Register's Report on the General Revision of the U.S. Copyright Law (1961)

FOREWORD

This report of the Register of Copyrights is the culmination of a program of studies by the Copyright Office preparatory to a general revision of the copyright law, title 17 of the United States Code.

The report contains the tentative recommendations of the Copyright Office for revision of the law. In issuing the report the Judiciary Committee neither approves nor disapproves the recommendations. It is issued for the purpose of inviting all persons concerned to submit comments and suggestions, which will be carefully considered in the drafting of a bill for general revision of the law.

EMANUEL CELLAR,
Chairman,
Committee on the Judiciary.

JULY 10, 1961.

§ [IV] LETTER OF TRANSMITTAL

THE LIBRARIAN OF CONGRESS,
Washington, D.C., July 7, 1961.

The Hon. SAM RAYBURN,

Speaker of the House of Representatives, Washington, D.C.

SIR: As authorized by Congress, the Copyright Office of the Library of Congress has in the past few years made a number of studies preparatory to a general revision of the copyright law, title 17 of the United States Code. That program has now been completed. Thirty-four studies and a subject index have been published in a series of 12 committee prints issued by the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary. The studies have been widely circulated and interested persons were invited to submit their comments and views.

On the basis of the studies and the comments and views received, the Copyright Office has prepared a report on the important issues to be considered and tentative recommendations for their solution in a general revision of the law.

I am pleased to submit the report of the Register of Copyrights on general revision of the copyright law to you and to the Vice President for consideration by the Congress.

Very truly yours,

L. QUINCY MUMFORD,
Librarian of Congress.

(Enclosure: Copyright Law Revision Report.)

§ [V] THE REPORT IN SUMMARY

The following summary is intended to highlight some of the principal recommendations of the report without analyzing their background or describing how the provisions would operate. It is necessarily oversimplified.

WORKS AND RIGHTS PROTECTED

Scope of works protected.--The report proposes that the statute drop the present reference to "all the writings of an author." Instead, the kinds of works to be protected would be specified in terms broad enough to cover everything now considered copyrightable, including future works presented in newly developed forms or media.

Architecture and applied art.--The report recommends that the copyright statute should not be extended to functional architectural structures or industrial designs as such, but that they should be given more limited protection under separate design legislation. However, when a pictorial, graphic, or sculptural work is used as a design or decoration of a useful article, it would continue to have all the protection now afforded by the copyright law.

Choreography and sound recordings.--The report recommends that the statute expressly cover choreographic works prepared for presentation to an audience. It also favors the principle of protecting sound recordings against unauthorized duplication, but makes no specific proposals pending further study.

Rights protected and "fair use."--In general the report proposes to retain the exclusive rights given to copyright owners under the present law--to make and publish copies, to make new versions, to give public performances, and to make recordings. It would, however, add a provision to the statute specifically recognizing the doctrine of fair use.

Library photocopying.--The report would permit a library to make a single photocopy of material in its collections for research purposes under explicit conditions.

Performing rights.-- As under the present law, the copyright owner of a dramatic work would have the exclusive right to perform it in public, and this right would be extended to all choreographic works and motion pictures. The performing right in nondramatic literary and musical works would continue to be limited to public performances "for profit." The mere reception of a broadcast of copyrighted material at no charge to the public would be excluded from the public performance right.

Jukebox exemption.--The report favors enactment, in advance of the general revision, of proposed legislation to repeal or modify the provision exempting jukebox operators from payment of performance royalties.

§ [VI] Compulsory license.--

The present law provides that, when the copyright owner of music once permits it to be recorded, anyone else may record it upon payment of a statutory royalty. It is recommended that this "compulsory license" be eliminated.

BEGINNING AND LENGTH OF COPYRIGHT TERM

"*Public dissemination*."--Works are now protected by the common law until they are either published in copies or registered voluntarily in unpublished form. The report proposes that common law protection should end, and the term of statutory copyright should begin, when a work has been "publicly disseminated" in any of the following ways: (1) publication of copies, (2) registration, (3) public performance, or (4) public distribution of sound recordings.

Voluntary registration.--The privilege of securing statutory copyright by voluntary registration--now available for some classes of unpublished works only--would be extended to all classes of undisseminated works.

Manuscripts in libraries.--The report also proposes to terminate common law rights, after a period of time, in manuscripts made available to the public in a library.

Duration of term.-- The present term of copyright is 28 years from first publication on registration, renewable by certain persons for a second period of 28 years. The report recommends that the maximum term be increased from 56 to 76 years. With certain exceptions, the basic term would run for 28 years from first public dissemination, and would be renewable for a second term of 48 years. Unlike the present law, the second term would merely be an extension of existing rights. Any person claiming an interest in the copyright could submit the renewal application, and the longer term would accrue to the benefit of everyone holding any interest under the copyright.

Limitation on lump-sum assignments.-- Under the present law the renewal copyright reverts in certain situations to the author or other specified beneficiaries. The report proposes to drop this reversion and to substitute a limitation on the duration of lump-sum assignments. Any assignment by an author or his heirs would not be effective after 20 years unless it provided for continuing royalties based on use or revenue from the work.

FORMAL REQUIREMENTS OF COPYRIGHT PROTECTION

Notice of copyright.--The statute now requires, as a condition of copyright protection, that the published copies of a work bear a copyright notice. The report recommends that the requirement of notice on published copies be retained, but that inadvertent omission or errors in the notice should not forfeit the copyright. However, innocent infringers misled by the omission or error would be shielded from liability.

Deposit and registration.--For works published with a copyright notice, the present law also requires registration in the Copyright Office, including the deposit of copies for the Library of Congress. The report proposes that the deposit of copies wanted for the Library should be mandatory, but that failure to register should not forfeit the copyright. However, application for registration would still be a **[VII]** prerequisite to bringing an infringement suit. And, unless registration is made within 3 months of first public dissemination, certain special remedies could not be recovered for infringements begun before registration.

OWNERSHIP OF COPYRIGHT

Ownership and divisibility.--The report would leave unchanged in most respects the present law regarding the ownership of copyright. Copyright would be made divisible, however, so that ownership of the various rights comprised in a copyright could be assigned separately. Under the present law an assignment is not effective against third persons without notice unless it is recorded, and this provision would be extended to exclusive licenses and partial assignments.

Contributions to periodicals.--The report proposes that the copyright secured by the publisher in a periodical or other composite work cover all contributions not separately copyrighted. In the absence of an express assignment, however, the publisher would hold in trust for the author all rights in the contribution except the right to publish it in a similar composite work.

REMEDIES FOR INFRINGEMENT

Actual damages or profits.--Infringers are now liable for the actual damages suffered by the copyright owner "as well as" the infringer's profits. The report recommends clarifying the statute to provide for recovery either of actual damages or of profits, whichever is higher.

Statutory damages.--If actual damages and profits are smaller than $ 250, the court must now award statutory damages of at least $ 250. The report recommends that the court should not be required to award the minimum of $ 250 against an innocent infringer. It also proposes that the court be given discretion to award up to $ 10,000 as the total sum of statutory damages against any infringer.

INTERNATIONAL ASPECTS OF COPYRIGHT

Copyright in foreign works.-- At present statutory protection is available to foreign works only if the author's country is covered by a copyright treaty or Presidential proclamation. The report proposes to extend the copyright statute to all foreign works but the President could restrict or withhold the application of the statute in the case of works originating in any particular country.

Manufacturing clause.--Certain works must now be manufactured in the United States to have copyright protection here. The report recommends elimination of the manufacturing requirement and related import limitations.

§ [IX] PREFACE

BASIS FOR THIS REPORT

In 1955 Congress authorized the Copyright Office to undertake a program of studies leading to general revision of the U.S. copyright law. Thirty-four studies, covering most of the problems to be considered in drafting a new statute, have been completed and circulated to an advisory panel and other interested persons. On the basis of the studies, and the comments that have been received on them, the Copyright Office has analyzed the problems and has developed some tentative recommendations for their solution.

This report is a summary of our analysis and preliminary conclusions. Although it represents our best thinking at the present time, it is not intended as the final word on any particular problem or on the revision program as a whole. Our purpose in issuing this report is to pinpoint the issues and to stimulate public discussion, so that the widest possible agreement can be reached on the principles to be incorporated in a revised statute.

We hope that this report will reach all persons and groups concerned with copyright, that they will review it carefully, and that they will forward their detailed comments and suggestions to the Copyright Office. Their views in support of or opposition to our tentative recommendations will be given serious consideration in the next step in the general revision program--the drafting of a bill for introduction in the Congress.

NEED FOR REVISION

The U.S. copyright statute, first enacted in 1790, has gone through three general revisions--in 1831, 1870, and 1909. The act of 1909, though since amended in some details, is still essentially the law today.

It seems unnecessary to dwell at length upon the changes in technology during the last half century that have affected the operation of the copyright law. Commercial radio and television were unknown in 1909. Motion pictures and sound recordings were in a rudimentary stage. New techniques for reproducing printed matter and recorded sounds have since come into use. These and other technical advances have brought in new industries and new methods for the reproduction and dissemination of the literary, musical, pictorial, and artistic works that comprise the subject matter of copyright. And the business relations between creators and users of copyright materials have evolved into new patterns.

A large body of judicial interpretation and business practice has grown up around the present statute. This has done much to adapt **[X]** the law to changing conditions, but its adaptability is limited. In many respects, the statute is uncertain, inconsistent, or inadequate in its application to present-day conditions. A general reexamination and revision have been urged on all sides.

PAST REVISION EFFORTSn1

Between 1924 and 1940 strong and continuous efforts were made to revise the act of 1909. A number of revision bills were introduced, and extended hearings were held by the congressional committees. The proposed revisions were designed mainly to conform our law with the Berne Convention, which was then the only international copyright convention of worldwide scope. Major changes in the U.S. law would have been required for this purpose. At the same time many persons were dissatisfied with the domestic impact of the 1909 statute, and most of the bills proposed broader changes than those required to join the Berne Union.

One revision bill was passed by the House in 1931, and a completely different bill passed the Senate in 1935. In the end, however, all these efforts bogged down in controversy among the various private interests, particularly over the fundamental differences between the Berne Convention and the U.S. law.

The legislative efforts aimed at U.S. membership in the Berne Union were abandoned after 1940. Instead, after the war, the United States participated in the development of a new worldwide convention--the Universal Copyright Convention--which was basically consistent with the U.S. law. In 1954 the statute was amended in the relatively minor respects necessary to conform it with the Universal Copyright Convention, and the United States became a party to the U.C.C. when the Convention came into force in 1955.

PRESENT REVISION PROGRAM

Copyright Office studies.-- The movement for general revision, which had been suspended during the development of the Universal Copyright Convention, was revived in 1955. In the legislative appropriation acts for the next 3 years, Congress provided funds for a comprehensive program of research and studies by the Copyright Office as the groundwork for general revision.

The studies were designed to present, as objectively as possible, the history and provisions of the present law, the problems it raises, past proposals for revision, comparable provisions in foreign laws and international conventions, and an analysis of the issues and alternative solutions. Most of the studies were prepared by the Copyright Office staff; a few were written by impartial specialists outside of the Office.

In carrying out this program the Copyright Office has been assisted by a General Revision Panel of 29 copyright specialists appointed by the Librarian of Congress. The Panel was chosen to include persons familiar with the problems and operations of the various groups concerned with copyright. A preliminary draft of each study was sent to the members of the Panel for review, and was then revised in the light of their comments. The members were also asked **[XI]** to submit their views on the substantive issues, and these were appended to the studies. The studies were then made available to the public, and all interested persons were invited to submit their comments and views.

The 34 studies have been printed in a series of committee prints by the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary. A list of the studies is given in appendix A to this report.

The present report.--This report is the result of many months of concentrated work by a number of people in the Copyright Office. Starting with the research and analysis contained in the studies and the views expressed by the Panel members and others, an advisory group of the Copyright Office staff reviewed and debated the various alternative solutions in detail, and eventually reached tentative conclusions. The members of the General Revision Panel have not participated in the preparation of this report. Although a preliminary draft of the report was circulated to the Panel

members for their comments, it cannot speak for them in general or on any specific point. The opinions and recommendations on the following pages represent my present thinking and that of the staff of the Copyright Office.

In arriving at our recommendations we have given consideration to all the views expressed on a particular problem. In the copyright law, however, few problems can be dealt with in isolation. A change in one provision will often require the adjustment of others, and many of our recommendations are closely interrelated.

Moreover, various private groups concerned with copyright have conflicting interests that impel them to differ sharply on some of the major issues.n2 The needs of all groups must be taken into account. But these needs must also be weighed in the light of the paramount public interest.

We have tried to find practical solutions that will afford a balance between the various private interests and at the same time safeguard the welfare of the public. No one knows better than we the difficulty of accomplishing this result. We nevertheless believe that, taken as a whole, a revision program along the lines of our basic recommendations would represent a significant improvement in the copyright law and would benefit all concerned.

This report, and the studies that led up to it, are a testimonial to Arthur Fisher. The former Register of Copyrights, who died on November 12, 1960, had planned and organized the entire general revision program, of which the studies and report are a part. Their ultimate purpose--the enactment of a new and better copyright law--was the goal of Mr. Fisher's career, and its accomplishment will be a tribute to his vision and energy.

ABRAHAM L. KAMINSTEIN,
Register of Copyrights,
Copyright Office, The Library of Congress

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§ [1] Chapter I THEORIES OF COPYRIGHT

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[3] REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW

CHAPTER 1 THEORIES OF COPYRIGHT

A. INTRODUCTION

Before embarking upon a discussion of the provisions of the copyright law, we are devoting this first chapter to a sketch of the underlying theories on which we believe the law has been and should be based.

We realize that any abstract statement of the nature and purposes of copyright is likely to be disputed, and is unlikely to resolve concrete questions as to what the law should provide. Also, in trying to outline our theories briefly, we run the risk of oversimplification. Nevertheless, we believe that a statement of our basic approach will help to explain the proposals made in the succeeding chapters.

B. THE NATURE OF COPYRIGHT

1. IN GENERAL

In essence, copyright is the right of an author to control the reproduction of his intellectual creation. As long as he keeps his work in his sole possession, the author's absolute control is a physical fact. When he discloses the work to others, however, he makes it possible for them to reproduce it. Copyright is a legal device to give him the right to control its reproduction after it has been disclosed.

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 expresses intellectual concepts. It enables him to prevent others from reproducing his individual expression without his consent. But anyone is free to create his own expression of the same concepts, or to make practical use of them, as long as he does not copy the author's form of expression.

2. COPYRIGHT AS PROPERTY

Copyright is generally regarded as a form of property, but it is property of a unique kind. It is intangible and incorporeal. The thing to which the property right attaches--the author's intellectual work--is incapable of possession except as it is embodied in a tangible article such as a manuscript, book, record, or film. The tangible articles containing the work may be in the possession of many persons other than the copyright owner, and they may use the work for their own enjoyment, but copyright restrains them from reproducing the work without the owner's consent.

[4] Justice Holmes, in his famous concurring opinion in *White-Smith Music Publishing Co. v. Apollo Co. (209 U.S. 1 (1908)*), gave a classic definition of the special characteristics of copyright as property:

The notion of property starts, I suppose, from confirmed possession of a tangible object and consists in the right to exclude other [*sic*] from interference with the more or less free doing with it as one wills. But in copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is now in vacuo, so to speak. It restrains the spontaneity of men where, but for it, there would be nothing of any kind to hinder their doing as the saw fit. It is a prohibition of conduct remote from the persons or tangibles of the party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong.

3. COPYRIGHT AS A PERSONAL RIGHT

a. Generally

Some commentators, particularly in European countries, have characterized copyright as a personal right of the author, or as a combination of personal and property rights. It is true that an author's intellectual creation has the stamp of his personality and is identified with him. But insofar as his rights can be assigned to other persons and survive after his death, they are a unique kind of personal rights.

*b. Moral rights*n1

On the theory of personal right, some countries have included in their copyright laws special provisions for "moral rights" of authors. These provisions are intended to protect the author against certain acts injurious to his personal identity or reputation. They give the author the following rights:

- To have his name appear on copies of his work;

- To prevent the attribution to him of another person's work;

- To prevent the reproduction of his work in a distorted or degrading form.

These moral rights are regarded as not assignable, but the author may sometimes agree to waive them in particular cases. In some countries the moral rights survive the author's death and may be enforced by his heirs or representatives.

In the United States the moral rights of authors have never been treated as aspects of copyright. But authors have been given much the same protection of personal rights under general principles of the common law such as those relating to implied contracts, unfair competition, misrepresentation, and defamation.

c. Assignability of copyright

On the theory that copyright is essentially a personal right of the author, there is a tendency in some countries to declare that only the author or his heirs can own the copyright, and that they cannot assign it. Nevertheless, they may give exclusive licenses to use the work, and the practical result is substantially the same as an assignment of the particular right covered by the license.

The assignability of copyrights has always been a fundamental feature of the law in the United States. To make them unassignable would conflict with the whole structure of the law and established practice.

The U.S. law, however, has recognized the principle of limiting assignments for the benefit of authors and their heirs, by providing **[5]** for the reversion to them of the right to renew the copyright beyond an initial term of years.

4. COPYRIGHT AS A MONOPOLY

Copyright has sometimes been said to be a monopoly. This is true in the sense that the copyright owner is given exclusive control over the market for his work. And if his control were unlimited, it could become an undue restraint on the dissemination of the work.

On the other hand, any one work will ordinarily be competing in the market with many others. And copyright, by preventing mere duplication, tends to encourage the independent creation of competitive works. The real danger of monopoly might arise when many works of the same kind are pooled and controlled together.

C. THE PURPOSES OF COPYRIGHT

1. CONSTITUTIONAL BASIS OF THE COPYRIGHT LAW

The copyright law of the United States must be founded on the provision of the Constitution (art. I, sec. 8) which empowers Congress--

* * * To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

As reflected in the Constitution, the ultimate purpose of copyright legislation is to foster the growth of learning and culture for the public welfare, and the grant of exclusive rights to authors for a limited time is a means to that end. A fuller statement of these principles was contained in the legislative report (H. Rept. No. 2222, 60th Cong., 2d sess.) on the Copyright Act of 1909:

The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights, but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings. The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best. Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention to give some bonus to authors and inventors.

In enacting a copyright law Congress must consider * * * two questions: First, how much will the legislation stimulate the producer and so benefit the public, and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.

2. THE RIGHTS OF AUTHORS AND THE PUBLIC INTEREST

a. In general

Although the primary purpose of the copyright law is to foster the creation and dissemination of intellectual works for the public welfare, it also has an important secondary purpose: To give authors the reward due them for their contribution to society.

[6] These two purposes are closely related. Many authors could not devote themselves to creative work without the prospect of remuneration. By giving authors a means of securing the economic reward afforded by the market, copyright stimulates their creation and dissemination of intellectual works. Similarly, copyright protection enables publishers and other distributors to invest their resources in bringing those works to the public.

b. Limitations on author's rights

Within reasonable limits, the interests of authors coincide with those of the public. Both will usually benefit from the widest possible dissemination of the author's works. But it is often cumbersome for would-be users to seek out the copyright owner and get his permission. There are many situations in which copyright restrictions would inhibit dissemination, with little or no benefit to the author. And the interests of authors must yield to the public welfare where they conflict.

Accordingly, the U.S. copyright law has imposed certain limitations and conditions on copyright protection:

- The rights of the copyright owner do not extend to certain uses of the work. (See *ch. III* of this report.)

- The term of copyright is limited, as required by the Constitution. (See. *ch. V*.)

- A notice of copyright in published works has been required. (See *ch. VI*.) The large mass of published material for which the authors do not wish copyright is thus left free of restrictions.

- The registration of copyrights and the recordation of transfers of ownership have been required. (See *ch. VII* and *VIII*.) The public is thus given the means of determining the status and ownership of copyright claims.

c. The author's reward

While some limitations and conditions on copyright are essential in the public interest, they should not be so burdensome and strict as to deprive authors of their just reward. Authors wishing copyright protection should be able to secure it readily and simply. And their rights should be broad enough to give them a fair share of the revenue to be derived from the market for their works.

D. SUMMARY

Copyright is a legal device to give authors the exclusive right to exploit the market for their works. It has certain features of property rights, personal rights, and monopolies, but it differs from each of these. The legal principles usually applicable to property, personal rights, or monopolies are not always appropriate for copyright.

The primary purpose of copyright is to stimulate the creation and dissemination of intellectual works, thus advancing "the progress of science and useful arts." The grant of exclusive rights to authors is a means of achieving this end, and of compensating authors for their labors and their contributions to society.

Within limits, the author's interests coincide with those of the public. Where they conflict, the public interest must prevail. The ultimate task of the copyright law is to strike a fair balance between the author's right to control the dissemination of his works and the public interest in fostering their widest dissemination.

[**7**] *Chapter II*

COPYRIGHTABLE WORKS

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§ [9] CHAPTER II COPYRIGHTABLE WORKSn1

A. GENERAL STANDARDS OF COPYRIGHTABILITY

1. THE BASIC REQUIREMENTS

It is well established, by a long line of court decisions, that in order to be copyrightable under the statute a work must meet the following requirements:

(*a*) The work must be in the form of a "writing," i.e., it must be fixed in some tangible form from which the work can be reproduced.

(*b*) The work must be a product of original creative authorship. Two interrelated elements are involved here: originality and creativity.

(1) The work must be original in the sense that the author produced it by his own intellectual effort, as distinguished from merely copying a preexisting work. It need not be novel (as a patentable invention must be); in theory at least, it could be precisely the same as a preexisting work as long as it was created by the author independently.

(2) The work must represent an appreciable amount of creative authorship.

These basic requisites of copyrightability are not mentioned explicitly in the statute. While they are generally recognized by copyright specialists, the absence of any reference to them in the statute seems to have led to misconceptions as to what is copyrightable matter. We believe it would be desirable for the new statute to mention these basic requisites in general terms.

2. THE COPYRIGHTABILITY OF NEW VERSIONS

Misunderstanding as to what is copyrightable matter has arisen particularly in regard to "new versions" of preexisting works. A new version may be an adaptation of an earlier work (e.g., a translation, a dramatization of a novel, or a new arrangement of music), or an original compilation of preexisting materials, or it may consist of preexisting material with the addition of new material.

The present statute (sec. 7) specifies that new versions "shall be regarded as new works subject to copyright," but that the copyright in the new work as such pertains only to the new elements, and does not affect the copyright or public domain status of the preexisting material. What the present statute fails to make clear is the basic requirement that the new elements must in themselves represent original creative authorship.

[10] 3. RECOMMENDATIONS

(*a*) The statute should mention the general requirements that any work, in order to be copyrightable, must be fixed in some tangible form and must represent the product of original creative authorship.

(*b*) The statute should make it clear that these requirements apply to new versions of preexisting works.

B. SPECIFICATION OF CLASSES OF COPYRIGHTABLE WORKS

1. DEVELOPMENT AND PROVISIONS OF THE PRESENT LAW

The copyright statutes before 1909 specified the classes of works that were copyrightable. The first copyright statute of 1790 provided protection for "maps, charts, and books." Revisions during the 19th century expanded the classes of copyrightable works to include dramatic works, musical compositions, photographs, and certain works of the fine and graphic arts.

In the present law, which is the act of 1909 with some amendments, a different approach was taken. Section 4 provides:

The works for which copyright may be secured under this title shall include all the writings of an author.

Section 5 then sets out 13 classes of copyrightable works--books, periodicals, music, and so forth--but provides that these classes are to be used in applying for registration, and "shall not be held to limit the subject matter of copyright as defined in section 4."

2. EFFECT OF THE PRESENT LAW

Since the phrase "all the writings of an author" in section 4 is substantially the same as the constitutional language, it has sometimes been said that the present law purports to cover the entire field of works that could be made copyrightable under the Constitution. And the 13 classes listed in section 5 have been said to be a mere classification for the convenience of the Copyright Office and claimants in making registration. Since section 5 states that the 13 classes "shall not be held to limit the subject matter of copyright as defined in section 4," the scope of copyrightable works under section 4 would appear on its face to be broader than the 13 classes listed in section 5.

Nevertheless, section 4 has not been so broadly construed by the courts. In 1955, for example, the Second Circuit Court of Appeals held that although a sound recording of a singer's performance could be made the subject of copyright under the Constitution, Congress had not chosen to make such a recording copyrightable under the present statute. *Capitol Records, Inc. v. Mercury Record Corp. , 221 F.2d 657 (2d Cir. 1955).* Thus, there are certain works which appear to be the "writings" of an "author" within the scope of the Constitution, but which do not come within the scope of the copyright statute.

At the same time, all works that have been held copyrightable under the statute can be fitted into the classes enumerated in section 5. And those classes have been broad enough to include works produced in the new forms developed by technological advances. For example, a microfilm may qualify as a "book," and a television film or **[11]** video tape as a "motion picture." For all practical purposes, section 5 has operated as a list of the categories of works capable of being copyrighted.

3. PROPOSAL FOR SPECIFICATION IN A NEW LAW

We believe that the all-embracing provision of section 4 is undesirable for two reasons:

(*a*) As already noted, this provision has been construed as not meaning what it appears to say. What kinds of works it might include, beyond those listed in section 5, is uncertain.

(*b*) The possible scope of the constitutional concept of the "writings" of an "author" will expand with the passage of time. This is illustrated by two developments: (1) the steady expansion since 1790 in the statutory specification of the classes of copyrightable works, and (2) the recent emergence of questions as to the protection available to creations such as sound recordings and the ornamental designs of useful articles.

We believe the scope of the statute should be broad enough to include not only those forms in which copyrightable works are now being produced, but also new forms which are invented or come into use later. At the same time, we do not think that the language of the statute should be so broad as to include some things--typography, broadcast emissions, and industrial designs are possible examples-- that might conceivably be considered the "writings of an author" but are not intended by Congress to be protected under the copyright law. We believe that the extension of the copyright statute to entirely new areas of subject matter should be left to the determination of Congress rather than to the chance interpretation of an omnibus provision.

Instead of the omnibus provision in section 4, we believe that the statute should specify the categories of copyrightable works. This specification should cover all of the classes now included in section 5 and any others that Congress may wish to add, and should be stated in broad terms to allow coverage of similar works in new forms or media.

Clarification of the scope of some of the categories as now listed in section 5, and the possible addition of other categories, will be considered in part C of this chapter.

4. SEPARATE CLASSIFICATION FOR ADMINISTRATIVE PURPOSES

Apart from the specification of copyrightable works, the Copyright Office, in administering the deposit and registration system needs to divide the works deposited into class groups. The Office now receives deposits for the registration of over 250,000 works a year, and the various kinds of material deposited require division into groups for efficient processing, examining, cataloging, Library selection, storage, and reference. The criteria for administrative classification are not necessarily the same as those for specifying the categories of copyrightable works.

The present section 5 prescribes a fixed scheme of classification for administrative purposes. The experience of the Copyright Office has shown that this classification scheme is too rigid for the most effective accommodation to changing conditions and procedures. Although the Copyright Office has combined or subdivided some of the pre **[12]** scribed classes over the years, the adaptability of the statutory specification in section 5 has been limited.

A classification scheme intended solely for administrative purposes should be flexible so as to permit alteration from time to time in the light of experience and changing needs. We propose that the Register of Copyrights be authorized to provide by regulation for the scheme of administrative classification.

5. RECOMMENDATIONS

(*a*) The provision of section 4, making "all the writings of an author" copyrightable, should be eliminated.

(*b*) Section 5, which now lists the classes of works for purposes of registration, should be reformulated as a specification of the categories of works copyrightable under the statute. The categories should be stated in broad terms to cover all the classes of works now included under section 5 and any others that Congress may wish to add, and to allow coverage of these general categories in any new forms or media that may be developed.

(*c*) The classification [*sic*] of works for purposes of administering the deposit and registration system should be left to administrative regulation by the Register of Copyrights with approval of the Librarian of Congress.

C. COPYRIGHTABILITY OF CERTAIN WORKS

1. WORKS OF "APPLIED ART"

a. Recent developments

In recent years an important problem has arisen as to whether ornamental designs of useful articles (also referred to as "applied art" or "industrial designs") come within the category of copyrightable "works of art." In *Mazer v. Stein (347 U.S. 201 (1954),* the Supreme Court held that, where a statuette had been copyrighted as a "work of art," its copyright protection was not lost or diminished because it was intended to be used, and was used, as a lamp base; an unauthorized maker of lamps, the bases of which were copies of the statuette, was held an infringer of the copyright. Since the *Mazer* decision the courts have sustained copyright claims in "works of art" embodied in costume jewelry, textile fabrics, toys, and dinnerware.

In the light of the *Mazer* case, the Copyright Office has registered a rapidly increasing number of claims in "works of art" that are embodied in useful articles, including fabrics, jewelry, lace, dishes, glassware, silverware, lamps, clocks, ashtrays, and the like. But there have also been a number of copyright claims in designs of useful articles that the Copyright Office has refused to register on the ground that they were not "works of art." The denial of registration for some of these claims has been challenged, and it can be expected that copyright claims in the design area will continue to grow.

The borderline between copyright protection for "works of art" and separate protection for the ornamental designs of useful articles has been the subject of much discussion in connection with a recent series of bills for the sui generis protection of designs. The most recent bills in this series, which were introduced in May 1961, include an amendment to the present copyright statute reaffirming and im **[13]** plementing the principle of the *Mazer* decision, and also defining its application. For the reasons explained below, we are in accord with the revisions in the copyright statute proposed in these bills.

b. The need for sui generis protection of designs of useful articles as such

We believe that, as the Supreme Court held in the *Mazer* case, the protection now accorded by the copyright statute should continue to be available for "works of art"--that is, pictorial, graphic, and sculptural works-- even after they have been employed as a design or decoration of a useful article. But we would not extend the copyright statute to designs of useful articles as such--automobiles, sewing machines, wearing apparel, etc. We would favor granting reasonable protection against the copying of these designs under a sui generis statute, but we do not believe they should be given protection of the length and breadth afforded by the copyright statute.

In the years since the *Mazer* decision, full protection under the copyright law has not proved inappropriate for "works of art" used as a design or decoration of useful articles. We do not believe, however, that it would be appropriate to extend the copyright law to industrial designs as such. In this area there is a delicate balance between the need for protection on the part of those who originate and invest in a design, and the possible effect of protection, if overextended, in restraining competition. The term of copyright (which is now up to 56 years and would be even longer under the proposal made in *ch. V* of this report) is too long for ordinary design protection. And there are other fundamentals of the copyright statute--the provisions on notice, deposit, registration, publication, and liability of innocent distributors of infringing articles, for example--that are not suitable for the entire range of industrial designs.

As noted above, special bills for the protection of "ornamental designs of useful articles"--S. 1884, H.R. 6776, H.R. 6777, 87th Congress, 1st session--were introduced in Congress in May 1961. These bills, which are identical, provide for a short term of protection and differ in other significant respects from the copyright statute. However, they specifically preserve the full copyright protection now available to "works of art" under the *Mazer* decision. They are the outgrowth of similar bills introduced in the 86th Congress (S. 2075, S. 2852, H.R. 9525, H.R. 9870), and result from a reconciliation of the differences between those earlier bills.

c. Relationship between copyright and the designs of useful articles

The principal administrative problem now faced by the Copyright Office in this field derives from the deposit of useful articles for copyright registration, and the difficulties in determining whether or not they embody or constitute copyrightable "works of art." As a practical matter this problem might be partially solved by the enactment of a sui generis design protection statute, which many applicants would invoke in preference to the copyright law. However, in order to achieve a fully effective solution to this problem, we propose that registration under the copyright statute should be confined to pictorial, graphic, or sculptural works, and that useful articles should not be acceptable for deposit. This would not, of course, preclude registration for drawings, models, photographs, or the like that portray useful **[14]** articles, or that are obviously going to be used in the manufacture of useful articles.

