Second Supplementary Register's Report on the General Revision of the U.S. Copyright Law (1975)

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The Register of Copyrights on the General
Revision of the U.S. Copyright Law
1975 Revision Bill, October-December 1975
(Draft): Second Supplementary Report

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SECOND SUPPLEMENTARY REPORT OF THE
REGISTER OF COPYRIGHTS ON THE
GENERAL REVISION OF THE
U.S. COPYRIGHT LAW:
1975 REVISION BILL
OCTOBER - DECEMBER 1975

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§ [3] STATEMENT OF BARBARA RINGER REGISTER OF COPYRIGHTS ON H.R. 2223, A BILL FOR GENERAL REVISION OF THE COPYRIGHT LAW

Before the Subcommittee on Courts, Civil Liberties,
and Administration of Justice
Committee on the Judiciary
House of Representatives
94th Congress, First Session
October 2, 1975

Mr. Chairman, I am Barbara Ringer, Register of Copyrights in the Copyright Office of the Library of Congress. On May 7, the first day of your hearings, I appeared as one of the opening witnesses on H.R. 2223. My duty then, as I saw it, was to try to put the bill in historical perspective, to pinpoint the major issues remaining to be settled, and to answer your initial questions about the substantive content and status of the legislation.

I am returning on the fourteenth day of these hearings, in response to your letter of September 9, 1975, asking me to "make the final presentation of testimony reflecting your views with respect to what the hearings reveal and what changes if any in the bill seem indicated." I am greatly honored by this request, and I will do my utmost to fulfill it in a way that will help the Committee complete the formidable task now confronting it.

During my testimony on May 7, I sought to identify what I considered the main issues remaining after a decade of sporadic legislative consideration of the general revision bill. The seven principle issues, more or less in the order of importance as I saw them then, were:

[4] 1) Cable television

2) Library photocopying

3) Fair use and reproduction for educational and scholarly purposes

4) Public and non-profit broadcasting

5) Jukebox

6) Mechanical royalty for use of music in sound recordings

7) Royalty for performance of recordings

Related to several of these issues was the chapter of the bill establishing a Copyright Royalty Tribunal, which also presents some problems on its own. I also mentioned the likelihood of questions arising in connection with the manufacturing clause and with various concerns of graphic artists and designers.

Looking back, I think that most of the testimony you heard during the hearings falls somewhere under one or another of these headings. However, under each one of these big issues there are varying numbers of interrelated sub-issues, and none of them can be approached in isolation. There is a figure in the carpet, but it is hard to find amid all the intricate strands and colors and patterns that go to make it up. I am not going to try to oversimplify something that is inherently complex, but I am going to try to organize the mass of arguments and proposals that have been put forward at these hearings in a way that will make them comprehensible in themselves and as part of a larger whole.

[5]With my testimony on May 7, I submitted seventeen briefing papers covering various aspects of the bill. I also mentioned that I was preparing a Second Supplementary Report of the Register of Copyrights on General Revision, which I hoped to have finished in time for the Subcommittee to be able to use it when it starts its mark-up. I have worked on this report off and on for most of the summer, seeking to incorporate into it everything that has been raised in these hearings, the changes made by the Senate Subcommittee when it reported the bill in June, and a very few, mainly technical, points that I felt I should raise independently since no one else had mentioned them.

This Supplementary Report is nearing completion in draft form, and I plan to present it to the Librarian of Congress for submission to Chairman Rodino of the House Judiciary Committee and Chairman Eastland of the Senate Judiciary Committee as soon as possible. In its final form the report will consist of about fifteen chapters organized by subject matter in roughly the same order as the bill. At the beginning of each chapter the report will identify the sections involved and the issues remaining to be decided. The body of each chapter will, in varying ways depending upon the nature of the problem, review the background and content of the provisions of the bill in question and explain the nature of the issues raised a[nd] the arguments with respect to them.

[6]The last section in each chapter will consist of comments and recommendations put forward by me as Register of Copyrights. In some cases I will put forward alternatives or suggested possibilities for methods of compromising disputed issues. My purpose here is not to add one more burden to the already heavy load of proposals you need to consider, but to help you to find ways of deciding among the disputed proposals and debated points you already have before you. I have opinions on some of the matters before you and I will be honest about expressing them when need be, but I have no axes to grind. You, the members of this Subcommittee, are the only decision-makers in this room. My aim is not to influence you; it is to help you, in any way I can, to do your legislative job.

During my scheduled two days of testimony I will first seek to give you an overview of the bill and to show how its many parts fit together. I will then start with Chapter 1 of the new title 17 of the U.S. Code, as revised by the bill, and proceed by subject matter through to the end. I am attaching to this statement the drafts of the first five chapters of the Supplementary Report, which I will use as the focal point of my testimony. Next week I will do my best to give you the draft text of the remaining chapters.

[7]Today I will try to cover the following topics:

1) Subject matter of copyright

2) Fair use and reproduction for educational and scholarly purposes

3) Reproduction by libraries and archives

4) General limitations on performing rights

5) Secondary transmissions (CATV)

These topics include the three most important and difficult issues remaining in general revision. I believe that all of them are susceptible of reasonable solutions. My hope is that my testimony this morning will not only sum up the results of the hearings on these hard issues, but will also help your Subcommittee succeed in finding those reasonable solutions and reporting a good bill.

[8]

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SECOND SUPPLEMENTARY REPORT OF THE
REGISTER OF COPYRIGHTS ON THE
GENERAL REVISION OF THE
U.S. COPYRIGHT LAW:
1975 REVISION BILL
OCTOBER 1975

PART 1:

Chapter I - SUBJECT MATTER OF COPYRIGHT

Chapter II - FAIR USE AND REPRODUCTION FOR EDUCATIONAL AND SCHOLARLY PURPOSES

Chapter III - REPRODUCTION BY LIBRARIES AND ARCHIVES

Chapter IV - LIMITATIONS ON PERFORMING RIGHTS: IN GENERAL

Chapter V - SECONDARY TRANSMISSIONS (INCLUDING CABLE TELEVISION)

§ [9]CHAPTER I SUBJECT MATTER OF COPYRIGHT

Sections Considered:

§ 101 - Definitions ("literary works"; "pictorial, graphic and sculptural works"; "work of the United States Government")

§ 102 - Subject matter of copyright: In general

§ 104 - Subject matter of copyright: National origin

§ 105 - Subject matter of copyright: United States Government works

Issues:

1. Does the language of sections 101 and 102 constitute a satisfactory statement of Congressional intention with respect to federal copyright protection for:

a) Computer programs?

b) Type face designs?

c) Architectural works?

2. Should copyright under section 104 be extended to published works of stateless persons regardless of domicile?

3. Should the bill deal with questions of expropriation as now proposed in section 104(c)?

4. Is the prohibition against copyright in U.S. Government works under section 105 too broad or too narrow?

[10]A. DISCUSSION OF ISSUES

1. SCOPE OF SECTION 102

a. In general

Section 102, the basic provision laying out what can be copyrighted under the bill, has undergone only one major change since 1967. This is the addition of a new subsection (b), reading:

(b) In no case does copyright for an original work of authorship extend to any idea, plan, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

As explained in the 1974 Senate report, the purpose of this added language was not to enlarge or contract the scope of copyright protection under the present law, but rather "to restate, in the context of the new single Federal system of copyright, that the basic dichotomy between expression and idea remains unchanged." The new provision had been added in response to the great debate over computers and copyright, and is intended to disclaim any intention to protect a programmer's algorithms under the bill. Beyond this, the principal of a distinction between idea and expression is a fundamental one in traditional copyright law, and extends to practically all fields of creative endeavor.

The 1974 Senate report also deleted a significant footnote from the 1967 House report, which has considerable bearing on this question. The text in the body of the 1967 report, which is unchanged in the 1974 report, reads:

[11]"Although the coverage of the present statute is very broad, and would be broadened further [under the revision bill] ..., there are unquestionably other areas of existing subject matter that this bill does not propose to protect but that future Congresses may want to." The footnote to this statement in the 1967 House report reads as follows:

Without implying that they would be wholly without protection under one or another of the seven categories listed in sec. 102, or that they are necessarily the "writings" of "authors" in the constitutional sense, we cite the following as examples. These are areas of subject matter now on the fringes of literary property but not intended, solely as such, to come within the scope of the bill: typography; unfixed performances or broadcast emissions; blank forms and calculating devices; titles, slogans, and similar short expressions; certain three-dimensional industrial designs; interior decoration; ideas, plans, methods, systems, mathematical principles; formats and synopses of television series and the like; color schemes; news and factual information considered apart from its compilation or expression. Many of these kinds of works can be clothed in or combined with copyrightable subject matter and thus achieve a degree of protection under the bill, but any protection for them as separate copyrightable works is not here intended and will require action by a future Congress.

[12]The deletion of this footnote has acquired even greater significance in light of the Supreme Court's decision in *Goldstein v. California , 412 U.S. 546 (1973).* The full import of that decision is subject to debate, but it apparently stands for the proposition that Federal pre-emption of State copyright protection is statutory and not constitutional. Thus, a clear-cut Congressional refusal to protect a certain type of work at all could be held to mean that the States are free to give the same kind of work unlimited protection. This point will be discussed further in relation to the pre-emption provision, section 301 of the bill.

b. Computer Programs

Although they are not mentioned as copyrightable subject matter in section 102 and are not referred to explicitly in the definition of "literary works" in section 101, a careful reading of the bill, together with the 1967 and, especially, the 1974 reports, make clear an intention to include computer programs or "software" within the subject matter of copyright. The definition of "literary works" refers to works expressed in "words, numbers, or other verbal or numerical symbols or indicia." This language is certainly broad enough to cover software, even though the embodiments mentioned as examples ("books, periodicals, manuscripts, phonorecords or film") seem limited when it comes to computer programs. **[13]**However, the 1974 Senate report expressly limits the scope of protection to the "writing" expressing the programmer's ideas, as distinguished from the ideas, methodology or processes he devises. It states: "Section 102(b) is intended, among other things, to make clear that the expression adopted by the programmer is the copyrightable element in a computer program, and that the actual processes or methods embodied in the program are not within the scope of the copyright law."

The protection for computer software under patent, copyright, and trade secret law, or other theories, has become a burning national and international issue, particularly among members of the industrial property bar. Nearly all commentators recognize that traditional copyright principles are inadequate for the kind of protection software owners are seeking, and some of them deplore the failure of the copyright revision bill to extend rights to original algorithms and methodology. The bill and the 1974 report have also been criticized for not making Congressional intentions clearer, especially since the mandate of the newly-created National Commission on New Technological Uses of Copyrighted Works does not include the question of software protection.

c. Type face designs

An issue that was first presented in the context of Copyright Office regulations and practices under the present law has now been raised directly in the course of the 1975 House Subcommittee hearings on the general revision bill: to what extent, if any, should original designs of type faces be granted copyright protection? This question has a variety of **[14]**aspects, and will be discussed below in connection with section 113, the provision dealing with the scope of protection for pictorial, graphic, and sculptural works. It has been pointed out, however, that regardless of how Congress settles the question, its decision on the point should be made clear, either in the bill or in the report, in connection with the provision including "pictorial, graphic, and sculptural works" within the subject matter of copyright.

d. Architectural works

Another class of creative work that is mentioned nowhere in the bill or reports is that of architectural designs. At least one commentator has scathingly criticized this complete silence, and urged that provisions modeled on foreign copyright laws be added to the revision bill to protect original designs for functional as well as nonfunctional works of architecture.

It is surprising, considering how often the question of protection for architectural works arises in litigation and legal literature, that it has never been addressed during the hearings on general revision of the copyright law. The issue was singled out for treatment as the sole subject of one of the 35 Copyright Office studies in the "Copyright Law Revision" series, and was discussed at some length in the 1961 Report of the Register. There was passing reference, in the Register's 1965 Supplementary Report, to the intention to include "designs of nonfunctional architectural works" within the scope of copyrightable pictorial, graphic, and sculptural works, but even this mention was not **[15]**preserved in any of the legislative reports. Worse yet, although the definition of "pictorial, graphic, and sculptural works" refers to "plans, diagrams, and models" (presumably including architectural plans and models), section 102(b) expressly rules out any copyright protection for "any idea, plan, [etc] ..., described, explained, illustrated, or embodied in [a] work." The 1974 Senate report recognizes this apparent inconsistency, stating: "The term 'plan' [in section 102(b)] refers to a mental formulation for achieving something, as distinguished from a graphic representation diagramming the mental concept." However, the critics of this inconsistency have apparently not accepted this explanation as satisfactory in view of the lack of any provision dealing with the scope of protection for architectural works.

2. STATELESS PERSONS

Under section 104 all unpublished works are protected regardless of the nationality or domicile of the author. Published works are protected under specified conditions: if the author is a national or domiciliary of the United States or of a country with which the United States shares copyright treaty relations; if the work is first published in the United States or a country belonging to the Universal Copyright Convention; or if the work comes under a Presidential proclamation. This over-all scheme has been praised as a reasonable solution to a difficult problem, but it leaves a small loophole that could deprive an author of protection in a case where it would be available today. This is the situation of stateless **[16]**authors whose works do not qualify by virtue of their domicile or the place of their works' first publication. All works of stateless authors, published or unpublished, are capable of protection under the existing copyright statute. It has been argued that, although the problem may be minor, it is nonetheless real, and that the revised law should not deprive stateless authors of protection because of technicalities involving place of domicile or publication.

3. EXPROPRIATION AND INVOLUNTARY TRANSFERS

In 1973 the Union of Soviet Socialist Republics adhered to the Universal Copyright Convention (the U.C.C.), thus for the first time offering copyright protection in the U.S.S.R. to works originating in the United States and more than sixty other countries. The action also meant that, under the U.C.C. principle of national treatment, works of Soviet authors would be entitled to protection in a particular U.C.C. country, including the United States, on the same basis as

the protection offered by that U.C.C. country to its own authors. Fears were expressed that this might mean the end of publication in the United States and other Western countries of works by certain Soviet authors. It was argued that the Soviet government might expropriate or otherwise assume exclusive ownership rights over the exercise of foreign copyrights in these works, and sue to enjoin their publication in the United States or elsewhere.

[17]This concern led to the introduction by Senator McClellan of S. 1359, 93rd Cong., 1st Sess. (1973), the substance of which was later incorporated in the revision bill as section 104(c) and passed by the Senate in that form on September 9, 1974. In the revision bills introduced in both the Senate and the House of Representatives early in 1975 (S. 22 and H.R. 2223) the provision remains as it was in section 104, and as such it received support in principle from the Department of State in testimony by Joel W. Biller, Deputy Assistant Secretary of State for Commercial Affairs and Business Activities, before the House Subcommittee on May 8, 1975. Mr Biller noted, however, that possible technical improvements might be made in the form and language of the provision.

After consultation with counsel of the Authors League, the Register of Copyrights recommended that, since it deals with ownership rather than nationality, the provision should be transferred to section 201 and redrafted along more general lines. The suggestion was accepted by the Senate Subcommittee and, in the version of S. 22 reported on June 13, 1975 to the full Senate Judiciary Committee, the provision appears as section 201(e) under the heading "Involuntary Transfer." The contents and wording of this new subsection will be discussed below in connection with section 201.

4. U.S. GOVERNMENT WORKS

A public issue that attracted considerable controversy earlier in the revision program involved the scope of the prohibition against copyright protection for "works of the United States Government." The lack of any extended dispute in recent years over the present provision **[18]**in section 105 and its correlative definition of "works of the United States Government" in section 101 may not betoken complete agreement, but it suggests substantial acceptance of the provision as a reasonable compromise.

The House Subcommittee heard testimony on section 105 from the Department of Commerce on May 8, 1975, and Chairman Rodino later received a letter from the National Aeronautics and Space Administration (NASA), dated September 5, 1975, supporting the definition now in section 101 but recommending certain amendments in section 105.

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

[19]The NASA letter made three specific recommendations with respect to section 105:

1. Allow for exceptions to the prohibition.

The Register's 1961 Report recommended that copyright in Government works be permitted in exceptional cases, and this proposal was carried over into the 1963 draft and the 1964 revision bill. It proved extremely controversial, and after an extensive public debate was dropped in the 1965 bill and thereafter. The arguments on the point, and the reasons for deciding not to allow exceptions in any case, are outlined in the Register's 1965 Supplementary Report and in the 1966 and 1967 House reports; they no longer appear in the 1974 Senate report. The NASA letter proposes the following amendment which, with minor changes, is taken from the 1964 bill:

"In exceptional cases, copyright may be secured in a published work of the United States Government where, because of the special nature of the work or the circumstances of its preparation, it is determined that copyright protection would result in more effective dissemination of the work or for other reasons would be in the public interest. The head of the Government agency for which the work was prepared shall make the determination in each case in accordance with regulations established by an administrative officer designated by the President, and shall publish a statement of the basis for its determination in each case in the manner specified by such regulations.

[20]It also suggests that the statute might limit protection in these exceptional cases to a fairly short period, such as five years.

2. Make clear that prohibition applies only to domestic copyright protection.

NASA strongly urges that section 105 be amended to make clear that the prohibition on U.S. copyright protection for U.S. Government works is intended to have no effect on protection of these works abroad. Works of the governments of most other countries are copyrighted, and the reasons behind section 105 do not "require a giveaway of U.S. Government works to foreign nationals and foreign governments."

3. Retain saving clause.

Section 8 of the current copyright statute includes a saving clause insuring that copyright in a private publication is not affected if the work is published by the Government. This provision, somewhat revised, had been included in the 1964 bill, but had been dropped in the 1965 bill and thereafter as superfluous. NASA urges its reinstatement as a useful clarification, and proposes insertion of the 1964 language:

[21]Publication or other use by the United States Government of any material in which copyright is subsisting does not impair the copyright or authorize any further use or appropriation of the material without the consent of the copyright owner.

The final problem remaining under section 105 involves the protection to be given to publications and other works of the United States Postal Service, notably the designs of postage stamps themselves. There are, of course, criminal statutes proscribing the forgery or counterfeiting of postage stamps, but the question arises as to the right of the Service to prevent reproduction for private or commercial non-postal purposes (for example, in philatelic publications and catalogs, in general advertising, in art reproductions, in textile designs, and so forth).

Before enactment of the Postal Reorganization Act of 1970, the Post Office Department was a U.S. Government agency. In 1938 Congress passed an act (52 Stat. 6) which, among other things, authorized the Postmaster General to compile and publish philatelic works containing black and white illustrations of stamps. This provision contained the following proviso: "... notwithstanding the provisions of [what is now section 8 of the copyright statute, prohibiting copyright in publications of the United States Government], or any other provision of law, copyright may be secured by the Postmaster General on behalf of the United States in the whole or any **[22]**part of the publication authorized by this section." This proviso was removed from the Postal Act of 1938 and transferred to section 8 of the copyright statute when it was codified as title 17 of the U.S. Code in 1947. Its meaning was, and remains, unclear.

The substance of the proviso was retained in early drafts of the revision bill, but in 1964 the Post Office Department indicated that it had no objection to deletion of the provision. The 1965 bill and all of its successors would simply have repealed the proviso.

In 1974 the reorganized United States Postal Service took the position that, since its status as a Government agency had changed, and since its employees and officials were no longer employees and officials of the United States Government, its works no longer fall under the prohibition of section 105. The Senate Committee accepted this argument, with which the Copyright Office agreed, and the 1974 Senate report contains a somewhat garbled paragraph to this effect.

In correspondence with the Copyright Office, the Postal Service now takes the position that, under the 1938 proviso contained in section 8 of the copyright law, it has an unlimited and perpetual copyright in its stamp designs without regard to the formalities, time limits, and other provisions of the copyright statute. It therefore urges that the revision bill transfer the postal clause of the existing section 8, *17 U.S.C., to 39* U.S.C. § 405, and that the paragraph in the Senate report be revised.

[23]B. COMMENTS AND RECOMMENDATIONS

1. SCOPE OF SECTION 102

a. In general

The Copyright Office considers the language and content of section 102, and the relevant definitions in section 101, basically satisfactory. The thrust of the provision, together with the explanatory material in the report, is not to exhaust completely the subject matter capable of copyright protection under the Constitution, leaving it to future Congresses to

expand the subject matter as they see fit. However, it may be important to express more clearly, in the report, Congress's intentions with respect to pre-emption of State common law or statutory protection. Since section 301 pre-empts only what is covered by section 102, and since the Supreme Court's Goldstein decision held that pre-emption is statutory and not constitutional, the States would presumably be free to give unlimited protection to any subject matter outside the scope of section 102. This may be a desirable result, but Congress should consider the consequences before adopting it.

b. Computer programs

The Copyright Office favors the result achieved in the bill: offering copyright protection to the programmer's original expression of his ideas, but not to the ideas themselves. It may well be that the algorithms and methodology embodied in a program are worthy of protection under other theories of law, but this is for further judicial or legislative consideration. The definition of "literary works" and the explanation in the report could be revised in minor ways to make the Congressional intention clearer.

[24]c. Type face designs

The Copyright Office favors limited protection for original type face designs, under conditions that will be discussed below in connection with section 113. Whatever position is eventually adopted on this point, however, the status of type face designs under section 102 should be made clear in the report.

d. Architectural works

The Copyright Office supports what it considers the appropriate interpretation of the bill: that architectural plans, drawings, models, etc., be copyrightable as such; that nonfunctional architectural works (monuments, ornamental embellishments of buildings, etc.) be fully copyrightable; and that functional architectural works be subject to design protection under title II. This should be made clear in the report, and the inconsistent use of the word "plan" in sections 101 and 102 should be corrected.

2. STATELESS PERSONS

The Copyright Office recommends closing the loophole by amending section 104 to make published works by stateless persons eligible for copyright regardless of the author's domicile or the place of the work's first publication.

3. EXPROPRIATION AND INVOLUNTARY TRANSFERS

We favor the approach now adopted by the Senate subcommittee, to revise section 104(c) and move it to section 201. The content of the provision will be discussed below in connection with the latter section.

[25]4. U.S. GOVERNMENT WORKS

a. The Copyright Office prefers to take no position on the request of the Department of Commerce for a specific exception allowing copyright in NTIS works.

b. We adhere to our position opposing a provision for setting up machinery to allow copyright in Government works under exceptional circumstances.

c. We agree with NASA that the copyrightability of U.S. Government works in foreign countries should be made clear, but we should prefer to accomplish this in the report.

d. We have no real objection to retaining the saving clause now in section 8, but we still doubt whether it is necessary.

e. We have no objection to a construction of the statute that would treat works of the U.S. Postal Service as private publications eligible for copyright, but we believe that all those works, including the designs of postage stamps, should be subject to the same conditions, formalities, and time limits as other copyrightable works.

§ [26]CHAPTER II FAIR USE AND REPRODUCTION FOR EDUCATIONAL AND SCHOLARLY PURPOSES

Sections Considered:

§ 106 Exclusive rights in copyrighted works

§ 107 Limitations on exclusive rights: Fair Use

§ 109 Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord

§ 502 Remedies for infringement: Injunctions

§ 504 Remedies for infringement: Damages and profits

Issues:

With respect to the reproduction and distribution of copyrighted works in connection with teaching and related educational activities, should the approach of the 1975 bill be changed in any of the following respects:

a) The fair use provision itself (§ 107)?

b) The interpretation of the fair use provision in the legislative report?

c) The establishment of evidentiary presumptions with respect to fair use?

d) The addition of a specific exemption for teaching, scholarship, and research?

e) The remedies for copyright infringement?

f) The resale of used textbooks?

g) The addition of a provision recognizing the special problems of newsletters?

[27]A. DISCUSSION OF ISSUES

1. SUBSTANTIVE ARGUMENTS

No issue arising under the general revision bill has been hashed over more thoroughly than the extent to which educators can reproduce and distribute copyrighted works outside of copyright control. The 1973 hearings on this question in the Senate, and the 1975 hearings in the House, produced some changes in position but no new arguments on the substantive issues. These arguments can be summarized very briefly as follows:

a. Arguments of educational organizations:

1. It is important that the doctrine of fair use be recognized in the statute, and that its applicability to reproduction for educational and scholarly purposes be made as clear as possible in the statute and report.

2. A provision on fair use alone is not sufficient to answer the needs of education, since teachers need more certainty about what they can and cannot do than the unpredictable doctrine of fair use can provide.

[28] 3. Teachers actually create a market for authors and publishers, and are not interested in the kind of mass copying that damages copyright owners.

4. Teachers must be enabled to make creative use of all of the resources available to them in the classroom to supplement textbooks and to seize the "teachable moment," by reproducing a variety of copyrighted materials, such as contemporaneous reports and analyses, isolated poems, stories, essays, etc., for purposes of emphasis, illustration, or bringing a lesson up to date.

5. The "not-for-profit" principle of present law should be applied to restricted educational copying that will not hurt the publishing industry and that will further American education, which is the paramount public interest.

6. Subjecting the use of modern teaching tools to requirements for advance clearance and payment of fees will stifle originality in teaching and inhibit the use of the teacher's imagination and ingenuity.

[29] 7. Various proposals for voluntary or compulsory licensing are too complicated and burdensome to be acceptable to teachers, who would be deterred from using valuable works by the necessity for paperwork and payments. Any blanket scheme would imply payment for all uses, even those that would be considered free under the doctrine of fair use.

b. Arguments of authors and publishers:

1. The doctrine of fair use should be confirmed in the statute, but by its nature it is an equitable rule of reason that must be flexible to avoid a statutory freezing of unintended results. Authors and publishers have no desire to oppress teachers or to stop minor or incidental reproduction of the sort that is undoubtedly fair use under the present law; their concern is with the potential danger of massive, unreasonable abuse.

2. Arguments that, since reproductions for educational and scholarly purposes have become increasingly easy and cheap, they should be made legal, are unreasonable and untenable.

[30] 3. The present "for profit" limitation has nothing whatever to do with copying. The argument that education should be exempt because it does not make a profit overlooks the fact that uncompensated educational uses, particularly in the textbook, reference book, and scientific publishing areas, result in direct and serious loss to copyright owners, and destroy the incentives for authorship and publication. Education is the textbook publisher's only market, and the main source of income of many authors.

4. Reproducing devices in educational establishments have proliferated tremendously, and unit costs continue to decrease. It is becoming easier and cheaper to make a copy than to buy one. Uninhibited reproduction of copyrighted material by a single educator, taken alone, might not do measurable damage to a particular author or publisher, but uninhibited reproduction of copyrighted material by all educators and educational establishments will literally destroy some important forms of authorship and publishing.

[31] 5.Workable voluntary licensing systems that would place no unwarranted budgetary or administrative burdens on copyright owners, and that would fully recognize the doctrine of fair use, are already being worked out, and should be expanded and encouraged by all concerned.

2. LEGISLATIVE HISTORY OF SECTION 107

The 1961 Register's Report concluded that "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." This recommendation was coupled with a proposal for a specific provision dealing with library photocopying. When these recommendations were translated into proposals for statutory language in the 1963 preliminary draft, the somewhat favorable reaction to the general fair use provision was drowned out by the strenuous opposition to the library photocopying section, which was attacked from all sides. The latter was thus dropped from the 1964 bill, and attention then focused on the text of the general fair use provision. The wording of this provision was closely similar to, though not identical with, the present text of section 107.

[32]A major part of the discussions of the problem of reproductions for educational purposes centered on the wording of the fair use provision, which was criticized by both sides for quite different reasons. As stated in the 1965 Supplementary Report of the Register, it appeared impossible to reach agreement on a general statement expressing the scope of the fair use doctrine, and therefore "we decided with some regret to reduce the fair use section to its barest essentials." Even in this form, the Supplementary Report said, section 107 "serves a real purpose and should be incorporated in the statute":

Notwithstanding the provisions of section 106, the fair use of a copyrighted work is not an infringement of copyright.

In 1965 there were extensive hearings on this issue in both Houses. The 1966 and 1967 House Judiciary Committee reports noted that the "bare statement" approach had attracted some support, in preference to an expended [sic] definition of fair use that "could freeze the concept and open the door to massive, unreasonable abuses." However, it added that, on the other side, "a number of witnesses representing various educational and scholarly organizations

criticized the provision as vague and nebulous, and stressed the need of teachers and scholars to be certain whether what they were doing constituted fair use or infringement."

[33]In addition to seeking an expanded statement of the doctrine of fair use at the 1965 hearings, the representatives of educators and scholars urged adoption of an entirely new section specifically exempting certain non-profit educational uses from copyright liability. On June 2 and 8, 1966, two "summit meetings" on "fair use and educational and scholarly reproductions" were held in the Library of Congress under the chairmanship of Herbert Fuchs, then as now Counsel of the House Subcommittee. Every aspect of the problem was considered; although, as noted in the 1966 and 1967 reports, no final agreements were reached, there was evident progress toward compromise solutions, including the precise wording of section 107.

The 1967 bill as reported contained a revised fair use provision, which in its exact language has remained unchanged up to and including the 1975 bill. There have been no proposals for amendment of the wording of section 107 during the most recent hearings. Although section 107 must, of course, be considered in the context of the entire problem of educational uses, the existence of a statutory provision on fair use and the present language of section 107 both appear to be generally acceptable.

[34]3. INTERPRETATION OF FAIR USE IN COMMITTEES' REPORTS AND PROPOSALS FOR EDUCATIONAL EXEMPTION

a. The 1966 report.

Much of the June 1966 "summit meetings" consisted of an exploration of actual situations of educational copying and whether or not particular practices should be considered fair use or copyright infringement. A fair amount of agreement was reached in principle on the conditions under which a particular educational practice could be regarded as fair use for copyright purposes.

When it came to mark up of the bill in 1966, the House Subcommittee reviewed not only the testimony and submissions at the 1965 hearings but also the minutes of the June 1966 "summit meetings" reflecting the discussions on specific points. It reached what was, in effect, a compromise consisting of: (1) a provision recognizing the doctrine of fair use as a limitation on the rights of a copyright owner, with statutory language specifically mentioning teaching and intended to offer "some guidance to users in determining when the principles of the doctrine apply"; (2) an amendment to section 504 limiting the liability of teachers who are found to have exceeded the bounds of fair use in good faith; and (3) most important, an extensive section in the Committee report, headed "Intention of the committee," discussing the applicability of the doctrine of fair use to educational photocopying in considerable detail. The purpose of this interpretative passage was to "provide **[35]**educators with the basis for establishing workable practices and policies" under the fair use doctrine, but without freezing application of the doctrine in the form of outright educational exemptions.

The following excerpt from the House Judiciary Committee reports of 1966 and 1967 indicates the purpose to be achieved by this approach:

... the committee does not favor a statutory provision specifying educational uses of copyrighted material that would be free from copyright control. On the other hand, the doctrine of fair use, as properly applied, is broad enough to permit reasonable educational use, and education has something to gain in the enactment of a bill that clarifies what may now be a problematical situation. The committee sympathizes with the argument that a teacher should not be prevented by uncertainty from doing things that he is legally entitled to do and that improve the quality of his teaching. It is therefore important that some ground rules be provided for the application of fair use in particular situations.

b. The 1967 Senate hearings.

On March 16, 1967, Dr. Harold E. Wigren, on behalf of an ad hoc committee representing 34 educational institutions and organizations, testified before the Senate Judiciary Subcommittee on the revised bill as reported by the House Judiciary Committee on October 12, 1966. Dr. Wigren's testimony indicated that, although the groups he represented still preferred a specific exemption for educational uses, they were willing to accept the approach reflected in the 1966 House bill and report, subject to certain conditions and reservations. He made clear that the Ad Hoc Committee regarded the bill and report "as one piece," and stated:

[36]The Ad Hoc Committee regards Section 107--the fair use provision of the Bill and the House Committee Report--as a marked improvement for classroom teachers over the previous draft. ... We are grateful that the House Committee Report enumerated at some length examples of reproductions by teachers for classroom purposes of single and multiple copying of materials in the course of teaching which would be considered as "fair" under the provisions of Section 107. This is in keeping with certain agreements we reached with the publishers and authors last June at the office of the Register of Copyrights.

In our original testimony before your committee, you will recall we had requested a statutory limited copying exemption for education--a new Section 111--which we believed then, and we still believe, provides the simplest and easiest way to give the teacher the certainty he needs in his use of materials. As a result of the summit conferences held with the publishing industry representatives at the Register's office, the present wording of Section 107 was agreed upon by both groups as a compromise position, and we are willing to abide by this agreement as a means of reaching an accommodation between the two opposing positions. In so doing, however, we recognize that we have sacrificed a general exemption for certain much-needed educational uses of materials and have substituted in its stead a categorical exemption for specific types of uses which are spelled out in the House Report. We must emphasize that our acceptance of this compromise is dependent upon retention in the bill of the words "including its reproduction in copies or phonorecords" and of the full listing of examples of reproductions which would be considered "fair" now included in the Report. Anything less than this will be totally unacceptable to the Ad Hoc Committee.

[37]Dr. Wigren went on to urge that the limitation on the liability of teachers in section 504 be extended to other educators, and that the bill be amended with respect to educational broadcasting, computer uses, and the duration of copyright protection. The Ad Hoc Committee accepted the language of section 107, but urged two changes in the commentary in the House report. The first dealt with fair use in respect to educational broadcasting and computer uses. The second was described as follows:

Section 107 sets forth four criteria by which teachers may judge whether a given use of a work is a fair use. The Ad Hoc Committee is greatly concerned about Criterion No. 4 in this section which is "the effect of the use on the potential market for or value of the work." The House Committee Report goes on to explain this criterion by stating "where the unauthorized copying displaces what realistically might have been a sale, no matter how minor the amount of money involved, the interests of the copyright owner need protection." There are already those who argue that any given use of a copyrighted work would in effect be ruled out by this last criterion, particularly when followed by the clause "no matter how minor the amount of money involved." We implore the Senate, at the very least, to strike this explanation from the Report. It will cause apprehension and concern on the part of teachers nationwide.

c. The 1973 Senate hearings.

After a long hiatus, further hearings on this issue were held before the Senate Judiciary Subcommittee in August, 1973--after the ruling by Commissioner Davis of the U. S. Court of Claims in favor of the copyright owner in *Williams & Wilkins, Inc. v. United States* , the famous **[38]**case involving library photocopying, but before the 4-3 reversal of that ruling by the full Court of Claims and the inconclusive result in the Supreme Court. The Ad Hoc Committee of Educational Institutions and Organizations, still under the chairmanship of Dr. Wigren, put forward the following proposal for specific exemptions covering teaching, scholarship and research:

Section.... limitations on exclusive rights: Reproduction for teaching, scholarship and research

Notwithstanding other provisions of this Act, nonprofit use of a portion of a copyrighted work for noncommercial teaching, scholarship or research is not an infringement of copyright.

For purposes of this section,

(1) "use" shall mean reproduction, copying and recording; storage and retrieval by automatic systems capable of storing, processing, retrieving, or transferring information or in conjunction with any similar device, machine or process;

(2) "portion" shall mean brief excerpts (which are not substantial in length in proportion to their source) from certain copyrighted works, except that it shall also include

(a) the whole of short literary, pictorial and graphic works

(b) entire works reproduced for storage in automatic systems capable of storing, processing, retrieving, or transferring information or in conjunction with any similar device, machine or process, provided that

i) a method of recording retrieval of the stored information is established at the time of reproduction for storage, and

[39] ii) otherwise applicable under law to copyrighted works shall apply to information retrieved from such systems;

(c) recording and retransmission of broadcasts within five school days after the recorded broadcast; provided that such recording is immediately destroyed after such 5-day period and that such retransmission is limited to immediate viewing in schools and colleges.

Provided that "portion" shall not include works which are

(a) originally consumable upon use, such as workbook exercises, problems, or standardized tests and the answer sheets for such tests;

(b) used for the purpose of compilation within the provisions of Section 103(a).

Dr. Wigren explained this shift in position as follows:

First, we would like to point out to the Sub-committee the rationale for this limited educational exemption. During the past years, the Ad Hoc Committee has made every effort to maintain contact and dialogue with publishers, authors, and materials producers to reach some type of accommodation which would take into account the interests of all parties concerned in the revision effort in order to strike a fair balance between the rights of proprietors and the rights of consumers/users of materials.

Our discussions, however, have been frustrated by the impact of the recent ruling by Commissioner Davis of the U. S. Court of Claims in favor of Williams & Wilkins, in its copyright infringement suit against the National Library of Medicine. ... The Commissioner's ruling has caused considerable consternation and alarm within the educational community not only because of its effect on libraries but also because it would undercut the accepted and traditional meaning of "fair use" for teachers. The language and rationale are just as applicable against teachers and schools as against libraries.

[40]Because the Williams & Wilkins decision proves the unreliability of "fair use" for schools and libraries, the Ad Hoc Committee urges Congress to adopt the concept of a limited educational exemption which would neutralize the harmful effect of the Commissioner's opinion on both schools and libraries and at the same time not be detrimental to publishers or producers of materials. In light of Williams & Wilkins, our request for a limited educational exemption is submitted to this committee not in lieu of "fair use" but in addition to "fair use" in the statute.

At the end of his statement, however, Dr. Wigren set forth the following fall-back position:

In the event that this Subcommittee cannot grant our request, the Ad Hoc Committee will be unable to support the proposed legislation (S. 1361) unless it is changed in two major respects: (1) unless the bill specifically provides adherence to the concepts and meanings of "fair use" which were written into House Report No. 83, 90th Congress, as amended in the following respects:

(a) the elimination of the expression "no matter how minor" in reference to the fourth criterion

(b) the authorization for classroom purposes for limited multiple copying of short whole works, such as poems, articles, stories, and essays

(c) the application of the full impact of "fair use" to instructional television

and (2) unless the decision of the Commissioner in the Williams & Wilkins case is specifically rejected to the extent in which it differs from that House Report, as amended.

[41]The 1973 response of authors, publishers, educational media producers, and representatives of the information industry was one of concerted opposition to the new proposal for an educational exemption, and of support for the approach adopted by the House of Representatives in 1967.

On July 3, 1974 the Senate Judiciary Committee reported the revision bill with no change in section 107; the 1974 Senate report retained much of the interpretative language of the 1966 and 1967 House reports, but with some deletions, additions, and revisions. The proposed educational exemption was not adopted. During the Senate debates preceding passage of the revision bill on September 9, 1974, there was no discussion of this issue.

d. The 1975 House hearings.

The draft proposal for an educational exemption was put forward by the representative of the National Education Association during the Ad Hoc Committee's presentation at the 1975 House Subcommittee hearings, and its text was identical to that of the 1973 version except for two words of no real significance. The opposition from authors and other copyright owners remained just as strong, and united support was reconfirmed for the pending bill and the commentary in the legislative reports. The witnesses pointed to the extremely broad language of the proposed amendment and the conflict between its provisions dealing with computer uses and section 107 of the bill, which is intended to preserve the status quo in that field pending the report of the newly-created National Commission on New Technological Uses **[42]**of Copyrighted Works (CONTU). The representative of the Information Industry Association submitted a statement indicating that, if serious consideration were to be given to the proposed educational exemption, it would be important to consider rather sweeping proposals from the IIA to create new rights in connection with the new information technologies.

Although the thrust of the testimony from the various witnesses representing educations organizations belonging to the Ad Hoc Committee was in the same direction, there were clearly some differences in emphasis if not in substance. The witness representing the NEA came closest to restating the Ad Hoc Committee's 1973 position; in submitting the proposed amendment he said:

In summary, the NEA will not be able to support a bill unless it--

- retains and clarifies an overall not-for-profit concept for educational, scholarly, and research uses and copying, whether couched as a limited educational exemption or in some other suitable comprehensive form;

- clarifies the meaning of fair use as applied to teachers and learners;

- shifts the burden of proof from the teacher to the alleger of the infringement.

NEA therefore urges the adoption of language by this committee that encompasses the above-stated concepts and makes copyright reform meaningful for the teachers, scholars, researchers, authors, and publishers who create, transmit, and perpetuate our heritage for future generations.

[43]The witness representing the Association of American Law Schools, the American Association of University Professors, and the American Council on Education did not refer to the proposed new section specifying educational exemptions, but took a somewhat different tack. Among other things, he said at various points in his statement:

We strongly urge that the doctrine of fair use be preserved and given formal recognition by Congress, both by express statutory provision and by appropriate language in the final Committee report.

... Given the paucity of decided cases in this area, it is necessary to recognize the difficulty of leaving the resolution of this important problem solely to the limited framework of existing decisions. We urge, therefore, the enactment of § 107, as it now appears in H.R. 2223, ... as supported by adequate legislative history.

...

We thus advocate that the House Report which accompanies this measure, be drafted to include an express reference to the effect that the doctrine of fair use would be applicable to copyrighted materials which might subsequently be designated as compensible, if photocopied for other uses. By clearly establishing that teaching and research uses are significant to the doctrine of fair use, subsequent uncertainty as to the treatment of library materials which might require compensation if copied for other purposes, would be avoided.

The representative of the Association for Educational Communications and Technology (AECT) likewise made no reference to the proposed exemption, but endorsed "the criteria to be used in the determination of 'fair use' as contained in Section 107 of the proposed bill." He also recommended that the doctrine of fair use "should apply equally to the classroom teacher and the media professional--including specialists in audiovisual and library resources." He added:

[44]Media personnel are becoming increasingly important members of educational planning teams and must have the assurance that they may assist classroom teachers in the selection of daily instructional materials as well as with long range curriculum development. Classroom teachers do not always operate "individually and at (their) own volition." The fact that the media professional makes use of advance planning and has knowledge aforethought of the materials he prepares for the teacher should not invalidate the application of the "fair use" principle.

The AECT representative also stressed the desirability of voluntary licensing arrangements covering educational activities beyond the scope of fair use:

Once the doctrine of "fair use" has been established in the revised law, negotiations should be conducted between the proprietor and user prior to any use of copyrighted materials that goes beyond that doctrine. We believe that the enactment of the "fair use" concept into law prior to negotiations will guard against the erosion of the concept. Generally, a reasonable fee should be paid for uses that go beyond "fair use," but such fee arrangement should not delay or impede the use of the materials. Producers are urged to give free access (no-cost contracts) whenever possible.

The witness for the National Council of Teachers of English did not share the AECT's faith in voluntary licensing arrangements. He strongly urged a change in one passage in the House Committee's reports dealing with the length of excerpts that can be copied under fair use, and summarized his organization's position as follows:

[45]What we do seek and need is a clearer statement, either in the statute or in the accompanying report, reassuring us that in a spontaneous teaching situation, we may make for one-time use by our students in our classrooms, multiple copies of self-contained short works of literature.

Following presentation of the prepared statements, and in response to a question, Harry N. Rosenfield, counsel of the Ad Hoc Committee, reviewed very briefly the eight points comprising the position of the Committee as a whole:

1) The limited educational exemption;

2) The clarification of fair use;

3) Opposition to a copyright term of life-plus-fifty years;

4) Waiver of statutory damages for innocent infringers;

5) Support of the librarians' position on section 108(g);

6) Treatment of instructional television as a school activity;

7) Opposition to clearinghouse arrangements;

8) "... that input into a computer not be infringement for the period of the study by the National Commission on New Technological Uses, ... but that output be paid for under the normal rules of the game."

At the 1975 hearings the Department of Justice also recommended a specific educational exemption, which it proposed as a proviso to be added at the end of section 107. Although the justification for the amendment, as explained in the Department's statement, refers only **[46]**to the need for clarifying "the extent to which librarians can reproduce works for use in libraries," the language of the proposed amendment is extremely broad, and would presumably exempt from copyright liability any nonprofit "educational" use:

... provided that nothing contained in this Section shall be construed to limit the use by reproduction in whole or in part in copies or phono-records or by other means specified in Section 106 whenever used in nonprofit educational activities.

4. REMEDIES FOR INNOCENT INFRINGEMENT BY EDUCATORS

The 1961 Register's report had recommended that, where an infringement is proved to be innocent, the court should have discretion to reduce the standard minimum statutory damages of $ 250 per infringement, or withhold them altogether. This proposal resulted in protracted debates and eventually produced a compromise, now embodied in the

second sentence of section 504(c)(2), under which statutory damages for an innocent infringement can be reduced to a minimum of $ 100.

The educators pressed their case for providing the possibility of complete remission at the 1966 "summit meetings." They argued that the deterrent effect of statutory damages would not apply to truly innocent teachers, and that the potential threat of minimum statutory damages could make teachers afraid to do things that are perfectly legal, thus adversely affecting good teaching practices. The House Judiciary Committee accepted this argument and added the following sentence to section 504(c)(2):

[47]In a case where an instructor, librarian or archivist in a nonprofit educational institution, library, or archives, who infringed by reproducing a copyrighted work in copies or phonorecords, sustains the burden of proving that he believed and had reasonable grounds for believing that the reproduction was a fair use under section 107, the court in its discretion may remit statutory damages in whole or in part.

