from copyrighted text material, act out a drama, play or sing a musical work, perform a motion picture or filmstrip, or display text or pictorial material to the class by means of a projector. However, nothing in this provision is intended to sanction the unauthorized reproduction of copies or phonorecords for the purpose of classroom performance or display, and the clause contains a special exception dealing with performances from unlawfully made copies of motion pictures and other audiovisual works, to be discussed below.

*Instructors or pupils*.--To come within clause (1), the performance or display must be "by instructors or pupils," thus ruling out performances by actors, singers, or instrumentalists brought in from outside the school to put on a program. However, the term "instructors" would be broad enough to include guest lecturers if their instructional activities remain confined to classroom situations. In general, the term "pupils" refers to the enrolled members of a class.

*Nonprofit educational institution*.--Clause (1) makes clear that it applies only to the teaching activities "of a nonprofit educational institution," thus excluding from the exemption performances or displays in profit-making institutions such as dance studios and language schools.

*Classroom or similar place*.--The teaching activities exempted by the clause must take place "in a classroom or similar place devoted to instruction." For example, performances in an auditorium or stadium during a school assembly, graduation ceremony, class play, or sporting event, where the audience is not confined to the members of a particular class, would fall outside the scope of clause (1), although in some cases they might be exempted by clause (4) of section 110. The "similar place" referred to in clause (1) is a place which is "devoted to instruction" referred to in clause (1) is a place which is "devoted to instruction" in the same way a classroom is; common examples would include a studio, a workshop, a gymnasium, a training field, a library, the stage of an auditorium, or the auditorium itself, if it is actually used as a classroom for systematic instructional activities.

*Motion pictures and other audiovisual works*.--The final provision of clause (1) deals with the special problem of performances from unlawfully-made copies of motion pictures and other audiovisual works. The exemption is lost where the copy being used for a classroom performance was "not lawfully made under this title" and the person responsible for the performance knew or had reason to suspect as much. This special exception to the exemption would not apply to performances from lawfully-made copies, even if the copies were acquired from someone who had stolen or converted them, or if the performances were in violation of an agreement. However, though the performance would be exempt under section 110(1) in such cases, the copyright owner might have a cause of action against the unauthorized distributor under section 106(3), or against the person responsible for the performance, for breach of contract.

*Projection devices*.-- As long as there is no transmission beyond the place where the copy is located, both section 109(b) and section 110(1) would permit the classroom display of a work by means of any sort of projection device or process.

*Instructional broadcasting*

*Works affected*.--The exemption for instructional broadcasting provided by section 110(2) would apply only to "performance of a non-**[83]**dramatic literary or musical work or display of a work." Thus, the copyright owner's permission would be required for the performance on educational television or radio of a dramatic work, of a dramatico-musical work such as an opera or musical comedy, or of a motion picture. Since, as already explained, audiovisual works such as filmstrips are equated with motion pictures, their sequential showing would be regarded as a performance rather than a display and would not be exempt under section 110(2). The clause is not intended to limit in any way the copyright owner's exclusive right to make dramatizations, adaptations, or other derivative works under section 106(2). Thus, for example, a performer could read a nondramatic literary work aloud under section 110(2), but the copyright owner's permission would be required for him to act it out in dramatic form.

*Systematic instructional activities*.--Under section 110(2) a transmission must meet three specified conditions in order to be exempted from copyright liability. The first of these, as provided by subclause (A), is that the performance or display must be "a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution." The concept of "systematic instructional activities" is intended as the general equivalent of "curriculums," but it could be broader in a case such as that of an institution using systematic teaching methods not related to specific course work. A transmission would be a regular part of these activities if it is in accordance with the pattern of teaching established by the governmental body or institution. The use of commercial facilities, such as those of a cable service, to transmit the performance or display, would not affect the exemption as long as the actual performance or display was for nonprofit purposes.

*Content of transmission*.--Subclause (B) requires that the performance or display be directly related and of material assistance to the teaching content of the transmission.

*Intended recipients*.--Subclause (C) requires that the transmission is made primarily for:

(*i*) Reception in classrooms or similar places normally devoted to instruction, or

(*ii*) Reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction, or

(*iii*) Reception by officers or employees of governmental bodies as a part of their official duties or employment.

In all three cases, the instructional transmission need only be made "primarily" rather than "solely" to the specified recipients to be exempt. Thus, the transmission could still be exempt even though it is capable of reception by the public at large. Conversely, it would not be regarded as made "primarily" for one of the required groups of recipients if the principal purpose behind the transmission is reception by the public at large, even if it is cast in the form of instruction and is also received in classrooms. Factors to consider in determining the "primary" purpose of a program would include its subject matter, content, and the time of its transmission.

Paragraph (i) of subclause (C) generally covers what are known as "in-school" broadcasts, whether open- or closed-circuit. The reference to "classrooms or similar places" here is intended to have the same meaning as that of the phrase as used in section 110(1). The **[84]** exemption in paragraph (ii) is intended to exempt transmissions providing systematic instuction [sic] to individuals who cannot be reached in classrooms because of "their disabilities or other special circumstances." Accordingly, the exemption is confined to instructional broadcasting that is an adjunct to the actual classwork of nonprofit schools or is primarily for people who cannot be brought together in classrooms such as preschool children, displaced workers, illiterates, and shut-ins.

There has been some question as to whether or not the language in this section of the bill is intended to include instructional television college credit courses. These telecourses are aimed at undergraduate and graduate students in earnest pursuit of higher educational degrees who are unable to attend daytime classes because of daytime employment, distance from campus, or some other intervening reason. So long as these broadcasts are aimed at regularly enrolled students and conducted by recognized higher educational institutions, the committee believes that they are clearly within the language of section 110(2)(C)(ii). Like night school and correspondence courses before them, these telecourses are fast becoming a valuable adjunct of the normal college curriculum.

The third exemption in subclause (C) is intended to permit the use of copyrighted material, in accordance with the other conditions of section 110(2), in the course of instructional transmissions for Government personnel who are receiving training "as a part of their official duties or employment."

*Religious services*

The exemption in clause (3) of section 110 covers performances of a nondramatic literary or musical work, and also performances "of dramatico-musical works of a religious nature"; in addition, it extends to displays of works of all kinds. The exemption applies where the performance or display is "in the course of services at a place of worship or other religious assembly." The scope of the clause does not cover the sequential showing of motion pictures and other audiovisual works.

The exemption, which to some extent has its counterpart in sections 1 and 104 of the present law, applies to dramatico-musical works "of a religious nature." The purpose here is to exempt certain performances of sacred music that might be regarded as "dramatic" in nature, such as oratorios, cantatas, musical settings of the mass, choral services, and the like. The exemption is not intended to cover performances of secular operas, musical plays, motion pictures, and the like, even if they have an underlying religious or philosophical theme and take place "in the course of [religious] services."

To be exempted under section 110(3) a performance or display must be "in the course of services," thus excluding activities at a place of worship that are for social, educational, fund raising, or entertainment purposes. Some performances of these kinds could be covered by the exemption in section 110(4), discussed next. Since the performance or display must also occur "at a place of worship or other religious assembly," the exemption would not extend to religious broadcasts or other transmissions to the public at large, even where the transmissions were sent from the place of worship. On the other hand, as long as services are being conducted before a religious gathering, the exemption would apply if they were conducted in places such as auditoriums, outdoor theaters, and the like.

**[85]** *Certain other nonprofit performances*

In addition to the educational and religious exemptions provided by clauses (1) through (3) of section 110, clause (4) contains a general exception to the exclusive right of public performance that would cover some, though not all, of the same ground as the present "for profit" limitation.

*Scope of exemption*.--The exemption in clause (4) applies to the same general activities and subject matter as those covered by the "for profit" limitation today: public performances of nondramatic literary and musical works. However, the exemption would be limited to public performances given directly in the presence of an audience whether by means of living performers, the playing of phonorecords, or the operation of a receiving apparatus, and would not include a "transmission to the public." Unlike the clauses (1) through (3) and (5) of section 110, but like clauses (6) through (8), clause (4) applies only to performing rights in certain works, and does not affect the exclusive right to display a work in public.

*No profit motive*.--In addition to the other conditions specified by the clause, the performance must be "without any purpose of direct or indirect commercial advantage." This provision expressly adopts the principle established by the court decisions construing the "for profit" limitation: that public performances given or sponsored in connection with any commercial or profit-making enterprises are subject to the exclusive rights of the copyright owner even though the public is not charged for seeing or hearing the performance.

*No payment for performance*.--An important condition for this exemption is that the performance be given "without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers." The basic purpose of this requirement is to prevent the free use of copyrighted material under the guise of charity where fees or percentages are paid to performers, promoters, producers, and the like. However, the exemption would not be lost if the performers, directors, or producers of the performance, instead of being paid directly "for the performance," are paid a salary for duties encompassing the performance. Examples are performances by a school orchestra conducted by a music teacher who receives an annual salary, or by a service band whose members and conductors perform as part of their assigned duties and who receive military pay. The committee believes that performances of this type should be exempt, assuming the other conditions in clause (4) are met, and has not adopted the suggestion that the word "salary" be added to the phrase referring to the "payment of any fee or other compensation."

*Admission charge*.--Assuming that the performance involves no profit motive and no one responsible for it gets paid a fee, it must still meet one of two alternative conditions to be exempt. As specified in subclauses (A) and (B) of section 110(4), these conditions are: (1) that no direct or indirect admission charge is made, or (2) that the net proceeds are "used exclusively for educational, religious, or charitable purposes and not for private financial gain."

**[86]** Under the second of these conditions, a performance meeting the other conditions of clause (4) would be exempt even if an admission fee is charged, provided any amounts left "after deducting the reasonable costs of producing the performance" are used solely for bona fide educational, religious, or charitable purposes. In cases arising under this second condition and as provided in subclause (B), where there is an admission charge, the copyright owner is given an opportunity to decide whether and under what conditions the copyrighted work should be performed; otherwise, owners could be compelled to make involuntary donations to the fund-raising activities of causes to which they are opposed. The subclause would thus permit copyright owners to prevent public performances of their works under section 110(4)(B) by serving notice of objection, with the reasons therefor, at least seven days in advance.

*Mere reception in public*

Unlike the first four clauses of section 110, clause (5) is not to any extent a counterpart of the "for profit" limitation of the present statute. It applies to performances and displays of all types of works, and its purpose is to exempt from copyright liability anyone who merely turns on, in a public place, an ordinary radio or television receiving apparatus of a kind commonly sold to members of the public for private use.

The basic rationale of this clause is that the secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no further liability should be imposed. In the vast majority of these cases no royalties are collected today, and the exemption should be made explicit in the statute. This clause has nothing to do with cable television systems and the exemptions would be denied in any case where the audience is charged directly to see or hear the transmission.

On June 17, 1975, the Supreme Court handed down a decision in *Twentieth Century Music Corp. v. Aiken , 95 S.Ct. 2040,* that raised fundamental questions about the proper interpretation of section 110(5). The defendant, owner and operator of a fast-service food shop in downtown Pittsburgh, had "a radio with outlets to four speakers in the ceiling," which he apparently turned on and left on throughout the business day. Lacking any performing license, he was sued for copyright infringement by two ASCAP members. He lost in the District Court, won a reversal in the Third Circuit Court of Appeals, and finally prevailed, by a margin of 7-2, in the Supreme Court.

The *Aiken* decision is based squarely on the two Supreme Court decisions dealing with cable television. In *Fortnightly Corp. v. United Artists , 392 U.S. 390,* and again in *Teleprompter Corp. v. CBS , 415 U.S. 394,* the Supreme Court has held that a CATV operator was not "performing" within the meaning of the 1909 statute, when it picked up broadcast signals off the air and retransmitted them to subscribers by cable. The *Aiken* decision extends this interpretation of the scope of the 1909 statute's right of "public performance for profit" to a situation outside the CATV context and, without expressly overruling the decision in *Buck v. Jewell-LaSalle Realty Co. , 283 U.S. 191 (1931),* effectively deprives it of much meaning under the present law. For more than forty years the *Jewell-LaSalle* rule was thought to require a business establishment to obtain copyright licenses before it could legally pick up any broadcasts off the air and retransmit them to its **[87]** guests and patrons. AS reinterpreted by the *Aiken* decision, the rule of *Jewell-LaSalle* applies only if the broadcast being retransmitted was itself unlicensed.

The majority of the Supreme Court in the *Aiken* case based its decision on a narrow construction of the word "perform" in the 1909 statute. This basis for the decision is completely overturned by the present bill and its broad definition of "perform" in section 101. The Committee has adopted the language of section 110(5), with an amendment expressly denying the exemption in situations where "the performance or display is further transmitted beyond the place where the receiving apparatus is located"; in doing so, it accepts the traditional, pre-*Aiken*, interpretation of the *Jewell-LaSalle* decision, under which public communication by means other than a home receiving set or further transmission of a broadcast to the public, is considered an infringing act.

Under the particular fact situation in the *Aiken* case, assuming a small commercial establishment and the use of a home receiver with four ordinary loudspeakers grouped within a relatively narrow circumference from the set, it is intended that the performances would be exempt under clause (5). However, the Committee considers this fact situation to represent the outer limit of the exemption, and believes that the line should be drawn at that point. Thus, the clause would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment, but it would impose liability where the proprietor has a commercial "sound system" installed or converts a standard home receiving apparatus (by augmenting it with sophisticated or extensive amplification equipment) into the equivalent of a commercial sound system. Factors to consider in particular cases would include the size, physical arrangement, and noise level of the areas within the establishment where the transmissions are made audible or visible, and the extent to which the receiving apparatus is altered or augmented for the purpose of improving the aural or visual quality of the performance for individual members of the public using those areas.

*Agricultural fairs*

The Committee also amended clause (6) of section 110 of S. 22 as adopted by the Senate. As amended, the provision would exempt "performance of a nondramatic musical work by a governmental body or a nonprofit agricultural or horticultural organization, in the course of an annual agricultural or horticultural fair or exhibition conducted by such body or organization." The exemption extends only to the governmental body or nonprofit organization sponsoring the fair; the amendment makes clear that, while such a body or organization cannot itself be held vicariously liable for infringements by concessionaires at the fair, the concessionaires themselves enjoy no exemption under the clause.

*Retail sale of phonorecords*

Clause (7) provides that the performance of a nondramatic musical work or of a sound recording by a vending establishment open to the public at large without any direct or indirect admission charge, where the sole purpose of the performance is to promote the retail sale of copies or phonorecords of the work, is not an infringement of copy**[88]**right. This exemption applies only if the performance is not transmitted beyond the place where the establishment is located and is within the immediate area where the sale is occurring.

*Transmission to handicapped audiences*

The new clause (8) of subsection 110, which had been added to S. 22 by the Senate Judiciary Committee when it reported the bill on November 20, 1975, and had been adopted by the Senate on February 19, 1976, was substantially amended by the Committee. Under the amendment, the exemption would apply only to performances of "non-dramatic literary works" by means of "a transmission specifically designed for and primarily directed to" one or the other of two defined classes of handicapped persons: (1) "blind or other handicapped persons who are unable to read normal printed material as a result of their handicap" or (2) "deaf or other handicapped persons who are unable to hear the aural signals accompanying a transmission." Moreover, the exemption would be applicable only if the performance is "without any purpose of direct or indirect commercial advantage," and if the transmission takes place through government facilities or through the facilities of a noncommercial educational broadcast station a radio subcarrier authorization (SCA), or a cable system.

SECTION 111. SECONDARY TRANSMISSIONS

*Introduction and general summary*

The complex and economically important problem of "secondary transmissions" is considered in section 111. For the most part, the section is directed at the operation of cable television systems and the terms and conditions of their liability for the retransmission of copyrighted works. However, other forms of secondary transmissions are also considered, including apartment house and hotel systems, wired instructional systems, common carriers, nonprofit "boosters" and translators, and secondary transmissions of primary transmissions to controlled groups.

Cable television systems are commercial subscription services that pick up broadcasts of programs originated by others and retransmit them to paying subscribers. A typical system consists of a central antenna which receives and amplifies television signals and a network of cables through which the signals are transmitted to the receiving sets of individual subscribers. In addition to an installation charge, the subscribers pay a monthly charge for the basic service averaging about six dollars. A large number of these systems provide automated programming. A growing number of CATV systems also originate programs, such as movies and sports, and charge additional fees for this service (pay-cable).

The number of cable systems has grown very rapidly since their introduction in 1950, and now total about 3,450 operating systems, servicing 7,700 communities. Systems currently in operation reach about 10.8 million homes. It is reported that the 1975 total subscriber revenues of the cable industry were approximately $ 770 million.

Pursuant to two decisions of the Supreme Court ( *Fortnightly Corp. v. United Artists Television, Inc. , 382 U.S. 390 (1968),* and *Teleprompter Corp. v. CBS, Inc. , 415 U.S. 394 (1974),* under the 1909 **[89]** copyright law, the cable television industry has not been paying copyright royalties for its retransmission of over-the-air broadcast signals. Both decisions urged the Congress, however, to consider and determine the scope and extent of such liability in the pending revision bill.

The difficult problem of determining the copyright liability of cable television systems has been before the Congress since 1965. In 1967, this Committee sought to address and resolve the issues in H.R. 2512, an early version of the general revision bill (see H.R. Rep. No. 83, 90th Cong., 1st Sess.). However, largely because of the cable-copyright impasse, the bill died in the Senate.

The history of the attempts to find a solution to the problem since 1967 has been explored thoroughly in the voluminous hearings and testimony on the general revision bill, and has also been succinctly summarized by the Register of Copyrights in her Second Supplementary Report, Chapter V.

The Committee now has before it the Senate bill which contains a series of detailed and complex provisions which attempt to resolve the question of the copyright liability of cable television systems. After extensive consideration of the Senate bill, the arguments made during and after the hearings, and of the issues involved, this Committee has also concluded that there is no simple answer to the cable-copyright controversy. In particular, any statutory scheme that imposes copyright liability on cable television systems must take account of the intricate and complicated rules and regulations adopted by the Federal Communications Commission to govern the cable television industry. While the Committee has carefully avoided including in the bill any provisions which would interfere with the FCC's rules or

which might be characterized as affecting "communications policy", the Committee has been cognizant of the interplay between the copyright and the communications elements of the legislation.

We would, therefore, caution the Federal Communications Commission, and others who make determinations concerning communications policy, not to rely upon any action of this Committee as a basis for any significant changes in the delicate balance of regulation in areas where the Congress has not resolved the issue. Specifically, we would urge the Federal Communications Commission to understand that it was not the intent of this bill to touch on issues such as pay cable regulation or increased use of imported distant signals. These matters are ones of communications policy and should be left to the appropriate committees in the Congress for resolution.

In general, the Committee believes that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs. The Committee recognizes, however, that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system. Accordingly, the Committee has determined to maintain the basic principle of the Senate bill to establish a compulsory license for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC.

The compulsory license is conditioned, however, on certain requirements and limitations. These include compliance with reporting re-**[90]**quirements, payments of the royalty fees established in the bill, a ban on the substitution or deletion of commercial advertising, and geographic limits on the compulsory license for copyrighted programs broadcast by Canadian or Mexican stations. Failure to comply with these requirements and limitations subjects a cable system to a suit for copyright infringement and the remedies provided under the bill for such actions.

In setting a royalty fee schedule for the compulsory license, the Committee determined that the initial schedule should be established in the bill. It recognized, however, that adjustments to the schedule would be required from time to time. Accordingly, the Copyright Royalty Commission, established in chapter 8, is empowered to make the adjustments in the initial rates, at specified times, based on standards and conditions set forth in the bill.

In setting an initial fee schedule, the Senate bill based the royalty fee on a sliding scale related to the gross receipts of a cable system for providing the basic retransmission service, and rejected a statutory scheme that would distinguish between "local" and "distant" signals. The Committee determined, however, that there was no evidence that the retransmission of "local" broadcast signals by a cable operator threatens the existing market for copyright program owners. Similarly, the retransmission of network programming, including network programming which is broadcast in "distant" markets, does not injure the copyright owner. The copyright owner contracts with the network on the basis of his programming reaching all markets served by the network and is compensated accordingly.

By contrast, the retransmission of distant non-network programming by cable systems causes damage to the copyright owner by distributing the program in an area beyond which it has been licensed. Such retransmission adversely affects the ability of the copyright owner to exploit the work in the distant market. It is also of direct benefit to the cable system by enhancing its ability to attract subscribers and increase revenues. For these reasons, the Committee has concluded that the copyright liability of cable television systems under the compulsory license should be limited to the retransmission of distant non-network programming.

In implementing this conclusion, the Committee generally followed a proposal submitted by the cable and motion picture industries, the two industries most directly affected by the establishment of copyright royalties for cable television systems. Under the proposal, the royalty fee is determined by a two step computation. First, a value called a "distant signal equivalent" is assigned to all "distant" signals. Distant signals are defined as signals retransmitted by a cable system, in whole or in part, outside the local service area of the primary transmitter. Different values are assigned to independent, network, and educational stations because of the different amounts of viewing of non-network programming carried by such stations. For example, the viewing of non-network programs on network stations is considered to approximate 25 percent. These values are then combined and a scale of percentages is applied to the cumulative total.

The Committee also considered various proposals to exempt certain categories of cable systems from royalty payments altogether. The Committee determined that the approach of the Senate bill to require some payment by every cable system is sound, but established separate fee **[91]** schedules for cable systems whose gross receipts for the basic retransmission service do not exceed either $ 80,000 or $ 160,000 semi-annually. It is the Committee's view that the fee schedules adopted for these systems are now appropriate, based on their relative size and the services performed.

All the royalty payments required under the bill are paid on a semi-annual basis to the Register of Copyrights. Each year they are distributed by the Copyright Royalty Commission to those copyright owners who may validly claim that their works were the subject of distant non-network retransmissions by cable systems.

Based on current estimates supplied to the Committee, the total royalty fees paid under the initial schedule established in the bill should approximate $ 8.7 million. Compared with the present number of cable television subscribers, calculated at 10.8 million, copyright payments under the bill would therefore approximate 81 cents per subscriber per year. The Committee believes that such payments are modest and will not retard the orderly development of the cable television industry or the service it provides to its subscribers.

*Analysis of provisions*

Throughout section 111, the operative terms are "primary transmission" and "secondary transmission." These terms are defined in subsection (f) entirely in relation to each other. In any particular case, the "primary" transmitter is the one whose signals are being picked up and further transmitted by a "secondary" transmitter which, in turn, is someone engaged in "the further transmitting of a primary transmission simultaneously with the primary transmission." With one exception provided in subsection (f) and limited by subsection (e), the section does not cover or permit a cable system, or indeed any person, to tape or otherwise record a program off-the-air and later to transmit the program from the tape or record to the public. The one exception involves cable systems located outside the continental United States, but not including cable systems in Puerto Rico, or, with limited exceptions, Hawaii. These systems are permitted to record and retransmit programs under the compulsory license, subject to the restrictive conditions of subsection (e), because off-the-air signals are generally not available in the offshore areas.

*General exemptions*

Certain secondary transmissions are given a general exemption under clause (1) of section 111(a). The first of these applies to secondary transmissions consisting "entirely of the relaying, by the management of a hotel, apartment house, or similar establishment" of a transmission to the private lodgings of guests or residents and provided "no direct charge is made to see or hear the secondary transmission."

The exemption would not apply if the secondary transmission consists of anything other than the mere relay of ordinary broadcasts. The cutting out of advertising, the running in of new commercials, or any other change in the signal relayed would subject the secondary transmitter to full liability. Moreover, the term "private lodgings" is limited to rooms used as living quarters or for private parties and does not include dining rooms, meeting halls, theatres, ballrooms, or similar places that are outside of a normal circle of a family and its social acquaintances. No special exception is needed to make clear that **[92]** the mere placing of an ordinary radio or television set in a private hotel room does not constitute an infringement.

*Secondary transmissions of instructional broadcasts*

Clause (2) of section 111(a) is intended to make clear that an instructional transmission within the scope of section 110(2) is exempt whether it is a "primary transmission" or a "secondary transmission."

*Carriers*

The general exemption under section 111 extends to secondary transmitters that act solely as passive carriers. Under clause (3), a carrier is exempt if it "has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission." For this purpose its activities must "consist solely of providing wires, cables, or other communications channels for the use of others."

Clause (4) would exempt the activities of secondary transmitters that operate on a completely nonprofit basis. The operations of nonprofit "translators" or "boosters," which do nothing more than amplify broadcast signals and retransmit them to everyone in an area for free reception, would be exempt if there is no "purpose of direct or indirect commercial advantage," and if there is no charge to the recipients "other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service." This exemption does not apply to a cable television system.

*Secondary transmissions of primary transmissions to controlled group*

Notwithstanding the provisions of subsections (a) and (c), the secondary transmission to the public of a primary transmission embodying a performance or display is actionable as an act of infringement if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public. Examples of transmissions not intended for the general public are background music services such as MUZAK, closed circuit broadcasts to theatres, pay television (STV) or pay-cable.

The Senate bill contains a provision, however, stating that the secondary transmission does not constitute an act of infringement if the carriage of the signals comprising the secondary transmission is required under the rules and regulations of the FCC. The exclusive purpose of this provision is to exempt a cable system from copyright liability if the FCC should require cable systems to carry to their subscribers a "scrambled" pay signal of a subscription television station.

The Committee is concerned, however, that the Senate bill is not clearly limited to the situation where a cable system is required by the FCC to carry a "scrambled" pay television signal. The Committee believes that the provision should not include any authority or permission to "unscramble" the signal. Further, the Senate bill does not make clear that the exception would not apply if the primary transmission is made by a cable system or cable system network transmitting its own originated program, *e.g.*, pay-cable. For these reasons, the subsection was amended to provide that the exception would only apply if (1) the primary transmission to a controlled group is made by a broadcast station licensed by the FCC; (2) the carriage of the **[93]** signal is required by FCC rules and regulations; and (3) the signal of the primary transmitter is not altered or changed in any way by the secondary transmitter.

*Compulsory license*

Section 111(c) establishes the compulsory license for cable systems generally. It provides that, subject to the provisions of clauses (2), (3) and (4), the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the FCC or by an appropriate governmental authority of Canada or Mexico is subject to compulsory licensing upon compliance with the provisions of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules and regulations of the FCC. The compulsory license applies, therfore, [sic] to the carriage of over-the-air broadcast signals and is inapplicable to the secondary transmission of any nonbroadcast primary transmission such as a program originated by a cable system or a cable network. The latter would be subject to full copyright liability under other sections of the legislation.

*Limitations on the compulsory license*

Sections 111(c)(2), (3) and (4) establish limitations on the scope of the compulsory license, and provide that failure to comply with these limitations subjects a cable system to a suit for infringement and all the remedies provided in the legislation for such actions.

Section 111(c)(2) provides that the "willful or repeated" carriage of signals not permissible under the rules and regulations of the FCC subjects a cable system to full copyright liability. The words "willful or repeated" are used to prevent a cable system from being subjected to severe penalties for innocent or casual acts ("Repeated" does not mean merely "more than once," of course; rather, it denotes a degree of aggravated negligence which borders on willfulness. Such a condition would not exist in the case of an innocent mistake as to what signals or programs may properly be carried under the FCC's complicated rules). Section 111(c)(2) also provides that a cable system is subject to full copyright liability where the cable system has not recorded the notice, deposited the statement of account, or paid the royalty fee required by subsection (d). The Committee does not intend, however, that a good faith error by the cable system in computing the amount due would subject it to full liability as an infringer. The Committee expects that in most instances of this type the parties would be able to work out the problem without resort to the courts.

*Commercial substitution*

Section 111(c)(3) provides that a cable system is fully subject to the remedies provided in this legislation for copyright infringement if the cable system willfully alters, through changes, deletions, or additions, the content of a particular program or any commercial advertising or station announcements transmitted by the primary transmitter

during, or immediately before or after, the transmission of the program. In the Committee's view, any willful deletion, substitution, or insertion of commercial advertisements of any nature by a cable system, or changes in the program content of the primary transmission, significantly alters the basic nature of the cable retransmission, service and makes its function similar to that of a broadcaster. Further, the placement of substitute advertising in a program by a cable system on a "local" signal harms the advertiser and, in turn, the copyright owner, whose compensation for the work is directly related to the size of the audience that the advertiser's message is calculated to reach. On a "distant" signal, the placement of substitute advertising harms the local broadcaster in the distant market because the cable system is then competing for local advertising dollars without having comparable program costs. The Committee has therefore attempted broadly to proscribe the availability of the compulsory license if a cable system substitutes commercial messages. Included in the prohibition are commercial messages and station announcements not only during, but also immediately before or after the program, so as to insure a continuous ban on commercial substitution from one program to another. In one situation, however, the Committee has permitted such substitution when the commercials are inserted by those engaged in television commercial advertising market research. This exception is limited to those situations where the research company has obtained the consent of the advertiser who purchased the original commercial advertisement, the television station whose signal is retransmitted, and the cable system, and provided further that no income is derived from the sale of such commercial time.

**[94]** *Canadian and Mexican signals*

Section 111(c)(4) provides limitations on the compulsory license with respect to foreign signals carried by cable systems from Canada or Mexico. Under the Senate bill, the carriage of any foreign signals by a cable system would have been subject to full copyright liability, because the compulsory license was limited to the retransmission of broadcast stations licensed by the FCC. The Committee recognized, however, that cable systems primarily along the northern and southern border have received authorization from the FCC to carry broadcast signals of certain Canadian and Mexican stations.

In the Committee's view, the authorization by the FCC to a cable system to carry a foreign signal does not resolve the copyright question of the royalty payment that should be made for copyrighted programs originating in the foreign country. The latter raises important international questions of the protection to be accorded foreign copyrighted works in the United States. While the Committee has established a general compulsory licensing scheme for the retransmission of copyrighted works of U.S. nationals, a broad compulsory license scheme for all foreign works does not appear warranted or justified. Thus, for example, if in the future the signal of a British, French, or Japanese station were retransmitted in the United States by a cable system, full copyright liability would apply.

With respect to Canadian and Mexican signals, the Committee found that a special situation exists regarding the carriage of these signals by U.S. cable systems on the northern and southern borders, respectively. The Committee determined, therefore, that with respect to Canadian signals the compulsory license would apply in an area located 150 miles from the U.S. Canadian border, or south from the border to the 42nd parallel of latitude, whichever distance is greater. Thus the cities of Detroit, Pittsburgh, Cleveland, Green Bay and Seattle would be included within the compulsory license area, while cities such as New York, Philadelphia, Chicago, and San Francisco would be located outside the area.

**[95]** With respect to Mexican signals, the Commission determined that the compulsory license would apply only in the area in which such signals may be received by a U.S. cable system by means of direct interception of a free space radio wave. Thus, full copyright liability would apply if a cable system were required to use any equipment or device other than a receiving antenna to bring the signal to the community of the cable system.

Further, to take account of those cable systems that are presently carrying or are specifically authorized to carry Canadian or Mexican signals, pursuant to FCC rules and regulations, and whether or not within the zones established, the Committee determined to grant a compulsory license for the carriage of those specific signals on those cable systems as in effect on April 15, 1976.

The Committee wishes to stress that cable systems operating within these zones are fully subject to the payment of royalty fees under the compulsory license for those foreign signals retransmitted. The copyright owners of the works transmitted may appear before the Copyright Royalty Commission and, pursuant to the provisions of this legislation, file claims to their fair share of the royalties collected. Outside the zones, however, full copyright liability would apply as would all the remedies of the legislation for any act of infringement.

*Requirements for a compulsory license*

The compulsory license provided for in section 111(c) is contingent upon fulfillment of the requirements set forth in section 111(d). Subsection (d)(1) directs that at least one month before the commencement of operations, or within 180 days after the enactment of this act, whichever is later, a cable system must record in the Copyright Office a notice, including a statement giving the identity and address of the person who owns or operates the secondary transmission service or who has power to exercise primary control over it, together with the name and location of the primary transmitter whose signals are regularly carried by the cable system. Signals "regularly carried" by the system mean those signals which the Federal Communications Commission has specifically authorized the cable system to carry, and which are actually carried by the system on a regular basis. It is also required that whenever the ownership or control or regular signal carriage complement of the system changes, the cable system must within 30 days record any such changes int he [sic] Copyright Office. Cable systems must also record such further information as the Register of Copyrights shall prescribe by regulation.

Subsection (d)(2) directs cable systems whose secondary transmissions have been subject to compulsory licensing under subsection (c) to deposit with the Register of Copyrights a semi-annual statement of account. The dates for filing such statements of account and the six-month period which they are to cover are to be determined by the Register of Copyrights after consultation with the Copyright Royalty Commission. In addition to other such information that the Register may prescribe by regulation, the statements of account are to specify the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were carried by the system, the total number of subscribers to the system, and the gross amounts paid to the system for the basic service of providing secondary **[96]** transmissions. If any non-network television programming was retransmitted by the cable system beyond the local service area of the primary transmitter, pursuant to the rules of the Federal Communications Commission, which under certain circumstances permit the substitution or addition of television signals not regularly carried, the cable system must deposit a special statement of account listing the times, dates, stations and programs involved in such substituted or added carriage.