There remains the question of protection to be given to a copyrighted work of art that is utilized as a design in the manufacture of useful articles. We believe that, where the copyrighted work is used as a design or decoration of a useful article, it should continue, as under the present law, to be protected by copyright if the owner wishes. In this situation the copyright owner should be given the option of securing protection under the design patent law or under special design legislation; but, if he does not do so, his copyright protection should remain unaffected. However, where the "work of art" actually portrays the useful article as such--as in a drawing, scale model, advertising sketch, or photograph of the article--existing court decisions indicate that copyright in the "work of art" does not protect against manufacture of the useful article portrayed. We agree with these decisions and the distinctions made in them.

Some examples will illustrate these points.

(1) The following would be accepted for deposit and registration by the Copyright Office, since they would not be considered "useful articles":

- A painting showing a floral pattern, submitted by a manufacturer of textile fabrics; a statuette in the form of a human figure, submitted by a lamp manufacturer;

- A technical drawing or scale model of an airplane;

- A jewelry design embodied in earrings.

(2) The following would not be accepted for deposit and registration by the Copyright Office, since they constitute useful articles as such:

- A rug; a yard of dress material;

- A lamp;

- A chair; a dress; a frying pan.

(3) Since the protection available to a copyrighted pictorial, graphic, or sculptural work is not affected by use of the work as a design or decoration of a useful article, the following works would continue to be accorded full protection under the copyright statute (unless the owner chooses to secure protection under the patent law or special design legislation):

- A copyrighted painting reproduced on textile fabrics;

- A copyrighted cartoon drawing or photograph reproduced on fabrics or in the form of toys or dolls;

- A copyrighted drawing of a chair reproduced on a lampshade;

- A copyrighted sculptured figure used as a lamp base.

(4) Under distinctions indicated in existing court decisions, that the copyright in a work portraying a useful article as such would not protect against manufacture of that article, copyright protection would not extend to the following cases:

- A copyrighted drawing of a chair, used to manufacture chairs of that design;

- A copyrighted scale model of an automobile, used to manufacture automobiles of that design;

- A copyrighted technical drawing showing the construction of a machine, used to manufacture the machine;

- A copyrighted picture of a dress, used to manufacture the dress.

[15] *d. Recommendations*

(1) The copyright statute should make it clear that, for purposes of registration, the "works of art" category includes pictorial, graphic, and sculptural works even though they may portray or be intended for use in useful articles, but that useful articles, as such, are not acceptable for deposit.

(2) When a copyrighted work of art is used as a design or decoration of a useful article, it should continue to have all the protection afforded by the copyright law. If the work is registered as a design under the patent law or special design legislation, copyright protection should terminate insofar as it relates to useful articles, but if patent or design registration is not made, copyright protection should continue unaffected.

(3) The statute should not alter the distinctions drawn in this area by existing court decisions--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.

2. ARCHITECTURAL DRAWINGS AND STRUCTURESn2

a. The present law

Architectural drawings are copyrightable under the present law within the general category of technical drawings. The copyright in an architectural drawing protects it against the unauthorized making and distribution of copies of the drawing.

When an architectural structure, such as a monument, is itself a "work of art," copyrighted drawings of the structure are protected against their "execution" by erecting the structure. This is merely an application of the provision in section 1(b) protecting "a model or design for a work of art" against its "execution." But the courts have held that the drawings of a functional structure, which is not a "work of art," are not protected against their use in building the structure.

Architectural structures themselves are not mentioned in the present statute. If a structure constitutes a "work of art" (e.g., a piece of sculpture or an artistic monument), the structure itself may now be copyrighted under the general category of "works of art." But copyright protection has been denied to functional structures that do not qualify as "works of art."

b. Protection for the artistic features of functional structures

It seems clear that a structure designed solely for esthetic effect should be entitled to copyright protection on the same basis as any other nonutilitarian work of art. It seems equally clear, at the other extreme, that a functional structure having no artistic features is not an appropriate subject for copyright protection, even though it embodies original ideas as to technical methods of construction. The more difficult question is whether copyright protection should extend to structures that are functional in purpose but also display nonfunctional features of "artistic" design.

We believe that what we have said above in regard to the ornamental design of useful articles applies also to the "artistic" design of **[16]** functional architectural structures. In the case of architecture particularly, it would often be difficult to differentiate between the functional and the "artistic" features of a design. While we are inclined to the view that a limited measure of protection should be afforded to the design of functional structures, we do not believe that the copyright statute provides the appropriate framework for their protection. We would leave this protection to be dealt with in the separate legislation proposed for the protection of ornamental designs of useful articles.

It should be understood, of course, that a nonutilitarian work of art, such as a piece of sculpture or a mural, which is superimposed upon a functional structure but retains its separate identity, remains copyrightable as a work of art apart from the structure.

c. Recommendations

(1) The copyright law should continue to protect--

(a) Architectural drawings, against the unauthorized making and distribution of copies;

(b) Nonfunctional architectural structures that constitute works of art, on the same basis as sculptural works of art;

(c) Drawings for such a nonfunctional structure, on the same basis as drawings for a sculptural work of art.

(2) The copyright law should not be extended to the design of functional architectural structures. Protection for these designs on a more limited basis should be considered in separate legislation for the protection of ornamental designs of useful articles.

3. CHOREOGRAPHIC WORKSn3

a. Choreographic works as proper subject of copyright

Choreographic works, such as ballets, represent a recognized art form, and undoubtedly constitute works of authorship. Until fairly recent times it was difficult to secure copyright protection for choreographic works because of the absence of practical means of fixing them in a tangible form. Fixation is now feasible in the form of systems of notation recently developed or in the form of motion pictures.

For purposes of copyright at least, the term "choreographic works" is understood to mean dance works created for presentation to an audience, thus excluding ballroom and other social dance steps designed merely for the personal enjoyment of the dancers. This distinction is important because the copyright protection of choreographic works is concerned mainly with their public performance.

b. Coverage under the present law

Although not mentioned by name in the present copyright statute, choreographic works have been regarded as copyrightable if they qualify as "dramatic compositions." There are some old court decisions indicating that a dance which presents a story or definite theme qualifies as a "dramatic" work.

The treatment of choreographic works as a species of "dramatic compositions" for copyright purposes has had two virtues: (1) It has served to define the choreographic works protected as being dance works created for presentation to an audience; and (2) it has placed **[17]** choreographic works in an existing category in which the rights of the copyright owner are established.

c. Choreographic works as distinct from dramatic works

Treating choreographic works as a species of "dramatic compositions," however, has one serious shortcoming. Many choreographic works present "abstract" dance movements, in which, aside from their esthetic appeal, no story or specific theme is readily apparent. Whether such "abstract" dances qualify as "dramatic compositions" is uncertain. We see no reason why an "abstract" dance, as an original creation of a choreographer's authorship, should not be protected as fully as a traditional ballet presenting a story or theme.

In view of the doubt as to whether "abstract" dances would come within the category of "dramatic compositions," we believe that choreographic works should be designated as a separate category. The statute should make it clear that this category covers only dances prepared for presentation to an audience. We believe that the rights of the copyright owner in dramatic works are appropriate for choreographic works.

d. Recommendations

(1) Choreographic works prepared for presentation to an audience should be mentioned specifically in the statute as a category of copyrightable works.

(2) They should be given the same protection as is accorded to dramatic compositions.

4. SOUND RECORDINGSn4

a. Recent developments

During the past several years there has been considerable discussion here and abroad of proposals to provide some protection for performing artists and for record producers in their sound recordings. It has been proposed that performers or record producers, or both, be given the right to prevent the unauthorized reproduction of their sound recordings. It has also been suggested that their rights might extend to the collection of royalties for the use of their recordings in broadcasts and other public performances. These proposals have been the subject of a series of international meetings to consider the development of a convention for the international protection of "neighboring rights." A diplomatic conference to develop the final text of a convention is to be held in Rome in October 1961.

b. The present legal situation

It is important to an understanding of the problems involved here to distinguish between: (1) the literary or musical composition of an author embodied in a recording, (2) the recorded rendition of the performer, and (3) the recording as a work in itself. All three of these elements are present in most recordings, but only the author's composition is given statutory copyright protection in the United States. The laws of some foreign countries have provisions for the protection of the performer in his recorded rendition, or for the protection of the record producer in the sound recording as a work in **[18]** itself. These provisions in the foreign laws usually appear as adjuncts to the copyright statute, but they frequently differ--as to the scope and duration of protection and in other respects--from the provisions governing copyright works in general.

Recent disclosures indicate that the unauthorized reproduction of sound recordings has reached serious proportions. While there are no statutory provisions in the United States protecting performers or record producers against the unauthorized reproduction of their sound recordings, several recent court decisions have accorded protection under common law doctrines of literary property rights and unfair competition. The lack of any statutory specification of the rights of performers and record producers may be leading to establishment of common law rights that are unlimited in scope and duration.

A bill aimed at combating the counterfeiting of records--H.R. 6354, 87th Congress, 1st session--was introduced on April 17, 1961. It would impose criminal penalties on anyone who, knowingly and with fraudulent intent, transports or receives in interstate or foreign commerce a reproduction of a sound recording made without permission of the "owner of the master recording."

c. Exploration of statutory solution

All of this suggests that the present legal situation with respect to the unauthorized reproduction of sound recordings is unsatisfactory, and that Federal statutory protection should be accorded within appropriate limits. Although we believe that the principles of the copyright law offer the most appropriate basis for this protection, there are many complex issues that have not yet crystallized sufficiently for us to make detailed recommendations at this time. Among the unresolved questions are: (1) whether rights should be given to the performer or to the record producer or both; (2) whether formalities such as the copyright notice, deposit, and registration should be applied to sound recordings; and (3) the scope and duration of protection to be accorded.

We hope that continuing study will develop proposals for the solution of these problems in the not too distant future.

d. Recommendation

Sound recordings should be protected against unauthorized duplication under copyright principles, but detailed recommendations are being deferred pending further study.

[19] *Chapter III*

RIGHTS OF COPYRIGHT OWNERS
OUTLINE OF CHAPTER

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§ [21] CHAPTER III RIGHTS OF COPYRIGHT OWNERS

A. RIGHTS SPECIFIED IN THE PRESENT LAW

1. DEVELOPMENT OF PRESENT RIGHTS

Copyright was originally concerned with printed matter, chiefly in the form of books. It meant the exclusive right of the copyright owner to make and publish copies. In the course of time, the concept of copyright expanded in two directions: (1) to cover other works of authorship such as dramatic, musical, and art works; and (2) to grant exclusive rights to the copyright owner to disseminate the work by other means such as public performance and the making and distribution of sound recordings. Copyright is now a bundle of several rights pertaining to the various means of reproducing and disseminating works of authorship.

2. SUMMARY OF PRESENT RIGHTS

The exclusive rights of a copyright owner now specified in section 1 of the copyright law may be summarized as follows:

(*a*) All categories of copyrighted works are protected against the making and publication of copies.

(*b*) Literary, dramatic, and musical works are protected against the making of new versions; models or designs for works of art are protected against the execution of the work of art.

(*c*) Nondramatic literary and musical works are protected against public delivery or public performance "for profit" (except for performances of music on coin-operated machines); dramatic works are protected against public performance, whether or not for profit.

(*d*) Literary, dramatic, and musical works are protected against reproduction in any transcription or record (subject, in the case of music, to the compulsory license for the making of sound recordings).

3. ANALYSIS OF PRESENT RIGHTS

a. The right to make and publish copies

Section 1(a) of the present law provides for the exclusive right of the copyright owner "to print, reprint, publish, copy, and vend the copyrighted work." These various terms are redundant. Printing and reprinting are modes of copying, and vending is a mode of publishing. As to vending, it is well settled that when publication has been authorized, the right to vend pertains only to the initial sale of a copy; the purchaser of the copy is then free to resell or otherwise dispose of it. On the other hand, when publication is not authorized, any vending of a copy is an infringement

of the right to publish. In substance, **[22]** as several courts have observed, the right embraced in the repetitive terms of section 1(a) is the twofold right to make and to publish copies.

This right is the historic basis of copyright and pertains to all categories of copyrighted works. The "copying" embraced in this right is a broad concept. "Copying" is not confined to complete and literal reproduction. While anyone is free to use the ideas disclosed in a work, and to use the same source material in creating another work, the reproduction of the essential substance of an author's expression constitutes "copying," even though his work is altered in the reproduction or is reproduced in a different medium or form.

In *White-Smith Music Publishing Co. v. Apollo Co. (209 U.S. 1 (1908)*), the Supreme Court held that "copying" implied a visual reproduction from which the work could be read; the making of a mechanical sound recording was held not to constitute "copying." By the same token, a public performance would not appear to be "copying" in this sense. The present statute provides separately for the rights to make sound recordings and to give public performances.

b. The right to make new versions

Section 1(b) of the present law provides for the exclusive right of the copyright owner to make new versions (translations, adaptations, etc.) of the copyrighted work. The making of a new version would appear to be a form of "copying," and there are court decisions so indicating. Nevertheless, provisions expressly granting the right to make translations and dramatizations, and to execute models or designs for works of art, have been incorporated in our copyright statutes since 1870; the remaining rights specified in section 1(b)--to make any other versions of a literary work, to convert a drama into a novel or other nondramatic work, and to arrange or adapt a musical work-- were added in 1909.

Although section 1(b) probably covers the most common forms of new versions, there are other types of works and forms of new versions not specifically mentioned. For example, a painting may be remade as a sculpture or vice versa, a photograph may be reproduced as a painting, or a motion picture may be converted into a stage play.

Perhaps section 1(b) is unnecessary, since the courts might well hold that any new version is a "copy" of the original work under section 1(a). However, section 1(b) has been relied on as the basis for some court decisions; and to avoid any doubt, we would retain a specific reference in the statute to the right to make new versions. We suggest, though, that the present language of section 1(b) be both simplified and broadened to refer to all classes of works and all forms of new versions.

c. The right of public performance

This right is now provided for in three separate subsections of section 1:

- Subsection (c) specifies the right "to deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work."

- Subsection (d) specifies the right "to perform or represent the copyrighted work publicly if it be a drama."

[23] - Subsection (e) specifies the right "to perform the copyrighted work publicly for profit if it be a musical composition." This right is subject to a special exemption for performances on coin-operated machines, to be discussed later.

Note that for nondramatic literary and musical works the right is limited to public performance "for profit"; while for dramas (which include dramatico-musical works) the right extends to any public performance whether or not for profit. This distinction will be discussed below.

It is now well established by a long line of court decisions that radio and television broadcasting is a form of public performance.

It seems odd that motion pictures are not designated among the categories of works to which performance rights are accorded, especially since performance (i.e., exhibition) is almost the only practical means of disseminating motion pictures. We shall discuss this in a later section.

d. The right to make records

This right is now provided for in the same three subsections as the public performance right:

- Subsection (c) specifies, for a nondramatic literary work, the right "to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced."

- Subsection (d) specifies substantially the same right for a dramatic work..

- Subsection (e) provides, for a musical work, the right "to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced."

The principal effect of these provisions is to give copyright owners the exclusive right to made [*sic*] sound-recordings--the right which the Supreme Court in the *White-Smith* case had held was not embraced in the right to make copies. In addition to sound recordings, these subsections cover the making of any form of visual record, such as a stenographic transcription or a motion picture of a performance. They also provide that the performance right extends to performances given by means of records.

The three subsections dealing with the recording right seem unnecessarily repetitious and confusing. We suggest that this right be restated more simply and clearly--as the right to make any form of transcription or record, visual or aural, from which the work can be performed or reproduced.

Section 1(e) also contains the long and complex "compulsory license" provisions, which we shall discuss later. In sum, these provide that when the copyright owner of a musical work has once permitted the making of a mechanical sound recording of the music, any other person may make such a recording upon giving notice and paying a specified royalty.

[24] 4. RECOMMENDATIONS

(*a*) Subject to certain limitations and exceptions to be discussed below, the statute should continue to accord to copyright owners the exclusive rights to exploit their works by (1) making and publishing copies, (2) making new versions, (3) giving public performances, and (4) making records of the work.

(*b*) The present provisions of section 1 granting these rights should be redrafted in simpler and clearer language.

B. SPECIAL RIGHTS, LIMITATIONS, AND EXCEPTIONS

1. FAIR USE IN GENERALn1

a. What is "fair use"?

Nothing is said in the statute as to the "fair use" of copyrighted works. The doctrine of "fair use," however, has been developed by the courts over a period of many years and is now firmly established as an implied limitation on the exclusive rights of copyright owners.

Copyright does not preclude anyone from using the ideas or information disclosed in a copyrighted work. Beyond that, the work itself is subject to "fair use." That term eludes precise definition; broadly speaking, it means that a reasonable portion of a copyrighted work may be reproduced without permission when necessary for a legitimate purpose which is not competitive with the copyright owner's market for his work.

The general scope of fair use can be indicated by the following examples of the kinds of uses that may be permitted under that concept:

- 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 at the scene of an event being reported.

Whether any particular use of a copyrighted work constitutes a fair use rather than an infringement of copyright has been said to depend upon (1) the purpose of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the material used in relation to the copyrighted work as a whole, and (4) the effect of the use on the copyright owner's potential market for his work. These criteria are interrelated and their relative significance may vary, but **[25]** the fourth one--the competitive character of the use--is often the most decisive.

b. Statutory recognition of fair use

Since the fair use doctrine may be applied in any number and variety of circumstances, it would be difficult to prescribe precise rules suitable for all situations. For example, the amount of a work that may be properly used under that doctrine will vary according to the nature of the work, the essential character of the portion used, and the purpose and competitive effect of the use.

Nevertheless, the doctrine of fair use is such an important limitation on the rights of copyright owners, and occasions to apply that doctrine arise so frequently, that we believe the statute should mention it and indicate its general scope. It seems anomalous to have the statute specify the rights of copyright owners in absolute terms without indicating that those rights are subject to the limitation of fair use.

c. Recommendation

The statute should include a provision affirming and indicating the scope of the principle that fair use does not infringe the copyright owner's rights.

2. PHOTOCOPYING BY LIBRARIESn2

a. Statement of the problem

The application of the principle of fair use to the making of a photocopy by a library for the use of a person engaged in research is an important question which merits special consideration. This question has not been decided by the courts, and it is uncertain how far a library may go in supplying a photocopy of copyrighted material in its collections. Many libraries and researchers feel that this uncertainty has hampered research and should be resolved to permit the making of photocopies for research purposes to the fullest extent compatible with the interests of copyright owners.

Scholars have always felt free to copy by hand from the works of others for their own private research and study. Aside from the impossibility of controlling copying done in private, the acceptance of this practice may have been based on the inherent limitation of the extent to which copying could be done by hand. But copying has now taken on new dimensions with the development of photocopying devices by which any quantity of material can be reproduced readily and in multiple copies.

Researchers need to have available, for reference and study, the growing mass of published material in their particular fields. This is true especially, though not solely, of material published in scientific, technical, and scholarly journals. Researchers must rely on libraries for much of this material. When a published copy in a library's collections is not available for loan, which is very often the case, the researcher's need can be met by a photocopy.

On the other hand, the supplying of photocopies of any work to a substantial number of researchers may diminish the copyright owner's market for the work. Publishers of scientific, technical, and scholarly **[26]** works have pointed out that their market is small; and they have expressed the fear that if many of their potential subscribers or purchasers were furnished with photocopies, they might be forced to discontinue publication.

b. Approach to a solution: single photocopies for research use

As a general premise, we believe that photocopying should not be permitted where it would compete with the publisher's market. Thus, when a researcher wants the whole of a publication, and a publisher's copy is available, he should be expected to procure such a copy.

In situations where it would not be likely to compete with the publisher's market, however, we believe that a library should be permitted to supply a single photocopy of material in its collections for use in research. Thus, when a researcher wants only a relatively small part of a publication, or when the work is out of print, supplying him with a single photocopy would not seriously prejudice the interests of the copyright owner. A number of foreign laws permit libraries to supply single photocopies in these circumstances.

c. Multiple and commercial photocopying

The question of making photocopies has also arisen in the situation where an industrial concern wishes to provide multiple copies of publications, particularly of scientific and technical journals, to a number of research workers on its staff. To permit multiple photocopying may make serious inroads on the publisher's potential market. We believe that an industrial concern should be expected to buy the number of copies it needs from the publisher, or to get the publisher's consent to its making of photocopies.

Similarly, any person or organization undertaking to supply photocopies to others as a commercial venture would be competing directly with the publisher, and should be expected to get the publisher's consent.

There has been some discussion of the possibility of a contractual arrangement whereby industrial concerns would be given blanket permission to make photocopies for which they would pay royalties to the publishers. Such an arrangement, which has been made in at least one foreign country, would seem to offer the best solution for the problem of multiple and commercial photocopying.

d. Recommendations

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

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

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

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

[27] 3. LIMITATIONS ON THE PERFORMANCE RIGHTn3

a. Nondramatic literary and musical works

(1) *The "for profit" limitation*.--In the case of nondramatic literary and musical works the present law limits the copyright owner's performance right to public performances "for profit." The phrase "for profit" has been construed in a number of court decisions, and now has a fairly well-defined meaning.

A public performance may be "for profit," even though no admission fee is charged, if it is given in furtherance of a commercial enterprise. Thus, the playing of music in a hotel or restaurant has been held "for profit" since its purpose is to attract patronage. The same has been held for broadcasts of music by stations that carry commercial advertising, even if the particular program was noncommercial, or if the station itself was a nonprofit enterprise.

On the other hand a public performance given by a charitable, educational, or similar organization, with no motive of private gain, has been regarded as not "for profit," even though the performance was part of a fund-raising event.

(2) *Alternatives to the "for profit" limitation*.--Some of the revision bills of 1924-40 proposed to specify, in addition to or instead of the general "for profit" limitation, particular situations in which a public performance could be given without permission of the copyright owner. Most foreign laws do not contain an express "for profit" limitation on the

public performance right, but specify in considerable detail the situations in which a public performance is freely permissible (e.g., for charitable, educational, religious, or civic purposes where no one derives financial gain). These specifications have substantially the same effect as the "for profit" limitation in our present law.

We believe that the principle of the "for profit" limitation on the right of public performance in nondramatic literary and musical works, and the application given to that principle by the courts, strike a sound balance between the interests of copyright owners and those of the public. There will undoubtedly be some specific instances in which the application of that general principle is uncertain until ruled on by the courts. We believe, however, that any attempt to specify the various situations in which the principle applies would be likely to include too much or too little, and to raise new uncertainties.

Incidentally, section 104 of the present statute contains a proviso to the effect that certain musical works may be performed freely by public schools, church choirs, or vocal societies, "provided the performance is given for charitable or educational purposes and not for profit." Since all nonprofit performances of music are exempt under the general provision of the law, this proviso (a vestige of an earlier draft of the bill that became the act of 1909) is entirely superfluous.

b. Dramatic works

In the case of dramatic works (including dramatico-musical works), the copyright owner's performance right extends to all public performances, whether for profit or not. This has been true since the **[28]** right of public performance was first accorded to dramatic works in 1856.

The reasons given for this difference in treatment between dramatic and nondramatic works are:

- The audience at a nonprofit performance of a dramatic work is less likely to pay to attend another performance than is the case with nondramatic works.

- Public performance is usually the main source of revenue from a dramatic work; in the case of nondramatic works, revenue is also available from the sale of copies and sound recording.

- Dramatic works are not as readily or as frequently performed for charitable, educational, and similar purposes as are nondramatic works.

We believe these reasons warrant continuing the public performance right in dramatic works with no "for profit" limitation.

c. Recommendations

(1) For nondramatic literary and musical works, the right of public performance should continue to be limited to such performances "for profit."

(2) For dramatic works, the right of public performance should continue to apply to all such performances, whether for profit or not. (As recommended in ch. II, C 3, this would be extended to choreographic works.)

4. EXTENSION OF THE PERFORMANCE RIGHT TO MOTION PICTURESn4

a. The present law

The present statute does not provide explicitly for the right to perform (i.e., to exhibit) a copyrighted motion picture. Motion pictures were not mentioned in the act of 1909. By an amendment in 1912, they were added to the classes of works enumerated in section 5, but no corresponding amendment was made in section 1 to provide for the right to perform motion pictures.

The courts have attempted to fill this gap by applying the terms of section 1 to the performance of motion pictures. In several decisions the courts have held that dramatic motion pictures (photoplays) are a species of dramatic works and are therefore accorded the right of public performance given to dramatic works by section 1(d). The more difficult problem of nondramatic motion pictures was presented to the Second Circuit Court of Appeals in *Patterson v. Century Productions (93 F.2d 489 (1937)*), in which an infringing copy of a documentary (nondramatic) motion picture had

been made and exhibited publicly in a theater. The court held that the exhibitor had infringed the copyright, on the ground that the projection of the motion picture on the theater's screen constituted the making of a "copy" under section 1(a).

We believe this last decision is an example of the maxim that "hard cases make bad law." In reaching what was no doubt a just result, and apparently seeing no other provision in the statute that would fit the case, the court stretched the concept of "copying" to new lengths. While that case involved a public exhibition, the theory of **[29]** "copying" on which the decision was based, if followed to its logical conclusion, would have a far-reaching effect: any unauthorized projection of a motion picture, private as well as public, would be an infringement of the copyright. Whether the courts would so hold in a case involving a private projection is still a matter of conjecture.

b. Public performances

We believe that the statute should provide explicitly for the performance right in motion pictures. We see no reason to distinguish between dramatic and nondramatic motion pictures in this regard. They are alike in physical form and in the manner of their performance.

It has been suggested that the performance right in motion pictures should not extend to nonprofit exhibitions given solely for educational purposes. However, the reasons given above for omitting the "for profit" limitation as to public performances of dramatic works apply equally to public exhibitions of motion pictures. We would extend to all motion pictures the same right of public performance, with no "for profit" limitation, as is now accorded to dramatic works.

c. Performances in "semipublic" places

The producers and distributors of motion pictures have been concerned about unauthorized performances in what might be called "semipublic" places--such as social clubs, lodges, camps, schools, and factories--where the audience may be large but is limited to a special group. Since the general public is not invited to attend, it might be argued that these are not "public" performances.

This question has not been resolved by the courts. In one case-- *Metro-Goldwyn-Mayer Distributing Corporation v. Wyatt and Maryland Yacht Club* (21 C.O. Bull. 203 (D. Md. 1932))--a Federal district court held (erroneously, we believe) that the performance of a motion picture at a social club for its members and their guests was not a public performance. The courts in Great Britain and several other countries have held that musical performances given in such places are public performances.

We are sympathetic with the view that performances--not only of motion pictures but also of other works--given at places such as clubs, lodges, and camps, should ordinarily be considered public performances. We have given some thought to defining "public performance" in the statute, but we believe it would be virtually impossible to formulate a definition that would draw an appropriate line between public and private performances. We would prefer to rely upon the courts to reach the proper result in particular situations.

d. Private performances

Motion picture producers and distributors have urged that the performance right in motion pictures should extend to what are clearly private performances, including performances given in private homes. They point to *Patterson v. Century Productions* , and its concept that exhibition is a form of "copying," to support their position. Motion picture films are commonly leased for exhibition at specified places and dates. Most leases are for commercial exhibitions, but many films are also leased for home use. It is argued that in either case private exhibitions beyond the terms of the lease should constitute an infringement of copyright.

[30] This argument may have some theoretical plausibility, but we would question it for several reasons:

- Injury to a copyright owner from private performances beyond the terms of a lease would be minimal. He may be entitled to the usual license fee as damages for a breach of contract, but the statutory damages for copyright infringement would be grossly excessive.n5

- As a practical matter, unauthorized private performances could rarely be discovered or controlled.

- Many motion picture films are sold for use in homes, schools, libraries, and the like. The purchaser should not be subjected to the risk of liability for private performances that the copyright owner might contend are not authorized.

- New technical devices will probably make it practical in the future to reproduce televised motion pictures in the home. We do not believe the private use of such a reproduction can or should be precluded by copyright.

- Libraries, museums, and other collectors of motion pictures should be free to have private showings for purposes of research or scholarship.

e. Recommendation

The statute should provide explicitly that the copyright owner of any motion picture shall have the exclusive right to perform (or exhibit) it in public, with no "for profit" limitation.

5. PUBLIC RECEPTION OF BROADCASTS

a. The problem presented

There is now no doubt, under a line of court decisions, that a radio or television broadcast of a copyrighted work is a public performance. The courts have had more difficulty with the further question of whether the reception of a broadcast by means of a receiving set in a public place, such as a hotel or restaurant, is a separate public performance for which the copyright owner may require a license. After some lower court decisions to the contrary, the Supreme Court, in *Buck v. Jewell-La Salle Realty Co. (283 U.S. 191 (1931)*), answered this question affirmatively, holding that the unlicensed reception in a hotel of a broadcast of copyrighted music, which the hotel retransmitted to its various rooms, constituted an infringement of the copyright.

Although the *Jewell-La Salle* case involved a retransmission, the effect of this decision may be that any business establishment that operates a radio or television receiving set for the entertainment of its patrons--including hotels, restaurants, taverns, barber shops. etc.--could be required to procure performing licenses for all copyrighted works in the broadcasts it receives.

As a practical matter this problem has been confined so far to broadcasts of music, though it could conceivably arise also as to broadcasts of dramatic and literary works and even of motion pictures. We understand that the two principal organizations controlling the performing rights in music (ASCAP and BMI) have generally followed **[31]** the policy of confining their demands for license fees to those establishments, such as the hotel in the *Jewell-La Salle* case, that retransmit broadcasts to their various rooms. Other similar organizations, however, may not have the same policy. And there have been complaints from some small establishments that they were asked to obtain performing licenses for the mere operation of receiving sets. In any event, the free use of receiving sets should not be left to the grace or forbearance of the performing rights organizations or other copyright owners.

In several of the previous revision bills of 1924-40, it was proposed to exempt the reception of broadcasts from the public performance right, except where a charge is made for such reception. Hotel operators, in particular, have sought such an exemption.

b. The principle of "clearance at the source"

It is now established practice, reinforced by consent decrees against ASCAP and BMI, that the use of copyrighted music in network broadcasts is "cleared at the source," i.e., the license to perform the music is obtained by the network broadcaster and no further license is required of local stations for their retransmission of the broadcast. The same principle of "clearance at the source" is applied to the performance of music in the public exhibition of motion pictures: the producer obtains a license and no further license is required of the exhibitors. Likewise the license obtained by the operator of a wired music service covers its public performance in the hotels, restaurants, and other places where the music is heard.

We believe this principle of clearance at the source should apply to the reception of broadcasts. The performing license obtained by the broadcaster should suffice, with no further license required of those who merely receive the broadcast. We would, however, require the receiver to obtain a performing license if he makes a charge to the public for

the reception of the broadcast--for example, by charging an admission fee, or by requiring a payment for operation of the receiving set.

c. Recommendation

The statute should exempt the mere reception of broadcasts from the public performance right, except where the receiver makes a charge to the public for such reception.

6. THE JUKEBOX EXEMPTION

a. The present status of the problem

Section 1(e) of the present law provides:

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 exempts the operators of "jukeboxes" from any obligation to pay royalties for the public performance of music, though their operation is clearly for profit and the public pays for the performance.