At the 1975 House hearings the educators proposed additional amendments to the remedies provided in *Chapter 5* of the revision bill. Professor Leo J. Raskind, representing the Association of American Law Schools, the American Association of University Professors, and the American Council on Education, recommended that the injunction provision (§ 502) be amended by the addition of the following sentence:

No temporary or final injunction shall be available against any library or user covered by § 108 or § 110.

Professor Raskind also proposed the revision of the new sentence in section 504(c)(2), which had been added at the instance of the educators, to expand its scope further. As revised, the sentence would read:

In a case where an instructor, librarian or archivist in a nonprofit educational institution, library, or archives, who infringed by reproducing a copyrighted work in copies or phonorecords, sustains the burden of proving that he believed and had reasonable grounds for believing that the reproduction was a fair use under § § 107 through 117 [the court in its discretion may remit statutory damages in whole or in part] there shall be neither statutory damages, nor costs, nor attorney's fees.

[48]A problem related to remedies in this context involves the nature of fair use as either an outright limitation on the rights of the copyright owner or as merely a defense in an infringement action. The 1966 and 1967 House Judiciary Committee reports contained the following comments on this point:

Proposals for presumption as to fair use

The representatives of various educational organizations proposed that, in infringement cases involving nonprofit uses for educational purposes, the use be presumed to be "fair" and the burden of proving otherwise be placed on the copyright owner. The representatives of authors and book publishers objected strenuously to this proposal, arguing that it would transform the doctrine of fair use into a blanket exemption in these cases.

The committee believes that any special statutory provision placing the burden of proving fair use on one side or the other would be unfair and undesirable. It has, however, added a provision to section 504(c), allowing minimum statutory damages to be reduced in these cases if the teacher proves that he acted in the reasonable belief that his reproduction constituted a fair use rather than an infringement.

This passage was deleted in the 1974 Senate report, though its interpretation presumably remains valid. However, it is clear that the educators have not dropped their proposal: for example, a shift in "the burden of proof for the teacher to the alleger of the infringement" is one of three fundamental demands listed by the National Education Association in its 1975 testimony as conditions for support of the bill.

[49]5. RESALE OF USED TEXTBOOKS

In his testimony before the House Subcommittee on June 5, 1975, Professor Rondo Cameron, appearing as an ordinary citizen as well as a teacher, research scholar, and author, urged that the bill provide for the payment of royalties for the commercial resale, through large, organized markets, of "used or 'second hand' books, especially textbooks." Since section 109(a) specifically excludes the right of resale in this situation, Professor Cameron acknowledged that he was opposed to this provision.

6. NEWSLETTERS

A statement submitted to the House Judiciary Subcommittee by the Independent Newsletter Association in connection with the 1975 hearings urges that independent newsletters, as distinguished from house organs and publicity or advertising publications, be given special treatment under the bill. The statement stresses the vulnerability of newsletters to mass photocopying because, by their nature, they are brief and pithy and depend solely on subscriptions for their existence; the majority of newsletters have less than 2,000 subscribers at an average annual subscription fee of $ 50. It recommends that corporate and business photocopying of newsletters be expressly excluded from the fair use doctrine.

[50]B. COMMENTS AND RECOMMENDATIONS

1. LANGUAGE OF SECTION 107

The tortuous history of this provision has finally produced a text that satisfactorily expresses the legislative intent and, as far as it goes, is acceptable to the interested parties. Aside from the Department of Justice, no one has suggested any changes. It would appear to be unwise and unnecessary to tinker with the language of section 107 as it stands.

2. CLARIFICATION OF LEGISLATIVE INTENT

a. Summary of positions.

Upon close analysis the following seems to be a fair, if somewhat oversimplified, summary of the main positions with respect to fair use and the problem of reproduction for educational and scholarly purposes:

1. There is general agreement that, because of the importance of the problem and the lack of judicial precedent, Congress should clarify its intentions as to whether certain educational practices are or are not to be considered fair use, but without freezing the application of the doctrine or opening the door to widespread abuse.

[51]2. There are essentially two ways of accomplishing this: 1) by a detailed interpretation of "fair use" in the legislative report; or 2) by an explicit statutory exemption.

3. Following extended discussions, the authors and publishers agreed to the present wording of section 107 and to an interpretative commentary with respect to educational uses along the lines of the 1966, 1967, and 1974 legislative reports. They have consistently and strongly opposed any explicit educational exemption.

4. Although the educators consistently favored an explicit exemption, they agreed at one point to accept the approach of a legislative interpretation of fair use on certain conditions, including the expanded wording of section 107, certain changes in the language of the commentary, and further insulation from liability for innocent infringement. After the first Commissioner's decision in favor of the copyright owner in the Williams & Wilkins litigation, the educators returned to their proposal for an outright exemption, which clearly remains their first choice. However, it also appears that the position of the educators is still flexible enough for them to accept the approach of a legislative interpretation **[52]**of section 107, provided it is sufficiently clear and reasonable from their point of view, and provided certain changes are made elsewhere in the bill.

b. General comments.

The Copyright Office adheres to its position favoring the present language of section 107, coupled with a clear legislative interpretation in the Committee reports. The proposed language for an express educational exemption is much too broad, but in any event we seriously doubt whether satisfactory statutory language for this purpose could ever be achieved.

At the same time, we recognize that the interpretative language in the 1974 Senate report consists, with some changes, of a text prepared nearly ten years ago. Given the importance of this section of the Committee reports to an overall solution of this important problem, the Copyright Office recommends that the commentary be carefully reviewed and, where necessary, revised to take account of some of the criticisms leveled at particular statements or omissions.

Over the years, some of the educators have seemed to be arguing that, with respect to photocopying, they enjoy under the present law a "not-for-profit" limitation co-extensive with that applicable to certain performances, and that somehow this "right" is being taken away from them. This line of argument tended to produce a rather testy reaction, since plainly the only explicit "not-for-profit" limitations on **[53]**the copyright owner's exclusive rights under the present law are with respect to public performances of nondramatic literary and musical works. On the other hand, although the commercial or nonprofit character of a use is not necessarily conclusive with respect to fair use, in combination with other factors it can and should weigh heavily in fair use decisions. It would certainly be appropriate to emphasize this point in the legislative commentary dealing with fair use and educational photocopying.

The special situation of newsletters does not warrant a statutory exclusion from the doctrine of fair use in section 107, but the problem should be dealt with in the revised commentary.

A significant letter to Chairman Kastenmeier dated August 1, 1975 and signed jointly by Townsend Hoopes, President of the Association of American Publishers, Inc. and Sheldon Elliot Steinbach, Chairman of the Ad Hoc Committee on Copyright Law Revision, states:

Pursuant to the suggestion made by you and several of your Subcommittee members during the hearings in June on H.R. 2223, representatives of publishers, authors, and educators have resumed their direct discussions of issues relating to the permissible limits of the photocopying of copyrighted materials for educational purposes.

The joint letter expresses the hope that an "agreed document" will emerge from the discussions "by early November, which we understand would be a date early enough to ensure full consideration by your Subcommittee." There is thus some genuine reason to hope that the interested parties will be able to provide direct assistance to the Congress in its final review of this problem in connection with the revision bill.

[54]3. REMEDIES AND PRESUMPTIONS

a. Injunctives, damages, etc.

The proposals put forward on behalf of educators at the 1975 hearings, under which the only remedy available against an innocent educational infringer would be actual damages, seem to go too far. Certainly the continuation of an activity after it has been held an infringement would destroy any argument of innocence and justify discretionary injunctive relief. On the other hand, if a defendant can prove complete innocence in this situation, a mandatory waiver of statutory (though not actual) damages can be justified.

b. Presumptions and burden of proof.

The educators are understandably concerned that, because the scope of the doctrine of fair use is not yet clear in this area, an educational defendant would have the burden not only of proving the facts with respect to what he or she did, but also of proving why, as a matter of law, these acts amounted to fair use. This is a difficult question which should not be brushed aside lightly. The Copyright Office adheres to its position that, when it comes to the infinitely variable questions of fair use, rigid rules involving legal presumptions and burdens of proof should not be laid out in the statute. We would have no objection, however, to an interpretation in the legislative report **[55]**making clear that, where a teacher in an infringement suit proves certain facts and alleges that they constitute fair use, it is up to the plaintiff to prove that, as a matter of law, they are beyond the scope of the fair use doctrine.

4. RESALE OF USED TEXTBOOKS

The proposal that royalties be imposed on the large-scale commercial resale of used copies of textbooks and other works received no support; it runs counter to the traditional "first-sale" doctrine of copyright law embodied in section 109(a), which has attracted no opposition. In fairness, however, it should be noted that, purely as a legal concept, the idea is not unthinkable. Other countries are beginning to experiment with analogous systems, such as the "public lending right," involving library lending, and the "droit de suite," involving an artist's participation in the proceeds of later sales of a work of art. There is little doubt that, as technology continues to erode authors' ability to control various uses of their works, additional points at which control can be exercised will be sought.

5. CONCLUSION

The question of educational photocopying was expressly excluded from the mandate of the National Commission on New Technological Uses of Copyrighted Works, on the assumption that, at the time when the **[56]**Commission bill was drafted, the issue was essentially settled. The immediate key to a reasonable legislative solution in 1975 appears to lie in a well-drafted legislative interpretation of section 107, coupled with some possible changes in the language or interpretation of the provisions dealing with infringement actions and remedies.

Beyond this immediate legislative solution, however, there is a fact that must be faced. Right now, there are activities connected with teaching that constitute infringement, not fair use, and these are bound to increase. Everyone seems to assume that they will somehow be licensed and that royalties will somehow be paid, but as a practical matter this cannot and will not be done on an individual, item-by-item basis. We are entering an era when blanket licensing and collective payments are essential if the educator is not to be a scofflaw and the author's copyright is not to be a hollow shell. It is not going to be easy, but once the scope of fair use in this field of activity has been clarified by legislative action, immediate efforts to establish workable licensing or clearinghouse arrangements will have to begin.

§ [57]CHAPTER III REPRODUCTION BY LIBRARIES AND ARCHIVES

Sections Considered:

§ 106 Exclusive rights in copyrighted works

§ 107 Limitations on exclusive rights: Fair use

§ 108 Limitations on exclusive rights: Reproduction by libraries and archives

Issues:

1. How should the legislative report deal with:

a) the application of the fair use doctrine under section 107 to reproduction by libraries and archives?

b) the interrelationship between sections 107 and 108 (see § 108(f)(3))?

2. Do the provisions of subsections (d) and (e) of section 108, establishing differing conditions for the reproduction of excerpts and of complete works, represent a satisfactory solution to the problem?

3. To what extent should the exemptions provided by section 108 apply to:

a) libraries and archives in profit-making business and professional organizations (see § 108(a))?

[58] b) music; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works (see § 108(h))?

c) making and distribution of videotapes of television news programs (see § 108(f)(4) and (h))?

4. Is subsection (g)(1), dealing with "one-at-a-time multiple copying" an appropriate exception to the exemptions of section 108?

5. With respect to section 108(g)(2):

a) Is a provision dealing with "systematic reproduction or distribution of single or multiple copies or phonorecords" an appropriate exception to the exemptions of section 108?

b) Is the wording of the clause satisfactory to accomplish its purpose?

c) Is the explanatory commentary on the clause in the 1974 Senate report a satisfactory statement of Congressional intent?

6. Recognizing that the National Commission on New Technological Uses is now functioning, and is mandated to study, compile data and make recommendations for legislation with respect to "various forms of machine reproduction," should the legislative reports on the general revision bills express Congressional intent with respect to the interrelationship between the work of the Commission and the effect of sections 107 and 108?

[59]A. DISCUSSION OF ISSUES

1. LEGISLATIVE HISTORY OF SECTION 108

Photocopying as a social phenomenon dates from the early 1960's, and the earlier copyright problems that arose from photostating and microfilming by libraries seem insignificant in comparison to what is facing us now. Photostats were expensive, microfilm required special readers which were not widely available, and both were cumbersome, inconvenient, and hard to read.

Yet, as early as the 1930's, the extent to which a library or other institution could supply photographic reproductions to scholars had blown up into a controversy. In 1935 a joint committee of the American Council of Learned Societies and the Social Science Research Council entered into the famous "gentlemen's agreement" with the National Association of Book Publishers. This agreement had no binding effect, but it was widely accepted as at least a norm of conduct for many years. The agreement read in part as follows:

A library, archives, office, museum, or similar institution owning books or periodical volumes in which copyright still subsists may make and deliver a single photographic reproduction or reduction of a part thereof to a scholar representing in writing that he desires such reproduction in lieu of loan of such publication or in place of manual transcription and solely for the purpose of research; provided

[60](1) that the person receiving it is given due notice in writing that he is not exempt from liability to the copyright proprietor for any infringement of copyright by misuse of the reproduction constituting an infringement under the copyright law;

(2) that such reproduction is made and furnished without profit to itself by the institution making it.

The Copyright Office saw the problem growing in the 1950's and devoted one of the studies in its revision series to "Photoduplication of Copyrighted Material by Libraries." The 1961 Register's Report analyzed the problem at some length, and made the following 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.

[61]The reaction to these recommendations from copyright owners ranged from cautious acceptance to strong opposition, mostly the latter; the few comments received from librarians were inconclusive. However, by the time the Copyright Office submitted its 1963 preliminary draft for comment, positions on both sides had begun to solidify. A joint committee of librarians agreed upon a policy statement which, as issued in 1961 and revised in 1963, read as follows:

Findings:

1. The making of a single copy by a library is a direct and natural extension of traditional library service.

2. Such service, employing modern copying methods, has become essential.

3. The present demand can be satisfied without inflicting measurable damage on publishers and copyright owners.

4. Improved copying processes will not materially affect the demand for single copy library duplication for research purposes.

Recommendations:

The Committee recommends that it be library policy to fill an order for a single photocopy of any published work or any part thereof. Before making a copy of an entire work, a library should make an effort by consulting standard sources to determine whether or not a copy is available through normal trade channels.

[62]The following is the text of the library photocopying provision in the 1963 preliminary draft:

§ 7. LIMITATIONS ON EXCLUSIVE RIGHTS: COPYING AND RECORDING BY LIBRARIES

Notwithstanding the provisions of section 5, any library whose collections are available to the public or to researchers in any specialized field shall be entitled to duplicate, by any process including photocopying and sound recording, any work in its collections other than a motion picture, and to supply a single copy or sound recording upon request, but only under the following conditions:

(a) The library shall be entitled, without further investigation, to supply a copy of no more than one article or other contribution to a copyrighted collection or periodical issue, or to supply a copy or sound recording of a similarly small part of any other copyrighted work.

(b) The library shall be entitled to supply a copy or sound recording of an entire work, or of more than a relatively small part of it, if the library has first determined, on the basis of a reasonable investigation that a copy or sound recording of the copyrighted work cannot readily be obtained from trade sources.

(c) The library shall attach to the copy a warning that the work appears to be copyrighted.

This modest effort was met with strenuous opposition from all sides. As the 1965 Supplementary Report summed it up:

Author and publisher groups attacked section 7 as opening the door to wholesale and unrestrained copying by libraries which, as reproduction equipment improves, could supplant the copies offered for sale by publishers and undercut the author's main source of remuneration. Library **[63]**groups were equally vehement in opposition to the proposals, which they argued would curtail established services and prevent the free utilization of new devices in the interests of research and scholarship.

...

Opposition to the provision was equally strong on both sides but for exactly opposite reasons, with one side arguing that the provision would permit things that are illegal now and the other side maintaining that it would prevent things that are legal now. Both agreed on one thing: that the section should be dropped entirely.

Having little choice in the matter, the Copyright Office dropped the provision entirely from the 1964 and 1965 bills. At the 1965 House hearings there was very little testimony about library photocopying, and most of it was in the context of fair use. Lonely support for an explicit exemption came from the American Council of Learned Societies, which recognized that the problem was difficult and controversial but regarded the bill's failure to deal with it a disservice to scholars. The ACLS felt that a reasonable compromise could be reached by distinguishing extracts from entire works: single copies of extracts for research use would be justified if properly safeguarded, but the inaccessibility or cost of an entire work would not be sufficient justification for permitting the copying of an entire work. The ACLS proposal, which attracted little attention at the time and is now almost completely forgotten, is worth setting out here:

[64] § _____. LIMITATIONS ON EXCLUSIVE RIGHTS: COPYING BY LIBRARIES

(a) Notwithstanding the provisions of clauses (1) and (3) of section 106(a), a library of an organization operated for scholarly, educational or religious purposes and not for private gain is entitled, without the authority of the copyright owner, upon the request of any person to duplicate by any process and furnish to such person a single copy or phonorecord of an extract from a copy or phonorecord of a copyrighted work in its collections other than a motion picture, but only under the following conditions:

(1) The extract shall consist of no more than one separate contribution to any periodical issue or other collective work, or no more than a relatively small part of any other work;

(2) The library shall furnish such copy or phonorecord without profit to itself, but shall charge the person to whom it is furnished an amount approximately equal to the cost (including labor and overhead) of duplicating and furnishing it;

(3) The library shall furnish such copy or phonorecord on its premises or by delivery in the form of a material object and not by transmitting the work or the extract therefrom; and

(4) The library shall by reasonable means inform its patrons that a person to whom such a copy or phonorecord is furnished is not exempt from liability to the copyright owner for any use of such copy or phonorecord constituting an infringement of copyright.

The Department of Health, Education, and Welfare also viewed with concern the omission of an exemption for photocopying and "computerization" by libraries, and recommended adoption of a somewhat enlarged version of the Copyright Office's 1963 preliminary draft.

[65]The 1966 and 1967 House Judiciary Committee reports noted the position taken at the hearings by representatives of libraries "that statutory provisions codifying or limiting present library practices in this area could crystallize a subject better left to flexible adjustment," and stated: "the committee does not favor a specific provision dealing with library photocopying." It added, however:

Unauthorized library copying, like everything else, must be judged a fair use or an infringement on the basis of all of the applicable criteria and the facts of the particular case. Despite past efforts, reasonable arrangements involving a mutual understanding of what generally constitutes acceptable library practices, and providing workable clearance and licensing conditions, have not been achieved and are overdue. The committee urges all concerned to resume their efforts to reach an accommodation under which the needs of scholarship and the rights of authors would both be respected.

At the same time, however, the House Committee did accept a proposal by archivists and historians for a specific exemption permitting facsimile reproduction of unpublished manuscript collections in archival institutions under certain conditions and for limited purposes. This new provision, which was added to the 1966 bill as section 108, turned out to be the seed from which grew the monster we are now considering.

[66]Library photocopying was not a major issue at the 1967 hearings in the Senate, but there were indications that the librarians were having second thoughts about the matter. The chairman of a joint committee of four major library associations urged that "the facts of life concerning single copying be recognized in this bill"; no specific amendment was proposed, but the joint committee recommended that a provision be added to the fair use section stating "that making a single copy within libraries for the use of scholars is within the concept of fair use."

This shift in position signalled a major policy reversal by the library community after the 1967 Senate hearings. Specific proposals for a detailed section dealing with reproductions by libraries and archives were evolved as the general library position, and were the subject of various discussions and exchanges of correspondence.

In gauging these developments it is also important to recognize that the issue of computer uses of copyrighted works, by networks of academic libraries among others, had emerged as a major copyright issue at the 1967 Senate hearings, and was the subject of lively debate during this same period. An approach to that problem was to establish a National Commission on New Technological Uses of Copyrighted Works to study the question of computer uses of copyrighted works, and along the way it was decided to add "various forms of machine reproduction," including library photocopying, to the Commission's mandate. A bill to **[67]**this effect (S. 2216) was passed by the Senate in 1967, during the 90th Congress, and was added as Title II to S. 543, the 1969 revision bill in its initial Senate version in the 91st Congress.

There was obviously some hope that, if a Commission could be set up quickly and could take up library photocopying as its first order of business, there might be no need to grasp the library photocopying nettle in the general revision bill. The original version of S. 543 contained no library photocopying exemption. However, as the Commission idea lost momentum and the library associations pressed harder for an express exemption, it became apparent that at least some of the recommendations had support on the Senate Judiciary Subcommittee. No further hearings were held, but on December 10, 1969, S. 543 was reported by the Subcommittee to the full Committee with some major

amendments. For one thing, section 108 had grown from an 8-line provision concerning archival collections to a 65-line section with six subsections dealing fairly comprehensively with "reproduction by libraries and archives." The new section as reported was retained verbatim in the 1971 version of the bill (S. 644) and again in the 1973 version as originally introduced in the 93rd Congress (S. 1361).

The version of section 108 that emerged on December 10, 1969 and remained a part of the revision bill until 1974, differed from the 1975 revision bill now under consideration in several respects, but the main differences were two:

[68] 1) The 1969 bill made no distinction between excerpts and short self-contained works (like articles) on the one hand, and complete works on the other. Under the section, a library could make a photocopy of any work only if "the user has established to the satisfaction of the library or archives that an unused copy cannot be obtained at a normal price from commonly known trade sources in the United States, including authorized reproducing services." In contrast, the 1975 bill would allow photocopying of a single article or contribution, or of a "small part" of a work, without further investigation. The library would be required to "determine, on the basis of a reasonable investigation" that a copy "cannot be obtained at a fair price," only in case the material to be photocopied constitutes "the entire work, or ... a substantial part of it."

2) The 1969 version contained no counterpart of the controversial subsection (g)(2) of the 1975 provision, which expressly excludes "systematic" single or multiple copying from the scope of the exemption.

[69]The 1969 bill fell short of the librarians' proposal, which would have allowed the making of one copy of any work, regardless of its length and whether or not it was "in-print," as long as it was for the personal use of an individual. The full sweep of this proposal was vigorously opposed by authors and publishers, who contended that it would authorize virtually unlimited copying and jeopardize scholarship by destroying incentives for creating and publishing many works. Meanwhile, the action of Williams & Wilkins Co. against two government medical libraries, alleging copyright infringement on the basis of extensive library photocopying practices, had begun making its way through the U.S. Court of Claims to the Supreme Court. This tended to polarize positions on the issue and to poison the atmosphere for accommodation.

When Senate hearings on this issue were held in August, 1973, the Court of Claims Commissioner had ruled in favor of Williams & Wilkins, and the full Court's reversal of that ruling had not yet occurred. The librarians proposed an amendment that was narrower than their original proposal: in effect it would permit making one copy of a single article or contribution, or of a short excerpt, without further investigation; a library could supply a single copy of an entire work after determining that it was out of print. For their part the authors and publishers, in general, appeared willing to accept the approach of section 108 as it then stood, although reluctantly and with some drafting changes. They concentrated their fire upon the librarians' new proposal.

[70]The ground upon which the controversy was based shifted in November, 1973, when the full Court of Claims, in a narrow and split decision, reversed the Commissioner and held in favor of the government libraries. It then shifted again in April, 1974, when the Senate Subcommittee reported the revision bill to the full Judiciary Committee with some striking amendments.

In effect, the 1974 bill accepted the librarians' 1973 proposal but added an entirely new provision stating that "the rights of reproduction and distribution under this section ... do not extend to cases where the library or archives, or its employee: ... (2) engages in the systematic reproduction or distribution of single or multiple copies...". The library community greeted this new subsection (g)(2) and the explanatory commentary accompanying it with howls of outrage, arguing that its substantive content had never been discussed at hearings or elsewhere, and that it took away everything that the other 1974 amendment had given. Authors and publishers generally accepted the section with this new provision. They argued that, as a technical matter, a prohibition against systematic copying was implicit in the rest of the section; however, the amendment allowing nearly unrestricted single copying of journal articles and similar works made an explicit prohibition against doing this on a systematic basis essential. The relevance of this dispute to the Williams & Wilkins case, which was then pending in the Supreme Court, was not lost on anyone.

[71]The revision bill was reported by the full Senate Judiciary Committee on July 3, 1974, and was passed by the Senate on September 9, 1974 with two changes in section 108 dealing with videotape and new archives. There was no debate on the fundamental issues underlying the section. Meanwhile, a great many of the groups and organizations involved in the dispute were filing briefs as amici curiae in the Williams & Wilkins case in the Supreme Court, and positions on the legislation were becoming increasingly inflexible and tenacious. During this difficult period a dialog of

sorts was reestablished through a series of meetings sponsored jointly by the Copyright Office and the National Commission on Libraries and Information Science (NCLIS). However, no consensus concerning the proper interpretation of "systematic" reproduction or the possibilities of establishing a practical mechanism for licensing library photocopying could be achieved under the circumstances.

The Williams & Wilkins case was argued before the Supreme Court in December, 1974. In January, 1975, at the opening of the 94th Congress, the revision bill was reintroduced in both Houses. The Senate version of section 108 was identical with the version passed by the Senate the previous September. The House version was identical with the Senate bill.

[72]Then, on February 24, 1975, in a spectacular anticlimax, the Supreme Court split 4-4 on the Williams & Wilkins case, automatically affirming the Court of Claims decision in favor of the government libraries, but effectively depriving that decision of any precedential weight and wiping out any authority the Court of Claims majority opinion might otherwise have carried. In a recent habeas corpus decision (*Neil v. Biggers , 409 U.S. 188 (1972)),* the U.S. Supreme Court itself has declared that an equally-divided affirmance "merely ends the process of direct review but settles no issue of law." The Court has thus left the issue squarely up to Congress to settle.

It should also be mentioned that separate legislation establishing the National Commission on New Technological Uses of Copyrighted Works (CONTU) was enacted by Congress late in 1974, and became effective on the last day of that year. The members of the Commission were appointed in mid-1975, and CONTU held its first meeting on October 8, 1975. The statutory purpose of the Commission is "to study and compile data on: (1) the reproduction and use of copyrighted works of authorship ... (B) by various forms of machine reproduction, not including reproduction by or at the request of instructors for use in face-to-face teaching activities." Its mandate also covers computer uses of copyrighted works. Under its statute, CONTU must complete its first report by October 8, 1976, and must conclude its work by the end of 1977.

[73]2. ANALYSIS OF 1975 BILL

Section 108, entitled "Limitations on exclusive rights: Reproduction by libraries and archives," now consists of 89 lines divided into eight subsections. The subsections are currently untitled, but can be summarized under the following headings, most of which are used in the 1974 Senate report:

(a) General scope of single copy exemption

(b) Archival reproduction

(c) Replacement of damaged copy

(d) Articles and small excerpts

(e) Out-of-print works

(f) General exemptions

(g) Multiple copies and systematic reproduction

(h) Works excluded from exemption

(a) Scope of exemption

Subsection (a) lays out the basic conditions under which a library can claim an exemption under the section. These can be summarized very generally as follows:

1) The exemption applies only to a library or archives or their employees acting within the scope of their employment.

[74] 2) "No more than one copy or phonorecord of a work" can be made under the exemption. This is explained further in subsection (g).

3) No distinction is made between nonprofit libraries and libraries in profit-making institutions, but the reproduction or distribution itself must be made "without any purpose of direct or indirect commercial advantage."

4) The library's collections must either be open to the public or to outside persons doing specialized research.

5) A notice of copyright must accompany the reproduction.

Note that the conditions set out in subsection (a) are only a general starting point. For a library activity to be exempt it must also qualify under one of the conditions laid out in subsections (b) through (f), must not run afoul of subsection (g), and must involve copying of a work that is not mentioned in subsection (h).

[75](b) Archival preservation

This exemption applies only to unpublished works in the current collection of a library or archives. It allows reproduction only in facsimile form, and only for "purposes of preservation or security or for deposit for research use in another library or archives."

(c) Replacement

With respect to published works, a library or archives can make a facsimile reproduction to replace material that is "damaged, deteriorating, lost, or stolen," but only if it finds that an unused replacement copy cannot be obtained at a fair price.

(d) Journal articles, small excerpts, etc.

This subsection applies to "no more than one article or other contribution to a copyrighted collection or periodical issue, or to ... a small part of any other copyrighted work." The only conditions for supplying a reproduction are that "the copy becomes the property of the user," that there is no reason to suppose that it "would be used for any purpose other than private study, scholarship, or research;" and that warning of copyright be given. The copy must be "made from the collection of a library or archives where the user makes his request, or from that of another library or archives."

[76](e) Entire works

With one addition the conditions applicable under subsection (d) apply under subsection (e) to "the entire work," or "a substantial part of it." The added condition is that "the library or archives has first determined, on the basis of a reasonable investigation, that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price."

(f) General exemptions

This subsection contains four clauses, aimed at precluding certain interpretations of section 108. In three of the clauses the effect would be to expand the scope of permissible copying activity, while in the fourth the effect would be restrictive.

(1) The first clause makes clear that no liability attaches to a library or its employees for "the unsupervised use of reproducing equipment located on its premises," as long as a copyright warning is posted on the machine.

(2) Conversely, the second clause makes clear that the individual user of the reproducing equipment is not insulated from liability if the reproduction exceeds fair use, and the same is true if the library is asked to make the copy for the individual.

[77] (3) Clause (3) is important. It declares that nothing in section 108 "in any way affects the right of fair use," or any contractual obligations the library has assumed.

(4) The fourth clause, which was added to the section during the floor debates in the Senate in September, 1974, reflects the controversy over the videotape archive of news programs at Vanderbilt University. It states that nothing in section 108 "shall be construed to limit the reproduction and distribution of a limited number of copies and excerpts by a library or archives of an audiovisual news program..."

(g) Multiple and systematic copying

It is hard to tell, from the wording, whether this controversial subsection is intended as an exception to the exemptions stated elsewhere in section 108, or whether its purpose is to offer a statutory interpretation of their negative effect. The original intention was probably the latter.

[78]In any event, the subsection starts with a positive statement: "The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same

material on separate occasions." But, it adds, these "rights" do not extend to cases where the library knew or should have known that "one-at-a-time" multiple copying was going on: where it "is aware or had substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group."

The first clause of subsection (g), just quoted, had been in the bill since 1969 and had caused little comment until clause (2) was joined to it in 1974. Under the clause, the reproduction and distribution "rights" of section 108 do not apply where the library "engages in the systematic reproduction of single or multiple copies or phonorecords of material described in subsection (d)" (i.e., of articles, contributions, and excerpts).

(h) Works excluded from exemption

Except for situations covered by subsections (b) and (c) -- archival preservation of unpublished works and replacement of damaged copies of published material -- subsection (h) makes the exemptions of section 108 inapplicable to:

[79] 1) a musical work;

2) a pictorial, graphic, or sculptural work;

3) a motion picture or other audiovisual work, other than one "dealing with news."

3. 1974 SENATE REPORT ON SECTION 108

The 1974 Senate report contains some significant comments bearing on the purpose and interpretation of specific provisions of section 108. Where these were put in issue at the 1975 House hearings, they will be reviewed below. In addition, the following explanations deserve note:

1) "Fair price"

There are some textual differences but, under both subsections (c), dealings with replacement of damaged or missing copies, and (e), dealing with what might be termed "out-of-print works," the library must, before making a reproduction, have first determined that a copy "cannot be obtained at a fair price." In explaining both subsections, the Senate report says:

The scope and nature of a reasonable investigation to determine that an unused replacement cannot be obtained will vary according to the circumstances of a particular situation. It will always require recourse to commonly-known trade sources in the United States, and in the normal **[80]**situation also to the publisher or other copyright owner (if such owner can be located at the address listed in the copyright registration), or an authorized reproducing service.

2) "Lawfully-made" copies and later unlawful use

Clause (2) of subsection (f) confirms the liability of a library patron who, beyond fair use, makes copies on a machine located in the library or has them made by the library for him. The report makes clear that any such copies are not "lawfully made" within the meaning of a number of sections throughout the bill, including sections 109 and 110. This means that, in a variety of situations, that would otherwise be exempted, including cases involving the resale, display, or importation of the copies or their use for performances, would be considered infringement. Conversely, the report states:

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

3) Contractual arrangements

In commenting on subsection (f)(3), providing that section 108 does not override any contractual obligations assumed by a library when it obtained a work for its collections, the report makes the following comments:

[81]For example, if there is an express contractual prohibition against reproduction for any purpose, this legislation shall not be construed as justifying a violation of the contract. This clause is intended to encompass the situation where

an individual makes papers, manuscripts or other works available to a library with the understanding that they will not be reproduced.

4. ANALYSIS OF SPECIFIC ISSUES

a. Interrelationship between fair use and library exemption

The strange eventful history of library photocopying as a copyright issue has left a major question unanswered: are the exemptions of section 108 essentially a definitive statement of what Congress intends fair use to mean in this area? or are they supplementary provisions augmenting but not restricting the present doctrine? or could it be argued that, because section 108 says definitively that certain things can be done and others cannot, the section prohibits certain activities that might be held fair use today?

Although section 108(f)(2) says that nothing in the section "in any way affects the right of fair use as provided by section 107," this has been, and certainly can be, interpreted in different ways. Suppose, for example, that the bill were enacted in its present form and Williams & Wilkins reinstituted suit under the new law. The Court of Claims had held that what the National Library of Medicine was doing constituted fair use under the 1909 copyright law; would section 108 change that result? The 1974 Senate report offers no clue to the answer.

[82]b. Subsections (d) and (e)

The statement of the Department of Justice recommends that the words "of a small part" be deleted from subsection (d), and that the words of the library or archives has first determined, on the basis of a reasonable investigation, that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price" be deleted from subsection (e). The reason given for the first suggestion was: "Libraries should be able to reproduce entire work for scholarship"; the reason for the second was: "Too difficult and cumbersome to make purchase investigation; discourages use."

c. Profit-making organizations

At the 1975 hearings the third of the three specific proposals made by the librarians, through the spokesman for the Special Libraries Association (SLA), involved the interpretation of one of the fundamental conditions of exemption under section 108: that, in the words of section 108(a)(1), "the reproduction is made without any purpose of direct or indirect commercial advantage." The SLA representative urged clarification of this requirement "because the majority of special library operations are conducted for purposes of 'indirect commercial advantage' when the library's parent organization is in the business, industrial, or financial communities thru its products and services." He suggested that the language might have been intended to refer to "an authorized or unauthorized reprinter or republisher of **[83]**copyrighted materials." The libraries therefore proposed either that the phrase "to a reprinter or a republisher" be added after the word "advantage" at the end of section 108(a)(1) or, alternatively, that the commentary make this intent clear.

The statement of the Special Libraries Association contains the following justification for this proposal:

Legislation to be enacted must not prevent or penalize the preparation of photocopies by any library. S.L.A. is, of course, particularly concerned about the status of specialized libraries --- especially those in for-profit organizations. There will be immeasurable damage to the total economy and welfare of the nation if such intent were to be contained in the enacted version of H.R. 2223, or if such interpretation is possible after enactment of the law. The rapid transmission of man's knowledge --- either to not-for-profit or to for-profit organizations ---must not be impeded by law. Whether libraries request or produce photocopies, the libraries are acting solely as the agents for the individual and distinct users of libraries who in their totality represent all strata of our American society.

d. Works not covered by exemption

The broad reproduction privileges provided by subsections (d) and (e) apply to literary works, dramatic works, and sound recordings. Under subsection (h) they do not apply to musical works, pictorial, graphic, and sculptural works, and audiovisual works other than television news programs. At the 1975 House hearings the librarians asked that **[84]**these exclusions from the exemptions be deleted entirely. Their representative stated:

We are also concerned with Section 108(h) which would limit the rights otherwise granted under Section 108 by excluding a musical work, pictorial, graphic and other audiovisual works. These exclusions are illogical. The need of the scholar doing research in music for a copy of a portion of a score is as legitimate and proper as that of the scholar

doing any other kind of research. Likewise, the copying of one map from an atlas or a page of diagrams and plans from a technical journal may be just as important as any other kind of material for research.

It seems to us that libraries ought to be encouraged to collect and preserve all of the forms in which knowledge is published and distributed, and that it should be possible for users of libraries to have access for their study and scholarship to all of these forms, not just some of them. If a student of the cinema asks a library to make a copy for him of a few selected frames of some famous motion picture which is being studied, so that he may consider at his leisure a certain key point which is made in an article he is reading, we thing the library ought to be able to do that.

This proposal, insofar as it applied to music, was supported by the Music Library Association, which stressed the importance of photocopying to serious music scholarship, it argued that copyright claims are asserted in edited versions of music in the public domain, including many works of the great masters, and that music libraries do not collect the great bulk of the popular musical ephemera that are copyrighted.

[85]In commenting on the deletion of subsection (h), the Special Libraries Association apparently assumed that sound recordings of musical works would be regarded as "audiovisual works," which is not the case. However, the SLA's basic point was that printed music should not be excluded from the over-all exemptions of section 108:

§ 108(h). The Association feels that there is a real need to distinguish between two formats of "musical works:"

(a) Printed musical works, and

(b) Sound reproductions of musical works.

To achieve this distinction, we suggest two possible amendments to § 108(h):

(1) Delete the words "a musical work" because performances are included in the subsequent phrase, "or other audio-visual work," or

(2) Add a modifying statement so that § 108(h) will read:

The rights of reproduction and distribution under this section do not apply to a musical work other than a printed copy ... [suggested words are underlined.]

It is important that research workers and students of musicology be allowed "fair use" access to portions of printed music just as § 108(a)(2) permits "fair use" access to textual materials. In § 108(h) a clear distinction must be made between performances or sound recordings and music in printed form.

[86]The librarians' proposals on this point were met with strong opposition from book and music publishers, who expressed surprise and dismay that the point was being raised so late in the day. They argued that "the primary purpose of music is performance" and that the overwhelming majority of photocopies that would be made if the exemption applied to music would be precisely for that purpose. They pointed out that fair use would, in most cases of real scholarly use, allow all that is needed -- copies of short extracts for illustrative purposes -- and that satisfactory joint arrangements have already been worked out with respect to obtaining copies of out-of-print music.

(e) Videotape archives

The 1974 amendments offered by Senator Baker, and adopted by the Senate as amendments to subsections (f) and (h) of section 108, were the subject of 1975 hearings in the House. The amendment was intended to exempt the Vanderbilt Television News Archive at Vanderbilt University, and presumably any other library or archive covered by section 108, from copyright liability for "the reproduction and distribution of a limited number of copies and excerpts ... of an audiovisual news program." The correlative amendment in subsection (h) refers to "an audiovisual work dealing with news."

[87]At the hearings Robert V. Evans, Vice President and General Counsel of CBS Inc., urged deletion of the Baker amendments as being too broad in scope and unnecessary to accomplish the purpose of establishing a national repository for television news programs. Paul C. Simpson, founder of the Vanderbilt Archive, declared that the revision bill should not prohibit libraries from:

1) recording news broadcasts from the air;

2) making them available for viewing at the library and copies for viewing elsewhere;

3) making, on specific request, copies of single stories or news items from the broadcasts available, just as such services are rendered by libraries from newspaper collections.

He supported the Baker amendments as accomplishing this result, and argued that national depository and educational icensing [sic] arrangements recently established by CBS are too restrictive for this purpose.

f. Multiple copying

Clause (1) of subparagraph (g) had been included in the librarians' original proposal to the Senate, and had apparently been accepted by everyone since its introduction into the bill in December, 1969. The 1974 Senate report contains the following interpretation:

[88]Subsection (g) provides that the rights granted by this section extend only to the "isolated and unrelated reproduction of a single copy," but this section does not authorize the related or concerted reproduction of multiple copies of the same material whether made on one occasion or over a period of time, and whether intended for aggregate use by one individual or for separate use by the individual members of a group. For example, if a college professor instructs his class to read an article from a copyrighted journal, the school library would not be permitted, under subsection (g), to reproduce copies of the article for the members of the class.

Citing this commentary, the librarians recommended its deletion in their May, 1975 presentation at the House hearings. Professor Low's statement contained the following paragraph:

Subsection (g)(1) gives us concern because often there is no basis for a library employee to judge whether a request for a copy represents "isolated and unrelated reproduction" as specified in Section 108(g)(1). For example, if a college instructor in a graduate seminar in English were to recommend to his students, some ten men and women sitting around a table, that they read an article on Milton's poetry that appeared ten years ago in Publications of the Modern Language Association, and if two of them over the next week were to go to that college's library and look at that article and decide that they wanted to take copies back to their dormitory for further study, we don't see how there is any practical way in which a library can prevent that kind of reproduction of a single copy on separate occasions, and we don't think they should have to. And yet, the Senate Committee report S. 1361 (S. Rept. 93-983) cites such an instance.

As might be expected, the authors and publishers reacted strongly against this interpretation, arguing, as they had from the discussions in the early 1960's, that a limitation of the exemption **[89]**to single copying "was meaningless unless it expressly guarded against the making of multiple copies one at a time."

g. Systematic reproduction

By far the most controversial provision of section 108 is clause (2) of subparagraph (g), and particularly its use of the undefined but inflammatory word "systematic." This is an extreme example from the front page of the Medical Library Association News for July, 1975:

We have been working very hard for the deletion of section 108G2 of the same bill which would not allow us to photocopy on a "systematic" basis. This is the same section of the Senate bill on which the Association passed a resolution in San Antonio last year. It is very important that you, as members, explain to library users that if HB2223 is passed with Section 108G2 that all photocopy, especially interlibrary loan, will be prohibited and a librarian liable to a very stiff fine (up to $ 50,000.)

Almost equally controversial with librarians is the rather long commentary on the clause appearing in the 1974 Senate report:

Subsection (g) also provides that section 108 does not authorize the systematic reproduction or distribution of copies or phonorecords of articles or other contributions to copyrighted collections or periodicals or of small parts of other copyrighted works whether or not multiple copies are reproduced or distributed. Systematic reproduction or distribution occurs when a library makes copies of such materials available to other libraries or to groups of users under formal or informal arrangements whose purpose or effect is to have the reproducing library serve as their source of such material. Such systematic reproduction and distribution, as distinguished from isolated and unrelated reproduction or distribution, may substitute the copies reproduced by the source library for subscriptions or reprints or other copies which the receiving libraries or users might otherwise have purchased for themselves, from the publisher or the licensed reproducing agencies.

[90]While it is not possible to formulate specific definitions of "systematic copying", the following examples serve to illustrate some of the copying prohibited by subsection (g).

(1) A library with a collection of journals in biology informs other libraries with similar collections that it will maintain and build its own collection and will make copies of articles from these journals available to them and their patrons on request. Accordingly, the other libraries discontinue or refrain from purchasing subscriptions to these journals and fulfill their patron's requests for articles by obtaining photocopies from the source library.

(2) A research center employing a number of scientists and technicians subscribes to one or two copies of needed periodicals. By reproducing photocopies of articles the center is able to make the material in these periodicals available to its staff in the same manner which otherwise would have required multiple subscriptions.

(3) Several branches of a library system agree that one branch will subscribe to particular journals in lieu of each branch purchasing its own subscriptions, and that the one subscribing branch will reproduce copies of articles from the publication for users of the other branches.

The committee believes that section 108 provides an appropriate statutory balancing of the rights of creators, and the needs of users. However, neither a statute nor legislative history can specify precisely which library photocopying practices constitute the making of "single copies" as distinguished from "systematic reproduction". Isolated single spontaneous requests must be distinguished from "systematic reproduction." The photocopying needs of such operations as multi-county regional systems, must be met. The committee therefore recommends that representatives of authors, book, and periodical publishers and other owners of copyrighted material meet with the library community to formulate photocopying guidelines to assist library patrons and employees. Concerning library photocopying practices not authorized by this legislation, the committee recommends that workable clearance and licensing procedures be developed.

[91]The following excerpts from a statement submitted on behalf of the Association of Research Libraries to the House Judiciary Subcommittee on May 30, 1975 will serve to summarize the librarians' position on this subsection, which they are urgently seeking to have deleted:

At issue is the making, whether at the request of a patron or at the request of another library, of single copies of copyrighted matter for the private use of a scholar or other reader. Such copies may be of articles from law reviews, medical journals or scientific or technical periodicals, or they may be passages from other published works. They are made in response to individual requests for single copies, although more than one individual may request a copy of a particular part of a work in a library's collection. In providing this service, a library may make a copy from a work located on its premises, or in the case of a work not in its own collection, it may request the copy from another library, just as it might obtain the original work itself on an inter-library loan for a patron who wished to borrow it...

Clause (g)(2) excludes from the library photocopying permitted under Section 108 any instance of "systematic reproduction and distribution". Because this restriction was written into the bill by the Senate Patents, Trademarks and Copyrights Subcommittee at the last minute (after public hearings had been held) and is only vaguely and confusingly explained in the committee report, it is impossible to determine exactly what it means... It appears, however, to be potentially applicable whenever a library makes a photocopy of an article or other portion of a published work in the context of a "system". There are, of course, many such systems of libraries, from city or county branch library systems to the university with branch campuses to regional library consortia. Where it applies, Section 108(g)(2) would reach the making of a single copy for a single requester, of any part, however small, of a copyrighted work. It is precisely the right to make such copies which Section 108 was intended to confirm ...