*Copyright royalty payments*

Subsection (d)(2)(B), (C) and (D) require cable systems to deposit royalty fee payments for the period covered by the statements of account. These payments are to be computed on the basis of specified percentages of the gross receipts from cable subscribers during the period covered by the statement. For purposes of computing royalty payments, only receipts for the basic service of providing secondary transmissions of primary broadcast transmitters are to be considered. Other receipts from subscribers, such as those for pay-cable services or installation charges, are not included in gross receipts.

Subsection (d)(2)(B) provides that, except in the case of a cable system that comes within the gross receipts limitations of subclauses (C) and (D), the royalty fee is computed in the following manner:

Every cable system pays.675 of 1 percent of its gross receipts for the privilege of retransmitting distant non-network programming, such amount to be applied against the fee, if any, payable under the computation for "distant signal equivalents." The latter are determined by adding together the values assigned to the actual number of distant television stations carried by a cable system. The purpose of this initial rate, applicable to all cable systems in this class, is to establish a basic payment, whether or not a particular cable system elects to transmit distant non-network programming. It is not a payment for the retransmission of purely "local" signals, as is evident from the provision that it applies to and is deductible from the fee payable for any "distant signal equivalents."

The remaining provisions of subclause (B) establish the following rates for "distant signal equivalents:"

The rate from zero to one distant signal equivalent is.675 of 1 percent of gross subscriber revenues. An additional.425 of 1 percent of gross subscriber revenues is to be paid for each of the second, third and fourth distant signal equivalents that are carried. A further payment of.2 of 1 percent of gross subscriber revenues is to be made for each distant signal equivalent after the fourth. Any fraction of a distant signal equivalent is to be computed at its fractional value and where a cable system is located partly within and partly without the local service area of a primary transmitter, the gross receipts subject to the percentage payment are limited to those gross receipts derived from subscribers located without the local service area of such primary transmitter.

Pursuant to the foregoing formula, copyright payments as a percentage of gross receipts increase as the number of distant television signals carried by a cable system increases. Because many smaller cable systems carry a large number of distant signals, especially those located in areas where over-the-air television service is sparse, and because smaller cable systems may be less able to shoulder the burden of copyright payments than larger systems, the Committee decided **[97]** to give special consideration to cable systems with semi-annual gross subscriber receipts of less than $ 160,000 ($ 320,000 annually). The royalty fee schedules for cable systems in this category are specified in subclauses (C) and (D).

In lieu of the payments required in subclause (B), systems earning less than $ 80,000, semi-annually, are to pay a royalty fee of.5 of 1 percent of gross receipts. Gross receipts under this provision are computed, however, by subtracting from actual gross receipts collected during the payment period the amount by which $ 80,000 exceeds such actual gross receipts. Thus, if the actual gross receipts of the cable system for the period covered are $ 60,000, the fee is determined by subtracting $ 20,000 (the amount by which $ 80,000 exceeds actual gross receipts) from $ 60,000 and applying.5 of 1 percent to the $ 40,000 result. However, gross receipts in no case are to be reduced to less than $ 3,000.

Under subclause (D), cable systems with semi-annual gross subscriber receipts of between $ 80,000 and $ 160,000 are to pay royalty fees of.5 of 1 percent of such actual gross receipts up to $ 80,000, and 1 percent of any actual gross receipts in excess of $ 80,000. The royalty fee payments under both subclauses (C) and (D) are to be determined without regard to the number of distant signal equivalents, if any, carried by the subject cable systems.

*Copyright royalty distribution*

Section 111(d)(3) provides that the royalty fees paid by cable systems under the compulsory license shall be received by the Register of Copyrights and, after deducting the reasonable costs incurred by the Copyright Office, deposited in the Treasury of the United States. The fees are distributed subsequently, pursuant to the determination of the Copyright Royalty Commission under chapter 8.

The copyright owners entitled to participate in the distribution of the royalty fees paid by cable systems under the compulsory license are specified in section 111(d)(4). Consistent with the Committee's view that copyright royalty fees should be made only for the retransmission of distant non-network programming, the claimant[s] are limited to (1) copyright owners whose works were included in a secondary transmission made by a cable system of a distant non-network television program; (2) any copyright owner whose work is included in a secondary transmission identified in a special statement of account deposited under section 111(d)(2)(A); and (3) any copyright owner whose work was included in distant non-network programming consisting exclusively of aural signals. Thus, no royalty fees may be claimed or distributed to copyright owners for the retransmission of either "local" or "network" programs.

The Committee recognizes that the bill does not include specific provisions to guide the Copyright Royalty Commission in determining the appropriate division among competing copyright owners of the royalty fees collected from cable systems under Section 111. The Committee concluded that it would not be appropriate to specify particular, limiting standards for distribution. Rather, the Committee believes that the Copyright Royalty Commission should consider all pertinent data and considerations presented by the claimants.

Should disputes arise, however, between the different classes of copyright claimants, the Committee believes that the Copyright Royalty Commission should consider that with respect to the copyright owners **[98]** of "live" programs identified by the special statement of account deposited under Section 111(d)(2)(A), a special payment is provided in Section 111(f).

Section 111(d)(5) sets forth the procedure for the distribution of the royalty fees paid by cable systems. During the month of July of each year, every person claiming to be entitled to compulsory license fees must file a claim with the Copyright Royalty Commission, in accordance with such provisions as the Commission shall establish. In particular, the Commission may establish the relevant period covered by such claims after giving adequate time for copyright owners to review and consider the statements of account filed by cable systems. Notwithstanding any provisions of the antitrust laws, the claimants may agree among themselves as to the division and distribution of such fees. After the first day of August of each year, the Copyright Royalty Commission shall determine whether a controversy exists concerning the distribution of royalty fees. If no controversy exists, the Commission, after deducting its reasonable administrative costs, shall distribute the fees to the copyright owners entitled or their agents. If the Commission finds the existence of a controversy, it shall, pursuant to the provisions of *chapter 8*, conduct a proceeding to determine the distribution of royalty fees.

*Off-shore taping by cable systems*

Section 111(e) establishes the conditions and limitation[s] upon which certain cable systems located outside the continental United States, and specified in subsection (f), may make tapes of copyrighted programs and retransmit the taped programs to their subscribers upon payment of the compulsory license fee. These conditions and limitations include compliance with detailed transmission, record keeping, and other requirements. Their purpose is to control carefully the use of any tapes made pursuant to the limited recording and retransmission authority established in subsection (f), and to insure that the limited objective of assimilating offshore cable systems to systems within the United States for purposes of the compulsory license is not exceeded. Any secondary transmission by a cable system entitled to the benefits of the taping authorization that does not comply with the requirements of section 111(e) is an act of infringement and is fully subject to all the remedies provided in the legislation for such actions.

*Definitions*

Section 111(f) contains a series of definitions. These definitions are found in subsection (f) rather than in section 101 because of their particular application to secondary transmissions by cable systems.

*Primary and secondary transmissions*

The definitions of "primary transmission" and "secondary transmission" have been discussed above. The definition of "secondary transmission" also contains a provision permitting the nonsimultaneous retransmission of a primary transmission if by a cable system "not located in whole or in part within the boundary of the forty-eight contiguous states, Hawaii or Puerto Rico." Under a proviso, however, a cable system in Hawaii may make a nonsimultaneous retransmission of a primary transmission if the carriage of the television broadcast signal comprising such further transmission is permissible under the rules, regulations or authorizations of the FCC.

**[99]** The effect of this definition is to permit certain cable systems in offshore areas, but not including cable systems in the offshore area of Puerto Rico and to a limited extent only in Hawaii, to tape programs and retransmit them to subscribers under the compulsory license. Puerto Rico was excluded based upon a communication the Committee received from the Governor of Puerto Rico stating that the particular television broadcasting problems which the definition seeks to solve for cable systems in other non-contiguous areas do not exist in Puerto Rico. He therefore requested that Puerto Rico be excluded from the scope of the definition. All cable systems covered by the definition are subject to the conditions and limitations for nonsimultaneous transmissions established in section 111(e).

*Cable system*

The definition of a "cable system" establishes that it is a facility that in whole or in part receives signals of one or more television broadcast stations licensed by the FCC and makes secondary transmissions of such signals to subscribing members of the public who pay for such service. A closed circuit wire system that only originates programs and does not carry television broadcast signals would not come within the definition. Further, the definition provides that, in determining the applicable royalty fee and system classification under subsection (d)(2)(B), (C), or (D) cable systems in contiguous communities under common ownership or control or operating from one headend are considered as one system.

*Local service area of a primary transmitter*

The definition of "local service area of a primary transmitter" establishes the difference between "local" and "distant" signals and therefore the line between signals which are subject to payment under the compulsory license and those that are not. It provides that the local service area of a television broadcast station is the area in which the station is entitled to insist upon its signal being retransmitted by a cable system pursuant to FCC rules and regulations. Under FCC rules and regulations this so-called "must carry" area is defined based on the market size and position of cable systems in *47 C.F.R. § § 76.57*, 76.59, 76.61 and 76.63. The definition is limited, however, to the FCC rules in effect on April 15, 1976. The purpose of this limitation is to insure that any subsequent rule amendments by the FCC that either increase or decrease the size of the local service area for its purposes do not change the definition for copyright purposes. The Committee believes that any such change for copyright purposes, which would materially affect the royalty fee payments provided in the legislation, should only be made by an amendment to the statute.

The "local service area of a primary transmitter" of a Canadian or Mexican television station is defined as the area in which such station would be entitled to insist upon its signals being retransmitted if it were a television broadcast station subject to FCC rules and regulations. Since the FCC does not permit a television station licensed in a foreign country to assert a claim to carriage by a U.S. cable system, the local service area of such foreign station is considered to be the same area as if it were a U.S. station.

The local service area for a radio broadcast station is defined to mean "the primary service area of such station pursuant to the rules **[100]** and regulations of the Federal Communications Commission." The term "primary service area" is defined precisely by the FCC with regard to AM stations in Section 73.11(a) of the FCC's rules. In the case of FM stations, "primary service area" is regarded by the FCC as the area included within the field strength contours specified in Section 73.311 of its rules.

*Distant signal equivalent*

The definition of a "distant signal equivalent" is central to the computation of the royalty fees payable under the compulsory license. It is the value assigned to the secondary transmission of any non-network television programming carried by a cable system, in whole or in part, beyond the local service area of the primary transmitter of such programming. It is computed by assigning a value of one (1) to each distant independent station and a value of one-quarter (1/4) to each distant network station and distant noncommercial educational station carried by a cable system, pursuant to the rules and regulations of the FCC. Thus, a cable system carrying two distant independent stations, two distant network stations and one distant noncommercial educational station would have a total of 2.75 distant signal equivalents.

The values assigned to independent, network and noncommercial educational stations are subject, however, to certain exceptions and limitations. Two of these relate to the mandatory and discretionary program deletion and substitution rules of the FCC. Where the FCC rules require a cable system to omit certain programs (e.g., the syndicated program exclusivity rules) and also permit the substitution of another program in place of the omitted program, no additional value is assigned for the substituted or additional program. Further, where the FCC rules on the date of enactment of this legislation permit a cable system, at its discretion, to make such deletions or substitutions or to carry additional programs not transmitted by primary transmitters within whose local service area the cable system is located, no additional value is assigned for the substituted or additional programs. However, the latter discretionary exception is subject to a condition that if the substituted or additional program is a "live" program (e.g., a sports event), then an additional value is assigned to the carriage of the distant signal computed as a fraction of one distant signal equivalent. The fraction is determined by assigning to the numerator the number of days in the year on which the "live" substitution occurs, and by assigning to the denominator the number of days in the year. Further, the discretionary exception is limited to those FCC rules in effect on the date of enactment of this legislation. If subsequent FCC rule amendments or individual authorizations enlarge the discretionary ability of cable systems to delete and substitute programs, such deletions and substitutions would be counted at the full value assigned the particular type of station provided above.

Two further exceptions pertain to the late-night or specialty programming rules of the FCC or to a station carried on a part-time basis where full-time carriage is not possible because the cable system lacks the activated channel capacity to retransmit on a full-time basis all signals which it is authorized to carry. In this event, the values for independent, network and noncommercial, educational stations set forth above, as the case may be, are determined by multiplying each by a fraction which is equal to the ratio of the broadcast **[101]** hours of such station carried by the cable system to the total broadcast hours of the station.

*Network station*

A "network station" is defined as a television broadcast station that is owned or operated by, or affiliated with, one or more of the U.S. television networks providing nationwide transmissions and that transmits a substantial part of the programming supplied by such networks for a substantial part of that station's typical broadcast day. To qualify as a network station, all the conditions of the definition must be met. Thus, the retransmission of a Canadian station affiliated with a Canadian network would not qualify under the definition. Further, a station affiliated with a regional network would not qualify, since a regional network would not provide nationwide transmissions. However, a station affiliated with a network providing nationwide transmissions that also occasionally carries regional programs would qualify as a "network station," if the station transmits a substantial part of the programming supplied by the network for a substantial part of the station's typical broadcast day.

*Independent station*

An "independent station" is defined as a commercial television broadcast station other than a network station. Any commercial station that does not fall within the definition of "network station" is classified as an "independent station."

*Noncommercial educational station*

A "noncommercial educational station" is defined as a television station that is a noncommercial educational broadcast station within the meaning of section 397 of title 47.

SECTION 112. EPHEMERAL RECORDINGS

Section 112 of the bill concerns itself with a special problem that is not dealt with in the present statutes but is the subject of provisions in a number of foreign statutes and in the revisions of the Berne Convention since 1948. This is the problem of what are commonly called "ephemeral recordings": copies or phonorecords of a work made for purposes of later transmission by a broadcasting organization legally entitled to transmit the work. In other words, where a broadcaster has the privilege of performing or displaying a work either because he is licensed or because the performance or display is exempted under the statute, the question is whether he should be given the additional privilege of recording the performance or display to facilitate its transmission. The need for a limited exemption in these cases because of the practical exigencies of broadcasting has been generally recognized, but the scope of the exemption has been a controversial issue.

*Recordings for licensed transmissions*

Under subsection (a) of section 112, an organization that has acquired the right to transmit any work (other than a motion picture or other audiovisual work), or that is free to transmit a sound recording under section 114, may make a single copy or phonorecord of a particular program embodying the work, if the copy or phonorecord is used solely for the organization's own transmissions within its own **[102]** area, after 6 months it must be destroyed or preserved solely for archival purposes.

*Organizations covered*.--The ephemeral recording privilege is given by subsection (a) to "a transmitting organization entitled to transmit to the public a performance or display of a work." Assuming that the transmission meets the other conditions of the provision, it makes no difference what type of public transmission the organization is making: commercial radio and television broadcasts, public radio and television broadcasts not exempted by section 110(2), pay-TV, closed circuit, background music, and so forth. However, to come within the scope of subsection (a), the organization must have the right to make the transmission "under a license or transfer of the copyright or under the limitations on exclusive rights in sound recordings specified by section 114(a)." Thus, except in the case of copyrighted sound recordings (which have no exclusive performing rights under the bill), the organization must be a transferee or licensee (including compulsory licensee) of performing rights in the work in order to make an ephemeral recording of it.

Some concern has been expressed by authors and publishers lest the term "organization" be construed to include a number of affiliated broadcasters who could exchange the recording without restrictions. The term is intended to cover a broadcasting network, or a local broadcaster or individual transmitter; but, under clauses (1) and (2) of the subsection, the ephemeral recording must be "retained and used solely by the transmitting organization that made it," and must be used solely for that organization's own transmissions within its own area. Thus, an ephemeral recording made by one transmitter, whether it be a network or local broadcaster, could not be made available for use by another transmitter. Likewise, this subsection does not apply to those nonsimultaneous transmissions by cable systems not located within the boundary of the forty-eight contiguous States that are granted a compulsory license under section 111.

*Scope of the privilege*.--Subsection (a) permits the transmitting organization to make "no more than one copy or phonorecord of a particular transmission program embodying the performance or display." A "transmission program" is defined in section 101 as a body of material produced for the sole purpose of transmission as a unit. Thus, under section 112(a), a transmitter could make only one copy or phonorecord of a particular "transmission program" containing a copyrighted work, but would not be limited as to the number of times the work itself could be duplicated as part of other "transmission programs."

Three specific limitations on the scope of the ephemeral recording privilege are set out in subsection (a), and unless all are met the making of an "ephemeral recording" becomes fully actionable as an infringement. The first requires that the copy or phonorecord be "retained and used solely by the transmitting organization that made it," and that "no further copies or phonorecords are reproduced from it." This means that a transmitting organization would have no privilege of exchanging ephemeral recordings with other transmitters or of allowing them to duplicate their own ephemeral

recordings from the copy or phonorecord it has made. There is nothing in the provision to prevent a transmitting organization from having an ephemeral record-**[103]**ing made by means of facilities other than its own, although it would not be permissible for a person or organization other than a transmitting organization to make a recording on its own initiative for possible sale or lease to a broadcaster. The ephemeral recording privilege would extend to copies or phonorecords made in advance for later broadcast, as well as recordings of a program that are made while it is being transmitted and are intended for deferred transmission or preservation.

Clause (2) of section 112(a) provides that, to be exempt from copyright, the copy or phonorecord must be "used solely for the transmitting organization's own transmissions within its local service area, or for purposes of archival preservation or security". The term "local service area" is defined in section 111(f).

Clause (3) of section 112(a) provides that, unless preserved exclusively for archival purposes, the copy or phonorecord of a transmission program must be destroyed within six months from the date the transmission program was first transmitted to the public.

*Recordings for instructional transmissions*

Section 112(b) represents a response to the arguments of instructional broadcasters and other educational groups for special recording privileges, although it does not go as far as these groups requested. In general, it permits a nonprofit organization that is free to transmit a performance or display of a work, under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a), to make not more than thirty copies or phonorecords and to use the ephemeral recordings for transmitting purposes for not more than seven years after the initial transmission.

*Organizations covered*.--The privilege of making ephemeral recordings under section 112(b) extends to a "governmental body or other nonprofit organization entitled to transmit a performance or display of a work under section 110(2) or under the limitations on exclusive rights in sound recordings specified by section 114(a)." Aside from phonorecords of copyrighted sound recordings, the ephemeral recordings made by an instructional broadcaster under subsection (b) must embody a performance or display that meets all of the qualifications for exemption under section 110(2). Copies or phonorecords made for educational broadcasts of a general cultural nature, or for transmission as part of an information storage and retrieval system, would not be exempted from copyright protection under section 112(b).

*Motion pictures and other audiovisual works*.--Since the performance exemption provided by section 110(2) applies only to non-dramatic literary and musical works, there was no need to exclude motion pictures and other audiovisual works explicitly from the scope of section 112(b). Another point stressed by the producers of educational films in this connection, however, was that ephemeral recordings made by instructional broadcasters are in fact audiovisual works that often compete for exactly the same market. They argued that it is unfair to allow instructional broadcasters to reproduce multiple copies of films and tapes, and to exchange them with other broadcasters, without paying any copyright royalties, thereby directly injuring the market of producers of audiovisual works who now pay substantial fees to authors for the same uses. These arguments are persuasive and justify, the placing of reasonable limits on the recording privilege.

**[104]** *Scope of the privilege*.--Under subsection (b) an instructional broadcaster may make "no more than thirty copies or phonorecords of a particular transmission program embodying the performance or display." No further copies or phonorecords can be reproduced from those made under section 112(b), either by the nonprofit organization that made them or by anyone else.

On the other hand, if the nonprofit organization does nothing directly or indirectly to authorize, induce, or encourage others to duplicate additional copies or phonorecords of an ephemeral recording in excess of the limit of thirty, it would not be held responsible as participating in the infringement in such a case, and the unauthorized copies would not be counted against the organization's total of thirty.

Unlike ephemeral recordings made under subsection (a), exchanges or recordings among instructional broadcasters are permitted. An organization that has made copies or phonorecords under subsection (b) may use one of them for purposes of its own transmissions that are exempted by section 110(2), and it may also transfer the other 29 copies to other instructional broadcasters for use in the same way.

As in the case of ephemeral recordings made under section 112(a), a copy or phonorecord made for instructional broadcasting could be reused in any number of transmissions within the time limits specified in the provision. Because

of the special problems of instructional broadcasters resulting from the scheduling of courses and the need to prerecord well in advance of transmission, the period of use has been extended to seven years from the date the transmission program was first transmitted to the public.

*Religious broadcasts*.--Section 112(c) provides that it is not an infringement of copyright for certain nonprofit organizations to make no more than one copy for each transmitting organization of a broadcast program embodying a performance of a nondramatic musical work of a religious nature or of a sound recording of such a musical work. In order for this exception to be applicable there must be no charge for the distribution of the copies, none of the copies may be used for any performance other than a single transmission by an organization possessing a license to transmit a copyrighted work, and, other than for one copy that may be preserved for archival purposes, the remaining copies must be destroyed within one year from the date the program was first transmitted to the public.

Despite objections by music copyright owners, the Committee found this exemption to be justified by the special circumstances under which many religious programs are broadcast. These programs are produced on tape or disk for distribution by mail of one copy only to each broadcast station carrying the program. None of the programs are prepared for profit, and the program producer either pays the station to carry the program or furnishes it free of charge. The stations have performing licenses, so the copyright owners receive compensation. Following the performance, the tape is returned or the disk destroyed. It seems likely that, as has been alleged, to require a second payment for the mechanical reproduction under these circumstances would simply have the effect of driving some of the copyrighted music off the air.

*Ephemeral recordings for transmissions to handicapped audiences*

As a counterpart to its amendment of section 110(8), the Committee adopted a new provision, subsection (d) of section 112, to provide an **[105]** ephemeral recording exemption in the case of transmissions to the blind and deaf. The new subsection would permit the making of one recording of a performance exempted under section 110(8), and its retention for an unlimited period. It would not permit the making of further reproductions or their exchange with other organizations.

*Copyright status of ephemeral recordings*

A program reproduced in an ephemeral recording made under section 112 in many cases will constitute a motion picture, a sound recording, or some other kind of derivative work, and will thus be potentially copyrightable under section 103. In section 112(e) it is provided that ephemeral recordings are not to be copyrightable as derivative works except with the consent of the owners of the copyrighted material employed in them.

SECTION 113. REPRODUCTION OF PICTORIAL, GRAPHIC, AND SCULPTURAL WORKS IN USEFUL ARTICLES

Section 113 deals with the extent of copyright protection in "works of applied art." The section takes as its starting point the Supreme Court's decision in *Mazer v. Stein , 347 U.S. 201 (1954),* and the first sentence of subsection (a) restates the basic principle established by that decision. The rule of *Mazer*, as affirmed by the bill, is that copyright in a pictorial, graphic, or sculptural work will not be affected if the work is employed as the design of a useful article, and will afford protection to the copyright owner against the unauthorized reproduction of his work in useful as well as nonuseful articles. The terms "pictorial, graphic, and sculptural works" and "useful article" are defined in section 101, and these definitions are discussed above in connection with section 102.

The broad language of section 106(1) and of subsection (a) of section 113 raises questions as to the extent of copyright protection for a pictorial, graphic, or sculptural work that portrays, depicts, or represents an image of a useful article in such a way that the utilitarian nature of the article can be seen. To take the example usually cited, would copyright in a drawing or model of an automobile give the artist the exclusive right to make automobiles of the same design?

The 1961 Report of the Register of Copyrights stated, on the basis of judicial precedent, that "copyright in a pictorial, graphic, or sculptural work, portraying a useful article as such, does not extend to the manufacture of the useful article itself," and recommended specifically that "the distinctions drawn in this area by existing court decisions" not be altered by the statute. The Register's Supplementary Report, at page 48, cited a number of these decisions, and explained the insuperable difficulty of finding "any statutory formulation that would express the distinction

satisfactorily." Section 113(b) reflects the Register's conclusion that "the real need is to make clear that there is no intention to change the present law with respect to the scope of protection in a work portraying a useful article as such."

Section 113(c) provides that it would not be an infringement of copyright, where a copyright work has been lawfully published as the design of useful articles, to make, distribute or display pictures of the articles in advertising, in feature stories about the articles, or in news reports.

**[106]** In conformity with its deletion from the bill of Title II, relating to the protection of ornamental designs of useful articles, the Committee has deleted subsections (b), (c), and (d) of section 113 of S. 22 as adopted by the Senate, since they are no longer relevant.

SECTION 114. SCOPE OF EXCLUSIVE RIGHTS IN SOUND RECORDINGS

Subsection (a) of Section 114 specifies that the exclusive rights of the owner of copyright in a sound recording are limited to the rights to reproduce the sound recording in copies or phonorecords, to prepare derivative works based on the copyrighted sound recording, and to distribute copies or phonorecords of the sound recording to the public. Subsection (a) states explicitly that the owner's rights "do not include any right of performance under section 106(4)." The Committee considered at length the arguments in favor of estabilshing [sic] a limited performance right, in the form of a compulsory license, for copyrighted sound recordings, but concluded that the problem requires further study. It therefore added a new subsection (d) to the bill requiring the Register of Copyrights to submit to Congress, on January 3, 1978, "a report setting forth recommendations as to whether this section should be amended to provide for performers and copyright owners ... any performance rights" in copyrighted sound recordings. Under the new subsection, the report "should describe the status of such rights in foreign countries, the views of major interested parties, and specific legislative or other recommendations, if any."

Subsection (b) of section 114 makes clear that statutory protection for sound recordings extends only to the particular sounds of which the recording consists, and would not prevent a separate recording of another performance in which those sounds are imitated. Thus, infringement takes place whenever all or any substantial portion of the actual sounds that go to make up a copyrighted sound recording are reproduced in phonorecords by repressing, transcribing, recapturing off the air, or any other method, or by reproducing them in the soundtrack or audio portion of a motion picture or other audiovisual work. Mere imitation of a recorded performance would not constitute a copyright infringement even where one performer deliberately sets out to simulate another's performance as exactly as possible.

Under section 114, the exclusive right of owner of copyright in a sound recording to prepare derivative works based on the copyrighted sound recording is recognized. However, in view of the expressed intention not to give exclusive rights against imitative or simulated performances and recordings, the Committee adopted an amendment to make clear the scope of rights under section 106(2) in this context. Section 114(b) provides that the "exclusive right of the owner of copyright in a sound recording under clause (2) of section 106 is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality."

Another amendment deals with the use of copyrighted sound recordings "included in educational television and radio programs * * * distributed or transmitted by or through public broadcasting entities." This use of recordings is permissible without authorization from the owner of copyright in the sound recording, as long as "copies or phonorecords of said programs are not commercially distributed by or through public broadcasting entities to the general public."

**[107]** During the 1975 hearings, the Register of Copyrights expressed some concern that an invaluable segment of this country's musical heritage--in the form of sound recordings--had become inaccessible to musicologists and to others for scholarly purposes. Several of the major recording companies have responded to the Register's concern by granting blanket licenses to the Library of Congress to permit it to make single copy duplications of sound recordings maintained in the Library's archives for research purposes. Moreover, steps are being taken to determine the feasibility of additional licensing arrangements as a means of satisfying the needs of key regional music libraries across the country. The Register has agreed to report to Congress if further legislative consideration should be undertaken.

Section 114(c) states explicitly that nothing in the provisions of section 114 should be construed to "limit or impair the exclusive right to perform publicly, by means of a phonorecord, any of the works specified by section 106(4)." This principle is already implicit in the bill, but it is restated to avoid the danger of confusion between rights in a sound recording and rights in the musical composition or other work embodied in the recording.

SECTION 115. COMPULSORY LICENSE FOR PHONORECORDS

The provisions of section[s] 1(e) and 101(e) of the present law, establishing a system of compulsory licensing for the making and distribution of phonorecords of copyrighted music, are retained with a number of modifications and clarifications in section 115 of the bill. Under these provisions, which represented a compromise of the most controversial issue of the 1909 act, a musical composition that has been reproduced in phonorecords with the permission of the copyright owner may generally be reproduced in phonorecords by another person, if that person notifies the copyright owner and pays a specified royalty.

The provisions of section[s] 1(e) and 101(e) of the present law, establishing a system of compulsory licensing for the making and distribution of phonorecords of copyrighted music, are retained with a number of modifications in section 115 of the bill. Under these provisions, which represented a compromise of the most controversial issue of the 1909 act, a musical composition that has been reproduced in phonorecords with the permission of the copyright owner may generally be reproduced in phonorecords by another person, if that person notifies the copyright owner and pays a specified royalty.

The fundamental question of whether to retain the compulsory license or to do away with it altogether was a major issue during earlier stages of the program for general revision of the copyright law. At the hearings it was apparent that the argument on this point had shifted, and the real issue was not whether to retain the compulsory license but how much the royalty rate under it should be. The arguments for and against retention of the compulsory license are outlined at pages 66-67 of this Committee's 1967 report (H. Rept. No. 83, 90th Cong., 1st Sess.). The Committee's conclusion on this point remains the same as in 1967: "that a compulsory licensing system is still warranted as a condition for the rights of reproducing and distributing phonorecords of copyrighted music," but "that the present system is unfair and unnecessarily burdensome on copyright owners, and that the present statutory rate is too low."

*Availability and scope of compulsory license*

Subsection (a) of section 115 deals with three doubtful questions under the present law: (1) the nature of the original recording that will make the work available to others for recording under a compulsory license; (2) the nature of the sound recording that can be made under a compulsory license; and (3) the extent to which someone acting under a compulsory license can depart from the work as written or recorded without violating the copyright owner's right to make an "arrangement" or other derivative work. The first two of these ques**[108]**tions are answered in clause (1) of section 115(a), and the third is the subject of clause (2).

The present law, though not altogether clear, apparently bases compulsory licensing on the making or licensing of the first recording, even if no authorized records are distributed to the public. The first sentence of section 115(a)(1) would change the basis for compulsory licensing to authorized public distribution of phonorecords (including disks and audio tapes but not the sound tracks or other sound records accompanying a motion picture or other audiovisual work). Under the clause, a compulsory license would be available to anyone as soon as "phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner."

The second sentence of clause (1), which has been the subject of some debate, provides that "a person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use." This provision was criticized as being discriminatory against background music systems, since it would prevent a background music producer from making recordings without the express consent of the copyright owner; it was argued that this could put the producer at a great competitive disadvantage with performing rights societies, allow discrimination, and destroy or prevent entry of businesses. The committee concluded, however, that the purpose of the compulsory license does not extend to manufacturers of phonorecords that are intended primarily for commercial use, including not only broadcasters and jukebox operators but also background music services.

The final sentence of clause (1) provides that a person may not obtain a compulsory license for use of the work in the duplication of a sound recording made by another, unless the sound recording being duplicated was itself fixed lawfully and the making of phonorecords duplicated from it was authorized by the owner of copyright in the sound recording (or, if the recording was fixed before February 15, 1972, by the voluntary or compulsory licensee of the music used in the recording). The basic intent of this sentence is to make clear that a person is not entitled to a compulsory license of copyrighted musical works for the purpose of making an unauthorized duplication of a musical sound recording originally developed and produced by another. It is the view of the Committee that such was the original intent of the Congress in enacting the 1909 Copyright Act, and it has been so construed by the 3d, 5th, 9th and 10th

Circuits in the following cases: *Duchess Music Corp. v. Stern , 458 F.2d 1305* (9th Cir.), *cert. denied, 409 U.S. 847 (1972); Edward B. Marks Music Corp. v. Colorado Magnetics, Inc. , 497 F.2d 285, aff'd on rehearing en banc*, *497 F.2d 292 (10th Cir. 1974), cert. denied, 419 U.S. 1120 (1975); Jondora Music Publishing Co. v. Melody Recordings, Inc. , 506 F.2d 392* (3d Cir. 1974, as amended 1975), *cert. denied,* 421, U.S. 1012 (1975); and *Fame Publishing Co. v. Alabama Custom Tape, Inc. , 507 F.2d 667* (5th Cir.), *cert. denied, 423 U.S. 841 (1975).*

Under this provision, it would be possible to obtain a compulsory license for the use of copyrighted music under section 115 if the owner of the sound recording being duplicated authorizes its duplication. This does not, however, in any way require the owner of the original sound recording to grant a license to duplicate the original **[109]** sound recording. It is not intended that copyright protection for sound recordings be circumscribed by requiring the owners of sound recordings to grant a compulsory license to unauthorized duplicators or others.