Bills to repeal or modify this exemption have been and are now before Congress, and have been the subject of repeated and exhaustive hearings. In the course of those hearings we have expressed our view **[32]** that this exemption should be repealed, or at least should be replaced by a provision requiring jukebox operators to pay reasonable royalties.

The jukebox exemption is a historical anomaly. The exemption was placed in the law in 1909 at the last minute with virtually no discussion. The coin-operated music machines of that day were apparently a novelty of little economic consequence. The jukebox industry is now among the largest commercial users of music, with an annual gross revenue of over a half-billion dollars.

Jukebox operators are the only users of music for profit who are not obliged to pay royalties, and there is no special reason for their exemption. No such exemption is made in any other country, except that in Canada the playing of music on jukeboxes comes within a general exemption of performances by means of a gramophone. A Canadian commission appointed to review its copyright law recently declared that the exemption of jukeboxes is not warranted; but that since the royalties collected in Canada would go mainly to copyright owners in the United States, the withdrawal of the exemption in Canada might await like action in our country.

Since the jukebox exemption has been thoroughly explored by the congressional committees, and proposals for the solution of the problem are presently under consideration by those committees, we are not reviewing the matter further in this report.

b. Recommendation

The jukebox exemption should be repealed, or at least should be replaced by a provision requiring jukebox operators to pay reasonable license fees for the public performance of music for profit. The consideration of legislation proposed for this purpose should continue without awaiting a general revision of the law.

7. THE COMPULSORY LICENSE FOR THE RECORDING OF MUSICn6

a. The present law and its history

Sections 1(e) and 101(e) of the present statute contain elaborate and complex provisions for what is commonly known as the "compulsory license" for the making of sound recordings of music. In brief, they provide that when the copyright owner of a musical work has once permitted it to be recorded, any other person may record the work upon (1) giving notice to the copyright owner of his intention to do so and (2) paying a royalty of 2 cents for each record manufactured.

These provisions were inserted in the act of 1909 in view of the special conditions existing at the time. The Supreme Court, in the *White-Smith* case mentioned above, had held that the pre-1909 law gave no exclusive right to the copyright owner to make a sound recording of his musical work. In the general revision bills leading up to the act of 1909 it was proposed to give the copyright owner such an exclusive right.

As stated at some length in their reports (H. Rept. No. 2222, S. Rept. No. 1108, 60th Cong., 2d sess.) the congressional committees felt that composers should be given adequate compensation for the use of their music in sound recordings. They were first inclined to **[33]** give the copyright owner the exclusive right to make sound recordings, in the same way that all other rights are given exclusively. During the course of the hearings, however, it was learned that one dominant record company, anticipating the establishment of an exclusive recording right, had contracted with the leading music publishers for the exclusive right to record all their music. To forestall the danger that this company would acquire a monopoly in the making of records, the committees adopted the device of the compulsory license.

b. Practical effect of the compulsory license

The compulsory license provisions are rather severe in their effect upon the copyright owner. Once he exploits his right to record his music, he is deprived of control over further recordings. He cannot control their quality nor can he select the persons who will make them. There have been many complaints of inferior recordings and of recordings by financially irresponsible persons. What is perhaps even more important, the statute places a ceiling of 2 cents per record on the royalty he can obtain. In essence, the compulsory license permits anyone indiscriminately to make records of the copyright owner's music at the 2-cent rate fixed in the statute.

In practice the authors of musical works generally assign their recording and other rights to publishers, under an agreement for the division of royalties. In most instances the record companies secure licenses from the publishers, thereby avoiding some of the mechanics of notice and accounting required by the statute for exercise of the compulsory license. But the statutory rate of 2 cents per record operates as a ceiling on the royalty rate paid, even as to the first recording. For records of popular music, the royalty rate paid is commonly less than 2 cents.

c. Need for the compulsory license

The danger of a monopoly in the situation existing in 1909 was apparently the sole reason for the compulsory license. There are now hundreds of recording companies competing with one another, and the music available for recording is widely scattered among hundreds of competitive publishers. The market for recordings and the number and variety of compositions recorded have increased tremendously. The volume of music available for recording is immense and constantly growing. Much of the new music available remains unrecorded, and no one can foretell whether a recording of a particular composition will strike the public fancy.

Author and publisher groups have urged strenuously that, since the compulsory license is no longer justified as an antimonopoly measure, it should now be eliminated. They argue that the fundamental principle of copyright--that the author is to have the exclusive right to control the commercial exploitation of his work--should apply to the recording of music, as it is applied to all other kinds of works and to other means of exploiting music.

d. Analysis of arguments for retaining the compulsory license

Representatives of the record industry argue that even though the antimonopoly reason for the compulsory license is gone, there are now other reasons for retaining it. They contend that, by giving all record companies the opportunity to make records of the music recorded by **[34]** any one company, the compulsory license is beneficial in the following respects:

(1) It provides the public with a variety of recordings of any particular musical work, which might not be true if the copyright owner could give an exclusive license to one record company.

(2) It enables smaller record companies to compete with the larger ones by offering other recordings of the same music.

(3) It benefits authors and publishers by giving their works public exposure through several different recordings, thereby increasing their revenue from royalties.

All of these asserted benefits flow from multiple recordings of a musical work by several companies under nonexclusive licenses, as opposed to a single recording by one company under an exclusive license. The removal of the compulsory license, however, would not necessarily result in exclusive licenses being given. If it is true that authors and publishers benefit from multiple recordings they would presumably seek to give nonexclusive licenses to several companies. We understand that in those foreign countries having no compulsory license, the recording of musical works is usually licensed nonexclusively to any reputable company.

It seems likely that in the absence of the compulsory license, multiple recordings would still be licensed nonexclusively. If so, the three benefits attributed to the compulsory license by the record industry would still exist, but with these differences: the author or publisher could refuse a license to a recorder whom he considered irresponsible or for a recording he considered undesirable, and the royalty rate would be fixed by free negotiation.

Even assuming that removal of the compulsory license would result in the granting of exclusive licenses, we believe that any loss of the three benefits flowing from multiple recordings would be offset by other considerations:

(1) The public now get a variety of recordings of certain musical works because, when a record made by one company promises to be a hit, other companies make records of the same music. Under a regime of exclusive licenses, each company would have to record different music; while the public would not get several recordings of the same music, it would probably get recordings of a greater number and variety of musical works.

(2) A small record company may now make a competing record of a musical work with which a large company has made a prospective hit, but this also works the other way. Many hits are now originated by small companies; and their prospective hits are often smothered by records of the same music brought out by larger companies having better known performers and greater promotional facilities. Under a regime of exclusive licenses, the companies would not compete with various recordings of the same music, but they would compete with recordings of different music. There is little danger that the large companies would get all the hits: in the popular field the number of compositions available for recording is virtually inexhaustible, and which of them may become hits is unpredictable.

(2) The authors and publishers believe they would benefit from removal of the compulsory license. They would no doubt **[35]** take care of their own interests in deciding whether nonexclusive or exclusive licenses are better for them. Nonexclusive licenses might be more profitable for those authors who have already achieved success. The possibility of granting an exclusive license might give new and unknown authors more opportunity to have their works recorded.

Representatives of the record industry have also argued that the enormous growth since 1909 in the volume of the records manufactured and sold has proved the worth of the compulsory license. They point out that the record industry has prospered, authors and publishers have received more royalties, and the public has been supplied with more records of a better quality at a lower price. We do not see why this expansion of the record industry, coincident with technical improvements and rising public demand, should be attributed to the compulsory license. Other entertainment industries have enjoyed a similar growth. And we understand that the record industry has also expanded in foreign countries where there is no compulsory license.

e. General observations

Removal of the compulsory license would be likely to result in a royalty rate, fixed by free negotiation, of more than the present statutory ceiling of 2 cents. The record companies would, of course, lose the advantage of the lower rate. The price of records to the public might be increased by a few cents, though this is not certain since many factors enter into the pricing of records. If it is true that a freely negotiated rate would exceed 2 cents, we would conclude that the 2-cent ceiling denies authors and publishers the compensation due them for the use of their works.

We have previously mentioned the fundamental principle of copyright that the author should have the exclusive right to exploit the market for his work, except where this would conflict with the public interest. In the situation prevailing in 1909, the public interest was thought to require the compulsory license to forestall the danger of a monopoly in musical recordings. The compulsory license is no longer needed for that purpose, and we see no other public interest that now requires its retention.

For these reasons we favor complete elimination of the compulsory license provisions. However, we recognize that the present practices in the record industry are based on the compulsory license, and that its elimination would require some major adjustments and new contractual relationships. We therefore propose that the present compulsory license provisions be left in effect for a reasonable time after the new statute is enacted.

If Congress, after considering this highly controversial question, determines that the principle of the compulsory license should be retained, we believe that substantial changes should be made in the present provisions. Among the problems that would need to be considered are:

- The royalty rate and the basis on which it is to be computed;

- The present requirement that the copyright owner file a notice of use as a condition to recovery for infringement;

- The mechanics for assuring payment of the royalties;

[36]

- The copyright owner's remedies against those who make records without permission and without complying with the compulsory license requirements.

f. Recommendations

(1) The compulsory license provisions in sections 1(e) and 101(e) of the present statute should be eliminated.

(2) Since elimination of the compulsory license would require negotiations between music publishers and record companies to make new contractual arrangements as to royalty rates, etc., we propose that the present compulsory license provisions be left in effect for one year after the enactment of the new law.

[37] *Chapter IV*

UNPUBLISHED WORKS COMMON LAW AND STATUTORY PROTECTION
OUTLINE OF CHAPTER

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§ [39] CHAPTER IV UNPUBLISHED WORKS: COMMON LAW AND STATUTORY PROTECTIONn1

A. HISTORICAL BACKGROUND AND THE PRESENT LAW

1. UNPUBLISHED WORKS PROTECTED BY COMMON LAW

Even before the adoption of our first Federal copyright statute in 1790, the common law protected authors against the unauthorized publication of their manuscripts. But when the author published his work by issuing copies, his common law rights ended and, in the absence of statutory copyright, the work went into the public domain. The first and succeeding Federal copyright statutes were designed to supplement the common law by giving authors the opportunity to secure copyright protection for their works for a limited time after publication.

This concept has largely been retained in the present copyright law. Except when voluntarily registered, unpublished works are protected by the common law (sec. 2). When a work is published, common law protection ceases and statutory copyright is secured by placing a notice of copyright on the published copies (sec. 10). Generally speaking, publication of copies without the prescribed notice puts the work in the public domain.

2. STATUTORY COPYRIGHT AVAILABLE FOR SOME UNPUBLISHED WORKS BY VOLUNTARY REGISTRATION

An innovation made in 1909 now permits certain kinds of unpublished works to be copyrighted under the statute by voluntary registration in the Copyright Office (sec. 12). This privilege of substituting statutory copyright for common law protection is extended to those classes of unpublished works that are commonly performed or exhibited in public: Lectures, dramas, music, photographs, drawings, art works, and motion pictures. It is not available, however, for other unpublished works, notably book material.

B. ABSENCE OF LIMITATIONS ON COMMON LAW PROTECTION OF UNPUBLISHED WORKS

Under our present copyright law, "publication" means making copies of a work available to the public. The important point here is that public performances, such as broadcasts and stage presentations, do not constitute "publication." And, although recent court decisions throw doubt on this assumption, it has traditionally been **[40]** thought that the sale of phonograph records is not "publication" of the recorded work.

Consequently, as long as a work is neither published in copies nor voluntarily registered, the exclusive rights under the common law continue with no time limit, even though the work is used commercially and widely disseminated. This result--perpetual protection for works disseminated in any manner other than publication--seems contrary to the principle embodied in the provision of the Constitution (art. I, sec. 8) empowering Congress "to promote the progress of science and useful arts, by securing *for limited times* to authors * * * the exclusive right to their * * * writings * * *." **[Emphasis added.]**

Unpublished works under common law protection are also immune from limitations on the scope of statutory protection that have been imposed in the public interest. These limitations are discussed in *chapter III*, part B. They include the "fair use" doctrine, the "for profit" limitation on the public performance right in nondramatic literary and musical works, and the compulsory license for the recording of music.

C. PUBLIC DISSEMINATION AS THE PRESENT EQUIVALENT OF PUBLICATION

1. IN REGARD TO LIMITATIONS ON STATUTORY COPYRIGHT

In the 19th century copyright was concerned principally with printed material, and the publication of copies was virtually the only means of making a work available to the public. At that time it was justifiable to make publication the event at which to terminate common law protection and apply the statute. Today the publication of copies is only one of several methods of public dissemination.

The constitutional provision contemplates that the public interest will be served by giving authors exclusive rights in their works for a limited time, after which the works go into the public domain. We believe that the constitutional principle of a time limitation should be applied when a work is disseminated to the public, whether by the publication of copies or registration, as under the present law, or by public performance or the public distribution of sound recordings. We also believe that any statutory limitations imposed in the public interest on the scope of copyright protection should apply when a work has been publicly disseminated in any of these ways.

2. IN REGARD TO ADVANTAGES OF STATUTORY COPYRIGHT

Although statutory copyright is subject to time and other limitations, it also affords to the author certain advantages over common law protection: (1) registration under the statute provides prima facie proof of the facts stated in the registration certificate, and (2) the statute affords better and more precise remedies for infringement. We see no reason why these advantages should not be accorded to all works when they are publicly disseminated.

[41] 3. CONCLUSION

We propose that the statute should apply to works that are publicly disseminated by the publication of copies, by registration, by public performance, or by the public distribution of sound recordings.

As stated in chapter II, part A, fixation of a work in some tangible form would be a requirement of its copyrightability. Hence, the statute would not apply to a work created in the process of its performance--such as an impromptu speech or a musical improvisation--which the author has not fixed in any tangible form.

D. PROTECTION OF UNDISSEMINATED WORKS

1. COMMON LAW OR STATUTORY PROTECTION

We have given considerable thought to the suggestion at the protection of all copyrightable material should be governed exclusively by the Federal statute. This would mean the complete elimination of protection for undisseminated works under the common law, and the extension of the Federal statute to all copyrightable material as soon as it comes into existence.

This approach is said to have the advantages of simplifying our present dual system of protection and of providing greater assurance of national uniformity. We agree that a uniform Federal copyright system is desirable for the protection of works that have been publicly disseminated. But we believe there are overbalancing reasons to preserve the common law protection of undisseminated works until the author or his successor chooses to disclose them.

2. TIME LIMITATION ON PROTECTION OF UNDISSEMINATED WORKS

Undisseminated material consists largely of manuscripts of a private nature, such as letters, memoranda, personal diaries, journals, and family photographs. Authors and their heirs may not wish to have their private papers disclosed to the public. The common law now protects them against unauthorized disclosure, without a time limit.

For protection under the Federal statute, however, the Constitution would necessarily require a time limitation. We believe that a fixed time limit for the protection of private papers against unauthorized disclosure would be undesirable. The right of privacy should be paramount in this situation.

We realize that, after some period of time, the need for privacy diminishes and private papers may become valuable sources of information for historians and other scholars. But we would not, for this reason, throw all such papers into the public domain after the lapse of a fixed period. To do so might induce the holders of private papers to destroy them. We believe that the right of privacy and the interests of scholarship can be balanced by a special provision for the use of manuscript material that is made accessible to the public in a library or other archive. We shall discuss this below.

[42] 3. EXCLUSIVE FEDERAL JURISDICTION

Extension of the Federal statute to all undisseminated works would preclude the protection of copyrightable material under common law or State statutes. It would also mean that all suits involving rights in copyrightable material would be tried exclusively in the Federal courts.

Undisseminated works would generally be matters of private and local concern until they are disclosed to the public. We therefore see no compelling reason to oust the State law and State courts from jurisdiction over questions concerning the private rights in these works.

4. STATUTORY COPYRIGHT AVAILABLE VOLUNTARILY

Many voluntary registrations are now made for unpublished works, to attain the advantages of the prima facie evidence afforded by the registration certificate and the stronger statutory remedies against infringers. Under the present law, however, this privilege of voluntary registration is limited to certain types of works. It does not extend to nondramatic literary material such as the manuscripts of books, stories, poems, and articles. The Copyright Office receives a considerable number of applications and inquiries seeking registration for unpublished material of this kind, which it must refuse. We believe that the privilege of securing statutory copyright by voluntary registration should be extended to undisseminated works of all types.

5. MANUSCRIPTS PLACED IN ARCHIVES

We have mentioned above the problem of permitting scholars to use manuscripts that have been made accessible to the public in a library or other archival institution. There is ordinarily no difficulty where the author or his heirs have deposited the manuscripts: They can authorize use of the manuscript material and can specify any restrictions they wish to impose. But many manuscripts are deposited by other persons, such as the recipients of letters or their successors. In these cases the depositor can impose restrictions on use of the manuscripts; but where the literary property rights are still owned by the author or his heirs, the depositor's authorization to use the material is probably ineffectual. Scholarly use of the manuscripts in a library is often handicapped by the uncertainty as to whether they are still subject to the authors' common law rights, and by the impracticality of seeking permission from numerous authors or heirs.

Authors who place their manuscripts in the possession of other persons take the risk that those persons even when not authorized to disclose the manuscripts, may in fact do so. When the holder of manuscripts has made them accessible to the public in a library they are no longer private in fact. We believe they should then be available for scholarly use.

For the same reasons we believe that the manuscript material in a library should eventually become available for publication. On the other hand, when a manuscript has been placed in a library by someone other than the author or his heirs, their literary property rights should be preserved for a reasonable period of time. We propose that these rights endure until the manuscript is 50 years old and has **[43]** been in the library for more than 10 years. During that time the author or his heirs could extend the period of their protection, if they so desired, by registering a copyright claim.

In regard to manuscripts placed in a library before the new law comes into effect, we propose that the rule terminating literary property rights in 50-year-old manuscripts should not apply until 10 years after the effective date of the new law.

Provisions of this character would enable scholars to determine whether old manuscripts accessible to them in libraries are available for publication, without having to seek out the authors or their heirs. We believe this would achieve a fair balance between the interests of authors and those of scholars.

E. RECOMMENDATIONS

1. The statute should apply, and common law rights should end, when a copyrightable work is publicly disseminated by the publication of copies, registration in the Copyright Office, public performance, or the public distribution of sound recordings.

2. Common law protection should be left in effect for copyrightable works not publicly disseminated. The privilege of securing statutory copyright in lieu of common law protection, by voluntary registration in the Copyright Office, should be extended to all copyrightable works.

3. When any holder of a manuscript has made it accessible to the public in a library or other archival institution:

(*a*) The institution should be permitted to supply any applicant with a single copy of the manuscript for his use in research.

(*b*) The manuscript should be subject to fair use.

(*c*) The manuscript material should go into the public domain when it is 50 years old and has been in the institution for more than 10 years, unless the owner of the literary property rights has registered a claim of copyright which is still subsisting. With respect to manuscripts placed in an institution before the effective date of the new law, this rule should not become applicable until 10 years after the effective date.

[45] ***Chapter V***

DURATION OF COPYRIGHT

OUTLINE OF CHAPTER

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§ [47] CHAPTER V DURATION OF COPYRIGHTn1

A. THE PRESENT LAW; REVISION NECESSARY

Under the constitutional requirement that Federal copyright protection be limited in time, the present statute (sec. 24) provides for two successive copyright terms totaling 56 years. Copyright endures for 28 years from the date of first publication of the work, and may be renewed by certain persons for a second term of 28 years. If the work is first registered in unpublished form, the 28- or 56-year term is measured from the date of registration, even if the work is later published.

We have recommended in chapter IV that the copyright statute apply to works that are publicly performed or publicly distributed in the form of sound recordings, as well as to those published or registered. This would require a new term provision applicable to works that are publicly disseminated in any of these ways. There are also other changes in the present term provisions that we believe should be considered.

B. BASE POINT FOR COMPUTING THE TERM

1. ALTERNATIVE APPROACHES

In fixing the base point from which to compute the term, either of two general approaches may be taken:

(*a*) To measure the term from the inception of copyright. This is the approach taken in our present law.

(*b*) To measure the term from the death of the author. Most foreign laws adopt this approach.

2. TERM BASED ON INCEPTION OF COPYRIGHT

Under the present law, publication or earlier registration begins the copyright and is also the base point from which the term is computed. If copyright is to begin upon public dissemination--that is, upon publication, registration, public performance, or the public distribution of sound recordings--a logical adaptation of the present law would be to compute the term from first public dissemination.

3. TERM BASED ON DEATH OF THE AUTHOR

In most foreign countries copyright begins upon creation of the work, and the term for works in which the author is identified is computed from the date of the author's death. A number of persons have urged that a term based on the author's death be adopted in our law.

[48] For many works, however, the date of the author's death could not be used as the base for computing the term. About 40 percent of all works registered in the Copyright Office are "corporate works"--that is, works prepared for corporations or other organized bodies by their employees. Many works of individual authors are also disseminated anonymously. The term for corporate and anonymous works would have to be based on something other than the death of the author. In most foreign countries the term for these works is computed from first publication, and no term provision is made for corporate or anonymous works that are not published.

4. COMPARISON OF THE ALTERNATIVES

a. Advantages of each alternative

Basing the term on dissemination would have the following advantages:

(1) The date from which the term is measured could be shown in the registration records and in the published copies of the work. Also, the term could be computed at any time after the copyright begins. (None of this would ordinarily be true of a term based on the author's death, and the death date of many authors would be difficult to ascertain.)

(2) The same term could be applied to all works. (A term based on the author's death would not apply to corporate and anonymous works, and some special provision would also be necessary for the joint works of two or more authors.)

(3) The term provisions would require little change in the established practices of the industries dealing with copyright materials. (A term based on the author's death would require a much greater adjustment.)

Basing the term on the death of the author--with a different basis for corporate and anonymous works--would have the following advantages:

(1) It would bring our term in line with that in most foreign countries.

(2) The author would be assured on the benefit of copyright during his entire life, and his family would benefit after his death. (A term based on dissemination might expire during the author's lifetime--unless it ran for longer than any author could be expected to live.)

(3) All of an author's works--except joint or anonymous works and works made for hire--would go into the public domain at the same time. (Under a term based on dissemination, each of his works would go into the public domain at a different date.)

b. Evaluation of advantages

(1) *Determination of controlling date*.--We believe the most important factor in deciding the base point for computing the term is the ability of the public to determine the date of that event. From this standpoint, basing the term on dissemination seems preferable. The death date of authors who are not well known would often be difficult to ascertain.

It has been suggested that this difficulty could be overcome by requiring that the date of the author's death be recorded in the Copyright Office within a specified period. But if the copyright were ter **[49]** minated for failure to record in due time, the purpose of basing the term on the death of the author would be defeated. And when there was a failure to record, the public would not know whether or when the author had died.

(2) *Same basis of term for all works*.--A term based on dissemination also seems preferable from the standpoint of uniformity and simplicity. It would be applicable to all works, while a term based on the author's death could not be applied to the large volume of corporate and anonymous works.

(3) *Protection for the author's lifetime and beyond*.--We believe that the benefits of copyright should be available to an author for his lifetime and to his dependents if he dies prematurely. This appears to be the premise that has led most foreign countries to adopt a term enduring for the life of the author and a number of years after his death. But, as we shall point out below, this objective can also be achieved by making the term based on dissemination sufficiently long.

(4) *Correspondence of U.S. term with that of foreign countries*.--In most foreign countries the term for works of an identified individual author runs for his life (or, if there is more than one author, for the life of the last survivor), and a stated number of years after his death. For corporate or anonymous works, and also for works first published after the

author's death, the term runs for a like number of years after first publication. Though the specified period varies in the foreign laws, ranging from 15 to 80 years, the most prevalent pattern is a term expiring 50 years after the death of the author or after publication.

It would, of course, simplify international copyright protection if the term in all countries were the same. And there is much weight to the argument that the United States should give foreign works protection equal to that given by foreign countries to the works of U.S. authors. In our 8iscussion below of the length of the term, we adopt the approach of making our term equivalent in length with the term most prevalent in other countries.

5. CONCLUSION

We believe that a term based on dissemination has the greater advantages for the public, and that the principal purposes of a term based on the death of the author can be achieved by a sufficiently long term based on dissemination.

C. LENGTH OF TERM

1. MAXIMUM TERM FOR ADEQUATE BENEFIT TO AUTHORS AND THEIR DEPENDENTS

Many persons have argued that the present maximum term of 56 years is too short. Those who advocate a term based on the author's death are concerned primarily with a longer term for the benefit of authors and their dependents.

A substantial number of works--though they constitute a small percentage of all copyrighted works--continue to have commercial value beyond the present term of 56 years. In some of these cases the author is still living or there are still dependents of a deceased author **[50]** when the term expires. We are sympathetic to the view that the author during his old age, or his dependents if he dies prematurely, should continue to have the benefits afforded by copyright. A maximum term of 56 years is not enough to assure this in all cases.

2. TERM EQUIVALENT IN LENGTH TO THAT IN OTHER COUNTRIES

We are also sympathetic to the view that our maximum term should be generally comparable to the term given our works in most other countries. The term of 56 years, measured from first public dissemination, is considerably shorter on the average than the term of 50 years after the author's death. In most instances dissemination will precede the author's death by substantially more than 6 years.

For any particular work, a term based on dissemination will hardly ever coincide with a term based on the author's death. But the length of the two terms can be roughly equated on the basis of an average span of time between dissemination and the author's death.

From the information given in the 1942 and 1955 editions of "Twentieth Century Authors," we have extracted the following data on 673 authors of English-language books who died between 1930 and 1955:

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A survey of 61 composers of serious music, based on 3 standard reference works, brought closely similar results. A surveyn2 of 191 authors of popular music who died between 1930 and 1950 indicates that, although the average life expectancy and creative period of this group may be somewhat shorter, the average span between the author's median age at publication and his age at death is also about 20 years.

On the basis of these figures, it might be assumed that a copyright term of 70 years after first publication would approximate, on the average, a term of 50 years after the author's death. However, this result is based on an average age of 68 years at death, while the last available census indicates that this figure for all men and women had reached almost 70 years in 1950, and it has steadily been rising. Also, publication will sometimes come later than dissemination in another manner. We therefore propose that the maximum term computed from first public dissemination be fixed at 76 years, which would add 20 years to the present maximum term.

[51] 3. CONCLUSION

A term of 76 years from first public dissemination would be generally equivalent to the term most prevalent in foreign countries. And it would virtually assure protection for the author's lifetime or, if he dies prematurely, for his dependents during a reasonable period after his death. Thus, in addition to the advantages of being based on

ascertainable events and of being applicable to all works, this term would achieve the main purposes of those who have advocated a term of 50 years from the death of the author.

D. RENEWABLE TERMn3

1. THE PRESENT RENEWAL SYSTEM

Under the present law (sec. 24) the maximum term of 56 years is divided into two periods of 28 years each. Copyright expires after the initial term of 28 years, unless it is renewed during the last year of that term. For some kinds of works--posthumous works, composite works, and works made for hire--the renewal for the second term of 28 years may be secured by the owner of the copyright at the time of renewal. For all other works, the renewal may be secured (*a*) by the author; (*b*) if the author is not living, then by his widow and children; (*c*) if there be no widow or children, then by his executors or, of he left no will, by his next of kin.

2. RENEWAL SYSTEM AS A LIMITATION ON THE TERM

a. Maximum term not needed for most works

We do not believe that the maximum term of copyright--which we are proposing be 76 years from first public dissemination--is necessary or advisable for all works. Experience indicates that the present initial term of 28 years is sufficient for the great majority of copyrighted works: less than 15 percent of all registered copyrights are being renewed at the present time.

The percentage of renewals varies from one class of works to another. During a recent year, for example, renewals ranged from 70 percent of the eligible motion pictures, down through 35 percent for music, 11 percent for periodicals, 7 percent for "books" (which includes text material published in various forms), to less than 1 percent for technical drawings.

b. Arguments in opposition to a renewable term

A number of persons have argued that a renewable term is undesirable because (1) it imposes on authors and other renewal claimants the burden of filing a renewal application and (2) it subjects them to the risk of losing their copyrights if they forget to file the application in time.

Some of the opponents of a renewable term recognize that certain works do not need as long a term as others; they suggest that the law provide single terms of different lengths for various classes of works. Others suggest that a uniform single term be provided for all works.

[52] (1) *Various single terms as an alternative to a renewable term*.--Only two foreign countries divide the term of copyright by a renewal device, though many of them have renewable terms for patents and trademarks. However, the copyright laws of a number of foreign countries provide special terms, shorter than the usual term, for certain classes of works--e.g., photographs, motion pictures, sound recordings, translations, and collective works.

For the following reasons, we believe that a uniform renewable term for all works is preferable to various single terms for different classes of works:

- A uniform term for all works is simpler. Different terms for various classes of works would raise questions as to the scope of each class, and as to the appropriate class for a particular work.

- A renewal system tailors the term to the need felt by the copyright owner. A single term for all works of a given class would be unnecessarily long for some works or not long enough for others of that class.

- Renewal registrations provide a fresh record of copyright ownership after the lapse of many years.

(2) *Uniform single term for all works*.--Advocates of a uniform single term contend that, even though most works have little or no commercial value beyond 28 years, it would do no harm to let their protection continue for the maximum term. They argue that no one is interested in using a work after it has ceased to have commercial value, so the continuation of copyright would be of no practical consequence.

We believe that this argument is fallacious on two grounds:

- Many works that have ceased to have substantial commercial value in themselves are still useful to scholars, researchers, historians, and educators, as well as to authors of new works based on preexisting ones.

- The argument seems to assume that the public derives no benefit from having works in the public domain. Copyright protection for a certain period is essential to foster the creation and dissemination of intellectual works and to give authors their due reward. But on the other hand, there are many circumstances in which copyright restrictions inhibit the dissemination of works or their use in the creation of new works.

We believe that, when authors or other copyright owners feel that they have no need for a longer term, the termination of copyright restrictions after 28 years is in the public interest.

(3) *Renewal as a burden; the danger of inadvertent failure to renew*.--The filing of a renewal application is a simple process. We do not believe it is too great a burden for those copyright owners who wish to have their protection extended beyond the initial term of 28 years.

It is nevertheless true that some renewals have been lost because the application was not filed within the 1 year allowed by the present law. A survey covering a recent period of 6 months showed that, out of a total of more than 10,000 renewal applications received, 102 had to be rejected because they were filed too late. There were undoubtedly other instances in which the claimant did not submit a renewal application because he realized that it was too late to do so.

[53] To reduce the danger that the period for filing renewal applications may be overlooked, we propose that renewal be permitted at any time within the last 5 years of the initial 28-year term.

c. Conclusions

We believe that the copyright term should continue to be divided, so that copyrights not renewed would terminate 28 years after first publication or other dissemination. Copyright owners should have the privilege of extending their protection to the maximum term of 76 years from first public dissemination, by filing an application for renewal during the last 5 of the initial 28 years.

Note that these conclusions relate only to the length of the term. The questions of who may apply for renewal and who owns the copyright during the renewal term will be considered next.

3. REVERSION OF RENEWAL, COPYRIGHT TO THE AUTHOR OR HIS HEIRS

a. The reversionary provision and its purpose

With certain exceptions, the present law gives the renewal copyright to the author or to specified heirs of a deceased author. The primary purpose of this provision was to protect the author and his family against his unprofitable or improvident disposition of the copyright. The renewal copyright was intended to revert to them so that they could negotiate new contracts for the further exploitation of the work.

The present provision also operates to change the usual rules, under State laws, of succession to a deceased person's property. For example, it gives the right to obtain a renewal copyright to a deceased author's widow and children, even if the author purports to leave his rights to others in his will.

b. Practical effect of the reversionary provision

In practice, this reversionary feature of the present renewal system has largely failed to accomplish its primary purpose. It has also been the source of more confusion and litigation than any other provision in the copyright law.