[92]The sole rationale offered for the new restrictions is an assertion that they are necessary in order to prevent present and potential subscribers from relying on library photocopying machines in the place of journal subscriptions. That assertion is simply and clearly not valid ...

The question which this Subcommittee is called upon to answer may be simply put. Should a library be prohibited from making, at a user's request, a single copy of a journal article or of an excerpt from another published work, or liable for a royalty fee simply because it obtains the copy from, or supplies it to a branch library, a library member of a county or regional library system, or other consortium of libraries? Because it is clear that such customary copying by libraries is responsive to specific, specialized needs of library users, provides the public access to materials which would otherwise be unavailable and does not in fact serve as a substitute for subscription to the publications concerned, the answer must be that libraries should not be so prohibited or so liable.

Of the arguments in favor of retention of subsection (g)(2) put forward by authors and publishers, the statement on behalf of the Association of American Publishers will serve as an example:

Systematic copying, in other words, substitutes the copying for the original which otherwise would have been purchased from the publishers. The library world appears to be divided on whether or not licensing procedures should be worked out for systematic copying. Some insist that no distinction should be admitted between unauthorized systematic copying and copying pursuant to isolated requests, and that payment should be made for neither. Others concede the difference in principle, but say that the kind of copying that should be paid for is too imprecisely defined in Section 108, and that no practical procedures have been established by which clearance can be obtained and payments made.

We think it unnecessary to belabor the point that unauthorized systematic copying -- the kind of copying that is done at a research center, or at a central resource point for use in a library network -- is the functional equivalent of piratical reprint publication. Certainly this kind of copying must be paid for if, as the National Commission on Libraries and information Science puts it, **[93]**"the economic viability and continuing creativity of authorship and publishing" are to be protected. (Synopsis of second draft proposal, June 1974.)

It is equally meretricious to complain that the "systematic copying" that is to be paid for is too imprecisely defined, or that payment cannot be made because payment systems have not been established.

Section 108(g) excludes from library copying privileges not only "systematic copying" but also the related or concerted reproduction or distribution of "multiple" copies. Systematic copying and multiple copying are general concepts; both are illustrated by examples in the Senate committee report (which closely follows the discussion of fair use in your 1967 committee report), and neither is more imprecise than many other statutory or common law doctrines with which we are all familiar. The libraries do not claim an inability to understand the multiple copying concept; the systematic copying concept is no less viable or understandable.

On September 19, 1975, in a letter to Chairman Rodino of the House Judiciary Committee, David Mathews, Secretary of the Department of Health, Education, and Welfare, stated:

In brief, the bill as presently worded contains a provision [subsection 108(g)] which would severely hamper the flow of biomedical information between the National Library of Medicine and the nation's medical libraries and thereby reduce the information available to researchers and practitioners. Deletion of Subsection 108(g) would remove this restriction. However, if deletion of this Subsection is not possible modification of the language contained therein would accomplish the same goal.

Attached to Secretary Mathews' letter was a memorandum which included the following draft revision of subsection (g)(2):

... engages in the systematic and unlimited reproduction or distribution of single or multiple copies or phonorecords of the same material described in Subsection (d) so as to substantially impair the market for, or value of, the copyrighted work.

[94]The memorandum added:

"For purposes of avoiding ambiguity the bill should include explicit definitions of 'systematic reproduction' and 'fair use.' "

h. Relation to Commission on New Technological Uses (CONTU)

An immediate question facing the CONTU commissioners at their first meeting on October 8, involves the interrelationship between section 108 and their mandate with respect to studying and making recommendations on "various forms of machine reproduction." In connection with section 108 the 1974 Senate report said:

In adopting these provisions on library photocopying, the committee is aware that through such programs as those of the National Commission on Libraries and Information Science there will be a significant evolution in the functioning and services of libraries. To consider the possible need for changes in copyright law and procedures as a result of new technology, title II of this legislation establishes a National Commission on New Technological Uses of Copyrighted Works. It is the desire of the committee that the Commission give priority to those aspects of the library-copyright interface which require further study and clarification.

The following statement also appeared in the section of the report dealing with the Commission itself:

It is not the intent of the committee that the Commission should undertake to reopen the examination of those copyright issues which have received detailed consideration during the current revision effort, and concerning which satisfactory solutions appear to have been achieved.

[95]5. COMMENTS AND RECOMMENDATIONS

a. Interrelationship between sections 107 and 108

The librarians finally decided to seek express photocopying exemptions because the flexible and untested doctrine of fair use does not provide enough assurance that some of the things they now want to do are legal. They object strenuously to the provisions expressly limiting the scope of those exemptions, because they fear that these express limitations will also have the effect of limiting the scope of what a court might hold to be fair use today. On the other hand, authors and publishers argue that, if section 108 consists only of unlimited exemptions, they would be placed in an impossible situation. To take an extreme example, suppose that under the new law a library were providing multiple copies of entire books still in print. This is clearly not covered by the exemption in section 108. Should the library be able to argue that, irrespective of section 108, its activities constitute fair use under section 107, and support its position with exactly the same arguments the National Library of Medicine used in the Williams & Wilkins case?

Although it has not been stated, or perhaps even perceived, in these terms, this is the real crux of the dispute over subsections (g) and (h). If section 108 were made to supersede the fair use doctrine completely, no limitations such as those in subsections (g) and (h) would be necessary; the only exemptions would be those stated in subsections (a) through (b). As long as fair use applies to library photocopying, without much more definitive legal authority as to its scope than now exists, some limitations are essential if section 108 is to settle anything.

[96]No one is arguing that the fair use doctrine should be made inapplicable to library photocopying and such would be very hard to sustain. The very amorphousness of fair use provides a needed safety valve. But as long as the revision bill contains both a section 107 and a section 108, the latter must put some express limitations on the express exemptions it provides. It would be a mistake to delete subsections (g) and (h) out of hand. What is needed is a much clearer statement in the report concerning the interrelationships between sections 107 and 108, and a careful look at the wording and content of subsections (g) and (h).

b. Subsections (d) and (e)

The deletions suggested by the Justice Department fail to take account of the long history of subsections (d) and (e). They would destroy the entire basis of the 1973 compromise, which was derived from a proposal of the librarians themselves.

Subsections (d) and (e) are the nub of section 108. No one at the 1975 hearings opposed them, and they were praised by representatives from both sides. Under these circumstances there is no convincing reason to change them.

c. Profit-making organizations

The language in section 108(a)(1)--"without any purpose of direct or indirect commercial advantage"--was included in the draft put forward by the librarians and adopted, in part, by the Senate Judiciary Subcommittee in 1969. The question of interpretation was first raised by **[97]**the librarians at the 1975 hearings, and apparently had not been made an issue earlier. The 1974 Senate report does not provide an explanation of the phrase's meaning in section 108. However, the phrase appears elsewhere in the bill, notably in section 110(4), and in that connection the Senate report has this to say:

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

The 1961 Register's Report contained a section headed "Multiple and commercial photocopying," which read as follows:

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.

[98]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.

On the other hand, the library photocopying section of the Copyright Office's 1963 preliminary draft contained no conditions limiting the exemption to nonprofit libraries or noncommercial motives. This lack was singled out for severe criticism by representatives of authors and publishers during the 1963 meetings on the draft.

It should be noted that, as the section is now written, it makes no difference whether the library or archive is part of a profit-making organization; the question is whether "the reproduction is made without any purpose of direct or indirect commercial advantage." The legislative history of this provision is sparse and the librarians' 1975 proposal has not been debated. The point should certainly be clarified.

On the substance of the question, the Copyright Office adheres to its 1961 position. We believe that a library or archives in a profit-making organization should not, without copyright licenses, be entitled to go beyond fair use in providing photocopies to employees engaged in furtherance of the organization's commercial enterprise. We believe that this was the meaning intended by the drafters of the language in question, and that this interpretation should be reflected in the report.

[99]d. Works not covered by exemption

Although the librarians at the 1975 hearings sought the complete deletion of subsection (h), their proposal seemed to involve music more than the other categories of works covered by that provision. The Copyright Office recognizes the concerns of music librarians, but we believe that -- with respect not only to music but also to pictorial graphic, and sculptural works and motion pictures and other audio-visual works -- the needs of scholars can and should be met through fair use. It is especially important for the legislative report to make clear the relationship between sections 107 and 108(h).

A point not raised at the hearings but of real concern in this connection involves pictorial and graphic works reproduced as illustrations in books, periodicals, and other literary works. There was probably no intention to prevent their reproduction as part of works or excerpts covered by subsections (d) and (e), and subsection (h) should probably be amended to make this clear.

e. Videotape archives

At the moment the highly publicized copyright infringement action of CBS against Vanderbilt University for unauthorized off-the-air taping of copyrighted network newscasts and distribution of the tapes, in some cases in slightly edited or compiled form, is in a state of suspension, apparently awaiting a possible agreed settlement, Congressional **[100]**action, or some other form of rescue. The public issues underlying the case, and the Baker amendments to section 108, are important, difficult, fascinating, and in some ways, dangerous.

The Copyright Office cannot support the Baker amendments as they stand. They go far beyond Senator Baker's announced purpose of insulating Vanderbilt from liability under the new law and assuring that it can continue its valuable work. The language could be construed to exempt activities that were in no way contemplated by the sponsors of the legislation, and that could open the door to completely unjustified abuses.

The Copyright Office believes strongly that the fundamental problems addressed in this legislation should be dealt with by establishing, through the mandatory copyright deposit system already in the bill, a national repository of television films, including but not limited to "hard news" programs, in the Library of Congress and the National

Archives. Recognizing the commendable initiative Vanderbilt has taken in preserving material of great historic value that was otherwise threatened with loss, and that other institutions or individuals might be in the same situation, there should be no objection to allowing them to continue on-going activities, at least up to a reasonable point. We recommend a grandfather clause for this purpose, coupled with amendments to the current revision bill establishing a national television repository that would preserve rather than destroy fully-justified copyright protection while, at the same time, giving **[101]**scholars, the public, and future generations the real benefits that Mr. Simpson and the Vanderbilt Archive have been seeking to provide.

This proposal is new to the discussions of the copyright revision bill, but consideration of it, or variations of it, have been going on for several years. Our television heritage is slipping away from us, but agreements on how to save it have been hard to achieve. The Baker amendment, and the testimony on it in the 1975 House hearings, reflect a bitter and unproductive controversy in which the public has been the principal loser. We believe that the best answer lies directly in the copyright revision bill, but not by means of the approach accepted by the Senate in section 108. We recommend that the Banker amendment be deleted, and that substitute amendments be drafted along the lines suggested here. The Copyright Office would be proud to play a part in such a program.

[102]f. Multiple copying

The Copyright Office believes that clause (1) of section 108(g) is reasonable and necessary, and that its language is clear and should not be changed, much less deleted. The legislative report should be revised to make the Congressional intent clearer and to quiet unnecessary fears.

g. Systematic reproduction

As indicated above in paragraph 1 of this section of Chapter III, the Copyright Office believes that it would be a mistake to delete paragraph (g) completely. Instead, the meaning of fair use in the context of library photocopying and section 108 must be clarified. As part of that process, both the language of subsection (g)(2) and the commentary on it in the report should be carefully reexamined in light of the real concerns of librarians.

A line must be drawn between legitimate interlibrary loans using photocopies instead of bound books, and pre-arranged understandings that result in a particular library agreeing to become the source for an indeterminate number of photocopies. To find that line and draw it clearly is one of the most difficult legislative tasks remaining in the revision program.

h. Relation to CONTU

The new National Commission on New Technological Uses of Copyrighted Works has been given very short deadlines, and could benefit from Congressional guidance as to what areas it could most **[103]**profitably explore with respect to photocopying. Three possibilities have been suggested:

1) Evolution of a more detailed and up-to-date version of the 1935 "gentlemen's agreement" (called by something besides that distasteful term) which would give ordinary librarians daily guidance with respect to practices they could live with;

2) Collection of unimpeachable data concerning library loan and inter-library loan activities, and development of proposals for voluntary licensing mechanisms;

3) Beyond photocopying by libraries, collection of information about the reprographic reproduction of copyrighted works in large industrial, commercial, and professional profit-making organizations.

§ [104]CHAPTER IV LIMITATIONS ON PERFORMING RIGHTS: IN GENERALn*

Sections Considered:

§ 106 -Exclusive rights in copyrighted works

§ 110 -Limitations on exclusive rights: Exemption of certain performances and displays

§ 501 -Infringement of copyright

Issues:

1. Does the decision of the U.S. Supreme Court in *Twentieth Century Music Corp. v. Aiken* call for any changes in the bill itself, in the legislative report, or both?

2. Should the bill be amended to absolve from liability the proprietors of establishments performing copyrighted music, where the performance is controlled by an independent contractor?

[105]A. DISCUSSION OF ISSUES

1. IN GENERAL

The general rights of public performance and display, which are enunciated in clauses (4) and (5) of section 106, are made subject to seven specific limitations in section 110 of the 1975 revision bill. An eighth limitation, dealing with broadcasts for blind, deaf, and other handicapped persons, was added by the Senate Judiciary Subcommittee on June 13, 1975, when it reported the bill to the full Committee. Each of the subsections has, at one time or another, been the focal point of controversy, some of it quite intense, and issues involving the scope of protection for performances and displays in nonprofit broadcasting still remain to be settled. These issues, and the relevant provisions of clause (2) and the new clause (8) of section 110, will be discussed in the next chapter.

As it has emerged from the legislative process so far, section 110 would exempt the following eight types of public performances and displays from copyright liability under specified conditions:

[106]

(1) face-to-face teaching activities;

(2) instructional broadcasting;

(3) religious services;

(4) live performances without commercial advantage to anyone;

(5) mere reception of broadcasts in a public place;

(6) annual agricultural and horticultural fairs;

(7) public performance in connection with sale of records or sheet music;

(8) noncommercial broadcasts to the blind or deaf (added by the Senate Judiciary Subcommittee on June 13, 1975).

At the 1975 hearings the only issues raised in connection with any of these provisions involved clauses (2) and (8). However, as the result of a Supreme Court decision handed down during the course of the hearings, further consideration of clause (5) of section 110 seems necessary. The other issue dealt with in this chapter was raised in connection with section 501, but is probably more germane to the general subject of limitations on performing rights.

2. COMMUNICATION OF BROADCASTS IN BUSINESS ESTABLISHMENTS

a. The 1961 Register's Report

The question of "public reception of broadcasts" was dealt with at some length in the 1961 Register's report, which characterized the problem as follows: "... whether the reception of a broadcast by means of a receiving set in a public place, such as a hotel or **[107]**restaurant, is a separate public performance for which the copyright owner may require a license." Like most people in those pre-CATV days, the Register regarded the 1931 Supreme Court decision in *Buck v. Jewell-LaSalle Realty Co. (283 U.S. 191)* as establishing the rule that the unlicensed reception by a hotel of copyrighted music, and its retransmission over wires to the hotel's various rooms, amounted to an infringement. The Register acknowledged that, on the basis of this supposed precedent, it was possible that "any business establishment that operates a radio or television set for the entertainment of its patrons -- including hotels, restaurants, taverns, barber shops, etc. -- could be required to procure performing licenses for all copyrighted music in the broadcasts it receives."

Concluding, however, that "the free use of receiving sets should not be left to the grace or forbearance of the performing rights organizations or other copyright owners," the Register made the following 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.

This 1961 recommendation for an exemption applied only to "mere operation of receiving sets," as distinguished from cases involving retransmission of broadcasts. The recommendation survived a great deal of discussion and two quite different attempts at **[108]**statutory drafting before emerging in the 1965 bill in almost exactly the same words as those now comprising section 110(5). The 1965 Supplementary Report of the Register provided the following interpretation:

The intention behind this exception is to make clear that it is not an infringement of copyright merely to turn on, in a public place, an ordinary radio or television receiving apparatus of a type commonly sold to members of the public for private use. This exception would apply for the most part to the incidental entertainment of small public audiences (patrons in a bar, customers getting a shoeshine, patients waiting in a doctor's office, etc.). It is not intended to exempt larger establishments, such as supermarkets, bus stations, factories, etc., in which broadcasts are not merely received in the usual manner of a private reception, but are transmitted to substantial audiences by means of a receiving system connected with a number of loudspeakers spread over a wide area. The exemption would also not apply in any case where the public is charged directly to see or hear the broadcast.

c. The 1966, 1967, and 1974 legislative reports

Essentially the same thought was expressed in the 1966 and 1967 House Judiciary Committee reports, with the addition of a paragraph setting forth the rationale for the exemption:

[109]Mere reception in public

Unlike the other clauses of section 110, clause (5) is not to any extent a counterpart of the "for profit" limitation of the present statute. It applies to performances and displays of all types of works, and its purpose is to exempt from copyright liability anyone who merely turns on, in a public place, an ordinary radio or television receiving apparatus of a kind commonly sold to members of the public for private use. The main effect of this exemption would be to allow the use of ordinary radio and television sets for the incidental entertainment of patrons in small business or professional establishments such as taverns, lunch counters, hairdressers, dry cleaners, doctors' offices, and the like. The clause has nothing to do with community antenna operations, and there is no intention to exempt performances in large commercial establishments, such as bus terminals, supermarkets, factories, or department stores, where broadcasts are transmitted to substantial audiences by means of loudspeakers covering a wide area. The exemption would also be denied in any case where the audience is charged directly to see or hear the transmission.

The basic rationale of this clause is that the secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no further liability should be imposed. In the vast majority of these cases no royalties are collected today, and the committee believes that the exemption should be made explicit in the statute. Some fears have been expressed that technical improvements in a "single receiving apparatus of a kind commonly used in private homes" might some day lead to abuse of this exemption, but the committee does not feel that this remote possibility justifies making vast numbers of small business and professional people guilty of technical infringements.

[110]Interestingly enough, the 1974 Senate report adopted almost the same language, but dropped the last, rather premonitory, sentence

d. The Aiken decision

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

disagreeing with practically everything in the majority opinion but concurring with the result, and Chief Justice Burger wrote a blistering dissent in which Justice Douglas joined.

The Aiken decision is based squarely on the two Supreme Court decisions dealing with cable television, in both of which Justice Stewart also wrote the majority opinions. In *Fortnightly Corp. v. United Artists , 392 U.S. 390,* and again in *Teleprompter Corp. v. CBS , 415 U.S. 394,* the Supreme Court had held that a CATV operator was not **[111]**"performing," within the meaning of the 1909 statute, when it picked up broadcast signals off the air and retransmitted them to subscribers by cable. The Aiken decision extends this interpretation of the scope of the 1909 statute's right of "public performance for profit" to a situation outside the CATV context and, without expressly overruling the decision in *Buck v. Jewell-LaSalle Realty Co. , 283 U.S. 191 (1931),* effectively deprives it of much meaning. For more than forty years the Jewell-LaSalle rule was thought to require a business establishment to obtain copyright licenses before it could legally pick up any broadcasts off the air and retransmit them to its guests and patrons. As reinterpreted by the Aiken decision, the rule of Jewell-LaSalle applies only if the broadcast being retransmitted was itself unlicensed.

In his dissent Justice Burger made the following highly relevant observations:

There can be no really satisfactory solution to the problem presented here, until Congress acts in response to long standing proposals. My primary purpose in writing is not merely to express disagreement with the Court but to underscore what has repeatedly been stated by others as to the need for legislative action. Radio today is certainly a more commonplace and universally understood technological innovation than CATV, for example, yet we are, basically, in essentially the same awkward situation as in the past when confronted with these problems.

[112]We must attempt to apply a statute designed for another era to a situation in which Congress has never affirmatively manifested its view concerning the competing policy considerations involved.

Yet, the issue presented can only be resolved appropriately by the Congress; perhaps it will find the result which the Court reaches today a practical and equitable resolution, or perhaps it will find this "functional analysis" too simplistic an approach.

e. The 1975 Senate subcommittee report

On June 13, 1975, four days before the Aiken decision was handed down, the Senate Judiciary Subcommittee reported the revision bill to the full Committee. No changes were recommended in section 110(5), but there were some material revisions in the language in the report interpreting this provision. The revised commentary, which has not been publicly released, indicates that copyright licensing would be required under the revised copyright law in factual situations like that in the Aiken case.

3. VICARIOUS LIABILITY FOR PERFORMANCES BY INDEPENDENT CONTRACTORS

In April, 1975, there was some discussion and correspondence concerning a possible amendment to section 501, intended to exempt the proprietors of an establishment, such as a ballroom or night club, from liability for copyright infringement committed by an independent contractor, such as an orchestra leader. The amendment would have added a new subsection reading:

[113](d) notwithstanding any other provision of this Title, the proprietor of an establishment in which non-dramatic musical work is performed by or under the exclusive directions of an independent contractor, not an employee of the proprietor, is not liable for infringement with respect to such public performance.

B. COMMENTS AND RECOMMENDATIONS

1. COMMUNICATION OF BROADCASTS IN BUSINESS ESTABLISHMENTS

The language of section 110(5) seems adequate to express the intended scope of the exemption, and any effort to make the provision more explicit (by reference to the size of the establishment, the number of patrons, the number of loudspeakers, etc.) could freeze the provision unnecessarily and leave unpredictable loopholes.

On the other hand, it seems imperative for fresh consideration to be given to the interpretation of section 110(5) in both Senate and House reports. The commentary should provide a consistent answer to the frequently-asked question:

how would the Aiken case be decided under the 1975 revision bill? As things stand now, the House reports of 1966 and 1967 and the Senate report of 1974 are inconclusive, while the 1975 Senate report, now in the form of a draft before the full Senate Committee on the Judiciary, may in its final form state: "This clause ... is not intended to generally exempt performances or displays in commercial establishments for the benefit of customers or employees."

[114]This statement seems overly broad. On the other hand, the legislative history of section 110(5) up to now indicates that the provision was based in part on the traditional, pre-Aiken, interpretation of the Jewell-LaSalle decision, and that public communication by means other than a home receiving set, or further transmission of a broadcast to the public, was not intended to be exempted. The Aiken majority based its decision on a narrow construction of the word "perform" in the 1909 statute, which in turn was impelled by the earlier CATV precedents; this basis for the decision would be completely overturned by the revision bill. It is reasonable to assume that Mr. Aiken's apparatus was not an ordinary home receiving set, and that, if four speakers were necessary for proper reception by all his customers there was a further transmission (i.e., a communication "whereby images or sounds are received beyond the place from which they were sent").

2. VICARIOUS LIABILITY FOR INFRINGING PERFORMANCES

A settled principle of the present copyright law is that a person who violates any of the exclusive rights of the copyright owner is an infringer, including persons who can be considered related or vicarious infringers. To be held a related or vicarious infringer in the case of performing rights, a defendant must either actively operate or supervise the operation of the place where the performances occur, or **[115]**control the content of the infringing program, and he must expect commercial gain from his operation and either direct or indirect benefit from the infringing performance. There is a large and forceful body of judicial authority upholding vicarious liability where these conditions are met. No justification exists for adopting a contradictory amendment, which could create a large and dangerous loophole in the public performance right.

§ [116]CHAPTER V SECONDARY TRANSMISSIONS, INCLUDING CABLE TELEVISION

Sections Considered:

§ 106 - Exclusive rights in copyrighted works

§ 111 - Limitations on exclusive rights: secondary transmissions

§ 501 - Infringement of copyright

Chapter 8-Copyright Royalty Tribunal

Issues:

1) Should any copyright liability or obligation to pay royalties apply to secondary transmissions?

2) With respect to the scope of secondary transmissions covered by section 111:

a) Should "boosters" and "translators" be exempt?

b) Should technical changes be made in subsections (a)(3) and (b) to insure against unwarranted liability of cable systems in cases where carriage is mandatory under FCC rules?

c) Should the compromise agreement concerning "non-simultaneous retransmission in noncontiguous areas," which was put forward as a substitute for the Won Pat bill, be accepted?

d) Should local signals be exempted?

[117]

3) Is the fee schedule specified in the bill satisfactory?

4) With respect to readjustment of fees by the Copyright Royalty Tribunal:

a) Should it be left solely to Congress to readjust the fees?

b) Is it appropriate for the Tribunal to adjust the base for computing the fees, as well as the amounts themselves?

c) When should the Tribunal make its first determination with respect to fee adjustment for CATV, and how often thereafter?

d) Should there be an exemption for small systems grossing under a stated amount?

5) Should the provision of section 501(c), expressly authorizing local broadcasters to sue for cable infringement, be retained?

6) Should organized sports be treated in a way different from other programming in section 111?

7) What should be the relationship, if any, between the FCC's nonduplication and program exclusivity rules and section 111?

[118]A. SHORT HISTORY OF THE COPYRIGHT ISSUES

INVOLVED IN CABLE TELEVISION

1. EXPLANATORY NOTE

Although the collision between CATV and copyright occurred less than ten years ago, the decade has been so crowded with events and forces, all interacting and conflicting at once, that it would take a combination of Homer and Gibbon to make sense of what has happened. Yet a legislator, confronting the 178 lines of section 111 and asked to vote on parts of all of its, needs more than a vague idea of what it means and how it came to be.

It is deceptive to speak of the "legislative history" of section 111, since a great deal of the real history of the provision was made far from the halls of Congress. The legislative phases in the section's erratic progress have been lively enough, with jurisdictional disputes between the Judiciary and Commerce Committees in the House in 1967 and again in the Senate in 1974. Several Supreme Court decisions involving CATV, including two copyright cases, have profoundly affected the progress and content of the bill. The Federal Communications Commission's dazzling succession of proposed rules and rules on cable have interacted directly with section 111. The White House, through its Office of Telecommunications Policy, was at least at one time closely involved in the wheeling and dealing, and of course the various private interests, and the factions within them, have not been inactive.

[119]The pages that follow will try to tell the tale chronologically and, if not intelligibly, at least as accurately and objectively as possible. It may be hard to believe, but this account barely scratches the surface.

2. PRE-1966 DEVELOPMENTS

Since there was no cable television to speak of, none of the Copyright Office revision studies dealt with the subject of secondary transmissions, and the subject was not touched on directly in the 1961 Register's Report. Section 13 of the 1963 Preliminary Draft took a running jump at the problem, but the nicest thing anyone said about it was that it was "confusing." The 1964 bill contained no explicit provision on CATV, though the drafters assumed that cable retransmissions were fully covered by the copyright owner's exclusive right to "perform."

The 1965 Supplementary Report of the Register started its extended discussion of "Community Antennas and other Systems" by saying prophetically:

Anyone looking for an example of how fast things move in the field of author's rights can find no more striking illustration than the problem of community antennas and their liability under the copyright law. This question, which was not even referred to in the 1961 Report, now promises to be one of the most hotly debated issues in the entire revision program.

[120]After reviewing the arguments for and against cable liability, the Supplementary Report concluded as its remarks in relation to the 1965 bill as follows:

Since these problems first emerged in our discussions we have given them a great deal of thought. There are valid arguments on both sides of this question. A particularly strong point on the CATV side is the obvious difficulty, under present arrangements, of obtaining advance clearances for all of the copyrighted material contained in a broadcast. This represents a real problem that cannot be brushed under the rug, and it behooves the copyright owners to come forward with practical suggestions for solving it.

On balance, however, we believe that what community antenna operators are doing represents a performance to the public of the copyright owner's work. We believe not only that the performance results in a profit which in fairness the copyright owner should share, but also that, unless compensated, the performance can have damaging effects upon the value of the copyright. For these reasons, we have not included an exemption for commercial community antenna systems in the bill.

On the other hand, we do not believe that the same considerations apply to the activities of those who install or operate a nonprofit "translator," "booster," or similar equipment which merely amplifies broadcast signals and retransmits them to everyone in an area for free reception. Section 109(5) would therefore exempt:

[121]"The further transmitting to the public of a transmission embodying a performance or exhibition of a work, if the further transmission is made without altering or adding to the content of the original transmission, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the further transmission; * * *."

Cable emerged as one of the major issues at the 1965 House hearings. The testimony was dialectical, the operators arguing for complete exemption and the full range of copyright owners, broadcasters, and sports promoters arguing for full liability. During its executive mark-up sessions in 1966 the House Judiciary Subcommittee wrestled with the problem which, it was becoming apparent, was extraordinarily complex.

3. THE 1966 FCC FREEZE

On March 8, 1966, the Federal Communications Commission issued an order asserting jurisdiction over CATV systems and promulgating rules which, in effect, amounted to a freeze. Before a CATV operator could import distant signals, a full hearing before a Commission officer was required in all cases involving major markets and, as a practical matter, in nearly all other cases. This slow and costly procedure proved completely unworkable, and the Commission had ample reason to hope that the practical workings of the copyright law would take over the impossible, if self-imposed, burden.

[122]4. THE 1966 AND 1967 BILLS

On October 12, 1966, and again on March 8, 1967, the House Judiciary Committee reported the general revision bill with a carefully worked out compromise provision which neither imposed full liability on cable operators nor made them completely exempt. Instead, it divided the problem into three parts: (1) CATV operations that were wholly exempt, (2) those that were fully liable, and (3) those subject to liability only if given advance notice that a local station had an exclusive license to show the same program in the area.

This compromise had some support but more opposition. When the bill reached the House floor in April, 1967, a full-scale verbal war broke out between representatives favouring broadcasting and others supporting cable interests. The result was that, in a successful effort to save the rest of the legislation, the CATV section was deleted in its entirety. Thus, with the cable problem as by far its [most] controversial issue, the revision bill was transferred to the Senate Judiciary Subcommittee.

5. THE SOUTHWESTERN AND FORTNIGHTLY DECISIONS

In June 1968 the Supreme Court made history in two cases involving cable television: *United States v. Southwestern Cable Co. , (392 U.S. 157),* and *Fortnightly Corp. v. United Artists Television, Inc. (392 U.S. 390).* The

cases were argued together, were decided on **[123]**succeeding Mondays, and were certainly intended to interact. Yet, though their parentage is the same, the relationship between the two rulings is more like that of Cain and Abel than that of Castor and Pollux.

The Southwestern case involved two questions: first, whether the Federal Communications Commission has authority, under the Communications Act of 1934, to regulate CATV systems at all; and second, whether 1966 FCC regulations banning cable retransmission of distant signals into the 100 largest television markets in the United States under certain conditions were within the Commission's authority. The Court's decision supported the FCC's authority to regulate cable television under the 1934 Act and without additional legislation, as long as the actions it takes are "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." Justice Harlan's opinion made clear that there were limits on the Commission's authority, but it pointedly declined to define what those limits are, and it specifically upheld the administrative order involved in the case as coming within the regulatory authority of the FCC.

The Commission had been relying on the Supreme Court not only to uphold the FCC's authority but also to establish the rights of local broadcasters, as the licensees of copyrights in particular programs, to control the cable retransmissions within their own **[124]**service areas of distant signals carrying the same programs. The FCC in 1968 was committed to the active support of local broadcasting, particularly by independent stations on the ultra-high-frequency bands, and it considered it a duty to maintain the inviolability of clearly-defined geographic television markets by preventing cable from fragmenting local audiences and thereby causing loss of advertising revenue to the local stations. The FCC looked on the copyright law as the perfect legal device for allowing the market place to regulate the growth of cable systems without destroying local broadcasters because of an unfair competitive advantage. By forcing CATV to "stand and bargain" for the importation of distant signals, the copyright law would supposedly relieve the Commission from having to rule on questions of importation in individual cases.

The FCC was therefore as disappointed as anyone by the Fortnightly decision which held that, at least under the circumstances in the case, cable operators do not "perform" the programs they retransmit, and therefore do not come within the 1909 statute at all. Rejecting arguments based on the technical similarities between what broadcasters and CATV systems do, as well as arguments involving the quantitative impact of cable retransmissions, the Supreme Court adopted a functional test: "a determination of the function that CATV plays in the total process of television broadcasting and reception." In applying this test, the Court held that a CATV system operates more as a viewer than as a broadcaster in that it "no more than enhances the viewer's capacity to receive the broadcaster's signals."

[125]6. THE 1968 FCC REGULATION

Despite its disappointment with the Fortnightly decision, the FCC was still determined not to let cable disrupt patterns of local broadcasting that it felt obliged to protect.

On 12 December 1968 the FCC issued a new regulation which, in general effect, retained the 1966 freeze, abandoned the hearing procedure entirely, and prohibited importation of any new distant signals into the largest 100 television markets unless the broadcasting station whose signals were being picked up "has expressly authorized the system to retransmit the program or programs on the signal extended." In areas below the top 100 markets, the cable operator could bring in, without consent, enough of the nearest available signals for it to provide "adequate service" to its subscribers (three network stations, one independent, and one educational station). If the cable system was not operating within 35 miles of any station, it could import distant signals without limit.

Despite many protestations to the contrary, the effect of this action was actually to harden the freeze. The precondition for carrying most distant signals was the obtaining of "retransmission consents," and the Commission made clear that these had to be obtained on a program by program basis and had to constitute "express retransmission authorization by originating stations of the program, programs, or series." A blanket "quit claim" authorization by the **[126]**station was not enough, and since hardly any originating stations have the contractual right to give the kind of authorization needed, the requirement was really for the negotiation of a copyright license.

This, of course, is precisely what the Supreme Court had held was unnecessary in the Fortnightly decision. What the FCC had done, in the guise of administrative regulation of what it called "unfair competition," was to impose copyright liability where the Supreme Court had held it did not exist, and to create de facto copyright protection in a situation where Congress had so far declined to act. It is hardly surprising that no significant retransmission consents were forthcoming, and that the freeze continued.

The balance in the bargaining positions of the private interests, which had tipped one way after the Fortnightly decision, tipped back the other way with the 1968 FCC action. This constant shifting of negotiating balance with each new development has become a familiar phenomenon over the years.

[127]7. THE 1969 "STAFF AGREEMENT"

Throughout this period there were countless private, semi-private, and public meetings aimed at negotiating a solution acceptable to the private interests involved. The first tangible result of all this talking, which rose to the surface in May, 1969, came to be known as "the abortive staff agreement." This master plan was formulated by attorneys representing the principal trade associations of the broadcasting industry (the National Association of Broadcasters) and of the CATV industry (the National Cable Television Association). In very broad terms it called for copyright legislation combined with FCC action that would guarantee payment for all CATV transmissions, impose a compulsory licensing system for CATV carriage of local signals and of the nearest available distant signals needed to provide subscribers in a particular market with adequate service (three network stations and three independents), and provide exclusive copyright control in the largest 50 television markets in the United States under certain circumstances. Existing CATV services would be "grandfathered" as to signals carried on a particular date, and CATV systems would be permitted to originate entertainment programming combined with commercial advertising on a single channel. The proposed deal included an agreement that "CATV systems receiving broadcast programs would be prohibited generally from interconnecting for the purpose of distributing entertainment type programming."

[128]When presented to the boards of directors of the two organizations, the proposal was accepted by the CATV operators but turned down by the broadcasters. Evidently the proposal to outlaw CATV networking was not enough to offset the concessions to cable and the lifting of the freeze. Predictably, the failure of the staff agreement produced some anger and bitterness, and made the resumption of negotiations more difficult. Nevertheless, the negotiations did resume, and the staff agreement, particularly its concept of adequate service, provided a starting point for an entirely new Senate draft of the CATV section in the copyright revision bill.

8. THE DECEMBER, 1969, AND 1971 REVISION BILLS

On December 10, 1969, Senator McClellan's Subcommittee favourably reported the bill for revision of the copyright statute (S. 543) to the full Senate Judiciary Committee with a number of amendments, including a completely rewritten section on cable television. The amended bill provided compulsory licensing for the CATV carriage of purely aural signals, local television signals, and signals transmitted outside any US television market. It also adopted the concept of "adequate television service," providing a compulsory license for the nearest available distant signals needed to supply cable subscribers in the top 50 markets with three network, one educational, and three independent stations, and to supply subscribers in all other markets with three **[129]**network, one educational, and two independent stations. The bill also provided for full exclusive rights, in the top 50 markets, to control or prevent the carriage of distant signals where a local broadcaster had been granted an exclusive license to transmit a particular copyrighted program within that market and had notified the cable system of the license; the same rights would apply in markets below the top 50, but only where the program had never before been shown in syndication in the market.

The bill contained a schedule of compulsory licensing fees based on a percentage of the CATV operator's gross receipts from subscribers, and set forth detailed procedural provisions governing operation of the compulsory license. Existing cable services would be grandfathered, and in individual cases the Federal Communications Commission would be allowed to expand, but not to decrease, the number of stations included under the bill's concept of adequate service.

The amended bill drew angry protests from broadcasters and copyright owners on the ground that it was weighted in favour of CATV, and the 91st Congress ended before the full Senate Judiciary Committee could act on it. On February 8, 1971, the revision bill, including the same CATV amendments, was introduced in the 92nd Congress (S. 644).

[130]9. THE FCC'S "PUBLIC DIVIDEND PLAN"

The amended copyright bill was also strongly criticized by the Federal Communications Commission, primarily on the ground that it left the FCC with too little flexibility to deal with the problems of cable retransmissions. As it

developed, the Commission had another plan of its own under consideration, and on June 24, 1970 a "Second Further Notice of Proposed Rule Making" was adopted by the Commission in a four-to-three vote.

The 1970 FCC proposal was never implemented, but it did mark a significant change of direction in Commission policy away from the fencing-in of local broadcasters against CATV competition and toward the recognition of cable television as a major communications medium. Under the proposal, CATV operators in the largest 100 markets in the United States would be permitted to retransmit the distant signals of four independent commercial stations, plus any network signals not carried locally and an unlimited number of educational broadcast signals, on the rather startling condition that the CATV delete the commercial advertising from these signals and substitute commercials provided by local stations under a detailed scheme of priorities. In addition, all cable systems would have been required to pay five per cent of their gross subscription charges to the Public Broadcasting Corporation as a form of permanent subsidy for educational broadcasting. The rights of copyright owners under this scheme were **[131]**somewhat obscure, but in general the proposal appeared to preclude exclusive rights and to favor the payment of compulsory licensing fees based on a fixed percentage of gross receipts multiplied by the number of distant signals imported.

Although the "public dividend plan" as a whole attracted little support and a great deal of strong opposition, it did provide the Commission with an opportunity to re-examine all of its basic policies concerning cable television.

10. THE "CONSENSUS AGREEMENT"

1971 was an important year in the CATV wars. There were significant breakthroughs in the bargaining positions of the special interests, a formal compromise of sorts was reached, and the FCC prepared definitive rules which were issued early in 1972. The catalyst identified as primarily responsible for these developments was Clay J. Whitehead, director of the Office of Telecommunications Policy in the White House. With the endorsement and active cooperation of Chairman Dean Burch of the FCC, Mr. Whitehead sought to bring the factions into enough of an agreement to permit the Commission to go forward with the promulgation of final regulations which, in turn, would form the basis for copyright legislation.

An initial Whitehead compromise proposal, which contained copyright provisions, had been floated in June and July 1971, but proved unsuccessful. At about the same time Chairman Burch put forward a **[132]**new FCC proposal, first in the form of testimony before two Senate subcommittees, and later as a letter dated August 5, 1971 and identified as an official Commission recommendation. This new proposal had the probably inadvertent effect of undercutting the Whitehead compromise, since it completely side-stepped the copyright issue, stating that the FCC had concluded that copyright is a matter for Congress and the courts. Thus, without any provision for copyright exclusivity or compulsory licensing, and leaving those chips to fall as they may, the Commission recommended a standard for the importation of distant signals based on three criteria: "mandatory service," "minimum service" (or "adequate service" as it had been called), and "additional service." The following rather complex formula was proposed:

1. In all markets, a CATV system would be required to carry all local signals (i.e., mandatory service), and could import, without restriction, distant signals consisting of non-English-language broadcasts and noncommercial educational broadcasts.

[133]

2. In addition, a CATV system could import as many of the following distant signals as would be necessary to make up the following totals (i.e., minimum service):

(a) in markets 1-50: three network and three independent stations;

(b) in markets 51-100: three network and two independent stations;

(c) in all markets: three network and one independent station.

3. In the top 100 markets, a CATV could carry two signals beyond those it is required to carry (i.e., additional service). These "wild card" situations would arise only in very large urban centres where the number of local stations equals or surpasses the total specified as minimum service.

None of the special interests was enthusiastic about either the Whitehead or the new FCC proposal; the cable operators were reluctant to accept the Whitehead plan (with its copyright restrictions) since it was less generous to them than the FCC package, and the broadcaster-copyright interests opposed the FCC plan since it failed to protect them affirmatively. Some very hard bargaining ensued, centred around Whitehead's efforts to reconcile those differences.

[134]On November 2, 1971 a new take-it-or-leave-it compromise proposal was put forward by Whitehead, with an endorsement by Burch and with the request that it either be accepted or rejected by November 11. In its bare essentials, this new compromise proposed to accept the FCC formula with respect to distant signals, as outlined above, but with added provisions for limited exclusivity to be written into the FCC regulations, and with a commitment on the part of all parties to the compromise to support separate copyright legislation providing for compulsory licensing and exclusivity under varying circumstances.

The compromise was rather unenthusiastically accepted as a package by representatives of all of the principal interests involved, though there were dissenters within each group and expressions of reluctance to accept any deviation from the package as proposed. As reported in the press, the cable operators were convinced to accept the agreement for fear that its failure would lead to Congressional hearings and an indefinite delay in the issuance of new FCC regulations lifting the freeze.

Since issues have been made over the contents of the "consensus agreement" during the 1975 House hearings, the complete text is reproduced on the next pages, together with the exchange of letters between Chairman Burch and Senator McClellan concerning it.

[135]CONSENSUS AGREEMENT

Local Signals

Local signals defined as proposed by the FCC, except that the significant viewing standard to be applied to "out-of-market" independent stations in overlapping market situations would be a viewing hour share of at least 2% and a net weekly circulation of at least 5%.

Distant Signals

No change from what the FCC has proposed.

Exclusivity for Nonnetwork Programming (against distant signals only)

A series shall be treated as a unit for all exclusivity purposes.

The burden will be upon the copyright owner or upon the broadcaster to notify cable systems of the right to protection in these circumstances.

A. *Markets 1-50*. A 12-month pre-sale period running from the date when a program in syndication is first sold any place in the U.S., plus run-of-contract exclusivity where exclusivity is written into the contract between the station and the program supplier (existing contracts will be presumed to be exclusive).

B. *Markets 51-100*. For syndicated programming which has had no previous non-network broadcast showing in the market, the following contractual exclusivity will be allowed:

(1) For off-network series, commencing with first showing until first run completed, but no longer than one year.

(2) For first-run syndicated series, commencing with first showing and for two years thereafter.

(3) For feature films and first-run, non-series syndicated programs, commencing with availability date and for two years thereafter.

(4) For other programming, commencing with purchase and until day after first run, but no longer than one year.

Provided, however, that no exclusivity protection would be afforded against a program imported by a cable system during prime time unless the local station is running or will run that program during prime time.

Existing contracts will be presumed to be exclusive. No pre-clearance in these markets.

C. *Smaller Markets*. No change in the FCC proposals.

Exclusivity for Network Programming

The same-day exclusivity now provided for network programming would be reduced to simultaneous exclusivity (with special relief for time-zone problems) to be provided in all markets.

Leapfrogging

A. For each of the first two signals imported, no restriction on point of origin, except that if it is taken from the top-25 markets it must be from one of the two closest such markets. Whenever a CATV system must black out programming from a distant top-25 market station whose signals it normally carries, it may substitute any distant signals without restriction.

B. For the third signal, the UHF priority, as set forth in the FCC's letter of August 5, 1971, p. 16.

Copyright Legislation

A. All parties would agree to support separate CATV copyright legislation as described below, and to seek its early passage.

B. Liability to copyright, including the obligation to respect valid exclusivity agreements, will be established for all CATV carriage of all radio and television broadcast signals except carriage by independently owned systems now in existence with fewer than 3500 subscribers. As against distant signals importable under the FCC's initial package, no greater exclusivity may be contracted for than the Commission may allow.

C. Compulsory licenses would be granted for all local signals as defined by the FCC, and additionally for those distant signals defined and authorized under the FCC's initial package and those signals grandfathered when the initial package goes into effect. The FCC would retain the power to authorize additional distant signals for CATV carriage; there would, however, be no compulsory license granted with respect to such signals, nor would the FCC be able to limit the scope of exclusivity agreements as applied to such signals beyond the limits applicable to over-the-air showings.

D. Unless a schedule of fees covering the compulsory licenses or some other payment mechanism can be agreed upon between the copyright owners and the CATV owners in time for inclusion in the new copyright statute, the legislation would simply provide for compulsory arbitration failing private agreement on copyright fees.