The second clause of subsection (a) is intended to recognize the practical need for a limited privilege to make arrangements of music being used under a compulsory license, but without allowing the music to be perverted, distorted, or travestied. Clause (2) permits arrangements of a work "to the extent necessary to conform it to the style or manner of interpretation of the performance involved," so long as it does not "change the basic melody or fundamental character of the work." The provision also prohibits the compulsory licensee from claiming an independent copyright in his arrangement as a "derivative work" without the express consent of the copyright owner.

*Procedure for obtaining compulsory license*

Section 115(b)(1) requires anyone who wishes to take advantage of the compulsory licensing provisions to serve a "notice of intention to obtain a compulsory license," which is much like the "notice of intention to use" required by the present law. Under section 115, the notice must be served before any phonorecords are distributed, but service can take place "before or within 30 days after making" any phonorecords. The notice is to be served on the copyright owner, but if the owner is not identified in the Copyright Office records, "it shall be sufficient to file the notice of intention in the Copyright Office."

The Committee deleted clause (2) of section 115(b) of S. 22 as adopted by the Senate. The provision was a vestige of jukebox provisions in earlier bills, and its requirements no longer served any useful purpose.

Clause (2) [formerly clause (3)] of section 115(b) provides that "failure to serve or file the notice required by clause (1) * * * forecloses the possibility of a compulsory license and, in the absence of a negotiated license, renders the making and distribution of phonorecords actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506." The remedies provided in section 501 are those applicable to infringements generally.

*Royalty payable under compulsory license*

*Identification of copyright owner*.--Under the present law a copyright owner is obliged to file a "notice of use" in the Copyright Office, stating that the initial recording of the copyrighted work has been made or licensed, in order to recover against an unauthorized record manufacturer. This requirement has resulted in a technical loss of rights in some cases, and serves little or no purpose where the registration and assignment records of the Copyright Office already show the facts of ownership. Section 115(c)(1) therefore drops any formal "notice of use" requirements and merely provides that, "to be entitled to receive royalties under a compulsory license, the copyright owner must be identified in the registration or other public records of the Copyright Office." On the other hand, since proper identification is an important precondition of recovery, the bill further provides that "the owner is entitled to royalties for phonorecords manufactured and **[110]** distributed after being so identified, but is not entitled to recover for any phonorecords previously made and distributed."

*Basis of royalty*.--Under the present statute the specified royalty is payable "on each such part manufactured," regardless of how many "parts" (i.e., records) are sold. This basis for calculating the royalty has been revised in section 115(c)(2) to provide that "the royalty under a compulsory license shall be payable for every phonorecord made and distributed in accordance with the license." This basis is more compatible with the general practice in negotiated licenses today. It is unjustified to require a compulsory licensee to pay license fees on records which merely go into inventory, which may later be destroyed, and from which the record producer gains no economic benefit.

It is intended that the Register of Copyrights will prescribe regulations insuring that copyright owners will receive full and prompt payment for all phonorecords made and distributed. Section 115(c)(2) states that "a phonorecord is considered 'distributed' if the person exercising the compulsory license has voluntarily and permanently parted with its possession." For this purpose, the concept of "distribution" comprises any act by which the person exercising the compulsory license voluntarily relinquishes possession of a phonorecord (considered as a fungible unit), regardless of whether the distribution is to the public, passes title, constitutes a gift, or is sold, rented, leased, or loaned, unless it is actually returned and the transaction cancelled. Neither involuntary relinquishment, as through theft or fire, nor the destruction of unwanted records, would constitute "distribution."

The term "made" is intended to be broader than "manufactured," and to include within its scope every possible manufacturing or other process capable of reproducing a sound recording in phonorecords. The use of the phrase "made and distributed" establishes the basis upon which the royalty rate for compulsory licensing under section 115 is to be calculated, but it is in no way intended to weaken the liability of record pressers and other manufacturers and makers of phonorecords for copyright infringement where the compulsory licensing requirements have not been met. As under the present law, even if a presser, manufacturer, or other maker had no role in the distribution process, that person would be regarded as jointly and severally liable in a case where the court finds that infringement has taken place because of failure to comply with the provisions of section 115.

Under existing practices in the record industry, phonorecords are distributed to wholesalers and retailers with the privilege of returning unsold copies for credit or exchange. As a result, the number of recordings that have been "permanently" distributed will not usually be known until some time--six or seven months on the average--after the initial distribution. In recognition of this problem, it has become a well-established industry practice, under negotiated licenses, for record companies to maintain reasonable reserves of the mechanical royalties due the copyright owners, against which royalties on the returns can be offset. The Committee recognizes that this practice may be consistent with the statutory requirements for monthly compulsory license accounting reports, but recognizes the possibility that, without proper safeguards, the maintenance of such reserves could be manipulated to avoid making payments of the full amounts owing to copyright owners. Under these circumstances, the regulations prescribed **[111]** by the Register of Copyrights should contain detailed provisions ensuring that the ultimate disposition of every phonorecord made under a compulsory license is accounted for, and that payment is made for every phonorecord "voluntarily and permanently" distributed. In particular, the Register should prescribe a point in time when, for accounting purposes under section 115, a phonorecord will be considered "permanently distributed," and should prescribe the situations in which a compulsory licensee is barred from maintaining reserves (e.g., situations in which the compulsory licensee has frequently failed to make payments in the past).

*Rate of royalty*.--A large preponderance of the extensive testimony presented to the Committee on section 115 was devoted to the question of the amount of the statutory royalty rate. An extensive review and analysis of the testimony and arguments received on this question appear in the 1974 Senate report (S. Rep. No. 94-473) at page 91-94.

While upon initial review it might be assumed that the rate established in 1909 would not be reasonable at the present time, the committee believes that an increase in the mechanical royalty rate must be justified on the basis of existing economic conditions and not on the mere passage of 67 years. Following a thorough analysis of the problem, the Committee considers that an increase of the present two-cent royalty to a rate of 2-3/4 cents (or.6 of one cent per minute or fraction of playing time) is justified. This rate will be subject to review by the Copyright Royalty Commission, as provided by section 801, in 1980 and at 10-year intervals thereafter.

*Accounting and payment of royalties; effect of default*

Clause (3) of Section 115(c) provides that royalty payments are to be made on a monthly basis, in accordance with requirements that the Register of Copyrights shall prescribe by regulation. In order to increase the protection of copyright proprietors against economic harm from companies which might refuse or fail to pay their just obligations, compulsory licensees will also be required to make a detailed cumulative annual statement of account, certified by a Certified Public Accountant.

A source of criticism with respect to the compulsory licensing provisions of the present statute has been the rather ineffective sanctions against default by compulsory licensees. Clause (4) of section 115(c) corrects this defect by permitting the copyright owner to serve written notice on a defaulting licensee, and by providing for termination of the compulsory license if the default is not remedied within 30 days after notice is given. Termination under this clause "renders either the making or the distribution, or both, of all phonorecords for which the royalty had not been paid,

actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506."

SECTION 116. PERFORMANCE ON COIN-OPERATED PHONORECORD PLAYERS

*General background of the problem*

No provision of the present law has attracted more heated denunciations and controversy than the so-called jukebox exemption of section 1(e). This paragraph, which has remained unchanged since its enactment in 1909, provides that--

**[112]** 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.

This blanket exemption has been widely and vigorously condemned as an anachronistic "historical accident" and in terms such as "unconscionable,", "indefensible," "totally unjustified," and "grossly discriminatory."

Efforts to repeal the clause have been going on for more than 50 years, and between 1947 and 1965 there had been some 25 days of congressional hearings devoted to the subject. The following summarizes the arguments against retaining the exemption:

1. The exemption for coin-operated machines was added to the 1909 act at the last moment, and its consequences were completely unforeseen. The coin-operated music player of today is not comparable to the player pianos and "penny parlor" mechanisms in use in 1909, and the unanticipated effect of the provision, creating a blanket exemption for a large industry that is based on use of copyrighted material, represents the "core defect" in the present law.

2. The exemption not only deprives copyright owners of revenue to which they are fairly entitled, but it also discriminates against all other commercial users who must pay in order to perform copyrighted music. Over the years the jukebox industry has become strong and prosperous by taking a free ride on the hits created and developed by authors and publishers. Jukebox operators, alone in the entertainment field, continue to use others' property for profits without payment.

3. The exemption also creates serious international problems. It is obviously unfair for U.S. composers to be paid when their songs are used in jukeboxes abroad, but also for foreign composers to be deprived of revenue from jukebox uses of their compositions in this country. The problem is particularly acute with respect to Canada. Jukebox royalties in foreign countries at the time of the hearings in the early 1960's averaged between $ 40 and $ 50 per machine annually, and are now higher.

4. It is difficult to find support for the argument that jukebox operators cannot afford to pay for use of the very property they must have in order to exist: copyrighted music. Revenues from jukebox performances may gross as much as $ 500 million annually of which the copyright owners receive nothing.

The following summarizes the principal arguments made by jukebox operators and manufacturers for retaining the present exemption:

1. The exemption in section 1(e) was not an accident or anomaly, but a carefully conceived compromise. Congress in 1909 realized that the new royalties coming to copyright owners from mechanical sound reproductions of their works would be so substantial that in some cases fees for performances resulting from the use of mechanical reproductions would not be justified. Automatic phonographs were widely known and used in 1909.

2. The present law does not discriminate in favor of jukebox operators, but removal of the exemption would discriminate against them; jukebox performances are really forms of incidental entertainment like relays to hotel rooms or turning on a radio **[113]** in a barber shop, and should be completely exempted like them. The industry buys some 50 million records per year which, under the present mechanical royalty of 2 cents per composition or 4 cents per record, means that jukebox operators are indirectly paying copyright owners over $ 2 million a year now and would be paying them more under any increased mechanical royalty in the bill. No one has shown why this is not ample. Moreover, jukeboxes use hit records rather than hit compositions, and the composition is usually not the most important factor in the success of a record; jukeboxes represent an effective plugging medium that promotes record sales and hence mechanical royalties.

3. The operation of coin-operated phonographs has been, for some time, a declining business, and a great many locations are now operating at a loss and are kept going only through profits from other coin-operated vending machines. Jukebox operators could not sustain licensing fees comparable to those paid in other countries.

*Conclusions reached by the committee*

The committee's basic conclusions can be summarized as follows:

1. The present blanket jukebox exemption should not be continued. Whatever justification existed for it in 1909 exists no longer, and one class of commercial users of music should not be completely absolved from liability when none of the others enjoys any exemption.

2. Performances on coin-operated phonorecord players should be subject to a compulsory license (that is, automatic clearance) with statutory fees. Unlike other commercial music users, who have been subject to full copyright liability from the beginning and have made the necessary economic and business adjustments over a period of time, the whole structure of the jukebox industry has been based on the existence of the copyright exemption.

3. The most appropriate basis for the compulsory license is a statutory per box fee, with a mechanism for periodic review and adjustment of the per box fee. Such a mechanism is afforded by the Copyright Royalty Commission.

4. The $ 8 per box annual compulsory license fee represents a compromise figure adopted in 1967 and, as a compromise, it is acceptable as the rate to be specified in section 116. The Committee was impressed by the testimony offered to show that shifting patterns in social activity and public taste, combined with increased manufacturing and servicing costs, have made many jukebox operations unprofitable.

*Limitations on exclusive right*

The compulsory licensing provisions in section 116 have been patterned after those in section 115, although there are differences. One difference occurs in the first subsection: section 116(a) not only provides "the operator of the coin-operated phonorecord player" with the opportunity of obtaining "a compulsory license to perform the work publicly on that phonorecord player," but also exempts entirely under certain conditions, "the proprietor of the establishment in which the public performance takes place." As provided by clause (1), the proprietor is not liable for infringement unless he is also "the operator **[114]** of the phonorecord player" or unless he refuses or fails to disclose the operator's identity upon request.

As defined in section 116(e)(2), an "operator" is anyone who, alone or jointly: (1) owns a coin-operated phonorecord player; (2) "has the power to make the *** player available for placement in an establishment for purposes of public performance", and (3) "has the power to exercise primary control over the selection of the musical works made available for public performance" in the machine. Several different persons may be "operators" of the same coin-operated phonorecord player under this definition, but they would not include the "location owner" in the ordinary case where that person merely provides a place for the machine to be used.

In contrast to the present statute, which merely refers to a "coin-operated machine," section 116(e)(1) of the bill contains a detailed definition of "coin-operated phonorecord player." Under the definition a machine or device would be considered a "coin-operated phonorecord player" only if it meets all four specified conditions.

1. It must be used for no purpose other than the "performance of nondramatic musical works by means of phonorecords" and, in order to perform that function, it must be "activated by the insertion of coins, currency, tokens, or other monetary units or their equivalent." The definition would thus exclude coin-operated radio and television sets, as well as devices similar to jukeboxes that perform musical motion pictures.

2. The establishment where the machine is located must make "no direct or indirect charge for admission." This requirement, which has its counterpart in section 1(e) of the present law, would exclude establishments making cover or minimum charges, and those "clubs" open to the public but requiring "membership fees" for admission.

3. The phonorecord player must be "accompanied by a list of the titles of all musical works available for performance on it," and the list must either be affixed to the machine itself or "posted in the establishment in a prominent position where it can be readily examined by the public." This condition would not be satisfied if the list is available only on request.

4. Finally, the machine must provide "a choice of works available for performance," and must allow "the choice to be made by the patrons of the establishment in which it is located." Thus, a machine that merely provides continuous music without affording any choice as to the specific composition to be played at a particular time, or a case where selections are made by someone other than patrons of the establishment, would be outside the scope of the definition.

Clause (2) of section 116(a) provides that a jukebox operator may obtain a compulsory license to perform copyrighted works by complying with the requirements of this section.

*Procedures*

Section 116(b)(1) sets forth the requirements that an operator must observe in order to obtain a compulsory license. The operator is required to file in the Copyright Office an application containing certain information and deposit with the Register of Copyrights an $ 8 royalty fee for each box. If performances on a particular box **[115]** are made for the first time after July 1, the royalty fee for the remainder of the year shall be $ 4.00.

The Register of Copyrights is required to issue to the applicant a certificate for each machine and the operator is required to affix the certificate to the particular box. Failure to observe these requirements renders the public performance an act of infringement and fully liable for the statutory remedies.

*Distribution of royalties*

Section 116(c) establishes the procedures for the distribution of the royalties paid by jukebox operators. During the month of January persons who believe they are entitled to share in the royalties shall file a claim with the Copyright Royalty Commission. After the first of October the Commission shall determine whether there exists a controversy concerning the distribution of the royalty fees. If it determines that there is no controversy, it shall, after deducting its reasonable administrative costs, distribute the fees to the respective claimants. If it determines that there is a controversy concerning the distribution of royalty fees, it shall conduct a hearing to determine the distribution of royalty fees, as provided in *Chapter 8*.

Section 116(c)(3) enumerates the formula for the distribution of royalty fees. With respect to the fees allocated to owners of copyright in nondramatic musical works, every copyright owner not affiliated with a performing rights society shall receive a pro rata share and the balance shall be allocated to be distributed in pro rata shares. The Commission is authorized to withhold an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

Section 116(c)(4) directs the Copyright Royalty Commission to promulgate regulations whereby those persons who can reasonably be expected to have claims may, without expense or harassment of jukebox operators or the proprietors of establishments in which jukeboxes are located, have access to such establishments and to the boxes, to obtain information that may be reasonably necessary to determine the proportion of the contribution of the musical works of each person to the earnings of the particular jukebox. A person who is denied access to the establishment and the jukeboxes may bring an action in the United States District Court for the District of Columbia for the cancellation of the compulsory license of the jukebox to which access has been denied, and the court may declare the compulsory license invalid. This clause is not intended to authorize the Commission to impose any record-keeping requirements upon jukebox operators, or to require the installation in jukeboxes of any metering devices for counting the play of particular recordings.

*Review of royalty rate*

The provisions of *Chapter 8* of this legislation provide for the periodic review and adjustment of the statutory royalty rates, including those provided in section 116. Jukebox operators have sought to have the jukebox royalty rate excluded from the review procedures of Chapter 8. This committee has accepted the $ 8 jukebox royalty in the expectation that it would be subject to periodic review.

[116] SECTION 117. COMPUTER USES

As the program for general revision of the copyright law has evolved, it has become increasingly apparent that in one major area the problems are not sufficiently developed for a definitive legislative solution. This is the area of computer uses of copyrighted works: the use of a work "in conjunction with automatic systems capable of storing,

processing, retrieving, or transferring information." The Commission on New Technological Uses is, among other things, now engaged in making a thorough study of the emerging patterns in this field and it will, on the basis of its findings, recommend definitive copyright provisions to deal with the situation.

Since it would be premature to change existing law on computer uses at present, the purpose of section 117 is to preserve the status quo. It is intended neither to cut off any rights that may now exist nor to create new rights that might be denied under the Act of 1909 or under common law principles currently applicable.

The provision deals only with the exclusive rights of a copyright owner with respect to computer uses, that is, the bundle of rights specified for other types of uses in section 106 and qualified in sections 107 through 116 and 118. With respect to the copyright-ability of computer programs, the ownership of copyrights in them, the term of protection, and the formal requirements of the remainder of the bill, the new statute would apply.

Under section 117, an action for infringement of a copyrighted work by means of a computer would necessarily be a federal action brought under the new title 17. The court, in deciding the scope of exclusive rights in the computer area, would first need to determine the applicable law, whether State statutory or common law or the Act of 1909. Having determined what law was applicable, its decision would depend upon its interpretation of what that law was on the point on the day before the effective date of the new statute.

SECTION 118. NONCOMMERCIAL BROADCASTING

*General background*

During its consideration of revision legislation in 1975, the Senate Judiciary Committee adopted an amendment offered by Senator Charles McC. Mathias. The amendment, now section 118 of the Senate bill, grants to public broadcasting a compulsory license for use of non-dramatic literary and musical works, as well as pictorial, graphic, and sculptural works, subject to payment of reasonable royalty fees to be set by the Copyright Royalty Tribunal established by that bill. The Mathias amendment requires that public broadcasters, at periodic intervals, file a notice with the Copyright Office containing information required by the Register of Copyrights and deposit a statement of account and the total royalty fees for the period covered by the statement. In July of each year all persons having a claim to such fees are to file their claims with the Register of Copyrights. If no controversy exists, the Register would distribute the royalties to the various copyright owners and their agents after deducting reasonable administrative costs; controversies are to be settled by the Tribunal.

On July 10, 1975, the House Subcommittee heard testimony on the Mathias amendment from representatives of public broadcasters, authors, publishers, and music performing rights societies. The public **[117]** broadcasters pointed to Congressional concern for the development of their activities as evidenced by the Public Broadcasting Act. They urged that a compulsory license was essential to assure public broadcasting broad access to copyrighted materials at reasonable royalties and without administratively cumbersome and costly "clearance" problems that would impair the vitality of their operations. The opponents of the amendment argued that the nature of public broadcasting has changed significantly in the past decade, to the extent that it now competes with commercial broadcasting as a national entertainment and cultural medium. They asserted that the performing rights society arrangements under which copyrighted music is licensed for performance removed any problem in clearing music for broadcasting, and that voluntary agreements could adequately resolve the copyright problems feared by public broadcasters, at less expense and burden than the compulsory license, for synchronization and literary rights. The authors of literary works stressed that a compulsory licensing system would deny them the fundamental right to control the use of their works and protect their reputation in a major communications medium.

*General policy considerations*

The Committee is cognizant of the intent of Congress, in enacting the Public Broadcasting Act on November 7, 1967, that encouragement and support of noncommercial broadcasting is in the public interest. It is also aware that public broadcasting may encounter problems not confronted by commercial broadcasting enterprises, due to such factors as the special nature of programming, repeated use of programs, and, of course, limited financial resources. Thus, the Committee determined that the nature of public broadcasting does warrant special treatment in certain areas. However, the Committee did not feel that the broad compulsory license provided in the Senate bill is necessary to the continued successful operation of public broadcasting. In addition, the Committee believes that the system provided in the Senate bill for the deposit of royalty fees with the Copyright Office for distribution to claimants and the resolution

of disputes over such distribution by a statutory tribunal, can be replaced by payments directly between the parties, without the intervention of government machinery and its attendant administrative costs.

In general, the Committee amended the public broadcasting provisions of the Senate bill toward attainment of the objective clearly stated in the Report of the Senate Judiciary Committee, namely, that copyright owners and public broadcasters be encouraged to reach voluntary private agreements.

*Procedures*

Not later than thirty days following the publication by the President of the notice announcing the initial appointments to the Copyright Royalty Commission (specified in Chapter 8), the Chairman of the Commission is to publish notice in the Federal Register of the initiation of proceedings to determine "reasonable terms and rates" for certain uses of published nondramatic musical works and published pictorial, graphic and sculptural works, during a period ending on December 31, 1982.

Copyright owners and public broadcasting entities that do not reach voluntary agreement are bound by the terms and rates estab**[118]**lished by the Commission, which are to be published in the Federal Register within six months of the notice of initiation of proceedings. During the period between the effective date of the Act and the publication of the rates and terms, the Committee has preserved the status quo by providing, in section 118(b)(4), that the Act does not afford to copyright owners or public broadcasting entities any greater or lesser rights with respect to the relevant uses of nondramatic musical works and pictorial, graphic, and sculptural works than those afforded under the law in effect on December 31, 1977.

License agreements that have been voluntarily negotiated supersede, as between the parties to the agreement, the terms and rates established by the Commission, provided that copies of the agreements are properly filed with the Copyrigt [sic] Office within 30 days of execution. Under clause (2) of section 118(b), the agreements may be negotiated "at any time"--whether before, during, or after determinations by the Commission.

Under section 118(c), the procedures for the Commission's establishing such rates and terms are to be repeated in the last half of 1982 and every five years thereafter.

*Establishment of reasonable terms and rates*

In establishing reasonable terms and rates for public broadcasting use of the specified works, the Commission, under clause (b)(1) of section 118, is to consider proposals timely submitted to it, as well as "any other relevant information", including that put forward for its consideration "by any interested party."

The Committee does not intend that owners of copyrighted material be required to subsidize public broadcasting. It is intended that the Commission assure a fair return to copyright owners without unfairly burdening public broadcasters. Section 118(b)(3) provides that "the Commission may consider the rates for comparable circumstances under voluntary license agreements." The Commission is also expected to consider both the general public interest in encouraging the growth and development of public broadcasting, and the "promotion of science and the useful arts" through the encouragement of musical and artistic creation.

The Committee anticipates that the "terms" established by the Commission shall include provisions as to acceptable methods of payment of royalties by public broadcasting entities to copyright owners. For example, where the whereabouts of the copyright owner may not be readily known, the terms should specify the nature of the obligation of the public broadcasting entity to locate the owner, or to set aside or otherwise assure payment of appropriate royalties, should he or she appear and make a claim. Section 118(b)(3) requires the Commission "to establish requirements by which copyright owners may receive reasonable notice of the use of their works." The Committee intends that these requirements shall not impose undue hardships on public broadcasting entities and, in the above illustration, shall provide for the specific termination of any period during which the public broadcasting entity is required to set aside payments. It is expected that, in some cases, especially in the area of pictorial, graphic, and sculptural works, the whereabouts of the owners of copyright may not be known and they may never appear to claim payment of royalties.

**[119]** The Commission is also to establish record keeping requirements for public broadcasting entities in order to facilitate the identification, calculation, allocation and payment of claims and royalties.

*Works affected*

Under sections 118(b) and (e) of the Committee's amendment, the establishment of rates and terms by the Copyright Royalty Commission pertains only to the use of published nondramatic musical works, and published pictorial, graphic, and sculptural works. As under the Senate bill, rights in plays, operas, ballet and other stage presentations, motion pictures and other audiovisual works are not affected.

Section 118(f) is intended to make clear that this section does not permit unauthorized use, beyond the limits of section 107, of individual frames from a filmstrip or any other portion of any audiovisual work. Additionally, the application of this section to pictorial, graphic, and sculptural works does not extend to the production of transmission programs drawn to any substantial extent from a compilation of such works.

The Committee also concluded that the performance of nondramatic literary works should not be subject to Commission determination. It was particularly concerned that a compulsory license for literary works would result in loss of control by authors over the use of their work in violation of basic principles of artistic and creative freedom. It is recognized that copyright not only provides compensation to authors, but also protection as to how and where their works are used. The Committee was assured by representatives of authors and publishers that licensing arrangements for readings from their books, poems, and other works on public broadcasting programs for reasonable compensation and under reasonable safeguards for authors' rights could be worked out in private negotiation. The Committee strongly urges the parties to work toward mutually acceptable licenses; to facilitate their negotiations and aid in the possible establishment of clearance mechanisms and rates, the Committee's amendment provides the parties, in section 118(e)(1), with an appropriately limited exemption from the anti-trust laws.

The Committee has also provided, in paragraph (2) of clause (e), that on January 3, 1980, the Register of Copyrights, after consultation with the interested parties, shall submit a report to Congress on the extent to which voluntary licensing arrangements have been reached with respect to public broadcast use of nondramatic literary works, and present legislative or other recommendations, if warranted.

The use of copyrighted sound recordings in educational television and radio programs distributed by or through public broadcasting entities is governed by section 114 and is discussed in connection with that section.

*Activities affected*

Section 118(d) specifies the activities which may be engaged in by public broadcasting entities under terms and rates established by the Commission. These include the performance or display of published nondramatic musical works, and of published pictorial graphic, and sculptural works, in the course of transmissions by noncommercial educational broadcast stations; and the production, reproduction, and distribution of transmission programs including such works by nonprofit organizations for the purpose of such transmissions. It is the intent of the Committee that "interconnection" activities serving as a technical adjunct to such transmissions, such as the use of satellites or microwave equipment, be included within the specified activities.

Paragraph (3) of clause (d) also includes the reproduction, simultaneously with transmission, of public broadcasting programs by governmental bodies or nonprofit institutions, and the performance or display of the contents of the reproduction under the conditions of section 110(1). However, the reproduction so made must be destroyed at the end of seven days from the transmission.

This limited provision for unauthorized simultaneous or off-the-air reproduction is limited to nondramatic musical works and pictorial graphic and sculptural works included in public broadcasting transmissions. It does not extend to other works included in the transmissions, or to the entire transmission program.

**[120]** It is the intent of the Committee that schools be permitted to engage in off-the-air reproduction to the extent and under the conditions provided in 118(d)(3); however, in the event a public broadcasting station or producer makes the reproduction and distributes a copy to the school, the station or producer will not be held liable for the school's failure to destroy the reproduction, provided it has given notice of the requirement of destruction. In such a case the school itself, although it did not engage in the act of reproduction, is deemed an infringer fully subject to the remedies provided in Chapter 5 of the Act. The establishment of standards for adequate notice under this provision should be considered by the Commission.

Section 118(f) makes it clear that the rights of performance and other activities specified in subsection (d) do not extend to the unauthorized dramatization of a nondramatic musical work.

SECTION 201. OWNERSHIP OF COPYRIGHT

*Initial ownership*

Two basic and well-established principles of copyright law are restated in section 201(a): that the source of copyright ownership is the author of the work, and that, in the case of a "joint work," the coauthors of the work are likewise coowners of the copyright. Under the definition of section 101, a work is "joint" if the authors collaborated with each other, or if each of the authors prepared his or her contribution with the knowledge and intention that it would be merged with the contributions of other authors as "inseparable or interdependent parts of a unitary whole." The touchstone here is the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit, although the parts themselves may be either "inseparable" (as the case of a novel or painting) or "interdependent" (as in the case of a motion picture, opera, or the words and music of a song). The definition of "joint work" is to be contrasted with the definition of "collective work," also in section 101, in which the elements of merger and unity are lacking; there the key elements are assemblage or gathering of "separate and independent works * * * into a collective whole."

The definition of "joint works" has prompted some concern lest it be construed as converting the authors of previously written works, such as plays, novels, and music, into coauthors of a motion picture in which their work is incorporated. It is true that a motion picture would normally be a joint rather than a collective work with respect to those authors who actually work on the film, although their usual status as employees for hire would keep the question of coownership from coming up. On the other hand, although a novelist, playwright, or songwriter may write a work with the hope or expectation that it will be used in a motion picture, this is clearly a case of separate or independent authorship rather than one where the basic intention behind the writing of the work was for motion picture use. In this case, the motion picture is a derivative work within the definition of that term, and section 103 makes plain that copyright in a derivative work is independent of, and does not enlarge the scope of rights in, any pre-existing material incorporated in it. There is thus no need to spell this conclusion out in the definition of "joint work."

**[121]** There is also no need for a specific statutory provision concerning the right and duties of the coowners of a work; court-made law on this point is left undisturbed. Under the bill, as under the present law, coowners of a copyright would be treated generally as tenants in common, with each coowner having an independent right to use or license the use of a work, subject to a duty of accounting to the other coowners for any profits.

*Works made for hire*

Section 201(b) of the bill adopts one of the basic principles of the present law: that in the case of works made for hire the employer is considered the author of the work, and is regarded as the initial owner of copyright unless there has been an agreement otherwise. The subsection also requires that any agreement under which the employee is to own rights be in writing and signed by the parties.

The work-made-for-hire provisions of this bill represent a carefully balanced compromise, and as such they do not incorporate the amendments proposed by screenwriters and composers for motion pictures. Their proposal was for the recognition of something similar to the "shop right" doctrine of patent law: with some exceptions, the employer would acquire the right to use the employee's work to the extent needed for purposes of his regular business, but the employee would retain all other rights as long as he or she refrained from the authorizing of competing uses. However, while this change might theoretically improve the bargaining position of screenwriters and others as a group, the practical benefits that individual authors would receive are highly conjectural. The pesumption [sic] that initial ownership rights vest in the employer for hire is well established in American copyright law, and to exchange that for the uncertainties of the shop right doctrine would not only be of dubious value to employers and employees alike, but might also reopen a number of other issues.

The status of works prepared on special order or commission was a major issue in the development of the definition of "works made for hire" in section 101, which has undergone extensive revision during the legislative process. The basic problem is how to draw a statutory line between those works written on special order or commission that should be considered as "works made for hire," and those that should not. The definition now provided by the bill represents a

compromise which, in effect, spells out those specific categories of commissioned works that can be considered "works made for hire" under certain circumstances.

Of these, one of the most important categories is that of "instructional texts." This term is given its own definition in the bill: "a literary, pictorial, or graphic work prepared for publication with the purpose of use in systematic instructional activities." The concept is intended to include what might be loosely called "textbook material," whether or not in book form or prepared in the form of text matter. The basic characteristic of "instructional texts" is the purpose of their preparation for "use in systematic instructional activities," and they are to be distinguished from works prepared for use by a general readership.

**[122]** *Contributions to collective works*

Subsection (c) of section 201 deals with the troublesome problem of ownership of copyright in contributions to collective works, and the relationship between copyright ownership in a contribution and in the collective work in which it appears. The first sentence establishes the basic principle that copyright in the individual contribution and copyright in the collective work as a whole are separate and distinct, and that the author of the contribution is, as in every other case, the first owner of copyright in it. Under the definitions in section 101, a "collective work" is a species of "compilation" and, by its nature, must involve the selection, assembly, and arrangement of "a number of contributions." Examples of "collective works" would ordinarily include periodical issues, anthologies, symposia, and collections of the discrete writings of the same authors, but not cases, such as a composition consisting of words and music, a work published with illustrations or front matter, or three one-act plays, where relatively few separate elements have been brought together. Unlike the contents of other types of "compilations," each of the contributions incorporated in a "collective work" must itself constitute a "separate and independent" work, therefore ruling out compilations of information or other uncopyrightable material and works published with editorial revisions or annotations. Moreover, as noted above, there is a basic distinction between a "joint work," where the separate elements merge into a unified whole, and a "collective work," where they remain unintegrated and disparate.

The bill does nothing to change the rights of the owner of copyright in a collective work under the present law. These exclusive rights extend to the elements of compilation and editing that went into the collective work as a whole, as well as the contributions that were written for hire by employees of the owner of the collective work, and those copyrighted contributions that have been transferred in writing to the owner by their authors. However, one of the most significant aims of the bill is to clarify and improve the present confused and frequently unfair legal situation with respect to rights in contributions.

The second sentence of section 201(c), in conjunction with the provisions of section 404 dealing with copyright notice, will preserve the author's copyright in a contribution even if the contribution does not bear a separate notice in the author's name, and without requiring any unqualified transfer of rights to the owner of the collective work. This is coupled with a presumption that, unless there has been an express transfer of more, the owner of the collective work acquires "only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series."

The basic presumption of section 201(c) is fully consistent with present law and practice, and represents a fair balancing of equities. At the same time, the last clause of the subsection, under which the privilege or republishing the contribution under certain limited circumstances would be presumed, is an essential counterpart of the basic presumption. Under the language of this clause a publishing company could reprint a contribution from one issue in a later issue of its magazine, and could reprint an article from a 1980 edition of an encyclopedia in a 1990 revision of it; the publisher could not revise the contri-**[123]**bution itself or include it in a new anthology or an entirely different magazine or other collective work.