The courts have held that an assignment of future renewal rights by the author is binding if he lives into the 28th year and renewal registration is then made in his name. In that situation the author's renewal rights become the property of the assignee as soon as the renewal term begins. It has become a common practice for publishers and others to take advance assignments of future renewal rights. Thus the reversionary purpose of the renewal provision has been thwarted to a considerable extent.

Moreover, the assignees are themselves in an uncertain position. The person entitled to secure the renewal copyright cannot be ascertained until the 28th year. If the assignor dies before then, an advance assignment will fall. A considerable amount of trafficking in the possible future renewal right of authors and their prospective heirs has grown up. An assignee can never be sure of his right to use the work during the renewal term until the time for renewal registration actually arrives.

To give full effect to the primary purpose of the reversionary provision would seem to require that the renewal right be made unas **[54]** signable in advance. Whether this would operate to the benefit of authors and their heirs is questionable. The commercial value of their copyrights might be diminished in many instances if they were unable to contract for the use of their works beyond the end of the first 28-year term. And, during the later years of that term, they might well find that publishers, motion picture producers, and other users who need assurance of continued use for an extended period, would be reluctant to undertake exploitation of the work.

c. Arguments for elimination of the reversionary provision

It has been argued that most authors do not need or want to be treated as incompetent to handle their business affairs. Many of them have banded together in organizations which negotiate standard contracts providing for continuing royalties. Their assignments can be and often are given for limited periods of time.

It is still true, however, that most authors are not represented by protective organizations and are in a relatively poor bargaining position. Moreover, the revenue to be derived from the exploitation of a work is usually unpredictable, and assignments for a lump sum are still common. There are no doubt many assignments that give the author less than his fair share of the revenue actually derived from his work. Some provision to permit authors to renegotiate their disadvantageous assignments seems desirable.

It has also been argued that the present provision for reversion of the renewal right should be eliminated for the following reasons:

(1) Authors would often be in a better bargaining position if they could assign their rights unconditionally beyond the 28th year.

(2) Assignees should have assurance that the rights acquired by them will not be cut off by the death of the author.

(3) An author's copyrights, like his other personal property, should be subject to his bequest by will or, if he leaves no will, should go to his heirs under the general law of intestate succession.

The widespread sentiment for elimination of the present renewal system seems to be prompted largely by the welter of confusion and uncertainty caused by the reversionary provision.

d. Conclusions

We believe that the provision of the present law for reversion of the renewal right to the author or specified heirs should be eliminated. We propose that the law simply provide for the extension of the first 28-year period to the maximum term upon the filing of a renewal application by any person claiming an interest in the copyright. This is in contrast with the present law, under which the copyright can be renewed only in the name of the particular claimant specified in the statute. Our proposal would mean that the renewal becomes a mere extension of term without affecting ownership of rights under existing contracts. Any person claiming an interest in the copyright--author, executor, heir, employer, assignee, licensee, etc.--could make renewal registration. The renewal would extend all rights under the copyright to the full 76-year term, for the benefit of everyone having any interest in the copyright.

[55] Instead of the present reversion of the renewal right, we believe that some other provision should be made to permit authors and their heirs to renegotiate their assignments in certain situations. We shall consider this later in chapter VIII, part D 3.

E. MINIMUM TERM FOR PUBLISHED WORKS

Our proposal that the term run for 28 years or, if renewed, for 76 years, from the first public dissemination of the work may raise a question as to foreign works protected under the Universal Copyright Convention. The Convention requires that the term run for at least 25 years from first publication (or earlier registration). And "publication" is defined in the Convention as "the reproduction in tangible form and the general distribution to the public of copies of a work

from which it can be read or visually perceived." It is doubtful whether a term of 28 years from first public dissemination in some other manner--that is, by public performance or by the public distribution of sound recordings--would satisfy the U.C.C. requirement in all cases.

The term of 28 years from first public dissemination could be made to conform with the U.C.C. by adding a proviso as follows: if a work is first disseminated otherwise than by publication and is later published before the term expires, the term would continue for a period of years--not less than 25--after first publication.

In addition to conforming our law with the U.C.C., this proviso would have the advantage of allowing established practices to be continued, particularly in regard to the copyright notice. Publishers could continue to use the year date of first publication in the notice, even if the work had previously been disseminated otherwise. And the date of publication is usually more significant to libraries and scholars than the date of an earlier dissemination in some other manner. Publication is also significant in many cases for purposes of international copyright protection.

We would favor a proviso of this sort for all works, foreign and domestic. And for the sake of uniformity--since a work first disseminated by the publication of copies would have a basic term of 28 years from publication--we would also have the alternative term under the proviso run for 28 years after publication. The term provisions would then operate as follows:

1. The basic copyright term in all cases would be 28 years from first public dissemination.

2. Renewal during the last 5 years of this basic term would extend the copyright for a further period of 48 years. The maximum term in all cases would be 76 years from first public dissemination.

3. An exception would be made for a work that (*a*) was first disseminated in some manner other than the publication of copies and (*b*) is published during the basic 28-year term. In this case the copyright would continue for 28 years from first publication, but would then expire if the copyright had not been renewed before the end of the basic term.

The following hypothetical cases will illustrate the effect of these provisions:

- A work is first disseminated by the publication of copies. The basic term of 28 years, the 5-year period for renewal, and the **[56]** maximum term of 76 years would all be measured from the year of publication.

- A work is first disseminated by a television broadcast in 1970. Copies are published in 1980.

(*a*) The copyright would be eligible for renewal between 1993 and 1998.

(*b*) If renewed, the term would run for 76 years from 1970.

(*c*) If not renewed, the term would run for 28 years from 1980.

A work is first disseminated by a television broadcast in 1970. Copies are first published in 1999. This publication would have no effect on the term. The copyright would expire in 1998 if not renewed, or in 1024 if renewed.

F. YEAR-END EXPIRATION OF TERM

The copyright term now expires 28 or 56 years from the precise day of first publication or earlier registration.

We propose that in all cases the term should run until the end of the calendar year in which it would otherwise expire. This provision, found in most foreign laws, would simplify the computation of the term. It would then be enough to determine the year, rather than the exact date, of the event from which the term is computed.

G. RECOMMENDATIONS

With respect to copyrights secured under the new law:

1. The copyright should endure for an original term of 28 years from the first public dissemination of the work (i.e., publication of copies, registration, public performance, or public distribution of sound recordings).

2. Any person claiming an interest in a copyright should be entitled to renew it by filing an application for renewal in the Copyright Office during the last 5 years of the original term. Renewal by any interested person should extend all rights in the copyright to endure for a total of 76 years from first public dissemination.

3. An alternative term should be provided in cases where a work (1) is first publicly disseminated otherwise than by the publication of copies, (2) is later published during the original 28-year term, and (3) is not renewed before the end of the original 28-year term. In such cases the copyright should continue for 28 years from first publication and then expire.

4. All terms should run to the end of the calendar year in which they would otherwise expire.

II. APPLICATION OF NEW TERM PROVISIONS TO PREEXISTING WORKS

1. IN GENERAL

There remain the questions of how the new term provisions should apply to (1) works under common law protection at the effective date of the new law, and (2) works in which copyright is subsisting at that date.

[57] The new law would not, of course, restore protection to works that had gone into the public domain before its effective date.

2. WORKS UNDER COMMON-LAW PROTECTION

Preexisting works that had neither been published nor registered should continue under common-law protection until their first public dissemination after the effective date of the new law, and should then come under the statute.

A question arises as to works that had not been published or registered but, on the effective date, were in the process of a continuous dissemination. Examples are the run of a stage play or the sale of phonograph records, begun before and continuing after that date. We believe it would create practical difficulties to shift from common-law to statutory protection in this situation. Therefore, the continuation of a series of disseminations begun before the new law comes into effect should be excluded from the rule that the new law applies upon the first public dissemination after its effective date.

3. SUBSISTING COPYRIGHTS

a. Length of term

We believe that, as far as feasible, the term provisions of the new law should be applied to subsisting copyrights. Thus, (1) we would have the term of subsisting copyrights run to the end of the calendar year, (2) we would extend the period for renewal registration to 5 years, and (3) we would lengthen the renewal term from 28 to 48 years. However, the base point for computing the term under the present law (publication or earlier registration) should remain unchanged for subsisting copyrights.

b. Ownership of future renewal rights

The new law would change the present renewal system in regard to the persons entitled to copyright for the renewal term. Where a subsisting copyright is in its first term at the effective date of the new law, who is to have the future renewal rights?

Certain persons will have acquired expectancies of the future renewal rights under the present law--expectancies that might accrue to them when the time for renewal arrives, depending upon who is living at that time. Substantial sums have been invested in some of these expectancies. To apply the new law would deprive potential claimants and their assignees of their expectancies in many cases.

Consequently, we believe that the present provisions as to who may renew should remain in effect for preexisting copyrights in their first term. It is unfortunate that the highly troublesome provisions for the reversion of renewal rights should continue in effect for 28 years longer, but we believe this is preferable to the confusion and unfairness that would result if existing renewal expectancies were cut off.

c. Ownership of renewal copyright for extended period

Under our recommendations, the new law would extend the renewal term of subsisting copyrights from 28 to 48 years, whether renewed before or after the effective date of the new law. Where the author or his heirs assigned their renewal rights before the effective date of the new law, who should have the copyright for the added 20 years? We **[58]** believe there would be little justification for lengthening the term unless the author or his heirs were to receive some benefit from it. At the same time, the interests of their assignees must also be considered.

If the assignee is obligated to continue paying royalties or a part of his revenue to the author or his heirs during the entire life of the copyright, we would allow the assignment to remain in effect during the added 20 years. On the other hand, if the author or his heirs would otherwise receive no benefit from the lengthened term, we would terminate the assignment at the end of the 28th year of the renewal term, even if it purported to convey ownership for the length of the copyright "and any extensions thereof"; the copyright for the remaining 20 years would then revert to the author or his heirs.

4. RECOMMENDATIONS

a. With respect to preexisting works not under copyright at the effective date of the new law--

(1) Works in the public domain on that date should stay in the public domain.

(2) Preexisting works that have not been published or registered before the effective date should come under the new law upon their first public dissemination after that date. But this should not apply to a dissemination that merely continues a series of disseminations begun before that date.

b. With respect to copyrights subsisting at the effective date of the new law--

(1) The term should continue to be computed from the first publication or earlier registration of the work. The new law should apply in the following respects:

(*a*) The term should run to the end of the calendar year.

(*b*) The period for renewal registration should be the last 5 years of the original 28-year term.

(*c*) The renewal term should be lengthened to 48 years.

(2) Subsisting copyrights that are still in the original term on the effective date should be renewable by the persons entitled to renew under the present law.

(3) Assignments of renewal rights, executed by an author or his representatives or heirs before the effective date, should expire at the end of the 28th year of the renewal term, and the copyright for the additional 20 years should revert to the author or his heirs, except where the assignee is obligated to continue paying royalties or a part of his revenue to the author or his heirs during the entire life of the copyright.

[59] *Chapter VI*

NOTICE OF COPYRIGHT
OUTLINE OF CHAPTER

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§ [61] CHAPTER VI NOTICE OF COPYRIGHTn1

A. THE PRESENT LAW

1. NOTICE IN PUBLISHED COPIES REQUIRED

The requirement that published copies of copyrighted works bear a notice of copyright has been in the U.S. copyright law since 1802. Before that, the first U.S. copyright law enacted in 1790 required that notice of copyright be given by publishing the record of copyright registration in one or more newspapers.

The present law (sec. 10) requires, as a condition of copyright, that "the notice of copyright * * * shall be affixed to each copy **[of the work]** published or offered for sale in the United States by authority of the copyright proprietor." The notice must be in a prescribed form (sec. 19) consisting of (1) the word "Copyright" or the abbreviation "Copr." or the

symbol (c), accompanied by (2) the name of the copyright proprietor and (3) the year in which copyright was secured. An alternative form without the year date is permitted for certain artistic or graphic works. The notice must be placed in specified positions (sec. 20) varying for different classes of works.

The copyright notice is designed to apprise persons coming into possession of a published copy that the work is copyrighted, who owned the copyright at the time of publication, and, where required, the year in which the copyright term began to run.

2. EFFECT OF OMISSION OF NOTICE

The absence of a notice in the published copies of a work can ordinarily be taken to mean that the work is in the public domain. This is not always true, however. For example, the absence of a notice in copies published without the consent of the copyright owner will not invalidate the copyright. And under section 21 of the present law, the omission of the notice from a few copies by accident or mistake will not invalidate the copyright; but an innocent infringer who has been misled by the omission is absolved from liability.

3. EFFECT OF ERRORS IN FORM OR POSITION OF NOTICE

Errors in the form or position of the notice, as well as its complete omission, may result in the loss of copyright. Earlier court decisions tended to require precise compliance with the statutory specifications as to the form and position of the notice. However, the trend of the more recent decisions has been to uphold notices which, though falling short of literal compliance with the statute, are adequate to apprise the public of the information required.

[62] 4. PROVISION FOR NOTICE IN THE UNIVERSAL COPYRIGHT CONVENTION

The Universal Copyright Convention, to which the United States adheres, permits any member country to require a copyright notice in the published copies of foreign works as a condition of their protection. If the prescribed notice is used, no other formality--such as deposit, registration, or domestic manufacture--is to be required for copyright protection.

The notice prescribed by the Convention differs in one important respect from that prescribed by our statute: Instead of specifying the position of the notice, the Convention provides that it be "placed in such manner and location as to give reasonable notice of claim of copyright." This liberalized provision has been inserted in section 9(c) of our statute, but it applies only to foreign works protected under the Convention.

B. ARGUMENTS FOR AND AGAINST THE NOTICE REQUIREMENT

1. VALUE OF THE NOTICE

a. Placing published material in the public domain

The notice requirement serves to place most of the great mass of published material in the public domain, while giving authors the opportunity to secure copyright when they want it.

Most published material bears no notice, and is therefore in the public domain, because the author is not interested in securing copyright. This uncopyrighted material includes, for example, most pamphlets, circulars, corporation and society reports, manuals, advertising matter, newspapers, etc., which have little or no commercial value for copyright exploitation. It also includes scholarly, scientific, and other informational matter which the author is willing to make freely available for reproduction and circulation by anyone.

b. Showing whether a work is under copyright

The notice on a published work serves to inform the public that the work is under copyright. Its absence generally indicates that the work is in the public domain.

c. Identifying the copyright owner

The notice indicates who is the copyright owner at the time of publication. In foreign countries where no notice is required, the laws commonly provide that if the author is identified in the copies of the work, he is presumed to own the copyright; otherwise the publisher named in the copies is presumed to be the copyright owner. In a substantial number

of instances, however, the notice required by our law shows that the copyright owner is someone other than the person to whom such a presumption would apply.

It is true, of course, that the copyright owner named in the published copies may later assign the copyright to another person. For this reasons it is often necessary to search the assignment records in the Copyright Office to determine ownership with certainty. But the notice, by naming the owner at the time of publication, provides a starting point from which further transactions can be traced.

[63] *d. Showing the year of publication*

The year date in the notice gives the public a basis for determining when the copyright expires. The notice will not usually show whether the copyright has been renewed; a search of the Copyright Office records will be necessary to determine that fact. But the public will know that the copyright expires 28 years after the date in the notice if not renewed, and--under the term proposals we are making--that it expires 76 years after that date at the most. The year date of publication is also of value to the public for other purposes, as in showing the age of a particular work or edition.

2. OBJECTIONS TO THE NOTICE REQUIREMENT

a. In general

There has been considerable sentiment, particularly among some author and publisher groups, for complete elimination of the notice requirement. Others, especially those who use copyright material, have been no less firm in urging that the notice is of great value and should be retained. It seems generally agreed that if a notice requirement is retained, the rigid specifications of the present law as to its form and position should be relaxed.

The elimination of the notice requirement would mean that everything potentially copyrightable is under copyright protection. With some exceptions for particular kinds and uses of works, this is the state of the law in most foreign countries. Advocates of eliminating our notice provision argue that, as a matter of principle, all authors are entitled to have copyright in all their works without any requirement that they assert their desire for copyright protection. They urge that it is unjust to deprive an author of copyright because of his failure to comply with a technical notice requirement.

b. Inadvertent loss of copyright

The chief objection to the present notice requirement is that copyright may be--and in a significant number of instances has been--lost unwittingly because, through mistake or inadvertence, the notice has been omitted or a fatal error has been made in its form or position.

We believe that the inadvertent forfeitures of copyright that occur under the present notice requirement should and can be avoided by appropriate modifications of the present provisions.

3. CONCLUSIONS

We believe the public interest is served by keeping free of copyright restrictions the great bulk of published material in which the authors do not wish to secure copyright. The copyright notice is a simple and highly useful device to accomplish that purpose, and also to give the public information as to the copyright status and ownership of any work. We would therefore continue to require a copyright notice in published copies, but with certain changes in the present law to avoid the forfeiture of copyright through inadvertent omission of or errors in the notice.

As under the present law, the notice requirement should be confined to published copies, although copyrighted works are also disclosed to **[64]** the public by other means of dissemination. It would not be practicable to require that a copyright notice be given, for example, at each public performance of a work. Nor does there seem to be the same need for a notice on such occasions. A notice is needed more particularly when copies of the work, from which it can readily be reproduced, are placed in the hands of the public.

C. PROPOSED CHANGES IN THE NOTICE PROVISIONS

1. INADVERTENT OMISSION OF NOTICE

Section 21 of the present law provides that when the copyright owner has sought to comply with the notice requirement, the omission of the notice "by accident or mistake * * * from a particular copy or copies" shall not invalidate the copyright. However, an innocent infringer who has been misled by the omission of the notice is absolved from liability for damages, and his infringement is not to be enjoined unless he is reimbursed for his outlay.

This provision applies only where the notice is affixed to most of the published copies, but is omitted from a few copies by accident or mistake. We believe that section 21 has served a valuable purpose, and we would retain it in substance.

We believe further that the same principles should be extended to cover the inadvertent omission of the notice from more than a few or from all of the copies in a published edition or printing. We would not sanction a deliberate omission of the notice, but we would avoid forfeiture where the claimant indicates his desire for copyright protection and shows that omission of the notice was inadvertent.

We propose that the inadvertent omission of the notice from more than a few copies or from an entire edition or printing should not invalidate the copyright if (*a*) the work has been registered before, or is registered within 1 year after, the publication of copies without the notice, and (*b*) within that 1 year the claimant files a statement of the circumstances causing the omission.

However, since the absence of notice is an indication to the public that the work is not under copyright, an innocent infringer who is misled by the absence of notice should be shielded from liability. We therefore propose that anyone who, relying on the absence of the notice, innocently begins an infringing undertaking before he is actually informed that a copyright claim has been registered, should not be held liable for infringement. Nor should he be enjoined from completing the undertaking innocently begun unless he is fully reimbursed for his outlay.

2. ERRORS IN FORM OF NOTICE

The most common errors in the form of the notice that have forfeited or jeopardized copyrights occur in (*a*) giving the wrong name or year date in the notice, and (*b*) giving the name or date elsewhere than in conjunction with the copyright word or symbol.

a. Wrong name or date

We propose that an erroneous name or date in the notice should not invalidate the copyright, but that any person not actually informed otherwise should be entitled to act on the assumption that the name and date given in the notice are correct.

[65] In the case where the year date given is later than the correct one, this assumption would not be enough to protect the public. The later date will indicate that the copyright term extends beyond its actual duration. It frequently occurs, however, that a work is published near the end of a year bearing the date of the next year; this error is not serious. We propose that where the notice is post-dated by more than 1 year, the claimant should be required to record in the Copyright Office, within 1 year after publication with the erroneous date, the correct date with a statement of the circumstances in which the later date was given.

b. Separated name or date

Where one or more names or dates appear in the copies but are so separated from the copyright word or symbol as not to be clearly identified as part of the notice, the copyright should not be invalidated; but certain presumptions should be established as to the name or date to be considered part of the notice.

3. POSITION OF THE NOTICE

The specifications in the present law (sec. 20) as to the position of the notice are unnecessarily rigid. The purpose would be served by a general requirement that the notice be so placed that it will reasonably come to the attention of the public. In accordance with this principle the Universal Copyright Convention provides that the notice may be "placed in such manner and location as to give reasonable notice of claim of copyright," and this provision has been inserted in our law (sec. 9(c)) in respect of foreign works protected under the Convention. We propose that a similar provision be adopted for all works.

4. NOTICE IN COLLECTIVE WORKS

A special problem is presented as to the notice in collective works (such as periodicals and anthologies) containing a number of component works that might be copyrighted separately. In some situations it is doubtful whether a single notice giving the copyright owner and year date of the collective work as a whole satisfies the notice requirement as to the individual component works, particularly where a component work was previously copyrighted.

We proposed that a single notice for a collective work as a whole should suffice also for the individual component works. This should apply to component works previously copyrighted, but without extending the copyright term for those works. The public should be entitled to rely upon the single notice as to any component work for which no separate notice is given. (In dealing with the public, the person named in the notice would act as trustee for other having rights in the component works: see *ch. VIII*, pt. B 4 b.)

5. YEAR DATE

a. To be required on all published works

"The year in which the copyright was secured by publication" is now required in the notice on literary, musical, and dramatic works (sec. 19). For graphic and art works, however, the present law per **[66]** mits the use of a special short form of notice which omits the year date. This short form was provided for in the act of 1909 because of objections that the longer form then required for other works, if placed on the face of a graphic or art work, would disfigure it. Our proposals as to the form and position of the notice would go far toward eliminating the basis for this objection. Since the year date gives important information to the public, we believe it should be required in the notice for all classes of published works.

b. Date to be year of publication

Where copyright is secured by registration of an unpublished work, and the work is later published with no change in substance, the present law has been construed as requiring that the date in the notice be the earlier year of registration. This has caused confusion and has resulted in erroneous notices in some cases.

We have proposed in chapter IV that copyright begin upon the first public dissemination of a work in any of several ways (including registration). However, a requirement that published copies contain the year of an earlier dissemination would upset existing practices and aggravate the present confusion. Under our recommendations in chapter V the copyright term of published works, if not renewed, would be measured from their first publication. The date of publication is also meaningful for other purposes.

For these several reasons, the date required in the notice should be the year of first publication in all cases.

D. RECOMMENDATIONS

1. A notice of copyright, consisting of either the word "copyright" or the symbol (c), accompanied by the name of the copyright owner and the year date of first publication, should be required in all published copies of copyrighted works.

2. With respect to inadvertent omission of the notice:

(*a*) If the notice is omitted inadvertently from a few copies only, and other copies bear the notice, the copyright should not be invalidated.

(*b*) If the notice is omitted inadvertently from more than a few copies or from an entire edition or printing, the copyright should not be invalidated if:

(1) a copyright claim is registered before, or within 1 year after, publication of the copies without notice, and

(2) a statement of the circumstances of the omission is filed within that 1-year period.

(*c*) In any case, an innocent infringer who is misled by the omission should not be liable for an infringement begun before he is actually informed that a copyright claim has been registered, and should not be enjoined from completing the infringement innocently begun unless he is fully reimbursed for his outlay.

3. An erroneous name or date in the notice should not invalidate the copyright. However:

(*a*) Any person not actually informed otherwise should be entitled to act on the assumption that the name and date given in the notice are correct.

[67] (*b*) Where the year date in the notice is more than 1 year later than the date of first publication, the claimant should be required to record in the Copyright Office, within 1 year after the publication of copies bearing the later date, a statement showing the correct year date and the circumstances in which the later date was given.

4. Where there is no name or no date accompanying or clearly associated with the rest of the notice, it should be presumed that, for purposes of the notice:

(*a*) The author named in the copy, or the publisher if no author is named, is the copyright owner.

(*b*) The imprint or issue date in the copy is the date of first publication.

5. The statute should not require that the notice be placed in a specified position. Instead, it should merely require that the notice be so placed that a reasonable inspection of the copy will reveal it.

6. A single notice in a collective work should be a sufficient notice for the work as a whole and for each of the component works, including those previously copyrighted. The single notice should be presumed to apply to all the component works for which no separate notice is given.

[69] *Chapter VII*

REGISTRATION AND DEPOSIT OF COPIES

OUTLINE OF CHAPTER

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§ [71] CHAPTER VII REGISTRATION AND DEPOSIT OF COPIESn1

A. THE PRESENT LAW

1. HISTORICAL DEVELOPMENT

A system of copyright registration has been a basic feature of our copyright law from its beginning in 1790, and the deposit of material to identify the work being registered has always been required. Since 1846 (except for one interval of a few years) copies of published works under copyright have also been required to be deposited in the Library of Congress for its collections.

Until 1909, copyright was secured by a registration made before the work was published. The deposit of certain material identifying the work was required for registration. After the work was published, copies of the published edition were required to be deposited.

The pre-1909 law resulted in the forfeiture of copyright when works were inadvertently published before being registered. To avoid these forfeitures, the act of 1909 inaugurated the present system: copyright is now secured by publication of the work with the copyright notice, and registration is made later when copies of the work as published are deposited. The one deposit now serves both to identify the work for the registration record and to enrich the collections of the Library of Congress.

2. PROVISIONS OF THE PRESENT STATUTE

The present statute provides that after copyright has been secured by publication of the work with the notice, copies of the work, accompanied by a claim of copyright, shall be "promptly" deposited in the Copyright Office (sec. 13). When the deposit has been received, the Copyright Office is to make registration and issue a certificate (secs. 11, 208, 209). Deposit and registration are prerequisites to the institution of an infringement suit (sec. 13). The certificate of registration is to be "admitted in any court as prima facie evidence of the facts stated therein" (sec. 209).

Copyright may also be secured for certain classes of unpublished works by a voluntary deposit and registration. Where a work registered in unpublished form is later published, copies of the published edition must be deposited promptly (sec. 12).

If the registered deposit is not made promptly after publication, the Register of Copyrights may demand it. Failure to comply with the demand within certain time limits will subject the copyright owner to a fine and will void the copyright (sec. 14).

[72] 3. THE REQUIREMENT OF "PROMPT" DEPOSIT

Instead of specifying a time period for the deposit, the present statute provides that deposit shall be made "promptly" after publication. What constitutes a "prompt" deposit, and the consequences of failure to deposit "promptly," remained open questions until the decision of the Supreme Court in *Washingtonian Publishing Co. v. Pearson (306 U.S. 30 (1939)*). It is now settled by that decision that a long delay in making the deposit does not affect the validity of the copyright or its enforcement against an infringement occurring before the deposit. Consequently, deposit may be deferred until (1) the Register of Copyrights makes a demand or (2) the copyright owner needs to institute an infringement suit.

As a practical matter, the Register cannot ascertain all works published with a copyright notice, and most copyrights are never involved in litigation. The result is that for many copyrighted works deposit and registration may be withheld indefinitely or never made.

B. THE REGISTRATION SYSTEM

1. VALUES OF REGISTRATION

a. Value to copyright owners

Registration provides, for authors and other copyright owners, a permanent and official record of their copyright claims. It furnishes them with proof of the existence of their works at a particular time and the facts supporting their copyright claims. Particularly important to them is the certificate of registration, which constitutes prima facie evidence of the stated facts and is generally accepted in trade circles as proof of copyright.

b. Value to users

Registration serves other purposes, perhaps even more important, for persons who wish to use copyright materials. It provides accessible official records from which they can obtain information regarding the existence and basis of a copyright claim, the extent of the claim (e.g., in a new version of a preexisting work), its duration, and its initial ownership. In conjunction with the records of assignments and other transfers of ownership, it enables users to trace title to the copyright.

c. Other values

A registration system also has other values:

(1) It provides a means for securing the automatic deposit of copies for the collections of the Library of Congress.

(2) It provides an administrative review of copyright claims whereby--

- Many unfounded claims, usually resulting from a lack of understanding or knowledge of the law, are weeded out, thus avoiding needless controversy and litigation;

- Authors and other claimants not familiar with the law are informed of the requirements for copyright protection;

The courts and the public are assisted in construing the law.

[73] (3) It facilitates the enforcement of certain requirements and restrictions in the law, such as those pertaining to domestic manufacture and imports (discussed below in *ch. X*, pts. B and C).

In the major foreign countries that have no public registry for copyrights, private organizations find it necessary to maintain much the same kind of copyright records for their own use. This is indicative of the value of a registration system, but we believe that a public registry is greatly preferable: it provides a single, comprehensive record that is official, based on an administrative review, and freely accessible to the public. Private records may serve the purpose of the particular groups that maintain them, but they do not provide, for users of copyright materials and for the public, the accessible source of authoritative information afforded by a central public registry.

2. PROPOSALS FOR A REVISED REGISTRATION SYSTEM

a. Basis of proposed system

Most interested groups in the United States appear to favor a public registration system that would provide the most complete and dependable record possible. At the same time most groups feel that failure to register should not entail forfeiture of copyright. No such forfeiture results under the present law, except where a demand by the Register of Copyrights is not complied with.

We agree with this approach. Accordingly, we propose that registration should not be required to sustain a copyright secured by publication or other public dissemination of the work, but that strong inducements to make registration within a reasonable time should be provided.

The problem of securing copies for the Library of Congress when they are not deposited for registration will be dealt with later in this chapter.

b. Inducements to register

(1) *Benefits of registration to copyright owners*.--The inherent value of the registration record to the copyright owner, and the prima facie proof afforded by the registration certificate, would probably induce a substantial number of registrations. But in those foreign countries having a wholly voluntary system of registration, where similar benefits are the only inducement, most copyrights are not registered. More compelling inducements are also needed to achieve the objective of fairly complete coverage of all copyright claims in the registration records.

(2) *Certain remedies dependent upon registration*.--We propose that these other inducements be provided by making certain remedies for infringement available only for registered copyrights.

The remedies available against copyright infringers (discussed below in *ch. IX*) include those comparable to the remedies usually accorded for torts in general--namely, (*a*) an injunction to prevent future infringement and (*b* recovery of the actual damages suffered by the copyright owner. The other remedies are somewhat unusual-- (*c*) an award of the infringer's profits, (*d*) an award of statutory damages in lieu of a lesser amount of actual damages and profits, and (*e*) the impounding and destruction of infringing articles.

[74] We propose that where a copyright has not been registered within a prescribed period of time, the remedies available for an infringement commenced before registration should be limited as follows:

(*a*) The copyright owner should recover the actual damages shown to have been suffered by him.

(*b*) No award of profits as such or of statutory damages should be allowed. (In some cases the infringer's profits may be a measure of the actual damages.)

(*c*) The court should have discretion to enjoin future infringements.

(*d*) The court should also have discretion to enjoin the completion of an infringing undertaking commenced before registration, or to order the impounding and destruction of infringing articles, but only on condition that the infringer be fully reimbursed for his outlay.

We believe that the matter of awarding costs and attorney's fees to the prevailing party (see *ch. IX*, pt. D) should be left to the court's discretion in any case.

In addition to these civil remedies, a willful infringement for profit would be subject to criminal penalties (see *ch. XI*, pt. B 1) even though the copyright had not been registered.

c. Time period for registration

To be most useful and reliable as a source of information, registration should be made shortly after the first public dissemination of the work. We believe that a period of 3 months after dissemination in the United States, or 6 months after dissemination abroad, would allow the copyright owner a reasonable period of time to apply for registration.