E. Broadcasters, as well as copyright owners, would have the right to enforce exclusivity rules through court actions for injunction and monetary relief.

Radio Carriage

When a CATV system carries a signal from an AM or FM radio station licensed to a community beyond a 35-mile radius of the system, it must, on request, carry the signals of all local AM or FM stations, respectively.

[136]*Grandfathering*

The new requirements as to signals which may be carried are applicable only to new systems. Existing CATV systems are "grandfathered." They can thus freely expand currently offered service throughout their presently franchised areas with one exception: In the top 100 markets, if the system expands beyond discrete areas specified in FCC order (e.g., the San Diego situation), operations in the new portions must comply with the new requirements.

Grandfathering exempts from future obligation to respect copyright exclusivity agreements, but does not exempt from future liability for copyright payments.

APPENDIX E

January 26, 1972.

Hon. JOHN L. MCCLELLAN,

Chairman, Subcommittee on Patents, Trademarks and Copyrights, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This letter is directed to an important policy aspect of our present deliberations on a new regulatory program to facilitate the evolution of cable television. That is the matter of copyright legislation, to bring cable into the competitive television programming market in a fair and orderly way--a matter with which you as Chairman of the Subcommittee on Patents, Trademarks and Copyrights have been so deeply concerned in this and the last Congress.

You will recall that we informed the Congress, in a letter of March 11, 1970 to Chairman Magnuson, of our view that a revised copyright law should establish the pertinent broad framework and leave detailed regulation of cable television signal carriage to this administrative forum. In line with that guiding principle and a statement in our August 5, 1971 Letter of Intent that we would consider altering existing rules to afford effective non-network program protection, we are now shaping a detailed program dealing with such matters as distant signal carriage, the definition of local signals, leapfrogging, and exclusivity (both network and non-network). That program is now approaching final action.

As of course you know, representatives of the three principal industries involved--cable, broadcasters, and copyright owners--have reached a consensus agreement that deals with most of the matters mentioned above. On the basis of experience and a massive record accumulated over the past several years, we regard the provisions of the agreement to be reasonable, although we doubtless would not, in its absence, opt in its precise terms for the changes it contemplates in our August 5 proposals. But the nature of consensus is that it must hold together in its entirety or not at all--and, in my own view, this agreement on balance strongly serves the public interest because of the promise it holds for resolving the basic issue at controversy.

This brings me directly to a key policy consideration where your counsel would be most valuable. That is the effect of the consensus agreement, if incorporated in our rules, on the passage of cable copyright legislation.

The Commission has long believed that the key to cable's future is the resolution of its status vis-a-vis the television programming distribution market. It has held to this view from the time of the First Report (1965) to the present. We remain convinced that cable will not be able to bring its full benefits to the American people unless and until this fundamental issue is fairly laid to rest. An industry with cable's potential simply cannot be built on so critical an area of uncertainty.

It has also been the Commission's view, particularly in light of legislative history, that the enactment of cable copyright legislation requires the consensus of the interested parties. I note that you have often stressed this very point and called for good faith bargaining to achieve such consensus.

Thus, a primary factor in our judgment as to the course of action that would best serve the public interest is the probability that Commission implementation of the consensus agreement will, in fact, facilitate the passage of cable copyright legislation. The parties themselves pledge to work for this result.

[137]Your advice on this issue, Mr. Chairman, would be invaluable to us as we near the end of our deliberations.

With warm personal regards,
Sincerely,

DEAN BURCH, *Chairman*.
UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON PATENTS, TRADE-MARKS, AND COPYRIGHTS,

Washington, D.C., January 31, 1972.

Form

HON. DEAN BURCH,

Chairman, Federal Communications Commission, Washington, D.C.

DEAR MR. CHAIRMAN: I have your letter of January 26, 1972, requesting my advice on the effect of the consensus agreement reached by the principal parties involved in the cable television controversy on the passage of legislation for general revision of the copyright law.

I concur in the judgment set forth in your letter that implementation of the agreement will markedly facilitate passage of such legislation. As I have stated in several reports to the Senate in recent years, the CATV question is the only significant obstacle to final action by the Congress on a copyright bill. I urged the parties to negotiate in good faith to determine if they could reach agreement on both the communications and copyright aspects of the CATV question. I commend the parties for the efforts they have made, and believe that the agreement that has been reached is in the public interest and reflects a reasonable compromise of the positions of the various parties.

The Chief Counsel of the Subcommittee on Patents, Trademarks and Copyrights in a letter of December 15, 1971 has notified all the parties that it is the intention of the Subcommittee to immediately resume active consideration of the copyright legislation upon the implementation of the Commission's new cable rules.

I hope that the foregoing is helpful to the Commission in its disposition of this important matter.

With kindest regards, I am

Sincerely,

JOHN L. MCCLELLAN, *Chairman*[.]

[138]11. THE 1972 FCC RULES

In the words of Professor Michael Botein:

At the end of 1971, the Commission was thus in the rather anomalous position of having one suspended set of rules, two discredited sets of proposed rules, and one informally announced proposal. As might be expected, the impasse was ultimately resolved behind closed doors.

The FCC finally adopted its definitive Cable Television Report and Order on February 2, 1972, with an effective date of 31 March 1972. The details of the 500-page document are not easy to grasp, much less summarize. The package consisted of the August 1971 FCC plan, drastically modified by the consensus agreement to provide for the protection of exclusive rights in programs carried by distant signals. The three-year freeze on distant-signal importation had been lifted; but, because of the rule's copyright provisions, the thaw was more theoretical than real in a number of important situations. Again in Botein's words, "what the Commission gave in terms of distant signals it took away in the name of exclusivity."

As to the right of cable systems to carry distant signals, the FCC retained unchanged its general scheme of mandatory service, minimum service, and additional service as already outlined above. As to the issue of copyright exclusivity, here is the essence of the 1972 FCC rules:

[139] 1. Network programs. Under its previous rules, the FCC had in effect required a cable system to carry the network signals of the most powerful local broadcasting station, and had prohibited duplication of those signals on the same day from any other station. The effect of this requirement, known as the same-day non-duplication rule, was altered in the 1972 rules in two ways:

(a) The network affiliate with the greatest signal strength in the area served by the cable system would continue to have complete exclusivity as against CATV carriage of the same programs as broadcast by other stations affiliated with the network. However, since importation of distant signals will now be permitted, the scope of the prohibition against duplicate carriage is necessarily broadened.

(b) On the other hand, the prohibition against same-day duplication is narrowed to a prohibition against simultaneous duplication, thus allowing a cable system to repeat a network broadcast carried on another channel at a different time on the same day.

2. Syndicated programs. (i.e., non-network programs sold in more than one market):

(a) In markets 1-50: Upon receipt of "appropriate notification," cable systems will be prohibited from importing distant signals carrying syndicated programs during the following periods, which will frequently overlap:

(i) One year from the date the program is first sold for television exhibition anywhere in the United States (i.e., the "pre-clearance period"); and

[140](ii) For the duration of the license, where a station in the CATV's service area has obtained an exclusive license for television exhibition (i.e., the "run of the contract" period).

(b) In markets 51-100: Here the exclusivity requirements are less stringent than in the top 50 markets, but the formula is unbelievably labyrinthine and hopeless to summarize. Distinctions are made among five classes of programs: (1) off-network series (i.e., series first shown on network television in the area and now in syndication); (2) first-run series; (3) first-run non-series programs; (4) feature films; (5) other programs. The various terms of exclusivity range from one day to two years, and further distinctions are made dependent upon whether the broadcasts will occur in prime time. In contrast to exclusivity in the top 50 markets, exclusive rights in the smaller markets cannot endure for the run of the contract.

(c) Other markets: No exclusivity is provided in markets below the largest 100 in the United States.

The February 1972 regulations are a far cry from the FCC's earlier conclusion, announced publicly less than six months before, that protection of exclusive rights should be left to Congress and the courts. The reason for this change is found in the copyright exclusivity provisions of the consensus agreement. However, the full impact of the 1972 regulations is only now beginning to be felt because of their broad "grandfathering" provisions, which were also based on the consensus agreement. Some relatively minor changes have been made in the 1972 rules but as time goes on their practical imposition of copyright exclusivity on more and more CATV operations seems certain to be felt.

[141]12. THE 1973 BILL AND HEARINGS

In June, 1972, Chairman McClellan announced that, in view of the FCC's definitive action, he anticipated active consideration of the revision bill in the next Congress. He warned that the CATV provision in his 1971 bill, then pending, would have to be modified because some of the "regulatory" provisions in section 111 were now covered by the FCC rules.

Senator McClellan introduced the revision bill once more, as S. 1361, on March 26, 1973. The cable provisions were not yet changed. A new case involving the liability of cable systems, *CBS, Inc. v. Teleprompter Corp.* , was making its way through the courts, and many people felt that the revision bill would again lie dormant until it was decided one way or the other. On August 1, 1973, a hearing of the McClellan Subcommittee received extensive testimony and documentation bearing on the CATV royalty schedule as laid out in S. 1361. It was apparent by then that the provision of the consensus agreement calling for arbitration if a schedule of fees could be arrived at by negotiation had broken down.

13. THE TELEPROMPTER DECISION

Early in 1974 the Supreme Court held in favor of the defendant cable system in the Teleprompter case, explicitly extending the ruling in the Fortnightly case to cover importation of distant signals, and effectively exempting retransmission activities of CATV systems from copyright control under the 1909 Act.

[142]14. THE 1974 BILL AND REPORT

The effect of this long-awaited decision on the progress of the revision bill seemed to be immediate. On April 9, 1974, the Senate Judiciary Subcommittee reported S. 1361 to the full Committee with certain amendments, including radical changes in section 111. Further changes were made when the bill was reported by the full Committee on July 3, 1974, and still further amendments were added when S. 1361 passed the Senate on September 9, 1974. Section 111 of the 1975 bills now under consideration is the same as the version that emerged from the Senate on that date.

B. A BRIEF SUMMARY OF SECTION 111 IN THE 1975 BILL

As it now stands, section 111 is not really as complicated as it looks. At the risk of oversimplification, the following is an attempt to outline the content of the section in comprehensible language:

1. What the section covers: Section 111 deals with all kinds of "secondary transmissions." This usually means picking up a broadcast off the air and retransmitting it simultaneously by one means or another, usually cable. The section normally does not cover situations where someone tapes a program off the air and the program is later retransmitted from the tape. There is a complicated exception involving cable systems outside the continental United States, some of which are allowed to use tape because they cannot pick signals out of the air.

[143]2. Exceptions: Some types of secondary transmissions are completely exempted from liability. These include rooftop antennas on apartments and hotels, wired instructional systems, common carriers who do nothing but send a signal on, and nonprofit "boosters" and "translators." Ordinary commercial cable systems are not exempted.

3. Closed-circuit: There is full copyright liability when a system is transmitting to a controlled group. Examples are pay-TV, closed-circuit telecasts to theatres and music services such as Muzak.

4. Compulsory license for cable systems: As long as a CATV operator is authorized by his FCC license to carry a particular signal, he is entitled to rely on a "compulsory license" with respect to the copyrighted materia carried by the signal. In other words, if he registers his system with the Copyright Office and pays a blanket fee based on a percentage of his gross, he is automatically licensed to carry copyrighted material as long as he complies with the FCC rules.

5. Fee schedule: The quarterly royalty fees under a compulsory license are set out in the statute in a sliding scale running from 1/2 percent of gross up to $ 40,000 up to 2 1/2 percent of gross over $ 160,000.

6. Distribution of fees: A procedure is established for distributing compulsory licensing fees to copyright owners through the Copyright Office.

7. Copyright Royalty Tribunal: A Tribunal is set up to settle disputes over fees and to readjust the royalty rates periodically. A readjustment can be vetoed by either house of Congress.

[144]An even briefer way to summarize the provision is this: a cable system does not have to worry about copyright liability for a particular program if all the signals he is carrying comply with the FCC regulations and he pays a set fee into the Copyright Office every three months.

D. COMMENTS AND RECOMMENDATIONS
ON ISSUES PRESENTED

1. CATV LIABILITY

The Copyright Office remains convinced in general that, when it imports distant signals, a cable system is adversely affecting the market for and value of copyrighted works and should pay a reasonable royalty. We consider the present bill, in its overall approach, a satisfactory solution to the problem.

2. SCOPE OF EXEMPTIONS

a) It appears that the Copyright Office was responsible for the provisions of subsection (a)(4) exempting nonprofit "boosters" and "translators," which have been in the bill since 1965 and have not been the subject of debate since then. We can see a rationale for the exemption but, in the absence of additional support for it, we would have no objection to its deletion.

b) The technical points made concerning subsections (a)(3) and (b) should be explained in more detail before a decision is made as to changing the language of the bill.

[145](c) The draft substitute for the Won Pat amendment has many admirable features, but seems unnecessarily long and detailed.

(d) The Copyright Office agrees in principle with the position expressed by the Justice Department, among others, that mere retransmission of local signals does not, theoretically at least, damage the copyright owner's market. However, we recognize the practical difficulties in finding an equitable way to draw the line, and we have no trouble in accepting the graduated scale approach of the bill.

3. FEE SCHEDULE

Lacking independent economic data, the Copyright Office has no basis for an opinion as to the fairness of the present amounts in the bill.

4. ROYALTY TRIBUNAL

The idea for a Royalty Tribunal did not originate with the Copyright Office and we have some questions about details of its operation. Nevertheless, we welcome it in principle as a means of helping to settle disputes over the distribution of royalties paid under various compulsory license systems in the bill. With respect to the rather powerful role assigned to the Tribunal in connection with various rate-adjustments, we can see arguments on both sides. We recognize that the Tribunal could be more effective than **[146]**Congressional Committees in marshalling and evaluating the masses of economic data necessary for certain purposes, and that safeguards are provided in the form of a Congressional veto power.

With respect specifically to the cable television royalty schedule, we do not favor giving the Tribunal power to change the base on which fees are computed. In our opinion, this is a legislative function that should not be delegated.

We take no position as to whether the Tribunal should have the power, as provided in the bill, to adjust the amounts of the fees every five years. We are particularly troubled about the uncertain procedural situation that might result if the Tribunal's determination were, in fact, rejected by Congress. We believe that the initial review period is much too short, and we question whether five year intervals are long enough to do the thorough exploration of long range economic trends and changes in industry, communications, and business practices. We are also aware that, unlike the flat amount of the royalty in section 115, the graduated scale in section 111 includes a built-in adjustment for inflation.

At the same time, we can understand Congress' unwillingness to assume the sole duty of making a de novo review of copyright royalty rates. We also recognize that the amounts now in section 111 were decided upon without a thorough economic analysis, and may prove unfair to one side or the other. If Congress should wish to change the present **[147]**bill without taking cable out from under the Tribunal altogether, it could consider several alternatives, including:

1) A one-time review by the Tribunal, after a long-enough period for the study to be meaningful;

2) A specific percentage limit on the amount the fees could be increased by the Tribunal on a particular occasion; or

3) A provision requiring the Tribunal to make the studies contemplated in the bill, but mandating it to report it's findings and recommendations to Congress rather than making the determination itself.

The National Cable Television Association has proposed that, instead of exempting local signals, the bill exempt the first $ 25,000 in subscription system fees collected by a system from computation of copyright royalties. Variations of this proposal have been put forward from time to time in the past. We have no objection if Congress chooses to accept this proposal, nor do we affirmatively favor it.

[148]5. SECTION 501(c)

Although this provision was part of the consensus agreement, and is still favored by broadcasters, we cannot see that it serves much purpose. Under the concept of divisible copyright in Chapter 2 of the bill, the owner of any exclusive right under a copyright is considered the copyright owner for purposes of suit.

6. ORGANIZED SPORTS

The full liability of CATV for certain secondary transmissions of sporting events was deleted from the 1974 bill in the Senate, and we are inclined to agree that this action was wise.

7. RELATION BETWEEN FCC REGULATIONS AND COPYRIGHT

In the absence of court decisions or legislation, and in furtherance of national communications policy from its viewpoint, the FCC has promulgated rules protecting the rights of copyright owners. We do not advocate Congressional action to abrogate those rules as inconsistent with federal copyright policy. We also tend to doubt whether an attack on the exclusivity rules would succeed on constitutional grounds. However, we do very seriously question the wisdom of

administrative rules giving copyright protection in cases where either the courts or the Congress have withheld it. At the very least, we believe that the Commission should carefully reconsider its 1972 exclusivity rules as soon as the revision bill has been enacted.

[149]- DRAFT -

SECOND SUPPLEMENTARY REPORT OF THE
REGISTER OF COPYRIGHTS ON THE
GENERAL REVISION OF THE
U.S. COPYRIGHT LAW:
1975 REVISION BILL
OCTOBER 1975

PART 2:

Chapter VI - PERFORMANCES AND RECORDINGS MADE FOR NON-PROFIT BROADCASTING

Chapter VII - WORKS OF ART AND DESIGNS

Chapter X - COIN-OPERATED PHONORECORD PLAYERS (JUKEBOXES)

§ [150]CHAPTER VI PERFORMANCES AND RECORDINGS MADE FOR NON-PROFIT BROADCASTING

Sections Considered:

§ 106 - Exclusive rights in copyrighted works

§ 107 - Limitations on exclusive rights: Fair use

§ 110 - Limitations on exclusive rights: Exemption of certain performances and displays

§ 112 - Limitations on exclusive rights: Ephemeral recordings

Issues:

1. With respect to those uses of copyrighted works in nonprofit instructional programs that are exempted from copyright liability for performances under section 110(2), to what extent should the making and retention of recordings of the programs be permitted under section 112(b)?

2. With respect to the use of copyrighted works in the programming of public broadcasting:

a) Should all performances be subject to voluntary licensing, or should there be compulsory licensing under certain circumstances?

b) If any sort of compulsory licensing is to be considered:

1) What should be the scope of "public broadcasting" activities subject to compulsory licensing?

[151] 2) Should compulsory licensing extend to nondramatic musical works? nondramatic literary works? pictorial, graphic, and sculptural works?

3) To what extent should it extend to the making and distribution of recordings of programs?

4) What should be the conditions for obtaining and using a compulsory license?

5) How should the compulsory licensing fees be fixed?

6) What should be the procedural framework for collecting, accounting for, and distributing the compulsory licensing fees?

3. To what extent should exemptions be provided with respect to nonprofit broadcasting of literary works aimed at blind or otherwise handicapped persons?

4. Should the provisions of section 112(c), dealing with the making and distribution of recorded programs embodying "a performance of a nondramatic musical work of a religious nature, or of a sound recording of such a musical work," be retained in the bill?

[152]A. DISCUSSION OF ISSUES

1. "EPHEMERAL RECORDINGS" OF ITV PROGRAMS

Since its revision in 1948, the Berne Copyright Convention has contained an article permitting broadcasting organizations to make "ephemeral recordings" for their own authorized broadcasts under various conditions and limitations. "Ephemeral recording" provisions have been adopted in a number of foreign laws, and have been the subject of much discussion in international copyright literature. As stated in the 1965 Supplementary Report of the Register: "There has been a fairly general recognition of the practical need to grant a restricted privilege to broadcasters allowing them to make recordings of copyrighted works for use solely in their licensed performances of the works. The question has been, and still is, what limitations should be imposed on this privilege."

Noting that no "ephemeral recording" provision had been included in the earlier drafts of the revision bill, the 1965 Supplementary Report stated that, in the view of the Copyright Office, "the statute should contain a properly limited, realistic provision allowing both commercial and educational broadcasters to make ephemeral recordings as a part of their authorized broadcasting activities." The 1965 bill contained a section which, under very specific conditions, would have permitted a broadcaster to make a single record for use in its authorized broadcasts within a six-month period.

[153]This provision proved to be controversial on several counts. As a result of this controversy, at the 1965 hearings and thereafter, section 112 in the 1966 and 1967 bills was recast, breaking the "ephemeral recording" provision into three subsections dealing generally with: (a) ephemeral recording privileges of organizations that have acquired a license to transmit the work; (b) ephemeral recording privileges of nonprofit organizations that are free to transmit the work under the instructional broadcasting exemption of section 110(2); and (c) the copyright status of works that come into being as the result of an ephemeral recording. Motion pictures and other audiovisual works were removed from the exemption, and the 1967 report stated:

In general, the committee's amendments represent a liberalization of the ephemeral recording privilege. It should be emphasized, however, that the section is still firmly based upon the traditional concept of ephemeral recordings as mere technical adjuncts of broadcasting that have no appreciable effect on the copyright owner's rights or market for copies or phonorecords. As explained further in the following analysis of the section, the committee has not adopted changes that could convert the ephemeral recording privilege into a damaging inroad upon the exclusive rights or [sic] reproduction and distribution. On the other hand, the committee is aware of the practical problems facing educational broadcasters and other transmitters if they are required to seek separate clearances of performing and recording rights, and trusts that copyright owners will work out licensing arrangements covering these cases, under which performance and recording rights could be cleared at the same time.

[154]As reported, section 112(b) of the 1967 bill would have allowed instructional broadcasters who were legally entitled to perform or display a copyrighted work to make not more than two reproductions of the program embodying the work, as long as they were used solely for legally-authorized transmissions or archival purposes and except for one archival copy, were destroyed within one year. The representatives of educational broadcasters objected to these limitations on number and use of copies, and these restrictions were eliminated during the floor debate when the House passed the bill on April 11, 1967.

During the Senate hearings on the bill late in 1967, the representatives of authors and publishers argued strongly in favor of restoring these restrictions. The result was a compromise of sorts; when the Senate Judiciary Subcommittee reported the bill to the full committee on December 10, 1969, the restrictions had been restored but were relaxed to

allow making and distribution of up to 12 reproductions for use during a 5-year period. This amount and period was retained in the 1971 bill and in the 1973 bill as introduced and as reported by the Senate Judiciary Subcommittee to the full Committee on April 9, 1974. However, when the full Judiciary Committee reported the bill on July 3, 1974, these figures were increased to 30 copies on phonorecords and 7 years. The report accompanying the bill states:

[155]Scope of the privilege.--Under subsection (b) an instructional broadcaster may make "no more than thirty copies or phonorecords of a particular transmission program embodying the performance or display." No further copies or phonorecords can be reproduced from those made under section 112(b), either by the nonprofit organization that made them or by anyone else. Unlike ephemeral recordings made under subsection (a), however, exchanges of recordings among instructional broadcasters are permitted. An organization that has made copies or phonorecords under subsection (b) may use one of them for purposes of its own transmissions that are exempted by section 110(2), and it may also transfer the other 29 copies to other instructional broadcasters for use in the same way.

As in the case of ephemeral recordings made under section 112(a), a copy or phonorecord made for instructional broadcasting could be reused in any number of transmissions within the time limits specified in the provision. Because of the special problems of instructional broadcasters resulting from the scheduling of courses and the need to prerecord well in advance of transmission, the period of use has been extended to five [sic] years from the date the transmission program was first transmitted to the public.

On August 20, 1974, Senator Bayh introduced a formal amendment to section 112(b) of S. 1361 (No. 1831) that would again have removed any restrictions. The amendment read as follows:

(b) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a governmental body or other nonprofit organization entitled to transmit a performance or display of a work under section 110(2) or 114(a) to make copies of a particular transmission program embodying the performance and display, and to distribute such copies for transmission by or through other governmental bodies or nonprofit organizations.

[156]In the floor debate on S. 1361 on September 9, 1974, there was passing reference to the Bayh amendment which, because of the date of its introduction had not been the subject of any hearings or extended comments.

The bill was therefore passed without the amendment, but with a suggestion that it might be reintroduced and given more thorough consideration in the 94th Congress.

The House Judiciary Subcommittee hearings on July 10, 1975 were devoted in part to the Bayh amendment. The representatives of instructional broadcasters took the position, in Mr. Aleinikoff's words, that "while at first glance these latest numbers may seem far more ample than before, they unfortunately still are sufficiently restrictive to prevent practical application of the ITV exemption to the rapidly changing electronic world of American education." Charles Lieb, speaking on behalf of authors, publishers, and educational media producers, opposed the proposed amendment on four grounds: (1) that it would distort the Committee's original purpose to protect "ephemeral" recordings; (2) that it would "stunt private sector development of educational materials"; (3) that it would "foster government control of curriculum material"; and (4) that the amendment is unnecessary. He urged that the Committee return to the 12-copy/5-year formula.

[157]Senator Bayh chose not to reintroduce his amendment in the 94th Congress, and refrained from putting it forward during the mark-up process. Hence, S. 22, as reported by the full Senate Judiciary Committee on October 7, 1975, retains the 30-copy/7-year formula.

2. COMPULSORY LICENSING FOR PUBLIC BROADCASTING

In recent months the treatment of performance, displays, and "ephemeral" recordings of certain copyrighted works by nonprofit broadcasters has become a major issue in copyright law revision. On October 7, 1975 the Senate Judiciary Committee reported the 1975 revision bill (S. 22), with a new section (section 118) creating a compulsory license for this purpose, together with complementary revisions in several sections of Chapter 8, the provision dealing with the Copyright Royalty Tribunal.

The Supplementary Report of the Register, in explaining why broadcasts for systematic instructional purposes were exempted by section 110(2) of the 1965 bill but general nonprofit "educational" or "public" broadcasting was not, said:

[158]... the bill ... imposes no blanket "for profit" limitation on the right of public performance. In view of the recent upsurge in the number and importance of non-profit performances, particularly nonprofit broadcasts reaching huge audiences, we have concluded that the present blanket exemption has become too broad in its application to the new conditions of today, and that it would involve serious dangers to the author's rights if continued into the future.

Although it has been broadened to some extent since its original introduction in section 110(2) of the revision bill the exemption is still mainly limited to the use of nondramatic literary and musical works, and of pictorial, graphic and sculptural works, by nonprofit instructional broadcasters. The program involved must be "a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution," and "directly related and of material assistance to the teaching content of the transmission." The primary purpose of the transmission must be for reception in classrooms, by handicapped people or other students who cannot attend classroom instruction, or by government employees.

When the Senate Subcommittee reported the 1969 bill to the full Judiciary Committee on December 10, 1969, it rejected an amendment "to provide a compulsory license at regulated rates for the use of copyrighted material in the programs of public television which are intended for reception by a general audience." The Senate **[159]**Judiciary Committee adopted the same position when it reported S. 1361, the 1973 bill, to the full Senate on July 3, 1974. Its report (S. Rept. No. 93-983) stated:

Public broadcasting

While the bill grants an exemption to instructional transmission meeting the criteria of section 110(2), the amendment to provide a compulsory license at regulated rates for the use of copyrighted material in the programs of public television which are intended for reception by a general audience, was not accepted. The programming of public television includes an increasing emphasis on programs of an entertainment or general cultural nature. The committee is not unaware of the financial strains of many public broadcasting stations. Such stations may deserve greater financial assistance, but they should not be subsidized by this country's creative talent.

Copyright proprietors should promptly undertake efforts to improve procedures whereby public television may secure copyright clearances. The committee understands that the Register of Copyrights is prepared to furnish the assistance of the Copyright Office in studying clearance procedures and making recommendations aimed at the establishment of voluntary clearinghouse arrangements.

On August 19, 1974, Senator Mathias introduced an amendment to S. 1361 which would have added a new section 118 to the bill:

[160] "§ 118. Limitations on exclusive rights: Public broadcast of nondramatic literary and musical works

"(a) Public broadcast of nondramatic literary and musical works, sound recordings, and pictorial, graphic, and sculptural works shall be subject to compulsory licensing as follows:

"(1) Any public broadcasting organization or institution wishing to obtain a compulsory license under this section shall fulfill the following requirements:

"(A) At least one month before initial broadcast and thereafter at intervals and in accordance with requirements prescribed by the Register of Copyrights, record in the Copyright Office a notice stating its identity, address, and intention to obtain a copyright license under this section.

"(B) Deposit with the Register of Copyrights, at intervals and in accordance with requirements prescribed by the Register, a statement of account and the total royalty fees for the period covered by the statement based on the royalty rates provided for in clause (2).

"(2) The royalty rates under this section shall be determined by the Copyright Royalty Tribunal as reasonable royalty fees for the inclusion of non-dramatic works in public television and radio broadcasts. Such royalty rates may be calculated on a per-use, per-program, pro rated or annual basis as the Copyright Royalty Tribunal finds most appropriate with respect to the type of the copyrighted work and the nature of broadcast use, and may be changed or supplemented from time to time as deemed appropriate by the Copyright Royalty Tribunal. In particular circumstances, royalty rates negotiated between one or more public broadcasting organizations or institutions and one or more copyright owners or agencies may be substituted for the applicable rates determined by the Copyright Royalty Tribunal.

[161]"(3) The royalty fees deposited with the Register of Copyrights under this section shall be distributed in accordance with the following procedures:

"(A) During the month of July of each year, every person claiming to be entitled to compulsory license fees for public broadcast during the preceding twelve-month period shall file a claim with the Register of Copyrights in accordance with the requirements prescribed by the Register. Notwithstanding any provision of the antitrust laws (as designated in section 1 of the Act of October 15, 1914, 38 Stat. 730; *15 U.S.C. 12,* and any amendments of such laws), for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory license fees among them, may lump their claims together, and may designate a common agent to receive payments on their behalf.

"(B) On the first day of August of each year, the Register of Copyrights shall determine whether there exists a controversy regarding the statement of account or distribution of royalty fees. If the Register determines that no such controversy exists, the Register shall, after deducting reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If the Register finds the existence of a controversy, the Register shall certify to such effect and proceed to constitute a panel of the Copyright Royalty Tribunal in accordance with section 803. In such cases the reasonable administrative costs of the Register under this section shall be deducted prior to distribution of the royalty fees by the Tribunal.

"(C) During the pendency of any proceeding under this subsection the Register of Copyrights or the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

[162]"(b) For the purposes of this section, 'public broadcast' shall mean production, duplication, interconnection, distribution, and transmission of 'educational television or radio programs' by or for 'noncommercial educational broadcast stations,' as those terms are defined in title III, part IV of the Federal Communications Act of 1934, except as may be otherwise exempted under sections 110(2), 111(a)(2) and (4), 112(b) and 114(d)."

Like the Bayh amendment, the Mathias Amendment (No. 1815) was not adopted when the full Senate passed S. 1361 on September 9, 1974, but the door was left open to further consideration.

When the Senate Judiciary Subcommittee resumed its consideration of the revision bill in the 94th Congress, efforts were made to resolve the problem of public broadcasting through negotiation, and a number of meetings aimed at blanket voluntary licensing were held. The Mathias Amendment was not adopted by the Subcommittee when it reported the bill to the full Senate Judiciary Committee on April 13, 1975, but the following statement was issued:

JOINT STATEMENT OF CHAIRMAN AND MEMBERS OF SENATE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS

The Senate Subcommittee on Patents, Trademarks, and Copyrights during the processing of the legislation for the general revision of the copyright law gave lengthy and detailed consideration to an amendment proposed by Senator Charles McC. Mathias, Jr., to establish a statutory compulsory license for the use of certain categories of copyrighted works by public broadcasting. The initiative taken by Senator Mathias has considerably improved the possibility of a satisfactory resolution of the copyright problems of public broadcasting.

[163]At the request of the Chairman of the Subcommittee, representatives of public broadcasting and of the creators and owners of copyrighted material have been meeting to explore mechanisms other than a statutory compulsory license to facilitate the availability of such material to public broadcasting. Representatives of the Chairman, of each member of the Subcommittee, and of Senator Mathias attended certain of these meetings.

The Subcommittee notes that considerable progress has been made, and tentative understandings have been achieved on a number of issues. Some issues remain in dispute but the Subcommittee believes that these also can be resolved if the parties seek reasonable accomodations. [sic] Consequently, the Subcommittee urges the parties on an urgent basis to continue with the negotiations.

The Subcommittee will maintain its interest in obtaining a mutually satisfactory solution. The Subcommittee expresses the hope that a complete agreement will shortly be reached.

On July 10, 1975, the House Judiciary Subcommittee heard testimony on the Mathias Amendment from panels representing public broadcasters on the one side and authors, publishers, and performing rights societies on the other. The arguments of the public broadcasters in favor of the amendment can be summarized as follows:

1. Congress, since the House of Representatives last acted on the bill in 1967, has demonstrated an "overriding concern for the financial and administrative burdens of noncommercial broadcasting," notably through the Public Broadcasting Act. Public broadcasting is financed by public support and donations; it does not permit any commercial exploitation.

[164] 2. While Congressional commitment should support some form of special consideration for noncommercial broadcasting in the copyright area, it "does not necessarily mean that noncommercial broadcasters would not be willing to make some form of payments to copyright holders in recognition of the valuable contributions that their works make in the production of programs of high quality and excellence."

3. H.R. 2223, in its present form, would face public broadcasters "with a multitude of administratively cumbersome and very costly rights 'clearance' problems that cannot help but impair the vitality of their enterprise." Administrative overhead for individual clearances would be more than any royalties, and far beyond the budgets of any public broadcaster.

4. Public broadcasting is therefore seeking a compulsory license, but one that differs from the other compulsory licensing systems in the revision bill in three respects:

a) It covers only non-dramatic works, and does not apply to motion pictures and other audiovisual works. It does not cover unpublished works or dramatizations of non-dramatic works.

b) Unlike the other compulsory licensing schemes, where the initial rate is set in the statute, it calls upon the Copyright Royalty Tribunal to set the initial rates after "full and detailed consideration of exactly what type and amount of royalty fees are appropriate for the various kinds of copyrighted works and public broadcasting exposure."

c) It "specifically encourages substitution of mutually acceptable arrangements between copyright owners and public broadcasting for Tribunal determinations."

[165]The arguments of the representatives of the musical performing rights societies can be summarized as follows:

1. The clearinghouse arrangements under which copyrighted music is licensed for performance under the present law have worked well, and there is nothing about public broadcasting that sets it apart from all other users of music.

2. Compulsory licensing is wrong in principle. The three compulsory licenses now in the revision bill are there for historical reasons, none of which apply to public broadcasting, and are the result of carefully worked out compromises.

3. Television broadcasts require both "performing" and "synchronization" licenses. Public broadcasters recognize that they need synchronization licenses in order to duplicate their programs lawfully, since the "for profit" limitation of the present law does not apply to reproduction rights. At one time they obtained synchronization licenses, and they have been negotiating for performing licenses, that would include synchronization rights, for a decade. Although their gross revenues have grown from $ 100 million to $ 250 million, and although they are using more music than ever, they have not paid any license fees during this period.

4. Under current law, public broadcasting is liable for copyright infringements of both performance and synchronization rights: their performances are "for profit" under the decisions interpreting the 1909 Act; copyright owners have exercised forbearance in the expectation that agreement would be reached.

[166]5. Public broadcasting has grown and changed significantly in the past decade and will continue to do so. It now competes with commercial broadcasting as a national medium, and its programming contains much of the same types of entertainment and cultural material presented by commercial broadcasters. The revenues of public broadcasting have grown significantly, and the Mathias Amendment does not take in to account its potential for future growth.

6. None of the justifications put forward in favor of the Mathias Amendment are valid: there is no problem in clearing music for broadcasting, and license fees that have been offered were all reasonable. There is no difference between commercial and public broadcasting that justifies a compulsory license. As drafted, the Amendment is ambiguous, impractical and unworkable, and Government intervention is unnecessary and unwise.

The representatives of authors and publishers of nondramatic literary material made a number of these same arguments, and expressed their willingness to continue working toward voluntary licensing agreements. They stated that "the literary community is totally opposed to compulsory-license expropriation of literary works for reading or similar uses on public broadcasting, because it would cause serious damage and needlessly establish a dangerous precedent." They argued that one of the author's fundamental rights is to decline to permit a reading or similar use because of the serious economic or aesthetic damage it might cause, and that such a serious inroad is wholly unnecessary.

[167]Mr. Karp's statement made the following point:

... **[A]** compulsory licensing system would deprive the author of his fundamental right to protect his reputation and the integrity of his work from the injury a misuse or inappropriate use would cause. The author may believe that the producer who intends to expropriate his work under a compulsory licensing system is an incompetent who will mangle it; or that a particular use will distort it; or even, as is sometimes the case, that a particular work will suffer in oral delivery. A compulsory licensing system would deny him the right to protect his reputation or work against such injuries by declining to authorize the particular use.

The authors and publishers, like the performing rights societies concluded that voluntary licensing arrangements will be less costly and burdensome to public broadcasters than a compulsory licensing system.

Both sides at the House hearings referred to the ongoing negotiations and to some of the problems that had been encountered, including questions of compulsory arbitration and anti-trust exemptions. In anticipation of the impending mark-up of the revision bill by the full Senate Judiciary Committee, the representatives of the public broadcasting industry again pressed for adoption of the Mathias Amendment, which was adopted, with some changes, by the full Senate Judiciary Committee as section 118 of S. 22, as reported on October 7, 1975. The text of the new section is as follows:

[168]§ 118. Limitations on exclusive rights: Public broadcasting of nondramatic literary and musical works, pictorial, graphic, and sculptural works

(a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a public broadcasting entity to broadcast any nondramatic literary or musical work, pictorial, graphic, or sculptural work under the provisions of this section.

(b) Public broadcasting of nondramatic literary and musical works, pictorial, graphic, and sculptural works by a public broadcasting entity shall be subject to compulsory licensing upon compliance with the requirements of this section. The public broadcasting entity shall--

(1) record in the Copyright Office, at intervals and in accordance with requirements prescribed by the Register of Copyrights, a notice stating its identity, address and intention to obtain a license under this section; and

(2) deposit with the Register of Copyrights, at intervals and in accordance with requirements prescribed by the Register, a statement of account and the total royalty fees for the period covered by the statement based on the royalty rates provided for in subsection (c).

(c) Reasonable royalty fees for public television and radio broadcasts by public broadcasting entities shall be established by the Copyright Royalty Tribunal. Such royalty fees may be calculated on a per-use, per-program, prorated or annual basis as the Copyright Royalty Tribunal finds appropriate with respect to the type of the copyrighted work and the nature of broadcast use, and may be changed or supplemented from time to time by the Copyright Royalty Tribunal. A particular or general license agreement between one or more public broadcasting entities and one or more copyright owners prior or subsequent to determination of applicable rates determined by the Copyright Royalty Tribunal may be substituted for a compulsory license provided in this section.

[169](d) The royalty fees deposited with the Register of Copyrights under this section shall be distributed in accordance with the following procedures:

(1) During the month of July of each year, every person claiming to be entitled to compulsory license fees for public broadcasting during the preceding twelve-month period shall file a claim with the Register of Copyrights in accordance with the requirements that the Register shall prescribe by regulation. Notwithstanding any provision of the antitrust laws (as defined in section 1 of the Act of October 15, 1914, 38 Stat. 730; *15 U.S.C. 12,* and any amendments of such laws), for purposes of this paragraph any claimants may agree among themselves as to the proportionate division of compulsory license fees among them, may lump their claims together, and may designate a common agent to receive payments on their behalf.

(2) On the first day of August of each year, the Register of Copyrights shall determine whether there exists a controversy regarding the statement of account or distribution of royalty fees. If the Register determines that no such controversy exists, the Register shall, after deducting reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If the Register finds the existence of a controversy, the Register shall certify to such effect and proceed to constitute a panel of the Copyright Royalty Tribunal in accordance with section 803. In such cases, the reasonable administrative costs of the Register under this section shall be deducted prior to distribution of the royalty fees by the Tribunal.

(3) During the pendency of any proceeding under this subsection, the Register of Copyrights or the Copyright Royalty Tribunal shall withhold from distribution, an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

[170](e) The compulsory license provided in this section shall not apply to unpublished nondramatic literary or musical works or to dramatization rights for nondramatic literary or musical works.

(f) As used in this section, the term--

(1) "public broadcasting" means production, acquisition, duplication, interconnection, distribution, and transmission of educational television or radio programs (as defined in section 397 of the Federal Communications Act of 1934 *(47 U.S.C. 397))* by or for noncommercial educational broadcast stations (as defined in section 397 of the Federal Communications Act of 1934 *(47 U.S.C. 397)),* except as may be otherwise exempted under sections 110(2), 111(a)(2) and (4), 112(b), and 114(a); and (2) "public broadcasting entity" means any licensee or permittee of a noncommercial educational broadcast station, or any nonprofit institution or organization engaged in public broadcasting.

A comparison between the 1974 and 1975 versions of the Mathias Amendment discloses some changes in language and structure. The following substantive changes are worth noting:

(1) Sound recordings are no longer included in the classes of works subject to compulsory licensing;

(2) Instead of making the act of "public broadcast" subject to compulsory licensing, the new Mathias Amendment grants an exemption to "a public broadcasting entity," subject to compliance with the compulsory licensing requirements. The new term "public broadcasting entity" is defined as "any licensee or permittee of a noncommercial educational broadcast station, or any nonprofit institution or organization engaged in public broadcasting." The latter term ("public broadcasting") is defined very broadly indeed. Taken literally, this change could vastly expand the scope of the amendment beyond anything discussed in the House Subcommittee hearings.

[171]3. BROADCASTING FOR THE BLIND AND HANDICAPPED

A by-product of the negotiations aimed at voluntary licensing for public broadcasting was a proposal to exempt the reading of literary works in broadcasts to the blind from copyright liability. No agreement on this issue could be reached during the negotiations, and on July 3, 1975 the Senate Judiciary Subcommittee reported S.22 to the full Committee with a new subsection adding the following performing rights exemption in section 110:

(8) performance of a literary work in the course of a broadcast service specifically designed for broadcast on noncommercial educational radio and television stations to a print or aural handicapped audience.

Following a reference to this problem during the House Judiciary Subcommittee hearing on public broadcasting on July 10, 1975, a full discussion was presented during the testimony on September 18, 1975. While reserving the position of his organization on the language in which it is expressed, the representative of the American Association of Publishers endorsed the principle of a limited exemption for broadcasting of copyrighted works to the blind and deaf. The representative of the Authors League, however, opposed the provision adopted by the Senate Subcommittee, as well as the following proposal, which had been put forward by the American Foundation for the Blind:

[172](8) performance or the reading aloud (whether in person or by phonorecords) of books and other literary works, musical scores, instructional texts, specialized materials and other printed matter in the course of a broadcast service specifically designed or presented for blind and other physically handicapped persons (who are unable to read normal printed material as a result of such limitations) on non-commercial educational radio or television, including non-commercial broadcasting on any subsidiary carrier authority or cable transmission. Provisions of this subsection shall apply to non-commercial telecasts specifically designed for the aural handicapped.

The authors' opposition was based partly on the broad and ambiguous wording of the proposals, and on the lack of demonstrated need for an exemption. It was pointed out that the Division for the Blind and Physically Handicapped of the Library of Congress obtains royalty free clearances expeditiously for a large number of braille and recorded editions of copyrighted works. The representatives of public radio supported the Senate Subcommittee amendment, and urged that a corresponding right to make "ephemeral recordings" in this situation be written into section 112.

On October 7, 1975, the full Senate Judiciary Committee reported S.22 without any change in the new section 110(8). Meanwhile, however, Durward K. McDaniel, National Representative of the American Council of the Blind, wrote to Chairman Kastenmeier of the House Judiciary Subcommittee, presenting a revised text of the Council's earlier proposal, **[173]**this time limiting the exemption to performance "on any subsidiary radio carrier authority or cable transmission." Mr. McDaniel's full text reads as follows:

(8) performance or the reading aloud (whether in person or by phonorecords) of books and other literary works, musical scores, instructional texts, specialized materials and other printed matter in the course of a non-commercial broadcast service specifically designed or presented for blind or other handicapped persons (who are unable to read normal printed material as a result of such limitations) on any subsidiary radio carrier authority or cable transmission. Provisions of this subsection shall apply to non-commercial telecasts specifically designed for the aural handicapped.

4. "EPHEMERAL RECORDINGS" OF WORKS OF A RELIGIOUS NATURE

Section 112(c) first met the light of day on February 8, 1971, when Senator McClellan introduced S.644, the 1971 version of the revision bill. With one minor change it has remained a part of the bill since then, and was the subject of hearings before the Senate Judiciary Subcommittee on August 1, 1973, and before the House Judiciary Subcommittee on September 18, 1975. The provision, which was sponsored by the association of National Religious Broadcasters (NRB), would exempt as a form of "ephemeral recording" the making by a nonprofit organization of a single reproduction of a program containing nondramatic musical works "of a religious nature" for use in a single broadcast by a licensed broadcaster. As stated in the 1974 Senate report:

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

The representative of SESAC, Inc., also representing other performing rights societies and musical copyright owners, regarded the issue as "whether or not a religious program producer can use a piece of religious music and distribute it to approximately 4,000 radio stations without any compensation to the creator of that religious music." He argued that a payment of mechanical reproduction fees in this situation would be nominal, but to withhold it altogether would violate established trade practices and would discriminate against the creators of music "of a religious nature," a term he considered questionably vague.