*Transfer of ownership*

The principle of unlimited alienability of copyright is stated in clause (1) of section 201(d). Under that provision the ownership of a copyright, or of any part of it, may be transferred by any means of conveyance or by operation of law, and is to be treated as personal property upon the death of the owner. The term "transfer of copyright ownership" is defined in section 101 to cover any "conveyance, alienation, or hypothecation," including assignments, mortgages, and exclusive licenses, but not including nonexclusive licenses. Representatives of motion picture producers have argued that foreclosures of copyright mortgages should not be left to varying State laws, and that the statute should establish a

Federal foreclosure system. However, the benefits of such a system would be of very limited application, and would not justify the complicated statutory and procedural requirements that would have to be established.

Clause (2) of subsection (d) contains the first explicit statutory recognition of the principle of divisibility of copyright in our law. This provision, which has long been sought by authors and their representatives, and which has attracted wide support from other groups, means that any of the exclusive rights that go to make up a copyright, including those enumerated in section 106 and any subdivision of them, can be transferred and owned separately. The definition of "transfer of copyright ownership" in section 101 makes clear that the principle of divisibility applies whether or not the transfer is "limited in time or place of effect," and another definition in the same section provides that the term "copyright owner," with respect to any one exclusive right, refers to the owner of that particular right. The last sentence of section 201(d)(2) adds that the owner, with respect to the particular exclusive right he or she owns, is entitled "to all of the protection and remedies accorded to the copyright owner by this title." It is thus clear, for example, that a local broadcasting station holding an exclusive license to transmit a particular work within a particular geographic area and for a particular period of time, could sue, in its own name as copyright owner, someone who infringed that particular exclusive right.

Subsection (e) provides that when an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, have not previously been voluntarily transferred, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title.

The purpose of this subsection is to reaffirm the basic principle that the United States copyright of an individual author shall be secured to that author, and cannot be taken away by any involuntary transfer. It is the intent of the subsection that the author be entitled, despite any purported expropriation or involuntary transfer, to continue exercising all rights under the United States statute, and that the governmental body or organization may not enforce or exercise any rights under this title in that situation.

**[124]** It may sometimes be difficult to ascertain whether a transfer of copyright is voluntary or is coerced by covert pressure. But subsection (e) would protect foreign authors against laws and decrees purporting to divest them of their rights under the United States copyright statute, and would protect authors within the foreign country who choose to resist such covert pressures.

Traditional legal actions that may involve transfer of ownership, such as bankruptcy proceedings and mortgage foreclosures, are not within the scope of this subsection; the authors in such cases have voluntarily consented to these legal processes by their overt actions--for example, by filing in bankruptcy or by hypothecating a copyright.

SECTION 202. DISTINCTION BETWEEN OWNERSHIP OF COPYRIGHT AND MATERIAL OBJECT

The principle restated in section 202 is a fundamental and important one: that copyright ownership and ownership of a material object in which the copyrighted work is embodied are entirely separate things. Thus, transfer of a material object does not of itself carry any rights under the copyright, and this includes transfer of the copy or phonorecord--the original manuscript, the photographic negative, the unique painting or statue, the master tape recording, etc.--in which the work was first fixed. Conversely, transfer of a copyright does not necessarily require the conveyance of any material object.

As a result of the interaction of this section and the provisions of section 204(a) and 301, the bill would change a common law doctrine exemplified by the decision in *Pushman v. New York Graphic Society, Inc. , 287 N.Y. 302, 39 N.E.2d 249 (1942)*. Under that doctrine, authors or artists are generally presumed to transfer common law literary property rights when they sell their manuscript or work of art, unless those rights are specifically reserved. This presumption would be reversed under the bill, since a specific written conveyance of rights would be required in order for a sale of any material object to carry with it a transfer of copyright.

SECTION 203. TERMINATION OF TRANSFERS AND LICENSES

*The problem in general*

The provisions of section 203 are based on the premise that the reversionary provisions of the present section on copyright renewal *(17 U.S.C. sec. 24)* should be eliminated, and that the proposed law should substitute for them a provision safeguarding authors against unremunerative transfers. A provision of this sort is needed because of the

unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited. Section 203 reflects a practical compromise that will further the objectives of the copyright law while recognizing the problems and legitimate needs of all interests involved.

*Scope of the provision*

Instead of being automatic, as is theoretically the case under the present renewal provision, the termination of a transfer or license under section 203 would require the serving of an advance notice within specified time limits and under specified conditions. How-**[125]**ever, although affirmative action is needed to effect a termination, the right to take this action cannot be waived in advance or contracted away. Under section 203(a) the right of termination would apply only to transfers and licenses executed after the effective date of the new statute, and would have no retroactive effect.

The right of termination would be confined to inter vivos transfers or licenses executed by the author, and would not apply to transfers by the author's successors in interest or to the author's own bequests. The scope of the right would extend not only to any "transfer of copyright ownership," as defined in section 101, but also to non-exclusive licenses. The right of termination would not apply to "works made for hire," which is one of the principal reasons the definition of that term assumed importance in the development of the bill.

*Who can terminate a grant*

Two issues emerged from the disputes over section 203 as to the persons empowered to terminate a grant: (1) the specific classes of beneficiaries in the case of joint works; and (2) whether anything less than unanimous consent of all those entitled to terminate should be required to make a termination effective. The bill to some extent reflects a compromise on these points, including a recognition of the dangers of one or more beneficiaries being induced to "hold out" and of unknown children or grandchildren being discovered later. The provision can be summarized as follows:

1. In the case of a work of joint authorship, where the grant was signed by two or more of the authors, majority action by those who signed the grant, or by their interests, would be required to terminate it.

2. There are three different situations in which the shares of joint authors, or of a dead author's widow or widower, children, and grandchildren, must be divided under the statute: (1) The right to effect a termination; (2) the ownership of the terminated rights; and (3) the right to make further grants of reverted rights. The respective shares of the authors, and of a dead author's widow or widower, children, and grandchildren, would be divided in exactly the same way in each of these situations. The terms "widow," "widower," and "children" are defined in section 101 in an effort to avoid problems and uncertainties that have arisen under the present renewal section.

3. The principle of per stirpes representation would also be applied in exactly the same way in all three situations. Take for example, a case where a dead author left a widow, two living children, and three grandchildren by a third child who is dead. The widow will own half of the reverted interests, the two children will each own 16-2/3 percent, and the three grandchildren will each own a share of roughly 5-1/2 percent. But who can exercise the right of termination? Obviously, since she owns 50 percent, the widow is an essential party, but suppose neither of the two surviving children is willing to join her in the termination; is it enough that she gets one of the children of the dead child to join, or can the dead child's interest be exercised only by the action of a majority of his children? Consistent with the per stirpes principle, the interest of a dead child can be exercised only as a unit by majority action of his surviving children. Thus, **[126]** even though the widow and one grandchild would own 55-1/2 percent of the reverted copyright, they would have to be joined by another child or grandchild in order to effect a termination or a further transfer of reverted rights. This principle also applies where, for example, two joint authors executed a grant and one of them is dead; in order to effect a termination, the living author must be joined by a per stirpes majority of the dead author's beneficiaries. The notice of termination may be signed by the specified owners of termination interests or by "their duly authorized agents," which would include the legally appointed guardians or committees of persons incompetent to sign because of age or mental disability.

*When a grant can be terminated*

Section 203 draws a distinction between the date when a termination becomes effective and the earlier date when the advance notice of termination is served. With respect to the ultimate effective date, section 203(a)(3) provides, as a general rule, that a grant may be terminated during the 5 years following the expiration of a period of 35 years from the execution of the grant. As an exception to this basic 35-year rule, the bill also provides that "if the grant covers the right of publication of the work, the period begins at the end of 35 years from the date of publication of the work under the grant or at the end of 40 years from the date of execution of the grant, whichever term ends earlier." This alternative method of computation is intended to cover cases where years elapse between the signing of a publication contract and the eventual publication of the work.

The effective date of termination, which must be stated in the advance notice, is required to fall within the 5 years following the end of the applicable 35- or 40-year period, but the advance notice itself must be served earlier. Under section 203(a)(4)(A), the notice must be served "not less than two or more than ten years" before the effective date stated in it.

As an example of how these time-limit requirements would operate in practice, we suggest two typical contract situations:

Case 1: Contract for theatrical production signed on September 2, 1987. Termination of grant can be made to take effect between September 2, 2022 (35 years from execution) and September 1, 2027 (end of 5 year termination period). Assuming that the author decides to terminate on September 1, 2022 (the earliest possible date) the advance notice must be filed between September 1, 2012 and September 1, 2020.

Case 2: Contract for book publication executed on April 10, 1980; book finally published on August 23, 1987. Since contract covers the right of publication, the 5-year termination period would begin on April 10, 2020 (40 years from execution) rather than April 10, 2015 (35 years from execution) or August 23, 2022 (35 years from publication). Assuming that the author decides to make the termination effective on January 1, 2024, the advance notice would have to be served between January 1, 2014, and January 1, 2022.

*Effect of termination*

Section 203(b) makes clear that, unless effectively terminated within the applicable 5-year period, all rights covered by an existing grant will continue unchanged, and that rights under other Federal, State, or foreign laws are unaffected. However, assuming that a copyright **[127]** transfer or license is terminated under section 203, who are bound by the termination and how are they affected?

Under the bill, termination means that ownership of the rights covered by the terminated grant reverts to everyone who owns termination interests on the date the notice of termination was served, whether they joined in signing the notice or not. In other words, if a person could have signed the notice, that person is bound by the action of the majority who did; the termination of the grant will be effective as to that person, and a proportionate share of the reverted rights automatically vests in that person. Ownership is divided proportionately on the same per stirpes basis as that provided for the right to effect termination under section 203(a) and, since the reverted rights vest on the date notice is served, the heirs of a dead beneficiary would inherit his or her share.

Under clause (3) of subsection (b), majority action is required to make a further grant of reverted rights. A problem here, of course, is that years may have passed between the time the reverted rights vested and the time the new owners want to make a further transfer; people may have died and children may have been born in the interim. To deal with this problem, the bill looks back to the date of vesting; out of the group in whom rights vested on that date, it requires the further transfer or license to be signed by "the same number and proportion of the owners" (though not necessarily the same individuals) as were then required to terminate the grant under subsection (a). If some of those in whom the rights originally vested have died, their "legal representatives, legatees, or heirs at law" may represent them for this purpose and, as in the case of the termination itself, any one of the minority who does not join in the further grant is nevertheless bound by it.

An important limitation on the rights of a copyright owner under a terminated grant is specified in section 203(b)(1). This clause provides that, notwithstanding a termination, a derivative work prepared earlier may "continue to be utilized" under the conditions of the terminated grant; the clause adds, however, that this privilege is not broad enough to permit the preparation of other derivative works. In other words, a film made from a play could continue to be licensed for performance after the motion picture contract had been terminated but any remake rights covered by the contract would be cut off. For this purpose, a motion picture would be considered as a "derivative work" with respect to

every "preexisting work" incorporated in it, whether the preexisting work was created independently or was prepared expressly for the motion picture.

Section 203 would not prevent the parties to a transfer or license from voluntarily agreeing at any time to terminate an existing grant and negotiating a new one, thereby causing another 35-year period to start running. However, the bill seeks to avoid the situation that has arisen under the present renewal provision, in which third parties have bought up contingent future interests as a form of speculation. Section 203(b)(4) would make a further grant of rights that revert under a terminated grant valid "only if it is made after the effective date of the termination." An exception, in the nature of a right of "first refusal," would permit the original grantee or a successor of such grantee to negotiate a new agreement with the persons effecting the termination at any time after the notice of termination has been served.

**[128]** Nothing contained in this section or elsewhere in this legislation is intended to extend the duration of any license, transfer or assignment made for a period of less than thirty-five years. If, for example, an agreement provides an earlier termination date or lesser duration, or if it allows the author the right of canceling or terminating the agreement under certain circumstances, the duration is governed by the agreement. Likewise, nothing in this section or legislation is intended to change the existing state of the law of contracts concerning the circumstances in which an author may cancel or terminate a license, transfer, or assignment.

Section 203(b)(6) provides that, unless and until termination is effected under this section, the grant, "if it does not provide otherwise," continues for the term of copyright. This section means that, if the agreement does not contain provisions specifying its term or duration, and the author has not terminated the agreement under this section, the agreement continues for the term of the copyright, subject to any right of termination under circumstances which may be specified therein. If, however, an agreement does contain provisions governing its duration--for example, a term of fifty years--and the author has not exercised his or her right of termination under the statute, the agreement will continue according to its terms--in this example, for only fifty years. The quoted language is not to be construed as requiring agreements to reserve the right of termination.

SECTIONS 204, 205. EXECUTION AND RECORDATION OF TRANSFERS

Section 204 is a somewhat broadened and liberalized counterpart of sections 28 and 29 of the present statute. Under subsection (a), a transfer of copyright ownership (other than one brought about by operation of law) is valid only if there exists an instrument of conveyance, or alternatively a "note or memorandum of the transfer," which is in writing and signed by the copyright owner "or such owner's duly authorized agent." Subsection (b) makes clear that a notarial or consular acknowledgement is not essential to the validity of any transfer, whether executed in the United States or abroad. However, the subsection would liberalize the conditions under which certificates of acknowledgment of documents executed abroad are to be accorded prima facie weight, and would give the same weight to domestic acknowledgments under appropriate circumstances.

The recording and priority provisions of section 205 are intended to clear up a number of uncertainties arising from sections 30 and 31 of the present law and to make them more effective and practical in operation. Any "document pertaining to a copyright" may be recorded under subsection (a) if it "bears that actual signature of the person who executed it," or if it is appropriately certified as a true copy. However, subsection (c) makes clear that the recorded document will give constructive notice of its contents only if two conditions are met: (1) the document or attached material specifically identifies the work to which it pertains so that a reasonable search under the title or registration number would reveal it, and (2) registration has been made for the work. Moreover, even though the Register of Copyrights may be compelled to accept for recordation documents that on their face appear self-serving or colorable, the Register should take care that their nature is not concealed from the public in the Copyright Office's indexing and search reports.

**[129]** The provisions of subsection (d), requiring recordation of transfers as a prerequisite to the institution of an infringement suit, represent a desirable change in the law. The one- and three-month grace periods provided in subsection (e) are a reasonable compromise between those who want a longer hiatus and those who argue that any grace period makes it impossible for a bona fide transferee to rely on the record at any particular time.

Under subsection (f) of section 205, a nonexclusive license in writing and signed, whether recorded or not, would be valid against a later transfer, and would also prevail as against a prior unrecorded transfer if taken in good faith and without notice. Objections were raised by motion picture producers, particularly to the provision allowing unrecorded nonexclusive licenses to prevail over subsequent transfers, on the ground that a nonexclusive license can have drastic effects on the value of a copyright. On the other hand, the impracticalities and burdens that would accompany any

requirement of recordation of nonexclusive licenses outweigh the limited advantages of a statutory recordation system for them.

SECTION 301. FEDERAL PREEMPTION OF RIGHTS EQUIVALENT TO COPYRIGHT

*Single Federal system*

Section 301, one of the bedrock provisions of the bill, would accomplish a fundamental and significant change in the present law. Instead of a dual system of "common law copyright" for unpublished works and statutory copyright for published works, which has been the system in effect in the United States since the first copyright statute in 1790, the bill adopts a single system of Federal statutory copyright from creation. Under section 301 a work would obtain statutory protection as soon as it is "created" or, as that term is defined in section 101, when it is "fixed in a copy or phonorecord for the first time." Common law copyright protection for works coming within the scope of the statute would be abrogated, and the concept of publication would lose its all-embracing importance as a dividing line between common law and statutory protection and between both of these forms of legal protection and the public domain.

By substituting a single Federal system for the present anachronistic, uncertain, impractical, and highly complicated dual system, the bill would greatly improve the operation of the copyright law and would be much more effective in carrying out the basic constitutional aims of uniformity and the promotion of writing and scholarship. The main arguments in favor of a single Federal system can be summarized as follows:

1. One of the fundamental purposes behind the copyright clause of the Constitution, as shown in Madison's comments in The Federalist, was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States. Today, when the methods for dissemination of an author's work are incomparably broader and faster than they were in 1789, national uniformity in copyright protection is even more essential than it was then to carry out the constitutional intent.

2. "Publication," perhaps the most important single concept under the present law, also represents its most serious defect. **[130]** Although at one time, when works were disseminated almost exclusively through printed copies, "publication" could serve as a practical dividing line between common law and statutory protection, this is no longer true. With the development of the 20th-century communications revolution, the concept of publication has become increasingly artificial and obscure. To cope with the legal consequences of an established concept that has lost much of its meaning and justification, the courts have given "publication" a number of diverse interpretations, some of them radically different. Not unexpectedly, the results in individual cases have become unpredictable and often unfair. A single Federal system would help to clear up this chaotic situation.

3. Enactment of section 301 would also implement the "limited times" provision of the Constitution, which has become distorted under the traditional concept of "publication." Common law protection in "unpublished" works is now perpetual, no matter how widely they may be disseminated by means other than "publication"; the bill would place a time limit on the duration of exclusive rights in them. The provision would also aid scholarship and the dissemination of historical materials by making unpublished, undisseminated manuscripts available for publication after a reasonable period.

4. Adoption of a uniform national copyright system would greatly improve international dealings in copyrighted material. No other country has anything like our present dual system. In an era when copyrighted works can be disseminated instantaneously to every country on the globe, the need for effective international copyright relations, and the concomitant need for national uniformity, assume ever greater importance.

Under section 301, the statute would apply to all works created after its effective date, whether or not they are ever published or disseminated. With respect to works created before the effective date of the statute and still under common law protection, section 303 of the statute would provide protection from that date on, and would guarantee a minimum period of statutory copyright.

*Preemption of State law*

The intention of section 301 is to preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright and that extend to works coming within the scope of the Federal copyright law. The declaration of this principle in section 301 is intended to be stated in the clearest and most unequivocal language

possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection.

Under section 301(a) all "legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 are governed exclusively by the Federal copyright statute if the works involved are "works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103." All corresponding State laws, whether common law or statutory, are preempted and abrogated. Regardless of when the work was cre**[131]**ated and whether it is published or unpublished, disseminated or undisseminated, in the public domain or copyrighted under the Federal statute, the States cannot offer it protection equivalent to copyright. Section 1338 of title 28, United States Code, also makes clear that any action involving rights under the Federal copyright law would come within the exclusive jurisdiction of the Federal courts. The preemptive effect of section 301 is limited to State laws; as stated expressly in subsection (d) of section 301, there is no intention to deal with the question of whether Congress can or should offer the equivalent of copyright protection under some constitutional provision other than the patent-copyright clause of article 1, section 8.

As long as a work fits within one of the general subject matter categories of sections 102 and 103, the bill prevents the State from protecting it even if it fails to achieve Federal statutory copyright because it is too minimal or lacking in originality to qualify, or because it has fallen into the public domain. On the other hand, section 301(b) explicitly preserves common law copyright protection for one important class of works: works that have not been "fixed in any tangible medium of expression." Examples would include choreography that has never been filmed or notated, an extemporaneous speech, "original works of authorship" communicated solely through conversations or live broadcasts, and a dramatic sketch or musical composition improvised or developed from memory and without being recorded or written down. As mentioned above in connection with section 102, unfixed works are not included in the specified "subject matter of copyright." They are therefore not affected by the preemption of section 301, and would continue to be subject to protection under State statute or common law until fixed in tangible form.

The preemption of rights under State law is complete with respect to any work coming within the scope of the bill, even though the scope of exclusive rights given the work under the bill is narrower than the scope of common law rights in the work might have been.

Representatives of printers, while not opposed to the principle of section 301, expressed concern about its potential impact on protection of preliminary advertising copy and layouts prepared by printers. They argued that this material is frequently "pirated" by competitors, and that it would be a substantial burden if, in order to obtain full protection, the printer would have to make registrations and bear the expense and bother of suing in Federal rather than State courts. On the other hand, these practical problems are essentially procedural rather than substantive, and the proposal for a special exemption to preserve common law rights equivalent to copyright in unpublished advertising material cannot be justified. Moreover, subsection (b), discussed below, will preserve other legal grounds on which the printers can protect themselves against "pirates" under State laws.

In a general way subsection (b) of section 301 represents the obverse of subsection (a). It sets out, in broad terms and without necessarily being exhaustive, some of the principal areas of protection that preemption would not prevent the States from protecting. Its purpose is to make clear, consistent with the 1964 Supreme Court decisions in *Sears, Roebuck & Co. v. Stiffel Co. , 376 U.S. 225,* and *Compco Corp. v. Day-Brite Lighting, Inc. , 376 U.S. 234,* that preemption does not extend to causes of action, or subject matter outside the scope of the revised Federal copyright statute.

**[132]** The numbered clauses of subsection (b) list three general areas left unaffected by the preemption: (1) subject matter that does not come within the subject matter of copyright; (2) causes of action arising under State law before the effective date of the statute; and (3) violations of rights that are not equivalent to any of the exclusive rights under copyright.

The examples in clause (3), while not exhaustive, are intended to illustrate rights and remedies that are different in nature from the rights comprised in a copyright and that may continue to be protected under State common law or statute. The evolving common law rights of "privacy," "publicity," and trade secrets, and the general laws of defamation and fraud, would remain unaffected as long as the causes of action contain elements, such as an invasion of personal rights or a breach of trust or confidentiality, that are different in kind from copyright infringement. Nothing in the bill derogates from the rights of parties to contract with each other and to sue for breaches of contract; however, to the extent that the unfair competition concept known as "interference with contract relations" is merely the equivalent of copyright protection, it would be preempted.

The last example listed in clause (3)--"deceptive trade practices such as passing off and false representation"--represents an effort to distinguish between those causes of action known as "unfair competition" that the copyright statute is not intended to preempt and those that it is. Section 301 is not intended to preempt common law protection in cases involving activities such as false labeling, fraudulent representation, and passing off even where the subject matter involved comes within the scope of the copyright statute.

"Misappropriation" is not necessarily synonymous with copyright infringement, and thus a cause of action labeled as "misappropriation" is not preempted if it is in fact based neither on a right within the general scope of copyright as specified by section 106 nor on a right equivalent thereto. For example, state law should have the flexibility to afford a remedy (under traditional principles of equity) against a consistent pattern of unauthorized appropriation by a competitor of the facts (i.e., not the literary expression) constituting "hot" news, whether in the traditional mold of *International News Service v. Associated Press , 248 U.S. 215 (1918),* or in the newer form of data updates from scientific, business, or financial data bases. Likewise, a person having no trust or other relationship with the proprietor of a computerized data base should not be immunized from sanctions against electronically or cryptographically breaching the proprietor's security arrangements and accessing the proprietor's data. The unauthorized data access which should be remediable might also be achieved by the intentional interception of data transmissions by wire, microwave or laser transmissions, or by the common unintentional means of "crossed" telephone lines occasioned by errors in switching.

The proprietor of data displayed on the cathode ray tube of a computer terminal should be afforded protection against unauthorized printouts by third parties (with or without improper access), even if the data are not copyrightable. For example, the data may not be copyrighted because they are not fixed in a tangible medium of expression (i.e., the data are not displayed for a period or [sic] not more than transitory duration).

**[133]** Nothing contained in section 301 precludes the owner of a material embodiment of a copy or a phonorecord from enforcing a claim of conversion against one who takes possession of the copy or phonorecord without consent.

A unique and difficult problem is presented with respect to the status of sound recordings fixed before February 12, 1972, the effective date of the amendment bringing recordings fixed after that date under Federal copyright protection. In its testimony during the 1975 hearings, the Department of Justice pointed out that, under section 301 as then written:

This language could be read as abrogating the anti-piracy laws now existing in 29 states relating to pre-February 15, 1972, sound recordings on the grounds that these statutes proscribe activities violating rights equivalent to * * * the exclusive rights within the general scope of copyright. * * *" Certainly such a result cannot have been intended for it would likely effect the immediate resurgence of piracy of pre-February 15, 1972, sound recordings.

The Department recommended that section 301(b) be amended to exclude sound recordings fixed prior to February 15, 1972 from the effect of the preemption.

The Senate adopted this suggestion when it passed S. 22. The result of the Senate amendment would be to leave pre-1972 sound recordings as entitled to perpetual protection under State law, while post-1972 recordings would eventually fall into the public domain as provided in the bill.

The Committee recognizes that, under recent court decisions, pre-1972 recordings are protected by State statute or common law, and that [they] should not all be thrown into the public domain instantly upon the coming into effect of the new law. However, it cannot agree that they should in effect be accorded perpetual protection, as under the Senate amendment, and it has therefore revised clause (4) to establish a future date for the pre-emption to take effect. The date chosen is February 15, 2047, which is 75 years from the effective date of the statute extending Federal protection to recordings.

Subsection (c) makes clear that nothing contained in Title 17 annuls or limits any rights or remedies under any other Federal statute.

SECTION 302. DURATION OF COPYRIGHT IN WORKS CREATED AFTER EFFECTIVE DATE

*In general*

The debate over how long a copyright should last is as old as the oldest copyright statute and will doubtless continue as long as there is a copyright law. With certain exceptions, there appears to be strong support for the principle,

as embodied in the bill, of a copyright term consisting of the life of the author and 50 years after his death. In particular, the authors and their representatives stressed that the adoption of a life-plus-50 term was by far their most important legislative goal in copyright law revision. The Register of Copyrights now regards a life-plus-50 term as the foundation of the entire bill.

Under the present law statutory copyright protection begins on the date of publication (or on the date of registration in unpublished **[134]** form) and continues for 28 years from that date; it may be renewed for a second 28 years, making a total potential term of 56 years in all cases.n1 The principal elements of this system--a definite number of years, computed from either publication or registration, with a renewal feature--have been a part of the U.S. copyright law since the first statute in 1790. The arguments for changing this system to one based on the life of the author can be summarized as follows:

1. The present 56-year term is not long enough to insure an author and his dependents the fair economic benefits from his works. Life expectancy has increased substantially, and more and more authors are seeing their works fall into the public domain during their lifetimes, forcing later works to compete with their own early works in which copyright has expired.

2. The tremendous growth in communications media has substantially lengthened the commercial life of a great many works. A short term is particularly discriminatory against serious works of music, literature, and art, whose value may not be recognized until after many years.

3. Although limitations on the term of copyright are obviously necessary, too short a term harms the author without giving any substantial benefit to the public. The public frequently pays the same for works in the public domain as it does for copyrighted works, and the only result is a commercial windfall to certain users at the author's expense. In some cases the lack of copyright protection actually restrains dissemination of the work, since publishers and other users cannot risk investing in the work unless assured of exclusive rights.

4. A system based on the life of the author would go a long way toward clearing up the confusion and uncertainty involved in the vague concept of "publication," and would provide a much simpler, clearer method for computing the term. The death of the author is a definite, determinable event, and it would be the only date that a potential user would have to worry about. All of a particular author's works, including successive revisions of them, would fall into the public domain at the same time, thus avoiding the present problems of determining a multitude of publication dates and of distinguishing "old" and "new" matter in later editions. The bill answers the problems of determining when relatively obscure authors died, by establishing a registry of death dates and a system of presumptions.

5. One of the worst features of the present copyright law is the provision for renewal of copyright. A substantial burden and expense, this unclear and highly technical requirement results in incalculable amounts of unproductive work. In a number of cases it is the cause of inadvertent and unjust loss of copyright. Under a life-plus-50 system the renewal device would be inappropriate and unnecessary.

6. Under the preemption provisions of section 301 and the single Federal system they would establish, authors will be giv-**[135]**ing up perpetual, unlimited exclusive common law rights in their unpublished works, including works that have been widely disseminated by means other than publication. A statutory term of life-plus-50 years is no more than a fair recompense for the loss of these perpetual rights.

7. A very large majority of the world's countries have adopted a copyright term of the life of the author and 50 years after the author's death. Since American authors are frequently protected longer in foreign countries than in the United States, the disparity in the duration of copyright has provoked consider able [sic] resentment and some proposals for retaliatory legislation. Copyrighted works move across national borders faster and more easily than virtually any other economic commodity, and with the techniques now in common use this movement has in many cases become instantaneous and effortless. The need the conform the duration of U.S. copyright to that prevalent throughout the rest of the world is increasingly pressing in order to provide certainty and simplicity in international business dealings. Even more important, a change in the basis of our copyright term would place the United States in the forefront of the international copyright community. Without this change, the possibility of future United States adherence to the Berne Copyright Union would evaporate, but with it would come a great and immediate improvement in our copyright relations. All of these benefits would accrue directly to American and foreign authors alike.

The need for a longer total term of copyright has been conclusively demonstrated. It is true that a major reason for the striking statistical increase in life expectancy since 1909 is the reduction in infant mortality, but this does not mean that the increase can be discounted. Although not nearly as great as the total increase in life expectancy, there has been a

marked increase in longevity, and with medical discoveries and health programs for the elderly this trend shows every indication of continuing. If life expectancy in 1909, which was in the neighborhood of 56 years, offered a rough guide to the length of copyright protection, then life expectancy in the 1970's which is well over 70 years, should offer a similar guide; the Register's 1961 Report included statistics indicating that something between 70 and 76 years was then the average equivalent of life-plus-50 years. A copyright should extend beyond the author's lifetime, and judged by this standard the present term of 56 years is too short.

The arguments as to the benefits of uniformity with foreign laws, and the advantages of international comity that would result from adoption of a life-plus-50 term, are also highly significant. The system has worked well in other countries, and on the whole it would appear to make computation of terms considerably simpler and easier. The registry of death dates and the system of presumptions established in section 302 would solve most of the problems in determining when an individual author died.

No country in the world has provisions on the duration of copyright like ours. Virtually every other copyright law in the world bases the term of protection for works by natural persons on the life of the author, and a substantial majority of these accord protection for 50 years after the author's death. This term is required for adherence to **[136]** the Berne Convention. It is worth noting that the 1965 revision of the copyright law of the Federal Republic of Germany adopted a term of life plus 70 years.

A point that has concerned some educational groups arose from the possibility that, since a large majority (now about 85 percent) of all copyrighted works are not renewed, a life-plus-50 year term would tie up a substantial body of material that is probably of no commercial interest but that would be more readily available for scholarly use if free of copyright restrictions. A statistical study of renewal registrations made by the Copyright Office in 1966 supports the generalization that most material which is considered to be of continuing or potential commercial value is renewed. Of the remainder, a certain proportion is of practically no value to anyone, but there are a large number of unrenewed works that have scholarly value to historians, archivists, and specialists in a variety of fields. This consideration lay behind the proposals for retaining the renewal device or for limiting the term for unpublished or unregistered works.

It is true that today's ephemera represent tomorrow's social history, and that works of scholarly value, which are now falling into the public domain after 28 years, would be protected much longer under the bill. Balanced against this are the burdens and expenses of renewals, the near impossibility of distinguishing between types of works in fixing a statutory term, and the extremely strong case in favor of a life-plus-50 system. Moreover, it is important to realize that the bill would not restrain scholars from using any work as source material or from making "fair use" of it; the restrictions would extend only to the unauthorized reproduction or distribution of copies of the work, its public performance, or some other use that would actually infringe the copyright owner's exclusive rights. The advantage of a basic term of copyright enduring for the life of the author and for 50 years after the author's death outweigh any possible disadvantages.

*Basic copyright term*

Under subsection (a) of section 302, a work "created" on or after the effective date of the revised statute would be protected by statutory copyright "from its creation" and, with exceptions to be noted below, "endures for a term consisting of the life of the author and 50 years after the author's death."

Under this provision, as a general rule, the life-plus-50 term would apply equally to unpublished works, to works published during the author's lifetime, and to works published posthumously.

The definition of "created" in section 101, which will be discussed in more detail in connection with section 302(c) below, makes clear that "creation" for this purpose means the first time the work is fixed in a copy or phonorecord; up to that point the work is not "created," and is subject to common law protection, even though it may exist in someone's mind and may have been communicated to others in unfixed form.

*Joint works*

Since by definition a "joint work" has two or more authors, a statute basing the term of copyright on the life of the author must provide a special method of computing the term of "joint works." Under the system in effect in many foreign countries, the term of copyright is measured from the death of the last survivor of a group of joint **[137]** authors,

no matter how many there are. The bill adopts this system as the simplest and fairest of the alternatives for dealing with the problem.

*Anonymous works, pseudonymous works, and works made for hire*

Computing the term from the author's death also requires special provisions to deal with cases where the authorship is not revealed or where the "author" is not an individual. Section 302(c) therefore provides a special term for anonymous works, pseudonymous works, and works made for hire: 75 years from publication or 100 years from creation, whichever is shorter. The definitions in section 101 make the status of anonymous and pseudonymous works depend on what is revealed on the copies or phonorecords of a work; a work is "anonymous" if "no natural person is identified as author," and is "pseudonymous" if "the author is identified under a fictitious name."