All the remedies for infringement--including the infringer's profits, statutory damages, and injunctions without reimbursement--would be available where the copyright is registered within the 3- or 6-month period. Where

registration is delayed beyond that period, all the remedies would still be available for an infringement commenced after registration, but only the limited remedies would be available for an infringement commenced before registration.

d. Exemption for U.C.C. works

The Universal Copyright Convention provides that foreign works covered under the convention, if they are unpublished or if they are published with a prescribed notice, are to be protected without deposit or registration. Their registration may be required, however, as a prerequisite to suit. The statute (sec. 9(c)) exempts these works from the present registration requirements, except before suit.

It might be argued that as long as registration is not a condition of copyright protection, and reasonably adequate remedies are provided for infringement of unregistered works, the withholding of additional remedies where the work is not registered would be consistent with the U.C.C. This, however, may be open to some question. It would comport better with the spirit of the U.C.C., if not its letter, to continue exempting foreign works covered under the convention from the consequences of failure to register. These works should therefore be excluded from the proposed limitations on the remedies for infringement of unregistered works.

[75] *e. Registration as prerequisite to suit*

The present law (sec. 13) provides that no infringement action shall be maintained until the work has been registered. Since the registration process identifies unfounded claims and assists the courts in establishing presumptive facts and applying the law, we believe the requirement of registration before suit should be maintained, but with one important modification.

Where registration has been applied for, but has been refused by the Register of Copyrights on the ground that the claim in invalid, the claimant may now bring an action in the nature of mandamus against the Register, seeking to establish that the claim is valid and entitled to registration. In *Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co. (260 F.2d 637 (1958)*), the Second Circuit Court construed the present law as meaning that the claimant whose application had been refused could not maintain a suit against an infringer until registration had been secured through an action against the Register.

We believe this result is unfortunate. If the infringement continues, the delay involved in proceeding first against the Register may aggravate the injury. And two successive actions--usually in different jurisdictions--may be an expensive burden.

Where a claimant has deposited the required copies, application, and fee, and registration has been refused, we believe he should be entitled to maintain a suit against an infringer. The validity of the claim would be determined in that suit. But the Register should be notified of the suit and given the opportunity to advise the court of the reasons for refusing registration.

f. Probative effect of registration

The present law (sec. 209) makes the certificate of registration prima facie evidence in any court of the facts stated. The certificate is not conclusive proof but, if not controverted, the facts stated supply the basis for determining the subject matter, ownership, and subsistence of the copyright.

The facts shown in the certificate are derived from the claimant's application, after an administrative examination of the application and deposit copies. They have generally proved to be reliable, and the prima facie proof afforded by the certificate simplifies judicial proceedings.

The reliability of the facts supplied by the claimant, however, is less certain when registration is made long after the copyright claim originated. This is true particularly when registration is made on the eve of an infringement suit, or is made by a claimant who is not the original owner.

We propose that registration certificates should continue to be prima facie proof when registration is made within 1 year after the first public dissemination of the work. When registration is delayed for more than 1 year, the probative effect of the certificate should be left to the discretion of the court.

g. Authority of the Register of Copyrights to refuse registration

The Register of Copyrights has for many years exercised the authority to refuse registration when he finds that the article deposited is not copyrightable, or that the requirements for securing copyright **[76]** or for registration have not been fulfilled. A recent survey shows, in round figures, that out of 250,000 applications received in a year, 6,000 or 2.4 percent were rejected. Of the rejections, 40 percent were for articles considered not copyrightable, 35 percent for articles not bearing the required notice, 17 percent for unpublished material of classes not eligible for registration, and the remaining 8 percent for miscellaneous reasons.

There have been several mandamus actions against the Register. In two cases, where he had refused registration on the ground that the materials deposited were not the copies required by the statute, the court held the deposit adequate and ordered registration. In other cases the courts have sustained his refusal to make registration on the ground that the articles were not copyrightable. Because the Register's authority to refuse registration is not stated explicitly in the statute, unsuccessful claimants have sometimes challenged his authority to reject applications for any reason.

We believe that if claims were registered without regard to their validity, the registration records and certificates would lose much of their probative value to claimants, the public, and the courts.

We suggest that the statute should state explicitly what we believe it now implies: (1) That the Register is required to make registration of any claim appearing to be valid under the statute, upon compliance with the procedural requirements for registration; and (2) that he is authorized, subject to review by the courts, to refuse registration for any claim he finds invalid.

As indicated above, his refusal should not prevent the claimant from bringing an infringement suit in which the validity of the claim can be determined by the court.

3. RECOMMENDATIONS

(*a*) Registration should not be a requirement for copyright protection, but it should be available for any valid copyright claim.

(*b*) The Register of Copyrights should be required to make registration of any copyright claim that appears to be valid, upon deposit of the prescribed copies, application, and fee. His authority to refuse registration of any claim he finds invalid, subject to review by the courts, should be stated expressly.

(*c*) Registration should continue to be a prerequisite to an action for copyright infringement. But where the procedural requirements for obtaining registration have been fulfilled and the Register of Copyrights refuses registration, the claimant should be entitled to bring an infringement suit if the Register is notified and permitted to become a party to the suit.

(*d*) The certificate of registration should continue to be admitted in any court as prima facie evidence of the facts stated, if registration is made within 1 year after the first public dissemination of the work. In the case of a later registration, the probative weight to be given to the certificate should be left to the discretion of the court.

(*e*) If registration is made within 3 months after the first public dissemination of the work in the United States, or within 6 months after its first public dissemination abroad, or at any time before an infringement is commenced, all remedies for the infringement **[77]** should be available to the copyright owner. If registration is not made within that time, the civil remedies for an infringement commenced before registration should be limited to the following:

(1) The actual damages suffered by the copyright owner.

(2) In the discretion of the court, an injunction against future infringements.

(3) In the discretion of the court, an injunction against completion of the infringing undertaking commenced before registration, and the impounding and destruction of infringing articles made in the course of the undertaking, but only on condition that the infringer be fully reimbursed for his outlay.

(*f*) Foreign works entitled to protection under the Universal Copyright Convention, if they are unpublished or if published with the notice prescribed by the convention, should have all remedies for infringement without regard to the time of registration.

(*g*) An award of costs and attorney's fees to the prevailing party should be left to the court's discretion in all cases.

(*h*) The criminal penalties against a willful infringement for profit should be applicable without regard to the time of registration.

C. DEPOSIT OF COPIES

1. PURPOSES OF DEPOSIT

Under the present law, the deposit of copies of copyrighted works is required for two purposes: (1) to identify the work being registered, and (2) to enrich the collections of the Library of Congress. A single deposit, accompanied by an application for registration, now serves both purposes.

2. DEPOSIT FOR THE LIBRARY OF CONGRESS

Most of the major countries of the world have established a deposit system of some kind to obtain copies of domestically published works for one or more libraries. In those countries having no copyright registration or a purely voluntary registration system, the deposit of copies is required apart from copyright. In other countries, as in the United States, copyright registration is a means of obtaining copies for the national library.

The deposit of copies in conjunction with copyright registration has been a principal source of acquisitions for the Library of Congress. Since 1909 about 7 million copies of various kinds of works have been supplied for the Library's collections out of copyright deposits. While the Library must acquire many uncopyrighted works from other sources--by gift, exchange, or purchase--the great bulk of the significant works published commercially in the United States have come to the Library through the copyright registration system.

3. DEPOSIT REQUIRED FOR REGISTRATION

a. In general

We believe that under the registration system recommended above most copyrighted works published in the United States will be registered. And it is economical for all concerned to have a single deposit that serves both for registration and for the Library of Congress. **[78]** The deposit required for registration should therefore continue to include the copies to be obtained for the Library.

b. Present requirements

For the purpose of copyright registration alone, the deposit of one copy of the work is sufficient; and where it is not practicable to deposit a copy of the work itself, other material identifying the work is usually an adequate substitute. Accordingly, for the registration of unpublished works, which are not generally wanted by the Library, the present law requires the deposit of one copy only or, in some cases, other identifying material (sec. 12).

Since most categories of published works are wanted by the Library, the present law requires, with certain exceptions, that two copies of the best edition of published works be deposited for registration (sec. 13). The exceptions--other than that for foreign works to be discussed below--pertain to categories of published works not generally wanted by the Library:

(1) For a separately copyrighted contribution to a periodical, only one copy of the periodical issue is required.

(2) For certain published works in the art classes, the Register of Copyrights may permit the deposit of photographs or other identifying reproductions in lieu of copies.

c. Need for flexibility

We believe that the basic approach of the present law--requiring, for registration, the deposit of two copies of a published work or one copy of an unpublished work, with exceptions to meet special situations--is sound. But the present statute does not permit exceptional treatment in a number of situations where exceptions are needed or warranted. For example:

- Under the present statute two complete copies of a published motion picture film must be deposited. The films are heavy, expensive, and inconvenient to handle. Other identifying material would suffice for registration, and the Library

wants only one copy of selected motion pictures. In practice, the two films are usually returned to the depositor immediately after registration upon his agreement to supply one film for the Library if later requested.

- The requirement that each issue of a newspaper be deposited for separate registration has discouraged the copyrighting of daily newspapers.

- Similarly, the copyrighting of photographs has been hampered by the requirement that each separately published photograph be deposited for separate registration.

- A sound recording is not now acceptable as a deposit for a musical work. In some instances the work is first produced in the form of a sound recording, and transcription into the written notation required for deposit is difficult and expensive.

- For some categories of published works not wanted for the Library's collections, the deposit of one copy would suffice for registration where two copies are now required.

- The Copyright Office may now permit, but cannot require, the deposit of identifying photographs in lieu of copies of unwieldy or fragile art objects; it must accept actual copies when sub **[79]** mitted though photographs would be preferable for storage, preservation, and reference.

An attempt could be made to specify in the statute the various exceptions to the basic requirement that two copies of a published work and one copy of an unpublished work be deposited for copyright registration. But we believe that the detailed exceptions should be left flexible to meet new and changing conditions. We propose that the Register of Copyrights, with the approval of the Librarian of Congress, be authorized to make exceptions by administrative regulation.

d. Special provisions for foreign works

Since it is not feasible to demand the deposit of works published in foreign countries, many of which are wanted by the Library, the present law seeks to facilitate and encourage their deposit. Thus, the deposit of one copy only is required for registration (sec. 13), or the registration fee is waived if two copies are deposited with a catalog card (sec. 215).

During the fiscal year 1960, a total of 12,785 works published in foreign countries were registered, 2,435 on deposit of one copy with the registration fee, and 10,350 on deposit of two copies without the fee. We believe the special deposit provisions have been a substantial factor in inducing the deposit and registration of foreign works.

We propose that these special provisions be retained with one minor change. The catalog cards deposited with the two copies for no-fee registration have proved to be of little or no use. The requirement of a catalog card should therefore be eliminated.

4. DEPOSIT FOR THE LIBRARY OF PUBLISHED WORKS NOT REGISTERED

a. Deposit to be mandatory

The registration system alone cannot be relied upon to obtain the copies of all copyrighted works published in the United States that are wanted by the Library. As long as registration is not mandatory, it can be expected that some copyrighted works will not be registered. Also, registration may be long delayed while the copies are needed by the Library at the earliest possible date.

We therefore propose that the statute should require the deposit of copyrighted works wanted by the Library within 3 months after they are published in the United States. This requirement would be fulfilled if the deposit were made in due time in conjunction with an application for registration, but the deposit would still be required if registration is not applied for.

b. Changes in present law

To carry out this proposal, we suggest that the present statute should be changed in the following respects:

- Instead of the present requirement that deposit be made "promptly" after publication (sec. 13), a time period of 3 months should be specified.

- The present law (sec. 13) is understood as requiring that each deposit of a published work be accompanied by an application for registration. Only the deposit of copies should be mandatory, with registration being optional.

[80]

- Since some categories of copyrighted works are not wanted by the Library, we propose that the Register of Copyrights, with the approval of the Librarian of Congress, be authorized to exclude any categories from the deposit requirement.

c. Penalty for failure to deposit after demand

When the Register makes a written demand for the required deposit, the penalty for failure to comply under the present law is forfeiture of the copyright and a fine of $ 100 plus twice the retail price of the work (sec. 14). It has been suggested that the forfeiture be eliminated and the fine increased to $ 200 plus twice the retail price of the work. There are differences of opinion on this question. Some believe that forfeiture is too drastic a penalty, while others are fearful that a fine alone might not be adequate to compel deposit. Under the present law, forfeiture cannot occur until 3 months after a specific demand has been made on the claimant, and in actual practice, the Register sends two or three preliminary requests for the deposit before he makes the demand. Forfeiture is rare and occurs in only four or five cases a year.

When foreign works protected under the Universal Copyright Convention are published in the United States, deposit could be demanded of the U.S. publisher. He would be made liable for the fine, but the Convention would preclude forfeiture of the copyright.

5. INCIDENTAL PROVISIONS REGARDING DEPOSITS

a. Mailing receipt

The present law (sec. 15) provides that the postmaster, if requested, shall give a receipt for copyright deposits placed in the mails. This is a vestige of the pre-1909 law under which copyright depended upon the deposit being made or placed in the mails by a certain date. The date of mailing now has little or no practical significance, and anyone wishing a receipt may obtain one for a small charge under general postal procedures. The special provision for a mailing receipt for copyright deposits is therefore superfluous.

b. Free postage

The present law (sec. 15) also provides that copyright deposits shall be mailed free of postage. In practice, the depositors pay the postage in about 70 percent of the cases. Since 1958 the Copyright Office has been required to pay the postage cost of free mailings, out of its appropriations, amounting to about $ 6,500 annually. We believe that the special procedures for the free mailing of copyright deposits are unnecessary, and that the depositor should pay the postage in the usual manner. We therefore propose that the free mailing privilege be discontinued.

c. Disposition of deposits

The present law (sec. 214) authorizes the Librarian of Congress and the Register of Copyrights to determine, at suitable intervals, which of the deposits not transferred to the Library are no longer needed for the files of the Copyright Office. These deposits may be destroyed after printing a notice in the Catalog of Copyright Entries to permit the copyright owners to reclaim them. A special notice must **[81]** be sent to the copyright owner before any manuscript of an unpublished work may be destroyed during its term of copyright.

In practice, about half of all the copies deposited for registration are transferred to the Library. Of the remaining half, unpublished works are retained in the Copyright Office for the full copyright term, but most of the published works are disposed of after a few years.

The retention of all deposits for the full copyright term--which might be ideal in theory--is impracticable. Copies are now being deposited for registration at the rate of over 380,000 a year. The space and expense required to retain all deposits for the full copyright term would be prohibitive.

The present practice of disposing of most published works not transferred to the Library, after a few years, is based on the experience that requests for a deposit copy generally come within the first few years after registration. Instances in which a requested deposit was not found in the Library or the Copyright Office have been relatively rare. Moreover, copies of most published works are available elsewhere, and the registration records will usually identify the work deposited.

We propose that the present provisions for the disposition of deposit copies be retained in substance, with one change. The notice now required to be printed in the Catalog of Copyright Entries has almost never brought a request to reclaim a deposit. This useless procedure should be eliminated.

6. RECOMMENDATIONS

(*a*) For copyright registration, the deposit of two copies of the best edition of a published work, or one copy of an unpublished work, should be required, except that--

(1) The Register of Copyrights, with the approval of the Librarian, should be authorized to make such modifications in these requirements, by regulation, as they find warranted by special circumstances.

(2) For the registration of a work published abroad, a foreign claimant should have the option of depositing either one copy with the registration fee or two copies without the fee.

(*b*) The copyright owner of any work published in the United States with a copyright notice should be required to deposit two copies of the best edition in the Copyright Office for the Library of Congress, not later than 3 months after the date of publication, if such copies have not meanwhile been deposited for copyright registration.

(1) The Register, with the approval of the Librarian, should be authorized to exclude any categories of works from this requirement.

(2) The Register should be authorized to make a written demand for deposit of the copies. Failure to deposit within 3 months after the demand should subject the copyright owner to a fine of $ 200 plus the retail price of the two copies.

(3) We make no recommendation at this time as to whether the present provision, that failure to comply with a demand voids the copyright, should be changed. In any event, failure to deposit copies would not affect the copyright in a foreign work protected under the Universal Copyright Convention.

[82] (*c*) Section 15 of the present law--providing for a postmaster's receipt and free mailing of copyright deposits--should be eliminated.

(*d*) Section 214 of the present law--providing for the disposition of deposits not transferred to the Library--should be retained in substance, except for deletion of the requirement that a notice be printed in the Catalog of Copyright Entries before the deposits of published works are destroyed.

[83] *Chapter VIII*

OWNERSHIP OF COPYRIGHT

OUTLINE OF CHAPTER

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§ [85] CHAPTER VIII OWNERSHIP OF COPYRIGHT

A. THE PRESENT LAW

The present statute (sec. 9) gives the right to secure copyright to "the author or proprietor * * * or his executors, administrators, or assigns." In the case of a "work made for hire," the employer is deemed to be the author (sec. 26).

Under the common law, the author has literary property rights in his work upon its creation. He may assign his common law rights to another person or, if he dies owning them, they will pass on to his legatees or heirs. The owner of the common law rights is the person entitled to secure copyright under the statute.

The owner of a statutory copyright may assign it to another person (sec. 28). When the owner dies, the copyright will pass on to the legatees under his will (sec. 28) or to his heirs under the State laws of intestate succession.

We have discussed above (ch. V, pt. D 3) the special provision in section 24 giving the renewal rights to the author or specified heirs.

B. INITIAL OWNERSHIP

1. IN GENERAL

The right to secure statutory copyright is vested initially in the author, and any other claimant must acquire the right from him. This basic rule, however, is subject to two qualifications:

(*a*) In the case of a work produced "for hire," the employer has the right to secure copyright (sec. 26).

(*b*) In the case of a composite or collective work--such as a periodical or encyclopedia--the publisher has the right to secure copyright. The reference in section 9 to the "proprietor" as a person entitled to secure copyright was apparently intended to cover this situation.

2. WORKS MADE FOR HIREn1

a. Ownership of rights

Rhe rule has long been established, both under the common law and under the statute, that the rights in a work produced by an employee in the course of his employment are vested in the employer. This rule has been based on several grounds: (1) the work is produced on behalf of the employer and under his direction; (2) the employee is paid for the work; and (3) the employer, since he pays all the costs and bears all the risks of loss, should reap any gain.

[86] Some commentators have urged that this rule be changed for the benefit of employee-authors. They propose that the employer be given the exclusive right to use the work in his regular business activities, but that the employee should have the rights in other noncompetitive uses. To illustrate how this proposal would work:

- In the case of a story written for a magazine publisher by an employee, the publisher would have the exclusive right to publish the story in any periodical; but the employee would have the exclusive right to use the story in a book, motion picture, broadcast, or any other medium not competitive with the magazine.

- In the case of a script written for a motion picture company by an employee, the company would have the exclusive right to use the script in a motion picture; but the employee would have the exclusive right to publish it in a book or magazine. The employee's right to use the script for a stage or television play would depend upon whether, in the particular situation, that use would compete with the motion picture.

We believe that in some situations there is considerable merit in the argument that an employee-author should share in any commercial value his work may have beyond its use in the employer's business. But we see many practical difficulties in the proposal to divide the rights between employers and employees by a statutory formula:

- Controversial issues would frequently arise as to the scope of the employer's business, and as to the degree of competition between his business and particular uses of the work. No definite rules could be laid down to resolve these issues in the great variety of situations involved.

- The proposal would be unworkable in the common situation where a work is the composite product of many employees.

- It would often be difficult for potential users to know whom to deal with.

It is more practical, we believe, to continue the present rule that all rights vest in the employer. Where employees are in a position to do so, they may bargain--as some have done--for a share of the revenue derived by the employer from subsidiary uses of the work. Most employees are not in this position, but they would probably gain little or nothing from having rights which their employers could require them to assign. In any event, we do not believe that the great variety of situations involved--in which the employment relations, the nature of the works, and their potential uses differ widely--can be fitted into a general statutory formula for the division of rights.

b. Form of statutory provision

(1) *Scope of "works made for hire."*--The phrase used in the present statute--"works made for hire"--has been criticized as being inexact, because it might be thought to include works made on special commission. The courts, however, have not generally regarded commissioned works as "made for hire."

It has also been suggested that the statutory language should reflect the holding of the courts that an employee owns the right in a work created on his own initiative outside the scope of his employment.

[87] Instead of the phrase "works made for hire," it was proposed in previous revision bills to substitute "works created by an employee within the regular scope of his employment." We would adopt this more precise language as a definition of "works made for hire."

(2) *Designation of employer as "author."*--The present provision (sec. 26) defining "author" as including "an employer in the case of works made for hire" has also been criticized on the ground that the employer is not in fact the author and should not be designated as such. It has been suggested that the statute, instead of indicating that the employer is the author, should merely provide that the right to secure copyright vests in the employer. We would adopt this suggestion.

3. COMPOSITE WORKS

a. Ownership of the work as a whole

In the case of a composite work--such as a periodical, encyclopedia, dictionary, or symposium--authorship of the work as a whole consists of compilation and editing. Ordinarily, this work is done by employees of the publisher, and the publisher secures the copyright.

The reference in section 9 to the "proprietor"--in addition to "the author * * * or * * * his assigns"--as a person entitled to secure copyright was inserted at the request of publishers of composite works. That reference, however, is cryptic and confusing. The publisher of a composite work acquires the right to secure copyright either as the employer or the assignee of the author. The additional category of "proprietor" as a person entitled to secure copyright is unnecessary. We propose that it be deleted.

b. Ownership of component parts

When the component parts of a composite work are created by the publisher's employees, the publisher acquires the rights in each part as employer. But when the component parts are contributed by independent authors, each author is the initial owner of his contribution, and the publisher must acquire his rights by assignment.

A contribution to a composite work may be copyrighted separately in the name of the author, by placing a separate copyright notice on the contribution. But this is not usually done. The common practice is to place a single notice on the composite work in the name of the publisher. We have recommended above (ch. VI, pts. C 4 and D 5) that the single notice should be deemed to cover all the component parts for which no separate notice is given. Accordingly, the publisher named in the notice should be considered the copyright owner of all the component parts not bearing a separate notice.

However, the author of a contribution may not have assigned all of his rights to the publisher. And in some cases there is no express agreement between them as to the assignment of rights. We propose that the rights not assigned should be held by the publisher in trust for the author. And in the absence of any express agreement, only the right to publish the contribution in a composite work like that of the publisher should be deemed to have been assigned.

[88] 4. RECOMMENDATIONS

The statute should provide that copyright may be secured by the author or his representatives, successors, or assigns, except that--

(*a*) In the case of a work made for hire (defined as a work created for an employer by an employee within the regular scope of his employment), the employer should have the right to secure copyright.

(*b*) In the case of a periodical, encyclopedia, or other composite work containing the contributions of a number of authors, the publisher should have the right to secure copyright. The copyright secured by the publisher in the composite work as a whole should cover all of the contributions not separately copyrighted; but the publisher should be deemed to

hold in trust for the author all rights in the author's contribution, except the right to publish it in a similar composite work and any other rights expressly assigned.

C. CO-OWNERSHIPn2

1. IN GENERAL

There are a number of situations in which two or more persons may become co-owners of the same rights in the same work:

- When two or more authors create a work in collaboration, they are usually co-owners of the rights in the first instance;

- When an author transfers to another person an undivided share of his rights, he and his transferee become co-owners;

- When an author transfers all his rights to two or more persons, they become co-owners;

- When a deceased author has two or more heirs, they may succeed to his rights as co-owners;

- Under the present law, when there are several persons in the class entitled to claim a renewal copyright, they take the renewal as co-owners.

Co-ownership must be distinguished from "divisibility," the concept discussed later in this chapter. "Divisibility" concerns the ownership by different persons of different rights in a work, while co-ownership means that two or more persons together own the same rights.

2. RIGHTS OF CO[-]OWNERS

The present statute is silent as to the rights of co-owners among themselves and in relation to third persons. The courts have dealt with these questions by adapting the established rules pertaining to the co-ownership of other forms of property by tenants in common. Under the court decisions, any one of the several co-owners of a copyright may use the work or license a third person to use it without the consent of the other owners, but he must share the profits with them.

One co-owner can, of course, assign his interest to a third person who would then become a co-owner in his stead. But since any **[89]** co-owner may use the work or license its use, no assignee or licensee of less than all the owners would acquire exclusive rights.

In the United Kingdom and a number of other countries the rule is that a use or license must have the consent of all the co-owners. Some of these countries have a supplemental provision that if one owner refuses his consent, the others may petition a court to arbitrate the dispute. This rule assures the right of every co-owner to control the use of his property. The contrary rule in the United States, on the other hand, facilitates the dissemination of works owned by two or more persons.

As a fundamental principle we believe it is in the public interest to encourage the dissemination of copyrighted works. As long as all co-owners are entitled to share in the profits, the right of any one owner to use or license the work will not ordinarily operate to the detriment of the others. We propose that the rules established by the courts be left undisturbed, and we see no need to restate them in the statute.

3. JOINT AUTHORSHIP

When two or more authors collaborate in creating a single work of joint authorship, they are initially co-owners of the work. When two or more authors independently create separate works, each is the sole owner of his own work even though the works are used collectively.

A clear example of a joint work is a single story written by two authors working together, their contributions being merged inseparably in a single whole. A clear example on the other side is that of several stories written independently by different authors and published together in a periodical. Between these two extremes, however, there are many cases that are not so clear cut.

The present statute provides no basis for determining what constitutes a work of joint authorship. Until recently the courts have held rather consistently that the test is whether the authors collaborated with the object of having their contributions combined into a single integrated work. Thus, where the composer of music and the author of lyrics

intended to have their contributions integrated as a song, the courts have held the song a joint work even though the music and lyrics could each be used separately.

The test of joint authorship has been thrown into some confusion by a new theory that first emerged in the *Melancholy Baby* case decided by the Second Circuit Court of Appeals in 1946 *(161 F.2d 406),* and was carried further in the *Twelfth Street Rag* case decided by the same court in 1955 *(221 F.2d 569,* modified in *223 F.2d 252).* In the latter case the composer of a musical composition without words, written as an instrumental piece, had secured copyright in his composition, and had assigned the copyright to a publisher who later commissioned a lyricist to write words for the music. The two authors separately assigned their renewal rights to different publishers. Though there was no collaboration between the authors, and the composer did not contemplate or consent to the addition of words to his music, the court held that the music and words together constituted a single work of joint authorship, so **[90]** that the assignees of the two authors were co-owners of the renewal copyright in the song.

The theory of this decision is that a copyrighted work complete in itself will become a joint work if additions are made later by another author at the request of the copyright owner. This theory is a sharp departure from the view previously taken by the courts. It does not require that the authors collaborate, or that the original author have any intention that his work be combined with that of another author. Under this theory it might even be contended that any new version of a preexisting work is a joint work.

Aside from the uncertainty created by this decision, we believe its theory would lead to inappropriate results. If a new work consisting of a previously copyrighted work by one author and additional material added later by another is considered a work of joint authorship, the two authors (or their successors) become co-owners of the new work. Either of them could then use or license the use of the new work, and each would be entitled to share in the profits from its use. Moreover, the owner of the original work would continue to be a co-owner of the new work after the copyright in the original work had expired.

We believe the question of what constitutes a work of joint authorship should be clarified in the statute. We would not go as far as the theory of the *Twelfth Street Rag* decision, but would adopt the test laid down by the earliest line of cases--that a joint work is one created by two or more authors who intend to have their contributions joined together as a single work.

4. RECOMMENDATIONS

(*a*) The rules established by the court decisions in regard to co-owners of a copyright--that any one co-owner may use or license the use of the work, but that he must account for profits to the other co-owners--should be left undisturbed.

(*b*) A "work of joint authorship" should be defined in the statute as a work created initially by two or more authors with the object of integrating their contributions into a single work.

D. TRANSFER OF RIGHTS

1. IN GENERAL

The author or other owner of the right to secure copyright may transfer that right to another person. Likewise, when copyright has been secured, the copyright owner may transfer any or all of the rights embraced in copyright. Except for an author's right to renew the copyright under the present law, discussed in *chapter V*, part D 3, the rights not transferred by the owner pass upon his death to his heirs or legatees under State laws. The following discussion is concerned only with inter vivos transfers such as assignments.

Copyright comprises a number of different rights, which are discussed in *chapter III*. The owner may assign the entire copyright, or he may grant an exclusive license of one or more of the several rights. For example, the copyright owner of a dramatic work may grant to another person the exclusive right to perform it on the **[91]** stage, while retaining to himself the other rights to publish the work, to convert it into a novel or a motion picture, to broadcast it, etc.

The copyright owner may also grant a nonexclusive license. This is a mere permit to use the work in the manner specified, and does not transfer ownership of any right.

2. DIVISIBILITY OF COPYRIGHTn3

a. The present theory of "indivisibility"

Transfers covering one right but not others are common in commercial practice. These partial transfers are sometimes designated as exclusive licenses, and sometimes as "assignments." In practical effect an exclusive license of a particular right is equivalent to an assignment of that right. The licensee acquires the right to the exclusion of all other persons, including the licensor.

The theory of the present law, however, has lagged behind the realities of practice. In certain situations the courts have indicated that copyright is an indivisible unit and, consequently, that a transfer of some, but not all, of the rights comprised in a copyright is merely a license and not an assignment. This theory of indivisibility has created a number of troublesome problems:

- It is now uncertain whether the copyright in a periodical, secured by the publisher, covers the individual contributions, unless all rights in the contributions have been assigned to the publisher. (We have dealt with this problem in pt. B 4 of this chapter.)

- The provisions of the present statute pertaining to transfers of ownership and their recordation (secs. 28-32) refer only to "assignments." It is now uncertain whether they apply to exclusive licenses or other partial transfers. (These provisions will be discussed in pt. D 2 of this chapter.)

- Whether a partial transfer is considered an assignment or a license may determine whether the proceeds are taxed as capital gains or ordinary income. Recent rulings, reversing earlier ones, have generally treated a partial transfer as an assignment for tax purposes.

- A partial transferee cannot now sue for infringement of a right transferred to him without joining the owner of the residual rights as a party to the suit.

This last--the necessity of joining the owner of the residual rights in an infringement suit--is particularly troublesome. Except where the validity of the copyright is challenged, he usually has no interest in the suit, and his joinder becomes a serious obstacle when he is out of the jurisdiction. Many commentators have urged that a partial transferee should be permitted to sue in his own name alone, subject to safeguards against multiple suits where the litigation also involves rights owned by other persons. These safeguards are now provided by *rules 19-22 of the Federal Rules of Civil Procedure* under which the court may require or permit the joinder or intervention of interested parties when appropriate.

[92] *b. Proposals for divisible copyright*

We believe that the copyright owner should be in a position to assign any one or more of his rights without assigning the entire copyright. And a person who acquires a particular right exclusively should be treated as the owner of that right, though he is not the owner of other rights. This would bring the statute in line with commercial practice. Specifically, we propose that the law provide:

(1) That any of the rights comprised in a copyright may be assigned separately.

(2) That the statutory provisions governing "assignments" extend to exclusive licenses and other exclusive transfers of any right.

(3) That the assignee of any particular right may sue in his own name alone for infringement of that right; but the court, in its discretion, may require or permit the joinder or intervention of any person appearing to have an interest in the suit.

c. Owner in copyright notice

Making copyright ownership divisible would raise questions under the present law as to whose name is to appear in the copyright notice on published copies of the work, and the effect of naming the owner of some but not all of the rights.

We believe these question would be resolved by our recommendations in chapter VI. A notice in the name of any partial owner would protect the copyright. Other owners could establish their rights by recording a transfer from him in the Copyright Office. Third persons could deal safely with the owner named in the notice if no transfer from his is recorded. In dealing with third persons he would act as trustee for any other owner.