The representatives of religious broadcasters stated that religious programs are produced on tape or disc for distribution by mail of one copy only to each broadcast station **[175]**carrying the program. None of the programs are prepared for profit, and the program producer either pays the station to carry the program or furnishes it free of charge. The stations have performing licenses so that the copyright owners receive compensation. Following the performance the tape is returned or the disc destroyed. To require a second payment for the mechanical reproduction would only drive some of the copyrighted music off the air.

B. COMMENTS AND RECOMMENDATIONS

1. LIMITATIONS ON RECORDINGS FOR ITV (THE "BAYH AMENDMENT")

The Copyright Office adheres to the position stated in a letter from the Register of Copyrights to Senator McClellan, dated January 31, 1975, expressing opposition to the Bayh amendment. The Register stated:

I feel that some limitation is essential, and 30 copies should be ample to facilitate the activities of nonprofit organizations. The circulation of as many as 30 copies itself presents some danger to creators, since it is extremely difficult to insure that unauthorized copies are not made. Moreover, I believe a limitation on the period the copies or phonorecords may be held is eminently sound. There is nothing magic about a seven-year cut but, as a matter of principle, if a program is to be rebroadcast authors and proprietors of the copyrighted works embodied in the program should be entitled to renegotiate a new deal, including additional compensation.

[176]2. COMPULSORY LICENSING FOR PUBLIC BROADCASTING

a. The failure of the negotiations, aimed at finding a voluntary solution to these problems, which seemed so promising at the time of the House hearings in July, 1975, is to be regretted and deplored. Compulsory licensing has been, and should be, regarded as an extreme last resort in copyright law. Despite the expressions of blame and disappointment now being exchanged, the Copyright Office remains unconvinced that voluntary arrangements are impossible other than under the compulsion of government regulation. It is true that public broadcasting is not paying anything now, that it enjoys at least some degree of exemption with respect to completely nonprofit performances, that its budgets remain low and clearances difficult, and that it is offering to pay fair royalties in the future under a compulsory license. It has also failed so far to gain the terms it was seeking in voluntary negotiations. But to conjure up the threat of massive government-run compulsory licensing machinery in an effort to improve its bargaining position is of questionable necessity.

b. A careful review of the statements made during the negotiations in various written submissions, and at the hearings, indicates that clearance of music is public broadcasting's foremost problem, and that a major impediment to a voluntary solution to that problem has been the lack of a statutory anti-trust exemption. At the same time, enactment of such an exemption has implications and unforeseeable consequences beyond the current problems of public **[177]**broadcasting. A compulsory license limited to nondramatic musical compositions, might, in view of the fairly organized structure of the industry, be made to work fairly well. Certainly, the dangers inhering [sic] in the compulsory licensing of literary works are less evident in the case of music.

c. The Copyright Office considers the dangers of an unqualified compulsory license for literary works so great and the need for it so unproven, that it could not support a copyright bill containing such a provision, including the revision bill as it was reported by the Senate Judiciary Subcommittee on October 7, 1975. The loss of control by authors over the use of their work in a major mass communications medium, and the dangers of State control and loss of freedom of expression implicit in the proposed system, would probably be too high a price to pay even if public broadcasting were being severely hampered by the legal obligation to get clearances. But, aside from the problem of reading to the blind, discussed below, it cannot be said that the practical problems of public broadcasters in getting clearances for reading literary works, have been illustrated convincingly, much less proved.

d. It has been suggested that the problem of loss of control might be solved by requiring a notice to be filed, perhaps two weeks or one month in advance, on the copyright owner (presumably at the last address shown in the records of the Copyright Office), thus providing a right of refusal as in section 110(4). We have **[178]**serious doubts about both the practicability or the necessity of such a system, though obviously it would be preferable to a raw compulsory license.

e. The problem of pictorial, graphic, and sculptural works, including photographs, strikes us as a great deal more real. Here, the public broadcasters' needs are obviously demonstrable, and the difficulties of individual clearance more evident. Should a compulsory license be established for music, its extension to graphics might be justified in theory. The problem here is that there is no organization or representative to speak for artists and photographers, whose exclusive rights should not, in fairness, be swept aside in the interests of expediency and business convenience.

f. The Copyright Office is not convinced that any compulsory license is necessary for public broadcasting. If Congress considers that some sort of compulsory licensing is needed, we believe it should be confined to music, and that the Mathias amendment should be completely rewritten to make its vague and ambiguous language conform to the language and context of the revision bill, to insure that it goes no further than intended or needed, and to provide for a workable and fair administrative framework. The rights to perform, and to make and distribute recorded programs, should be limited to bona fide noncommercial educational broadcasters, and should be carefully circumscribed in the statute itself.

[179]g. Part of the language of the Mathias amendment appears aimed at allowing schools to make videotape recordings of public broadcasts. This is a relevant question in connection with classroom uses under the fair use doctrine in section 107, and should be dealt with in that context in the legislative report.

h. One possible way of dealing with the problem of pictorial, graphic and sculptural works might be to provide a temporary moratorium. During the moratorium, public broadcasters would be free to use graphics, but only if they made reports on the works used, and the nature and frequency of their use, to the Copyright Office. The Office could be charged with the responsibility to report its findings to the Congressional Committees by a certain date, together with recommendations for legislative action. It could be hoped that, out of this process, a nation-wide clearinghouse arrangement with standard fees and blanket licensing agreements covering graphics, could be evolved.

i. The Copyright Office opposition to compulsory licensing schemes involving primary uses of literary works, even if combined with advance notice and right of refusal, is deep-seated. At the same time, we recognize the advantages in centralized blanket licensing on a voluntary basis for all concerned. We also recognize that negotiations toward this end are not going to occur automatically and need to be encouraged, if not strongly induced. We do not favor a moratorium in this area, but perhaps the same effect could be **[180]**achieved by limiting liability for statutory, or even actual, damages for a stated period, during which the patterns of use and the practical needs of copyright owners and users could be studied in some depth.

j. As already indicated, whatever its substantive content, the language and structure of the Mathias Amendment needs thorough revision. In addition, if changes in the duties and functions of the Copyright Royalty Tribunal are contemplated as a result of actions on the Mathias Amendment in either House, a careful review of the substantive and procedural impact of these changes on the workings of the other compulsory licensing provisions in the bill should be undertaken at the same time.

3. BROADCASTING FOR THE BLIND AND HANDICAPPED

The recent proposal of the American Council of the Blind appears to form the basis for a reasonable compromise, based on limiting the exemption to subcarriers or restricted cable facilities. Where a royalty-free license is desired for broadcasts and other transmissions going beyond those permitted under the exemption, a possibility for expediting clearances would be to use the procedure proposed in section 710 of the current Senate version of the bill (S.22 as reported on October 7, 1975). This provision authorizes the Register of Copyrights, in consultation with the Chief of the Library of Congress Division for the Blind and Physically Handi**[181]**capped, to establish standardized forms and procedures for clearing rights for braille and tape editions, voluntarily, at the time of copyright registration. In any event, the language of section 110(8) in the current Senate version needs substantial tightening and clarification.

4. "EPHEMERAL RECORDINGS" OF WORKS OF A RELIGIOUS NATURE

A precedent for special treatment of works of a religious nature is found in section 104 of the present copyright law, which states:

... nothing in this title shall be so construed as to prevent the performance of religious or secular works such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or

obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit.

Even more pertinent, a specific exemption using the words "works of a religious nature" and referring to "services at a place of worship or other religious assembly" appears in section 110(3) of the current bill. The 1974 Senate Report on this provision reads, in part, as follows:

The exemption, which to some extent has its counterpart in sections 1 and 104 of the present law applies to dramatico-musical works "of a religious nature." The purpose here is to exempt certain performances of sacred music that might be regarded as "dramatic" in nature, such as oratorios, cantatas, musical settings of the mass, choral services, and the like. The exemption is not intended to cover performances of secular operas, musical plays, motion pictures, and the like, even if they have **[182]**an underlying religious or philosophical theme and take place "in the course of [religious] services."

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

Special treatment for works of a religious nature and for performances in the course of religious services are common in foreign laws and have not been challenged in U.S. copyright law. The question can thus be approached purely as a matter of policy. The Copyright Office takes no position as to whether or not section 112(c) should be retained in this bill.

§ [183]CHAPTER VII WORKS OF ART AND DESIGNS

Sections Considered:

§ 101 - Definitions ("pictorial, graphic, and sculptural works"; "useful articles")

§ 102 - Subject matter of copyright: In general

§ 106 - Exclusive rights in copyrighted works

§ 113 - Scope of exclusive rights in pictorial, graphic, and sculptural works

TITLE II - Protection of Ornamental Designs of Useful Articles

Issues:

1. Should the bill for general revision of the copyright law contain provisions, such as those now in Title II, aimed at establishing a special form of protection, based on but more limited in scope than copyright, for ornamental designs of useful articles?

2. Assuming that the bill establishes a sui generis form of design protection, is the inter-relationship between copyright and design protection, under section 113 of Title I and sec. 227 of Title II, satisfactory?

[184] 3.Are the provisions of sec. 202 ("Designs not subject to protection") too restrictive?

4. Should protection for a design under Title II commence when it is "first made public," as provided by sec. 204, or on some other date?

5. What should be the term of protection under the design title?

6. Are the administrative provisions of secs. 209-218, including sec. 215 on fees, satisfactory?

7. Under what circumstances should the claimant of protection for a design under Title II be entitled to maintain an action for infringement in the absence of a certificate of registration?

8. Where should the "Design Act" be administered?

9. Are the amendments proposed by sec. 232 to title *28 U.S.C. § 1498*(a), dealing with U.S. Government infringement of a protected design, satisfactory?

10. With respect to calligraphy:

a) Should calligraphic works be subject to copyright protection?

b) To what extent should a calligrapher be entitled to reproduce copyrighted text matter in a calligraphic work?

[185] 11. With respect to designs for type faces:

a) Should an original type face design be eligible for copyright protection under Title I?

b) Should, alternatively or cumulatively, an original type face design be entitled to design protection under Title II?

c) Are the definitions of "useful article," in sec. 101 and sec. 201(b)(1), and the list of designs not subject to protection in sec. 202, satisfactory in relation to type face designs?

d) Should the bill specifically limit the protection for type face designs:

1) By restricting liability to the unauthorized duplication of the design in the manufacture of fonts, matrixes, plates, etc. used for printing, thus freeing printers, authors, publishers, photocopiers, etc. from any risk of liability?

2) By establishing a compulsory licensing system insuring that anyone wishing to manufacture a font, matrix, place, etc., reproducing a protected type face design, could do so on payment of a reasonable fee?

[186]A. LEGISLATIVE HISTORY OF
SECTION 113 AND TITLE II

Until 1954 it had been widely assumed that the only statutory protection for the designs of utilitarian articles was that available under the design patent law, which dated back to 1842. That patents have proved inadequate as a practical form of protection for designs is something on which most people will agree. The main arguments usually advanced against the patent law as a means of protecting designs are:

1) Inappropriateness. Patentable designs must be more than "original" (created independently without copying); they must also be "novel" (new in the absolute sense of never having existed before anywhere) and "non-obvious" (the product of a creative act going beyond mere talent or artistry). A patented design that meets these extraordinarily high standards gets more than rights against copying; a design patent consists of a complete monopoly over the use of the design in any manner.

2) Judicial hostility. Because the standards of protection are so high and the scope of protection is so broad, the mortality rate of those design patents that have been tested in the courts has been extremely high.

[187] 3) Cost. Obtaining a design patent is expensive, in some cases prohibitively so. Nearly all applicants are required to retain an attorney, and the substantial costs of filing and pursuing an application through the searching process often operate as a deterrent, especially since the chances of issuance are problematical. An applicant with several new designs has no way of knowing which will be popular, but in most cases cannot afford to apply for design patents on all of them.

4) Delay. The patent examining process consists of searching the "prior art" to determine novelty in an absolute sense. Whatever realistically may be the effectiveness of prior-art searching in the case of designs, the process is inevitably a slow one. In the design patent area, the Patent and Trademark Office now has a backlog of about 7 months,

and the average time lag between filing and issuance for a design patent is about 21 months. It must be emphasized that protection under a patent starts only upon issuance, so that a design may be vulnerable to copying during the time a patent application is pending.

[188]Beginning around 1914, the growth and economic impact of design piracy, and the nearly total failure of the patent law as a method to combat it, led to a variety of alternative efforts to protect original designs. The attempts to stop design piracy by industry self-regulation through the NRA Codes, and later through the formation of "originators' guilds" combined with a form of boycott, were quite effective for a time during the 1930's, but were eventually struck down by the courts. Judicial actions aimed at getting the courts to declare design piracy illegal on any one of a number of theories -- Federal copyright, State common law copyright, Federal and State trademarks, unfair competition (including claims of "passing off" and "misappropriation"), fraud and breach of confidence, implied contract, etc. -- were almost entirely unsuccessful.

During this period there were constant and frequently intense efforts to obtain Congressional enactment of separate design legislation. Between 1914 and 1957 nearly 50 design protection bills were introduced, and a number of hearings were held. Some of the bills were closer to copyright than patent; some leaned the other way; most of them took the form of special protection based on copyright principles but considerably more limited in scope and duration than traditional copyright. Several of the bills came close to enactment, but none made it all the way through both Houses.

[189]In 1952, a successful program for the general revision of the patent laws resulted in comprehensive new patent legislation in which the design patent provisions were deliberately left untouched. The basic reason for leaving the design provisions alone was an agreement among the sponsors of the legislation that the patent law was not the place to deal with design protection. It was understood that, as soon as the general patent bill had been enacted into law, the Coordinating Committee of the National Council of Patent Law Associations would turn to the development of separate design legislation based on a registration system similar to copyright.

This effort started several years before the current program for general revision of the copyright law got underway in 1955, and for some time the two legislative efforts proceeded independently of each other. However, in addition to spearheading the general revision effort during its first decade, the Copyright Office was actively and intimately involved with the NCPLA Coordinating Committee and the Patent Office in the development and drafting of the design bill, and with the compromises that produced what is now Title II of the 1975 copyright bill. It was originally contemplated, with considerable optimism, that the design bill would be enacted before the legislative phase of the general revision bill had even begun.

[190]A radical change in the legal status of original designs in the United States occurred on March 8, 1954. On that date the U.S. Supreme Court, by a 7 to 2 majority in *Mazer v. Stein , 347 U.S. 201,* upheld the copyrightability of "works of art" that had been incorporated as the designs of useful articles. The Court strongly endorsed a Copyright Office Regulation accepting as copyrightable "works of artistic craftsmanship, in so far as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware, and tapestries, as well as all works belonging to the fine arts, such as paintings, drawings and sculpture...."

The Mazer case involved identical copies of lamp bases in the form of statuettes representing human figures. The figurines had been registered for copyright as "works of art." The majority of the Court, with Justices Douglas and Black dissenting, held that works of art are copyrightable as the "writings of an author," that original works of art do not cease to be copyrightable, as works of art, when they are embodied in useful articles, and that for this purpose the following factors make no difference whatever:

1) the potential availability of design patent protection for the same subject matter; on this point Justice Reed said:

[191]We ... hold that the patentability of the statuettes, fitted as lamps or unfitted, does not bar copyright as works of art. Neither the Copyright Statute nor any other says that because a thing is patentable it may not be copyrighted. We should not so hold.

Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea -- not the idea itself. ... The copyright protects originality rather than novelty or invention -- conferring only "the sole right of multiplying copies." Absent copying there can be no infringement of copyright. Thus, respondents may not exclude others from using statuettes of human figures in table lamps; they may only prevent use of copies of their statuettes as such or as incorporated in some other article. ... The dichotomy of protection for the aesthetic is not beauty and utility but art for the copyright and the invention of original and ornamental design for design patents. We find

nothing in the copyright statute to support the argument that the intended use or use in industry of an article eligible for copyright bars or invalidates its registration. We do not read such a limitation into the copyright law.

2) the intention of the artist as to commercial application and mass production of the design.

3) the aesthetic value of the design, or its total lack thereof; the majority opinion on this point states:

[192]The successive acts, the legislative history of the 1909 Act and the practice of the Copyright Office unite to show that "works of art" and "reproductions of works of art" are terms that were intended by Congress to include the authority to copyright these statuettes. Individual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art. ... They must be original, that is, the author's tangible expression of his ideas. ... Such expression, whether meticulously delineating the model or mental image or conveying the meaning by modernistic form or color, is copyrightable.

4) the fact that the design, in its useful embodiment, was mass-produced and merchandised commercially on a nation-wide scale.

Justice Reed concluded his opinion for the majority by saying:

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

The revolutionary impact of the Mazer decision upon design protection took some time to sink in. Its reach clearly went beyond lamp base designs, but did it go so far as to cover all original industrial designs (machinery, automobiles, refrigerators, etc.)? The Copyright Office decided that, for purposes of registration, the following lines should be drawn in its regulations, which are still in effect:

[193]§ 202.10 Works of art (Class G).

(a) General. This class includes published or unpublished works of artistic craftsmanship, insofar as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware, and tapestries, as well as works belonging to the fine arts, such as paintings, drawings and sculpture.

(b) In order to be acceptable as a work of art, the work must embody some creative authorship in its delineation or form. The registrability of a work of art is not affected by the intention of the author as to the use of the work, the number of copies reproduced, or the fact that it appears on a textile material or textile product. The potential availability of protection under the design patent law will not affect the registrability of a work of art, but a copyright claim in a patented design or in the drawings or photographs in a patent application will not be registered after the patent has been issued.

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

[194]This meant that virtually all original two-dimensional designs for useful articles (textile fabrics, wallpaper, floor tiles, painted or printed decorations, etc.), were subject to copyright registration. The same was true of those three-dimensional designs that can be conceptually separated and are capable of existing independently of the utilitarian aspects of the article embodying them (lamp bases, carvings on furniture, costume jewelry, decorator items, etc.). This interpretation has been accepted in a number of court decisions and has not been successfully challenged. During fiscal year 1975 the Patent and Trademark Office issued 3,631 design patents, and the Copyright Office made 9,617 registrations covering designs for useful articles. Although it has substantially expanded the scope of designs subject to copyright registration as "works of art," the Mazer case, as interpreted by the courts and the Copyright Office, leaves unprotected a large body of creative work: three-dimensional designs of utilitarian articles as such, as distinguished from three-dimensional ornamentation or embellishment incorporated in them.

In its origins in the early 1950's, the design bill was intended as the main alternative to design patents for all original designs of useful articles. After the impact of the Mazer decision and its interpretation had been absorbed, the

interaction between the proposed design legislation and the present or proposed copyright law **[195]**had to be carefully reexamined. Extended discussions and debates produced a compromise, now embodied in section 113 of Title I and sec. 227 of Title II.

The current design bill, as separate legislation, was first introduced by Chairman Willis of the House Judiciary Subcommittee on July 23, 1957, by request of the Chairman of the Coordinating Committee on Designs of the National Council of Patent Law Associations. The bill was introduced in both Houses in the next (86th) Congress, and Senate hearings were held on S. 2075 (the O'Mahoney-Wiley-Hart bill) on June 29, 1960. Further hearings were held in the Senate on August 16 and 17, 1961 on the 87th Congress' version of the bill. The full Senate Judiciary Committee reported it favorably on July 12, 1962, and the bill (S. 1884) passed the Senate on July 23, 1962. In the 88th Congress the Senate, without further hearings, passed the bill on December 6, 1963, and a hearing was held in the House Subcommittee on December 12, 1963. The Subcommittee reported the bill favorably to the full House Judiciary Committee on August 12, 1964, but there was no further action during the 88th Congress. In the following Congress the Senate Subcommittee held a hearing on July 28, 1965, and the bill was reported with amendments by the full Committee on July 22, 1966. It passed the Senate five days later. The bill was reintroduced in the 90th and 91st Congresses, and on December 10, 1969 the Senate Judiciary Subcommittee reported it as Title III of the general revision bill. **[196]**In this form it was introduced again in the 92nd and 93rd Congress, was reported favorably by the Senate Judiciary Committee on July 3, 1974, and passed the Senate on September 9, 1974.

To summarize, the design bill has been pending in one or both Houses ever since its initial introduction in 1957. It has been the subject of hearings three times in the Senate and once in the House. On four occasions it has passed the Senate. On two other occasions it has been reported favorably by the House and Senate Judiciary Subcommittees, and was the subject of a hearing before the House Judiciary Subcommittee in December, 1963. As a historical sidelight, it is worth noting that Representative Gerald R. Ford sponsored six successive design bills bearing his name, in every Congress from the 86th through the 91st.

Aside from the Justice Department, there has been no expressed opposition to the design bill in either House since it was joined to the copyright bill in 1969. Amid all the sound and fury over protection for type face designs at the House Subcommittee hearing on July 17, 1975, the only witness on Title II as such strongly supported its enactment as part of copyright law revision.

[197]B. THE TYPEFACE ISSUE

In a letter to Chairman Kastenmeier of the House Judiciary Subcommittee dated June 6, 1975, the Register of Copyrights stated that the question of protection for designs of typefaces had become a major point of concern for the Copyright Office. The letter went on as follows:

... To the best of my recollection, no issue of protection for typeface designs of typeface designs as works of art under the copyright law was raised during the early part of the revision program, including the period during which the bill was under consideration by your Subcommittee. I first became aware of typeface design as a major domestic copyright issue in the early 1970's when the widespread introduction of photomechanical processes for reproducing the printed word promised to alter the typographic industry radically.

In the Copyright Office, my predecessor, Mr. Kaminstein gave serious consideration to industry arguments that we should register claims to copyright in typeface designs as works of art. We had, and still have, a regulation **[*37 C.F.R. 202.1 (a)*]** that has been interpreted to prohibit copyright registration for typeface designs, and the Copyright Office was urged either to change the regulation or to interpret it differently. Following Mr. Kaminstein's retirement the issue was reserved, but has been raised again during the past two years, both in the Copyright Office and in the courts.

Meanwhile, the technological developments in this field were being felt throughout the world, and resulted in a movement to obtain better international protection for typeface designers. The United States participated in the development **[198]**of, but did not sign, the Vienna Typeface Convention of 1973, which would obligate members to protect original typeface designs for a minimum of 15 years under one or another form of law, specifically including copyright protection.

Shortly after I became Register of Copyrights, I was once more presented with the petition and arguments of domestic proponents of copyright protection for typeface designs, some of whom had been active in formulating the international treaty. However, I was also made aware of considerable opposition to any change in the Copyright Office Regulations to permit registration of typeface designs. To provide an opportunity for both sides to present their arguments openly, I held a public hearing on November 6, 1974, the first rulemaking hearing ever held by the Copyright

Office, and received testimony on the issues implicit in any change in the regulations affecting typeface designs ... We specifically requested comment on five points. Written comments were received through January 15, 1975.

In my closing statement at the conclusion of a highly informative all-day hearing, I had to say that I felt I was "between a rock and a hard place." A strong case was made by each side. Proponents of a change in the regulation sought to demonstrate the significance of artistry in designing typefaces -- a "beautiful group of letters," and the differences between the typefaces of different designers. Opponents of any change raised the issues as to the scope of my regulatory authority, and the practical ramifications of an administrative change in this case.

Among others, Irwin Karp, Counsel for the Authors' League, insisted that protection for typeface designs should be dealt with solely as a legislative matter. He said:

[199]'We also believe that if any change ultimately ought to be made in the status of publishing typography -- font and face -- it should certainly not be done by the inflexible method of change in your registration regulations. Neither you or the regulations have the capacity to cope with multitudinous problems that would be created, ...

You are not a legislator. You can only say yes or no. Register or not Register. And you can't mediate or modify the impact of that absolute judgment on many industries and the whole process of disseminating information and culture in this country.'

[Transcript of Typeface Hearing, November 6, 1974, pages 83-84]

As I indicated at the Office's hearing, I take this argument very seriously. I also believe that, implicit in the provisions of H.R. 2223 is the hitherto unexplored question of whether and to what extent typeface designs would be protected under the language of your revision bill, including the design legislation in title II. At the Office's hearing I asked proponents and opponents to reflect on the design bill as a possible solution to the question of protection for typefaces.

From the written comments, two primary issues emerged. First, the term of protection in the design bill is considered by many to be too short for typeface designs; enactment in its present form would not enable us to join the Vienna Typeface Convention. Some doubt was also expressed as to whether typeface designs are within the subject matter of the design bill, since the bill protects "ornamental designs of useful articles" and the various physical embodiments of typeface designs might not come within the bill's definition of "useful articles."

[200]Under the circumstances, I believe it would be highly appropriate for you to schedule time at your hearings to receive testimony from both sides on the question of protection for typeface designs under either title I or title II of your bill."

The hearing, which was held on July 17, 1975, produced a sharp controversy. Proponents of typeface design protection argued that new photocomposition techniques have made unauthorized copying of typefaces an urgent problem, that original designs for fonts of type are the "writings of an author" in both the constitutional and the statutory sense, that no case law in any field rules out their copyrightability, that registration for typeface designs would impose no burden on authors and reprinters, and that both Titles I and II of the revision bill should be amended to make clear that typeface designs can be considered "original" and that fonts of type are "useful articles." They also recommended that the term of protection under the design bill be extended to 15 years, to conform with international standards.

Opponents argued that neither Title I nor Title II of the bill as drafted protects typeface designs; they opposed any amendment of Title I to bring typeface designs within the scope of traditional copyright protection, and they stated that Title II would be inappropriate without "very extensive amendment including mandatory licensing at reasonable rates." They argued that the issue is not **[201]**one of "typeface piracy," but of creating exclusive rights for a few big manufacturers, who would use them to enforce tying arrangements between their machines and fonts. Concern was expressed by a representative of magazine publishers lest recognition of exclusive rights might lead to suits to enjoin publication of printed matter. Representatives of typographers and the American Institute of Graphic Arts expressed concern about the danger of excessive protection that would foreclose the use of certain typefaces.

In a letter dated July 28, 1975 to Chairman Kastenmeier, supplementing his testimony on July 17, Michael Parker, Director of Typographical Development for the Mergenthaler Linotype Company, stated:

"As stated at the hearings, Mergenthaler has no objection to compulsory licensing of protected typeface designs at a reasonable fee. Additionally, it does not seek unfettered protection for original typeface designs. It seeks only to protect original typeface designs:

1. from unauthorized use to make means for composing text, and

2. from such unauthorized means being used to compose a page of text.

We make no claim to the composed page, and would have no objection to expressly stating that text composed from an unauthorized means is not an **[202]**infringement of the protected typeface design. These limitations and disclaimers provide a complete answer to the objections of the International Typographers' Association, and Mr. Wasserstrom, Counsel for Hearst Corporation."

A recent letter to the Register of Copyrights from Mergenthaler's attorney states:

"... The sole question that should be considered by the Copyright Office is whether original typeface designs are copyrightable subject matter under the present Copyright Law. If there is any doubt, this doubt must be resolved in favor of registration in accordance with established Copyright Office practice.

It is respectfully submitted that the outcome of the July 17 hearings before Representative Kastenmeier are wholly immaterial to the responsibility of the Copyright Office to determine if original typeface designs are entitled to copyright protection under the present Copyright Law. The impact of such registration should be equally immaterial to the Copyright Office and is a matter solely for the Courts to consider in appropriate cases. Of course, if the Copyright Office feels the present law grants too many rights in the case of original typeface designs, that is a matter which can be properly raised in the legislative forum of Congress, but it should not be used as an excuse to deny registration of copyrightable subject matter.

It is courteously urged that the Copyright Office reach an early determination whether it will or will not register the claim of copyright in original typeface designs under current law. The decision should not be deferred pending the "political winds" which might blow from Congress.

[203]The Copyright Office has had pending for more than a year an application by Eltra Corporation, parent of Mergenthaler Linotype Company, to register its claim of copyright in an original typeface design entitled ORION. Prompt action on this application is urged. In this regard, it is the desire of Mergenthaler to have a judicial determination, if necessary, on whether it is entitled to register the claim of copyright in ORION in order to clarify the status of the current law insofar as original typeface designs in view of the limitations in Section 113 of Title I, H.R. 2223."

C. COMMENTS AND RECOMMENDATIONS

1. THE DESIGN PROTECTION ACT (TITLE II)

a. As the law now stands, a large area of designs of useful articles is subject to full copyright protection, while the remainder, consisting of a large body of fine three dimensional designs, is virtually without effective protection. The design bill (Title II of the revision bill) would remedy this injustice and restore a balance to the level of deserved protection in a field involving a high degree of creativity.

b. The Copyright Office adheres to its position strongly favoring the enactment of Title II of the bill. We agree with the comments of the National Aeronautics and Space Agency (NASA) that a decision should be made as to whether this Title of the bill is to be part of title 17 of the U.S. Code, and that an effort should be made to clear up possible ambiguities resulting from conjoining the two titles in the Code.

[204]c. Section 202 of the design title has been strongly criticized for its failure to protect the shape of wearing apparel. However, this restriction represents a hard-won compromise, and may well be the reason why there has been no opposition to the bill since 1969, other than the traditional opposition of the Department of Justice.

d. In the context of protection for typeface designs under Title II, questions have been raised as to whether a font is a "useful article," and whether any typeface design can qualify for protection under subsections (b) and (c) of section 202. In our opinion there is no question that truly original designs for typefaces can qualify for protection under the

design title, and we do not feel that revisions in the definition of "useful article" or the language of Sec. 202 are necessary to achieve this purpose.

e. In its testimony before the House Judiciary Subcommittee on May 8, 1975, the Department of Commerce raised several points, all worthy of consideration:

(1) The bill should not require that the design be made public before registration;

(2) The bill should permit multiple designs to be filed on a single application;

(3) Declarations should be allowed in lieu of the requirements for statements under oath;

[205](4) The fee of $ 15 is too low, and the Administrator should have discretion to set the fee at cost. The Copyright Office has no fundamental objection to these suggestions. We observe, however, that multiple designs should be registrable on a single application only if they bear some discernable relation to each other. As for the fee, we have severe reservations about the Administrator being able to set fees on the basis of costs of operations in cases of this sort, where he could be in a position to subsidize the inefficiency of his own operations. If, as we are recommending, administration of the design operation is entrusted to the Copyright Office, the design fee should bear some relation to standard copyright fees.

f. A point raised by the Patent Office, by the representatives of typographers, and supported by Alan Latman in his testimony before the House Judiciary Subcommittee, has to do with the possibility, under Sec. 220, of maintaining an action for infringement without a certificate of registration. The Copyright Office sees no objection to tightening this provision to prevent maintenance of suit in the absence of a certificate of registration.

g. The question of where the design title should be administered is unanswered in the bill but some expectation has been expressed that the Administrator would be the Commissioner of Patents or a subordinate official of the Patent Office. There **[206]**were, in fact, some informal discussions of this possibility over 20 years ago. However, in the light of the Mazer decision and the extremely close relationship between copyright and design registration, the Copyright Office now feels strongly that administration of the design title should be in the Copyright Office.

h. Both the Department of Justice and NASA raise questions concerning Sec. 232, which concerns suits against the United States Government for design infringement under the new bill. We agree with the suggestions advanced by NASA for technical improvements in the section, but we do not share the Justice Department's concern about possible "difficulties for government procurement."

2. CALLIGRAPHY

The age-old "art of beautiful writing" has not, unless accompanied by illuminated letters, ornamental borders, pictorial embossing, and the like, been considered a subject of traditional copyright. In the light of the recent discussions of the Copyright Office Regulations in the context of the dispute over typeface designs, we are inclined to believe that this position is wrong. We believe that the report on Title I should make clear the copyrightability of original calligraphic works as "pictorial, graphic, or sculptural works."

[207]A related question concerning the liability of calligraphers for copyright infringement was the subject of correspondence between Senator McClellan and the Register of Copyrights. In a letter dated December 17, 1974, the Register wrote:

In their correspondence, calligraphers have requested an exemption to use copyrighted works without incurring copyright liability for two purposes: (1) instruction of student calligraphers, and (2) a single reproduction on a commission basis at the request of clients, i.e., for a profit-making purpose. In my review, I concluded that those two cases should be distinguished.

As you know, the judicial doctrine of fair use would be codified in a general way in section 107 of the copyright revision bill. Viewing the guidelines for fair use in the bill, I think a single reproduction of excerpts (or in the case of short works, the entire work) from a copyrighted work by a student calligrapher or the teacher in a learning situation would be a fair use of the copyrighted work. I do not recommend any change in the bill, but you may want to include a paragraph in the Committee Report on this point when the bill is next reported.

Reproduction by a calligrapher of a copyrighted work at the request of a client represents another, and possibly different, case. Since the reproduction would be made for profit, the fair use privilege is more circumscribed. Resolution

of the infringement question turns on facts such as possible competition between the copyright owner and the calligrapher or her client, and possible dilution of the market for the copyrighted work. In most cases, I think it probable that the courts would consider that the single copy reproduction of a copyrighted work by a calligrapher, for one client, for his private enjoyment, would not represent an infringement of the copyright, especially where only excerpts are reproduced. On the other hand, multiple copy reproduction for sale would probably represent an infringement ....

[208]In conclusion, I do not believe any specific exemption for calligraphers in the revision bill is justified. The fair use provisions probably free calligraphers of copyright liability in most cases of single copy reproduction. In other cases, I do not perceive any basis for a special exemption from the rights of copyright owners.

3. DESIGNS FOR TYPE FACES

a. The issue of protection for original typeface designs under the present law, Title I of the revision bill, or the design act embodied in Title II, is one of extraordinary difficulty and complexity. In view of the consistent tradition in the Copyright Office in opposition to the registration of any type face designs, the long-standing interpretation of the Office's regulations to this effect, and the many doubts raised at the Copyright Office hearing on the subject, it is our view that registration under the present law should be made only on the basis of a clear-cut judicial decision.

b. The testimony at the House hearings on July 17, 1975 suggested that, underneath the sharp arguments, there may be an underlying basis of agreement. It seems possible that, if the bill were amended to foreclose copyright for typeface designs under Title I and to make clear the availability of protection under Title II, the various positions might be accommodated if:

a) liability were clearly restricted to the unauthorized duplication of the design in the manufac**[209]**ture of fonts, matrixes, etc., and if printers, authors, publishers, etc., were clearly freed from any risk of liability; and

b) a compulsory licensing system were established under Title II, allowing anyone to manufacture a font, etc., reproducing a protected type face design on payment of a reasonable fee.

This proposal would obviously require careful elaboration as to content, form, and procedure. However, the Copyright Office considers this the best hope of resolving an important and difficult problem, and would do its best to contribute to a productive result.

§ [210]CHAPTER VIII EXCLUSIVE RIGHTS IN SOUND RECORDINGS

Sections Considered:

§ 106 - Exclusive rights in copyrighted works.

§ 114 - Scope of exclusive rights in sound recordings.

H.R. 5345 - (94th Cong., 1st Sess., March 21, 1975) - A bill to amend the Copyright Act of 1909, and for other purposes

Issues:

1. Should sections 106 and 114 be amended to grant the owner of copyright in a sound recording the exclusive right to make derivative works?

2. Should the exclusive right of reproduction of copyrighted sound recordings under section 114 be made subject to compulsory licensing?

3. Should the rights in copyrighted sound recordings be expanded by establishing a compulsory licensing system under which royalties would be paid for performances of copyrighted sound recordings?

[211]A. BACKGROUND OF SECTION 114

The Copyright Office revision study on the unauthorized duplication of sound recordings, published in 1957, summarized the legislative history on the subject up to that point as follows:

Legislative attempts to make sound records copyrightable go back as far as 1906, and reached their climax between 1925 and 1947. Before the impact of radio broadcasting was really felt, these provisions attracted very little attention. As the importance of radio in the music publishing and recording industries grew, there was a proportionate increase in the pressure to secure copyright in sound records, and in the concerted opposition to such proposals on the part of author and user groups. The performers and manufacturers each sought protection for themselves and opposed it for the others. The author-publisher groups claimed that the proposals would unfairly discriminate against them, and the broadcasting and jukebox interests were strongly opposed to additional payments and licenses. The motion picture interests were favorably inclined toward limited protection for recorded performances. The AFM backed away from its original support of the proposals, and later expressed no opinion on the question.

The study described the position of the American Federation of Musicians on the question in the middle 1950's in the following terms:

The Federation's present program is directed at benefitting the large number of musicians displaced by recording devices, rather than the relatively small number who make recordings. As time has passed, the interests of these two groups appear **[212]**to have come into basic conflict. The solution to the problem offered by the AFM "trust fund" device, under which recording companies pay royalties for records manufactured into a fund, which is distributed to union locals for the employment of musicians in live performances.

Attitudes of the AFM and of most other groups on this issue have undergone some radical changes since 1957. In 1961, the Register's Report, after noting the ferment then taking place, took an equivocal position:

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.

On October 26, 1961, after many years of preparatory drafting and meeting, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (usually known as the "Rome Convention" or the "Neighboring Rights Convention") was signed at Rome. **[213]**This treaty sought to establish rights of performers, record producers, and broadcasters not only against other users but also as against each other. The Rome Convention contained provisions protecting records against unauthorized duplication, but this is not what made it so controversial. Although subject to reservations, a provision requiring payment of royalties for performances and broadcasts of records attracted so much opposition, particularly from broadcasters, that the Rome Convention has had great difficulty in obtaining widespread acceptance. In recent years it has been showing new signs of life, and we may even be approaching a time when adherence to the Rome Convention by the United States can be discussed in other than polemical terms.

As things stood between 1961 and 1965, however, anything that smacked of "neighboring rights" was likely to produce strong, emotional opposition from a range of groups including, but not limited to, broadcasters. For its part, the American Federation of Musicians shifted position once more, and joined with other performers in favoring copyright for recorded performances.

The Copyright Office's 1965 bill contained provisions, much like those in the 1975 bill as introduced, according copyright protection to sound recordings but limiting it to the **[214]**right of reproduction of the actual sounds embodied in a recording, and expressly withholding performing rights. The Register's Supplementary Report took the position that "the aggregate of sounds embodied in a sound recording is clearly capable of being considered the 'writing of an author' in the constitutional sense." It noted that there is little dispute on this question in the context of unauthorized duplication, but added:

However, when it comes to the question of whether a copyrighted sound recording should be given exclusive rights of public performance, the issue becomes explosively controversial. The question is then one of whether radio and

television broadcasters, jukebox operators, wired music services, and others who use records for public performances should have to pay royalties to the owner of copyright in the recorded musical compositions.

Representatives of record companies have argued that there are no valid reasons in principle for placing sound recordings in a different category from all other works, and the American Federation of Musicians has recently adopted a formal position opposing the 1965 bill because it would deny performers "a modicum of economic incentive and participation in the vast profits derived from the public performance of records * * *." On the other side, proposals to this effect are strenuously opposed not only by those users who would have to pay additional royalties, but also by the owners of copyright in musical compositions who would probably get a smaller slice of the pie. Musical copyright owners also stress the argument that, since record producers enjoy a compulsory license at their expense, it would be fundamentally unfair to give the producers a copyright in their recordings under which they could claim a share of the performing royalties. Underlying these arguments **[215]**is a further concern that, since performers contribute substantially to the aggregate of sounds fixed in a sound recording, the recognition of a performing right could introduce new and unpredictable factors of bargaining with performers into an already crowded and complicated copyright structure.

The 1965 Supplementary Report emphasized that the limitation on exclusive rights in sound recordings imposed by the bill--

... is not meant to imply any disparagement of sound recordings as creative works or any doubts as to their copyrightability. At the same time, we cannot close our eyes to the tremendous impact a performing right in sound recordings would have throughout the entire entertainment industry. We are convinced that, under the situation now existing in the United States, the recognition of a right of public performance in sound recordings would make the general revision bill so controversial that the chances of its passage would be seriously impaired.

Smarting from wounds suffered from his experiences with the Rome Convention, the Register of Copyrights testified even more strongly to the same effect before the House Judiciary Subcommittee in 1965:

... the chance now of enacting a copyright law in this country that recognizes any rights of public performance in sound recordings is so remote as to be nonexistent. You have seen no towering wave of opposition to these proposals simply because there is a general feeling that they will not get anywhere; but, if genuine fears were to be aroused on this score, I am sure you would see a wave of protest that would be likely to tear this bill apart.

[216]The 1966 and 1967 House reports agreed that sound recordings should be recognized as copyrightable works and protected against unauthorized duplication, but declined to go further. They summarized the situation in 1967 as follows:

At the hearings representatives of the American Federation of Musicians opposed the bill because of its failure to give performers an exclusive right in the public performance of sound recordings embodying their performance. They argued that performing musicians now suffer economic deprivation because of competing performances from their own records, and that the bill discriminates against them by denying exclusive rights under the statue while abolishing any vestige of protection under the common law. They asserted that opposition to the principle of a performing right in sound recordings is limited to competing economic interests who either do not want to share in remuneration from performances or do not want to have to pay any more than they do now. Their position was that this represents a "sharp moral issue" which some countries have resolved in the performers' favor, and they proposed an amendment establishing a special performing right that would endure for 10 years and would be subject to compulsory licensing.

While the position of record producers on this question appeared somewhat more qualified, individual representatives of the industry spoke strongly in favor of recognizing full rights of public performance in sound recordings. They condemned the bill as inequitable in denying public performance rights to record producers who, they argued, are responsible for the most creative and valuable elements of sound recordings today. They recommended recognition of full performing rights in sound recordings, with ownership being divided between the record producer and the various performers involved.

[217]Although there was little direct response to these arguments, it was apparent that any serious effort to amend the bill to recognize even a qualified right of public performance in sound recordings would be met with concerted opposition. The committee believes that the bill, in recognizing rights against the unauthorized duplication of sound recordings but in denying rights of public performance, represents the present thinking of other groups on that subject in

the United States, and that further expansion of the scope of protection for sound recordings is impracticable. This conclusion in no way disparages the creativity and value of the contributions of performers and record producers to sound recordings, or forecloses the possibility of a full consideration of the question by a future Congress.

On April 11, 1967, the House passed and sent to the Senate a revision bill in which section 114 limited the rights in sound recordings to protection against unauthorized duplication and distribution.

The situation during the Senate hearings in 1967 had changed. A new organization of performers, the National Committee for the Recording Arts (NCRA) joined by the Record Industry Association of America (RIAA), put forth a concerted effort to obtain adoption of a compulsory licensing system establishing a royalty for performances and broadcasts of records. This initiative was strongly opposed by broadcasters and jukebox operators; some opposition was expressed by copyright owners, but it was obvious that the traditional opposition from this quarter was beginning to disappear. Basic **[218]**changes in the music industry were making a performance royalty more attractive to composers and music publishers.

On March 16, 1967 Senator Harrison Williams introduced a formal amendment (Amdt. No. 131) to the 1967 Senate bill, and on April 3, 1969, Senator Williams was joined by six other Senators in sponsoring an amendment (Amdt. No. 9) to the then-pending revision bill (S. 453, 91st Cong., 1st Sess., 1969). Among other things the Williams amendment was aimed at establishing a compulsory license for the public performance of sound recordings. This amendment was accepted, with various changes in details, when the revision bill was reported by the Senate Judiciary Subcommittee to the full Committee on December 10, 1969. It remained in the 1971 and 1973 bills, and was reported favorably by the full Senate Judiciary Committee on July 3, 1974.

Meanwhile, the extraordinary explosion of tape piracy in the late 1960's and early 1970's produced separate federal copyright legislation in advance of general revision in the United States, a large number of State anti-piracy statutes and a great many State and Federal court decisions against piracy on a variety of theories, as well as a new multilateral treaty paralleling the Rome Convention but limited to prohibitions against unauthorized duplication of "phonograms." The amendment of the 1909 **[219]**Copyright Law (P.L.92-140) was initially enacted as temporary legislation, but was made permanent by a further amendment effective on December 31, 1974 (P.L.93-573).