Section 302(c) provides that the 75- and 100-year terms for an anonymous or pseudonymous work can be converted to the ordinary life-plus-50 term if "the identify of one or more authors * * * is revealed" in special records maintained for this purpose in the Copyright Office. The term in such cases would be "based on the life of the author or authors whose identity has been revealed." Instead of forcing a user to search through countless Copyright Office records to determine if an author's identity has been revealed, the bill sets up a special registry for the purpose, with requirements concerning the filing of identifying statements that parallel those of the following subsection (d) with respect to statements of the date of an author's death.

The alternative terms established in section 302(c)--75 years from publication or 100 years from creation, whichever expires first--are necessary to set a time limit on protection of unpublished material. For example, copyright in a work created in 1978 and published in 1988 would expire in 2063 (75 years from publication). A question arises as to when the copyright should expire if the work is never published. Both the Constitution and the underlying purposes of the bill require the establishment of an alternative term for unpublished work and the only practicable basis for this alternative is "creation." Under the bill a work created in 1980 but not published until after 2005 (or never published) would fall into the public domain in 2080 (100 years after creation).

The definition in section 101 provides that "creation" takes place when a work "is fixed in a copy or phonorecord for the first time." Although the concept of "creation" is inherently lacking in precision, its adoption in the bill would, for example, enable a scholar to use an unpublished manuscript written anonymously, pseudonymously, or for hire, if he determines on the basis of internal evidence that the manuscript is at least 100 years old. In the case of works written over a period of time or in successive revised versions, the definition provides that the portion of the work "that has been fixed at any particular time constitutes the work as of that time," and that, "where the work has been prepared in different versions, each version constitutes a separate work." Thus, a scholar or other user, in attempting to determine whether a particular work is in the public domain, needs to look no further than the particular version he wishes to use.

**[138]** Although "publication" would no longer play the central role assigned to it under the present law, the concept would still have substantial significance under provisions throughout the bill, including those on Federal preemption and duration. Under the definition in section 101, a work is "published" if one or more copies or phonorecords embodying it are distributed to the public--that is, generally to persons under no explicit or implicit restrictions with respect to disclosure of its contents--without regard to the manner in which the copies or phonorecords changed hands. The definition clears up the question of whether the sale of phonorecords constitutes publication, and it also makes plain that any form or dissemination in which a material object does not change hands--performances or displays on television, for example--is not a publication no matter how many people are exposed to the work. On the other hand, the definition also makes clear that, when copies or phonorecords are offered to a group of wholesalers, broadcasters, motion picture theaters, etc., publication takes place if the purpose is "further distribution, public performance, or public display."

Although the periods of 75 or 100 years for anonymous and pseudonymous works and works made for hire seem to be longer than the equivalent term provided by foreign laws and the Berne Conventions, this difference is more apparent than real. In general, the terms in these special cases approximate, on the average, the term of the life of the author plus 50 years established for other works. The 100-year maximum term for unpublished works, although much more limited than the perpetual term now available under common law in the United States and under statute in some foreign countries, is sufficient to guard against unjustified invasions of privacy and to fulfill our obligations under the Universal Copyright Convention.

*Records and presumption as to author's death*

Subsections (d) and (e) of section 302 together furnish an answer to the practical problems of how to discover the death dates of obscure or unknown authors. Subsection (d) provides a procedure for recording statements that an author died, or that he was still living, on a particular date, and also requires the Register of Copyrights to maintain obituary records on a current basis. Under subsection (e) anyone who, after a specified period, obtains certification from the Copyright Office that its records show nothing to indicate that the author is living or died less than 50 years before, is entitled to rely upon a presumption that the author has been dead for more than 50 years. The period specified in subsection (e)--75 years from publication or 100 years from creation--is purposely uniform with the special term provided in subsection (c).

SECTION 303. PREEXISTING WORKS UNDER COMMON LAW PROTECTION

Theoretically, at least, the legal impact of section 303 would be far reaching. Under it, every "original work of authorship" fixed in tangible form that is in existence would be given statutory copyright protection as long as the work is not in the public domain in this country. The vast majority of these works consist of private material that no one is interested in protecting or infringing, but section 303 would still have practical effects for a prodigious body of material already in existence.

**[139]** Looked at another way, however, section 303 would have a genuinely restrictive effect. Its basic purpose is to substitute statutory for common law copyright for everything now protected at common law, and to substitute reasonable time limits for the perpetual protection now available. In general, the substituted time limits are those applicable to works created after the effective date of the law; for example, an unpublished work written in 1945 whose author dies in 1980 would be protected under the statute from the effective date through 2030 (50 years after the author's death).

A special problem under this provision is what to do with works whose ordinary statutory terms will have expired or will be nearing expiration on the effective date. The committee believes that a provision taking away subsisting common law rights and substituting statutory rights for a reasonable period is fully in harmony with the constitutional requirements of due process, but it is necessary to fix a "reasonable period" for this purpose. Section 303 provides that under no circumstances would copyright protection expire before December 31, 2002, and also attempts to encourage publication by providing 25 years more protection (through 2027) if the work were published before the end of 2002.

SECTION 304. DURATION OF SUBSISTING COPYRIGHTS

The arguments in favor of lengthening the duration of copyright apply to subsisting as well as future copyrights. The bill's basic approach is to increase the present 56-year term to 75 years in the case of copyrights subsisting in both their first and their renewal terms.

*Copyrights in their first term*

Subsection (a) of section 304 reenacts and preserves the renewal provision, now in section 24 of the statute, for all of the works presently in their first 28-year term. A great many of the present expectancies in these cases are the subject of existing contracts, and it would be unfair and immensely confusing to cut off or alter these interests. Renewal registration will be required during the 28th year of the copyright but the length of the renewal term will be increased from 28 to 47 years.

Although the bill preserves the language of the present renewal provision without any change in substance, the Committee intends that the reference to a "posthumous work" in this section has the meaning given to it in *Bartok v. Boosey & Hawkes, Inc. , 523 F.2d 941 (2d Cir. 1975)*--one as to which no copyright assignment or other contract for exploitation of the work has occurred during an author's lifetime, rather than one which is simply first published after the author's death.

*Copyrights in their renewal term*

Renewed copyrights that are subsisting in their second term at any time during the period between December 31, 1976, and December 31, 1977, inclusive, would be extended under section 304(b) to run for a total of 75 years. This provision would add another 19 years to the duration of any renewed copyright whose second term started during the 28 years immediately preceding the effective date of the act (January 1, 1978). In addition, it would extend by varying

lesser amounts the duration of renewal copyrights already extended under Public Laws 87-668, 89-142, 90-141, 90-416, 91-147, 91-555, 92-170, 92-566, and 93-573, all of which would otherwise expire on December 31, 1976. The subsection would also extend the duration of renewal copyrights whose second 28-year term is scheduled to expire during 1977. In none of these cases, however, would the total terms of copyright for the work be longer than 75 years.

**[140]** Subsection (b) also covers the special situation of a subsisting first-term copyright that becomes eligible for renewal registration during the year before the act comes into effect. If a renewal registration is not made before the effective date, the case is governed by the provisions of section 304(a). If a renewal registration is made during the year before the new law takes effect, however, the copyright would be treated as if it were already subsisting in its second term and would be extended to the full period of 75 years without the need for further renewal.

*Termination of grants covering extended term*

An issue underlying the 19-year extension of renewal terms under both subsections (a) and (b) of section 304 is whether, in a case where their rights have already been transferred, the author or the dependents of the author should be given a chance to benefit from the extended term. The arguments for granting rights of termination are even more persuasive under section 304 than they are under section 203; the extended term represents a completely new property right, and there are strong reasons for giving the author, who is the fundamental beneficiary of copyright under the Constitution, an opportunity to share in it.

Subsection (c) of section 304 is a close but not exact counterpart of section 203. In the case of either a first-term or renewal copyright already subsisting when the new statute becomes effective, any grant of rights covering the renewal copyright in the work, executed before the effective date, may be terminated under conditions and limitations similar to those provided in section 203. Except for transfers and licenses covering renewal copyrights already extended under Public Laws 87-668, 89-142, 90-141, 90-146, 91-147, 91-555, 92-170, 92-566, and 93-573, which would become subject to termination immediately upon the coming into effect of the revised law, the 5-year period during which termination could be made effective would start 56 years after copyright was originally secured.

The bill distinguishes between the persons who can terminate a grant under section 203 and those entitled to terminate a grant covering an extended term under section 304. Instead of being limited to transfers and licenses executed by the author, the right of termination under section 304(c) also extends to grants executed by those beneficiaries of the author who can claim renewal under the present law: his or her widow or widower, children, executors, or next of kin.

There is good reason for this difference. Under section 203, an author's widow or widower and children are given rights of termination if the author is dead, but these rights apply only to grants by the author, and any effort by a widow, widower, or child to transfer contingent future interests under a termination would be ineffective. In contrast, under the present renewal provisions, any statutory beneficiary of the author can make a valid transfer or license of future renewal rights, which is completely binding if the author is dead and **[141]** the person who executed the grant turns out to be the proper renewal claimant. Because of this, a great many contingent transfers of future renewal rights have been obtained from widows, widowers, children, and next of kin, and a substantial number of these will be binding. After the present 28-year renewal period has ended, a statutory beneficiary who has signed a disadvantageous grant of this sort should have the opportunity to reclaim the extended term.

As explained above in connection with section 203, the bill adopts the principle that, where a transfer or license by the author is involved, termination may be effected by a per stirpes majority of those entitled to terminate, and this principle also applies to the ownership of rights under a termination and to the making of further grants of reverted rights. In general, this principle has also been adopted with respect to the termination of rights under an extended renewal copyright in section 304, but with several differences made necessary by the differences between the legal status of transfers and licenses made after the effective date of the new law (governed by section 203) and that of grants of renewal rights made earlier and governed by section 304(c). The following are the most important distinctions between the termination rights under the two sections:

*1. Joint authorship*.--Under section 304, a grant of renewal rights executed by joint authors during the first term of copyright would be effective only as to those who were living at the time of renewal; where any of them are dead, their statutory beneficiaries are entitled to claim the renewal independently as a new estate. It would therefore be inappropriate to impose a requirement of majority action with respect to transfers executed by two or more joint authors.

*2. Grants not executed by author*.--Section 304(c) adopts the majority principle underlying the amendments of section 203 with respect to the termination rights of a dead author's widow or widower and children. There is much less reason, as a matter of policy, to apply this principle in the case of transfers and licenses of renewal rights executed under the present law by the author's widow, widower, children, executors, or next of kin, and the practical arguments against doing so are conclusive. It is not clear how the shares of a class of renewal beneficiaries are to be divided under the existing law, and greater difficulties would be presented if any attempt were made to apply the majority principle to further beneficiaries in cases where one or more of the renewal beneficiaries are dead. Therefore, where the grant was executed by a person or persons other than the author, termination can be affected only by the unanimous action of the survivors of those who executed it.

*3. Further grants*.--The reason against adopting a principle of majority action with respect to the right to terminate grants by joint authors and grants not executed by the author apply equally with respect to the right to make further grants under section 304(c). The requirement for majority action in clause (6)(C) is therefore confined to cases where the rights under a grant by the author have reverted to his or her widow or widower, or children, or both. Where the extended term reverts to joint authors or to a class of renewal beneficiaries who have joined in executing a grant, their rights would be governed by the general rules of tenancy in common; each coowner **[142]** would have an independent right to sell his share, or to use or license the work subject to an accounting.

Nothing contained in this section or elsewhere in this legislation is intended to extend the duration of any license, transfer, or assignment made for a period of less than fifty-six years. If, for example, an agreement provides an earlier termination date or lesser duration, or if it allows the author the right of cancelling or terminating the agreement under certain circumstances, the duration is governed by the agreement. Likewise, nothing in this section or legislation is intended to change the existing state of the law of contracts concerning the circumstances in which an author may terminate a license, transfer or assignment.

Section 304(c)(6)(E) provides that, unless and until termination is effected under this section, the grant, "if it does not provide otherwise," continues for the term of copyright. This section means that, if the agreement does not contain provisions specifying its term or duration, and the author has not terminated the agreement under this section, the agreement continues for the term of the copyright, subject to any right of termination under circumstances which may be specified therein. If, however, an agreement does contain provisions governing its duration--for example, a term of sixty years--and the author has not exercised his or her right of termination under the statute, the agreement will continue according to its terms--in this example, for only sixty years. The quoted language is not to be construed as requiring agreements to reserve the right of termination.

SECTION 305. YEAR END EXPIRATION OF TERMS

Under section 305, which has its counterpart in the laws of most foreign countries, the term of copyright protection for a work extends through December 31 of the year in which the term would otherwise have expired. This will make the duration of copyright much easier to compute, since it will be enough to determine the year, rather than the exact date, of the event from which the term is based.

Section 305 applies only to "terms of copyright provided by sections 302 through 304," which are the sections dealing with duration of copyright. If therefore has no effect on the other time periods specified in the bill; and, since they do not involve "terms of copyright," the periods provided in section 304(c) with respect to termination of grants are not affected by section 305.

The terminal date section would change the duration of subsisting copyrights under section 304 by extending the total terms of protection under subsections (a) and (b) to the end of the 75th year from the date copyright was secured. A copyright subsisting in its first term on the effective date of the act would run through December 31 of the 28th year and would then expire unless renewed. Since all copyright terms under the bill expire on December 31, and since section 304(a) requires that renewal be made "within one year prior to the expiration of the original term of copyright," the period for renewal registration in all cases will run from December 31 through December 31.

A special situation arises with respect to subsisting copyrights whose first 28-year term expires during the first year after the act comes into effect. As already explained in connection with section 304(9), if a renewal registration for a copyright of this sort is made be-**[143]**fore the effective date, the total term is extended to 75 years without the need for a further renewal registration. But, if renewal has not yet been made when the act becomes effective, the period for renewal registration may in some cases be extended. If, as the bill provides, the act becomes effective on January 1, 1978, a copyright that was originally secured on September 1, 1950, could have been renewed by virtue of the present

statute between September 1, 1977, and December 31, 1977; if not, it can still be renewed under section 304(a) of the new act between January 1, 1978, and December 31, 1978.

SECTION 401. NOTICE ON VISUALLY-PERCEPTIBLE COPIES

A requirement that the public be given formal notice of every work in which copyright is claimed was a part of the first U.S. copyright statute enacted in 1790, and since 1802 our copyright laws have always provided that the published copies of copyrighted works must bear a specified notice as a condition of protection. Under the present law the copyright notice serves four principal functions:

(1) It has the effect of placing in the public domain a substantial body of published material that no one is interested in copyrighting;

(2) It informs the public as to whether a particular work is copyrighted;

(3) It identifies the copyright owner; and

(4) It shows the date of publication.

Ranged against these values of a notice requirement are its burdens and unfairness to copyright owners. One of the strongest arguments for revision of the present statute has been the need to avoid the arbitrary and unjust forfeitures now resulting from unintentional or relatively unimportant omissions or errors in the copyright notice. It has been contended that the disadvantages of the notice requirement outweigh its values and that it should therefore be eliminated or substantially liberalized.

The fundamental principle underlying the notice provisions of the bill is that the copyright notice has real values which should be preserved, and that this should be done by inducing use of notice without causing outright forfeiture for errors or omissions. Subject to certain safeguards for innocent infringers, protection would not be lost by the complete omission of copyright notice from large numbers of copies or from a whole edition, if registration for the work is made before or within 5 years after publication. Errors in the name or date in the notice could be corrected without forfeiture of copyright.

Sections 401 and 402 set out the basic notice requirements of the bill, the former dealing with "copies from which the work can be visually perceived," and the latter covering "phonorecords" of a "sound recording." The notice requirements established by these parallel provisions apply only when copies or phonorecords of the work are "publicly distributed." No copyright notice would be required in connection with the public display of a copy by any means, including projectors, television, or cathode ray tubes connected with information storage and retrieval systems, or in connection with the public performance of a work by means of copies or phonorecords, whether in the presence of an audience or through television, radio, computer transmission, or any other process.

**[144]** It should be noted that, under the definition of "publication" in section 101, there would no longer be any basis for holding, as a few court decisions have done in the past, that the public display of a work of art under some conditions (e.g., without restriction against its reproduction) would constitute publication of the work. And, as indicated above, the public display of a work of art would not require that a copyright notice be placed on the copy displayed.

Subsections (a) of both section 401 and section 402 require that a notice be used whenever the work "is published in the United States or elsewhere by authority of the copyright owner." The phrase "or elsewhere," which does not appear in the present law, makes the notice requirements applicable to copies or phonorecords distributed to the public anywhere in the world, regardless of where and when the work was first published. The values of notice are fully applicable to foreign editions of works copyrighted in the United States, especially with the increased flow of intellectual materials across national boundaries, and the gains in the use of notice on editions published abroad under the Universal Copyright Convention should not be wiped out. The consequences of omissions or mistakes with respect to the notice are far less serious under the bill than under the present law, and section 405(a) makes doubly clear that a copyright owner may guard himself against errors or omissions by others if he makes use of the prescribed notice an express condition of his publishing licenses.

Subsection (b) of section 401, which sets out the form of notice to appear on visually-perceptible copies, retains the basic elements of the notice under the present law: the word "Copyright", the abbreviation "Copr.", or the symbol "(c)"; the year of first publication; and the name of the copyright owner. The year of publication, which is still significant in computing the term and determining the status of a work, is required for all categories of copyrightable works. Clause (2) of subsection (b) makes clear that, in the case of a derivative work or compilation, it is not necessary to list the dates

of publication of all preexisting material incorporated in the work; however, as noted below in connection with section 409, the application for registration covering a compilation or derivative work must identify "any preexisting work or works that it is based on or incorporates." Clause (3) establishes that a recognizable abbreviation or a generally known alternative designation may be used instead of the full name of the copyright owner.

By providing simply that the notice "shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright," subsection (c) follows the flexible approach of the Universal Copyright Convention. The further provision empowering the Register of Copyrights to set forth in regulations a list of examples of "specific methods of affixation and positions of the notice on various types of works that will satisfy this requirement" will offer substantial guidance and avoid a good deal of uncertainty. A notice placed or affixed in accordance with the regulations would clearly meet the requirements but, since the Register's specifications are not to "be considered exhaustive," a notice placed or affixed in some other way might also comply with the law if it were found to "give reasonable notice" of the copyright claim.

[145] SECTION 402. NOTICE ON PHONORECORDS OF SOUND RECORDINGS

A special notice requirement, applicable only to the subject matter of sound recordings, is established by section 402. Since the bill protects sound recordings as separate works, independent of protection for any literary or musical works embodied in them, there would be a likelihood of confusion if the same notice requirements applied to sound recordings and to the works they incorporate. Like the present law, therefore, section 402 thus sets forth requirements for a notice to appear on the "phonorecords" of "sound recordings" that are different from the notice requirements established by section 401 for the "copies" of all other types of copyrightable works. Since "phonorecords" are not "copies," there is no need to place a section 401 notice on "phonorecords" to protect the literary or musical works embodied in the records.

In general, the form of the notice specified by section 402(b) consists of the symbol "e"; the year of first publication of the sound recording; and the name of the copyright owner or an admissible variant. Where the record producer's name appears on the record label, album, sleeve, jacket, or other container, it will be considered a part of the notice if no other name appears in conjunction with it. Under subsection (c), the notice for a copyrighted sound recording may be affived [sic] to the surface, label, or container of the phonorecord "in such manner and location as to give reasonable notice of the claim of copyright."

There are at least three reasons for prescribing use of the symbol "e" rather than "(c)" in the notice to appear on phonorecords of sound recordings. Aside from the need to avoid confusion between claims to copyright in the sound recording and in the musical or literary work embodied in it, there is also a necessity for distinguishing between copyright claims in the sound recording and in the printed text or art work appearing on the record label, album cover, liner notes, et cetera. The symbol "e" has also been adopted as the international symbol for the protection of sound recordings by the "Phonograms Convention" (the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, done at Geneva October 29, 1971), to which the United States is a party.

SECTION 403. NOTICE FOR PUBLICATIONS INCORPORATING UNITED STATES WORKS

Section 403 is aimed at a publishing practice that, while technically justified under the present law, has been the object of considerable criticism. In cases where a Government work is published or republished commercially, it has frequently been the practice to add some "new matter" in the form of an introduction, editing, illustrations, etc., and to include a general copyright notice in the name of the commercial publisher. This in no way suggests to the public that the bulk of the work is uncopyrightable and therefore free for use.

To make the notice meaningful rather than misleading, section 403 requires that, when the copies or phonorecords consist "preponderantly of one or more works of the United States Government," the copyright notice (if any) identify those parts of the work in which **[146]** copyright is claimed. A failure to meet this requirement would be treated as an omission of the notice, subject to the provisions of section 405.

SECTION 404. NOTICE FOR CONTRIBUTIONS TO COLLECTIVE WORKS

In conjunction with the provisions of section 201(c), section 404 deals with a troublesome problem under the present law: the notice requirements applicable to contributions published in periodicals and other collective works. The basic approach of the section is threefold:

(1) To permit but not require a separate contribution to bear its own notice;

(2) To make a single notice, covering the collective work as a whole, sufficient to satisfy the notice requirement for the separate contributions it contains, even if they have been previously published or their ownership is different, and

(3) To protect the interests of an innocent infringer of copyright in a contribution that does not bear its own notice, who has dealt in good faith with the person named in the notice covering the collective work as a whole.

As a general rule, under this section, the rights in an individual contribution to a collective work would not be affected by the lack of a separate copyright notice, as long as the collective work as a whole bears a notice. One exception to this rule would apply to "advertisements inserted on behalf of persons other than the owner of copyright in the collective work." Collective works, notably newspapers and magazines, are major advertising media, and it is common for the same advertisement to be published in a number of different periodicals. The general copyright notice in a particular issue would not ordinarily protect the advertisements inserted in it, and relatively little advertising matter today is published with a separate copyright notice. The exception in section 404(a), under which separate notices would be required for most advertisements published in collective works, would impose no undue burdens on copyright owners and is justified by the special circumstances.

Under section 404(b) a separate contribution that does not bear its own notice, and that is published in a collective work with a general notice containing the name of someone other than the copyright owner of the contribution, is treated as if it has been published with the wrong name in the notice. The case is governed by section 406(a), which means that an innocent infringer who in good faith took a license from the person named in the general notice would be shielded from liability to some extent.

SECTION 405. OMISSION OF COPYRIGHT NOTICE

*Effect of omission on copyright protection*

The provisions of section 405(a) make clear that the notice requirements of section 401, 402, and 403 are not absolute and that, unlike the law now in effect, the outright omission of a copyright notice does not automatically forfeit protection and throw the work into the public domain. This not only represents a major change in the theoretical framework of American copyright law, but it also seems certain to have immediate practical consequences in a great many individual **[147]** cases. Under the proposed law a work published without any copyright notice will still be subject to statutory protection for at least 5 years, whether the omission was partial or total, unintentional or deliberate.

Under the general scheme of the bill, statutory copyright protection is secured automatically when a work is created, and is not lost when the work is published, even if the copyright notice is omitted entirely. Subsection (a) of section 405 provides that omission of notice, whether intentional or unintentional, does not invalidate the copyright if either of two conditions is met:

(1) if "no more than a relatively small number" of copies or phonorecords have been publicly distributed without notice; or

(2) if registration for the work has already been made, or is made within 5 years after the publication without notice, and a reasonable effort is made to add notice to copies or phonorecords publicly distributed in the United States after the omission is discovered.

Thus, if notice is omitted from more than a "relatively small number" of copies or phonorecords, copyright is not lost immediately, but the work will go into the public domain if no effort is made to correct the error or if the work is not registered within 5 years.

Section 405(a) takes a middle-ground approach in an effort to encourage use of a copyright notice without causing unfair and unjustifiable forfeitures on technical grounds. Clause (1) provides that, as long as the omission is from "no more than a relatively small number of copies or phonorecords," there is no effect upon the copyright owner's rights except in the case of an innocent infringement covered by section 405(b); there is no need for registration or for efforts to correct the error if this clause is applicable. The phrase "relatively small number" is intended to be less restrictive than the phrase "a particular copy or copies" now in section 21 of the present law.

Under clause (2) of subsection (a), the first condition for curing an omission from a larger number of copies is that registration be made before the end of 5 years from the defective publication. This registration may have been made

before the omission took place or before the work had been published in any form and, since the reasons for the omission have no bearing on the validity of copyright, there would be no need for the application to refer to them. Some time limit for registration is essential and the 5-year period is reasonable and consistent with the period provided in section 410(c).

The second condition established by clause (2) is that the copyright owner make a "reasonable effort," after discovering the error, to add the notice to copies or phonorecords distributed thereafter. This condition is specifically limited to copies or phonorecords publicly distributed in the United States, since it would be burdensome and impractical to require an American copyright owner to police the activities of foreign licensees in this situation.

The basic notice requirements set forth in sections 401(a) and 402(a) are limited to cases where a work is published "by authority of the copyright owner" and, in prescribing the effect of omission of notice, section 405(a) refers only to omission "from copies or phonorecords publicly distributed by authority of the copyright owner." The intention behind this language is that, where the copyright owner author-**[148]**ized publication of the work, the notice requirements would not be met if copies or phonorecords are publicly distributed without a notice, even if he expected a notice to be used. However, if the copyright owner authorized publication only on the express condition that all copies or phonorecords bear a prescribed notice, the provisions of section 401 or 402 and of section 405 would not apply since the publication itself would not be authorized. This principle is stated directly in section 405(a)(3).

*Effect of omission on innocent infringers*

In addition to the possibility that copyright protection will be forfeited under section 405(a)(2) if the notice is omitted, a second major inducement to use of the notice is found in subsection (b) of section 405. That provision, which limits the rights of a copyright owner against innocent infringers under certain circumstances, would be applicable whether the notice has been omitted from a large number or from a "relatively small number" of copies. The general postulates underlying the provision are that a person acting in good faith and with no reason to think otherwise should ordinarily be able to assume that a work is in the public domain if there is no notice on an authorized copy or phonorecord and that, if he relies on this assumption, he should be shielded from unreasonable liability.

Under section 405(b) an innocent infringer who acts "in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted", and who proves that he was misled by the omission, is shielded from liability for actual or statutory damages with respect to "any infringing acts committed before receiving actual notice" of registration. Thus, where the infringement is completed before actual notice has been served--as would be the usual case with respect to relatively minor infringements by teachers, librarians, journalists, and the like--liability, if any, would be limited to the profits the infringer realized from the act of infringement. On the other hand, where the infringing enterprise is one running over a period of time, the copyright owner would be able to seek an injunction against continuation of the infringement, and to obtain full monetary recovery for all infringing acts committed after he had served notice of registration. Persons who undertake major enterprises of this sort should check the Copyright Office registration records before starting, even where copies have been published without notice.

The purpose of the second sentence of subsection (b) is to give the courts broad discretion to balance the equities within the framework of section 405. Where an infringer made profits from infringing acts committed innocently before receiving notice from the copyright owner, the court may allow or withhold their recovery in light of the circumstances. The court may enjoin an infringement or may permit its continuation on condition that the copyright owner be paid a reasonable license fee.

*Removal of notice by others*

Subsection (c) of section 405 involves the situation arising when, following an authorized publication with notice, someone further down the chain of commerce removes, destroys, or obliterates the notice. The courts dealing with this problem under the present law, especially in connection with copyright notices on the selvage of textile fabrics, have generally upheld the validity of a notice that was securely attached to **[149]** the copies when they left the control of the copyright owner, even though removal of the notice at some later stage was likely. This conclusion is incorporated in subsection (c).

SECTION 406. ERROR WITH RESPECT TO NAME OR DATE IN NOTICE

In addition to cases where notice has been omitted entirely, it is common under the present law for a copyright notice to be fatally defective because the name or date has been omitted or wrongly stated. Section 406 is intended to avoid technical forfeitures in these cases, while at the same time inducing use of the correct name and date and protecting users who rely on erroneous information.

*Error in name*

Section 406(a) begins with a statement that the use of the wrong name in the notice will not affect the validity or ownership of the copyright, and then deals with situations where someone acting innocently and in good faith infringes a copyright by relying on a purported transfer or license from the person erroneously named in the notice. In such a case the innocent infringer is given a complete defense unless a search of the Copyright Office records would have shown that the owner was someone other than the person named in the notice. Use of the wrong name in the notice is no defense if, at the time infringement was begun, registration had been made in the name of the true owner, or if "a document executed by the person named in the notice and showing the ownership of the copyright had been recorded."

The situation dealt with in section 406(a) presupposes a contractual relation between the copyright owner and the person named in the notice. The copies or phonorecords bearing the defective notice have been "distributed by authority of the copyright owner" and, unless the publication can be considered unauthorized because of breach of an express condition in the contract or other reasons, the owner must be presumed to have acquiesced in the use of the wrong name. If the person named in the notice grants a license for use of the work in good faith or under a misapprehension, that person should not be liable as a copyright infringer, but the last sentence of section 406(a) would make the person named in the notice liable to account to the copyright owner for "all receipts, from transfers or licenses purportedly made under the copyright" by that person.

*Error in date*

The familiar problems of antedated and postdated notices are dealt with in subsection (b) of section 406. In the case of an antedated notice, where the year in the notice is earlier than the year of first publication, the bill adopts the established judicial principle that any statutory term measured from the year of publication will be computed from the year given in the notice. This provision would apply not only to the copyright terms of anonymous works, pseudonymous works, and works made for hire under section 302(c), but also to the presumptive periods set forth in section 302(e).

As for postdated notices, subsection (b) provides that, where the year in the notice is more than one year later than the year of first publication the case is treated as if the notice had been omitted and is governed by section 405. Notices postdated by one year are quite common on works published near the end of a year, and it would be unnecessarily strict to equate cases of that sort with works published without notice of any sort.

**[150]** *Omission of name or date*

Section 406(c) provides that, if the copies or phonorecords "contain no name or no date that could reasonably be considered a part of the notice," the result is the same as if the notice had been omitted entirely, and section 405 controls. Unlike the present law, the bill contains no provision requiring the elements of the copyright notice to "accompany" each other, and under section 406(c) a name or date that could reasonably be read with the other elements may satisfy the requirements even if somewhat separated from them. Direct contiguity or juxtaposition of the elements is no longer necessary; but if the elements are too widely separated for their relation to be apparent, or if uncertainty is created by the presence of other names or dates, the case would have to be treated as if the name or date, and hence the notice itself had been omitted altogether.

SECTION 407. DEPOSIT FOR THE LIBRARY OF CONGRESS

The provisions of sections 407 through 411 of the bill mark another departure from the present law. Under the 1909 statute, deposit of copies for the collections of the Library of Congress and deposit of copies for purposes of copyright registration have been treated as the same thing. The bill's basic approach is to regard deposit and registration as separate though closely related: deposit of copies or phonorecords for the Library of Congress is mandatory, but exceptions can be made for material the Library neither needs nor wants; copyright registration is not generally

mandatory, but is a condition of certain remedies for copyright infringement. Deposit for the Library of Congress can be, and in the bulk of cases undoubtedly will be, combined with copyright registration.

The basic requirement of the deposit provision, section 407, is that within 3 months after a work has been published with notice of copyright in the United States, the "owner of copyright or of the exclusive right of publication" must deposit two copies or phonorecords of the work in the Copyright Office. The Register of Copyrights is authorized to exempt any category of material from the deposit requirements. Where the category is not exempted and deposit is not made, the Register may demand it; failure to comply would be penalized by a fine.

Under the present law deposits for the Library of Congress must be combined with copyright registration, and failure to comply with a formal demand for deposit and registration results in complete loss of copyright. Under section 407 of the bill, the deposit requirements can be satisfied without ever making registration, and subsection (a) makes clear that deposit "is not a condition of copyright protection." A realistic fine, coupled with the increased inducements for voluntary registration and deposit under other sections of the bill, seems likely to produce a more effective deposit system than the present one. The bill's approach will also avoid the danger that, under a divisible copyright, one copyright owner's rights could be destroyed by another owner's failure to deposit.

**[151]** Although the basic deposit requirements are limited to works "published with notice of copyright in the United States," they would become applicable as soon as a work first published abroad is published in this country through the distribution of copies or phonorecords that are either imported or are part of an American edition. With respect to all types of works other than sound recordings, the basic obligation is to deposit "two complete copies of the best edition"; the term "best edition," as defined in section 101, makes clear that the Library of Congress is entitled to receive copies of phonorecords from the edition it believes best suits its needs regardless of the quantity or quality of other U.S. editions that may also have been published before the time of deposit. Once the deposit requirements for a particular work have been satisfied under section 407, however, the Library cannot claim deposit of future editions unless they represent newly copyrightable works under section 103.