Two or more owners could be named in the notice with/an indication of the rights held by each, if they wished. But in accordance with the principle that the wrong name in a notice should not invalidate the copyright, we would not require the naming of more than one owner.

3. PROTECTION OF AUTHORS AGAINST UNREMUNERATIVE TRANSFERSn4

a. In general

The present statute has sought to protect authors against transfers of their rights for an inadequate remuneration, by providing for the reversion of the renewal copyright to the author or his heirs. In chapter V, part D 3, we have recommended that this reversion of the renewal right be eliminated, because it has largely failed to accomplish the purpose of protecting authors and their heirs against improvident transfers, and has been the source of much confusion and litigation.

Since authors are often in a relatively poor bargaining position, however, we believe that some other provision should be made to permit them to renegotiate their transfers that do not give them a reasonable share of the economic returns from their works.

[93] *b. Possible limitation on transfers*

The laws in many foreign countries seek to protect authors and their heirs against disadvantageous transfers, by various provisions such as the following:

- Transfers are effective for not more than a certain period of time.

- Transfers for a lump sum are prohibited except in certain special situations.

- Only those rights specifically enumerated in the written instrument are transferred, with certain limitations on the transfer of all rights.

- Transfer agreements must meet certain statutory standards such as minimum royalties payable to the author and stated periods of time during which the transferee must exploit the work.

We would not favor a statutory specification of the terms and conditions of transfer agreements, or a prohibition of transfers on any particular terms. Transfers are made in a wide variety of situations; terms that may be unfair in some cases may be appropriate in others. And statutory specifications or prohibitions may hamper authors, as well as potential users, in arranging for the exploitation of copyright works.

The situation in which authors are most likely to receive less than a fair share of the economic value of their works is that of an outright transfer for a lump sum. At the time of transfer the revenue to be derived from the work cannot ordinarily be foretold with any degree of certainty. This fact has led to the common practice by which transferees agree to pay authors royalties based on the number of copies sold or performances given, or on a percentage of the revenue. There have been many cases, however, in which authors have sold outright, for a small lump sum, their rights in a work that later proves to be highly popular and lucrative; and lump-sum transfers are still not uncommon.

We would encourage the compensation of authors on a royalty basis, but we would not forbid lump-sum transfers. In some situations--for example, where a contribution is published in a periodical, or where a novel is converted into a motion picture--the payment of a lump sum may be the only or most practical way of remunerating the author.

In several of the revision bills of 1924 to 1940 which proposed to eliminate the reversionary renewal right, it was provided that transfers by an author were not to be effective for more than a certain period of time, after which the rights transferred would revert back to the author or his heirs. Some of those bills would have imposed the time limit on transfers for a lump sum, but not on transfers for which the author or his heirs would receive continuing royalties.

c. Conclusion

We believe this last approach--placing a time limit on transfers that do not provide for continuing royalties--would afford a practical measure of assurance that authors or their heirs will be in a position to bargain for remuneration on the basis of the economic value of their works.

[94] We suggest that a period of 20 years would be ample to enable a lump-sum transferee to complete his exploitation of the work and to realize a fair return on his investment. If he should wish to exploit the work beyond that period, he could then negotiate a new contract with the author or his heirs. We do not believe this time limit would hamper exploitation.

4. RECOMMENDATIONS

(*a*) The statute should recognize the divisibility of copyright ownership. Specifically, it should provide:

(1) That any of the various rights comprised in a copyright may be assigned separately.

(2) That an exclusive license or other exclusive transfer of any particular right constitutes an assignment of that right.

(3) hat the assignee of any particular right may sue in his own name alone for infringement of that right; but that the court, in its discretion, may require that notice of the suit be given to other persons appearing to have an interest in the suit, and may require or permit the joinder or intervention of any such person.

(*b*) The statute should provide that any assignment by an author or his representatives or heirs shall not be effective for more than 20 years from the date of its execution, unless it provides for the continuing payment of royalties based on the uses made of the work or the revenue derived from it.

E. EXECUTION AND RECORDATION OF TRANSFERSn5

1. THE PRESENT LAW

Sections 28-32 of the present statute deal with "assignments" of copyright. Section 28 provides that copyrights may be "assigned, granted, or mortgaged by an instrument in writing signed by the proprietor of the copyright." Section 29 specifies how an "assignment executed in a foreign country" may be acknowledged. Section 30 provides for the recordation of "every assignment" in the Copyright Office within a specified period of time, and states the consequences of failure to record. Section 31 requires the Register of Copyrights to record "such assignment" and to issue a certificate of recordation. Section 32 provides that when an "assignment" has been recorded, the assignee may substitute his name in the copyright notice.

2. SCOPE OF "ASSIGNMENTS"

It is not clear whether the term "assignment," as used in sections 28-32, includes an exclusive license or other transfer of less than all the rights comprised in a copyright. Nor is it clear whether "assignments" includes other instruments--such as wills, trust indentures, decrees of distribution, mortgages and discharges, and corporate mergers--which evidence transfers of copyright ownership.

We propose that the provisions of the statute relating to "assignments" be extended expressly to cover exclusive licenses and all other transfers of any exclusive right under a copyright.

[95] 3. FORM AND EXECUTION OF TRANSFERS

a. Written and signed instrument

Since transfers of copyright are important transactions and are to be recorded, they should be required--as "assignments" are now--to be in writing and signed by the transferor.

This requirement should not be extended to nonexclusive licenses. They do not transfer ownership but merely grant permission to use a work. In practice, they are frequently given orally.

b. Acknowledgment

The present statute does not require that an instrument transferring copyright ownership be acknowledged, and we see no reason to require it. We believe, however, that an acknowledgment should constitute prima facie evidence of the execution of a copyright transfer.

The only provision in the copyright statute dealing with acknowledgment is section 29, which specifies that an acknowledgment before an authorized consular officer or secretary of legation of the United States shall be prima facie

evidence of the execution of an assignment in a foreign country. The comparable provision in the patent law *(35 U.S.C. sec. 261)* goes farther in two respects:

- Acknowledgment constitutes prima facie evidence of the execution of a patent assignment executed in the United States, as well as of one executed in a foreign country.

- Acknowledgment in a foreign country may be made either before an authorized "diplomatic or consular officer of the United States" or before "an officer authorized to administer oaths whose authority is proved by a certificate of a diplomatic or consular officer of the United States."

We propose that provisions similar to those in the patent law be incorporated in the copyright statute.

4. RECORDATION OF TRANSFERS AND OTHER INSTRUMENTS

a. Purposes of recordation

A recordation system for copyright transfers has the same basic purposes as recordation systems for transfers of other forms of property:

(1) To enable a transferee to give constructive notice to all third persons of the transfer of ownership to him; and

(2) To enable third persons to determine from the record who is the owner.

Records of copyright ownership are particularly important in view of the nature of copyright as a form of intangible and incorporeal property not capable of physical possession.

b. Recordable instruments

(1) *As to their content*.--In accordance with these purposes, the recordation system should embrace all instruments by which the ownership of a copyright is transferred in whole or in part.

In addition, there are other types of instruments which, though not transferring ownership, have some bearing on the status of a copyright. The Copyright Office now receives and records a number of miscellaneous documents such as nonexclusive licenses, powers of at **[96]** torney, employment agreements, publishing contracts, changes in names or titles, and court decrees. In the absence of some provision in the statute for recording instruments of this sort, it is doubtful that their recordation operates to give constructive notice.

We do not believe it is necessary or practical to require that instruments other than transfers of ownership be recorded. But we would encourage the recordation of any instruments pertaining to a copyright, by providing that they may be recorded with the effect of giving constructive notice of the information disclosed.

(2) *As to their form*.--There should be practical assurance that the instrument recorded is precisely the same as the one executed. The statute should, therefore, require explicitly that any instrument filed for recordation bear the actual signature of the person executing it or a sworn or official certification that it is a true copy of the original signed instrument.

c. Constructive notice

Recordation serves to give constructive notice to all third persons of the facts disclosed in the recorded instrument. But there are two situations in which there is some uncertainty as to the scope of constructive notice:

(1) *Reference to unrecorded documents*.--In some cases a recorded instrument will refer to another unrecorded document for further information. We believe that third persons should be able to rely on the record as being complete in itself. The statute should, therefore, indicate that constructive notice is confined to the facts specified in recorded instruments.

(2) *Blanket transfers*.--In some cases a recorded transfers will cover "all the copyrights" owned by the transferor with no identification of the individual works. It may be extremely difficult and time-consuming for a third person to ascertain whether the copyright in a particular work is covered by such a blanket transfer. We believe the statute should

indicate that constructive notice is confined to the copyrights in works specifically identified by the recorded instrument.

d. Effect of failure to record

(1) *In general*.--It is fundamental to the recordation system that: (*a*) Failure to record has no effect on the validity of the transfer as between the parties to it, but (*b*)third persons not otherwise informed are entitled to rely on the record and to deal with the person who appears from the record to be the owner.

In accordance with this principle, section 30 of the present statute provides that if an assignment is not recorded within 3 months after its execution in the United States, or within 6 months after its execution abroad, "it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded."

(2) *The grace period*.--Whether a grace period--now 3 or 6 months-- should be allowed for recording a transfer is open to question. The present law assumes that a transferee should be allowed a period of time in which to record before the transfer to him is subject to being defeated by a subsequent transfer to another person. On the other hand, the result of a grace period is that no transferee can be certain of his title for that period of time after the transfer to him.

[97] We believe the arguments for and against a grace period are rather evenly balanced. In that position we are inclined to continue the existing law. However, in view of present methods of rapid transportation, we believe the period of 3 or 6 months is unnecessarily long. We propose that it be reduced to 1 month for transfers executed in the United States and 3 months for transfers executed abroad.

(3) *Priority between conflicting transfers*.--Section 30 provides that, as between two conflicting transfers, the one first executed prevails when it is recorded within the grace period. Otherwise the later transfer, if taken in good faith for value, will prevail when it is the first to be recorded. Section 30 leaves unanswered the question of which prevails when the one first executed is recorded after the grace period but before the recordation of the later one.

The corresponding section in the patent law *(35 U.S.C. sec. 261)* provides that the first of two transfers of a patent will prevail if it is recorded within 3 months or prior to the date of the subsequent transfer.

We would adopt this principle in clarifying the copyright statute but with one change: We would retain the provision in section 30 that the later transfer must itself be recorded in order to prevail. In sum, we propose that the statute provide that the first of two conflicting transfers will prevail if it is recorded within the grace period or before the later one is recorded.

(4) *Priority of nonexclusive license*.--Another question left in doubt by section 30 is whether a nonexclusive license, obtained in good faith from the copyright owner of record, is effective as against an earlier unrecorded transfer. We believe that a licensee should be able to rely on the record when he seeks permission to use a work. We therefore propose that the statute specify that a nonexclusive license obtained in good faith is effective as against an earlier unrecorded transfer.

Since nonexclusive licenses are not required to be recorded, we believe that they now remain effective without recordation as against subsequent transferees of ownership. In some instances the nonexclusive licenses outstanding may affect the value of a transfer. Nevertheless, we are not proposing that recordation of such licenses be required. It would not be practicable to record the great number and variety of licenses that do not transfer ownership but merely permit the use of a work.

5. NAME OF TRANSFEREE IN COPYRIGHT NOTICE

Section 32 provides that when an assignment has been recorded, the assignee may substitute his name for that of the assignor in the copyright notice. An unfortunate result of this provision has been a judicial holding that, where the assignee's name is substituted before recordation of the assignment, the notice is fatally defective and the copyright is lost.

Our recommendations in chapter VI, concerning the name of the owner in the notice, would preserve the copyright in any case where an assignee is named in the notice, and would eliminate the question dealt with in section 32. That section should therefore be deleted.

[98] 6. RECOMMENDATIONS

(*a*) The provisions of the statute regarding "assignments" should be extended to cover exclusive licenses, mortgages, and all other transfers of any exclusive right under a copyright.

(*b*) The present requirement that assignments be in writing and signed by the assignor should be retained.

(*c*) Acknowledgment of the execution of an assignment, whether executed in the United States or abroad, should not be required but, when made, should be prima facie evidence of its execution. Acknowledgment abroad should be permitted before an authorized officer of the United States or before a foreign officer whose authority is certified by an officer of the United States.

(*d*) The statute should provide that an assignment or any other document pertaining to a copyright may be recorded in the Copyright Office, and that recordation will give constructive notice to all persons of the facts contained in the recorded document with respect to the works specifically identified.

(*e*) The statute should require that the document to be recorded must bear either the actual signature of the person executing it or a sworn or official certification that it is a true copy of the original signed instrument.

(*f*) The statute should provide that if an assignment is not recorded within 1 month after its execution in the United States, or within 3 months after its execution abroad, or before the recordation of a subsequent assignment, then the subsequent assignment will prevail when it is taken for a valuable consideration without notice and recorded first.

(*g*) The statute should specify that a nonexclusive license taken without notice of an unrecorded assignment will be valid as against the assignee; and that a nonexclusive license, though not recorded, will be valid as against a subsequent assignment.

[99] *Chapter IX*

REMEDIES FOR INFRINGEMENT
OUTLINE OF CHAPTER

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§ [101] CHAPTER IX REMEDIES FOR INFRINGEMENT

A. THE PRESENT LAW

The civil remedies for copyright infringement are now provided in sections 101 and 116 of the statute. The provisions for criminal penalties (secs. 104-105) and those regarding judicial procedures (secs. 112-114) will be discussed below in *chapter XI*.

The present civil remedies are summarized as follows:

- The court in its discretion may enjoin the infringement (sec. 101(a)).

- The infringer is liable for the actual damages suffered by the copyright owner, "as well as" the infringer's profits. Or, in lieu of a smaller sum of actual damages and profits, the court is to award statutory damages in an amount it deems just; this amount, with certain exceptions, is to be not less than $ 250 nor more than $ 5,000 (sec. 101(b)).

- The court may order the impounding, during the pendency of the action, of all articles alleged to be infringing, and may order the destruction of all infringing copies and devices for making them (sec. 101(c) and (d)).

- In all suits, except those by or against the United States, "full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs" (sec. 116).

B. DAMAGES AND PROFITSn1

1. ACTUAL DAMAGES AND PROFITS

a. In general

Liability of a wrongdoer for the actual damages suffered by the injured person is a traditional remedy for civil wrongs generally. Actual damages have been one of the remedies for copyright infringement since the first U.S. copyright statute of 1790.

Liability for the profits derived from a wrongful act has also been recognized as a remedy for civil wrongs. The wrongdoer's profits may sometimes be a measure of the damages suffered by the injured person, or they may be awarded to prevent unjust enrichment. Liability for the profits from a copyright infringement was first specified in the act of 1909, but had been imposed by the courts in some earlier cases.

b. Damages and profits as cumulative or alternative remedies

Under the present law there is some question as to whether the copyright owner is entitled to recover both his damages and the in **[102]** fringer's profits cumulatively, in cases where the profits are more than a measure of the damages. The language of section 101(b) would seem to indicate so. However, the 1909 congressional committee reports (H. Rept. No. 2222, S. Rept. No. 1108, 60th Cong., 2d sess.) show that the intention was to allow the plaintiff to recover either his damages or the infringer's profits, whichever is greater. The few court decisions on this question do not seem to have settled the issue.

We believe the more equitable rule is that under which damages and profits are not cumulative. The statute should be clarified to provide for recovery of either damages or profits, whichever of the two is larger.

c. Problems in awarding profits

In regard to the infringer's profits, the statute now provides that the plaintiff must prove "sales" only, and that the defendant must prove all the elements of cost to be deducted. This provision seems sound in principle. However, since many infringements do not involve "sales," a broader term such as "gross revenue" should be used.

The courts have sometimes had difficulty in determining the elements that are properly deductible as costs. This seems essentially a problem of accounting inherent in the situation and not peculiar to copyright cases. We believe it would be impracticable to attempt any statutory specification of deductible costs.

Another question has arisen as to whether profits are to be apportioned where the infringer has used copyrighted and other materials together. The statute now refers to "all the profits * * * made from such infringement." In some of the earlier decisions the courts said that the infringer is liable to pay over all his profits without apportionment. But more recently the courts have construed the statutory language as meaning only the profits attributable to the infringing use of the copyrighted work, and have apportioned profits accordingly. We believe the statute should be clarified in accordance with these recent decisions, to permit the courts to apportion profits when they find it appropriate to do so.

2. STATUTORY DAMAGES

a. The principle of statutory damages

Statutory damages--stated amounts for which an infringer may be held liable as an alternative to actual damages--have been a feature of the U.S. copyright statutes since 1790. The need for this special remedy arises from the acknowledged inadequacy of actual damages and profits in many cases:

- The value of a copyright is, but its nature, difficult to establish, and the loss caused by an infringement is equally hard to determine. As a result, actual damages are often conjectural, and may be impossible or prohibitively expensive to prove.

- In many cases, especially those involving public performances, the only direct loss that could be proven is the amount of a license fee. An award of such an amount would be an invitation to infringe with no risk of loss to the infringer.

- The actual damages capable of proof are often less than the cost to the copyright owner of detecting and investigating infringements.

[103]

- An award of the infringer's profits would often be equally inadequate. There may have been little or no profit, or it may be impossible to compute the amount of profits attributable to the infringement. Frequently the infringer's profits will not be an adequate measure of the injury caused to the copyright owner.

In sum, statutory damages are intended (1) to assure adequate compensation to the copyright owner for his injury, and (2) to deter infringement. A stated minimum amount is to be awarded in any case, and the court may award more, up to a stated maximum, where it considers that the actual damages or profits capable of proof would be inadequate for those purposes. In principle, statutory damages are similar to the liquidated damages frequently provided in contracts, or to statutory amounts specified as damages in various statutes dealing with civil wrongs, such as wrongful death, workmen's compensation, and antidiscrimination laws.

The principle of statutory damages for copyright infringement appears to be acceptable generally to the interested groups. There is considerable sentiment, however, for changing some of the features of the present provisions. The points in issue will be considered below.

b. When statutory damages are awarded

With certain exceptions to be noted later, the amount of statutory damages that may be awarded ranges from $ 250 to $ 5,000. Within that range the court has discretion to award the sum it considers just, whenever that sum exceeds the actual damages and profits. Thus:

- If actual damages and profits are both less than $ 250, the court must award at least $ 250 and may in its discretion award a higher sum up to $ 5,000.

- If actual damages or profits are proven in some amount between $ 250 and $ 5,000, the court in its discretion may award either the proven amount or any higher sum up to $ 5,000.

- If actual damages or profits are proven in excess of $ 5,000, the court will award the proven amount. Statutory damages are not applicable in this case.

c. Mandatory minimum; innocent infringers

In any case the court must award at least $ 250. The representatives of various groups of copyright owners--authors, book and music publishers, motion picture producers, etc.-- have stressed the vital importance to the copyright owner of a mandatory minimum. They argue that a minimum amount is essential to assure the recovery of enough to warrant the expense of detecting infringements, to compensate the owner for his loss, and to deter infringement.

On behalf of certain users of copyright materials--broadcasters, periodical publishers, motion picture exhibitors, etc.--it has been argued that the minimum of $ 250 can bear too heavily on innocent infringers. In a few cases where the defendant infringed unwittingly, the courts have expressed regret at being compelled to award the statutory minimum. It has been suggested that as against innocent infringers, the mandatory minimum should be eliminated or reduced.n2

[104] The present statute reflects a concern for the impact of statutory damages on innocent infringers, in providing three exceptions to the ordinary minimum and maximum amounts:

- Section 101(b) specifies statutory damages of from $ 50 to $ 200 for newspaper reproductions of copyrighted photographs.

- Section 101(b) also provides maximum statutory damages of $ 100 for innocent infringement of nondramatic works in motion pictures.

- Section 1(c) provides for damages of not more than $ 100 for innocent infringement of nondramatic literary works in broadcasts.

These three exceptions do not absolve innocent infringers from liability for damages, but merely reduce the amount recoverable. If special treatment is justified in these three cases, however, it would seem equally justified in a variety of other situations involving innocent infringement.

The basic principle that an innocent infringer is liable, except where he has been misled through some act or omission of the copyright owner, is firmly established in the copyright law. As between an innocent copyright owner and an innocent infringer, it has generally been agreed that the loss caused by the infringement should be borne by the latter. The question is not whether innocent infringers should be liable; it is whether they should be subject to some minimum amount of damages and, if so, what the minimum should be.

The only purpose of awarding damages for an innocent infringement is to compensate the copyright owner. The other purpose of statutory damages--to deter infringement--is not present as to infringements committed innocently. Statutory damages may still be appropriate in many cases to compensate the copyright owner adequately, but a mandatory minimum of $ 250 might be excessive in some instances.

We would not attempt to fix special amounts of statutory damages recoverable against innocent infringers, either generally or in specified situations. Rather, we would provide that where an infringer establishes his innocence, the statutory minimum is not mandatory but the court, in its discretion, may award statutory damages in any amount it deems just. Since a plea of innocence may be used as a cloak for negligence and may be difficult to disprove, the infringer should have the burden of proving his innocence.

With the removal of the mandatory minimum as to innocent infringements generally, the three special exceptions in the present statute could be eliminated.

d. Multiple infringements

Another question involves the sum that might be awarded as statutory damages if a single series of events is held to constitute a number of infringements. For example, the production of an infringing motion picture and each of its many exhibitions might be deemed separate infringements. The same is true of an infringing network broadcast and its relay by each of many local stations. The motion picture and broadcasting industries have expressed some concern that statutory damages might be pyramided to an exorbitant total if a court should multiply the statutory minimum by the number of infringements.

[105] We believe that the danger of exorbitant awards in multiple infringement cases is more theoretical than real. In a few cases involving multiple infringements--e.g., where various items in a copyrighted merchandise catalog were reproduced in a series of infringing catalogs--the courts have used this formula of multiplying the number of infringements by $ 250, but they did so to reach a result they thought just. We know of no case in which the court has felt constrained to use this formula where the resulting total was considered excessive. The present statute, however, is not clear on this point. It is conceivable that a court might construe the statute as requiring the use of this formula in multiple-infringement cases.

We believe that the courts should, as they do not, have discretion to assess statutory damages in any sum within the range between the minimum and maximum. In exercising this discretion the courts may take into account the number of works infringed, the number of infringing acts, the size of the audience reached by the infringements, etc. But in no case should the courts be compelled, because multiple infringements are involved, to award more than they consider reasonable.

We propose that the statute be clarified and made more flexible. It should provide that statutory damages within the minimum and maximum range are to be assessed as the total award for all infringements for which the defendant is liable. The maximum should be sufficiently high to enable the court to award an adequate sum for multiple infringements.

Section 101(b) now provides specially for one case of multiple infringements. It specifies that the total sum of statutory damages recoverable when a motion picture innocently infringes a dramatic work shall be within the range of $ 250 to $ 5,000. Our proposal would extend the same principle to all multiple infringements. The special provision could then be dropped.

e. Infringements after actual notice

Section 101(b) now permits the court to exceed the $ 5,000 maximum, with no limit specified, in the case of "infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him." Some fear has been expressed that this might result in exorbitant awards.

This provision was apparently based on the supposition that any infringement occurring after actual notice would necessarily be willful. But this supposition is questionable. For example, a television network may receive a notice alleging infringement on the eve of a scheduled broadcast when it is too late to defer the program pending an investigation of the claim. Likewise a periodical publisher may receive a notice when an issue is about to be distributed.

The possibility that a court, in its discretion, might award statutory damages greatly exceeding the usual maximum, merely because a notice had been sent, seems remote. In the very few cases where statutory damages of more than $ 5,000 were awarded, other factors such as willful infringement on a large scale were involved. Nevertheless, we believe the statute is faulty in making the service of notice the basis for exceeding the maximum. A better basis which was proposed in some of the revision bills of 1924-40, would be a showing that the infringement was willful.

[106] We believe, however, that a still better solution was proposed in some of the other revision bills. They would have made the maximum--raised to $ 10,000 or $ 20,000--an absolute ceiling, with no special provision for infringements committed after notice or willfully. This would allow the court to take willfulness into account in awarding statutory damages up to the maximum. We favor this approach.

The absolute maximum for statutory damages would not, of course, preclude the recovery of a larger sum of actual damages or profits if proven.

f. Minimum and maximum amounts

The present minimum of $ 250 and maximum of $ 5,000 were adopted in 1909. With the depreciation in the value of the currency, those amounts now represent much less than they did then. Some commentators have suggested that these amounts should therefore be raised. Others have suggested, apparently with innocent infringers in mind, that the minimum should be reduced.

In view of our proposal that the minimum not be mandatory against innocent infringers, we see no reason to reduce the present minimum of $ 250. An award of that amount does not seem unduly severe; anything less would often be inadequate to enable the copyright owner to enforce his rights, and to foster due care by others not to infringe. On the other hand, despite the decreased value of the dollar, the present minimum seems to be enough for these purposes. The court may award more when it considers the minimum inadequate. We would retain the present minimum of $ 250.

In regard to the maximum, the depreciated value of the dollar seems more significant. In any case where an award of $ 5,000 would have been appropriate some years ago, an award of $ 10,000 would be justified now. Any award of more than the minimum is within the court's discretion. And in the light of our proposals to make the maximum an absolute ceiling, even for multiple and willful infringements, we would allow the courts to make awards up to $ 10,000 as they deem just in the circumstances.

g. Schedule of amounts per copy or performance

Section 101(b) now contains a schedule of amounts for each infringing copy or performance, the amounts varying for different kinds of works. It is understood that this schedule is a mere guide that the courts might use, in their discretion, in fixing the sum to be awarded as statutory damages within the present range between $ 250 and $ 5,000.

The schedule has not proved to be a very useful guide, because the amounts are arbitrary and the number of copies or performances is only one of many factors to be considered in assessing damages. In most cases the courts have not applied the mathematical formula of the schedule, and in a few cases where this has been done the results are questionable. To some extent the fear of excessive awards under the present statute is founded on the possibility of a merely mathematical application of the schedule.

The schedule adds a needless complication to the scheme of statutory damages. We would omit it.

[107] 3. RECOMMENDATIONS

(*a*) The present provisions of section 101(b) regarding actual damages and profits should be clarified to provide that--

(1) An infringer is liable for the actual damages suffered by the copyright owner, or the profits of the infringer attributable to the infringement, whichever is greater.

(2) In establishing profits, the plaintiff is required to prove only "gross revenue," rather than "sales." The defendant should continue to have the burden of proving deductions.

(*b*) The present provisions of section 101(b) regarding statutory damages should be modified to provide that--

(1) Where an award of actual damages or profits would be less than $ 250, the court shall award instead, as statutory damages for all infringements for which the defendant is liable, a sum of not less than $ 250 nor more than $ 10,000, as it deems just. However, if the defendant proves that he did not know and had no reason to suspect that he was infringing, the court may, in its discretion, withhold statutory damages or award less than $ 250.

(2) Where an award of actual damages or profits would exceed $ 250 but would be less than the court deems just, the court in its discretion may award instead, as statutory damages for all infringements for which the defendant is liable, any higher sum not exceeding $ 10,000.

(*c*) The following provisions of the present statute should be omitted:

(1) The provisions in sections 101(b) and 1(c) fixing special amounts of damages in certain cases.

(2) The provision in section 101(b) for statutory damages in excess of the maximum where notice has been served on the infringer.

(3) The schedule of amounts per copy or performance in section 101(b).

C. REMEDIES OTHER THAN DAMAGES AND PROFITSn3

1. INJUNCTIONS

a. Present statutory provisions

Section 101(a) of the present statute provides simply that a copyright infringer "shall be liable * * * to an injunction restraining such infringements." This provision is reiterated in the first sentence of section 112, which gives the Federal district courts discretionary power "to grant injunctions to prevent and restrain the violation of any right secured by this title, according to the course and principles of courts of equity."

b. The purpose and effect of injunctions

The issuance of injunctions to restrain infringements of copyright is merely one instance of the general power exercised by the courts to enjoin civil wrongs. The court may temporarily enjoin the defendant while the suit is pending, or it may issue a permanent injunction when the rights of the parties have been decided.

[108] The general principles of equity followed by the courts in granting or denying injunctions are applicable to copyright infringements. An injunction, by preventing future injury to the plaintiff, is often the most effective remedy, particularly because the damages caused by an infringement may be incapable of accurate assessment. In some situations, however, an injunction may be futile, as where the only injury contemplated has already occurred. In other cases an injunction may be too harsh on the defendant. The courts, in the exercise of their discretion to issue or deny an injunction, balance the plaintiff's need against the consequences the defendant would suffer. The terms of an injunction are tailored to fit the exigencies of the particular case.

c. Proposals to preclude injunctions in certain cases

Some of the revision bills of 1924-40 contained provisions to prevent a court from issuing an injunction in certain cases. For example, various bills specified that no injunction should be issued against the completion of an architectural structure, the publication of a newspaper, the exhibition of a motion picture after its production had innocently begun, or the broadcast of a program after the innocent beginning of its rehearsal.

We see no need for provisions of this kind. If there is any reason why an injunction should not be issued in a particular case, we believe the courts can be relied upon to exercise their discretion appropriately. Moreover, any statutory prohibition against injunctions in a particular situation might prove to be too rigid.

d. Conclusion

We propose that the statute simply provide, as it does now in effect, that the court, in its discretion, may issue an injunction to restrain a copyright infringement.

2. IMPOUNDING AND DESTRUCTION OF

INFRINGING ARTICLES

Section 101(c) provides that articles alleged to infringe a copyright may be impounded "during the pendency of the action, upon such terms and conditions as the court may prescribe." The rules of the Supreme Court require that the plaintiff post a bond of at least twice the value of the articles before they may be impounded, to indemnify the defendant for his loss if the articles are later found not to be infringing.

Section 101(d) provides that the court may order an infringer "to deliver up on oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies." Destruction is ordered only after the court has determined that the articles are infringing.

Impounding and destruction are extraordinary remedies which are rather infrequently [*sic*] applied by the courts. Like injunctions they may be a highly effective remedy in some cases, and may be unnecessary or unwarranted in others. These are matters for the court to consider in exercising its discretion.

As mentioned above, some of the revision bills of 1924-40 would have prohibited the granting of injunctions in certain situations. These bills would also have precluded impounding and destruction in similar **[109]** situations. As in the case of injunctions, we would not attempt to specify situations in which impounding and destruction are not to be ordered, but would leave the application of these remedies to the discretion of the courts.

3. RECOMMENDATIONS

(*a*) The statute should simply provide that injunctions may be issued the court's discretion.

(*b*) The present provisions for the impounding and destruction of infringing articles should be retained in substance.

D. COSTS AND ATTORNEY'S FEESn4

1. THE PRESENT STATUTORY PROVISIONS

Section 116 of the present statute provides that in copyright suits "full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee." The costs involved in an infringement action are usually relatively small. But the prosecution or defense of a copyright suit may entail a good deal of work and expense, and an award of attorney's fees can be quite substantial.

The discretionary power of the courts to require the losing party to pay "a reasonable attorney's fee" is intended to discourage unfounded suits and frivolous defenses. The courts have generally denied awards of attorney's fees where the losing party had solid grounds for litigating his claim or defense. This discretionary power of the courts is generally regarded as salutary, and we concur in this view.

The language of section 116 indicates that the allowance of "full costs" is mandatory, and some courts have so held, but others have treated the allowance of costs as discretionary. Section 116 should be clarified in this respect. We believe that the allowance of costs, like the award of attorney's fees, should be left to the discretion of the court.

2. RECOMMENDATION

The statute should provide that the court, in its discretion, may allow costs and a reasonable attorney's fee to the prevailing party.