The remaining issue was that of performance rights in sound recordings. The complicated provisions of section 114 of the 1973 bill, and the even more complicated series of legislative developments with respect to the issue in the Senate in 1974, are summarized in Senator McClellan's annual report of the Senate Judiciary Subcommittee on Patents, Trademarks, and Copyrights (S. Rept. No. 94-92, April 22, 1975), as follows:

S. 1361, as introduced and reported by the subcommittee, specifically granted to the copyright owner the exclusive right of public performance in sound recordings. Without such rights, the copyright owner would be unable to receive royalties for the public performance of his recorded work by anyone else. The bill divided the ownership of the performance rights between the record producers and the performers and subjected such rights to a system of compulsory licensing. The measure further provided the user with an option to compute the fees on either a blanket or a prorated basis and that such royalties would be paid to the Copyright Office for distribution to the claimants. For a radio or television station the bill provided that the blanket rate was two percent of the net receipts received from advertising sponsors. The prorated rate was a fraction of two percent of such net receipts, based on a calculation made in accordance with a formula devised by the Register of Copyrights. For companies that supply background music and other transmitters of performances of sound recordings, the blanket rate was two percent of the gross receipts received from **[220]**subscribers or others who pay to receive such transmissions. The prorated rate for background music companies was to be determined by the Register of Copyrights under a formula similar to that used in calculating the prorated rate for radio and television stations. The measure also exempted broadcast stations and background music companies whose gross annual receipts were less than $ 25,000 and $ 10,000 respectively from the payment of royalties for the use of sound recordings. The bill further provided that the performance rates for owners of coin-operated phonorecord players would be one-ninth of the annual nine dollars per machine for the use of copy-righted music. With the adoption of the Ervin amendment by the Judiciary Committee, which reduced the yearly jukebox royalty to eight dollars per box, the performance royalty became one-eighth of the annual royalty fees.

During consideration of the measure by the Committee on the Judiciary, Senator Gurney offered an amendment to delete the performance royalty for broadcasters. Senator Sam J. Ervin of North Carolina proposed a similar amendment with respect to the jukebox operators. The Judiciary Committee rejected both amendments by a tie vote of eight-to-eight. The committee did accept, however, an amendment sponsored by Senator Hugh Scott of Pennsylvania, which

would reduce the performance rates for radio and television stations. Under the amendment, stations with annual gross receipts of more than $ 25,000 but less than $ 100,000 would pay a royalty of $ 250 per year. Stations with gross income of more than $ 100,000 but less than $ 200,000 would pay $ 750 annually. Stations with gross receipts of more than $ 200,000 would pay a royalty fee of one percent of its net income.

During its study of S. 1361, the Commerce Committee adopted an amendment to provide for the elimination of the performance royalty for both broadcast stations and operators of coin-operated phonorecord players. When the Senate considered the performance royalty issue, however, it voted on an amendment introduced by Senator Ervin, for himself and several other Senators, which would **[221]**eliminate the performance royalty in sound recordings. By a vote of sixty-seven-to-eight, the Senate approved the Ervin amendment and subsequently tabled the Commerce Committee Amendment.

The proponents of the Ervin amendment argued that the establishment of a performance royalty was unconstitutional and that the payment of royalties to performers and record producers in addition to fees already being paid to authors and composers would impose severe financial burdens on broadcasters and jukebox operators. The opponents of the amendment contended that Congress had the power to create a performance royalty in sound recordings and cited several decisions rendered by the Federal courts to support their position. They also argued that artists and record manufacturers were just as entitled to payment for their creative efforts as other owners of copyrighted works and that the broadcasters and jukebox operators possessed the financial capability to pay such fees. It was further contended that the granting of exclusive rights in the public performance of sound recordings containing a performance would "Promote the Progress of ... useful Arts ..." by rewarding the copyright owners for their creative endeavors.

The performance royalty provisions of section 114 were, from all appearances, the most controversial feature of the revision bill during the Senate debates in September, 1974; it is unlikely that the bill would have passed the Senate by a margin of 70-1, if at all, had these provisions not been deleted. As things stand now, the performance royalty has been removed from the 1975 revision bills in both House and Senate, and is not even referred to in the Senate Judiciary Committee's report of November 20, 1975.

[222]At the same time, however, a new bill in the form of an amendment to the 1909 statute, seeking to establish a form of compulsory licensing for performances of sound recordings, has been introduced in both Houses. The Senate version (S. 111, 94th Cong., 1st Sess.) was introduced by Senator Hugh Scott. The House version (H.R. 5345) was introduced by Mr. Danielson, and is co-sponsored by some 20 other Members of the House under several other bill numbers. By coincidence, Senator Scott chaired a hearing of the Senate Judiciary Subcommittee on July 24, 1975, the day following testimony from most of the same witnesses on H.R. 5345 before the House Judiciary Subcommittee.

The text of the Danielson bill is set out for convenient reference on the next seven pages of this chapter:

[223]94th CONGRESS_____H. R. 5345
lst Session

IN THE HOUSE OF REPRESENTATIVES

MARCH 21, 1975

MR. DANIELSON introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend the Copyright Act of 1909, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Performance Rights Amendment of 1975".

SEC. 2. The first section of title 17, United States Code, is amended--

(1) by striking out "and" where it appears at the end of subsections (c) and (d);

(2) by striking out the period at the end of subsection (e) and inserting in lieu thereof a semicolon and "and";

[224](3) by striking out subsection (f) and inserting in lieu thereof the following:

"(f)(1) To perform publicly for profit and to reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease, or lending, any reproduction of a copyrighted work which is a sound recording: *Provided*, That the exclusive rights of the owner of a copyright in a sound recording to reproduce and perform it are limited to the rights to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording, and to perform those actual sounds: *Provided further*, That these rights do not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, or to the performance of other sounds, even though such sounds imitate or simulate those in the copyright sound recording; or to reproductions made by broadcasting organizations exclusively for their own use.

"(2) Where the copyrighted sound recording has been distributed to the public under the authority of the copyright owner, the public performance of the sound recording shall be subject to compulsory licensing in accordance with the provisions of section 33 of this title."; and

(4) by inserting immediately before the period at the end of the last sentence of such section (relating to **[225]**coin-operated machines) a comma and the following: "except that the provisions of this sentence shall not apply to the public performance of a sound recording under subsection (f) of this section".

SEC. 3. (a) Chapter 1 of title 17, United States Code, is amended by adding at the end thereof the following new section:

"§ 33. Compulsory licensing; royalties

"(a) The annual royalty fees for the compulsory license provided for in section 1(f)(2) of this title may, at the user's option, be computed on either a blanket or a prorated basis. Although a negotiated license may be substituted for the compulsory license prescribed by this subsection, in no case shall the negotiated rate amount to less than the following applicable rate or payment:

"(1) For a radio broadcast station licensed by the Federal Communications Commission, the royalty rate or payment shall be as follows:

"(A) in the case of a broadcast station with gross receipts from its advertising sponsors of more than $ 25,000 but less than $ 100,000 a year, the yearly performance royalty payment shall be $ 250; or

"(B) in the case of a broadcast station with gross receipts from its advertising sponsors of more **[226]**than $ 100,000 but less than $ 200,000 a year, the yearly performance royalty payment shall be $ 750; or

"(C) in the case of a broadcast station with gross receipts from its advertising sponsors of more than $ 200,000 a year, the yearly blanket rate shall be 1 per centum of the net receipts from the advertising sponsors during the applicable period, and the alternative prorated rate is a fraction of 1 per centum of such net receipts, taking into account the amount of the station's commercial time devoted to playing copyrighted sound recordings.

"(2) For a television broadcast station licensed by the Federal Communications Commission, the royalty rate or payment shall be as follows:

"(A) in the case of a broadcast station with gross receipts from its advertising sponsors of more than $ 1,000,000 but less than $ 4,000,000 a year, the yearly performance royalty payment shall be $ 750; or

"(B) in the case of a broadcast station with gross receipts from its advertising sponsors of more than $ 4,000,000 a year, the yearly performance royalty payment shall be $ 1,500.

"(3) For background music services and other **[227]**transmitters of performances of sound recordings, the yearly blanket rate is 2 per centum of the gross receipts from subscribers or others who pay to receive the transmission during the applicable period, and the alternative prorated rate is a fraction of 2 per centum of such gross receipts, taking into account the proportion of time devoted to musical performances by the transmitter during the applicable period.

"(4) For an operator of coin-operated phonorecord players, the yearly performance royalty payment shall be $ 1 for each phonorecord player.

"(5) For all other users not otherwise exempted, the blanket rate is $ 25 per year for each location at which copyrighted sound recordings are performed, and the alternative prorated rate shall be based on the number of separate performances of such works during the year and shall not exceed $ 5 per day of use.

"(6) No royalty fees need be paid for a compulsory license for the public performance of copyrighted sound recordings by a radio broadcast station where its annual gross receipts from advertising sponsors were less than $ 25,000, by a television broadcast station where its annual gross receipts from advertising sponsors were less than $ 1,000,000, or by a background music service or other transmitter of performances of sound recordings **[228]**where its annual gross receipts from subscribers or others who pay to receive the transmission were less than $ 10,000.

"(b) The annual royalty fees provided in subsection (a) shall be applicable until such time as the royalty rate is agreed upon by negotiation between the copyright owner and the licensee, or their designated representatives: *Provided*, That the annual royalty fees provided for in subsection (a) shall be applicable for a period of not less than two years following the date of enactment of the Performance Rights Amendment of 1975. In the event that the parties or their representatives are unable to agree upon a royalty rate pursuant to negotiation, the public performance of the sound recording shall be subject to compulsory licensing at a royalty rate and under terms which shall be set by an arbitration panel composed of three members of the American Arbitration Association, of which one member of the panel shall be selected separately by each of the parties in disagreement, and one member shall be selected jointly by the parties in disagreement.

"(c) The royalty fees collected pursuant to this section shall be divided equally between the performers of the sound recording and the copyright owners of the sound recording. Neither a performer nor a copyright owner may assign his right to the royalties provided for in this section **[229]**to the copyright owner or performer of the sound recording, respectively.

"(d) As used in this section, the term--

"(1) 'performers' means musicians, singers, conductors, actors, narrators, and others whose performance of a literary, musical, or dramatic work is embodied in a sound recording; and

"(2) 'net receipts from advertising sponsors' means gross receipts from advertising sponsors less any commissions paid by a broadcast station to advertising agencies.".

(b) The analysis of such chapter is amended by adding at the end thereof the following new item:

"33. Compulsory licensing; royalties.".

[230]B. COMMENTS AND RECOMMENDATIONS ON SPECIFIC ISSUES

1. EXCLUSIVE RIGHT TO PREPARE DERIVATIVE WORKS

The Justice Department presentation on the revision bill before the House Judiciary Committee on May 8, 1975 included a number of proposals related to what it referred to as "the Department's anti-piracy program." Those dealing with the compulsory licensing provisions of section 115 will be taken up in Chapter IX, and the recommendations involving Federal preemption of sound recordings fixed before February 15, 1975 will be discussed below in *Chapter XII*. The various recommendations concerning criminal penalties are covered in *Chapter XIII*.

While evidently endorsing section 114 as far as it goes, the Department of Justice recommended that it be amended--

... to provide for the copyright owner of a sound recording to have the right to make derivative works or it should be amended to clarify that persons other than the copyright owner do not have such a right absent consent of the copyright owner, notwithstanding the fact that the sound recording copyright owner would have no such right.

Justice regarded it as "a real possibility that an unauthorized duplicator who made a 'derivative' work by slightly altering the original copyrighted sounded recording would claim that he did so legally since the copyright owner is given no exclusive right to make derivative works," and recommended "including **[231]**part (2) of Section 106 in the list in Section 114 of exclusive rights granted to a sound recording copyright owner--an action which would grant to sound recording copyright owners no more rights than they presently possess."

This recommendation was adopted by the Senate Judiciary Committee when it reported S. 22 on November 20, 1975.

The Copyright Office recognizes that the copyright owner of a sound recording should have the right to create derivative works by taking the actual sounds in the recording and re-mixing or otherwise altering or combining them. We favor amending sections 106 and 114 to make this clear. However, the amendments adopted in the Senate appear to conflict with the basic principle enunciated in section 114(b): that the owner has no rights against the unauthorized maker of derivative works such as "mirror records" or"sound-alikes"--simulations that are, in fact, "independent fixations of other sounds." We recommend that a somewhat different formula be found to accomplish the result suggested by the Justice Department.

2. SUGGESTIONS FOR COMPULSORY LICENSING

The House Judiciary Subcommittee, on July 17, 1975, heard testimony from Alan Wally, David Heilman, and Thomas Gramuglia, representing tape duplicators. A point urged dur-**[232]**ing this testimony was that a few very large record companies control the bulk of the records distributed, and that a huge number of recorded performances, going back several decades, are completely unavailable to the public because the "majors" will neither release them, license them, nor permit their unauthorized duplication. The witnesses urged that a compulsory licensing system be provided that would permit the public to have access to these old recordings and would generate royalties for the performing artists.

Without either accepting or rejecting any of the specific charges made in this testimony, the Copyright Office is convinced that a real problem exists with large and growing catalogs of recordings that record companies are sitting on and will neither release nor license. Unless voluntary licensing methods can be found for providing access to these recordings, it may well be that some kind of compulsory licensing system will eventually have to be devised to deal with the problem. While we have no specific recommendations for amendments in the bill, we do not feel that this problem can be swept under the rug. One constructive suggestion might be to mandate the Copyright Royalty Tribunal, as part of its survey of the recording industry in connection with rate adjustments under section 115, to probe into the question of how serious this problem actually is.

[233]3. PERFORMANCE ROYALTY

The hearings held in the House Judiciary Subcommittee on July 23, 1975, and in the Senate Subcommittee on July 24, 1975, on the Scott and Danielson bills, respectively, were the first Congressional hearings on the issue of a performance royalty in records to be held since 1967. There had clearly been some changes in position over the intervening 8 years, but it was also apparent that the possibility of compromise is no closer now than it was then. Performers, performers' unions, and other affiliated union organizations, have joined closely with the record industry, and appear to be going all out for copyright royalties. A significant development, reported at the hearings, was an agreement between the two main performers' unions (the American Federation of Television and Radio Artists and the American Federation of Musicians) that all performers on a record would share equally in one-half of the royalties; the other half would go to the record maker.

For their part the broadcasters and jukebox interests appear to be adamantly opposed to any acceptance of the principle of a performance royalty for records, no matter how small the royalty. Having supported the earlier anti-piracy, legislation, the National Association of Broadcasters had al-**[234]**ready acknowledged the creative elements embodied in a record, but nonetheless argued that protection of performing rights in records does not fit the constitutional guidelines and cannot be justified on economic grounds. The broadcasters argued strongly that the proposed royalty would impose an unreasonable burden on radio and would provide an unwarranted windfall for performers and record producers, who are already enjoying sales benefits from free promotion through radio play.

The proponents of a performance royalty urged that sound recordings are the only copyrighted works lacking a performance right, that they furnish three-fourths of all radio programming, and that they have replaced "live" performances to the severe detriment of individual performers. They sharply contested the argument that broadcasts should not be compensated because they promote record sales, and compared the large profits of broadcasters with the small royalties contemplated in the bill. They stressed the unfairness of granting cable fees to broadcasters while withholding royalties to performers and record makers, and referred to the fairly large number of countries whose laws provide for royalties in this situation.

On October 31, 1975, Jack Galodner, Executive Secretary of the Council of AFL-CIO Unions for Professional Employees, **[235]**wrote to Peter W. Rodino, Jr., Chairman of the House Judiciary Committee, on behalf of the Council and the 20 national unions comprising it. Mr. Galodner pointed out the Council's interest in the general revision bill, and its concern that "it would do nothing to provide America's performers with the right to collect even the smallest amount of remuneration from the exploitation of their recorded performances." He went on to say:

This Council considers this to be a fatal omission and, unless corrected, a serious subversion of the quest for true copyright reform. Along with the AFL-CIO we have urged your Committee to correct this oversight. Unless appropriate recognition is accorded the artists who create sound recordings by inclusion of a performance royalty, this Council cannot, in good conscience, support H.R. 2223.

In addition to most of the witnesses who testified before the House Subcommittee, the Senate Judiciary Committee heard favorable testimony from Nancy Hanks, Chairman of the National Endowment for the Arts, and from Barbara Ringer, the Register of Copyrights. While recognizing the dangerous impasse on this issue, the Copyright Office does not feel that it can temporize on this issue, and adheres to the position expressed on July 24, 1975.

The Register first stated full agreement with the fundamental aim of S. 111: "to create, within the framework of federal copyright law, a public performance right in sound **[236]**recordings for the benefit of performers and record producers." After reviewing the applicable case law and legislative history on the subject she observed:

Thus, Congress and the courts have already declared that sound recordings as a class are constitutionally eligible for copyright protection. With this principle established, any broadening of protection for sound recordings to include a public performance right becomes one not of constitutionality but of statutory policy.

In considering this pivotal policy question, Congress should first take a hard look at just what the lack of copyright protection for performers has done to the performing arts profession in the United States. The Twentieth Century technological revolution in communications has had a fundamental impact on a number of forms of creative expression, but there is no case in which the impact was more drastic or destructive than that of the performing artist. Performers were whipsawed by an unmerciful process in which their vast live audiences were destroyed by phonograph records and broadcasting, but they were given no legal rights whatever to control or participate in the commercial benefits of the vast new electronic audience.

The results have been tragic: the loss of a major part of a vital artistic profession and the drying up of an incalculable number of creative wellsprings. The effect of this process on individual performers has been catastrophic, but the effect on the nature and variety of records that are made and kept in release, and on the content and variety of radio programming, have been equally malign. Most of all it is the United States public that has suffered from this process.

Congress cannot repair these past wrongs, but it can and should do something about avoiding or minimizing them in the future. There is, in the United States today, no more vital and creative force than that of performed music. Adequate pro-**[237]**tection for those responsible for this creative force involves much more than economics and the ability or willingness of various communications media to pay performing royalties. It is, first of all, a matter of justice and fairness; but, beyond that, it is in the paramount national interest to insure that growth in the creativity and variety of the performing arts in this country is actively encouraged by reasonable protection, rather than stunted or destroyed by the lack of it.

The Register then pointed out a number of technical problems with S. 111, but stated:

To my mind it is less important whether the performance royalty for sound recordings be established under the revision bill or separate legislation than that Congress act affirmatively by declaring itself in favor of the principle of such a payment. Whatever form the legislation takes, I recommend that such a step be taken by the present Congress, and that, recognizing the damaging effects of legislative inaction in the past, it not again postpone this affirmative declaration to another Congress, or another decade, or another generation.

At the same time it must be said, on the basis of experience, that if this legislation were tied to the fate of the bill for general revision of the copyright law there is a danger that it could turn into a "killer" provision that would again stall or defeat the omnibus legislation. This danger exists, and it would be very real if the potential compulsory licensees, notably the broadcasting and jukebox industries, exerted their considerable economic and political power to oppose the revision bill as a whole. Should this happen, there could be no question about priorities: the performance

royalty for sound recordings would have to yield to the overwhelming need for omnibus reform of the 1909 copyright law.

The opposition of broadcasters, music operators, wired music services, and other users of recorded performance royalties to paying additional performance **[238]**royalties and handling additional paperwork is certainly understandable on purely economic grounds. But these services are part of a continuum that relies for its very existence on the creative efforts of authors, composers, performers and record makers. Is it naive and unrealistic of me to hope that the commercial users of music could realize the benefit to their own interests of doing everything reasonably possible to promote the economic interests of those whose work it is their business to purvey? Would it be too much to hope that, recognizing that they are all part of the same process, the users of copyrighted sound recordings could accept the principle of performance royalties, and could sit down with the performers and record makers to work out a reasonable compulsory licensing system? The alternative, no one need be told, is years more of wrangling in the legislative arena, with people pitted against each other who should be working together for their mutual benefit.

At the end of her statement, Ms. Ringer threw out several possible alternative approaches to the problem:

Once the principle of performance royalty is established, the alternative ways of implementing it are not confined to S. 1111 or section 114 of the earlier revision bill. An obvious possibility would be for Congress to accept the principle of payment, but delay implementation for a period long enough to allow the working out of a viable compulsory licensing procedure. Another possibility would be, as in the case of the previous legislation establishing copyright for sound recordings, to put a terminal date on the legislation, leaving it to a future Congress to judge, on the basis of actual experience, whether it should be extended permanently. Other alternatives might include a transitional period during which all payments would go to the National Endowment for the Arts while a workable procedure for distributing license fees to individual copyright owners was being worked out.

[239]I am not committed to any of these or other alternatives. But I do express the hope that they might be explored in a spirit of good will and give-and-take, with the aim of providing a framework in which the fairest, least burdensome payment mechanism could be established.

§ [240]CHAPTER IX COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS ("THE MECHANICAL ROYALTY")

Section Considered:

§ 115 - Scope of exclusive rights in non-dramatic musical works:
Compulsory license for making and distributing
phonorecords.

Issues:

1. Should the basic compulsory licensing system established in the 1909 Act to govern the manufacture and distribution of phonorecords of music be retained?

2. Assuming that a compulsory licensing system is retained:

a) Should the statute foreclose the operation of a compulsory license where there has been an unauthorized duplication of a sound recording?

b) Should the basis of the royalty be the number of phonorecords "made" or the number "manufactured and distributed"?

c) What formalities should be required for obtaining a compulsory license and for making payments and accounting under it?

[241] d) Should the amount of the royalty be based on a fixed monetary amount per phonorecord, or should it be a fixed percentage of the price of the phonorecord?

e) Assuming that the royalty should be based on a fixed monetary amount, what should that amount be?

[242]A. BACKGROUND OF THE PROBLEM

After years of controversy over sections 1(e) and 101(e) of the present copyright law, and over section 115 of the revision bill, the issue seems to have resolved itself into a simple dispute over dollars and cents. To deal intelligently with this issue however, a legislator must have some understanding of the background of the present law and of the development of section 115 as a whole.

The "compulsory licensing" provisions of the Act of 1909, which are now contained in slightly amended form in sections 1(e) and 101(e) of title 17 of the U.S. Code, have been severely criticized for both their content and their drafting. It is hard to dispute, however, that the compulsory licensing provision of the 1909 statute were an imaginative effort to compromise a difficult problem, and that they represent a daring legislative innovation of historic significance. Section 1(e) of the 1909 Act established the first compulsory licensing system in any copyright or patent statute, in any intellectual or industrial property statute, or (as far as anyone seems to know) in any statute in the world. It set a pattern that has been widely followed in other countries and in other fields of law, and it had a profound effect upon the development of the music industry in the United States.

[243]As stated briefly in the 1961 Register's Report, sections 1(e) and 101(e) of the present law are "elaborate and complex provisions" which "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."

In 1908, during the last stages of the legislative efforts leading to the Act of 1909, the Supreme Court handed down a landmark decision in *White-Smith Music Publishing Co. v. Apollo Co. , 209 U.S. 1,* which, as the 1961 Register's Report said:

... 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 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.

[244]The 1961 Register's Report reviewed at some length the practical effect of the compulsory license, which it considered "rather severe," and the need for the compulsory license, which it considered much diminished in comparison to the situation in 1909. After analyzing the arguments for retaining the compulsory license, the 1961 Report recommended that the provision should be retained for one year and then eliminated. Its basic conclusion was stated as follows:

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.

[245]The Register's Report anticipated the opposition this conclusion would provoke, however, and hedged its recommendations as follows:

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;

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

As expected, the 1961 recommendations on this point produced a storm of controversy. The reactions included not only strong opposition from record producers but also considerable uneasiness among copyright owners as to the changes in the structure of the music industry that elimination of compulsory licensing might bring. The 1965 Supplementary Report of the Register described the situation as follows:

[246]During the discussions following issuance of the Report, it became apparent that record producers, small and large alike, regard the compulsory license as too important to their industry to accept its outright elimination. Moreover, while still opposing the provision in principle, some copyright owners implied that ultimately there might be advantages in ameliorating the harsh and burdensome effects of the compulsory license rather than doing away with it altogether; a number of publishers and some authors now have ties with record companies, and it was suggested that the compulsory license continues to have a favorable impact on competition by fostering the easy entry and growth of small companies within the industry. Moreover, although there appears to have been a trend away from "cover records" because of the type of music most popular at the moment, copyright owners also find advantages in having more than one recorded version of a song available to the public; frequently the first recording is not the hit that makes the song popular. Finally, and perhaps most important, there seemed to be a feeling that people in the industry generally would rather bear those ills they have than fly to others that they know not of.

Recognizing that some sort of compromise would be necessary, the Copyright Office put forward three alternatives in its 1963 preliminary draft: (1) complete elimination; (2) a percentage royalty of 8 percent "of the manufacture's suggested or established retail price, as published in its catalogs, advertisements, or other trade media"; and (3) a flat royalty of 3/4 cents per minute (or fraction) of playing time. The extensive discussions of these alternatives produced a compromise **[247]**proposal, which was put forward by a subcommittee of the American Bar Association Committee on General Revision, and was incorporated in both the 1964 and 1965 bills. It reflected the continuing allure of a flat rate per record: the compromise was for a royalty of "three cents per record, or one cent per minute of playing time or fraction thereof, whichever amount is larger."

The 1965 Supplementary Report of the Register made the following comments on the amount of the royalty:

We know of no precise mathematical formula for fixing an appropriate royalty rate in the statute. There are, however, two general observations on this question we should like to make:

(1) A flat rate per record, whatever the amount, has the obvious disadvantage of inflexibility, since it must apply to all kinds of records regardless of their nature, and since it cannot take account of changing economic factors and industry patterns over a period of time. We rejected the alternative of a royalty based on a percentage of the selling price of the record, partly because of the opportunities for abuse and subterfuge that it would offer, and partly because in the United States pricing in the record industry has been so disorganized that this alternative would be impractical. We are convinced, however, that the flat per-record rate would be intolerable unless it were accompanied by an alternative rate based on the playing time of the composition on the record; this avoids the anomaly of a compulsory licensee paying the same rate for a 3-minute popular tune and a 30-minute symphony.

[248](2) It should be borne in mind that exercise of the compulsory license is entirely optional with the record producer, being compulsory only on the copyright owner. The alternative of bargaining with the copyright owner for a negotiated license is always open to the record producer. Consequently the statutory royalty rate operates as a ceiling: the record producer can bargain for a lower rate, but the copyright owner can never bargain for a higher one. The vast majority of recording licenses in the United States have been negotiated and, at various times in the past, record producers have obtained negotiated licenses at less than the existing statutory rate of 2 cents. If the present 2-cent ceiling is raised, licenses could still be negotiated at 2 cents or less if current market conditions did not justify more; and if a higher ceiling resulted in negotiated licenses at more than 2 cents, it could well be argued that a 2-cent ceiling had proved to be too low. As we see it, the statutory rate should be at the high end of a range within which the parties can negotiate, now and in the future, for actual payment of a rate that reflects market values at that time. It should not be so

high, however, as to make it economically impractical for record producers to invoke the compulsory license if negotiations fail.

The 1966 and 1967 Reports of the House Judiciary Committee recognized, on the basis of the testimony at the 1965 hearings, that the argument on compulsory licensing had shifted from "whether" to "how much." They nevertheless reviewed the arguments for and against the compulsory license itself:

... the record producers argued vigorously that the compulsory license system must be retained. They asserted that the record industry is a half-billion-dollar business of great economic importance in the United States and throughout the world; records today are the principal means of disseminating music, and this creates special **[249]**problems, since performers need unhampered access to musical material on nondiscriminatory terms. Historically, the record producers pointed out, there were no recording rights before 1909 and the 1909 statute adopted the compulsory license as a deliberate anti-monopoly condition on the grant of these rights. They argued that the result has been an outpouring of recorded music, with the public being given lower prices, improved quality, and a greater choice. The position of the record producers is that the compulsory license has avoided antitrust problems that have plagued the performing rights field, and for the same reasons has been adopted (and recently retained) in a number of foreign countries. They maintained that the dangers of monopolies and discriminatory practices still exist, and repeal would result in a great upheaval of the record industry with no benefit to the public.

The counterargument of the music publishers was that compulsory licensing is no longer needed to meet the special antitrust problems existing in 1909, and that there is no reason why music, alone of all copyrighted works, should be subject to this restriction. They maintained that music publishing is not a public utility, and that the establishment of a statutory fee for a product wholly produced and distributed within the private sector of our economy is a strange incongruity. Their basic position was that they would much prefer outright repeal, but if, in the face of the record industry's opposition, the compulsory license must be retained, they would be willing to accept a compromise as long as the copyright owner's situation is improved.

[250]As stated in its 1966 and 1967 reports, the House Judiciary Committee concluded:

... from these arguments, and from the array of economic data presented to it in connection with the rate, ... that a compulsory licensing system is still warranted as a condition for the rights of reproducing and distributing phonorecords of copyrighted music. The committee also concluded, however, that the present system is unfair and unnecessarily burdensome on copyright owners, and that the present statutory rate is too low.

In very general terms, the provision that was reported by the House Judiciary Committee in 1966 and 1967, and that passed the House in 1967, accepted the principle of compulsory licensing but substantially revised the 1909 statute to close some of its numerous loopholes, narrow its scope, and lessen its burdensome formalities in favor of copyright owners, and to some extent to increase the obligations and potential liability of compulsory licensees. The House bill based its royalty rate on the number of phonorecords "made in accordance with the license"; on this controversial issue of whether payment should be limited only to records "distributed," the House reports had this to say:

Under the present statute the specified royalty is payable "on each such part manufactured," regardless of how many "parts" (i.e., records) are sold. This basis for calculating the royalty has been retained in section 115(c)(2), which provides that "the royalty under a compulsory license shall be payable for every phonorecord made in accordance with the license."

[251]The record producers were strongly critical of this provision, arguing that it is unjustified to require a compulsory licensee to pay license fees on records which merely go into inventory, which may later be destroyed, and from which the manufacturer gains no economic benefit. They argued that the royalty basis should be records "made and distributed," which is the principle reflected in general practice with respect to negotiated licenses under the law today. However, the committee believes that, unless a negotiated agreement provides otherwise, the liability for royalties should be fixed at the time phonorecords are made under a compulsory license. A recordmaker should not be free to reproduce as many phonorecords as he wishes without any permission from or obligation to the copyright owner, and then to pay a royalty only with respect to the phonorecords he eventually distributes to the public.

On the all-important question of royalty rate, the House reports noted:

A large preponderance of the extensive testimony presented to the committee on section 115 (then section 113) was devoted to the question of whether the statutory royalty rate should be left at 2 cents per composition per phonorecord

or whether it should be raised to 3 cents as provided by the 1965 bill. After devoting many hours to this question, the committee amended the bill to set the fee at 2 1/2 cents.

This result was not a simple split-the-difference decision, but was based on an extremely searching analysis of the economic statistics that had been presented to the House Subcommittee. This analysis, which is summarized in five pages of the 1966 and 1967 House reports, **[252]**is broken down under four headings: 1) the need for an increase by music publishers; 2) potential impact of increase on record industry; 3) potential impact of increase on consuming public; and 4) the statutory fee as a ceiling or as an established rate.

After explaining the basis for adopting a rate halfway between 2-cents and 3-cents, the House Judiciary Committee reports emphasized that this was not intended to:

... suggest that 2 1/2 cents should necessarily constitute the prevailing rate now or in the future. The half cent increase is intended merely to widen the copyright owner's bargaining range without destroying the value of compulsory licensing to record producers.

They also explained the reason for reducing the per-minute rate for compositions running over five minutes:

The bill as introduced provided for an alternative rate based on the playing time of the composition on the record; the statutory royalty was to be "either 3 cents, or 1 cent per minute of playing time or fraction thereof, whichever amount is larger." The present statute lacks a rate based on playing time, and the record producers expressed no opposition to remedying this omission. They did, however, oppose the 1-cent per minute rate as a 300 percent increase over the one-quarter cent per minute rate that has been voluntarily incorporated into negotiated licenses under the present law. They argued that, since many popular compositions run for more than 3 minutes, the proposal would have a substantial impact both in increasing the fee and in artificially shortening recorded performances.

[253]Under the record industry's proposal for an alternate rate of one-fourth cent per minute of playing time, a composition would have to run 10 minutes before the copyright owner could collect more than the standard 2 1/2 cents. The committee regards this as too long, and has adopted the half cent per minute rate as a reasonable compromise. Under the amended bill a composition running up to 5 minutes would carry the standard rate, with a half cent added for each minute, or fraction, over 5.

Section 115 of the revision bill, as reported by the House Judiciary Committee, was passed without change by the House of Representatives on April 11, 1967. Meanwhile, on March 20 and 21, 1967, the Senate Judiciary Subcommittee had heard extensive testimony on section 115, with particular emphasis on the basis and amount of the royalty rate. When the bill was reintroduced in the Senate at the beginning of the 91st Congress (S. 543, January 22, 1969), it retained, in identical form and content, the provisions of section 115 as it had passed the House. When this bill was reported by the Senate Judiciary Subcommittee to the full Committee on December 10, 1969, the amount of the rate (2 1/2 cents per record or 1/2 cent per minute) was retained, but the basis of the royalty was changed from "every phonorecord made" to "every phonorecord made and distributed." A provision that would have allowed the copyright owner to require a compulsory licensee to have his accounts certified by a Certified Public Accountant was also deleted.

[254]The 1971 revision bill (S. 644, 92nd Cong., 1st Sess.) and the 1973 Bill as initially introduced on March 26, 1973 (S. 1361, 93rd Cong., 2d Sess.), retained the provisions of section 115 as reported by the Senate Subcommittee on December 10, 1969. However, on December 1, 1972, Thomas C. Brennan, Chief Counsel to the Senate Subcommittee on Patents, Trademarks, and Copyrights, sent a letter on behalf of the subcommittee to various music and recording associations expressing the view that the royalty rate should be reexamined in light of the 26.6 percent increase in the Consumer Cost of Living Index between 1967 and 1972.

The responses to this letter included an extended exchange of arguments and counterarguments by the National Music Publishers' Association (NMPA) and the Record Industry Association of America (RIAA). Reduced to their essentials, NMPA's arguments for an increase in the rate to at least 3.5 cents were based on the effects of inflation since 1967. The rejoinder of RIAA was to the effect that an inflation factor cannot constitute the sole basis for determining an equitable royalty rate, and that a variety of complex economic factors would have to be reopened and examined in detail before any adjustment of the 2 1/2-cent rate could be considered.

[255]With respect to the question of whether the royalty should be based, as in the Senate version of the bill, on the number of phonorecords "made and distributed," the NMPA submitted a memorandum dated September 19, 1973

recommending that, as in the bill passed by the House in 1967, the words "and distributed" be omitted. The RIAA opposed this suggestion, and on October 29, 1973, Senator McClellan wrote to both organizations on behalf of the Subcommittee, urging them to meet to consider the compulsory licensing procedure under section 115. As described in a joint letter dated February 15, 1974, the two organizations reached a compromise agreement which was embodied in section 115 of the bill as reported by the Senate Judiciary Subcommittee to the full Committee on April 9, 1974.

The joint letter of February 15, 1974 also referred to "the joint view of both associations, previously transmitted to this Committee, that Section 115 should also be amended to make absolutely clear that record pirates have never had a right to a compulsory license." An amendment to this effect was also included in the April 9, 1974 version of the Senate bill.

Section 115 of the bill that emerged from the Senate Subcommittee on April 9, 1974, can be summarized for our purposes as follows:

[256] 1) The basic provisions of the 1967 House version were left intact, including the royalty rate of 2 1/2 cents or 1/2 cent per minute

2) The change in the basis for computing the royalty that had been adopted by the Senate Subcommittee when it reported the bill on December 10, 1969 ("made and distributed") was retained. However, as agreed in the joint NMPA-RIAA letter of February 15, 1974, the word "made" was changed to "manufactured" in some places in section 115 (although, apparently through inadvertence, not in others).

3) In response to the NMPA-RIAA agreement, the royalty payments and detailed accounts under a compulsory license were required to be filed monthly rather than quarterly. Moreover, the requirement for certification by Certified Public Accountant, which had been deleted from the Senate bill in December, was not only restored but was mandatory in all cases.

[257]

4) As also agreed, the following sentence was added to section 115(a)(1):

A person may not obtain a compulsory license for use of the work in the duplication of a sound recording made by another.

When S. 1361 was reported by the full Senate Judiciary Committee on July 3, 1974, section 115 remained unchanged from the Subcommittee version with one major exception: the royalty rate was raised to 3 cents, 3/4 cent per minute of playing time, whichever amount was larger. The Committee Report (S. Rept. No. 93-983) made attempt to explain this change in detail, noting only that:

While upon initial review it might be assumed that a rate established in 1909 would not be reasonable at the present time, the committee believes that an increase in the mechanical royalty rate must be justified on the basis of existing economic conditions and not on the mere passage of sixty years. Much of the data submitted by the parties was incomplete and somewhat superseded by events. The committee has made its own evaluation of the relevant data. On the basis of this review the committee has concluded that a flat rate of 2 cents is too low, and that the proponents of an increase in the mechanical royalty rate have not justified an increase above a basic rate of 3 cents. Therefore, the bill provides that the mechanical rate shall be 3 cents, or cent per minute of playing time, whichever amount is larger.

[258]The 1974 Senate report tracks the 1966 and 1967 House reports rather closely in most respects. With reference to the change from "made" to "manufactured and distributed" it explains:

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

The addition of the words "and distributed" is not intended to disturb existing judicial interpretation of the 1909 Law and its application to licenses issued under that Law, including the joint and several liability of pressers along with record companies.

With respect to amendments concerning payments and accounting, the report notes simply:

In order to increase the protection of copyright proprietors against economic harm from companies which might refuse or fail to pay their just obligations, compulsory licensees will be required to make a monthly accounting certified by a Certified Public Accountant.

[259]The reason for the new language added to subsection (a)(1) is explained as follows:

The final sentence of clause (1) provides that a person may not obtain a compulsory license for use of the work in the duplication of a sound recording made by another. The committee has considered the proliferation of litigation in the federal courts concerning whether person making an unauthorized duplication of a musical sound recording originally developed and produced by another is entitled to utilize the compulsory license. While it is the view of the committee that the original intent of the Congress has been correctly stated by the *Ninth Circuit in Duchess Music Corp. v. Stern , 458 Fed. 2nd 1305,* (1972), which held that the compulsory license was not available to those making unauthorized duplications, this question is still being litigated in a number of other circuits.

Section 115 of S. 1361 passed the Senate without change on September 9, 1974. It was reintroduced in its new guise in both Houses in January, 1975 (H.R. 2223; S. 22). When the Senate Subcommittee reported S. 22 to the full Senate Judiciary Committee on June 13, 1975, section 115, including the basic 2 1/2-cent rate, remained unchanged. At the House Subcommittee hearing on September 11, 1975, the testimony was almost entirely devoted to the amount of the royalty rate.

On October 7, 1975, the full Senate Judiciary Committee marked up the bill and reported it favorably with a number of amendments, including two in section 115. In one of its most important actions, the Committee knocked the 3-cent/ 3/4-cent per minute rate back down to 2 1/2 cents/ 1/2-cent per minute. It also revised the last sentence of section 115(a)(1) to read as follows:

[260]A person may not obtain a compulsory license for use of the work in the duplication of a sound recording made by another, unless he has first obtained the consent of the owner of that sound recording.

B. ANALYSIS OF ISSUES

1. AVAILABILITY OF COMPULSORY LICENSE TO UNAUTHORIZED RECORD DUPLICATORS

The Aeolian Company was the big piano roll manufacturer which had, by obtaining exclusive licenses from most music publishers, induced Congress to devise the compulsory license in 1909 in order to break Aeolian's potential monopoly. In 1912 the Aeolian Company sued a competitor that had duplicated Aeolian piano rolls of music for which Aeolian held a copyright license. The district court, in *Aeolian Co. v. Royal Music Roll Co. , 196 F. 926 (W.D.N.Y. 1912)* held the defendant liable for copyright infringement and granted Aeolian an injunction as a "party aggrieved" under the 1909 statute. It offered the following explanation for its conclusion:

The provision of the statute [section 1(e)] that "any other person may make similar use of the copyrighted work" becomes automatically operative by the grant of the license; but the subsequent user does not thereby secure the right to copy the perforated rolls or records. He cannot avail himself of the skill and labor of the original manufacturer of the perforated roll or record by copying or duplicating the same, but must resort to the copyrighted composition or sheet music, and not pirate the work of a competitor who has made an original perforated roll.

[261]Although the Aeolian decision seemed to open an inviting door to both copyright owners and record producers for the protection of recorded music, it was sixty years before anyone walked through it. In one of those unexplained mysteries of U.S. copyright law, the Aeolian case lay dormant, neither cited nor overruled, for generations during which efforts to obtain legislation against "record piracy" went for naught and the results of efforts to obtain judicial relief on other theories were problematical at best. Finally, in 1972, at almost the same time that Congress recognized sound recordings as copyrightable subject matter and gave performers and record producers protection against unauthorized duplication, the courts began holding that a compulsory license under section 1(e) of the 1909 copyright law gives the compulsory licensee only a right to make "similar use" of a copyrighted musical work, and that "similar use" does not include the duplication of someone else's recording.

Between 1972 and 1975 several federal district courts and four federal courts of appeals held that making an identical copy of a recorded version of a copyrighted musical composition is not a "similar use" as permitted by the compulsory license provisions of § 1(e). The four circuits that have adopted this rule are the third, fifth, ninth, and tenth, and the appellate decisions in question are:

[262] *Duchess Music Corp. v. Stern , 458 F. 2d 1305* (9th Cir.), cert. denied, *409 U.S. 847 (1972).*

Edward B. Marks Music Corp. v. Colorado Magnetics, Inc. , 497 F. 2d 285, aff'd on rehearing en banc, *497 F. 2d 292 (10th Cir. 1974),* cert. denied, U.S. (197).

Jondora Music Publishing Co. v. Melody Recordings, Inc. , 506 F. 2d 392 (3d Cir. 1974, as amended 1975), cert. denied, U.S. (1975).

Fame Publishing Co. v. Alabama Custom Tape, Inc. , 507 F. 2d 667 (5th Cir.), cert. denied, U.S. (1975).

Three of these decisions were reversals, and all of them were made by divided courts. It is also true that the Supreme Court has not ruled on the question. However, the Supreme Court has denied petitions for writs of certiorari in all four cases. It is particularly significant that, in the Marks case, the Supreme Court invited the Solicitor General to file a brief expressing the views of the United States as to whether certiorari should be granted. The brief filed by the Solicitor General, which recommended denial of certiorari, agreed with the decisions in the Marks and other cases, and added:

There is no conflict among the circuits, and, although "piracy" is an important law enforcement problem, the importance of the issues will steadily diminish. The construction of Section 1(e) is not important only with respect to recordings issued before February 15, 1972. The music on these discs and tapes will gradually become less popular, and therefore less attractive to "pirates."

[263]By thereupon denying the petitions for certiorari in Marks, and later in the Jondora and Fame cases, the Supreme Court has strengthened their authority. At present there is no real authority to the contrary.

As noted above, in the middle of all this litigation, and at a time when the decisions were in substantial conflict, the representatives of music publishers and record producers jointly proposed that the principle of the Duchess decision be written into section 115 of the revision bill. This proposal was accepted by the Senate Judiciary Subcommittee on April 9, 1974, by the full Senate Judiciary Committee on July 3, 1974, and by the Senate on September 9, 1974. The wording of the amendment, which also appears in section 115(a)(1) of the 1975 bills, reads:

A person may not obtain a compulsory license for use of the work in the duplication of a sound recording made by another.

On May 8, 1975, the representative of the Department of Justice testified at the House Subcommittee hearings that the Department "wholeheartedly supports this provision," which, it believed, "states explicitly and with clarity what four courts of appeals have ruled is the scope of compulsory licensing under the present law, namely:

... that absent authorization by the owner of a composition copyright, the duplication of a sound recording embodying a copyrighted musical composition is an infringement of the composition copyright even though the duplicator tenders royalty payments and otherwise attempts to comply with present compulsory licensing provisions.

[264]It added, significantly, that "**[s]**ince this prohibition is not limited to copyrighted sound recordings, the effect is to prevent the operation of the compulsory license mechanism for making copies of any sound recordings embodying copyrighted musical compositions."

This was precisely the point that was attacked by four witnesses who testified at the House hearings: Mr. Merry (June 5, 1975), and Messrs. Gramuglia, Heilman, and Wally (July 17, 1975). The witnesses on July 17, 1975 argued, among other things, that both the present law and the revision bill should be amended to repeal the Duchess/Marks/Jondora/Fame rule. Mr. Heilman urged that the word "not" should be removed from the last sentence of subsection (a)(1).

Mr. Gramuglia also attacked the sentence for its potential impact on small record and tape producers who actually make their own master sound recordings rather than merely duplicating those of others. The same point had been made earlier by Mr. Merry, who testified:

Under section 115, at page 21, line 21 - "A person may not obtain a compulsory license for use of the work in the duplication of a sound recording made by another." I suggest you add "without the approval of the owner of the master sound recording". Many of the sound recording masters in use today are licensed out to businesses who manufacture and distribute under the compulsory license provisions. Present wording of section 115 could be construed so as to render legally useless large libraries of music properly assembled for this purpose. Presently **[265]**section 115 requires the use of musicians to qualify for a compulsory license and ignores the fact that there are businesses which specialize in recording (studios), and there are businesses which manufacture and distribute. There are also the major music companies who are wealthy enough to do both. Section 115 as it stands would eliminate that segment of the music industry (small business) which cannot justify or afford an expensive recording studio. It pre-empts the present pooling of such cost by small business and would result in lost royalties to the copyright holder. It favors big business.