The deposit requirement for sound recordings includes "two complete phonorecords of the best edition" and any other visually-perceptible material published with the phonorecords. The reference here is to the text or pictorial matter appearing on record sleeves and album covers or embodied in separate leaflets or booklets included in a sleeve, album, or other container. The required deposit in the case of a sound recording would extend to the entire "package" and not just to the disk, tape, or other phonorecord included as part of it.

Deposits under section 407, although made in the Copyright Office, are "for the use or disposition of the Library of Congress." Thus, the fundamental criteria governing regulations issued under section 407(c), which allows exemptions from the deposit requirements for certain categories of works, would be the needs and wants of the Library. The purpose of this provision is to make the deposit requirements as flexible as possible, so that there will be no obligation to make deposits where it serves no purpose, so that only one copy or phonorecord may be deposited where two are not needed, and so that reasonable adjustments can be made to meet practical needs in special cases. The regulations, in establishing special categories for these purposes, would necessarily balance the value of the copies or phonorecords to the collections of the Library of Congress against the burdens and costs to the copyright owner of providing them.

The Committee adopted an amendment to subsection (c) of section 407, aimed at meeting the concerns expressed by representatives of various artists' groups concerning the deposit of expensive art works and graphics published in limited editions. Under the present law, optional deposit of photographs is permitted for various classes of works, but not for fine prints, and this has resulted in many artists choosing to forfeit copyright protection rather than bear the expense of depositing "two copies of the best edition." To avoid this unfair result, the last sentence of subsection (c) would require the Register to issue regulations under which such works would either be exempted entirely from the mandatory deposit or would be subject to an appropriate alternative form of deposit.

If, within three months after the Register of Copyright has made a formal demand for deposit in accordance with section 407(d), the person on whom the demand was made has not complied, that person becomes liable to a fine up to $ 250 for each work, plus the "total retail price of the copies or phonorecords demanded." If no retail price has been fixed, clause (2) of subsection (d) establishes the additional amount as "the reasonable cost to the Library of Congress of acquiring them." Thus, where the copies or phonorecords are not available for sale through normal trade channels--as would be true of many motion picture films, video tapes, and computer tapes, for example--the item of cost to be included in the fine would be equal to the basic expense of duplicating the copies or phonorecords plus a reasonable amount representing what it would have cost the Library to obtain them under its normal acquisition procedures, if they had been available.

**[152]** There have been cases under the present law in which the mandatory deposit provisions have been deliberately and repeatedly ignored, presumably on the assumption that the Library is unlikely to enforce them. In addition to the penalties provided in the current bill, the last clause of subsection (d) would add a fine of $ 2,500 for willful or repeated failure or refusal to deposit upon demand.

The Committee also amended section 407 by adding a new subsection (e), with conforming amendments of sections 407(a) and 408(b). These amendments are intended to provide a basis for the Library of Congress to acquire, as a part of the copyright deposit system, copies or recordings of non-syndicated radio and television programs, without imposing any hardships on broadcasters. Under subsection (e) the Library is authorized to tape programs off the air in all cases and may "demand" that the broadcaster supply the Library with a copy or phonorecord of a particular program. However, this "demand" authority is extremely limited: (1) The broadcaster is not required to retain any recording of a program after it has been transmitted unless a demand has already been received; (2) the demand would cover only a particular program; "blanket" demands would not be permitted; (3) the broadcaster would have the option of supplying the demand by gift, by loan for purposes of reproduction, or by sale at cost; and (4) the penalty for willful failure or refusal to comply with a demand is limited to the cost of reproducing and supplying the copy or phonorecord in question.

SECTION 408. COPYRIGHT REGISTRATION IN GENERAL

*Permissive registration*

Under section 408(a), registration of a claim to copyright in any work, whether published or unpublished, can be made voluntarily by "the owner of copyright or of any exclusive right in the work" at any time during the copyright term. The claim may be registered in the Copyright Office by depositing the copies, phonorecords, or other material specified by subsection (b) and (c), together with an application and fee. Except where, under section 405(a), registration is made to preserve a copyright that would otherwise be invalidated because of omission of the notice, registration is not a condition of copyright protection.

*Deposit for purpose of copyright registration*

In general, and subject to various exceptions, the material to be deposited for copyright registration consists of one complete copy or phonorecord of an unpublished work, and two complete copies or **[153]** phonorecords of the best edition in the case of a published work. Section 408(b) provides special deposit requirements in the case of a work first published abroad ("one complete copy or phonorecord as so published") and in the case of a contribution to a collective work ("one complete copy or phonorecord of the best edition of the collective work"). As a general rule the deposit of more than a tear sheet or similar fraction of a collective work is needed to identify the contribution properly and to show the form in which it was published. Where appropriate as in the case of collective works such as multivolume encyclopedias, multipart newspaper editions, and works that are rare or out of print, the regulations issused [sic] by the Register under section 408(c) can be expected to make exceptions or special provisions.

With respect to works published in the United States, a single deposit could be used to satisfy the deposit requirements of section 407 and the registration requirements of section 408, if the application and fee for registration are submitted at the same time and are accompanied by "any additional identifying material" required by regulations. To serve this dual purpose the deposit and registration would have to be made simultaneously; if a deposit under section 407 had already been made, an additional deposit would be required under section 408. In addition, since deposit for the Library of Congress and registration of a claim to copyright serve essentially different functions, section 408(b) authorizes the Register of Copyrights to issue regulations under which deposit of additional material, needed for identification of the work in which copyright is claimed, could be required in certain cases.

*Administrative classification*

It is important that the statutory provisions setting forth the subject matter of copyright be kept entirely separate from any classification of copyrightable works for practical administrative purposes. Section 408(c)(1) thus leaves it to the Register of copyrights to specify "the administrative classes into which works are to be placed for purposes of deposit and registration," and makes clear that this administrative classification "has no significance with respect to the subject matter of copyright or the exclusive rights provided by this title."

*Optional deposit*

Consistent with the principle of administrative flexibility underlying all of the deposit and registration provisions, subsection (c) of section 408 also gives the Register latitude in adjusting the type of material deposited to the needs of the registration system. The Register is authorized to issue regulations specifying "the nature of the copies or phonorecords to be deposited in the various classes" and, for particular classes, to require or permit deposit of identifying material rather than copies or phonorecords, deposit of one copy or phonorecord rather than two, or, in the case of a group of related works, a single rather than a number of separate registrations. Under this provision the Register could, where appropriate, permit deposit of phonorecords rather than notated copies of musical compositions, allow or require deposit of print-outs of computer programs under certain circumstances, or permit deposit of one volume of an encyclopedia for purposes of registration of a single contribution.

**[154]** Where the copies or phonorecords are bulky, unwieldy, easily broken, or otherwise impractical to file and retain as records identifying the work registered, the Register would be able to require or permit the substitute deposit of material that would better serve the purpose of identification. Cases of this sort might include, for example, billboard posters, toys and dolls, ceramics and glassware, costume jewelry, and a wide range of three-dimensional objects embodying copyrighted material. The Register's authority would also extend to rare or extremely valuable copies which would be burdensome or impossible to deposit. Deposit of one copy or phonorecord rather than two would probably be justifiable in the case of most motion pictures, and in any case where the Library of Congress has no need for the deposit and its only purpose is identification.

The provision empowering the Register to allow a number of related works to be registered together as a group represents a needed and important liberalization of the law now in effect. At present the requirement for separate registrations where related works or parts of a work are published separately has created administrative problems and has resulted in unnecessary burdens and expenses on authors and other copyright owners. In a number of cases the technical necessity for separate applications and fees has caused copyright owners to forego copyright altogether. Examples of cases where these undesirable and unnecessary results could be avoided by allowing a single registration include the various editions or issues of a daily newspaper, a work published in serial installments, a group of related jewelry designs, a group of photographs by one photographer, a series of greeting cards related to each other in some way, or a group of poems by a single author.

*Single registration*

Section 408(c)(2) directs the Register of Copyrights to establish regulations permitting under certain conditions a single registration for a group of works by the same individual author, all first published as contributions to periodicals, including newspapers, within a twelve-month period, on the basis of a single deposit, application, and registration fee. It is required that each of the works as first published have a separate copyright notice, and that the name of the owner of copyright in the work, (or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner) is the same in each notice. It is further required that the deposit consist of one copy of the entire issue of the periodical, or of the entire section in the case of a newspaper, in which each contribution is first published. Finally, the application shall identify each work separately, including the periodical containing it and its date of first publication.

Section 408(c)(3) provides under certain conditions an alternative to the separate renewal registrations of subsection (a). If the specified conditions are met, a single renewal registration may be made for a group of works by the same individual author, all first published as contributions to periodicals, including newspapers, upon the filing of a single application and fee. It is required that the renewal claimant or claimants, and the basic [sic] of claim or claims under section 304(a), is the same for each of the works; that the works were all copyrighted upon their first publication, either through separate copyright notice and registration or by virtue of a general copyright notice in the periodical issue as a whole; that the renewal application and fee are received not more than twenty-eight or less than twenty-seven years after December 31 of the calendar year in which all of the works were first published; and that the renewal application identifies each work separately, including the periodical containing it and its date of first publication.

**[155]** *Corrections and amplifications*

Another unsatisfactory aspect of the present law is the lack of any provision for correcting or amplifying the information given in a completed registration. Subsection (d) of section 408 would remedy this by authorizing the Register to establish "formal procedures for the filing of an application for supplementary registration," in order to correct an error or amplify the information in a copyright registration. The "error" to be corrected under subsection (d) is an error by the applicant that the Copyright Office could not have been expected to note during its examination of the claim; where the error in a registration is the result of the Copyright Office's own mistake or oversight, the Office can make the correction on its own initiative and without recourse to the "supplementary registration" procedure.

Under subsection (d), a supplementary registration is subject to payment of a separate fee and would be maintained as an independent record, separate and apart from the record of the earlier registration it is intended to supplement. However, it would be required to identify clearly "the registration to be corrected or amplified" so that the two registrations could be tied together by appropriate means in the Copyright Office records. The original registration would not be expunged or cancelled; as stated in the subsection: "The information contained in a supplementary registration augments but does not supersede that contained in the earlier registration."

*Published edition of previously registered work*

The present statute requires that, where a work is registered in unpublished form, it must be registered again when it is published, whether or not the published edition contains any new copyrightable material. Under the bill there would be no need to make a second registration for the published edition unless it contains sufficient added material to be considered a "derivative work" or "compilation" under section 103.

On the other hand, there will be a number of cases where the copyright owner, although not required to do so, would like to have registration made for the published edition of the work, especially since the owner will still be obliged to deposit copies or phonorecords of it in the Copyright Office under section 407. From the point of view of the public there are advantages in allowing the owner to do so, since registration for the published edition will put on record the facts about the work in the form in which it is actually distributed to the public. Accordingly, section 408(e), which is intended to accomplish this result, makes an exception to the general rule against allowing more than one registration for the same work.

SECTION 409. APPLICATION FOR REGISTRATION

The various clauses of section 409, which specify the information to be included in an application for copyright registration, are intended **[156]** to give the Register of Copyrights authority to elicit all of the information needed to examine the application and to make a meaningful record of registration. The list of enumerated items was not exhaustive; under the last clause of the section the application may also include "any other information regarded by the Register of Copyrights as bearing upon the preparation or identification of the work or the existence, ownership, or duration of the copyright."

Among the enumerated items there are several that are not now included in the Copyright Office's application forms, but will become significant under the life-plus-50 term and other provisions of the bill. Clause (5), reflecting the increased importance of the interrelationship between registration of copyright claims and recordation of transfers of ownership, requires a statement of how a claimant who is not the author acquired ownership of the copyright. Clause (9) requires that, "in the case of a compilation or derivative work" the application include "an identification of any preexisting work or works that it is based on or incorporates, and a brief, general statement of the additional material covered by the copyright claim being registered." It is intended that, under this requirement, the application covering a collection such as a song-book or hymnal would clearly reveal any works in the collection that are in the public domain, and the copyright status of all other previously-published compositions. This information will be readily available in the Copyright Office.

The catch-all clause at the end of the section will enable the Register to obtain more specialized information, such as that bearing on whether the work contains material that is a "work of the United States Government." In the case of works subject to the manufacturing requirement, the application must also include information about the manufacture of the copies.

SECTION 410. REGISTRATION OF CLAIM AND ISSUANCE OF CERTIFICATE

The first two subsections of section 410 set forth the two basic duties of the Register of Copyrights with respect to copyright registration: (1) to register the claim and issue a certificate if the Register determines that "the material

deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met," and (2) to refuse registration and notify the applicant if the Register determines that "the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason."

Subsection (c) deals with the probative effect of a certificate of registration issued by the Register under subsection (a). Under its provisions, a certificate is required to be given prima facie weight in any judicial proceedings if the registration it covers was made "before or within five years after first publication of the work"; thereafter the court is given discretion to decide what evidentiary weight the certificate should be accorded. This five-year period is based on a recognition that the longer the lapse of time between publication and registration the less likely to be reliable are the facts stated in the certificate.

Under section 410(c), a certificate is to "constitute prima facie evidence of the validity of the copyright and of the facts stated in **[157]** the certificate." The principle that a certificate represents prima facie evidence of copyright validity has been established in a long line of court decisions, and it is a sound one. It is true that, unlike a patent claim, a claim to copyright is not examined for basic validity before a certificate is issued. On the other hand, endowing a copyright claimant who has obtained a certificate with a rebuttable presumption of the validity of the copyright does not deprive the defendant in an infringement suit of any rights; it merely orders the burdens of proof. The plaintiff should not ordinarily be forced in the first instance to prove all of the multitude of facts that underline the validity of the copyright unless the defendant, by effectively challenging them, shifts the burden of doing so to the plaintiff.

Section 410(d), which is in accord with the present practice of the Copyright Office, makes the effective date of registration the day when an application, deposit, and fee "which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration" have all been received. Where the three necessary elements are received at different times the date of receipt of the last of them is controlling, regardless of when the Copyright Office acts on the claim. The provision not only takes account of the inevitable timelag between receipt of the application and other material and the issuance of the certificate, but it also recognizes the possibility that a court might later find the Register wrong in refusing registration.

SECTION 411. REGISTRATION AS PREREQUISITE TO INFRINGEMENT SUIT

The first sentence of section 411(a) restates the present statutory requirement that registration must be made before a suit for copyright infringement is instituted. Under the bill, as under the law now in effect, a copyright owner who has not registered his claim can have a valid cause of action against someone who has infringed his copyright, but he cannot enforce his rights in the courts until he has made registration.

The second and third sentences of section 411(a) would alter the present law as interpreted in *Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co. , 260 F.2d 637 (2d Cir. 1958).* That case requires an applicant, who has sought registration and has been refused, to bring an action against the Register of Copyrights to compel the issuance of a certificate, before suit can be brought against an infringer. Under section 411, a rejected claimant who has properly applied for registration may maintain an infringement suit if notice of it is served on the Register of Copyrights. The Register is authorized, through not required, to enter the suit within 60 days; the Register would be a party on the issue of registrability only, and a failure by the Register to join the action would "not deprive the court of jurisdiction to determine that issue."

Section 411(b) is intended to deal with the special situation presented by works that are being transmitted "live" at the same time they are being fixed in tangible form for the first time. Under certain circumstances, where the infringer has been given advance notice, an injunction could be obtained to prevent the unauthorized use of the material included in the "live" transmission.

[158] SECTION 412. REGISTRATION AS PREREQUISITE TO CERTAIN REMEDIES

The need for section 412 arises from two basic changes the bill will make in the present law.

(1) Copyright registration for published works, which is useful and important to users and the public at large, would no longer be compulsory, and should therefore be induced in some practical way.

(2) The great body of unpublished works now protected at common law would automatically be brought under copyright and given statutory protection. The remedies for infringement presently available at common law should continue to apply to these works under the statute, but they should not be given special statutory remedies unless the owner has, by registration, made a public record of his copyright claim.

Under the general scheme of the bill, a copyright owner whose work has been infringed before registration would be entitled to the remedies ordinarily available in infringement cases: an injunction on terms the court considers fair, and his actual damages plus any applicable profits not used as a measure of damages. However, section 412 would deny any award of the special or "extraordinary" remedies of statutory damages or attorney's fees where infringement of copyright in an unpublished work began before registration or where, in the case of a published work, infringement commenced after publication and before registration (unless registration has been made within a grace period of three months after publication). These provisions would be applicable to works of foreign and domestic origin alike.

In providing that statutory damages and attorney's fees are not recoverable for infringement of unpublished, unregistered works, clause (1) of section 412 in no way narrows the remedies available under the present law. With respect to published works, clause (2) would generally deny an award of those two special remedies where infringement takes place before registration. As an exception, however, the clause provides a grace period of three months after publication during which registration can be made without loss of remedies; full remedies could be recovered for any infringement begun during the three months after publication if registration is made before that period has ended. This exception is needed to take care of newsworthy or suddenly popular works which may be infringed almost as soon as they are published, before the copyright owner has had a reasonable opportunity to register his claim.

SECTION 501. INFRINGEMENT OF COPYRIGHT

The bill, unlike the present law, contains a general statement of what constitutes infringement of copyright. Section 501(a) identifies a copyright infringer as someone who "violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118" of the bill, or who imports copies or phonorecords in violation of section 602. Under the latter section an unauthorized importation of copies or phonorecords acquired abroad is an infringement of the exclusive right of distribution under certain circumstances.

The principle of the divisibility of copyright ownership. established by section 201(d), carries with it the need in infringement actions to safeguard the rights of all copyright owners and to avoid a multiplicity of suits. Subsection (b) of section 501 enables the owner of a particular right to bring an infringement action in that owner's name alone, while at the same time insuring to the extent possible that the other owners whose rights may be affected are notified and given a chance to join the action.

**[159]** The first sentence of subsection (b) empowers the "legal or beneficial owner of an exclusive right" to bring suit for "any infringement of that particular right committed while he or she is the owner of it." A "beneficial owner" for this purpose would include, for example, an author who had parted with legal title to the copyright in exchange for percentage royalties based on sales or license fees.

The second and third sentences of section 501(b), which supplement the provisions of the Federal Rules of Civil Procedure, give the courts discretion to require the plaintiff to serve notice of the plaintiff's suit on "any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright"; where a person's interest "is likely to be affected by a decision in the case" a court order requiring service of notice is mandatory. As under the Federal rules, the court has discretion to require joinder of "any person having or claiming an interest in the copyright"; but, if any such person wishes to become a party, the court must permit that person's intervention.

In addition to cases involving divisibility of ownership in the same version of a work, section 501(b) is intended to allow a court to permit or compel joinder of the owners of rights in works upon which a derivative work is based.

Section 501 contains two provisions conferring standing to sue under the statute upon broadcast stations in specific situations involving secondary transmissions by cable systems. Under subsection (c), a local television broadcaster licensed to transmit a work can sue a cable system importing the same version of the work into the broadcaster's local service area in violation of section 111(c). Subsection (d) deals with cases arising under section 111(c)(3), the provision dealing with substitution or alteration by a cable system of commercials or other programming; in such cases standing to sue is also conferred on: (1) the primary transmitter whose transmission has been altered by the cable system, and (2) any broadcast stations within whose local service area the secondary transmission occurs. These provisions are linked to section 509, a new provision on remedies for alteration of programming by cable systems, discussed below.

*Vicarious liability for infringing performances*

The committee has considered and rejected an amendment to this section intended to exempt the proprietors of an establishment, such as a ballroom or night club, from liability for copyright infringement committed by an independent

contractor, such as an orchestra laeder [sic]. A well-established principle of copyright law is that a person who violates any of the exclusive rights of the copyright owner is an infringer, including persons who can be considered related or vicarious infringers. To be held a related or vicarious infringer in the case of performing rights, a defendant must either actively operate or supervise the operation of the place wherein the performances occur, or control the content of the infringing program, and expect commercial gain from the operation and either direct or indirect benefit **[160]** from the infringing performance. The committee has decided that no justification exists for changing existing law, and causing a significant erosion of the public performance right.

SECTION 502. INJUNCTIONS

Section 502(a) reasserts the discretionary power of courts to grant injunctions and restraining orders, whether "preliminary," "temporary," "interlocutory," "permanent," or "final," to prevent or stop infringements of copyright. This power is made subject to the provisions of section 1498 of title 28, dealing with infringement actions against the United States. The latter reference in section 502(a) makes it clear that the bill would not permit the granting of an injunction against an infringement for which the Federal Government is liable under section 1498.

Under subsection (b), which is the counterpart of provisions in section 112 and 113 of the present statute, a copyright owner who has obtained an injunction in one State will be able to enforce it against a defendant located anywhere else in the United States.

SECTION 503. IMPOUNDING AND DISPOSITION OF INFRINGING ARTICLES

The two subsections of section 503 deal respectively with the courts' power to impound allegedly infringing articles during the time an action is pending, and to order the destruction or other disposition of articles found to be infringing. In both cases the articles affected include "all copies or phonorecords" which are claimed or found "to have been made or used in violation of the copyright owner's exclusive rights," and also "all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies of phonorecords may be reproduced." The alternative phrase "made or used" in both subsections enables a court to deal as it sees fit with articles which, though reproduced and acquired lawfully, have been used for infringing purposes such as rentals, performances, and displays.

Articles may be impounded under subsection (a) "at any time while an action under this title is pending," thus permitting seizures of articles alleged to be infringing as soon as suit has been filed and without waiting for an injunction. The same subsection empowers the court to order impounding "on such terms as it may deem reasonable." The present Supreme Court rules with respect to seizure and impounding were issued even though there is no specific provision authorizing them in the copyright statute, and there appears no need for including a special provision on the point in the bill.

Under section 101(d) of the present statute, articles found to be infringing may be ordered to be delivered up for destruction. Section 503(b) of the bill would make this provision more flexible by giving the court discretion to order "destruction or other reasonable disposition" of the articles found to be infringing. Thus, as part of its final judgment or decree, the court could order the infringing articles sold, delivered to the plaintiff, or disposed of in some other way that would avoid needless waste and best serve the ends of justice.

[161] SECTION 504. DAMAGES AND PROFITS

*In general*

A cornerstone of the remedies sections and of the bill as a whole is section 504, the provision dealing with recovery of actual damages, profits, and statutory damages. The two basic aims of this section are reciprocal and correlative: (1) to give the courts specific unambiguous directions concerning monetary awards, thus avoiding the confusion and uncertainty that have marked the present law on the subject, and, at the same time, (2) to provide the courts with reasonable latitude to adjust recovery to the circumstances of the case, thus avoiding some of the artificial or overly technical awards resulting from the language of the existing statute.

Subsection (a) lays the groundwork for the more detailed provisions of the section by establishing the liability of a copyright infringer for either "the copyright owner's actual damages and any additional profits of the infringer," or statutory damages. Recovery of actual damages and profits under section 504(b) or of statutory damages under section 504(c) is alternative and for the copyright owner to elect; as under the present law, the plaintiff in an infringement suit is not obliged to submit proof of damages and profits and may choose to rely on the provision for minimum statutory

damages. However, there is nothing in section 504 to prevent a court from taking account of evidence concerning actual damages and profits in making an award of statutory damages within the range set out in subsection (c).

*Actual damages and profits*

In allowing the plaintiff to recover "the actual damages suffered by him or her as a result of the infringement," plus any of the infringer's profits "that are attributable to the infringement and are not taken into account in computing the actual damages," section 504(b) recognizes the different purposes served by awards of damages and profits. Damages are awarded to compensate the copyright owner for losses from the infringement, and profits are awarded to prevent the infringer from unfairly benefiting from a wrongful act. Where the defendant's profits are nothing more than a measure of the damages suffered by the copyright owner, it would be inappropriate to award damages and profits cumulatively, since in effect they amount to the same thing. However, in cases where the copyright owner has suffered damages not reflected in the infringer's profits, or where there have been profits attributable to the copyrighted work but not used as a measure of damages, subsection (b) authorizes the award of both.

The language of the subsection makes clear that only those profits "attributable to the infringement" are recoverable; where some of the defendant's profits result from the infringement and other profits are caused by different factors, it will be necessary for the court to make an apportionment. However, the burden of proof is on the defendant in these cases; in establishing profits the plaintiff need prove only "the infringer's gross revenue," and the defendant must prove not only "his or her deductible expenses" but also "the element of profit attributable to factors other than the copyrighted work."

**[162]** *Statutory damages*

Subsection (c) of section 504 makes clear that the plaintiff's election to recover statutory damages may take place at any time during the trial before the court has rendered its final judgment. The remainder of clause (1) of the subsection represents a statement of the general rates applicable to awards of statutory damages. Its principal provisions may be summarized as follows:

1. As a general rule, where the plaintiff elects to recover statutory damages, the court is obliged to award between $ 250 and $ 10,000. It can exercise discretion in awarding an amount within that range but, unless one of the exceptions provided by clause (2) is applicable, it cannot make an award of less than $ 250 or of more than $ 10,000 if the copyright owner has chosen recovery under section 504(c).

2. Although, as explained below, an award of minimum statutory damages may be multiplied if separate works and separately liable infringers are involved in the suit, a single award in the $ 250 to $ 10,000 range is to be made "for all infringements involved in the action." A single infringer of a single work is liable for a single amount between $ 250 and $ 10,000, no matter how many acts of infringement are involved in the action and regardless of whether the acts were separate, isolated, or occurred in a related series.

3. Where the suit involves infringement of more than one separate and independent work, minimum statutory damages for each work must be awarded. For example, if one defendant has infringed three copyrighted works, the copyright owner is entitled to statutory damages of at least $ 750 and may be awarded up to $ 30,000. Subsection (c)(1) makes clear, however, that, although they are regarded as independent works for other purposes, "all the parts of a compilation or derivative work constitute one work" for this purpose. Moreover, although the minimum and maximum amounts are to be multiplied where multiple "works" are involved in the suit, the same is not true with respect to multiple copyrights, multiple owners, multiple exclusive rights, or multiple registrations. This point is especially important since, under a scheme of divisible copyright, it is possible to have the rights of a number of owners of separate "copyrights" in a single "work" infringed by one act of a defendant.

4. Where the infringements of one work were committed by a single infringer acting individually, a single award of statutory damages would be made. Similarly, where the work was infringed by two or more joint tortfeasors, the bill would make them jointly and severally liable for an amount in the $ 250 to $ 10,000 range. However, where separate infringements for which two or more defendants are not jointly liable are joined in the same action, separate awards of statutory damages would be appropriate.

Clause (2) of section 504(c) provides for exceptional cases in which the maximum award of statutory damages could be raised from $ 10,000 to $ 50,000, and in which the minimum recovery could be reduced from $ 250 to $ 100.

The basic principle underlying this provision is that the courts should be given discretion to increase statutory damages in cases of willful infringement and to lower the minimum where the infringer is innocent. The language of the clause makes clear that in these situations the burden of proving willfulness rests on the copyright owner and that of proving innocence rests on the infringer, and that the court must make a finding of either willfulness or innocence in order to award the exceptional amounts.

The "innocent infringer" provision of section 504(c)(2) has been the subject of extensive discussion. The exception, which would allow reduction of minimum statutory damages to $ 100 where the infringer "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright," is sufficient to protect against unwarranted liability in cases of occasional or isolated innocent infringement, and it offers adequate insulation to users, such as broadcasters and newspaper publishers, who are particularly vulnerable to this type of infringement suit. On the other hand, by establishing a realistic floor for liability, the provision preserves its intended deterrent effect; and it would not allow an infringer to escape simply because the plaintiff failed to disprove the defendant's claim of innocence.

In addition to the general "innocent infringer" provision clause (2) deals with the special situation of teachers, librarians, archivists, and public broadcasters, and the nonprofit institutions of which they are a part. Section 504(c)(2) provides that, where such a person or institution or infringed copyrighted material in the honest belief that what they were doing constituted fair use, the court is precluded from awarding any statutory damages. It is intended that, in cases involving this provision, the burden of proof with respect to the defendant's good faith should rest on the plaintiff.

[163] SECTIONS 505 THROUGH 509. MISCELLANEOUS PROVISIONS ON INFRINGEMENT AND REMEDIES

The remaining sections of chapter 5 of the bill deal with costs and attorneys' fees, criminal offenses, the statute of limitations, notification of copyright actions, and remedies for alteration of programming by cable systems.

Under section 505 the awarding of costs and attorney's fees are left to the court's discretion, and the section also makes clear that neither costs nor attorney's fees can be awarded to or against "the United States or an officer thereof."

Four types of criminal offenses actionable under the bill are listed in section 506: willful infringement for profit, fraudulent use of a copyright notice, fraudulent removal of notice, and false representation in connection with a copyright application. The maximum fine on conviction has been increased to $ 10,000 and, in conformity with the general pattern of the Criminal Code (18 U.S.C.), no minimum fines have been provided. In addition to or instead of a fine, conviction for criminal infringement under section 506(a) can carry with it a sentence of imprisonment of up to one year. Section 506(b) deals with seizure, forfeiture, and destruction of material involved in cases of criminal infringement.

Section 506(a) contains a special provision applying to any person who infringes willfully and for purposes of commercial advantage the copyright in a sound recording or a motion picture. For the first such offense a person shall be fined not more than $ 25,000 or imprisoned for not more than one year, or both. For any subsequent offense a person shall be fined not more than $ 50,000 or imprisoned not more than two years, or both.

**[164]** Section 507, which is substantially identical with section 115 of the present law, establishes a three-year statute of limitations for both criminal proceedings and civil actions. The language of this section, which was adopted by the act of September 7, 1957 (71 Stat. 633), represents a reconciliation of views, and has therefore been left unaltered. Section 508, which corresponds to some extent with a provision in the patent law *(35 U.S.C. 290),* is intended to establish a method for notifying the Copyright Office and the public of the filing and disposition of copyright cases. The clerks of the Federal courts are to notify the Copyright Office of the filing of any copyright actions and of their final disposition, and the Copyright Office is to make these notifications as part of its public records.

Section 509(b) specifies a new discretionary remedy for alteration of programming by cable systems in violation of section 111(c)(3): the court in such cases may decree that, "for a period not to exceed thirty days, the cable system shall be deprived of the benefit of a compulsory license for one or more distant signals carried by such cable system." The term "distant signals" in this provision is intended to have a meaning consistent with the definition of "distant signal equivalent" in section 111.

Under section 509(a), four types of plaintiffs are entitled to bring an action in cases of alteration of programming by cable systems in violation of section 111(c)(3). For regular copyright owners and local broadcaster-licensees, the full battery of remedies for infringement would be available. The two new classes of potential plaintiffs under section

501(d)--the distant-signal transmitter and other local stations--would be limited to the following remedies: (i) discretionary injunctions; (ii) discretionary costs and attorney's fees; (iii) any actual damages the plaintiff can prove were attributable to the act of altering program content; and (iv) the new discretionary remedy of suspension of compulsory licensing.

SECTION 601. MANUFACTURING REQUIREMENT

*The requirement in general*

A chronic problem in efforts to revise the copyright statute for the past 85 years has been the need to reconcile the interests of the American printing industry with those of authors and other copyright owners. The scope and impact of the "manufacturing clause," which came into the copyright law as a compromise in 1891, have been gradually narrowed by successive amendments.

Under the present statute, with many exceptions and qualifications, a book or periodical in the English language must be manufactured in the United States in order to receive full copyright protection. Failure to comply with any of the complicated requirements can result in complete loss of protection. Today the main effects of the manufacturing requirements are on works by American authors.

The first and most important question here is whether the manufacturing requirement should be retained in the statute in any form. Beginning in 1965, serious efforts at compromising the issue were made by various interests aimed at substantially narrowing the scope of the requirement, and these efforts produced the version of section 601 adopted by the Senate when it passed S.22.

**[165]** The principal arguments for elimination of the manufacturing requirement can be summarized as follows:

1. The manufacturing clause originated as a response to a historical situation that no longer exists. Its requirements have gradually been relaxed over the years, and the results of the 1954 amendment, which partially eliminated it, have borne out predictions of positive economic benefits for all concerned, including printers, printing trades union members, and the public.

2. The provision places unjustified burdens on the author, who is treated as a hostage. It hurts the author most where it benefits the manufacturer least: in cases where the author must publish abroad or not at all. It unfairly discriminates between American authors and other authors, and between authors of books and authors of other works.

3. The manufacturing clause violates the basic principle that an author's rights should not be dependent on the circumstances of manufacture. Complete repeal would substantially reduce friction with foreign authors and publishers, increase opportunities for American authors to have their works published, encourage international publishing ventures, and eliminate the tangle of procedural requirements now burdening authors, publishers, the Copyright Office, and the United States Customs Service.

4. Studies prove that the economic fears of the printing industry and union are unfounded. The vast bulk of American titles are completely manufactured in the United States, and U.S. exports of printed matter are much greater than imports. The American book manufacturing industry is healthy and growing, to the extent that it cannot keep pace with its orders. There are increasing advantages to domestic manufacture because of improved technology, and because of the delays, inconveniences, and other disadvantages of foreign manufacture. Even with repeal, foreign manufacturing would be confined to small editions and scholarly works, some of which could not be published otherwise.