[111] *Chapter X*

INTERNATIONAL ASPECTS OF COPYRIGHT

OUTLINE OF CHAPTER

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§ [113] CHAPTER X INTERNATIONAL ASPECTS OF COPYRIGHT

A. WORKS OF FOREIGN AUTHORSn1

1. BACKGROUND

As first enacted in 1790, the copyright statute afforded protection to published works of citizens and residents of the United States alone. The principal concern at that time was to establish a Federal system of copyright throughout the new Nation, and no effort was made to provide copyright protection for foreign authors. For the next century the works

of British and other foreign authors were freely copied and published in the United States, without the need for either authorization or payment. As a result, many 19th-century American authors found it difficult to have their works published, since they were forced to compete with royalty-free works from the rest of the world.

Agitation for the extension of the copyright statute to foreign works began in the 1830's and finally came to fruition in 1891. The act of 1891 (26 Stat. 1106) extended the copyright statute to authors of foreign countries, on certain conditions of reciprocal protection by the foreign country to U.S. authors. Some of the provisions of the 1891 act were changed in 1909 and have been amended since, but the system of protecting foreign authors on the basis of reciprocity has remained fundamentally the same.

2. THE PRESENT LAW

a. In general

The protection now given in the United States to the works of foreign authors differs as between the common law and the copyright statute. Common law protection extends to the unpublished works of all authors, without regard to their nationality. Under the statute, however, the published or registered works of foreign authors are eligible for copyright protection only when certain conditions are met.

The provisions now governing the eligibility of foreign works for statutory copyright are found in section 9, which extends copyright protection to works by "a citizen or subject of a foreign state or nation" only in the following cases:

(1) When the alien author is domiciled in the United States.

(2) When the author is a national of a country designated in a proclamation of the President.

(3) When the work is entitled to protection under the Universal Copyright Convention.

[114] *b. Domiciled aliens*

Section 9(a) extends the statute to the work of an alien who is "domiciled within the United States at the time of the first publication of his work." The principle involved here is the simple one of treating domiciliaries on the same basis as citizens.

The reference in section 9(a) to the time of publication has left a doubt as to whether an alien domiciled in the United States can secure statutory copyright for his unpublished works by voluntary registration. We see no reason to withhold the privilege of voluntary registration from the works of domiciled aliens. Moreover, we have proposed, in chapter IV, that the statute apply upon the first public dissemination of a work in any of several ways, including voluntary registration. If a provision such as section 9(a) is to be retained in the statute, we would propose that it refer to the alien's domicile at the time of first public dissemination.

c. Nationals of proclaimed countries

(1) *The statutory provisions*.--Section 9(b) provides that the President may, "by proclamation made from time to time," extend the statute to the works of the citizens or subjects of a foreign country when he determines that one of the three following conditions exists:

(*a*) That the foreign country grants copyright protection to U.S. citizens "on substantially the same basis as to its own citizens"; or

(*b*) That the foreign country grants copyright protection to U.S. citizens "substantially equal to the protection" given by the United States to the authors of that country; or

(*c*) That the foreign country "is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto."

The first of the three conditions specified in section 9(b) is for "national treatment"--that the foreign country treats U.S. citizens on the same basis as its own citizens. The second is for "reciprocal treatment"--that the foreign country gives U.S. citizens protection equal to that given by the United States to citizens of that country.

The third condition is anomalous. It appears to cover countries that are parties to an international agreement which the United States might join, but to which it has not actually adhered. Until the United States becomes a party to an agreement, there cannot be any assurance of protection for U.S. citizens in the other adhering countries. No Presidential proclamation has ever been issued on the basis of this third condition. If the system of proclamations under section 9(b) is retained, we would omit this condition.

(2) *Present status of proclamations under section 9(b)*.--Numerous proclamations have been issued under section 9(b) on the basis of either "national" or "reciprocal" treatment. Individual proclamations have been issued extending our statute to 38 foreign countries now in existence. In addition, general proclamations have been issued declaring the Buenos Aires and Universal Copyright Conventions to be in effect with regard to all adhering countries, and 23 countries not named in any proclamation now adhere to one or both of those conventions.

[115] Section 9(b) provides that the President's determination may be based on the protection given U.S. citizens by a "treaty, convention, agreement, or law" of the foreign country. The existing proclamations for three countries were based on bilateral treaties and the remainder on findings or assurances that the law of the proclaimed country then provided the required protection for works of U.S. citizens. Since the law of a proclaimed country may later be changed, section 9(b) also permits the President at any time to terminate or suspend a proclamation. However, even though there have been one or two instances in which a proclaimed country has curtailed the protection of U.S. citizens on which the proclamation was based, no proclamation has ever been terminated or suspended for that reason.

(3) *Application of formal requirements to foreign works*.--The protection of foreign works by virtue of a proclamation, like the protection of domestic works, depends upon compliance with the general requirements of our statute for securing or maintaining copyright. These include the requirements of a copyright notice on published copies, the deposit of copies for registration of the copyright claim, and the manufacture of copies of certain works in the United States.

Aside from the copyright notice, these requirements impose a much greater practical burden on foreign authors than on domestic authors. As noted below, these formal requirements are mainly eliminated for foreign works protected under the Universal Copyright Convention if they are published with a prescribed notice. And apparently the same result was contemplated under the Buenos Aires Convention.

(4) *Special proclamations as to mechanical recording right*.--For the extension of the mechanical recording right to foreign musical works, section 1(e) requires a special proclamation based on a finding that the author's country grants an equivalent right to the musical works of U.S. citizens. This requirement was placed in the statute in 1909, at a time when the recording right was new to the United States and was not yet provided for in most foreign copyright laws. Today that right is accorded almost universally, and the requirement of a special proclamation seems an unnecessary complication. If the general system of proclamations is retained, this special requirement could well be eliminated.

d. International copyright conventions

(1) *In general*.--Until 1952 the successive conventions of the Berne Union--the first was drafted in 1886 and the most recent in 1948--were the only international copyright conventions designed for worldwide adherence. The members of the Berne Union are predominantly European and British Commonwealth countries; of the countries in the Western Hemisphere, only Canada and Brazil adhere to one of the Berne conventions.

In the United States, as well as in the Latin American countries other than Brazil, the Berne conventions have not been considered acceptable for various reasons. Instead, a series of separate conventions designed for adherence by all the American Republics was developed--the first in 1902 and the latest in 1946. Of these Pan American copyright conventions the United States ratified two: the Mexico **[116]** City Convention of 1902, which now governs our copyright regulations with El Salvador only, and the Buenos Aires Convention of 1910, which 16 of the 20 Latin American countries have also ratified.

The Universal Copyright Convention, drafted in 1952 under the auspices of UNESCO, was intended not only as a bridge between the Berne and Pan American groups, but was also designed for worldwide adherence. Ratification by the United States of the Universal Copyright Convention in 1954 was a signal development in our international copyright relations. To date 36 countries in addition to the United States have ratified the UCC, including among others some Berne and Pan American countries. Additional countries will no doubt adhere to this convention in the future.

(2) *The Universal Copyright Convention*.--The underlying principle of the Universal Copyright Convention is "national treatment"--each country is to protect the works originating in other member countries on the same basis as it protects the works of its own nationals. In addition, the UCC specified certain minimum standards of protection. Section 9(c) was added to our statute in 1954 (effective in 1955) to make it conform with the terms of the Convention.

Section 9(c) extends the statute to the works of authors who are citizens or subjects of a foreign country that is a party to the UCC, and also to the works of any foreign author first published in a Convention country. It also provides that if the published copies of a foreign work eligible for protection under the UCC bear a prescribed copyright notice, the work is exempt from--

(*a*) The general requirement of deposit and registration (except as a prerequisite to suit);

(*b*) The requirement of domestic manufacture for certain works;

(*c*) The importation limit of 1,500 copies for certain works; and

(*d*) The requirement of a special proclamation for the extension of mechanical recording rights to foreign musical works.

(3) *The Buenos Airs [sic*] Convention.--The Buenos Aires Convention provides for copyright protection among the adhering American Republics on the general basis of "national treatment" in each country for the works of the citizens or domiciliaries of the other countries. Although it is not clear on this and other points, the Convention appears to apply only to works published in one of the member countries.

There are no provisions in our statute implementing or referring specifically to the Buenos Aires Convention. It was declared to be in effect, however, by a presidential proclamation. The Convention appears to contemplate that, under certain conditions, a work of another member country would be entitled to protection in the United States without compliance with some of the formal requirements of our statute.

As of the date of this report, 7 of the 16 Latin American members of the Buenos Aires Convention have also adhered to the Universal Copyright Convention, and others will undoubtedly join. Until all 16 have done so, however, our copyright relations with some of the Latin American countries will continue to be governed by the Buenos Aires Convention.

[117] *e. Special types of foreign works*

There are two special types of works--those of stateless authors and those of certain international organizations--which are undoubtedly copyrightable in the United States, though they are not specifically mentioned in the statute. The famous "Mein Kampf" decision, *Houghton Mifflin Co. v. Stackpole Sons, Inc. (104 F.2d 306 (2d Cir. 1939)*), established the copyrightability of works by stateless authors. Protocol 2 of the Universal Copyright Convention requires the United States to extend copyright to works published by the United Nations or its specialized agencies or by the Organization of American States.

3. SUMMARY AND ANALYSIS OF THE PRESENT SITUATION

Among the total of 60 countries to which the United States extends copyright protection, the various forms of international relationships can be summarized as follows:

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The 60 countries with which the United States has copyright relations comprise almost all of the countries in which copyright materials are of substantial commercial importance at the present time. With a few exceptions, the other 40 or more countries of the world are for the most part relatively underdeveloped or recently established. Of the exceptions the most notable is the Soviet Union, which has no copyright relations with any other nation.

The present arrangements extending protection under our copyright statute to the works of foreign authors are a complex structure of numerous Presidential proclamations and two multilateral conventions. The proclamations and conventions differ as to the standards of eligibility and the conditions for protection, and they overlap for a number of countries. A further complicating factor is the existence of 40 or more countries with which the United States has no copyright relations.

4. POSSIBILITIES OF SIMPLIFICATION AND IMPROVEMENT

a. In general

The Universal Copyright Convention has become the most important and effective means for the permanent establishment of reciprocal copyright protection between the United States and other countries. It goes without saying that our statute should continue to protect foreign works coming under the UCC in accordance with its terms. We must also honor our obligations under the Buenos Aires Convention, at least until all adherents have joined the UCC.

[118] There remain the countries that do not belong to either the Universal or Buenos Aires Conventions--15 "proclaimed" countries and 40 or more countries with which we have no copyright relations. It is here that we may find an opportunity to simplify the protection of foreign works and to improve our international copyright relations.

b. Reciprocity as the basis for international copyright relations

Our present scheme of proclamations is based on the theory of reciprocity: that protection should be extended to foreign authors only if their country grants protection to U.S. authors. The requirement of reciprocity was probably important to us in former years, when our international copyright relations were in the developmental stage and the works of our authors were not yet protected in many foreign markets. Reciprocity still has considerable surface appeal as a means of obtaining protection abroad for works of U.S. citizens. Most foreign countries have likewise based their international copyright relations on this requirement.

As a practical matter, however, the requirements of reciprocity has created an involved complex of protection for some foreign works and no protection for others. The extension of our statute to foreign works generally, without regard to reciprocity, would greatly simplify our international copyright relations and the determination of the copyright status of foreign works.

Our laws dealing with various forms of property other than copyright--chattels, shares of stock, contractual rights, and especially patents--apply generally to the property of citizens and aliens alike. Even in the realm of copyrightable works, our common law now protects the unpublished works of all foreign and domestic authors indiscriminately.

For the purpose of securing protection abroad for U.S. authors, the requirement of reciprocity seems to be of little importance today. The works of U.S. authors are now protected in almost all of the countries where copyright is of commercial value. Removal of our requirement of reciprocity would not be likely to affect this situation adversely. With regard to the 40 or more countries whose works are not now protected under our statute, there is little chance that our withholding of copyright from their authors would encourage them to adopt laws giving protection to our authors. On the contrary, we believe that our recognition of copyright in works emanating from newly established and other underdeveloped countries is more likely to encourage their adoption of copyright laws and their adherence to the Universal Copyright Convention.

France and one or two other countries have extended the protection of their copyright laws to all foreign works without regard to reciprocity. It is noteworthy that French works are protected in at least as many countries as the works of any other nation.

Aside from the matter of securing protection abroad for U.S. authors, we believe that the extension of copyright protection to foreign works generally, without requiring reciprocity, would serve our best interests. U.S. distributors of intellectual works--publishers, motion picture producers, etc.--often need exclusive rights in a work to warrant their investment in its reproduction and distribution. Consequently, copyright protection of foreign works serves to foster their dissemination in the United States. Most important, our adoption **[119]** of the general principle of affording copyright protection to the works of all authors, regardless of their nationality, would enhance our esteem abroad and give impetus to the development of copyright relations among all nations.

c. Conclusions

As we see it, we have little to lose and much to gain by extending our copyright statute to the works of foreign countries generally, without regard to the existence of reciprocity. There are, however, two qualifications of this principle that we would suggest:

(1) Additional countries should be encouraged to adhere to the Universal Copyright Convention. Works originating in countries belonging to the convention are now exempted from certain formal requirements of our statute, and we would continue to extend these special advantages to U.C.C. works.

(2) The President should be authorized to withhold, suspend, or restrict the statutory protection afforded to the works of a particular country. This power should be available in special situations, or in cases of discrimination against U.S. citizens--although, of course, it would not be exercised in violation of our treaty obligations. There would probably not be many occasions to use this power.

5. RECOMMENDATIONS

(*a*) Sections 9(a) and 9(b) should be replaced by a provision extending the statute to all foreign and domestic works on the same basis, but with a proviso authorizing the President to withhold, suspend, or restrict statutory protection for the works of nationals or domiciliaries of any country.

(*b*) The present exemptions enjoyed by foreign works that qualify under the Universal Copyright Convention should be continued in substance.

B. MANUFACTURING AND RELATED PROVISIONS

1. BACKGROUND

Before the International Copyright Act of 1891, the works of foreign authors had been freely and widely pirated in the United States. The piratical printing of foreign works had become such a large part of the domestic printing industry that the printers opposed any extension of copyright to foreign works unless their interests were protected. They insisted upon requiring printing in the United States as a condition of U.S. copyright, not only for foreign works but for the works of U.S. authors as well.

The result was the "manufacturing clause" in the act of 1891 which provided that "in the case of a book, photograph, chromo, or lithograph," the copies which had to be deposited to secure copyright "shall be printed from type set within the limits of the United States" or from other printing devices made in the United States. The act also prohibited the importation of copies of certain types of copyrighted works that had been manufactured abroad.

The manufacturing clause was the price exacted by the printers for the establishment of international copyright protection in the **[120]** United States. Its purposes were to preserve for the U.S. printing industry the business it had derived from the piracy of foreign works, and to protect it against foreign competition. Whatever justification may have existed for the manufacturing clause in 1891, however, it is now considered an anomaly in our copyright law. No other country requires domestic manufacture as a condition of copyright protection.

When first enacted the manufacturing clause required that the work be printed in the United States before its publication anywhere. Since foreign works are normally first printed and published abroad, this requirement was so difficult and expensive to meet that it operated to deny copyright protection in a great many cases. The provision has been modified several times since 1891 to ameliorate some of its more drastic effects.

Foreign countries have long protested against the requirement that their works, in order to have copyright protection in the United States, must be printed here. In the preparation of the Universal Copyright Convention they insisted upon the provision, which was adopted, exempting the works of other member countries from any requirement of domestic manufacture. Accordingly, the statute was amended in 1954 (effective in 1955) to exempt foreign works that qualify for protection under the U.C.C.

2. THE PRESENT LAW

The manufacturing clause is found in section 16 of the present statute, supplemented by section 17, 18, 22, 23, and 107. The provisions of these sections are now an intricate and abstruse tangle of general requirements, exceptions, and special procedures. If the substance of any of these provisions is to be retained in a new statute, the present language is badly in need of clarification and simplification.

In substance, section 16 provides that the various steps in the manufacture of English-language books and periodicals must be performed in the United States, and that with certain exceptions the same requirements apply to lithographs and photoengravings. Sections 17 and 18 require an affidavit of domestic manufacture in the case of books subject to the manufacturing clause, and prescribe penalties for knowingly making a false affidavit. Section 107

prohibits importation, except for certain limited purposes, of copies of copyrighted English-language books manufactured abroad.

Sections 22 and 23 provide a partial exception to the manufacturing requirements. An "ad interim copyright," lasting 5 years, may be secured for English-language books or periodicals first published abroad, by registration in the Copyright Office within 6 months. An ad interim copyright permits the copyright owner to import up to 1,500 copies of the foreign edition during the 5-year period of ad interim protection, so that he may test the U.S. market and determine whether it would be worthwhile to manufacture an edition in the United States. If an edition is manufactured and published in the United States within the 5-year period, the ad interim copyright may be extended to the full copyright term.

Section 9(c) exempts foreign works protected under the Universal Copyright Convention from the manufacturing requirements, the ad interim provisions, and the importation restrictions.

[121] 3. EFFECT OF THE PRESENT LAW

a. Books and periodicals in the English language

The manufacturing clause has its most direct impact upon English-language books and periodicals by U.S. authors, or by foreign authors who are not covered by the Universal Copyright Convention. These works are denied full-term copyright unless they are printed in the United States.

If, for example, a U.S. citizen writes a book in English and has it printed abroad, he is faced with a number of difficulties. In order to secure any protection in the United States he must publish his work abroad and register a claim to ad interim copyright within 6 months of publication. Under his ad interim copyright he can import only 1,500 copies; if he wishes to sell more than 1,500 copies in the United States, he must either abandon his copyright or manufacture an edition in the United States. And most important, he will lose copyright protection at the end of the 5-year ad interim term unless he manufactures and publishes a U.S. edition within that period and then registers a full-term copyright claim.

The same difficulties face foreign authors who write works in English that are not covered by the Universal Copyright Convention. And while American authors could normally be expected to have their works manufactured in the United States, this is not the case with most foreign authors. The result in the past has been to deny protection altogether to many foreign works. Foreign countries, however, may now obtain exemption for the works of their authors by joining the U.C.C. Several English-speaking countries, including the United Kingdom, have done so, and others--such as Canada, Australia, and New Zealand--may be expected to join in the future.

b. Books and periodicals in a foreign language

Books and periodicals "of foreign origin" in a language other than English are exempted from the manufacturing requirements and the import prohibitions. The phrase "of foreign origin," however, has an unfortunate and perhaps unforeseen result: a foreign-language book or periodical by a U.S. citizen is denied copyright altogether if the first edition is printed abroad. It is not even eligible for ad interim protection, since the statute makes ad interim copyright available only for English-language books and periodicals.

The domestic printing industry has not been concerned about foreign-language works, and the present requirement has caused hardships in a number of cases. Thus, if the manufacturing requirements are retained, we believe the exemption of foreign-language works should be extended to those by U.S. authors.

c. Lithographs and photoengravings

Many pictorial works are excluded from the provision extending the manufacturing requirements to lithographs and photoengravings:

(1) Foreign works protected under the Universal Copyright Convention are exempted from the manufacturing requirement.

(2) Pictorial works not produced by a lithographic or photoengraving process--including etchings, hand engravings, photogravures, and collotypes--are not affected by the requirement.

(3) Section 16 specifically exempts lithographs and photoengravings where "the subjects represented are located in a for **[122]** eign country and illustrate a scientific work or reproduce a work of art." This ambiguous provision has been construed as exempting any reproduction of an art work or technical drawing located abroad.

In effect, reproductions of pictorial works by artists residing abroad will usually be excluded from the manufacturing clause, while lithographs and photoengravings of works by artists in the United States will be subject to that requirement. We believe that this provision is of no substantial benefit to the U.S. printing industry, but it has been the cause of considerable confusion and of abandonment of some copyright claims. Even if a manufacturing requirement is retained for books and periodicals, we would recommend dropping it for lithographs and photoengravings.

4. CONSIDERATIONS FOR A NEW LAW

a. In general

It is hard to see the basis in logic or principle for denying copyright protection to authors as a means of protecting against foreign competition. With the possible exception of the printers themselves, all groups concerned appear to agree that copyright should not be conditioned upon manufacture in the United States.

Foreign authors will usually have their works printed and published first in their own countries. In those instances where there is a large U.S. market for a foreign work, a U.S. edition is likely to be printed. But in most cases it is a burden on foreign authors to require, as a condition of copyright protection, that they have their works reprinted here.

U.S. authors will normally have their works manufactured in the United States, but there are special situations in which their works are manufactured abroad for practical reasons; for example:

- Where the author resides or is stationed abroad;

- Where the work is in a foreign language or is aimed at a foreign market;

- Where a foreign publisher is the only one offering to publish the work;

- Where the market for the work is so small, as in the case of some scholarly or technical works, that printing must be procured wherever the cost is lowest; or

- Where the special quality needed, as in the case of some art reproductions, requires the unique skills of certain foreign artisans.

In these situations it seems unjust to deprive U.S. authors of copyright protection if they do not have their works printed in the United States.

b. Effect on printing industry

In 1891, and in 1909, there was concern about protecting the "infant" printing industry against foreign competition. Even then, however, the device of protecting printers by denying or restricting an author's copyright was questionable. If the printing industry needs this sort of protection today, we believe that a limitation on imports, without depriving authors of copyright, would be sufficient. Moreover, as long as the import limitation is tied to copyright, it will give no protection to printers against foreign editions of works not under copyright.

[123] The present provision for the importation of 1,500 copies of a foreign edition under a 5-year ad interim copyright was adopted in 1949 with the full support of the printers. They were apparently satisfied that the printing industry would not be threatened by permitting a 5-year period of copyright protection for works printed abroad, as long as imports were limited to 1,500 copies. During the hearings in 1954 on the Universal Copyright Convention,n2 however, some representatives of the printers opposed the complete removal of the manufacturing requirement and the import limitation, for foreign works protected under the convention.

It seems apparent that an import limitation, rather than the denial or curtailment of copyright, is the effective method for protecting the printing industry against foreign competition. The limitation of copyright to the 5-year "ad interim" term seems to be of no real benefit to the printers. The copyright owner of a work printed abroad who finds no U.S. market for more than 1,500 copies is not likely to reprint in the United States, though faced with the loss of

copyright after 5 years. On the other hand, if there is a U.S. market for substantially more than 1,500 copies, the import limitation is likely to cause the printing of a U.S. edition.

Data presented at the 1954 hearings on the Universal Copyright Convention showed that--

- U.S. book exports greatly exceed imports.

- Even when foreign editions can be imported without limit, as in the case of books in the public domain, U.S. editions are generally preferred in the domestic market, and it is usually more economical to print a domestic edition when there is a market for 2,500 copies or more.

Statistics have been collected on imports of copyrighted English-language books since the United Kingdom joined the Universal Copyright Convention in 1957. They indicate that even though British editions could have been imported without limit under the U.C.C. exemption, no great number has been imported in more than 1,500 copies.

c. Conclusions

We believe that there is no justification for denying copyright protection, or cutting it off after 5 years, for failure to manufacture an edition in the United States. The effect on authors is severe. They lose not only the right to reproduce their works in printed form, but also the other rights, often more remunerative, to use their works in motion pictures, broadcasts, plays, etc. Moreover, withholding or cutting off copyright from works printed abroad has proved to be of little or no benefit to the printing industry. If printers need protection against foreign competition, it should be afforded by other means such as an import limitation.

Whether an import limitation is still needed for the protection of the printing industry against foreign competition is an open question that we consider beyond the province of copyright. We see no reason why import restrictions, if found necessary, should be tied to copyright or confined to copyrighted works. In any event, even if the **[124]** 1,500 copy limit on imports is retained, we believe that the copyright protection of authors should not depend upon printing in the United States.

5. RECOMMENDATIONS

(*a*) The requirement of manufacture in the United States as a condition of copyright (sec. 16) and the related provisions dealing with affidavits (secs. 17 and 18) and ad interim copyright (secs. 22 and 23) should be eliminated.

(*b*) The prohibition against the importation of copyrighted English-language books manufactured abroad (sec. 107) and the provision for importing up to 1,500 copies under ad interim copyright (sec. 16) should be eliminated. If Congress finds that an import limitation on English-language books is necessary for the protection of the U.S. printing industry, the limitation need not be confined to copyrighted books, and it should be provided for in legislation other than the copyright statute.

C. OTHER IMPORT PROVISIONS

1. UNCOPYRIGHTED WORKS BEARING FALSE NOTICE

a. The statutory provision and its background

Section 106 prohibits the importation of articles bearing "a false notice of copyright when there is no existing copyright thereon in the United States." This prohibition supplements section 105 which provides a criminal penalty for the fraudulent sale or importation of uncopyrighted articles bearing a false notice. The criminal provisions are discussed below in *chapter XI*.

The false notice provisions of sections 105 and 106 were carried over from pre-1909 statutes under which copyright was secured by registration prior to publication of the work. Before 1909 a copyright notice in published copies was a factual representation that a copyright claim had been registered, and it was possible to determine whether or not a notice was false simply by checking the registration records. This is no longer true.

b. Section 106 now inoperative

Copyright is now secured by publication with notice, and registration is made later. The notice is a declaration that copyright is being claimed, and would not be false as long as a claim could reasonably be asserted. Whether a particular notice is false is now a question involving a legal determination of the copyrightability of the article and the good faith of the claimant.

It is wholly impracticable to expect the customs officers to recognize that a notice may be false, or to exclude articles on this ground. In any case where the question might be raised, the falsity of the notice should be a matter for judicial determination. We believe, therefore, that section 106 is not a suitable method for preventing importation of articles bearing false notice. This purpose should be accomplished by means of a provision, such as that in section 105, under which a person who knowingly imports an article bearing a false notice is subject to criminal prosecution.

[125] 2. PIRATICAL COPIES

a. The present statutory provision and regulations

Section 106 also prohibits the importation of "any piratical copies of any work copyrighted in the United States." Section 107 repeats this prohibition with respect to piratical copies of "any book," but adds nothing to section 106.

The statute does not define "piratical copies," but the phrase has been understood to mean copies made without the authorization of the copyright owner. "Piratical copies" are, of course, infringing copies, and the copyright owner could sue for infringement in the United States after piratical copies made abroad had been imported and distributed here. The statute is designed to prevent the importation of infringing copies in the first instance.

Section 109 directs the Secretary of the Treasury and the Postmaster General to make rules and regulations for enforcement of the import prohibitions. The substance of the regulations now in force (*19 C.F.R. secs. 11.18-11.*21) is as follows:

(1) Copyright claimants seeking to stop the importation of piratical copies must file an application with customs, accompanied by material identifying the work and a fee of $ 75.

(2) Customs collectors may bar articles if satisfied that they are piratical. "Piratical copies" are defined in the regulations as "actual copies or substantial reproductions of legally copyrighted works produced and imported in contravention of the rights of the copyright proprietor."

(3) If the importer objects, the copyright claimant may be required to post a bond, and the articles are then detained until the Bureau of Customs determines whether or not they are piratical.

b. Problems of enforcement

The basic policy of prohibiting importation of piratical copies is well established in the United States and other countries. Enforcement of the prohibition, however, has inherent difficulties. It requires customs officers to decide questions of law and fact which are sometimes complex or beyond their ability to investigate. Particularly troublesome are contested claims that commercial art works being imported are piratical copies.

The present customs regulations give the importer the opportunity to show that the articles are not piratical, and seek to safeguard him against loss for a wrongful detention. And he may appeal customs decisions to the courts. At any rate the possible shortcomings in the administrative process do not appear so serious as to require abandonment of the prohibition. Modifications in the present regulations may be called for, but we would rely on the Treasury Department to make them.

3. AGREEMENTS TO DIVIDE INTERNATIONAL MARKETS

When arrangements are made for both a U.S. edition and a foreign edition of the same work, the publishers frequently agree to divide the international markets. The foreign publisher agrees not to sell his edition in the United States, and the U.S. publisher agrees not to sell **[126]** his edition in certain foreign countries. It has been suggested that the import ban on piratical copies should be extended to bar the importation of the foreign edition in contravention of such an agreement.

Some countries, including the United Kingdom, bar importation in this situation, apparently on the ground that, even though the copies were authorized, their sale in violation of a territorial limitation would be an infringement of the

copyright. In the United States, there is no clear decision as to whether the sale of authorized copies beyond a territorial limitation is an infringement. But the import ban on "piratical copies" does not seem to apply to authorized copies.

We assume, without considering the antitrust questions involved, that agreements to divide international markets for copyrighted works are valid and enforcible contracts as between the parties. But we do not believe that the prohibition against imports of piratical copies should be extended to authorized copies covered by an agreement of this sort. To do so would impose the territorial restriction in a private contract upon third persons with no knowledge of the agreement. And even as between the parties, Customs does not seem to be an appropriate agency for the enforcement of private contracts.

4. RECOMMENDATIONS

(*a*) The provision of section 106 prohibiting importation of any article bearing a false notice of copyright should be deleted.

(*b*) The prohibition in section 106 against importation of "piratical copies"--i.e., copies made without authorization of the author or any other copyright owner--should be retained in substance.

(*c*) The provision of section 109, authorizing the Secretary of the Treasury and the Postmaster General to prescribe rules and regulations for the enforcement of the import restrictions, should be retained in substance.

[127] *Chapter XI*

MISCELLANEOUS PROBLEMS

OUTLINE OF CHAPTER

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§ [129] CHAPTER XI MISCELLANEOUS PROBLEMS

A. GOVERNMENT PUBLICATIONSn1

1. THE PRESENT LAW AND ITS BACKGROUND

a. The law before 1895

Before 1895 the statutes were silent as to the copyrightability of material emanating from governmental bodies. During the 19th century, however, a series of court decisions had established the rule that, for reasons of public policy, the text of laws, court decisions, governmental proceedings, and similar official documents must be freely available and are therefore not subject to copyright.

At the same time the courts held that a person publishing an official document with his own additions--such as annotations, headnotes, or commentaries--could secure copyright in them. Several cases sustained a State government's copyright in additions of this character prepared by its employees. Hence, although official documents in the nature of governmental edicts and rulings were considered uncopyrightable, there was nothing to prevent governmental bodies, at least of the States, from securing copyright in other kinds of material.

b. The Printing Law of 1895

The 1895 act to centralize printing for the U.S. Government in the Government Printing Office (28 Stat. 608) contained a provision permitting that office to sell duplicate plates "from which any Government publication is printed." This was intended to facilitate the private reproduction of Government publications. To forestall copyright claims in private reproductions it was also provided that "no publication reprinted from such * * * plates and no other Government publication shall be copyrighted." This provision is still in the Printing Law *(44 U.S.C. sec. 58)* and its substance was incorporated in the copyright statute in 1909.

c. The present copyright law

Section 8 of the present copyright statute provides that "no copyright shall subsist * * * in any publication of the United States Government, or any reprint, in whole or in part, thereof * * *." It also contains a provision intended to preserve the copyright subsisting in a private work when it is reproduced in a publication of the Government.

The ban against copyright in Government publications does not extend to publications of State and local governments. The judicially established rule would still prevent copyright in the text of State laws, municipal ordinances, court decisions, and similar official documents, but other State or local government publications--such as those con **[130]** taining historical, technical, educational, or other informational material--may be copyrighted. Almost every State in the Union has registered copyright claims in some of its informational publications.