In a letter dated October 7, 1975 to Shirley Johnson, counsel on the staff of the Senate Judiciary Subcommittee on Antitrust and Monopoly, the representative of the Record Industry Association of America reiterated the necessity of retaining the sentence in question and expressed the Association's disagreement with the fears expressed before the House Subcommittee by Mr. Merry. He added, however, that RIAA had no objection to making the point clear in the statute and legislative history and recommended that the words "unless he has first obtained the consent of the owner of that sound recording" be added at the end of the sentence. RIAA recommended that the report explain this addition as follows:

The last part of the same sentence makes it clear that the compulsory license is available for authorized duplications licensed or approved by the owner of the original sound recording.

When the bill was marked up later in the same day, October 7, 1975, the full Senate Judiciary Committee accepted the amendment proposed by RIAA.

[266]2. BASIS OF ROYALTY AND COMPULSORY LICENSING PROCEDURES

As noted above, section 115 of the 1975 bills contains some provisions with respect to the basis for computing the royalty, and the payment and accounting procedures under a compulsory license, that differ both from the present law and the 1967 House bill. These can be summarized as follows:

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The change making royalties payable only for records that are "distributed," and leaving records "manufactured" but not "distributed" free of any royalty is an extremely significant one. It is clear that the National Music Publishers Association acceded to it only after the Record Industry Association of America agreed to very substantial tightening of the formal obligations a compulsory licensee must follow in order not to make himself fully liable as an infringer.

[267]These are by no means minor changes. They should be considered carefully, in light of the joint letter dated February 15, 1974, signed by James F. Fitzpatrick on behalf of RIAA and by Leonard Feist on behalf of NMPA, and addressed to Thomas C. Brennan, Chief Counsel of the Senate Subcommittee:

In response to Senator McClellan's letter of October 29, 1973, to the National Music Publishers' Association (NMPA) and the Recording Industry Association of America (RIAA), a number of discussions have been held to determine whether language in the statute and report can be developed to protect music publishers from economic harm from companies who might refuse or fail to pay their just obligations under the compulsory licensing procedures of Section 115. These discussions have proceeded in light of the joint view of both associations, previously transmitted to this Committee, that Section 115 should also be amended to make absolutely clear that record pirates have never had a right to a compulsory license.

The present state of discussions between the parties is as follows: Both parties agree that the term "manufactured" should be substituted for the term "made" in Section 115 so that the section will read "manufactured and distributed". In addition, the Committee Report should state that the addition of the words "and distributed" is not intended to disturb existing judicial interpretation of the 1909 Law and its application to licenses issued under that Law, including the joint and several liability of pressers along with record companies.

Second, both parties agree in principle that accounting and auditing procedures should be strengthened so that compulsory licensees under Section 115 will be required to make a monthly accounting and that such monthly statement

of **[268]**account should be certified by a Certified Public Accountant. NMPA is developing proposed statutory language and proposed explanatory language for the committee report if necessary, for consideration by RIAA.

Third, the parties have considered the proposal that a licensee under the compulsory license system make some advance financial commitment to guarantee payment of compulsory license fees legitimately due and owing to the publisher. RIAA would prefer a prepayment arrangement; it was concerned that any bonding proposal might handicap the ease of entry of new record producers. However, NMPA has suggested that a bonding procedure might, in fact, be far less costly than a prepayment approach, that a bonding procedure might be administered by the Register of Copyrights, and finally that such bonds are readily and economically available. NMPA has agreed to develop information on the availability of such bonds and the particulars of a bonding procedure and to draft proposals for any necessary statutory changes which RIAA has agreed to review. If these proposals carry out the spirit of the present compulsory license provisions to permit continued ease of entry and benefit the public, and are essential and practicable, RIAA has indicated it would have no objection as a matter of principle.

Both parties have agreed to review the specifics of these proposals so that they can be presented to the Committee as promptly as possible. In this connection, NMPA has agreed to furnish such specifics by February 22 and RIAA will respond by February 28. Of course, the final position of the parties will depend upon the specifics of the various proposals.

[269]On June 5, 1975, Donald D. Merry, President of SICOM Electronics Corporation, testified as follows on the detailed requirements of section 115.

Section 115, paragraph (a), clause (2) should be reviewed carefully to assure it does not stifle creativity. Many innovations such as the moog might be cramped by the wording of this clause.

Under Section 115, paragraph (c), clause (1), at line 21 - It is suggested that, due to problems frequently experienced today a more specific location for the identification of a copyright holder be set forth. ... "the registration or other public records of the copyright office" is too vague to be workable as experience has proved. This is an excellent time to solve this age old problem by simply nailing down a specific location where anybody can obtain this information readily. By location, I mean a specific file in the Library of Congress.

Under Section 115, paragraph (c), clause (3), at line 35 - The requirement for a CPA to certify with a detailed statement of account, the monthly royalty reports, each month, is unworkable in practice and is a severe and unnecessary burden on small businesses. It will not hurt big business. Annual Certified statements following monthly statements attested to by company officers should be adequate.

Under Section 115, some provisions should be provided to clarify situations which arise when the copyright holder refuses to acknowledge the rights of a compulsory license applicant. Experience has shown that this is not an isolated problem. The statutes are generally written with the protection of the copyright holder in mind; however, where we have a compulsory contract between two parties by statute, we must be sure to offer consideration to both.

[270]3. BASIS FOR THE ROYALTY RATE

One of the alternatives put forward by the Copyright Office in its 1963 preliminary draft involved a rate based on a percentage of retail price per record. The draft sought to solve the obvious problems involved in this system as follows:

The royalty with respect to each record shall be 8% of the manufacturer's suggested or established retail price, as published in its catalogs, advertisements, or other trade media; where more than one work is embodied in a record, the royalty with respect to each work covered by a compulsory license shall be computed on the basis of the ratio between its playing time and the total playing time of the record. In the absence of any suggested or established price, the royalty with respect to each work embodied in the record shall be 3/4 cent per minute of playing time or fraction thereof.

In the process of compromise that accompanied consideration of the 1963 preliminary draft, the percentage approach was abandoned, and the 1965 Supplementary Report of the Register stated:

We rejected the alternative of a royalty based on a percentage of the selling price of the record, partly because of the opportunities for abuse and subterfuge that it would offer, and partly because in the United States pricing in the record industry has been so disorganized that this alternative would be impractical.

[271]Following passage of the House bill in 1967, with its flat rate of 2 1/2 cents per record, the copyright owners floated another proposal in the Senate for basing the rate on a percentage of list price. On August 12, 1969, Senator Hart offered a formal amendment to S. 543 (Amdt. No. 137, 91st Cong., 1st Sess.) which would have deleted the provision establishing a flat rate per record and would have substituted the following:

(2) Except as provided by clause (1), the royalty under a compulsory license shall be payable for every phonorecord made in accordance with the license. With respect to each work embodied in the phonorecord, the royalty shall be no more than that proportion of 8 per centum of the manufacturer's suggested retail price of the phonorecord which the playing time of the work on the phonorecord bears to the total playing time of the phonorecord.

This amendment was defeated on December 10, 1969 in the Senate Judiciary Subcommittee, whose draft report explained:

The committee has considered and not accepted a proposal that the mechanical royalty rate should be a specified percentage of the manufacturer's retail price. The most persuasive argument advanced in support of a mechanical royalty rate based on a percentage figure is that it affords flexibility so that the payment made would continue to reflect economic conditions. This bill, however, in Chapter 8 establishes a Copyright Royalty Tribunal for the periodic review of all the royalty rates specified by statute. This approach provides the desired flexibility without the complications necessarily involved in a percentage formula.

[272]A joint statement of the American Guild of Authors and Composers (AGAC) and the National Music Publishers Association (NMPA), offered to the House Subcommittee at its hearing, on September 11, 1975, said of this effort:

The copyright proprietors sought as a matter of equity to restore in the Senate Subcommittee the concept of a percentage royalty rate ceiling -- 8% of the suggested retail list price -- instead of a fixed rate; but this effort was again defeated by the record industry.

When the revision bill resumed its momentum in early 1973 the dispute shifted to a question of the amount of a flat rate, and the possibility of basing the rate on a percentage of selling price again faded into the background.

4. AMOUNT OF ROYALTY RATE

In his statement before the House Judiciary Subcommittee on September 11, 1975, Stanley Gortikov, representing the Record Industry Association of America (RIAA), stated that the proposed raise in the royalty rate from 2 cents to 3 cents would involve $ 47,000,000 annually in increased royalty payments, more than twice the combined royalties anticipated from jukebox, CATV, and performance of records. He called it "the biggest money issue in this bill and the major commercial and consumer question before this **[273]**committee." The RIAA offered a statement by John D. Glover, Director of the Cambridge Research Institute, containing detailed statistical material suggesting the following summary of its position:

... [O]ur study leads to two major conclusions thoroughly documented by firm statistical data:

FIRST, there is no economic justification for increasing the statutory royalty rate.

The music publishing industry has argued that a higher rate is justified by virtue of inflation. We shall show that, in fact, income going to music publishing companies and other owners of copyright music has risen much faster than inflation, as measured either by (a) the Consumer Price Index, or (b) Median Family Income. In fact, publisher income from mechanical royalties has more than doubled in the past 10 years.

SECOND, the higher rate would have serious impacts on all other interested parties:

- There would be considerable pressure for a rise in record prices -- of perhaps as much as $ 100 million to consumers and other buyers of recordings, including the jukebox industry.

- Profits of record makers, especially smaller ones, would be under grave, not minor, pressures.

- **[274]**The incentive to record and release new and experimental, and hence unknown and riskier music -- and performances by unknown artists both popular and "serious" -- would be impaired.

- Employment in the recording industry would tend to fall. This would affect artists, working musicians, sound technicians, and production workers.

This view was sharply disputed by witnesses representing authors, composers, and music publishers, whose position was summarized as follows:

... To defend themselves against the ravages of inflation in the intervening years [Note: Since 1965-67], the record companies, while enjoying large increases in aggregate income, have increased their rates (prices); record performers, producers and musicians have increased their rates (wages); and those lending money to the record and publishing industries have increased their rates (interest). Only the composers, songwriters, lyricists and music publishers of America have been forced to operate under the same ceiling rate which is steadily declining in purchasing power. Treating the creators of American music more fairly can only encourage the writing, recording and consumption of still more songs to the benefit of all concerned. Respectfully but urgently, therefore, we petition Congress to rectify this inequity, to let us at least ask for a fair royalty, by increasing the ceiling over negotiations to no less than 4c per selection.

[275]Stated very generally, the copyright owners' arguments are based on inflation: if 2 1/2 cents was a fair ceiling for copyright owners in 1965-67, when records were selling at around $ 3.98, then 4 cents is a fair ceiling in 1975, when both the cost of living and the price of records have zoomed. The record industry argued that, despite inflation, copyright owners in the aggregate are receiving much more per release because of the enormous increases in unit sales since the mid-1960's, and that record companies' profit margins have actually declined in proportion to the copyright owners' share. The statistics in the new Glover report are presented in an effort to show that copyright owners are generally better off now than ten years ago, and that the impact of a one-cent increase would be serious not only to record makers but also to record consumers, the entertainment industry, and the economy in general.

C. COMMENTS AND RECOMMENDATIONS

1. RETENTION OF THE COMPULSORY LICENSE

In view of the failure of the Copyright Office's 1961 proposal to eliminate the compulsory licensing system for recording copyrighted music and the developments since then, one thing seems certain: the compulsory license has taken solid root in U.S. copyright law. We are past the point of talking about free negotiations in this area. However, Congress must consider the extent to which any real negotiations under a rate ceiling would be realistically possible.

[276]2. AVAILABILITY OF COMPULSORY LICENSE TO UNAUTHORIZED DUPLICATORS

The Copyright Office agrees that section 115 should deal with the question of whether a person who duplicates a particular sound recording of a copyrighted musical work, without a negotiated license from anyone, should be able to rely on a compulsory license as far as the music is concerned. In view of the solid authority provided by the Duchess/Marks/Jondora/Fame decisions, we also agree that the compulsory license should be precluded where the sound recording reproducing the musical composition is an unauthorized duplication of a recording already in existence. However, we believe that the language of the last sentence of section 115(a)(1), both in its original form and as amended by the Senate Judiciary Committee, needs some substantial redrafting to express its purpose.

3. BASIS OF ROYALTY AND COMPULSORY LICENSING PROCEDURES

The Copyright Office has considerable misgivings about the changes with respect to the basis of royalty and accounting procedures made in section 115 since passage of the 1967 House bill. Substitution of the word "manufactured" for "made" in some places but not others seems wholly unnecessary and could have mischievous results. More important, we remain convinced that, as stated in the House reports of 1966 and 1967, "a record maker should not be free to reproduce as many phonorecords as he wishes without any permission from or obligation to **[277]**the copyright owner, and then to pay a royalty only with respect to the phonorecords he eventually distributes to the public." Moreover, although the testimony before the committee on the question of "cut-outs" was put forward by tape duplicators rather than copyright owners, we believe that the problem is a real one and should not be ignored. It is

unclear whether the royalty to be paid on phonorecords "distributed" includes payments for phonorecords that have entered the stream of commerce, have been returned or "cut out," supposedly to be destroyed, but which are known on occasion to reenter the stream of commerce. These records and tapes should certainly be paid for before they leave the compulsory licensee's hands.

The trade-off for basing royalties on records "distributed" is the imposition of unrealistic accounting and certification requirements, which a large record company might be able to observe but which would be extraordinarily onerous and expensive for small record producers. The last two paragraphs of the RIAA/NMPA letter of February 15, 1974 makes clear that the agreement was intended to be fleshed out further, but this apparently never occurred. The Copyright Office believes that section 115 of the 1967 House bill represented a reasonable procedural reform of the 1909 compulsory license, and we prefer its approach. Thus, while we disagree with some of the concerns expressed by Mr. Merry, we concur with his view that the requirements of section 115(c)(2) are unworkable and unfair.

[278]Finally, it seems appropriate to raise a question as to whether section 115(b)(2), and the reference to that clause in section 115(b)(3), still serve any purpose. Clause (2) reads as follows:

(2) If the copyright owner so requests in writing not later than ten days after service or filing of the notice required by clause (1), the person exercising the compulsory license shall designate, on a label or container accompanying each phonorecord of the work distributed by him, and in the form and manner that the Register of Copyrights shall prescribe by regulation, the name of the copyright owner or his agent to whom royalties for public performance of the work are to be paid.

As the 1966 and 1967 House reports make clear, this provision was an integral part of the scheme for compulsory licensing of jukebox performances that was knocked out of the House bill on the House floor on April 11, 1967, and out of the Senate bill on December 10, 1969. At the moment, clause (2) seems to be a useless, and potentially burdensome vestige; in the absence of fresh reasons for retention, it should be deleted.

3. BASIS FOR THE ROYALTY RATE

A royalty-rate basis involving a percentage of selling price is, at least on its face, a fairer and more flexible approach than a flat rate per record. It is the approach followed in other countries that have adopted compulsory licensing systems. It should be noted that, in those countries, the actual compulsory licensing procedures are much more often used by record producers, and their operations are regulated by government tribunals authorized to adjudicate and settle disputes.

[279]The time may come when patterns in the music industry and the legal and administrative frameworks in which they operate make it advisable to shift from a flat-rate per record to a percentage of price. It seems clear, however, that this time has not yet arrived.

4. AMOUNT OF ROYALTY RATE

The Copyright Office's basic position on the royalty rate remains as stated in the 1965 Supplementary Report of the Register (and as repeated in the 1966 and 1967 House reports):

... the statutory rate should be at the high end of a range within which the parties can negotiate, now and in the future, for actual payment of a rate that reflects market values at that time. It should not be so high, however, as to make it economically impractical for record producers to invoke the compulsory license if negotiations fail.

We also endorse the following conclusion, expressed in the 1966 and 1967 reports:

In the significant debate over whether the statutory fee is a ceiling or a rate there appears to be some validity to the arguments on both sides. The fee is certainly a ceiling in the sense that no higher amounts are ever paid, but the record producers may well be right in asserting that the statutory fee establishes a base, with stereotyped variations downward, that for practical business reasons is used as the rate in most written agreements. In this sense there may be relatively few "negotiated" agreements; **[280]**but this does not necessarily mean that, if the statutory maximum were increased somewhat, the prevailing fee structure would immediately be increased to the maximum without negotiations.

Operating on these premises, the House Judiciary Subcommittee in 1966 undertook a thorough analysis of the testimony and statistical data that had been presented to it at the 1965 hearings, and that it had been able to collect on its

own. It concluded that two cents was too low, and that three cents would be too high. It adopted 2 1/2 cents, but not necessarily as "the prevailing rate now or in the future." The 1966 and 1967 House reports emphasize that "the half cent increase is intended merely to widen the copyright owner's bargaining range without destroying the value of compulsory licensing to record producers."

Following the 1967 Senate hearings, the Library of Congress Legislative Reference Service (now the Congressional Reference Service) was asked to study and report on the issue. A 113-page report, dated June 30, 1969, was prepared by Edward Knight, Analyst in Industrial Organization in the LRS Economics Division, and was entitled The Mechanical Royalty Rate on Sound Recordings: Survey of Issues before the Judiciary Committees of the Congress. Mr. Knight's last paragraph plaintively sums up his conclusion:

This study has attempted to evaluate whether or not the Congress has the information it needs to render a final judgment on the mechanical royalty controversy. Unfortunately, it must be said that the findings to date remain inconclusive.

[281]Specifically, the Knight report observes:

This review and evaluation of House and Senate testimony on the mechanical royalty rate issue has shown, among other things, that:

1. The record industry--which opposes any increase in the current mechanical royalty rate ceiling--has not provided the Congress a complete and meaningful picture of its financial condition.

2. Similarly, the music publishers and the composers they represent--who advocate an increase in the ceiling rate--have demonstrated a clear reluctance to provide the Congress with the type of financial information that will be needed to evaluate their position.

Mr. Knight recommended additional independent factfinding by the Congressional Committees through methods such as "further study and investigation by committee staff--including, if necessary, outside (independent) research assistance; the establishment of an independent ad hoc study group by the Congress; and/or the reopening of hearings by one or both of the committees having jurisdiction over this question."

The Knight report recommended that two principal areas of inquiry be thoroughly explored before a definitive conclusion is reached:

1. The obtaining of complete, definitive, accurate information about all aspects of the financial characteristics of the music-recording business, using the following guidelines:

[282] 1. The Congress should require disclosure of the financial records of all music publishing and recording firms which will be directly affected by proposed changes in the mechanical royalty rate ceiling. This includes not only independent firms but divisions and subsidiaries of multi-market companies as well.

2. Because both segments of the music business (publishing and recording) encompass many hundreds of enterprises, it must be assumed that any financial survey will have to be conducted on a sample basis. Nonetheless, it is essential that it be demonstrated to the satisfaction of the Congress that such a sample is, within reason, representative of firm activity--large, medium and small (based on appropriate sales ranges), in both segments of the industry.

3. The time period to be covered in such a survey should be long enough to take into account the extensive changes that have taken place in the structure and economic performance of the music-recording business--with particular attention being given to changes that have taken place since the middle 1950's. Moreover, it is essential that a breakdown according to firm size be shown for each year covered by the financial survey.

2. Obtaining full knowledge of the "many important changes that have taken place in the economic structure of the music-publishing and recording businesses since the end of World War II and particularly since the middle 1950's," with special attention to the economic implications of:

[283] (1) the growing number of music-recording organizations which assume the role of both the music publisher and the record producer--including enterprises formed by composers and recording artists and new recording companies;

(2) large scale and integrated entertainment companies--including in particular the major motion picture companies and broadcasting organizations--which have become extensively involved in both music publishing and the production distribution of sound recordings; and

(3) the growing importance of conglomerates or multi-market enterprises in both the publishing and recording fields of the music-recording business--a fairly recent development.

After reviewing the Knight report and the various economic data submitted to it during and after 1967, the Senate Subcommittee reported the revision bill on December 10, 1969, with the rate pegged at 2 1/2 cents / 1/2 cent per minute. Apparently accepting the inflation argument put forward by the authors, composers, and music publishers, the full Senate Judiciary Committee raised the rate back up to 3 cents / 3/4 cent per minute when it reported the bill on July 3, 1974. The bill passed the Senate on September 9, 1974 with the 3-cent rate, which was carried over in the 1975 bills and survived the Senate Subcommittee mark-up on June 13, 1975. When the full Senate Judiciary Committee reported the bill on October 7, 1975, it knocked the rate back to 2 1/2 cents / 1/2 cent per minute. And so it goes.

[284]It is obviously much too late in the game for Congress to undertake the kind of thoroughgoing review urged by the Knight report. Moreover, the bill in its present form creates a Copyright Royalty Tribunal which, for the future, could undertake the kind of exhaustive study Mr. Knight contemplated, particularly if it were given subpoena power. However, Congress must decide now on the specific fee that the Tribunal will be reviewing later.

The Copyright Office believes that the 2 1/2 cents / 1/2 cent per minute rate adopted by the House of Representatives in 1967 was well thought-out and fair in 1967. We take no position as to whether it is sufficient in 1975 because the copious testimony and data submitted to the House subcommittee on September 11, 1975 is in sharp conflict and, by itself, does not provide a sufficient basis for a definitive conclusion.

At the same time, the Copyright Office is not opposed to the 3 cent / 3/4 cent per minute rate set in H.R. 2223, the bill now under consideration by the House Judiciary Subcommittee. We cannot agree that the factor of inflation, taken alone, is automatically sufficient to justify an increase, but we equally cannot agree that inflation of the sort we have seen in recent years can be discounted entirely.

[285]Although these points have been made many times, it bears repeating that the mechanical royalty is compulsory only on the copyright owner, not the record maker; that it has a ceiling but no floor; and that the real market value of mechanical rights in this country has never been established because, ever since these rights were created in 1909, the bargaining power has all been one way. In a typical case at present the individual authors of a song will divide one cent per record, or $ 1,000, for a "hit" record selling 100,000 copies.

We are talking here about individual songwriters, not corporations, and the impact of inflation on them since 1967 has been real. The costs of making records has risen dramatically in the past ten years, but so have the prices of records. It may be true, as the RIAA claims, that corporate profits in the record industry have decreased because of inflation. The fact remains that, of the various individual human beings involved in making a record, the individual songwriters are the only ones who have received no increase in their remuneration to make up for the rise in their individual cost of living.

The range of rates under discussion in the two Houses at present are 2 1/2 and 3 cents. The Copyright Office believes that Congress has enough information before it to enact a fair rate within this range, recognizing that the rate's relation to true market value and its effect as a ceiling will be thoroughly examined by the Royalty Tribunal.

§ [286]CHAPTER X COIN-OPERATED PHONORECORD PLAYERS ("JUKEBOXES")

Sections Considered:

§ 116 - Scope of exclusive rights in nondramatic musical works: Public performance by means of coin-operated phonorecord players

Issues:

1. Should jukebox performances be subject to copyright royalties; or, conversely, should they be subject to exclusive rights, without compulsory licensing?

2. Assuming a compulsory license, what should the annual royalty be?

3. Should the royalty be subject to review, by the Copyright Royalty Tribunal?

[287]A. BACKGROUND OF THE PROBLEM

The hearings before the House Judiciary Subcommittee on June 3, 1975 were devoted to section 116 of the revision bill, the provision dealing with performances of music on coin-operated machines, and they proved a pale reflection of the full-blooded battles waged over this issue for more than forty years. Since 1926 the jukebox operators have successfully staved off continuous attempts to repeal the present "jukebox clause" of the 1909 law:

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 outright exemption was added to the 1909 act without explanation just before its passage, apparently as the result of some last-minute legislative expediency. As long as the machines involved were player pianos and similar musical automats the economic impact of the exemption was slight, but, with the enormous expansion of the jukebox industry beginning in the late 1920's, unfairness was more and more apparent. A particularly sore spot has arisen from the fact that American copyright owners, whose works are popular in foreign countries, receive substantial royalties from jukebox performances abroad, while a foreign composer who has a jukebox hit in the United States receives nothing from that source.

[288]Proposals to remove the exemption have taken different forms, and by the early 1960's it was becoming apparent that some sort of compulsory licensing probably offered the only realistic solution. The 1961 Register's Report stated:

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 that this exemption should be repealed, or at least should be replaced by a provision requiring jukebox operators to pay reasonable royalties. ...

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. ...

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.

House hearings were held in 1963 and a bill completely removing the exemption after a one-year period (H.R. 7194) was reported (with minority views) by the House Judiciary Committee on September 10, 1963 (H.R. Rep. No. 733, 88th Cong., 1st Sess.). This measure failed to reach the House floor, but was incorporated in the 1964 and 1965 drafts. However, other 1963 bills had adopted different forms of compulsory licensing. The 1965 Supplementary Report of the Register stated:

[289]It would be tragic if the controversy on this one issue were to cause the complete failure of a general revision bill that is urgently needed in the public and national interest. But, lest there be any misunderstanding, we believe it would be deplorable if, to avoid this controversy, one of the most striking inequities of the present law were to be left untouched.

The position of the Copyright Office on this issue is that the results of the jukebox exemption were unforeseen by Congress in 1909, and that it would be inequitable to continue to deny copyright owners any royalties whatever for performances that are certainly "in public" and "for profit," and that are the whole purpose of a large industry. "Mechanical royalties," whether under the compulsory license or otherwise, compensate the copyright owner for the recording of his work on disks or tapes; they do not compensate him for public performance of his work from the records, whether the performances are broadcast over the air, transmitted over wires, played publicly in a discotheque or theatre, or played publicly on a jukebox.

The principal argument of the jukebox operators, which deserves careful and objective consideration, is that removal of the exemption would subject them to royalty demands and risks of infringement suits without limits or safeguards. In an effort to meet this argument, a bill (H.R. 5174) was introduced in the 88th Congress which would have

repealed the jukebox exemption but would have excused a jukebox operator from any further liability if he paid a specified annual sum ($ 5 per jukebox) into a fund from which distributions could be made to copyright owners.

At the hearings on that bill, the operators expressed their firm opposition to this or any other plan that would require them to pay performing royalties. This opposition was based on two arguments: that the proper way to compensate copyright owners is through an increase in "mechanical" royalties under the compulsory license, and that, if the principle of royalties for jukebox performances were ever to be established in the statute in any form, efforts would inevitably be made to raise the statutory fee or remove any ceiling on it.

[290] Following one more round of sharply conflicting testimony in 1965, the House Judiciary Subcommittee reported a bill (H.R. 4347) on October 12, 1966, which contained a jukebox section (§ 116) based on a compulsory licensing system. The 1966 report stated:

Even though the arguments at the hearings were presented dialectically in support of completely opposite conclusions, it was apparent that neither outright repeal nor unqualified retention of the jukebox exemption was the only possible solution to the problem. Following the hearings various alternative proposals were put forward, both by the interests affected and within the committee itself, and were given thoroughgoing consideration.

The report then went on to describe four possible approaches to the problem: 1) compulsory arbitration; 2) compulsory license with per-box maximum; 3) compulsory licensing with fixed fee per record purchased; and 4) compulsory licensing with fixed fee per record in box.

The House Judiciary Committee opted for the fourth of these systems, concluding that:

Performances on coin-operated phonorecord players should be subject to a compulsory license (that is, automatic clearance) with statutory fees. Unlike other commercial music users, who have been subject to full copyright liability from the beginning and have made the necessary economic and business adjustments over a period of time, the whole structure of the jukebox industry has been based on the existence of the copyright exemption. Merely withdrawing the exemption might, as they fear, place the operators in a position that would be unjustifiably weak with respect to bargaining and unnecessarily perilous with respect to liability.

[291] After a fairly careful economic analysis, the Committee set an alternative quarterly fee of either 3-cents per song or a prorated amount of less than 3 cents based on box capacity and the total number of songs available for performance during the quarter. On this basis, it estimated that annual royalties would average $ 19.20 per box or $ 9,216,000 per year.

This formula was again adopted by the House Judiciary Committee in 1967, when it reported H.R. 2512. However, when the bill went to the floor of the House, it became apparent that neither the system nor the amount could be enacted without substantial change. After strenuous negotiations, essentially the same formula now in the bill was passed by the House on April 11, 1967. The amount of the royalty was to be $ 8 per box.

The original 1969 Senate version of the bill reverted to the earlier formula of 3 cents per work, but when the bill was reported on December 10, 1969 by the Senate Judiciary Subcommittee it had adopted essentially the version passed by the House. However, since the 1969 bill as reported by that Subcommittee also contained a provision granting royalties for public performances of sound recordings, the per-box fee was set at $ 9 per year with 1/9 allocated to the producers and performers of copyrighted sound recordings. This version of the bill also established a 50-cent fee for recording a jukebox in the Copyright Office as part of the compulsory licensing procedure. **[292]**The 1969 bill, as reported, also set up the Copyright Royalty Tribunal and, among other things, gave it responsibility for periodic review and adjustment of the $ 9 jukebox royalty.

These provisions remained unaltered in the 1971 revision bill and in the 1973 revision bill as originally introduced (S.1361). However, when the full Senate Judiciary Subcommittee reported S.1361 on July 3, 1974, the fee was reduced to $ 8, with 1/8 going to the copyright owners and performers of sound recordings. The 50-cent registration fee was deleted from section 708 though a vestige of it remained in section 116. The Senate report states:

This committee in 1958 recommended an average annual per box payment of $ 19.70. The most recent hearings on the jukebox question did not provide any indication that the committee's decision in 1958 was unwise or the rate of payment unreasonable. In providing in this legislation for a total payment of $ 8 per box, of which 1/8 shall be allocated

to the copyright owners and performers of sound recordings, the committee has been greatly influenced by the desire to conform to the rate provided in the copyright legislation passed by the House of Representatives during the 90th Congress. Therefore, although a higher rate would be warranted, the committee has endeavored to facilitate the progress of this legislation by preserving, to the extent possible in view of other provisions of this bill, the rate adopted by the House of Representatives.

The reported bill retained the provisions in *Chapter 8* making the $ 8 fee subject to periodic review by the Copyright Royalty Tribunal, but even this was deleted on the floor when the bill passed the Senate on September 9, 1974.

[293]On September 11, 1974, Senator McClellan inserted a statement in the Congressional Record which read in part as follows:

Mr. President, on September 9 the Senate, by a voice vote, adopted an amendment to S. 1361, the copyright revision bill, to freeze the jukebox copyright royalty rate, and exempt the jukebox industry from the provisions of the bill providing for periodic review of royalty rates by impartial arbitrators. The proponents of the amendment alleged economic hardship in the jukebox industry. In speaking against this amendment, I said it gave "no protection to the consumer, for a jukebox operator can increase the fees charged to the public. But, for all practical purposes, the payment that he makes to the composers of the songs played on his machine are permanently frozen."

My office received today the September 14, 1974, issue of Billboard, which contains an article reporting that a major jukebox manufacturer is recommending that jukebox operators charge the public 25 cents per play on certain machines.

Again, on November 27, 1974, Senator McClellan wrote to jukebox operators, manufacturers, and other interested parties indicating once more that he felt the annual fee should be $ 19.70, especially if the $ 8 was not to be subject to review.

The 1975 bill as introduced in both Houses adopted the form in which the 1974 bill passed the Senate. However, when S.22 was reported by the Senate Judiciary Subcommittee on June 13, 1975, the provision for Tribunal review was restored in Chapter 8, and this change was retained by the full Committee when it reported S.22 to the Senate on October 7, 1975.

[294]Meanwhile, on June 5, 1975, the House Judiciary Subcommittee held a hearing on section 116 of H.R. 2223, the first jukebox hearing since 1967. The same old pro and con arguments were made, but the tone was muted. It appeared, to some observers at least, that the only true issue being discussed was whether or not the $ 8 fee should be subject to Tribunal review.

B. COMMENTS AND RECOMMENDATIONS

Section 116 seems too far down the road to warrant reopening either its premises or its basic formulation. The vestigial reference to section 708(9) should be removed, assuming that the Committee wishes the costs of licensing jukeboxes by the Copyright Office to be borne by copyright owners. Similarly, it might be wise to add language making clear that "coin-operated" machines include devices activated by tokens, currency, etc.

Aside from these minor adjustments, the only questions are the $ 8 amount and whether the Royalty Tribune [sic] should be able to review it. These are essentially practical and interrelated questions. The Copyright Office takes no position on them, although as in the case of other compulsory licenses, we recognize that the Tribunal could be more effective than Congressional Committees in marshalling and evaluating the masses of economic data necessary to revise the rates up or down, and that a Congressional veto power is provided.

§ [295]CHAPTER XI COPYRIGHT OWNERSHIP AND TRANSFER

Sections Considered

§ 101 - Definitions ("work made for hire")

§ 201 - Ownership of copyright

§ 202 - Ownership of copyright as distinct from material object

§ 203 - Termination of transfers and licenses granted by the author

§ 204 - Execution of transfers of copyright ownership

§ 295 - Recordation of transfers and other documents

Issues:

1. Should commissioned portraits be considered "works made for hire" under the definition in section 101?

2. Is the provision dealing with involuntary transfers, added as subsection (e) of section 201 by the Senate Judiciary Subcommittee on June 13, 1975, a satisfactory solution to the problem?

3. Are the provisions of clauses (4), (5), and (6), of section 203(b) satisfactory?

[296]A. BACKGROUND AND SUMMARY

1. GENERAL BACKGROUND

During the pre-legislative period in the current revision program, and particularly between 1961 and 1965, the provisions on ownership and transfers of copyright were the subject of close scrutiny, some hot debate, and a great deal of tortuous drafting and redrafting. Almost every provision in *Chapter II* represents a compromise of one sort or another, and those involving works made for hire and termination of transfers were extraordinarily difficult to achieve. However, by the time the bill reached the stage of hearings before the House Judiciary Subcommittee in 1965, most of the disagreements were on the way to being resolved. After painstakingly reviewing Chapter 2, particularly the labyrinthine provisions of section 203, and after adopting some amendments, the subcommittee produced a chapter on copyright ownership and transfer together with a definitive legislative report, that have remained unchanged and virtually unchallenged for nearly ten years.

[297]2. SUMMARY OF CHAPTER 2

Initial Ownership. The bill in section 201(a) reaffirms the established principle that copyright ownership originates in the author, and that two or more authors of a "joint work" are co-owners of the copyright. The bill, like the present statute, is silent as to the rights of co-owners of a copyright to use and authorize the use of the copyrighted work, thus leaving in effect the court decisions which generally treat co-owners of copyright as tenants-in-common.

Works made for hire. Section 201(b) follows the present law in providing that, "[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author." A "work made for hire" is defined in section 101 as "a work prepared by an employee within the scope of his employment"; it also includes special cases of works "specially ordered or commissioned" for certain specified purposes, if "the parties expressly agree in writing that the work shall be considered a work made for hire."

Contributions to collective works. Section 201(c) makes clear that each separate contribution to a collective work (such as a periodical issue or encyclopedia) is to be regarded as a separate work in which copyright ownership "vests initially in the author." The subsection also establishes a presumption, in the absence of an express transfer, that the author remains the copyright owner in his contribution, and that the publisher acquires only certain publishing rights.

[298]Transfer and divisibility of copyright. Like the present statute, section 201(d)(1) of the bill would make copyrights transferable by any means of conveyance or by operation of law. In addition, section 201(d)(2) attempts to solve the problems that have arisen under the present law because of the theory that a copyright is indivisible, and therefore that a transfer of less than all of the rights under a copyright is a license rather than an assignment. It provides that "(a)ny of the exclusive rights comprised in a copyright, including any subdivision of any of the rights * * * may be transferred * * * and owned separately."

Distinction between ownership of copyright and material object. Section 202 makes clear a principle stated in the present law: that ownership of a copyright and ownership of a "copy" or "phonorecord" embodying a copyrighted work

are two different things, and that the transfer of one is not of itself a transfer of the other. As a result of the interaction between this and other sections, however, a presumption now established under the common law -- that an artist or other author transfers his literary property rights along with his work of art or manuscript unless he expressly reserves them -- would be reversed.

[299]Termination of transfers and licenses ("reversion"). Under the present law, the renewal copyright after the first term of 28 years reverts in certain situations to the author or other specified beneficiaries. The bill drops the renewal device, but section 203 would permit the author or his widow and children to terminate any grant he himself had made of his rights after 35 years (or up to 40 years in certain situations). The termination would not be automatic, but could be effected by serving an advance written notice on the grantee within specified time limits. Grantees would be given the equivalent of a right of "first refusal," and grantees who have made derivative works during the 35-year period could continue to use them in any event.

Execution and recordation of transfers. The general requirement of section 204 that all transfers of copyright ownership be in writing and signed will have a much broader application than the equivalent section in the present law since, under the bill, all unpublished works will be brought under the statute. The bill would also clarify and tighten the provisions with respect to recording transfers in the Copyright Office.

[300]B. ANALYSIS OF ISSUES

1. COMMISSIONED PORTRAITS AS "WORKS MADE FOR HIRE"

As noted in the 1965 Supplementary Report of the Register:

The problem of "works made for hire" -- their scope, definition, and treatment -- has been a difficult and hotly contested issue in the development of the bill. Whether or not a work is considered "made for hire" has a number of important consequences, particularly in relation to duration of copyright, ownership, and the right to terminate transfers under section 203. The definition now in section 101 represents a carefully worked out compromise aimed at balancing legitimate interests on both sides.

One of the most difficult problems to be resolved was the status of works made on "special order or commission." The Copyright Office's 1963 preliminary draft explicitly excluded commissioned works from the scope of "works made for hire," but this met with strong opposition particularly from book publishers. Their argument, as stated in the 1965 Supplementary Report was that:

... there are a great many works which for practical reasons are prepared "on special order or commission" but which by their nature deserve to be treated as "works made for hire." Examples were given of translations, maps and illustrations in books, front matter and appendixes, contributions to dictionaries and encyclopedias, and parts of motion pictures, which are prepared by freelance authors at the instance, direction, and risk of a publisher or producer. It was argued that the same legal and policy consideration dictating to these works and that, in particular, it would be unfair in these cases to allow authors to terminate assignments of rights under section 203.

[301]On the other hand, as the 1965 Supplementary Report pointed out, there are many works, such as serious music and choreography, that are written on commission but are not, and should not, be considered "works made for hire." The 1964 bill tried to draw a proper line by bringing a commissioned work under the definition "if the parties expressly agree in writing that it shall be considered a work made for hire." As the Supplementary Report explained:

This approach drew even heavier fire from the representatives of authors' organizations, who argued that an author could easily be induced to sign a form contract stating that his work is "made for hire," and that ordinary book publication contracts, signed before the author has completed the work and calling for an advance against royalties, could be converted into "employment agreements" as a matter of course.

After a great deal of discussion and splitting of hairs, the definition of a "work made for hire" which emerged in the bill as passed by the House on April 11, 1967 represented a carefully balanced compromise:

A "work made for hire" is:

(1) a work prepared by an employee within the scope of his employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

[392]The definition then went, on at length, to define "supplementary work" and "instructional text."

All this has remained unchanged since 1967 with one exception: when the Senate Judiciary Subcommittee reported the bill to the full Committee on December 10, 1969, it added "a work specially ordered or commissioned for use ... as a photographic or other portrait of one or more persons" to the list. The origin and rationale of this amendment is unclear; the 1974 Senate report merely says:

Another specific category under the definition of "works made for hire" is a "photographic or other portrait of one or more persons." Works of this sort are frequently commissioned and should be considered "works made for hire" if, as in the other specified categories, both of the parties sign a written agreement to this effect.

2. INVOLUNTARY TRANSFERS

As explained above in *Chapter I*, the 1975 bills as introduced contained, in section 104, a provision stating that the expropriation of copyright by a governmental organization of a foreign country was not to be accorded legal affect [sic]under the U.S. copyright statute. This provision originated as a response to concerns arising from adherence by the Soviet Union to the Universal Copyright Convention.

[303]This provision was substantially redrafted and moved to section 201, the basic provision on copyright ownership, by the Senate Judiciary Subcommittee on June 13, 1975 and by the full Senate Judiciary Committee on October 7, 1975. It now appears as subsection (e) of section 201, and reads as follows:

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

The Senate report on S. 22 has not yet been published but it will presumably use the 1974 Senate report as its point of departure. It will make clear that the purpose of the provision is to reaffirm the basic principle that the individual author is the fountainhead of copyright protection, and that his copyright cannot be taken from him involuntarily. As now worded, the provision would apply to all involuntary transfers, including but not limited to foreign expropriation. The report would make clear, however, that legal actions involving copyrights, such as bankruptcy proceedings and mortgage foreclosures, would not be affected by the subsection, since the author has taken some voluntary act, in effect consenting to the transfer.

[304]3. TERMINATION OF TRANSFERS AND LICENSES

The 1965 Supplementary Report of the Register introduced its discussion of section 203 as follows:

Throughout the drafting phase of the revision program the most explosive and difficult issue has been the problem that the Report in 1961 called "protection of authors against unremunerative transfers," and that section 203 of the 1965 bill calls "termination of transfers and licenses granted by the author," but that has come to be known generally as the "revision problem." The present renewal section of the statute provides that, under certain circumstances, ownership can revert to the author, or specified beneficiaries at the end of 28 years. However, the provisions of that section are so complex and poorly drawn that, under the court decisions construing them, they have become extremely burdensome and in some cases self-defeating. The Report recommended that the present renewal provision be done away with, but also took the view that, "**[s]**ince authors are often in a relatively poor bargaining position * * * some other provision should be made to permit them to renegotiate their transfers that do not given them a reasonable share of the economic return from their works."

Section 203 is a compromise that attempts to balance the interests of individual authors and their transferees in a fairer way than the present renewal provision. The subject is inherently complex, and the bargaining over individual

provisions was very hard indeed. The result is an extremely intricate and difficult provision, but one that has appeared to have gained general support.

[305]At the 1975 House Subcommittee hearings, the Justice Department challenged one of the provisions of section 203 on policy grounds. As noted in the 1967 House report noted, Justice had raised the same objection earlier:

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

The Justice Department, in its statement of May 8, 1975, said:

We do not believe that the grantee or his successor should be in a preferred position to enter into an agreement for transfer prior to termination of the original transfer. We see no reason why all potential transferees should not have an equal opportunity to enter into such an agreement. It is therefore suggested that subparagraph (4) of Section 203(b) and subparagraph (D) of Section 304(c)(6) be deleted.

[306]Concerns have also been raised by the counsel of the Authors League of America as to the possible misinterpretation of clauses (5) and (6) of section 203(b). In a letter to the Register of Copyrights dated September 3, 1975, Irwin Karp urged that either the bill or the legislative report be amended to make clear that:

1) the provisions of section 203 (and of its counterpart in section 304) cannot be interpreted to "change the rules of contract law which permit an author to terminate a license, transfer or assignment when the user fails to exploit the copyright or exclusive rights transferred thereby;"

2) the provisions of these two sections do not have the effect of extending the duration of any transfer or license that has been made for a period of less than 35 years.

C. COMMENTS AND RECOMMENDATIONS

1. COMMISSIONED PORTRAITS AS "WORKS MADE FOR HIRE"

The addition of portraits to the list of commissioned works that can be made into "works made for hire" by agreement of the parties is difficult to justify. Artists and photographers are among the most vulnerable and poorly protected of all the beneficiaries of the copyright law, and it seems clear that, like serious composers and choreographers, they were not intended to be treated as "employees" **[307]**under the carefully-negotiated definition in section 101. The Copyright Office recommends deleting this reference or, at the very least, calling it to the attention of the various groups now concerned with artists' rights.

2. INVOLUNTARY TRANSFERS

The Copyright Office concurs with the Senate amendment now embodied in section 201(e) of S. 22, as reported on October 7, 1975.

3. TERMINATION OF TRANSFERS AND LICENSES

The "first refusal" exception was one of the compromises on which the delicate balance of section 203 rests. We agree with the House Judiciary Committee's conclusion in 1967 that the provision should be retained.

We also agree with the proposals for clarification put forward by the Authors League, and feel that they can both be dealt with in the legislative report.