The following were the principal arguments in favor of retaining some kind of manufacturing restriction.

1. The historical reasons for the manufacturing clause were valid originally and still are. It is unrealistic to speak of this as a "free trade" issue or of tariffs as offering any solution, since book tariffs have been removed entirely under the Florence Agreement. The manufacturing requirement remains a reasonable and justifiable condition to the granting of a monopoly. There is no problem of international comity, since only works by American authors are affected by section 601. Foreign countries have many kinds of import barriers, currency controls, and similar restrictive devices comparable to a manufacturing requirement.

2. The differentials between U.S. and foreign wage rates in book production are extremely broad and are not diminishing; Congress should not create a condition whereby work can be done under the most degraded working conditions in the world, be given free entry, and thus exclude American manufacturers from the market. The

manufacturing clause has been responsible for a strong and enduring industry. Repeal could destroy small businesses, bring chaos to the **[166]** industry, and catch manufacturers, whose labor costs and break-even points are extremely high, in a cost-price squeeze at a time when expenditures for new equipment have reduced profits to a minimum.

3. The high ratio of exports to imports could change very quickly without a manufacturing requirement. Repeal would add to the balance-of-payments deficit since foreign publishers never manufacture here. The U.S. publishing industry has large investments abroad, and attacks on the manufacturing clause by foreign publishers, show a keen anticipation for new business. The book publishers' arguments that repeal would have no real economic impact are contradicted by their arguments that the manufacturing requirement is stifling scholarship and crippling publishing; their own figures show a 250 percent rise in English-language book imports in 10 years.

After carefully weighing these arguments, the Committee concludes that there is no justification on principle for a manufacturing requirement in the copyright statute, and although there may have been some economic justification for it at one time, that justification no longer exists. While it is true that section 601 represents a substantial liberalization and that it would remove many of the inequities of the present manufacturing requirement, the real issue is whether retention of a provision of this sort in a copyright law can continue to be justified. The Committee believes it cannot.

The Committee recognizes that immediate repeal of the manufacturing requirement might have damaging effects in some segments of the U.S. printing industry. It has therefore amended section 601 to retain the liberalized requirement through the end of 1980, but to repeal it definitively as of January 1, 1981. It also adopted an amendment further ameliorating the effect of this temporary legislation on individual American authors.

In view of this decision, the detailed discussion of section 601 that follows will cease to be of significance after 1980.

*Works subject to the manufacturing requirement*

The scope of the manufacturing requirement, as set out in subsections (a) and (b) of section 601, is considerably more limited than that of present law. The requirements apply to "a work consisting preponderantly of nondramatic literary material that is in the English language and is protected under this title," and would thus not extend to: dramatic, musical, pictorial, or graphic works; foreign-language, bilingual, or multilingual works; public domain material; or works consisting preponderantly of material that is not subject to the manufacturing requirement.

The term "literary material" does not connote any criterion of literary merit or qualitative value; it includes catalogs, directories and "similar materials."

A work containing "nondramatic literary material that is in the English language and is protected under this title," and also containing dramatic, musical, pictorial, graphic, foreign-language, public domain, or other material that is not subject to the manufacturing requirement, or any combination of these, is not considered to consist "preponderantly" of the copyright-protected nondramatic English-language literary material unless such material exceeds the exempted material in importance. Thus, where the literary material in a work consists merely of a foreword or preface, and captions, headings, or **[167]** brief descriptions or explanations of pictorial, graphic or other non-literary material, the manufacturing requirement does not apply to the work in whole or in part. In such case, the non-literary material clearly exceeds the literary material in importance, and the entire work is free of the manufacturing requirement.

On the other hand, if the copyright-protected non-dramatic English-language literary material in the work exceeds the other material in importance, then the manufacturing requirement applies. For example, a work containing pictorial, graphic, or other non-literary material is subject to the manufacturing requirement if the non-literary material merely illustrates a textual narrative or exposition, regardless of the relative amount of space occupied by each kind of material. In such a case, the narrative or exposition comprising the literary material plainly exceeds in importance the non-literary material in the work. However, even though such a work is subject to the manufacturing requirement, only the portions consisting of copyrighted nondramatic literary material in English are required to be manufactured in the United States or Canada. The illustrations may be manufactured elsewhere without affecting their copyright status.

Under section 601(b)(1) works by American nationals domiciled abroad for at least a year would be exempted. The manufacturing requirement would generally apply only to works by American authors domiciled here, and then only if none of the co-authors of the work are foreign.

In order to make clear the application of the foreign-author exemption to "works made for hire"--of which the employer or other person for whom the work was prepared is considered the "author" for copyright purposes--section 601(b)(1) provides that the exemption does not apply unless a substantial part of the work was prepared for an employer or other person who is not a national or domiciliary of the United States, or a domestic corporation or enterprise. The reference to "a domestic corporation or enterprise" is intended to include a subsidiary formed by the domestic corporation or enterprise primarily for the purpose of obtaining the exemption.

The provision adopts a proposal put forward by various segments of both the United States and the Canadian printing industries, recommending an exemption for copies manufactured in Canada. Since wage standards in Canada are substantially comparable to those in the United States, the arguments for equal treatment under the manufacturing clause are persuasive.

*Limitations on importation and distribution of copies manufactured abroad*

The basic purpose of the temporary manufacturing requirements of section 601, like that of the present manufacturing clause, is to induce the manufacture of an edition in the United States if more than a certain limited number of copies are to be distributed in this country. Subsection (a) therefore provides in general that "the importation into or public distribution in the United States" of copies not complying with the manufacturing clause is prohibited. Subsection (b) then sets out the exceptions to this prohibition, and clause (2) of that subsection fixes the importation limit at 2,000 copies.

Additional exceptions to the copies affected by the manufacturing requirements are set out in clauses (3) through (7) of subsection (b). **[168]** Clause (3) permits importation of copies for governmental use, other than in schools, by the United States or by "any State or political subdivision of a State." Clause (4) allows importation for personal use of "no more than one copy of any work at any one time," and also exempts copies in the baggage of persons arriving from abroad and copies intended for the library collection of nonprofit scholarly, educational, or religious organizations. Braille copies are completely exempted under clause (5), and clause (6) permits the public distribution in the United States of copies allowed entry by the other clauses of that subsection. Clause (7) is a new exception, covering cases in which an individual American author has, through choice or necessity, arranged for publication of his work by a foreign rather than a domestic publisher.

*What constitutes "manufacture in the United States" or Canada*

A difficult problem in the manufacturing clause controversy involves the restrictions to be imposed on foreign typesetting or composition. Under what they regard as a loophole in the present law, a number of publishers have for years been having their manuscripts set in type abroad, importing "reproduction proofs," and then printing their books from offset plates "by lithographic process *** wholly performed in the United States." The language of the statute on this point is ambiguous and, although the publishers' practice has received some support from the Copyright Office, there is a question as to whether or not it violates the manufacturing requirements.

In general the book publishers have opposed any definition of domestic manufacture that would close the "repro proof" loophole or that would interfere with their use of new techniques of book production, including use of imported computer tapes for composition here. This problem was the focal point of a compromise agreement between representatives of the book publishers and authors on the one side and of typographical firms and printing trades unions on the other, and the bill embodies this compromise as a reasonable solution to the problem.

Under subsection (c) the manufacturing requirement is confined to the following processes: (1) Typesetting and platemaking, "where the copies are printed directly from type that has been set, or directly from plates made from such type"; (2) the making of plates, "where the making of plates by a lithographic or photoengraving process is a final or intermediate step preceding the printing of the copies"; and (3) in all cases, the "printing or other final process of producing multiple copies and any binding of the copies." Under the subsection there would be nothing to prevent the importation of reproduction proofs, however they were prepared, as long as the plates from which the copies are printed are made here and are not themselves imported. Similarly, the importation of computer tapes from which plates can be prepared here would be permitted. However, regardless of the process involved, the actual duplication of multiple copies, together with any binding, are required to be done in the United States or Canada.

*Effect of noncompliance with manufacturing requirement*

Subsection (d) of section 601 makes clear that compliance with the manufacturing requirements no longer constitutes a condition of copyright with respect to reproduction and the distribution of copies. The **[169]** bill does away with the special "ad interim" time limits and registration requirements of the present law and, even if copies are imported or distributed in violation of the section, there would be no effect on the copyright owner's right to make and distribute phonorecords of the work, to make derivative works including dramatizations and motion pictures, and to perform or display the work publicly. Even the rights to reproduce and distribute copies are not lost in cases of violation, although they are limited as against certain infringers.

Subsection (d) provides a complete defense in any civil action or criminal proceedings for infringement of the exclusive rights of reproduction or distribution of copies where, under certain circumstances, the defendant proves violation of the manufacturing requirements. The defense is limited to infringement of the "nondramatic literary material comprised in the work and any other parts of the work in which the exclusive rights to reproduce and distribute copies are owned by the same person who owns such exclusive rights in the nondramatic literary material." This means, for example, that the owner of copyright in photographs or illustrations published in a book copyrighted by someone else who would not be deprived of rights against an infringer who proves that there had been a violation of section 601.

Section 601(d) places the full burden for proving violation on the infringer. The infringer's defense must be based on proof that: (1) copies in violation of section 601 have been imported or publicly distributed in the United States "by or with the authority" of the copyright owner; and (2) that the infringing copies complied with the manufacturing requirements; and (3) that the infringement began before an authorized edition complying with the requirements had been registered. The third of these clauses of subsection (d) means, in effect, that a copyright owner can reinstate full exclusive rights by manufacturing an edition in the United States and making registration for it.

Subsection (e) requires the plaintiff in any infringement action involving publishing rights in material subject to the manufacturing clause to identify the manufacturers of the copies in his complaint. Correspondingly, section 409 would require the manufacturers to be identified in applications for registration covering published works subject to the requirements of section 601.

SECTION 602. INFRINGING IMPORTATION

*Scope of the section*

Section 602, which has nothing to do with the manufacturing requirements of section 601, deals with two separate situations: importation of "piratical" articles (that is, copies or phonorecords made without any authorization of the copyright owner), and unauthorized importation of copies or phonorecords that were lawfully made. The general approach of section 602 is to make unauthorized importation an act of infringement in both cases, but to permit the United States Customs Service to prohibit importation only of "piratical" articles.

Section 602(a) first states the general rule that unauthorized importation is an infringement merely if the copies or phonorecords "have been acquired outside the United States", but then enumerates three specific exceptions: (1) importation under the authority or for **[170]** the use of a governmental body, but not including material for use in schools or copies of an audiovisual work imported for any purpose other than archival use; (2) importation for the private use of the importer of no more than one copy or phonorecord of a work at a time, or of articles in the personal baggage of travelers from abroad; or (3) importation by nonprofit organizations "operated for scholarly, educational, or religious purposes" of "no more than one copy of an audiovisual work solely for archival purposes, and no more than five copies or phonorecords of any other work for its library lending or archival purposes." The bill specifies that the third exception does not apply if the importation "is part of an activity consisting of systematic reproduction or distribution, engaged in by such organization in violation of the provisions of section 108(g)(2)."

If none of the three exemptions applies, any unauthorized importer of copies or phonorecords acquired abroad could be sued for damages and enjoined from making any use of them, even before any public distribution in this country has taken place.

*Importation of "piratical" copies*

Section 602(b) retains the present statute's prohibition against importation of "piratical" copies or phonorecords--those whose making "would have constituted an infringement of copyright if this title had been applicable." Thus, the Customs Service could exclude copies or phonorecords that were unlawful in the country where they were made; it

could also exclude copies or phonorecords which, although made lawfully under the domestic law of that country, would have been unlawful if the U.S. copyright law could have been applied. A typical example would be a work by an American author which is in the public domain in a foreign country because that country does not have copyright relations with the United States; the making and publication of an authorized edition would be lawful in that country, but the Customs Service could prevent the importation of any copies of that edition.

*Importation for infringing distribution*

The second situation covered by section 602 is that where the copies or phonorecords were lawfully made but their distribution in the United States would infringe the U.S. copyright owner's exclusive rights. As already said, the mere act of importation in this situation would constitute an act of infringement and could be enjoined. However, in cases of this sort it would be impracticable for the United States Customs Service to attempt to enforce the importation prohibition, and section 602(b) provides that, unless a violation of the manufacturing requirements is also involved, the Service has no authority to prevent importation, "where the copies or phonorecords were lawfully made." The subsection would authorize the establishment of a procedure under which copyright owners could arrange for the Customs Service to notify them whenever articles appearing to infringe their works are imported.

SECTION 603. ENFORCEMENT OF IMPORTATION PROHIBITIONS

The importation prohibitions of both sections 601 and 602 would be enforced under section 603, which is similar to section 109 of the statute now in effect. Subsection (a) would authorize the Secretary of **[171]** the Treasury and the United States Postal Service to make regulations for this purpose, and subsection (c) provides for the disposition of excluded articles.

Subsection (b) of section 603 deals only with the prohibition against importation of "piratical" copies or phonorecords, and is aimed at solving problems that have arisen under the present statute. Since the United States Customs Service is often in no position to make determinations as to whether particular articles are "piratical," section 603(b) would permit the Customs regulations to require the person seeking exclusion either to obtain a court order enjoining importation, or to furnish proof of his claim and to post bond.

SECTIONS 701 THROUGH 710. ADMINISTRATIVE PROVISIONS

Chapter 7, entitled "Copyright Office," sets forth the administrative and housekeeping provisions of the bill.

*Administrative Procedure Act*

Under an amendment to section 701 adopted by the Committee, the Copyright Office is made fully subject to the Administrative Procedure Act with one exception: under section 706(b), reproduction and distribution of copyright deposit copies would be made under the Freedom of Information Act only to the extent permitted by the Copyright Office regulations.

*Retention and disposition of deposited articles*

A recurring problem in the administration of the copyright law has been the need to reconcile the storage limitations of the Copyright Office with the continued value of deposits in identifying copyrighted works. Aside from its indisputable utility to future historians and scholars, a substantially complete collection of both published and unpublished deposits, other than those selected by the Library of Congress, would avoid the many difficulties encountered when copies needed for identification in connection with litigation or other purposes have been destroyed. The basic policy behind section 704 is that copyright deposits should be retained as long as possible, but that the Register of Copyrights and the Librarian of Congress should be empowered to dispose of them under appropriate safeguards when they decide that it has become necessary to do so.

Under subsection (a) of section 704, any copy, phonorecord, or identifying material deposited for registration, whether registered or not, becomes "the property of the United States Government." This means that the copyright owner or person who made the depodsit [sic] cannot demand its return as a matter of right, even in rejection cases, although the provisions of section 407 and 408 are flexible enough to allow for special arrangements in exceptional cases. On the other hand, Government ownership of deposited articles under section 704(a) carries with it no privileges

under the copyright itself; use of a deposited article in violation of the copyright owner's exclusive rights would be infringement.

With respect to published works, section 704(b) makes all deposits available to the Library of Congress "for its collections, or for exchanges or transfer to any other library"; where the work is unpublished, the Library is authorized to select any deposit for its own **[172]** collections or for transfer to the National Archives of the United States or to a Federal records center.

Motion picture producers have expressed some concern lest the right to transfer copies of works, such as motion pictures, that have been published under rental, lease, or loan arrangements, might lead to abuse. However, the Library of Congress has not knowingly transferred works of this sort to other libraries in the past, and there is no reason to expect it to do so in the future.

The Committee added a new subsection (c) to section 704, under which the Register is authorized to make microfilm or other record copies of copyright deposits before transferring or otherwise disposing of them.

For deposits not selected by the Library, subsection (d) provides that they, or "identifying portions or reproductions of them," are to be retained under Copyright Office control "for the longest period considered practicable and desirable" by the Register and the Librarian. When and if they ultimately decide that retention of certain deposited articles is no longer "practicable and desirable," the Register and Librarian have joint discretion to order their "destruction or other disposition." Because of the unique value and irreplaceable nature of unpublished deposits, the subsection prohibits their intentional destruction during their copyright term, unless a facsimile reproduction has been made.

Subsection (e) of section 704 establishes a new procedure under which a copyright owner can request retention of deposited material for the full term of copyright. The Register of Copyrights is authorized to issue regulations prescribing the fees for this service and the "conditions under which such requests are to be made and granted."

*Catalog of copyright entries*

Section 707(a) of the bill retains the present statute's basic requirement that the Register compile and publish catalogs of all copyright registrations at periodic intervals, but provides for "discretion to determine, on the basis of practicability and usefulness the form and frequency of publication of each particular part". This provision will in no way diminish the utility or value of the present catalogs, and the flexibility of approach, coupled with use of the new mechanical and electronic devices now becoming available, will avoid waste and result in a better product.

*Copyright Office fees*

The schedule of fees set out in section 708 reflects a general increase in the fees of the Copyright Office from those established by the Congress in 1965. The basic fees are $ 10 for registration, $ 6 for renewal registration, $ 10 for recordation of documents and $ 10 per hour for searching. The section also contains new fee provisions needed because of new requirements or services established under the bill, and subsection (a)(11) authorizes the Register to fix additional fees, on the "basis of the cost of providing the service," "for any other special services requiring a substantial amount of time or expense." Subsection (b) makes clear that, except for the possibility of waivers in "occasional or isolated cases involving relatively small amounts," the Register is to charge fees for services rendered to other Government agencies.

**[173]** *Postal interruptions*

Section 709 authorizes the Register of Copyrights to issue regulations to permit the acceptance by the Copyright Office of documents which are delivered after the close of the prescribed period if the delay was caused by a general disruption or suspension of postal or other transportation or communications services.

*Reproductions for the blind and handicapped*

Section 710 directs the Register of Copyrights to establish by regulation forms and procedures by which the copyright owners of certain categories of works may voluntarily grant to the Library of Congress a license to reproduce and distribute copies or phonorecords of the work solely for the use of the blind and physically handicapped.

CHAPTER 8. COPYRIGHT ROYALTY COMMISSION

Chapter 8 establishes a Copyright Royalty Commission for the purpose of periodically reviewing and adjusting statutory royalty rates for use of copyrighted materials pursuant to compulsory licenses provided in sections 111 (secondary transmissions by cable systems), 115 (mechanical royalties) and 116 (jukebox) of the bill. In addition, the Commission will make determinations as to reasonable terms and rates of royalty payments as provided in section 118 (public broadcasting), and to resolve disputes over the distribution of royalties paid pursuant to the statutory licenses in sections 111 and 116.

The Committee recognizes that the industries affected by the royalty rates over which the Commission has jurisdiction are very different, and it is therefore expected that any adjustment of a rate by the Commission shall be based on the economic conditions peculiar to the industries affected by that rate. Likewise, the Committee recognizes the fact that the cable television industry is a developing industry in transition, whereas the recording and jukebox industries are long-established. Therefore, the Committee has chosen periods of different lengths in which the Commission is to review the rates affecting those industries. Rates for retransmission of copyrighted works by cable television systems will be reviewed in 1980 and each subsequent fifth year. Rates established for mechanical reproduction will be reviewed in 1980, 1987, and in each subsequent 10th year. Rates for performance by jukebox will be reviewed in 1980 and in each subsequent 10th year. Rates and terms under section 118 will be reviewed in 1982 and in each subsequent fifth year. The Committee does not intend that rate changes, whether up or down, should necessarily be made as the result of such periodic reviews.

The Committee has chosen to stagger the times for review of the various rates established under the bill so as to balance the workload of the Commission. Cable and copyright owners agree to a set of standards for the adjustment of rates which the Committee in large measure has accepted. No specific standards governing the establishment or adjustment of rates by the Commission, other than rates for cable transmissions, have been detailed in the legislation, because the Committee did not wish to limit the factors that the Commission might consider in a world of constantly changing economics and technology. However, it is anticipated that the Commission will consider the following objectives in determining a reasonable rate under sections 115 and 116:

**[174]** (1) The rate should maximize the availability of diverse creative works to the public.

(2) The rate should afford the copyright owner a fair income, or if the owner is not a person, a fair profit, under existing economic conditions, in order to encourage creative activity.

(3) The rate should not jeopardize the ability of the copyright user

(a) to earn a fair income, or if the user is not a person, a fair profit, under existing economic conditions, and

(b) to charge the consumer a reasonable price for the product.

(4) The rate should reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.

(5) The rate should minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

Similar considerations are noted in connection with Commission review of rates and terms for public broadcasting in the discussion of section 118, above.

*Structure of the Copyright Royalty Commission*

The Senate bill provides that, upon certifying the existence of a controversy concerning distribution of statutory royalty fees or upon periodic petition for review of statutory royalty rates by an interested party, the Register of Copyrights, is to convene a three member panel to constitute a Copyright Royalty Tribunal for the purpose of resolving the controversy or reviewing the rates.

The Senate bill provides that the Tribunal be appointed by the Register from among the membership of the American Arbitration Association or similar organization. The Tribunal is to exist within the Library of Congress.

Due to constitutional concern over the provision of the Senate bill that the Register of Copyrights, an employee of the Legislative Branch, appoint the members of the Tribunal, the Committee adopted an amendment providing for direct appointment of three individuals by the President. The name of the Tribunal was changed to the Copyright Royalty Commission.

Although under the Committee Amendment, the Commission is to be an independent authority, it is to receive administrative support from the Library of Congress.

The Commission is authorized to appoint a staff to assist it in carrying out its responsibilities. However, it is expected that the staff will consist only of sufficient clerical personnel to provide one full time secretary for each member and one or two additional employees to meet the clerical needs of the entire Commission. Members of the Commission are expected to perform all professional responsibilities themselves, except where it is necessary to employ outside experts on a consulting basis. Assistance in matters of administration, such as payroll and budgeting, will be available from the Library of Congress.

The Committee expects that the President shall appoint members **[175]** of the Commission from among persons who have demonstrated professional competence in the field of copyright policy.

*Adjustment of Cable Television Royalty Rates*

Section 801(b)(2) authorizes the Commission to make determinations concerning the adjustment of the copyright royalty rates contained in Section 111. Such determinations are to be made solely in accordance with the provisions contained in Section 801(b)(2)(A), (B), (C), and (D). The time periods when such adjustments may be made are set forth in Section 804.

Under Section 801(b)(2)(A), the Commission may adjust the rates established in Section 111(d)(2)(B) to reflect (1) national monetary inflation or deflation, or (2) changes in the average rates charged cable subscribers for the basic service of providing secondary transmission to maintain the real constant dollar level of the royalty fee per subscriber which existed as of the date of enactment of this legislation. The purpose of this provision is to assure that the value of the royalty fees paid by cable systems is not eroded by changes in the value of the dollar or changes in average rates charged cable subscribers. The Committee recognizes, however, that no royalty fees will be paid by cable systems until the legislation is effective on January 1, 1978, and accordingly that the royalty fee per subscriber base calculated at the time of enactment must necessarily constitute an estimated value. In the Committee's view, and based on projections supplied by the interested parties, the total royalties produced under the fee schedule at the time of enactment should approximate $ 8.7 million.

In adjusting the fee the Copyright Royalty Commission is limited to changes reflecting national monetary inflation or deflation or changes in the average rates charged cable subscribers for the basic service of providing secondary transmissions. Concern was expressed during the hearings on the revision legislation that cable systems may reduce the basic charge for the retransmission of broadcast signals as an inducement for individuals to become subscribers to additional services (e.g., pay-cable). Such a shift of revenue sources would have the effect of understating basic subscriber revenues and would deny copyright owners the level of royalty fees for secondary transmission contemplated by this legislation. Accordingly, such shift of revenue sources, if they do occur, should be taken into account by the Commission in adjusting the basic rates.

There are also two limitations on the power of the Commission to adjust rates under Section 801(b)(2)(A). The first provides that no change in the rates established by Section 111(d)(2)(B) is permitted if the average rates charged cable system subscribers for the basic service of providing secondary transmissions exceeds the change in national monetary inflation. Thus, in the situation where subscriber rates during a particular adjustment period increase 20 percent but national monetary inflation increases only 10 percent no change or reduction in the rates is permitted.

The second limitation provides that no increase in the royalty fee shall be permitted based on any reduction in the average number of distant signal equivalents per subscriber. The purpose of this limitation is to make clear that if the average number of distant signals carried by a cable system is reduced in the future (and thereby **[176]** the average number of distant signal equivalents per subscriber) no increase in the royalty fee to offset this reduction is permitted. The limitation does not, however, preclude any change in the rates that may be required to maintain the real constant dollar level of royalty fees per subscriber because of national monetary inflation or deflation or changes in the average rates charged subscribers for the basic service of providing secondary transmissions.

The Commission may also consider, in its discretion, any other factor relating to the maintenance of the real constant dollar level of royalty fees per subscriber and need not increase the royalty rates to the full extent, provided it can be demonstrated that the cable industry has been restrained by subscriber rates regulating authorities from increasing the rates for the basic service of providing secondary transmissions.

*Increase in the Number of Distant Signals*

Under Section 801(b)(2)(B), the Commission may adjust the rates established in Section 111(d)(2)(B) if the rules and regulations of the FCC are amended at any time after April 15, 1976, to permit the carriage of additional distant signals. In this event the Commission may ensure that the rates for the additional distant signal equivalents resulting from such carriage are reasonable in light of the changes effected by the amendment to the FCC rules and regulations.

The purpose of this provision is to give the Commission broad discretion to reconsider the royalty rates applicable to (but only to) the carriage of any additional distant signals permitted under the rules and regulations of the FCC after April 15, 1976. The present FCC rules limiting the number of distant signals that may be carried by cable systems have the effect of protecting copyright owners by restricting the amount of television broadcast programming retransmitted into distant markets. If these rules are changed in the future to allow additional cable carriage of television programs it is the Committee's judgment that the royalty rates paid by cable systems should be adjusted to reflect such changes. At the same time, Section 801(b)(2)(B) makes clear that the royalty rates may not be adjusted with respect to (1) distant signals permitted under FCC rules and regulations in effect on April 15, 1976; (2) distant signals of the same type (i.e., independent, network or noncommercial educational) substituted for such permitted signals; or (3) distant television broadcast signals first carried after April 15, 1976, pursuant to an individual waiver of the FCC rules and regulations as such rules and regulations were in effect on April 15, 1976. Royalty adjustments with respect to any distant signal equivalent or any fraction thereof represented by the carriage of such distant signals may be made pursuant to Section 801(b)(2)(A).

In determining the reasonableness of rates under this provision, the Commission should consider, among other factors, the economic impact that such adjustment may have on copyright owners and users, including broadcast stations, and the effect of such additional distant signal equivalents, if any, on local broadcasters' ability to serve the public.

**[177]** *Change in the Syndicated and Sports Program Exclusivity Rules*

Section 801(b)(2)(C) provides that the Commission may adjust the rates established in Section 111(d)(2)(B) in the event of any change in the FCC rules and regulations with respect to syndicated and sports program exclusivity after April 15, 1976. In this event the rates may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations. Any such adjustment, however, shall only apply to the affected television broadcast signals carried on those systems affected by change. For this purpose, the Commission may exercise its discretion to adopt royalty schedules for particular classes of cable systems.

The purpose of this subclause is similar to that of Section 801(b)(2)(B). The syndicated and sports program exclusivity rules of the FCC have the effect of protecting copyright owners by restricting the cable carriage of certain distant television programming. If these rules are changed in the future to relax or increase the exclusivity restrictions, it is the Committee's judgment that the royalty rates paid by cable systems should be adjusted to reflect such changes.

*Adjustment of the Small System Royalty Fees*

Section 801(b)(2)(D) provides that the small system gross receipts limitations established in Section 111(d)(2)(C) and (D) may be adjusted to reflect national monetary inflation or deflation or changes in the average rates charged cable system subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar value of the exemptions provided therein. That is, the Commission is directed to look at these two factors to insure that systems of the same size as are now entitled to the exemptions provided for in sections 111(d)(2)(C) and (D) continue to be so entitled. For the purposes of section 111(d)(2)(C), references to the gross receipt limitations of that section mean all of the dollar amount specified therein.

*Distribution of Royalty Fees*

Section 801(b)(3) provides that the Commission is authorized to distribute the royalty fees deposited with the Register of Copyrights under Sections 111 and 116 and to determine the distribution of such fees where a controversy exists.

*Institution and Conclusion of Proceedings*

Section 804 establishes the time periods during which the Commission shall institute and conclude proceedings for the adjustment or distribution of royalty fees.

*Periodic Adjustment of Certain Rates*

Under Section 804(a), proceedings to adjust the royalty rates specified in Section 115 (mechanical royalty) and 116 (juke-box) and proceedings under Sections 801(b)(2)(A) and (D) (cable television rates for certain purposes), are instituted in the following periodic time intervals:

(1) On January 1, 1980, the Chairman of the Commission is required to publish in the Federal Register notice of the commencement of proceedings to adjust all the rates referred to in Section 804(a).

**[178]** (2) Thereafter, during the calendar years specified below, any owner or user of a copyrighted work whose royalty rates are specified in the legislation, or by a rate established by the Commission, may file a petition with the Commission declaring that the petitioner requests an adjustment of the rate. If the Commission determines that the applicant has a significant interest in the royalty rate for which adjustment is requested, the Chairman of the Commission shall cause notice to be published in the Federal Register of this determination together with notice of the commencement of proceedings to adjust the rate.

(A) In proceedings to adjust the cable television rates for certain purposes under Sections 801(b)(2)(A) and (D) such petitions may be filed during 1985 and in each subsequent fifth calendar year;

(B) In proceedings under Section 801(b)(1) to adjust the mechanical royalty rate as provided in Section 115, such petitions may be filed in 1987 and in each subsequent tenth year;

(C) In proceedings under Section 801(b)(1) to adjust the juke-box royalty rate as provided in Section 116, such petitions may be filed in 1990 and in each subsequent tenth calendar year.

*Immediate Review of Cable Television Rates for Certain Purposes*

Section 804(b) provides that following an event described in Section 801(b)(2)(B) or (C), any owner or user of a copyrighted work whose royalty rates are specified by Section 111, or by a rate established by the Commission, may, within 12 months, file a petition requesting an adjustment of the rates. In this event the Commission is required to proceed as in Section 804(a)(2). Any change in the royalty rates made by the Commission pursuant to this provision may be reconsidered in 1980, 1985, and each fifth calendar year thereafter in accordance with the provisions in Section 801(b)(2)(B) or (C).

The purpose of this provision is to reflect the Committee's concern about any change in the rules and regulations of the FCC pertaining to cable carriage of distant signals or to syndicated or sports program exclusivity. The Committee believes that if these rules and regulations are revised, amended, or changed in any manner by the FCC, any owner or user of a copyrighted work should have an immediate right, exercisable for a 12 month period following the date such changes are finally effective, to request an adjustment of the royalty rates specified in Section 111. Further, it is the Committee's intent that any change made by the Commission pursuant to such a petition may be reviewed again in 1980, 1985, and each subsequent fifth calendar year, as the case may be, and under the standards established in Section 801(b)(2)(B) and (C). It is also the Committee's intent that the ability to petition the Commission to adjust the rates pursuant to this subsection is not limited, following the first adjustment, to the subsequent five year periods specified, but may arise at any time as FCC rule changes described above take place.

**[179]** *Institution of Proceedings to Adjust Public Broadcasting Royalty Rates*

Section 804(c) provides that the institution of proceedings under Section 801(b)(1) concerning the determination of reasonable terms and rates of royalty payments as provided in Section 118 shall proceed when and as provided in that section.

*Institution of Proceedings to Distribute Royalty Fees*

Section 804(d) provides that with respect to proceedings under Section 801(b)(3) concerning the distribution of royalty fees in certain circumstances under Section 111 or 116, the Chairman of the Commission shall, upon determination by the Commission that a controversy exists concerning such distribution, publish a notice of commencement of proceedings to distribute the royalty fees in the Federal Register.

*Prompt Resolution of Proceedings*

Section 804(e) provides that all proceedings instituted by the Commission shall be initiated without delay following publication of the notices specified in this section and that the Commission is required to render a final decision in any such proceeding within one year from the date of publication of the notice.

*Judicial Review*

The Senate bill provides that, following a final determination in any proceeding with respect to royalty rates, the Copyright Royalty Tribunal is to transmit its decision to the Senate and House of Representatives for review. Within 90 days of such transmittal either House of Congress may nullify the determination of the Tribunal by adoption of a resolution expressing disapproval of such determination. Judicial review of determinations of the Royalty Tribunal under the Senate bill is permitted only where: (1) The determination was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in any of the members of the Tribunal, or (3) any member of the Tribunal was guilty of any misconduct by which the rights of any party were prejudiced.