2. RATIONALE OF THE PRESENT LAW

Most foreign countries permit copyright in publications of their national governments other than laws, rulings, and similar official documents. In the United States the Government is permitted to obtain patents on inventions made for it by its employees. And, as we have just seen, State and local governments may copyright their informational publications. We have therefore tried to find the reasons why copyright has been prohibited entirely for publications of the U.S. Government.

The legislative history of the initial prohibition in the Printing Law of 1895 indicates that it was aimed at precluding copyright claims by private persons in their reprints of Government publications. It was apparently assumed, without discussion, that the Government itself would have no occasion to secure copyright in its publications. Most Government publications at that time consisted of official documents of an authoritative nature. When the copyright laws were consolidated in the act of 1909, the same provision in substance was incorporated in that act.

During the preliminary consideration of the 1909 act, a suggestion to extend the prohibition to State publications was opposed and dropped. The States generally did not have their own facilities for printing. As a matter of economy, they contracted with private publishers who undertook to print and publish at their own expense as a commercial venture, for which the publishers required copyright protection.

The Federal Government today issues a great variety and quantity of informational material--technical manuals, educational guides, research reports, historical reviews, maps, motion pictures, etc. The basic argument against permitting these publications to be copyrighted is that any material produced and issued by the Government should be freely available to the public and open to the widest possible reproduction and dissemination.

3. WHAT IS A "GOVERNMENT PUBLICATION"

There has been much uncertainty as to what constitutes a "publication of the U.S. Government" in which copyright is prohibited. The word "publication" may mean either of two things:

(*a*) It may refer to the work itself. In this sense a "Government publication" would be any work produced by the Government--that is, produced for the Government by its employees--regardless of who published it.

(*b*) It may refer to the act of publishing copies of a work. In this sense a "Government publication" would be any work published by the Government, regardless of who produced it.

It has also been suggested that--

(*c*) Any work which has either been produced or published by the Government is a "Government publication."

[131]

(*d*) Only a work which has both been produced and published by the Government is a "Government publication."

The courts have expressed various opinions, but the weight of authority seems to point to the first meaning: a work produced by the Government. In practice, the Copyright Office and a number of other Government agencies have adopted that construction, with the following conclusions:

- Any work produced by a Government employee within the scope of his employment is not copyrightable, even though issued by a private publisher.

- Any work privately produced may be copyrighted by the author, even though he permits the Government to publish it.

- The Government is not precluded from acquiring copyright in privately produced works by assignment.

Under this construction a number of Government agencies have adopted the following practices:

- They permit private persons who produce works under a Government contract or grant to secure copyright, with the Government obtaining a nonexclusive license to publish.

- They arrange for the private publication of works produced under Government contracts or grants.

- They take assignments to the Government of copyrights secured by private persons.

4. VIEWS OF GOVERNMENT AGENCIES

We have asked a number of Government agencies with extensive publication programs for their experience and views. They agreed generally that the scope of the prohibition should be clarified by defining "Government publications" as meaning works produced for the Government by its employees. Most of them indicated that this would solve their problems, which relate chiefly to works produced under contracts or grants, and that there is no need for copyright in works produced by their employees.

Several agencies, however, indicated that there are exceptional cases in which it would be highly desirable to permit copyright in works produced by their employees; for example:

- Where the agency has special reasons to have a work published commercially, and the publisher wants copyright protection.

- Where a work is the joint product of the agency and a private organization desiring copyright.

- Where a work is produced by the agency under a grant from a private organization desiring copyright.

- Where an agency seeks to operate a self-supporting program for the publication of its research reports.

- Where the agency has reason to believe that reproduction of a publication must be controlled to prevent distortion in a dangerous manner.

These, of course, are unusual situations. The agencies concerned agree that no copyright protection is needed for the great bulk of their publications, but they feel that exceptions to the general prohibition should be authorized in extraordinary cases.

[132] In the past, special legislation has been proposed to permit copyright in individual works of the Government, and a few bills of this character have been enacted.

5. CONCLUSIONS AS TO THE COPYRIGHT PROHIBITION

We agree with the basic principle that works produced by the Government should be open to the widest possible dissemination. We would therefore retain the general prohibition against copyright in "Government publications," with that term being defined as works produced for the Government by its employees.

We believe, however, that provision should be made to permit exceptions in unusual cases, without requiring the agencies to seek special legislation in each instance. It does not seem feasible to spell out the appropriate exceptions in the statute, and we think it would not be advisable to authorize each agency to establish its own standards. A better procedure, we suggest, would be to empower a central agency--possibly the Congressional Joint Committee on Printing or the Bureau of the Budget--to permit exceptions in particular situations. This would provide for the development of uniform standards for the Government as a whole, with controls to assure that copyright is permitted only in special cases where the extraordinary circumstances warrant the departure from the general rule.

The public would be informed of the copyright in any particular case by the copyright notice required to appear in all published copies.

6. TRANSFERS OF GOVERNMENT-OWNED COPYRIGHTS

Ownership of copyrights by the Government raises a problem that has been encountered with Government-owned patents. There is no established procedure enabling Government agencies to grant exclusive licenses to use patents held by them, or to transfer ownership of the patents. We suggest that the central agency empowered to permit the copyrighting of Government publications be further empowered to permit the exclusive licensing or transfer of Government-owned copyrights.

7. PRIVATE WORKS PUBLISHED BY THE GOVERNMENT

A saving clause in the present section 8 is intended to assure that the copyright of a private person is preserved when his work is published by the Government. We believe the saving clause needs to be supplemented in two respects:

(*a*) It now provides for the preservation of a "subsisting copyright," which might be understood as referring only to a copyright previously secured under the statute. It should be made clear that the rights of a private owner are likewise preserved when his previously unpublished work is published by the Government.

(*b*) In the absence of a copyright notice in a Government document containing privately owned material, the public may be misled into assuming that the document is a Government publication in the public domain. We propose that when the Government publishes a document containing privately owned material, it should be required to insert a notice identifying that material.

[133] 8. RECOMMENDATIONS

(*a*) The general prohibition against copyright in "publications of the U.S. Government" should be retained in the copyright statute, with that term being defined as meaning published works produced for the Government by its officers or employees. To avoid duplication and possible confusion, the similar prohibition in the Printing Law should be deleted.

(*b*) A central Government agency should be empowered to authorize exceptions to the general prohibition in special cases, and to authorize the exclusive licensing or transfer of Government-owned copyrights.

(*c*) The saving clause, preserving the copyright of a private owner when his work is published by the Government, should be clarified to assure copyright protection for the private owner of a previously unpublished work. The Government should be required to insert a copyright notice identifying privately owned material in documents published by it.

B. PHOTOGRAPHS

1. DIFFICULTIES UNDER THE PRESENT LAW

The statutes have designated photographs as copyrightable works since 1865. Some of the general provisions of the law, however, have made it difficult for photographers to secure and maintain copyright in their works:

- Each separately published work is now required to be deposited and registered individually. The economic value of any one photograph is likely to be small. The cost to a photographer of registering each of his published photographs separately is usually prohibitive.

- Many photographs are published in periodicals and the publishers are often unwilling to place a separate copyright notice on individual photographs. Under the present law, it is doubtful whether the general notice for the periodical as a whole will protect a contribution in which copyright has not been assigned to the publisher. Consequently, photographers must either assign all their rights to the publisher or risk the loss of copyright.

2. SOLUTIONS AFFORDED BY PRECEDING RECOMMENDATIONS

We believe that recommendations made earlier in this report would provide solutions for these difficulties.

a. Deposit and registration

In chapter VII we have proposed that the Register of Copyrights be authorized to modify the general specification in the statute as to the deposit required for registration. Photographs were mentioned as an example of the cases for which a departure from the general requirement is desirable. The Register, by regulation, could permit the deposit of a number of photographs collectively for a single registration. In addition, our recommendations in chapter VII would afford protection, though with limited remedies, for unregistered photographs published with notice.

[134] *b. Notice*

In Chapter VI we have proposed that a general notice in a composite work be sufficient for all component contributions. We have also proposed that the use of the wrong name in the notice should not invalidate the copyright. Photographs contributed to a periodical would be protected by a general notice in the name of the publisher.

c. Ownership

In chapter VIII we have proposed that the publisher who secures copyright in a composite work should be deemed to hold in trust for the contributor all rights not expressly assigned, except the right of publication in a similar composite work. This would apply to a photograph contributed to a periodical.

C. CRIMINAL PROVISIONS

1. WILLFUL INFRINGEMENT FOR PROFITn2

In addition to the civil remedies for infringement, discussed above in *chapter IX*, the statute provides criminal penalties against willful infringement for profit. Section 104 makes it a misdemeanor, punishable by fine, imprisonment, or both, to infringe a copyright "willfully and for profit," or to "knowingly and willfully aid or abet such infringement."

Copyright owners have ordinarily pursued their civil remedies alone; but they have occasionally invoked this criminal provision. The criminal penalties can be effective in deterring flagrant and repeated infringements. We favor retaining them.

2. FRAUDULENT USE OR REMOVAL OF NOTICEn3

Section 105 provides criminal penalties against the following acts:

(*a*) Inserting a copyright notice, with fraudulent intent, in "any uncopyrighted article";

(*b*) Removing or altering, with fraudulent intent, the copyright notice upon "any article duly copyrighted";

(*c*) Issuing, selling, or importing any article with knowledge that it bears a copyright notice and "has not been copyrighted in this country."

Penalties against the false use of a copyright notice have been provided ever since the notice was first made a requirement in the statute of 1802. Their purpose is to make the notice a reliable indication of the copyright status of a published work, by punishing fraudulent use of a false notice. Since it is not intended to penalize an honest mistake, section 105 makes "fraudulent intent," or knowledge that the notice is false, an essential element of the offense. A notice inserted in an article in good faith does not subject the claimant to criminal prosecution even if the claim is ultimately held invalid.

Although prosecutions for violation of section 105 have been rare, we believe the section has an important deterrent effect which helps insure the reliability of copyright notices. We would retain it in substance, but the present language can be improved. The references to **[135]** uncopyrighted articles bearing a notice are vestiges of the pre-1909 law when copyright had to be secured by registration before any copies could be published with a notice. Since copyright is now secured by the very act of publication with notice, these references are somewhat anomalous. The present language may also be too narrow to cover cases where a false date or name is used in the notice with fraudulent intent.

3. FALSE STATEMENTS IN REGISTRATION AND OTHER DOCUMENTS

Some of the previous bills to revise the copyright law included criminal penalties for knowingly filing in the Copyright Office any documents containing false statements. There is no such provision in the present copyright statute, but the Criminal Code *(18 U.S.C. sec. 1001)* provides penalties against anyone who knowingly makes false statements or uses false documents "in any matter within the jurisdiction of any department or agency of the United States."

It is, of course, important that the information filed in the Copyright Office for its public records be reliable. It seems clear, however, that the general provision of the Criminal Code applies to documents filed in the Copyright Office. We see no need for a special provision to the same effect in the copyright statute.

4. RECOMMENDATIONS

(*a*) The present criminal penalties against willful infringement for profit should be retained.

(*b*) The provisions of section 105 concerning false use of the copyright notice should be retained in substance, with some improvements in language.

(*c*) No special provisions concerning the filing of false information in the Copyright Office appear to be needed.

D. PROVISIONS REGARDING JUDICIAL PROCEDURES

1. IN GENERAL

The Copyright Act of 1909 contained several sections dealing with the jurisdiction, venue, and procedures of the courts in copyright cases. In 1948 some of these provisions were repealed, since they were covered in the Judicial Code (title 28, United States Code) and in the Federal Rules of Civil Procedure. The three remaining sections, 112-114, concern injunctions and appellate review.

2. PROCEDURE INVOLVING INJUNCTIONS

The first sentence of section 112 states that the Federal district courts shall have power to grant injunctions against copyright infringements according to equity principles. As noted in chapter IX, injunctions are mentioned elsewhere in the statute among the remedies to be available for copyright infringement. Nothing of substance is added by the first sentence of section 112.

In contrast, the second sentence of section 112, as supplemented by section 113, provides for procedures not covered otherwise. They make it possible for a copyright owner who has obtained an injunction **[136]** in one State to enforce it against the defendant when he is located in another State. We believe these provisions should be retained.

3. REVIEW BY APPELLATE COURTS

Section 114 says merely that the decisions of the Federal district courts in copyright cases are reviewable on appeal as provided elsewhere by law. Review of all district courts decisions by the circuit courts of appeals and the Supreme Court are provided for in the Judicial Code.

4. RECOMMENDATIONS

(*a*) The first sentence of section 112 and section 114 should be deleted as superfluous.

(*b*) The second sentence of section 112 and section 113, which provide for the service and enforcement of injunctions anywhere in the United States, should be retained in substance.

E. PERFORMING RIGHTS ORGANIZATIONS

1. THE PURPOSE AND NATURE OF PERFORMING RIGHTS ORGANIZATIONS

In the United States, as in virtually every other major country, copyright owners have found it necessary as a practical matter to place their musical works in a pool for the licensing of public performances. Musical performances are given so widely that no one copyright owner could police all performances of his music or collect the royalties due him. And on the other hand, persons who give performances of many musical works, such as broadcasters, would find it impractical to obtain licenses from, and pay royalties to, each of the many copyright owners individually.

Organizations have therefore been formed to combine the musical compositions of many owners into a single catalog for which the organization issues performing licenses and collects royalties.

Inherent in any organization of this sort is the potential danger of monopolistic control and discrimination, both as to users seeking licenses and as to copyright owners seeking to participate. In this respect a performing rights organization is comparable to a public utility.

2. PERFORMING RIGHTS ORGANIZATIONS ABROAD

In most foreign countries there is only one performing rights organization, operated under some form of government control. The following are some of the typical methods by which these organizations are regulated abroad:

- Government approval must be obtained for the establishment of a performing rights organization;

- Royalty rate schedules must be filed with the government and applied nondiscriminately;

- Royalty rates are made subject to review and adjustment by a tribunal upon complaint;

- Lists of the musical works in the organization's catalog, or lists of its members, must be filed periodically with the government;

- The admission of copyright owners to membership in the organization, and the distribution of its revenue among the members, are made subject to government regulation or review.

3. PERFORMING RIGHTS ORGANIZATIONS IN THE UNITED STATES

a. Organizations now operating

In the United States there are now two principal performing rights organizations--the American Society of Composers, Authors, and Publishers (ASCAP), and Broadcast Music, Inc. (BMI). Between them they license the public performance of the great bulk of copyrighted music. A third organization, SESAC, licenses a relatively small catalog of music.

ASCAP is a membership organization of music writers and publishers, started in 1914. In 1958 it had about 4,600 writer and 1,100 publisher members. Its gross revenue for 1960 was about $ 32 million. Its net revenue, after expenses, is distributed among its members, 50 percent to the writers and 50 percent to the publishers.

BMI was organized in 1939 by the broadcasting industry as a counterweight to ASCAP. In 1958 it licensed the music of about 2,600 publishers, many of which were currently inactive, and a number of individual writers. Its gross revenue for 1960 was about $ 12 million. BMI is not intended to make a profit. Its royalty schedules are adjusted to produce the revenue needed to defray its expenses, establish a reserve, and make payments to publishers and writers at stipulated rates.

SESAC is a privately owned corporation established in 1930. As of 1958 it licensed the music of 284 publishers with a catalog of about 280,000 works, largely of specialized varieties. It is operated for profit and makes payments to its publisher members at stipulated rates. Its gross revenue is not known.

b. The present method of regulation

The copyright statute makes no mention of performing rights organizations, nor is there any other Federal statute for their regulation. Nevertheless, there has been official recognition of the need for these organizations and of the necessity to guard against abuses of their monopolistic position. Antitrust proceedings by the Department of Justice resulted in the acceptance by ASCAP and BMI of consent decrees in 1941, and the ASCAP decree was amended in 1950 and 1960.

These consent decrees contain a variety of requirements designed to prevent discrimination in the licensing of public performances. In addition, the ASCAP decree provides that any user may petition the court to review its royalty rates, and contains provisions regulating its admission of members, its internal organization and voting structure, and its distribution of revenue.

c. Consideration of other methods of regulation

The organization and activities of the performing rights organizations in the United States have been the object of much discussion and controversy in congressional hearings and in antitrust proceeding. It has been seriously questioned whether the antitrust procedure is the most appropriate or effective means of regulating their operations, **[138]** and suggestions have been made that they should be regulated by an administrative agency under statutory provisions.

Whether and how these organizations should be further regulated is a problem that will require extensive investigation and study. Several agencies of the Government have been concerned with some of their activities. We have made no study of this problem since we believe it is beyond the range of the present project for revision of the copyright law, but we suggest that consideration should be given to developing legislation for its solution.

4. RECOMMENDATION

Whether performing rights organizations should be further regulated, and the appropriate method for their regulation, involve problems that are too large and complex to be dealt with in the present program for copyright law revision, but Congress should make it the special subject of comprehensive study.

[139] *Chapter XII*

ADMINISTRATIVE PROVISIONS
OUTLINE OF CHAPTER

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§ [141] CHAPTER XII ADMINISTRATIVE PROVISIONS

A. IN GENERAL

Sections 201-216 of the present law provide for the organization of the Copyright Office in the Library of Congress, and for the administration by that Office of the deposit and registration system. For the most part, these provisions are satisfactory in substance, though they could be improved in form and detail.

We have already proposed, in chapter VII, parts B 2 d and C 5 c, that certain changes be made in sections 209 and 214. The discussion below covers other substantive changes that we believe should be made.

B. ACCOUNTING PROCEDURES

1. SECTION 203 NOW OBSOLETE

Section 203, which dates back to 1909, specifies certain procedures under which the fees received by the Copyright Office are to be deposited and accounted for. Since the enactment of the Budget and Accounting Act of 1921, which authorized the General Accounting Office to audit and settle the accounts of all Government agencies, the provisions of section 203 have been superseded by procedures prescribed by the General Accounting Office.

2. RECOMMENDATION

Section 203 should be deleted.

C. CONTENTS OF REGISTRATION RECORDS AND CERTIFICATES

1. IN GENERAL

The registration of copyright claims in the Copyright Office is intended to produce a public record that identifies the work and shows facts determinative of the validity, ownership, and duration of the claim. This information is derived from the claimant's application for registration and the deposit copies of the work.

The present law does not specify directly what information is to be given in the application. Section 209 does so indirectly, however, by requiring that specified information be shown in the certificate of registration. Most of this information, for both the public record and the certificate, must be obtained from the application.

[142] 2. INADEQUACY OF SECTION 209

Section 209 was designed to enumerate the facts to be shown in the certificate, but this enumeration has proved to be incomplete. For example, it does not include the following:

- The place of publication, which is not pertinent where copyright is claimed under the Universal Copyright Convention.

- The fact that a work is a new version of a preexisting work.

- The limitation of the claim to the new material only, where a work contains both preexisting and new material.

- Data distinguishing the particular work from other editions or versions.

The Copyright Office has sought to fill these gaps by calling for information in the applications beyond that enumerated in section 209, and by including this additional information in its records and in the certificates. It is not clear, however, whether the provision that the certificate is prima facie evidence of the facts stated therein extends to all the facts given in the certificate or only to those enumerated in section 209.

3. NEED FOR FLEXIBILITY

Some of the information needed differs for various kinds of works and various situations. The required information will be changed in some respects when the present law is revised. Further changes will no doubt become necessary in the future as new conditions develop. For these reasons, we believe that the specification of the information to be

contained in applications, registration records, and certificates should be broad enough to elicit all relevant information, and flexible enough to fit various and changing conditions.

4. RECOMMENDATIONS

(*a*) In addition to any statutory specification of facts to be included in applications, registration records, and certificates, the Register of Copyrights should be authorized to include any other pertinent information that will identify the work and show facts bearing upon the validity, ownership, or duration of the copyright claim.

(*b*) The certificate of registration should be prima facie evidence of any and all pertinent information it contains if registration is made within 1 year of the first public dissemination of the work.

D. RECEIPT FOR COPIES DEPOSITED

1. PROVISION IN QUESTION

The last sentence of section 209 provides that, in addition to the certificate of registration, "the Register of Copyrights shall furnish, upon request, without additional fee, a receipt for the copies of the work deposited to complete the registration."

Since the certificate of registration shows that the required copies of the work have been deposited, there is no need for an additional receipt. These receipts have rarely been requested.

On the other hand, a recommendation made earlier in this report (ch. VII, pt. C 6 b) contemplates that some deposits may be made **[143]** without registration. In such cases the depositor who wishes to have a receipt should be given one. But since no registration fee would be paid in connection with the deposit, we propose that a small fee--possibly $ 1--be charged for issuance of the receipt.

2. RECOMMENDATIONS

(*a*) The provision in section 209 requiring issuance of a receipt, upon request, for copies deposited in connection with registration should be deleted.

(*b*) The statute should provide that a receipt will be issued, upon request and payment of a small fee, for copies deposited without registration.

E. THE CATALOG OF COPYRIGHT ENTRIESn1

1. PRINTED CATALOG NOW REQUIRED

Sections 210 and 211 require that an indexed catalog of all copyright registrations be printed at periodic intervals, and that it be distributed to customs and postal officials and offered for sale to the public.

The printed catalog--designated the "Catalog of Copyright Entries"--was originally designed in 1891 to assist customs and postal officials in enforcing restrictions on the importation of copyrighted works. At the same time, it was anticipated that the printed catalog would be useful to the public as a local source of copyright information and as a national bibliography.

When provision was later made for the free distribution of Government documents to depository libraries throughout the Nation *(44 U.S.C. secs. 82*-89), the "Catalog of Copyright Entries" was included among the documents distributed.

The printed catalog is issued semiannually in eight separate parts, each covering one or more classes of works. The eight parts together cover all copyright registrations made during a 6-month period.

2. USES OF THE PRINTED CATALOG

a. Use by the public

The printed catalog is made available to the public through the sale of all or any parts, and through its distribution to libraries. It is used by the public for two purposes:

(1) As a local source of copyright information which would otherwise be available only in the Copyright Office.

(2) As a national bibliography. The parts of the catalog covering certain classes of works--particularly music, motion pictures, and maps--are the most comprehensive national bibliographies now available in their fields. For other classes of works, including books and periodicals, there are other bibliographies of equal or wider coverage.

The extent to which the printed catalog is used by the public varies among its eight parts. During 1959, for example, the sales of the **[144]** several parts ranged from a high of 299 for music to a low of 23 each for periodicals and for commercial prints and labels.

Surveys made by the Copyright Office indicate that many libraries use parts of the catalog as bibliographies for their own internal purposes. The surveys indicate further that the public makes extensive use of the catalog in a few libraries located in the major publishing and entertainment centers, but makes little or no use of the catalog in other libraries.

The copyright information given in the printed catalog is, of course, available in the records kept in the Copyright Office. Many persons consult these records in the Office, or have a record search made for them by the Office. But the printed catalog is undoubtedly a great convenience [*sic*] for subscribers who have constant need for copyright information, and for an unknown number of persons who use the catalog in public libraries.

b. Use in the Copyright Office

The printed catalog is used in the Copyright Office as a source of quick reference, both for its own internal purposes and in making searches for the public. But the same information is available, though sometimes less conveniently, from the primary records in the Office.

The printed catalog has incidental value as a safeguard against the destruction of the primary records. Other less expensive means could be used, however, for preservation of the records. For example, recorded transfers of ownership are now reproduced on microfilm, and a copy of the microfilm is placed in storage as a security measure.

c. Other contemplated uses

The printed catalog has proved to be of little or no use to customs and postal officials in the enforcement of import restrictions. Distribution of the catalog to those officials was discontinued in 1953.

Section 210 provides that the catalog shall be admissible in court as prima facie evidence of the facts stated therein. Certificates of registration are used as such evidence in court; the catalog has almost never been used for this purpose.

3. COST OF THE PRINTED CATALOG; POSSIBLE CURTAILMENT OR SUBSTITUTES

Only a small fraction of the cost of producing the printed catalog is recovered from sales. In 1959, for example, the total cost of assembling, printing, and binding the entire yearly catalog came to about $ 109,000, while receipts from the year's sales totaled slightly over $ 4,000. Most of the copies printed are distributed free of charge to libraries and Government agencies.

The parts of the printed catalog that are used widely, either as a local source of copyright information or as a bibliography, provide a public service that is thought to justify their cost. It is questionable, however, whether the cost of the printed catalog is warranted for other parts that appear to be useful to a relatively small number of persons.

The development of new techniques of reproduction may offer possibilities in the future of replacing the printed catalog, as to some or all of its parts, with a less costly substitute. For example, the possibility is now being explored of reproducing the registration records **[145]** on microfilm; if found to be less costly and equally useful, copies of the microfilm, instead of the printed catalog, might be made available to the public.

We suggest that the Register of Copyrights should be authorized to determine, on the basis of periodic appraisals of their usefulness and cost, whether the various parts of the catalog should be issued and in what form.

4. RECOMMENDATIONS

(*a*) Instead of requiring that the Register of Copyrights prepare a printed catalog of all copyright registrations, the statute should authorize him to prepare catalogs of registrations in such form and with such content as he may determine.

(*b*) The catalogs should continue to be available for free distribution to libraries and for sale to the public.

F. FEES

1. FEE RATES IN GENERAL

Section 215 specifies the fees to be paid to the Copyright Office for registrations, for the recording of assignments and other documents, for certifications, and for record searches. The present schedule of fees reflects increases made in 1928 and again in 1948.

In recent years the total of fees received, plus the estimated value of deposits added to the collections of the Library of Congress, has been slightly greater than the total expenditures of the Copyright Office. Leaving aside the value of the deposits, the fees alone have been approximately equal to the expenditures that could be attributed directly to the performance of the services for which fees are charged. The expenditures in excess of the fees can be traced to the governmental functions of the Office--including services performed for the Congress, the Library, other Government agencies, and the general public--which we think the fees should not be expected to cover.

We believe this balance between receipts and expenditures should be maintained. Because of the rising cost of running the Office, it seems likely that some increase in the present fees will be needed to maintain this position. The House Subcommittee on Legislative Appropriations has suggested that the present fees should be raised. We believe the need for higher fees has not yet become urgent, and we therefore propose that changes in the fee schedule be deferred for a brief period until further experience shows what increases may be necessary.

2. REGISTRATION FEES

The present fee for copyright registration is generally $ 4, but the statute prescribes special fees of $ 6 for the registration of a commercial print or label, and $ 2 for a renewal registration.

These special registration fees are not justified by any differences in the registration process. The higher fee of $ 6 for commercial prints and labels is a holdover from the time before 1940 when they were registered in Patent Office. The process of registering them in the Copyright Office is now the same as for other classes of works. As to the lower fee of $ 2 for renewal registrations, their processing **[146]** requires more time and work, on the average, than the processing of original registrations.

3. FEES FOR SPECIAL SERVICES

The Copyright Office is occasionally requested to furnish special services not mentioned in the statutory fee schedule. For example, copies of some of its catalog cards are being supplied to several persons and groups at the estimated cost of production. We suggest that a general provision be added to the fee schedule authorizing the Register to fix fees, commensurate with cost, for any services not covered by the schedule.

4. RECOMMENDATIONS

(*a*) The fees charged by the Copyright Office should be so fixed that the total of its receipts plus the value of deposits added to the Library's collections is approximately equal to its total expenditures. An increase in the present fees may soon be necessary to maintain this position, but specific recommendations should await further experience in the near future.

(*b*) The fee for all original and renewal registrations should be uniform.

(*c*) The Register of Copyrights should be authorized to fix fees, commensurate with cost, for services not covered by the statutory fee schedule.

[147] APPENDIXES

FOOTNOTES:

[n1] Footnote 1. See "Copyright Law Revision Study No. 1" (Senate committee print).

[n2] Footnote 2. For a listing of various industries concerned with copyright materials, and an estimate of their economic importance, see "Copyright Law Revision Study No. 2" (Senate committee print).

[n3] Footnote 1. See "Copyright Law Revision Study No. 4" (Senate committee print).

[n4] Footnote 1. See "Copyright Law Revision Study No. 3" (Senate committee print).

[n5] Footnote 2. See "Copyright Law Revision Study No. 27" (Senate committee print).

[n6] Footnote 3. See "Copyright Law Revision Study No. 28" (Senate committee print).

[n7] Footnote 4. See "Copyright Law Revision Study No. 26" (Senate committee print).

[n8] Footnote 1. See "Copyright Law Revision Study No. 14" (Senate committee print).

[n9] Footnote 2. See "Copyright Law Revision Study No. 15" (Senate committee print).

[n10] Footnote 3. See "Copyright Law Revision Study No. 16" (Senate committee print).

[n11] Footnote 4. See "Copyright Law Revision Study No. 16" (Senate committee print).

[n12] Footnote 5. Statutory damages are discussed below in *ch. IX*, pt. B 2.

[n13] Footnote 6. See "Copyright Law Revision Studies Nos. 5 and 6" (Senate committee prints).

[n14] Footnote 1. See "Copyright Law Revision Study No. 29" (Senate committee print).

[n15] Footnote 1. See "Copyright Law Revision Study No. 30" (Senate committee print).

[n16] Footnote 2. Since there are no comprehensive biographical reference works dealing with the authors of popular music, our survey was based on the 1,344 songwriters of the approximately 4,600 songs published between 1900 and 1950 which are listed in the 1950 edition of "Variety Music Cavalcade." By checking through the obituaries in the 1,500 weekly issues of Variety from 1930 through 1958, we found the death dates of 215 of the 1,344 songwriters; death dates of an additional 80 of the authors were found in the "ASCAP Dictionary of Composers, Authors, and Publishers" (1948). Of the total of 295 songwriters whose dates of death were found, 191 died within the sample period 1930-50.

[n17] Footnote 3. See "Copyright Law Revision Study No. 31" (Senate committee print).

[n18] Footnote 1. See "Copyright Law Revision Studies Nos. 7-9" (Senate committee print).

[n19] Footnote 1. See "Copyright Law Revision Studies Nos. 17, 18, and 20" (Senate committee prints).

[n20] Footnote 1. See "Copyright Law Revision Study No. 18" (Senate committee print).

[n21] Footnote 2. See "Copyright Law Revision Study No. 12" (Senate committee print).

[n22] Footnote 3. See "Copyright Law Revision Study No. 11" (Senate committee print).

[n23] Footnote 4. See "Copyright Law Revision Study No. 31" (Senate committee print).

[n24] Footnote 5. See "General Revision Study No. 19" (Senate committee print).

[n25] Footnote 1. See "Copyright Law Revision Studies Nos. 22 and 23" (Senate committee print).

[n26] Footnote 2. As to the liability of innocent infringers, see "Copyright Law Revision Study No. 25" (Senate committee print).

[n27] Footnote 3. See "Copyright Law Revision Study No. 24" (Senate committee print).

[n28] Footnote 4. See "Copyright Law Revision Studies Nos. 22 and 23" (Senate committee print).

[n29] Footnote 1. See "Copyright Law Revision Study No. 32" (Senate committee print). As to copyright in territories and possessions of the United States, see "Copyright Law Revision Study No. 34" (Senate committee print).

[n30] Footnote 2. Hearings before subcommittees of the Senate Committees on Foreign Relations and on the Judiciary, Apr. 7 and 8, 1954, on the "Universal Copyright Convention and Implementing Legislation" (Ex. M and S. 2559, 83d Cong., 1st sess.).

[n31] Footnote 1. See "Copyright Law Revision Study No. 33" (Senate committee print).

[n32] Footnote 2. See "Copyright Law Revision Study No. 24" (Senate committee print).

[n33] Footnote 3. See "Copyright Law Revision Study No. 10" (Senate committee print).

[n34] Footnote 1. See "Copyright Law Revision Study No. 21" (Senate committee print).