The Committee concluded that determinations of the Copyright Royalty Commission were not appropriate subjects for regular review by Congress and that the provisions of the Senate bill providing for judicial review were far too restrictive. Therefore, it amended the Senate bill to eliminate automatic Congressional review and to broaden the scope of judicial review. The amended bill provides for the full scope of judicial review provided by Chapter 7 of the Administrative Procedure Act. Congressional review of the activities of the Copyright Royalty Commission will occur as part of the oversight functions of the Judiciary Committees of the House of Representatives and the Senate. The oversight process will provide the Congress sufficient information to determine whether statutory changes are needed at some time in the future.

The expanded judicial review provided in the Committee amendment will permit much more detailed, thoughtful, and careful review of possibly arbitrary or capricious determinations of the Commission than can be provided by Congressional review.

**[180]** TRANSITIONAL AND SUPPLEMENTARY PROVISIONS

Sec. 101 of S. 22 consists of the completely revised text of title 17 of the United States Code, containing eight chapters and 71 sections running from section 101 through section 809. Sections 102 through 115 of the bill are "transitional and supplementary" provisions which would not be a part of the new title 17.

*Effective date*

Under Sec. 102 of the transitional and supplementary provisions, the revised title 17 would come into effect on January 1, 1978, "except as otherwise expressly provided by this Act." Specific exceptions are made for the provisions of sections 118, 304(b), and *Chapter 8*, which take effect immediately upon enactment. The reference to section 304(b) is necessary to take account of the specific cases of subsisting renewal copyrights that have already been extended under Public Laws 87-668, 89-142, 90-141, 90-416, 91-147, 91-555, 92-170, 92-566, and 93-573, of renewal copyrights scheduled to expire during 1977 and of copyrights for which renewal registration is made between December 31, 1976,

and December 31, 1977. In these cases the new statute would operate, before its effective date, to extend the total duration of copyright to 75 years from the date it was secured.

*Works in the public domain*

Since there can be no protection for any work that has fallen into the public domain before January 1, 1978, Sec. 103 makes clear that lost or expired copyrights cannot be revived under the bill. The second sentence of the section, which prohibits recording rights in nondramatic musical works copyrighted before July 1, 1909, relates to the provision in the 1909 act limiting recording rights to musical works copyrighted after its effective date.

*Amendments of other statutes*

Sec. 105 contains seven subsections, each amending an existing Federal statute that refers to copyright protection. Consistent with the provisions of section 105 of revised title 17 on works of the U.S. Government, subsection (a) repeals the vestigial provision of the Printing Act dealing with the same subject. Subsection (b) amends the Federal Records Act of 1950 to preserve immunity of the General Services Administration with respect to infringement of Presidential papers that have neither been published nor registered for copyright.

Section 1498(b) of title 28 of the United States Code, the provision dealing with Government liability for copyright infringement, is amended by Sec. 105(c) to substitute the appropriate section number.

Subsection (d) would amend *section 543(a)(4) of the Internal Revenue Code*, as amended, to delete a parenthetical phrase exempting common law copyrights and copyrights in commercial prints and labels from special treatment of personal holding company income; the Treasury Department has agreed to this amendment. Subsection (e) repeals a clause of section 3202(a) of title 39 of the United States Code dealing with the free mailing privilege for copyright deposits under the present law. Subsection (f) amends a provision of the Standard Reference Data Act creating a special exception to the prohibition against copyright in works of the United Sates Government, and subsection (g) adjusts terminology in the statute governing the Library of Congress.

**[181]** *Existing compulsory licenses for mechanical reproduction of music*

As already explained in connection with section 115, the bill would preserve the general principle of a compulsory license for the mechanical reproduction of copyrighted music, but with a great many changes in specific features. Section 106 is a transitional provision dealing with the status of compulsory licenses that have already been obtained when the new law becomes effective. In general, it would permit the compulsory licensee to "continue to make and distribute such parts [i.e., phonorecords] embodying the same mechanical reproduction [i.e., sound recording] without obtaining a new compulsory license." However, any new "mechanical reproduction" would be fully subject to the provisions of section 115 and, even where the earlier sound recording is reproduced, any phonorecords made after January 1, 1978 would be subject to the provisions of the revised statute as to royalty rate, methods of payment, and consequences of default.

*Ad interim copyrights*

As an exception to the manufacturing requirements, sections 22 and 23 of the present statute provide a special procedure under which, if registration is made within 6 months after publication, a temporary or "ad interim" copyright can be secured for 5 years. The "ad interim" time limits and procedures have been dropped from the manufacturing provisions of section 601 of the bill, and Sec. 107 therefore deals with the transitional case of "any work in which ad interim copyright is subsisting or is capable of being secured on December 31, 1977." Where a work is already covered by an ad interim copyright or, having been published during the last 6 months of 1977, the work is eligible for ad interim registration on that date, its copyright protection is automatically extended to the full term provided by section 304.

*Notice in copies of previously published works*

Since the notice requirements of the new statute are different and, with respect to the year date, more inclusive that [sic] those of the present law, a transitional provision is needed to cover works first published before the effective date

of the revised law. Sec. 108 makes clear that, as a general rule, the notice provisions of the new law apply to "all copies or phonorecords publicly distributed after January 1, 1978," but adds that, in the case of a work published before that date, "compliance with the notice provisions of title 17 either as it existed on December 31, 1977, or as amended by the first section of this Act, is adequate with respect to copies publicly distributed after December 31, 1977."

*Registration and recordation with respect to subsisting copyrights*

Sec. 109 of the transitional and supplementary provisions makes clear that registration and recordation on the basis of materials received in the Copyright Office before the effective date of the new law are to be made under the present law, even though the process is completed after January 1, 1978. Where the Register of Copyrights makes a demand, either before or after the effective date of the new law, for deposit of copies published before that date, Sec. 110 provides that the demand, and the effect of noncompliance with it, will be governed by the present statute; however, any deposit, application, and fee received after December 31, 1977, in response to the demand are to be filed in accordance with revised statute.

Several provisions of the bill, including sections 205(c)(2), 205(d), 405(a)(2), 406(a)(1), 406(a)(2), 411, and 412, prescribe registration **[182]** or recordation as a prerequisite for certain purposes. Where the work involved is covered by a subsisting copyright when the new law becomes effective, it is intended that any registration or recordation made under the present law would satisfy these provisions.

*Phonograph records bearing counterfeit labels*

Sec. 111 amends section 2318 of title 18 of the United States Code, the counterfeit record label statute, to increase the criminal penalty from the current misdemeanor status. A person shall be fined not more than $ 10,000 or imprisoned not more than one year, or both, for the first offense of knowingly and with fraudulent intent causing the transportation of phonorecords bearing forged or counterfeit labels. For any subsequent offense a person shall be fined not more than $ 25,000 or imprisoned not more than 2 years, or both. The section further amends Section 2318 to provide for the forfeiture and destruction of counterfeit labels.

*Applicable law*

Sec. 112 makes clear that a cause of action existing on January 1, 1977, is to be governed by the law under which it arose.

*American Television and Radio Archives*

The American Television and Radio Archive established by this bill will provide a repository for the preservation of our nation's television and radio heritage. The need for such a repository has become more pressing as the importance of television's role in American society has increased, and particularly as television news has become more heavily relied upon by Americans as an important source of news. The provisions of the bill establishing an American Television and Radio Archive attempt to ensure preservation and limited distribution (for research purposes) of this material while at the same time not causing or encouraging copyright infringement.

Under this section, the Librarian of Congress shall estblish [sic] the Archive in the Library of Congress. After consulting with interested organizations and individuals, the Librarian shall place in the Archives fixations of those television and radio programs which are of present or potential public or cultural interest, historical significance, cognitive value, or otherwise worthy of preservation. These may include copies and phonorecords of transmission programs, both published and unpublished, acquired in accordance with the provisions of sections 407 and 408 of Title 17, transferred from the existing collections of the Library of Congress; given to or exchanged with the Archive by other libraries, archives, organizations or individuals; or purchased from the owner.

The Librarian shall also maintain and publish appropriate catalogs and indexes of the collections or the Archives, and make the collections available for study and research under the conditions prescribed in this section. It is expected that in compiling its index of collected materials, and particularly in establishing an indexing system for retrieval of those news broadcasts eligible for distribution under this section, the Librarian will make use of existing indexes which may have been prepared by the owners of copyrighted news product and shall attempt to make this indexing process as

complete and accurate as possible. In any event, however, it is expected that any such index compiled by the Librarian shall be a list of items in the collections of the Library **[183]** (without summaries or other commentary), and shall not be regarded as an official determination of the appropriateness or completeness of the categories contained therein or the items contained within those categories.

The functions of the Archive in serving as a central distribution point for research uses of broadcast news products are also provided for in this section. The Librarian is authorized to reproduce transmission programs consisting of regularly scheduled newscasts or on-the-spot coverage of news events; to compile by subject matter, without abridgement or any other editing, portions of these reproductions; and to reproduce these compilations and distribute any such reproductions by loan to a person engaged in research, and for deposit in a library or archive meeting the requirements of section 108(a) of Title 17. The distribution of such reproductions shall be for use only in research and not for further reproduction or performance. By regularly scheduled newscasts and on-the-spot coverage of news events, the committee intends to conform to the substantial precedents of the Federal [sic]

The committee recognizes the difficulty of properly responding to requests for research materials under this section. The Librarian is authorized to establish standards and conditions for this process through regulation. The committee believes that these standards should indicate that no compilation undertaken by the Librarian shall be deemed for any purposes or proceeding to be an official determination of the subject matter covered by such a compilation. Further, the committee urges the Librarian to make compilations available to individual researchers under section 113(b)(3)(A) only if the researcher indicates the particular segments of news broadcasts he or she wishes to receive in compiled form, on the basis of the index prepared by the Librarian, which index would be supplied to the researcher requesting material from the Archive. Finally, the committee believes such regulations should indicate that any compilations should be in chronological order and should include enough material broadcast directly before and after the segment requested to ensure the researcher that the entire segment was included.

The proper functioning of the Archive will also depend on its ability to ensure the copyright integrity of materials it distributes for research purposes. The committee believes the Librarian, through regulation, should establish procedures which will facilitate proper use of any materials loaned for research or deposited for archival purposes in other libraries. These conditions should include provisions to implement the section's prohibition on performance or reproduction.

*Authorization and severability clause*

Sec. 114 is a general authorization provision, except that "no more than $ 500,000 shall be appropriated annually for the operations of the Copyright Royalty Commission." Sec. 115 is the familiar clause preserving the constitutionality of the remainder of the statute if any part of it is held unconstitutional.

OVERSIGHT

Oversight of the Copyright Office and the Copyright Royalty Commission is the responsibility of the Committee on the Judiciary of the Communications Commission in developing these terms. **[184]** U.S. House of Representatives. The legislation requires that the Copyright Office and the Copyright Royalty Commission shall submit reports on their activities each year to each House of Congress.

NEW BUDGET AUTHORITY

The bill creates new budget authority for the Copyright Royalty Commission within the Library of Congress. The Commission will consist of three members compensated at the rate prescribed for grade 18 of the General Schedule of Section 5332 of title 5, United States Code.

STATEMENT OF THE BUDGET COMMITTEE

No statement has been received on the bill from the House Committee on the Budget.

STATEMENT OF THE COMMITTEE ON GOVERNMENT OPERATIONS

No statement has been received on the bill from the Committee on Government Operations.

ESTIMATED COST OF THE LEGISLATION

This legislation confers a number of new duties upon the Copyright Office of the Library of Congress and creates a Copyright Royalty Commission. However, the cost of the Copyright Office's services would be recompensated either by

fees required to be paid under section 708 or by deduction of costs under sections 111 and 116. The Copyright Royalty Commission is expressly authorized to deduct the costs of its proceedings involving distribution of royalty fees under section 806. In addition, the value of copies of copyrighted works required to be deposited for the Library of Congress under the mandatory deposit provisions of section 407 and the registration provisions of section 408 will amount to several million dollars annually. Income to the U.S. Government under the bill, combining cash receipts, cost deductions, and value of deposit copies, will very substantially exceed 100 per cent of the annual cost of the legislation.

The following table illustrates the cost to the United States for the present and each of five following fiscal years:

INCREASED COST AND REVENUES

[In millions of dollars]

**[357]**

[Comparative bill print omitted]

INFLATION IMPACT STATEMENT

The bill will have no foreseeable inflationary impact on prices of costs in the operation of the national economy.

COMMITTEE VOTE

S. 22 was reported by a recorded vote with 27 members voting in favor and 1 against.

SECTION 107. FAIR USE  ADDITIONAL CONCURRING VIEWS OF HON. GEORGE E. DANIELSON

I concur in the foregoing report and state the following additional views:

The bill S. 22 which this report accompanies is an exceedingly complex bill. Among many other things it would establish new rights and liabilities in the copyright liability of cable television, a subject which until now has not been covered by legislation. The subject is somewhat controversial, largely because it is new, and I feel that it requires added discussion.

At the threshold we must be aware that we are dealing with a property right. Copyright is a property right. It is often referred to as "intellectual property". It was known and honored in the common law. It was specifically recognized by the Founding Fathers in the Constitution, and the regulation of copyright was among the powers delegated to the Congress. Article I, Section 8, clause 8.

As with more familiar forms of property, copyright can be bargained for, bought and sold, it can be the subject of a gift, it can be licensed for a specific use or period of time. It is subject to testamentary disposition and the laws of succession.

As a form of property, copyright is also afforded the protection of the Constitution and our laws, including the injunctions of the Fifth and Fourteenth Amendments which declare that no person shall be deprived of property without due process of law, nor shall private property be taken for public use without just compensation. The Constitution also provides that authors and inventors are to have the exclusive right to their respective writings and discoveries.

For more than a year and a half the Judiciary Committee has been working on the copyright revision bill which is reported to the House herewith. The most controversial, difficult and extensive part of that work has been the granting of a compulsory license and the development of a formula for the imposition and allocation of copyright royalty charges placed upon the secondary transmission by cable television systems of copyrighted programming which is broadcast by television stations.

In more familiar transactions in property there is no need for government to intervene. In the free market buyers and sellers are able to bargain for and to reach prices which are acceptable to all concerned. The same is usually true in the case of business transactions involving copyrighted properties. However, the unique character and role of cable television is such that the committee has been compelled to depart from traditional practices. The bill now reported subjects broadcasts of copyrighted programming to a compulsory license vested in cable systems which re-transmit (secondarily transmit) those broadcasts to their subscribers, it imposes a royalty charge on certain of those secondary transmissions, and provides a means for the payment and distribution of the royalty charges by the users and to the owners. **[360]** In working out this formula, the committee has arrived at a solution which, I submit, is workable and is

fair and equitable to both the owners and the users of copyrighted materials and which also protects and serves the public interest.

Over the years it has been decided, and it is now settled, that it is the "performance of a copyrighted work which gives rise to the liability to pay a royalty to the owner of the copyright." It has also been decided that the broadcast of a work by radio or television constitutes a "performance" and invokes copyright liability. The vastness and anonymity of the audience, the uncontrollable public access to programming once broadcast, the inability to identify and to impose a direct charge upon the viewers, our public policy that "the airwaves belong to the public", all of these gave rise to complex royalty problems arising out of radio and television broadcasts, but most of those problems have been resolved. The advent of cable television re-opened and compounded those problems, and added another. What is the nature of the service provided by a cable system? Is it a "performance" which invokes copyright liability? Admittedly its role is passive, for it does not control the original broadcast. It is argued that cable merely intercepts the signal which has already been broadcast and then carries it to the subscriber's television receiver. It is argued that cable is merely an extension of the viewer's antenna. But the copyright owners and the copyright licensees argue that the cable systems are distributing the broadcast signals to a vastly greater audience than the broadcaster could reach and that this constitutes a "performance" and should invoke a copyright liability.

Being compelled to work with the existing copyright law, which was enacted in 1909, before radio and television, let alone cable, the Supreme Court has had a difficult time deciding the cases and controversies involving copyright which have heretofore arisen between copyright owners, broadcasters and cable television systems. In the Fortnightly and Teleprompter cases cited in the body of this report, the Supreme Court held that the role played by cable was not that of a performer but, rather, the passive role of the viewer and as an extension of the viewer's antenna and that since this did not constitute a "performance" copyright liability was not invoked. In my opinion those were correct decisions under the facts of those cases. If the cable system does no more than intercept a broadcast signal and deliver it to the subscriber's television receiver, within the broadcasting station's local market area, then the cable system is only an extension of the viewer's antenna, should not be considered as a "performer" of the copyrighted material and no liability to pay a royalty should attach. Under such circumstances the copyright owner has been able to bargain for a royalty payment with the knowledge that the performance may be viewed and heard by all persons within the local market area. Also, the broadcast station which purchases the right to use the copyrighted material is in an excellent position to estimate the number of viewers/listeners who will witness the performance and is able to bargain for the mix of royalties which he pays and advertising rates which he charges which will meet his commercial needs.

Today cable is able to do more, and often does more, than merely to intercept a signal and deliver it to the subscriber's receiving set located within the local market area of the primary transmitter. With advances in the state of the art, cable systems are now able to transmit **[361]** signals by cable, microwave and satellite, almost without limit as to distance. They are governed, as they should be, by the Federal Communications Commission and other regulatory and franchising agencies but are restricted very little by technological limitations. Cable now can, and does, transmit signals far beyond the local market area. In the bill we refer to these as "distant signals". Admittedly they serve the public interest.

The copyright laws should not limit the extent to which cable serves the public interest. Although the Founding Fathers could not contemplate the size of the geographical distribution of the audience which can be reached by cable they certainly did not contemplate an arbitrary limitation on either of those factors. And it should be remembered that they delegated to the Congress the power to regulate copyright in order "to promote the progress of science and the useful arts".

Cable has a yet unrealized capability to broaden our horizons and to bring education, information and entertainment to people everywhere. Surely this is in the public interest and for the public benefit. The copyright laws should not be used to restrict or impair that flow of knowledge. To the extent that regulation is necessary it can be accomplished through the FCC and through state and local utility commissions and similar bodies. Such regulation is not the proper role of the copyright laws.

Remembering that copyright is a property right we must also remember that the owner cannot be deprived of his property without due process of law nor can it be taken for public use without just compensation. This is where the most difficult problems arose in working out the copyright bill. We wished to permit and encourage the broader dissemination of communications through cable while being fair and equitable to the owners and users of copyrighted materials and at the same time protecting the public interest. The committee process is now complete and the committee has presented a bill which gives cable a compulsory license to intercept and re-transmit (secondarily transmit) television

and radio broadcasts. It recognizes the passive, "antenna", role of cable in secondary transmissions within the local market area, and imposes no liability to pay copyright royalties for those "local" transmissions. The bill, however, recognizes that when cable secondarily transmits signals to a place beyond the local market area, then it is doing something extra, it is adding something which would not exist but for the role of the cable system. This something extra, which is distant signal transmitting, impinges upon the property rights of the copyright owner who is thereby, to some extent, deprived of his property and denied the exclusive right to his property which is guaranteed by the Constitution and our laws and he is entitled to just compensation. This "something extra" could be considered as a "performance", or as an alternative to a performance.

The bill which we report therefore imposes a schedule of royalty charges upon the secondary transmission of distant signals. The charges which are imposed, and the manner of their imposition, is set forth in detail in the body of the committee report; so is the method by which they are to be distributed to the copyright owners. Provision is made for future adjustments to the royalty schedules because the setting of royalties is unduly burdensome for a legislative body and should not be one of the problems of the Congress. **[362]** It may seem that a compulsory license is a drastic invasion of the rights of private property. Yet, when we remember that a cable system is passive in its program selection and must intercept and distribute whatever the primary transmitter transmits then we must recognize that it is impossible and impractical for the cable system to negotiate for a license with the copyright owner in advance of transmitting the programming. At the same time item by item negotiating between users and owners of copyright prior to each performance would be so burdensome as to destroy this valuable means of communication and would also effectively deny a valuable market to the copyright owners. Those facts have long since been recognized by copyright owners and the broadcast and entertainment industries which use such organizations as ASCAP and BMI as mediums through which they adjust their copyright liabilities and benefits.

I submit that the royalty fee schedule which the committee has agreed upon is fair and equitable to all concerned. There are those who disagree and feel that so-called "rural" cable systems are called upon to pay higher fees than "urban" cable systems.

It has been asserted that cable systems in non-metropolitan areas bear the burden of royalty payments while urban systems will pay minimal fees. I respectfully disagree with this point of view.

Under the fee schedule proposed in this bill all systems with up to $ 160,000 in revenue semi-annually ($ 320,000 annually) will pay under a sliding scale based on revenue, not on the number of distant signals carried. This small system adjustment was enacted specifically to avoid excessive impact on small, rural systems. These systems, because they are located in areas without adequate local service, import a large number of distant signals. Payment based solely on the number of distant signals would be onerous. Thus, the "adjustment".

Under the formula in this bill, systems with revenue over $ 320,000 per year will pay royalties based on the number and type of distant signals. Distant independent stations count as one full distant signal while distant network stations count as one-fourth of one distant signal. Among other reasons, this significantly lower cost for network stations was instituted to avoid undue burden on those larger rural systems carrying a great many distant networks. Due to the relative scarcity of independent stations, carriage of networks by rural systems usually greatly overshadows the carriage of independents.

Under current FCC regulations, urban cable systems are authorized to import a maximum of three distant independent signals. Some cable operators have argued that this limitation effectively diminishes the copyright burden on major market systems. It is vitally important to note that payment is based on both number and type of signal. Because independent signals each count as one full distant signal, an urban system will pay for three full distant signals. Rural systems will generally carry network stations, being able to carry 12 distant network signals (an unrealistic and unlikely situation) before bearing the same liability as an urban system.

It has been suggested that all signals imported from markets less than 150 miles distant should be considered local for purposes of fee determination. This change in definition would affect only those systems with annual revenue over $ 160,000 semi-annually ($ 320,000 annual revenue) and therefore paying on the basis of distant signal carriage **[363]** rather than the amount of revenue. The 150 mile local definition would cause several problems:

One hundred and fifty miles is considerably beyond any currently accepted or established market definition. For example, under this definition Washington, D.C., signals would be "local" (and therefore not liable for copyright) through most of southeastern Pennsylvania. Likewise, New York City would be considered local throughout much of that state.

Cable systems which are not located within 150 miles of an urban area (systems in many parts of the country) would bear an undue burden For example, the majority of systems in Pennsylvania are located so that they are within 150 miles of either Philadelphia, New York, Washington, D.C., Baltimore or Pittsburgh. In other areas of the country, without such a proliferation of urban centers, signals are simply not available within 150 miles.

By decreasing (for many systems) the number of signals considered distant and thus liable for copyright, the total amount of dollars paid into the copyright royalty "pot" would be greatly decreased. In order to keep the "pot" at the proposed $ 8.5 million, the payment burden would have to be shifted to those systems not fortunate enough to be located within 150 miles of the primary transmitter. In such cases systems located beyond 150 miles would incur a larger copyright burden.

The same arguments which apply to the suggestion that 150 miles be considered the cut off point between distant and local signals also apply to the suggestion that distant signals be considered as those which cannot be received "off the air." To include as "local signals" those receivable off the air by direct interception of a free space radio wave would permit signals received from over 100 miles distance using a 1000 foot antenna to be considered "local signals" even though such places are clearly beyond the local market area of the primary transmitter.

The distinction between local and distant signals as used in the Committee bill draws heavily on the FCC's experience in defining what should be considered local signals.

Local signals are signals received within the geographical market area to which a broadcaster directs his programming and which serves as the basis for his advertising revenues. When a copyright owner sells his work to a given broadcaster, he must assume that the work will be viewed within that broadcaster's local market area and the royalty which he charges will be based upon that assumption. However, neither he nor the broadcaster can control the retransmission of his work by a cable system to a distance area which would ordinarily constitute a separate market for his work. For this reason, the Committee has provided compensation to the copyright owner for signals retransmitted (secondarily transmitted) beyond the local market area.

To define the term "local signals" by accepting either the 150 mile proposal or the concept that any signal which can be received off the air by an antenna mounted atop a high tower would be purely arbitrary. It would be inconsistent with commercial practice in the broadcast and advertising industries. It would deny fair compensation to copyright owners, and would place an unfair financial burden on cable systems located distant from urban areas. For this reason, the Com-**[364]**mittee has provided compensation to the copyright owner for signals retransmitted (secondary transmission) beyond the local market area.

This bill goes a long way toward completing the revision of the copyright laws, but some work remains to be done. In particular, the Committee should go forward to complete its study and possibly to report legislation on the subject of performers' rights. Also, the new but imminent problems which will inevitably stem from the secondary transmission of electronic communications across national boundaries by cable, microwave and satellite must be anticipated and provided for in the very near future, --they are nearly upon us. The subject of design patents received some consideration during the hearings but was eliminated from the final bill since there was not sufficient time to review the subject fully. In addition, design patent would probably be more suited for inclusion in other legislation rather than in a copyright revision bill.

GEORGE E. DANIELSON.

**[365]**

VIEWS OF HON. JOSHUA EILBERG IN DISSENT TO COPYRIGHT LEGISLATION, SENATE 22, REPORTED FROM HOUSE JUDICIARY COMMITTEE, AUGUST 27, 1976

INTRODUCTION

Recognizing the complexity of the subject of copyright revision and the long and careful labor of the Subcommittee on Courts, Civil Liberties and the Administration of Justice and its Chairman, Robert Kastenmeier of Wisconsin, I respectfully feel constrained, notwithstanding, to register my dissent to the provisions of Senate 22 governing cable television copyright royalty payments.

The Committee bill, Senate 22, in the nature of a substitute, acts to approve major changes in the Nations's 67 year-old copyright law, which originated in 1909 prior to the development of radio, television, and cable television. The

Senate already has passed its version of this copyright revision legislation which now has been pending before the Congress for more than a decade.

My vote was the only dissenting voice in the full House Judiciary Committee's 27-1 vote because of my opposition to the bill's cable television provisions.

Sections 111, 501, and 801 of S. 22, in the nature of a substitute, have as their purpose:

(1) The imposition of a copyright royalty fee on the cable antenna function;

(2) Authorizing a Copyright Royalty Commission to make adjustments in the rates (percentages) provided in Section 111 (d)(2)(B) to reflect monetary inflation or deflation or changes in the average rates charged subscribers to maintain the real constant dollar level of the fee per subscriber; and

(3) Treating a television station as a beneficial owner, if an infringement of a work he is licensed to transmit occurs in his local service area, giving standing to sue to a primary transmitter (any broadcast station) whose transmission is altered and giving *any* broadcast station (AM, FM, TV) within whose local service area the secondary transmission occurs standing to sue.

**I**

I cannot concur in the cable television provisions of this bill which are discriminatory against the non-metropolitan areas with fewer television stations and in favor of the large metropolitan areas which have the benefit of the diversity of network and independent television stations and programs.

I see no excuse with today's technology to impose higher copyright fees on communities because of the accident of their location and the difficulties of securing satisfactory television reception from existing television stations, nor can I concur in a bill which discriminates **[366]** among the public solely on the basis of the kind of television reception device used (a master antenna of a CATV system or a conventional rooftop individual antenna).

The basic concept of this proposed legislation is to impose copyright liability only for the privilege of receiving and for the reception of "distant" signals. This concept implements the fundamental proposition that no copyright liability should attach for the reception and secondary transmission of "local" signals. Accordingly, every cable television system would pay a percentage of its gross revenue from basic cable television services as a copyright fee.

However, as most Members will agree, once the payment for the privilege of receiving "distant" signals is accepted by cable television, the issue becomes then which signals are distant and what will be paid by a cable television system receiving and re-transmitting those signals to its subscribers.

"Local" signals, under the Federal Communications Commission's Rules, have four different meanings depending on the size of the television market or local of the CATV system outside all television markets. These various definitions have no relationship to actual reception of signals directly off-the-air.

It is also worthy of note that the definitions of stations which are entitled to have their signals transmitted have been changed by the Federal Communications Commission from time to time and will almost certainly be changed again; whereas the Commission's definition as of April 15, 1976 governs under the bill.

Further, it is well established that in many areas of the country many more television signals are available directly off-the-air than the "local" signals as defined by the FCC rules. Thus, it is clear that the Commission's Rules on "local", or "must carry," signals are not based on signals that can be received directly off-the-air but rather are designed for communications policy and other administrative goals.

These goals concern such matters as the exclusivity or nonduplication of signals in accordance with priorities assigned according to signal strength. The adoption in this bill of the FCC definition in defining "local service area of a primary transmitter" is arbitrary; it does not take into account what signals actually may be received directly off-the-air; and consequently ought not to be incorporated in this legislation.

The conversion of the FCC Rules permitting television stations to insist on carriage into a definition of a local service area of a primary transmitter will result in signals receivable off-the-air being arbitrarily treated as distant signals, with copyright liability contrary to the stated concept of the bill.

Further, the greatest impact for copyright payment would seem to fall on the very systems which were developed to provide satisfactory television reception service. They will pay three to four times the.00675 charge and as high as 3 percent for so-called distant signals which are locally available and received directly off-the-air.

In my judgment, this bill should more realistically define a local and distant signal solely on the basis of whether it may be received directly off-the-air. Definitions and language similar to that used in treating the foreign broadcast stations in Section 111(c)(4) in terms of a distance limitation of 150 miles or of the "direct interception of a free **[367]** space radio wave emitted" appear appropriate for the definition of a local signal.

Cable television and related technology can provide the means for equalizing the television reception opportunity for all viewers. This capability corrects the limitation of the electronic spectrum to provide a minimum choice of signals for all citizens on an equal basis by whatever means reception is secured. Copyright owners have greatly increased their earnings, because of wide dissemination made possible by television, and pay nothing for the benefits conferred upon them by the use of the public's air waves. It is, therefore, appropriate for copyright owners equally to consider the interests of the television viewing public as consumers in return.

To illustrate the scope of the differences in reception opportunity, some areas of the country today have as many as fourteen different television signals available while some areas have one receivable signal and a small area has none at all.

Since modern technology can provide it, the Congress should, as a part of the copyright royalty fee assessed for the privilege of retransmitting distant signals, include a minimum complement of signals for which the.00675 fee required is paid. Such a complement might include the three national networks, three independent, and one educational station at a minimum, however received.

A provision of this nature would avoid the current problem under this bill of the creation of second class television citizens because of copyright. Of course, this does not in any way impede the Federal Communications Commission, under present law, from granting or withholding authority for cable television systems to carry television broadcast signals. Such a provision would merely establish the price and leave the communications regulatory aspects for resolution by the appropriate committees of Congress and the Commission.

**II**

The use of a percentage of gross as the basis for cable television copyright payment rather than of a fixed sum, as was originally done for coin-operated phonorecords, was to provide a flexible return to the copyright owner tied to inflation, deflation or increased revenue of the cable television system from expanded service or increased subscriber rates.

As a result there is no need to give the Copyright Royalty Commission any jurisdiction to alter the rates (percentage) of cable television systems. If inflation occurs, the copyright owner's revenues will increase, just as they will decrease if basic subscriber revenues decline.

Using a percentage of basic subscriber revenues as the criteria of payment insures an equitable result. Likewise, if subscriber rates in crease, the copyright owner's revenues increase. Consequently, there is no reason or justification for the expense of proceedings before the Copyright Royalty Commission for adjusting cable television percentage rates.

Moreover, under the provisions of Section 801, the cable television subscriber is required to guarantee the copyright owner (via the cable television system and the Copyright Royalty Commission) protection against inflation or deflation based on today's inflated dollar or on any **[368]** increase in subscriber rates-- which have trailed behind the inflation of the past few years, particularly in Pennsylvania. Further, the Commission also is given authority to maintain the real constant dollar level of the royalty fee per subscriber.

This potentially is a most unfair situation and one which will act to require the public to protect and to subsidize the copyright owner to its own detriment.

In my judgment, Section 801(b)(2)(A) should be deleted from the bill. The Copyright Royalty Commission then should be confined to its proper and appropriate purpose, as set forth in this otherwise valuable, much-needed copyright revision legislation.

JOSHUA EILBERG.

FOOTNOTES:

[n1] Footnote *. Editor's note: Without any alteration in content, Sec. 509 of the copyright bill as reported by the House Committee became Sec. 510 in the final Copyright Act.

[n2] Footnote *. This subsection 2(a) is set forth as corrected in 122 Cong. Rec. H 10875 (daily ed. September 22, 1976) (remarks of Rep. Kastenmeier).

[n3] Footnote 1. Under Public Laws 87-668, 89-142, 90-141, 90-416, 91-147, 91-555, 92-170, 92-566, and 93-573, copyrights that were subsisting in their renewal term on September 19, 1962, and that were scheduled to expire before Dec. 31, 1976, have been extended to that later date, in anticipation that general revision legislation extending their terms still further will be enacted by then.

1. Editor's note: As corrected in 122 Cong. Rec. H 10727-8 (daily ed. Sept. 21, 1976). Original pagination is indicated in brackets[ ].