§ [308]CHAPTER XII FEDERAL PRE-EMPTION AND DURATION OF COPYRIGHT

Sections Considered:

§ 301 - Pre-emption with respect to other laws

§ 302 - Duration of copyright: Works created on or after January 1, 1977

§ 303 - Duration of copyright: Works created but not published or copyrighted before January 1, 1977

§ 304 - Duration of copyright: Subsisting copyrights

§ 305 - Duration of copyright: Terminal date

Issues:

1. Should section 301 be amended to reflect more accurately the current state of the law with respect to Federal pre-emption?

2. Should sound recordings fixed before February 15, 1972 be made an exception to the Federal pre-emption presented by section 301?

3. Should the term of copyright provided by the bill be shortened?

4. Should the legislative report on section 304 indicate agreement with the interpretation of "posthumous work" in *Bertok v. Boosey Hawkes, Inc.* ?

[309]A. SUMMARY OF CHAPTER 3

Single national system. Instead of the present dual system of protection of works under the common law before they are published and under the Federal statute after publication, the bill would, under section 301, establish a single system of statutory protection for all works, whether published or unpublished. The common law would continue to protect works (such as choreography and improvisations) up to the time they are fixed in tangible form, but thereafter they would be subject to exclusive Federal protection under the statute, even though they are never published or registered.

Duration of copyright in works created after new law's effective date. The present term of copyright is 28 years from first publication or registration, renewable for a second period of 28 years. With respect to works created after it comes into effect, the bill would provide in section 302 for a term of the author's life plus 50 years, in order to bring it into line with the copyright term in most countries. "Joint works" would be protected for the life of the second author to die plus 50 years after his death. For anonymous or pseudonymous works, and works made for hire, the term would generally be 75 years from publication, with a maximum limit of 100 years from creation **[310]**of the work. Section 302 also provides that the Copyright Office is to maintain records of information concerning the dates of authors' deaths, and establishes a system of presumptions to take care of the situation in which a user cannot determine the precise date of an author's death.

Duration of copyright in pre-existing works under common law protection. Under section 303, an unpublished work still under common law protection when the statute comes into effect would be brought under the statute and given the same term of copyright as that applicable to works created after the effective date. However, in order to assure that all of these existing works are given a reasonable term of statutory protection, the bill provides that in no case will the copyright in such a work expire before 1990, and the minimum term would be extended to 2015 if the work is published before the end of 1990.

Duration of subsisting copyrights. For copyrights still in their first term when the new law comes into effect, the bill would by section 304 retain the present renewal provisions but would extend the length of the renewal term from 28 to 47 years (making a total of 75 years from publication or registration). For copyrights in their renewal term the total term would also be extended to 75 years. In both cases the bill contains provisions, closely similar to those with respect to the right to terminate assignments and licenses, which would entitle the author or certain of his beneficiaries to reclaim rights in the extended term of copyright.

[311]B. DISCUSSION OF SPECIFIC PROVISIONS

1. FEDERAL PRE-EMPTION (SECTION 301)

The pre-emption of common law copyright, and the establishment of a single Federal system protecting all works from their creation for a definite term, represent the most basic changes to be made in the U.S. copyright system since its inception. The United States inherited the present dual system of common law copyright for unpublished works and statutory copyright for published works from England, which abandoned it in 1911.

The advantages of a uniform national copyright system have been widely recognized, and it is noteworthy that no opposition to the principle of section 301 has been expressed in recent years. The major arguments in favor of a single Federal system have been summarized in all of the legislative reports since 1966 as follows:

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

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

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

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

[313]When it reported the revision bill on November 20, 1975, the Senate Judiciary Committee adopted some changes in the wording of section 301. As revised, the provision now reads as follows:

§ 301. Pre-emption with respect to other laws

(a) On and after January 1, 1977, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to:

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

(2) any cause of action arising from undertakings commenced before January 1, 1977; or

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106, including rights against misappropriations not equivalent to any **[314]**of such exclusive rights, breaches of contract, breaches of trust, trespass, conversion, invasion of privacy, defamation, and deception [sic] trade practices such as passing off and false representation; or

(4) sound recordings fixed prior to February 15, 1972.

(c) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

2. DURATION OF COPYRIGHT

The legislative reports list 7 reasons for changing the present term of copyright to one based on the life of the author:

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

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

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

[315]4. A system based on the life of the author would go a long way toward clearing up the confusion and uncertainty involved in the vague concept of "publication" and would provide a much simpler, clearer method for computing the term. The death of the author is a definite, determinable event, and it would be the only data that a potential user would have to worry about. All of a particular author's works, including those successively revised by him, would fall into the public domain at the same time, thus avoiding the present problems of determining a multitude of publication dates and of distinguishing "old" and "new" matter in later editions. The bill answers the problems of determining when relatively obscure authors died, by establishing a registry of death dates and a system of presumptions.

5. One of the worst features of the present copyright law is the provision for renewal of copyrights. A substantial burden and expense, this unclear and highly technical requirement results in incalculable amounts of unproductive work. In a number of cases it is the cause of inadvertent and unjust loss of copyright.

Under the life-plus-50 system the renewal device would be inappropriate and unnecessary.

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

[316]7. A very large majority of the world's countries have adopted a copyright term of the life of the author and 50 years after his death. Since American authors are frequently protected longer in foreign countries than in the United States, the disparity in the duration of copyright has provoked considerable resentment and some proposals for retaliatory legislation. Copyrighted works move across national borders faster and more easily than virtually any other economic commodity, and with the techniques now in common use this movement has in many cases become instantaneous and effortless. The need to conform the duration of U.S. copyright to that prevalent throughout the rest of the world is increasingly pressing in order to provide certainty and simplicity in international business dealings. Even more important, a change in the basis of our copyright term would place the United States in the forefront of the international copyright community. Without this change, the possibility of future United States adherence to the Berne

Copyright Union would evaporate, but with it would come a great and immediate improvement in our copyright relations. All of these benefits would accure [sic] directly to American and foreign authors alike.

C. COMMENTS AND RECOMMENDATIONS

1. AMENDMENT OF SECTION 301

Aside from the new clause (4) of section 301(b), discussed in the next paragraph, the Copyright Office endorses the changes made by the Senate Judiciary Committee in section 301. They appear to satisfy points raised by the Department of Commerce and NASA, among others.

[317]2. EXCEPTION FOR PRE-1972 SOUND RECORDINGS

A unique and difficult problem is presented with respect to the status of sound recordings fixed before February 15, 1972, the effective date of the amendment bringing recordings fixed after that date under Federal copyright protection. In its testimony before the House Judiciary Subcommittee on May 8, 1975, the Department of Justice pointed out that, under section 301 as then written, "this language could be read as abrogating the anti-piracy laws now existing in 29 states relating to pre-February 15, 1972, sound recordings on the grounds that these statutes proscribe activities violating rights 'equivalent to ... the exclusive rights within the general scope of copyright ...' Certainly such a result cannot have been intended for it would likely effect the immediate resurgence of piracy of pre-February 15, 1972, sound recordings. (Note: in any event, there would be no effect on sound recordings produced after February 15, 1972, since it would appear that the states cannot constitutionally enforce their anti-piracy laws against the unauthorized duplication of these later recordings). We therefore urge that Section 301(b) be amended to include a new subsection (4) as follows:

(4) Sound recordings fixed prior to February 15, 1972."

[318]The Senate Judiciary Committee adopted this suggestion in the bill as reported on November 20, 1975. The Senate report states:

At the present time, 32 states prohibit record piracy by statute, and four more do so under common law. The Congress and many states have determined that record pirates unfairly appropriate the property, efforts and capital of the legitimate music industry. There is no justification for exposing pre-1972 recordings to expropriation by record pirates.

The result of this amendment would be to leave pre-1972 sound recordings as entitled to perpetual protection under State law, while post-1972 recordings would eventually fall into the public domain as provided in the bill. The Copyright Office recognizes that, under recent court decisions, most pre-1972 recordings are protected by State statute or common law, and that they should not all be thrown into the public domain instantly upon the coming into effect of the new law. However, we cannot agree that they should in effect be accorded perpetual protection, as under the Senate amendment. A possible solution would be to revise clause (4) to establish a future date for the pre-emption to take effect. This date might be February 15, 2047, which is 75 years from the effective date of the statute extending Federal protection to recordings.

[319]3. LENGTH OF TERM

Although the length of the term of copyright as provided in the bill was challenged by the Department of Justice, the National Education Association, and certain tape duplicators at the 1975 House hearings, no real issue was made of the question of duration. The life-plus-fifty term is strongly favored by a wide range of interests, and it seems clear that it is accepted by most others. The Copyright Office considers it the foundation of the entire bill.

4. POSTHUMOUS WORKS

Section 304 of the revision bill retains verbatim the renewal provisions of the present law with respect to subsisting copyrights in their first term. In a recent case of first impression, *Bartok v. Boosey & Hawkes, Inc.* , the Second Circuit Court of Appeals ruled that the term "posthumous work" in the present renewal section means a work "as to which no assignment has occurred during an author's lifetime, rather that one which is simply first published after the author's

death." The Author's League has urged that this interpretation be cited with approval in the legislative report on section 304, and the Copyright Office concurs with this suggestion.

§ [320]CHAPTER XIII FORMALITIES, INFRINGEMENT, AND REMEDIES

Sections Considered:

Chapter 4 - Copyright Notice, Deposit, and Registration

Chapter 5 - Copyright Infringement and Remedies

Issues:

1. Are the general requirements for copyright formalities provided by *Chapter 4* satisfactory?

2. Are the provisions of section 403 requiring disclosure where a work consists predominantly of U.S. Government publications, sufficiently broad?

3. In cases of error or omission of notice, should further safeguards be provided in section 405 for innocent infringers?

4. Should the mandatory deposit provisions of section 407 be broadened and strengthened?

5. Should the Register of Copyrights be required to allow single registrations for groups of works under certain circumstances?

[321]

6. Should section 502(a) be amended to clarify the exclusive jurisdiction of the U.S. Court of Claims under *28 U.S.C. 1498*(b)?

7. Should the provisions of section 506, dealing with criminal offenses, be amended or expanded?

8. Should the waiver of sovereign immunity with respect to infringements by the United States Government be limited to unpublished works?

[322]

A. BACKGROUND AND SUMMARY OF CHAPTERS 4 AND 5

A. COPYRIGHT FORMALITIES (CHAPTER 4)

During the pre-legislative phase of the current general revision program one of the issues most thoroughly studied and debated involved the extent to which the formalities for securing copyright (notice, deposit, and registration) should be retained or altered. By far the strongest criticism of present formalities was leveled at the requirement of a copyright notice as a condition of copyright protection. As the 1965 Supplementary Report summarized the situation:

Unintentional omission of the notice and comparatively trivial errors in its form and position have caused complete forfeiture in a number of cases, and it has been argued that, because of this injustice, the notice requirements should be eliminated entirely. It has also been urged that, as a matter of principle, an author should be entitled to protection without the need of giving public notice of his claim.

The 1961 Report weighed these objections against the four principal values of a copyright notice: (1) placing published material which no one is interested in protecting in the public domain; (2) showing whether a work is under copyright; (3) identifying the copyright owner; and (4) showing the year of publication. It concluded that these are real and important purposes which should be preserved, and it proposed to "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." The broad outlines of the Report's recommendations for carrying out this proposal have been retained in the 1965 bill, but with some additional changes aimed at making the notice simpler and minimizing still further the effect of omissions and errors.

[323]A similar effort was made to simplify the deposit and registration requirements, and to make them more practical and useful. As the 1965 Supplementary Report pointed out:

The 1961 Report treated the problems of deposit of copies and phonorecords for the Library of Congress and of registration of claims to copyright as two closely related but different things. The general approach of its proposals was to establish a mandatory deposit system which would preserve the right of the Library of Congress to obtain those copies and phonorecords needed for its collections, but without requiring deposit of unneeded and unwanted material. The related provisions on registration would not (except for works published without notice) represent a condition of copyright, but compliance with them would be required for the recovery of certain remedies in cases of infringement. Since, under the Report's recommendations, deposit for the Library could be coupled with deposit for purposes of copyright registration, the expectation was that most copyright owners would register their claims at the time they deposit their copies or phonorecords, but under no circumstances would they be required to do so.

By the time the revision bill reached the stage of hearings in 1965, the compromises embodied in Chapter 4 of the bill had largely been accepted and only a few, relatively minor, changes have been made since then. The provisions of Chapter 4 in H.R. 2223 and S. 22, as introduced, can be summarized as follows:

Notice requirements in general. The statute now requires, as a condition of copyright protection, that the published copies of a work bear a copyright notice in a definite form **[324]**and position. Sections 401 through 406 of the bill represent an effort to preserve the values of the copyright notice by inducing its use, while substantially ameliorating the effect of accidental or even deliberate errors or omissions.

Form and position of notice. Under section 401, all publicly distributed copies of a work are to bear a copyright notice, "affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright." In form the notice is to consist of three elements: (1) the symbol "(c)," the word "Copyright," or the abbreviation "Copr."; (2) the year of first publication of the work; and (3) the name of the copyright owner. Section 402 contains parallel provisions for the notice applicable to sound recordings, the main difference being that the symbol "e" is to be used as the first of the three elements in the notice.

Publications incorporating U.S. Government works. This provision was added to Chapter 4 by the Senate. The 1975 Senate report explains its intent and meaning as follows:

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

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

Contributions to collective works. Section 404 is intended to clarify the present confused situation with respect to contributions published without a copyright notice in collective works that bear a general notice of their own. The bill would permit the contribution to bear its own notice, but provides generally that, except for independent advertisements, "a single notice applicable to the collective work as a whole is sufficient to satisfy the requirements * * * with respect to the separate contributions it contains."

Effect of omission of notice. Under section 405, the omission of notice would not invalidate the copyright if: (1) the omission was from a "relatively small number" of publicly distributed copies or phonorecords, or (2) copyright registration for the work is made before or within five years after the omission, and a reasonable effort is made to add the notice after its omission is discovered; or (3) the notice has been omitted in violation of an express agreement to include it. In any case, an innocent infringer who was misled by the omission would be shielded from monetary liability under certain circumstances.

[326]Error with respect to name or date. Section 406(a) makes clear that the use of the wrong name in the copyright notice will not affect the validity or ownership of the copyright. However, unless the error had been corrected in the Copyright Office records, an innocent infringer who was misled by the notice would have a complete defense if he infringed under the purported authority of the person named in the notice. An antedated notice might shorten the term of

copyright, but would not affect the scope of protection under the bill. However, if the notice is postdated by more than one year, or if the name or date has been omitted, the case would be treated as if the notice had been omitted completely.

Deposit for the Library of Congress. The bill treats the deposit of copies or phonorecords for the Library of Congress and for the registration of claims to copyright as two closely related but different things. It would establish a mandatory deposit system under which the right of the Library of Congress to obtain copies and phonorecords for its collections would be preserved. However, section 407 makes clear that "**[t]**his deposit is not a condition of copyright protection," and need not be coupled with registration unless the applicant wishes. The deposit requirements would be enforced by the imposition of a specified fine, and certain categories of material could be **[327]**exempted by the Register of Copyrights from the deposit requirements altogether.

Copyright registration in general. As under the present law, registration would generally not be a condition of copyright protection. A single deposit could be made to serve both as the deposit for the Library under section 407 and as the deposit required for registration under section 408. The Register of Copyrights would be authorized to establish optional deposit requirements for certain classes of material. Section 410 provides that the certificate of registration would be "prima facie evidence of the validity of the copyright and of the facts stated in the certificate" if registration is made before or within five years after first publication; if not, the court could give it any evidentiary weight it saw fit.

Effects of failure to register. Section 411 retains the requirement of the present law that copyright registration must be made before a suit for copyright infringement can be brought. It also provides, however, that if a claimant has properly applied for registration and been refused, he may maintain an infringement suit if the Register of Copyrights is notified and permitted to become a party. Except for a grace period of three months after publication, section 412 would deny the extraordinary remedies of statutory damages and attorney's fees for infringements occurring before registration.

[328]B. INFRINGEMENT AND REMEDIES (CHAPTER 5)

The infringement and remedies provisions are among the most poorly drafted of the present statute; many of the judicial decisions interpreting them are in conflict, and a number of important questions remain unsettled. As a result, a great deal of time and effort went into the drafting of the infringement and remedies sections of the revision bill during the early 1960's. The problems were primarily technical rather than substantive, and by the time the bill reached House hearings in 1965, the basic structure, wording, and content of the chapter had been settled.

Section 501 first lays down a statement of what constitutes infringement, and then seeks to sort out the question of who can maintain an action for infringement under the principle of divisibility of copyrights. According to section 501(b), the "legal or beneficial owner of an exclusive right under a copyright" would be entitled "to institute an action for any infringement of that particular right committed while he is the owner of it." However, in order to protect the interests of other owners of exclusive rights and to avoid a multiplicity of suits, the subsection also contains provisions governing notice, joinder, or intervention with respect to other persons who may have an interest in the copyright.

[329]Except for the provisions on damages, profits, and criminal infringement, the bill would make few changes in the remedies for copyright infringement available under the present law. With respect to damages and profits, however, section 504 not only attempts to settle a number of disputed questions but also makes some substantive changes. The copyright owner would be given the election of recovering either his "actual damages and any additional profits of the infringer" or statutory damages. Recovery of profits in addition to actual damages would be permitted where they "are attributable to the infringement and are not taken into account in computing the actual damages." As an alternative, statutory damages of not less than $ 250 or more than $ 10,000 could be recovered for all of the "infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally."

Under the bill, as amended in the Senate in 1969, the $ 10,000 maximum could be increased to $ 50,000 in certain cases of willful infringement, and the $ 250 minimum could be reduced to $ 100 where the infringement is shown to be innocent, or remitted entirely where a teacher or librarian proves that "he believed and had reasonable grounds for believing that the reproduction was a fair use."

[330]Various proposals for amendments to limit liability in cases of reproduction for educational and scholarly purposes have been discussed above in *Chapter II* of this Report, and the provisions of section 501(c), dealing with the standing of broadcasters to sue for infringement, have been discussed, in Chapter V, in connection with the cable

television issue. Aside from these problems, and two technical questions raised by NASA involving government infringement, the remaining issues all seem to involve the provisions dealing with criminal offenses.

B. COMMENTS AND RECOMMENDATIONS ON SPECIFIC ISSUES

1. FORMALITIES IN GENERAL

As will noted below, the Copyright Office favors certain perfecting amendments to sections 407 and 408. Aside from these specific points, we continue to regard Chapter 4 of the bill as a reasonable compromise, and we endorse it as a considerable improvement over the present law.

2. SCOPE OF SECTION 403

In a letter dated September 5, 1975, addressed to Chairman Rodino of the House Committee on the Judiciary, the National Aeronautics and Space Administration made the following recommendation:

[331]Sec. 403 of H.R. 2223 provides that when a work is published in copies or phonorecords consisting preponderantly of one or more Government works, the notice of copyright shall also include a statement identifying the portions embodying work protected under Title 17. It is NASA's opinion that Sec. 403 is too limited and that it would be in the public interest to require such a statement also where a work consists preponderantly of any material that is in the public domain. We recommend that Sec. 403 be amended by adding the phrase "or works in the public domain" after the word "works" in the heading and before the words "the notice" in line 3 of the body of the section.

The Senate Judiciary Subcommittee added section 403 to the bill in 1969 in response to complaints about a specific abuse: the private reprinting of a Government publication with only small additions of original material, but carrying nonetheless an unqualified copyright notice, thereby leading the public to think that the entire work is protected by copyright. NASA's recommendation to extend this requirement to all reprints consisting preponderantly of public domain material is theoretically justified, and the Copyright Office is not opposing it. It would, however, have extremely widespread effects in various fields of publishing, including books, music, and maps, and would unquestionably raise a number of borderline, quantitative, questions. If the proposal is accepted, we believe that the legislative report should offer some guidance as to the meaning of the word "preponderantly" in this context.

[332]3. SAFEGUARDS FOR INNOCENT INFRINGERS

Two Government agencies have commented upon the scope of section 405(b), which deals with the effect of an omission of copyright notice on the liability of an innocent infringer. The following points were made by NASA in the letter referred to above:

Under Sec. 405(b) an innocent infringer who acts in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted, and who proves that he was misled by the omission, is shielded from liability for actual or statutory damages with respect to any infringing acts committed before receiving actual notice of registration. No protection is spelled out in the proposed legislation for an innocent infringer who relies on an unauthorized copy or phonorecord of a published work from which the copyright notice has been omitted; or for an innocent infringer of an unpublished work, i.e., one who relies on a copy or phonorecord which has been published without authority of the owner.

It seems clear that, as under the present law, the innocent infringer is not insulated from liability through reliance on the absence of a notice on an unauthorized copy. As between the copyright owner, who has done everything called for under the statute, and an innocent infringer who reproduces a piratical copy, the courts have held that the burden for infringement should fall on the infringer. This is the necessary interpretation of section 405(b), but in view of NASA's comments it would be well to make the point explicitly in the legislative report.

[333]In its testimony on May 8, 1975, the Justice Department in effect proposed that the present law with respect to the consequences of omission of notice be retained:

A copyright should be protected from invalidation only when the failure to provide notice was the result of an accident or mistake or in violation of the copyright owner's written requirement that, as a condition of authorization of public distribution, the copies or phonorecords bear the prescribed notice, and distribution of only a small number of

such items has been made to the public. To permit, as proposed in Section 405, a copyright owner to issue an entire publication of his work without notice and yet enforce the copyright tends to negate the purpose of the notice. Although innocent infringers would incur no liability, they would still have to establish their innocence even where the omission was deliberate in many cases. We suggest that the Section specifically be limited to the effect of omission of the copyright notice by accident or mistake. We also believe it advisable that the words "particular copy or copies", contained in the present statute, be used instead of the broader and more general words "a relatively small number," found in Section 405, to designate the limits within which notice may be omitted without loss of copyright. And we think the discretion in the court to order reimbursement to the innocent infringer should be retained.

The House Judiciary Committee, in its 1966 and 1967 reports, noted that the Justice Department had, then as now, favored immediate forfeiture for deliberate omission of notice. It rejected this argument in favor of the compromise embodied in section 405, stating:

The committee has taken the middle-ground approach in the bill as reasonable and as likely to be most effective in encouraging use of a copyright notice without causing unfair and unjustifiable forfeitures on technical grounds. Making the validity of a copyright depend **[334]**upon whether or not an omission of notice was "deliberate" would introduce a subjective criterion that would result in injustice and confusion.

The Copyright Office agrees with this conclusion, and with the provisions of section 405(b).

4. SCOPE AND EFFECT OF DEPOSIT PROVISIONS

Under section 407, the Library of Congress is entitled to demand, through the Register of Copyrights, the mandatory deposit of one or two copies or phonorecords of any work published in the United States with a copyright notice. Failure to comply with the requirement does not result in forfeiture of copyright; the penalty is a fine of up to $ 250 per work, plus payment to the Library of the price or cost of the copies or phonorecords.

At the time this provision was drafted, well over ten years ago, it appeared adequate to serve as an effective legal deposit system, even though deposit would no longer be backed up by the sanction of loss of copyright. However, after consultation between officials of the Copyright Office and other officials of the Library of Congress, we have come to doubt whether the provision is broad or strong enough to serve its purpose fully.

Most important, since the power to demand applies only to published works, the Library of Congress would have no authority to obtain copies or phonorecords of television and radio programs, unless they are placed into syndication. Under the bill all pro**[335]**grams (except those that are broadcast "live" and are never recorded) will automatically be copyrighted. Unlike other "unpublished" works, transmission programs are disseminated widely to the public and reproductions of them should be maintained in an archive in the Library of Congress under appropriate safeguards for the sake for future generations. We therefore recommend that section 407 be amended to require deposit of copies or phonorecords of copyrighted transmission programs under appropriate conditions.

We are also concerned lest the scofflaw attitude now sometimes encountered with respect to the deposit requirements should become more prevalent when there is no danger of loss of copyright. For this reason we also recommend that the penalties for failure to deposit be transferred from section 407 to section 506, and that they be amended to provide an additional fine for willful or repeated failure or refusal to comply with a demand for deposit.

5. SINGLE REGISTRATION FOR GROUPS OF WORKS

An amendment adopted by the full Senate Judiciary Committee when it reported S. 22 on November 20, 1975 added two new subsections to section 408, the general provision on Copyright registration. Their text is as follows:

(2) Without prejudice to his general authority under clause (1), the Register of Copyrights shall establish regulations specifically permitting a single **[336]**registration for a group of works by the same individual author, all first published as contributions to periodicals, including newspapers, within a twelve-month period, on the basis of a single deposit, application, and registration fee, under all of the following conditions:

(A) if each of the works as first published bore a separate notice, and the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner was the same in each notice; and

(B) if the deposit consists of one copy of the entire issue of the periodical, or of the entire section in the case of a newspaper, in which each contribution was first published; and

(C) if the application identifies each work separately, including the periodical containing it and its date of first publication.

(3) As an alternative to separate registrations under subsection (a) of section 304, a single renewal registration may be made for a group of works by the same individual author, all first published as contributions to periodicals, including newspapers, upon the filing of a single application and fee, under all of the following conditions:

(A) the renewal claimant or claimants, and the basis of claim or claims under section 304(a), is the same for each of the works; and

(B) the works were all copyrighted upon their first publication, either through a separate copyright notice and registration or by virtue of a general copyright notice in the periodical issue as a whole; and

(C) all of the works were first published not more than twenty-eight or less than twenty-seven years before the date of receipt of the renewal application and fee; and

[337](D) the renewal application identifies each work separately, including the periodical containing it and its date of first publication.

This amendment has its counterpart in provisions of H.R. 7149, the separate bill introduced on May 20, 1975 by Mr. Kastenmeier, which is discussed in detail in *Chapter XV*. The Copyright Office recommended the amendment to the Senate Judiciary Committee, and strongly supports its adoption.

6. TECHNICAL AMENDMENT OF SECTION 502(a)

The letter from NASA, already mentioned, makes the following point:

Sec. 502(a) provides that any court having jurisdiction of a civil action arising under the title may, subject to the provisions of section 1498(b) of title 28, grant injunctions to prevent or restrain infringement (emphasis added). It is recommended that the phrase "subject to the provisions of" be replaced by "except in actions against the Government under" to clarify the exclusive jurisdiction of the Court of Claims under *28 U.S.C. 1948*(b).

This appears to be a desirable technical amendment, and the Copyright Office endorses it.

7. CRIMINAL PROVISIONS

Section 506 of the 1975 bill as introduced contains four subsections, dealing respectively with: (a) criminal infringement; (b) fraudulent copyright notice; (c) fraudulent removal of copyright notice; and (d) false representation in applications **[338]**or statements to the Copyright Office. As explained above, the Copyright Office is recommending that the penalties for failure or refusal to make deposit for the Library of Congress on demand be moved from section 407 to this section.

It should also be noted in passing that S. 1, 94th Cong., 1st Sess., a bill for the complete revision of the U.S. Criminal Code, was introduced by Senator McClellan on January 15, 1975. His bill contains provisions aimed at amending the criminal provisions of title 17 of the U.S. Code as it now exists, and in most cases the proposed changes differ from those provided in the general revision bill. Hearings were held in the Senate on S. 1 on April 17, 1975. If further action is taken on S. 1, an effort should be made to coordinate its provisions with those of the revision bill.

The remaining questions all center around the specific penalties for criminal infringement. The following is a somewhat oversimplified summary of the legislative history of the criminal infringement provisions of the bill:

1) As reported by the House Judiciary Subcommittee in 1967, the maximum penalties were $ 2,500 plus one year for a first offense, and $ 10,000 plus 3 years for subsequent offenses.

[339]2) The maximum sentence in cases of recidivism was reduced from 3 years to one year on the House floor when the bill passed the House of Representatives on April 11, 1967.

3) Following some intermediate amendments, the Senate passed the revision bill on September 9, 1974 with the following changes in section 506(a):

i) The 3-year maximum sentence for subsequent offenses was restored;

ii) The following proviso dealing with criminal infringement of sound recordings and motion pictures was added to section 506(a):

provided however, that any person who infringes willfully and for purposes of commercial advantage or private financial gain the copyright in a sound recording accorded by subsections (1) and (3) in section 106 or the copyright in a motion picture afforded by subsections (1), (3), and (4) in section 106 shall be fined not more than $ 25,000 or imprisoned for not more than one year, or both, for the first such offense and shall be fined not more that $ 50,000 or imprisoned not more than two years, or both, for any subsequent offense.

[340]4) The text of the provision, as passed by the Senate, was retained in the revision bills introduced in January 1975 (H.R. 2223, S. 22).

5) In its May 8, 1975 testimony before the House Judiciary Subcommittee on H.R. 2223, the Department of Justice recommended several amendments to section 506 as part of its "anti-piracy program in the sound recording field":

i) Amendment of section 506(a) to increase punishment of second offenders in cases of criminal infringement of sound recordings and motion pictures;

ii) Amendment of subsections (b), (c), and (d) (and of section 116(d)), to impose a maximum one-year term of imprisonment for the other criminal offenses prescribed by the revision bill. This suggestion was made "from the standpoint of making deterrents meaningful beyond the financial deterrent and provide a penalty for those who can 'take' financial loses as a cost of business."

[341] iii) Addition of a new subsection to section 506 "to provide for forfeiture of infringing articles in criminal cases resulting in convictions." As explained in the statement of the Department of Justice:

At present, the government has no clear-cut authority to destroy infringing articles which have been seized or otherwise obtained in the investigation or prosecution of a tape piracy case or, for that matter, any criminal copyright infringement case. This lack of specific authority has resulted in critical storage problems for many F.B.I. and U.S. Marshals' offices throughout the country and poses the embarrassing possibility that the government may be ordered to return known infringing articles to a convicted defendant.

iv) A conforming amendment to title 18 of the U.S. Code, § 2318, concerning interstate transportation of counterfeit record labels.

v) Addition of a new section to Chapter 5 "to provide for summary and judicial forfeitures in criminal cases."

[342]6) When the full Senate Judiciary Committee reported S. 22 on November 20, 1975, it adopted nearly all of the proposals put forward by the Justice Department:

i) The maximum penalties for criminal infringement of sound recordings and motion pictures were increased for both first and second offenses: the maximum for a first offense is set at $ 25,000 plus 3 years, and, for a second offense, at $ 50,000 plus 7 years.

ii) The proposal to add imprisonment to the fines provided for the other criminal offenses in the bill was not adopted.

iii) A new subsection (b) was added to section 506, reading as follows:

(b) FORFEITURE AND DESTRUCTION. -- When any person is convicted of any violation of subsection (a), the court in its judgement of conviction shall, in addition to the penalty therein prescribed, order the forfeiture and destruction or other disposition of all infringing copies or phonorecords and all implements, devices, or equipment used or intended to be used in the manufacture, use, or sale of such infringing copies or phonorecords.

[343] iv) The conforming amendment to *18 U.S.C. § 2318* was added in SEC.111 of the bills Transitional and Supplementary Provisions.

v) The following new section 509 was added to the bill:

§ 509. Seizure and forfeiture

(a) All copies or phonorecords manufactured, reproduced, distributed, sold, or otherwise used, intended for use, or possessed with intent to use in violation of section 506(a), and all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced, and all electronic, mechanical, or other devices for manufacturing, reproducing, assembling, using, transporting, distributing, or selling such copies or phonorecords may be seized and forfeited to the United States.

(b) All provisions of law relating to (1) the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in title 19, United States Code, (2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof, (3) the remission or mitigation of such forfeiture, (4) the compromise of claims, and (5) the award of compensation to **[344]**informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the provisions of the customs law contained in title 19 of the United States Code shall be performed with respect to seizure and forfeiture of all articles described in subsection (a) by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

The Copyright Office considers that these are matters of law enforcement on which it should take no position one way or the other.

8. GOVERNMENT INFRINGEMENT OF UNPUBLISHED WORKS

The letter from the National Aeronautics and Space Administration to Chairman Rodino, referred to several times earlier in this chapter, makes a final point in connection with U.S. Government liability for copyright infringement:

28 U.S.C. 1498(b) provides for a cause of action against the Government for infringement of "copyright in any work protected under the copyright laws of the United States." This waiver of sovereign immunity has been **[345]**construed not to embrace common law copyright, i.e. unpublished works. See e.g. *Porter et al. v. United States , 473 F.2d 1329, 117 USPQ 238 (CA 5 1973).* Since H.R. 2223 protects unpublished as well as published works, the Government's liability will be extended. It is urged that *28 U.S.C. 1498*(b) be amended so that it continues to restrict the Government's liability for copyright infringement to "published" works only. Government agencies receive a voluminous amount of material from private sources which does not bear a copyright notice and which is reproduced, distributed, etc. in its day-to-day business activities, for example, under the Freedom of Information Act. It would be extremely difficult, if not impossible, to ascertain whether the material submitted has been published with no intent to claim copyright, or whether it is published and the owner intends to claim copyright protection.

The effect of compliance with the Freedom of Information Act (FOIA) on the Government's liability for copyright infringement also needs clarification. If a document requested under the FOIA bears a copyright notice, the requester can be so advised and will usually be able to secure a copy elsewhere. Where the document requested contains no copyright notice, it may be an unpublished work subject to protection under the proposed copyright revision; and providing access or a copy may very well frustrate the copyright owner's desires and subject the Government to liability. We are concerned whether the furnishing of a copy of a document by the Government under the FOIA will be considered excusable, or a form of fair use. Of course, if a document is released under FOIA, the Government may not itself restrict its use by others. For clarification purposes, it is recommended that language be inserted in H.R. 2223

explaining the fair use doctrine's applicability to unpublished works and the Government's release of documents under the FOIA.

Under the present law, the waiver of government immunity applies to unpublished works if they have been registered for federal statutory copyright. Under the bill all unpublished works **[346]**would be protected by federal statutory copyright without registration, but like other infringers, the government would not be liable for statutory damages unless the work had been registered. In effect, the government's only liability for infringement of an unpublished, unregistered work would be for actual damages, and this does not appear to be an excessive burden where infringement is proved. NASA's comments upon the effect of the Freedom of Information Act upon possible copyright infringement express more of a theoretical fear than a practical problem and, as such, do not appear to justify an amendment of the bill.

§ [347]CHAPTER XIV MANUFACTURING REQUIREMENT AND IMPORTATION

Sections Considered:

§ 601 - Manufacture, importation, and public distribution of certain copies

§ 602 - Infringing importation of copies or phonorecords

§ 603 - Importation prohibitions: Enforcement and disposition of excluded articles

Issues:

1. Should any manufacturing requirement be retained in the general revision bill?

2. If so, should it be retained permanently, or should it be phased out after a period of years? If it is phased out, how long should it remain in effect?

3. If section 601 is retained in the bill, permanently or temporarily, should manufacture in Canada be equated with manufacture in the United States?

4. Should the effect of the manufacturing clause be limited to situations where an American publisher chooses to have copies manufactured abroad, thus removing the requirement for books by American authors published abroad by foreign publishers?

[348] 5. Should section 601 be amended to make clear that importation of more than 2,000 copies is permitted without requiring that the notice of copyright be deleted on all copies over 2,000 (thus destroying all protection for the work)?

6. With respect to the specific provisions of section 601, should any changes be made in the language of the bill or the interpretation in the legislative report with respect to:

a) the meaning of "literary material"?

b) the meaning of "preponderantly"?

c) the scope of the "work for hire" exception in section 601(b)(1)?

7. Should the provisions of section 602(a)(3), permitting unrestricted importation by libraries and archives of up to five unauthorized copies of copyrighted material, be reexamined in light of the issue of "systematic" photocopying arising under section 108?

[349]A. LEGISLATIVE HISTORY OF CURRENT MANUFACTURING CLAUSE

For over a century the U.S. copyright law offered no protection whatever to foreign authors. Following the lead of state copyright laws enacted under the Articles of Confederation, the 1790 copyright act granted protection only to works by citizens or residents of the United States: but it became clear soon enough that what seemed on its face to be preferential treatment in favor of American authors actually amounted to devastating discrimination against them. English books and authors were popular with the American public and required no permission or payment of royalties.

Why should U.S. publishers bring out American books, for which the profit was uncertain, when they could publish sure-fire English books without seeking permission from anyone or paying anything? The problem was compounded by the lack of any international copyright relations between the United States and other countries: if an American author did manage to achieve some success in his own country, he would find his works reprinted, translated, and published throughout the rest of the world without permission or payment.

This situation produced what became known as the international copyright movement, which proceeded without success from generation to generation throughout most of the Nineteenth Century in the United States. Beginning in 1837, Henry Clay sponsored legislation in several successive Congresses that would have granted U.S. **[350]**copyright to foreign authors under certain conditions; significantly, one of those conditions was that their works must be printed in the United States to be protected here. However, until the last decade of the 1800's, the economic interests of the American publishers and printers, coupled with the strong protectionist sentiments of the era, served not only to keep the U.S. tariff on imports of foreign books very high, but also to defeat every effort at international copyright reform.

What finally emerged, in the Act of March 3, 1891, was a complicated compromise which had the effect of giving U.S. copyright protection to foreign authors with one hand and taking it away from many of them with the other. The key to the compromise was the manufacturing clause, which was the price demanded by printers, book manufacturers, and particularly the labor unions in the printing trades. Under the 1891 Act, U.S. manufacture of books in all languages and of graphic works was an absolute condition of copyright protection; as part of the compromise, musical and dramatic works were exempted from the manufacturing requirement entirely.

The practical effect of this provision was to make the obtaining of U.S. copyright extremely difficult for foreign authors writing in English, and nearly impossible for foreign authors writing in other languages. The history of the manufacturing clause since 1891 **[351]**has been one of gradual legislative liberalization in regular stages, each one involving a process of confrontation and compromise. The following summary of the legislative history of the manufacturing clause from 1891 to 1955 is oversimplified, but is intended to convey in general terms what the manufacturing clause was, and how it has evolved.

1. Act of March 3, 1891 ("International Copyright Act"):

a) Works covered by manufacturing clause: Books (in all languages), photographs, chromos, lithographs;

b) Manufacture required: Printing from type set in U.S.A.;

c) Scope of requirement: Absolute. Under the 1891 Act, copyright was lost if a book was published "in this or any foreign country" before two copies manufactured in the U.S.A. had been deposited in the Copyright Office.

2. Temporary "Interim" Act of January 4, 1904:

a) Purpose: To induce foreign book and graphic publishers to exhibit their works at the St.Louis World's Fair without losing copyright because of the 1891 manufacturing clause.

b) Effect: To create a temporary or "ad interim" copyright for works exhibited at the Fair, as an exception to the 1891 manufacturing clause.

[352] c) Requirements for securing the "ad interim" copyright:

1) The work had to be of foreign origin;

2) Deposit had to be made in the Copyright Office before the closing date of the Fair.

d) Duration of protection:

1) "Ad interim" term, of two years, from deposit;

2) Extension to full term of protection if, within the two-year "ad interim" period, copies were manufactured in the U.S.A. and another deposit was made in the Copyright Office.

3. Permanent "Interim"Act of March 3, 1905:

a) Purpose: To give permanent status to 1904 "ad interim" copyright as an exception aimed at softening the rigors of the 1891 manufacturing clause.

b) Works qualifying for "ad interim" exception: Books in a foreign language first published abroad.

c) "Ad interim" requirements: Deposit in the Copyright Office of one copy within 30 days after first publication abroad.

d) Duration of protection:

1) "Ad interim" term of 12 months from date of first publication abroad;

[353] 2) Extension to full term if, within the one-year "ad interim" period, copies were manufactured in the U.S.A. and another deposit was made in the Copyright Office.

4. Act of March 4, 1909 (General Revision):

a) General effect: To exempt foreign-language works of foreign origin from the manufacturing clause entirely, and to extend the "ad interim" exception to English-language works, but with a shorter time limit.

b) Works covered by manufacturing requirement:

1) Printed books and periodicals, except:

i) works of foreign origin in foreign languages;

ii) works reproduced in Braille;

iii) works seeking "ad interim" protection.

2) Illustrations in books and separate lithographs and photoengravings, with certain exceptions.

c) Manufacture required: All named processes supposedly required to be performed in U.S.A.: typesetting; plate-making; lithographic or photoengraving processes; printing; binding. However, the ambiguous wording left loopholes.

[354] d) Scope of requirement: The wording of the 1909 Act, and particularly of its manufacturing provisions, is extremely ambiguous, and the relatively few judicial interpretations still leave dozens of questions unanswered. Insofar as it applies to English-language books and periodicals, the Copyright Office's interpretation of the basic manufacturing requirement in the 1909 Act, which has received some direct support from the courts, can be stated as follows: If an English-language book or periodical was manufactured and first published outside the United States, it could secure copyright in the United States only if it fulfilled the "ad interim" requirements of the 1909 Act. If it failed to meet the "ad interim" formalities and time limits, it fell into the U.S. public domain when those time limits expired.

e) Works qualifying for "ad interim" exception: "A book published abroad in the English language before publication in this country." (This was interpreted to include periodicals and their contents.)

f) "Ad interim" requirements: Deposit in the Copyright Office of one copy within 30 days after first publication abroad.

g) Duration of protection:

1) "Ad interim" term of 30 days from date of deposit in the Copyright Office;

2) Extension to full term if, within the 30-day "ad interim" period, an authorized edition were manufactured in the U.S.A. and all registration, deposit, and other formalities were observed.

[355] 5. Act of December 18, 1919:

a) Purpose: As part of legislation caused by the disruption of foreign commerce and transportation during World War I, to allow all works "produced or published" in certain foreign countries between the beginning of the war and the proclamation of peace a grace period for fulfilling U.S. copyright conditions and formalities.

b) Effect on manufacturing clause: In addition to providing temporary grace periods, the 1919 Act contained a permanent amendment of the "ad interim" time limits.

c) "Ad interim" requirements: Deposit in the Copyright Office of any one copy within 60 days after first publication abroad.

d) Duration of protection:

1) "Ad interim" term of four months from date of deposit in the Copyright Office;

2) Extension to full term if, within the four-month "ad interim" period, an authorized edition were manufactured in the U.S.A. and all registration, deposit, and other formalities were observed.

6. Act of July 3, 1926:

a) Purpose: To make clear that the manufacturing clause did not bar copyright protection for "works printed or produced in the United States" by processes (e.g., typewriting, mimeographing, hectographing, ditto, etc.) other than those specifically named in the section.

[356] b) Comment: This amendment was based on a highly debatable interpretation of the literal language of the manufacturing clause of the Act of 1909, and its effect, if any, is unclear.

7. Act of June 3, 1949:

a) Purpose: To liberalize the manufacturing clause by substantially increasing the ad interim time limits and permitting importation of up to 1500 copies of a foreign edition of a work under ad interim copyright.

b) Importation exemption: The Act of 1949 introduced a major innovation into the manufacturing clause: the privilege of importing a limited number of foreign copies to "test the American market". The conditions were laid down as follows:

1) "Ad interim" registration must first have been made for the work, and the copies must be imported during the 5-year ad interim term;

2) No more than 1,500 copies of a particular work could be imported;

3) The work had to be a book or periodical in the English language, and it could only be "of foreign origin"; the import privilege did not extend to works by American authors or works first published in the U.S.A.;

4) All copies imported had to bear a copyright notice.

c) "Ad interim" requirements: Deposit in the Copyright Office of one copy within 6 months after first publication abroad.

[357] d) Duration of protection:

1) "Ad interim" term of five years from the date of first publication abroad;

2) Extension to full term if, within the five-year "ad interim" period, an authorized edition were manufactured in the U.S.A. and all registration, deposit, and other formalities were observed.

8. Act of August 31, 1954:

a) Purpose: To implement U.S. ratification of the Universal Copyright Convention (the U.C.C.), effective September 16, 1955. A key provision of the U.C.C. requires Contracting States to waive all formal conditions of copyright protection (including manufacturing requirements) for works originating in other Contracting States, if the work in question bears a special form of copyright notice.

b) Effect: All manufacturing requirements, including ad interim requirements and importation restrictions, were abrogated if the work was by an author of a country party to the U.C.C., or was first published in a U.C.C. country, as long as all published copies of the work bore the special U.C.C. notice. Subsisting ad interim copyrights in U.C.C. works were automatically extended to the full term upon the coming into effect of the U.C.C. in the country of origin. However, the amendment made very clear that the U.C.C. exemptions did not extend to works by American citizens and domiciliaries and works first published in the United States.

c) Import provision liberalized: Under the 1949 amendment, the privilege of importing up to 1,500 copies under an ad interim copyright applied only to works of foreign authorship. This restriction was removed by the 1954 Act, thus allowing copies of works by U.S. authors, first published abroad, to be imported up to the 1,500 copy limit.

[358]B. SUMMARY OF PRESENT MANUFACTURING REQUIREMENTS

The current manufacturing requirement thus consists of the Act of 1909 as amended in 1919, 1926, 1949, and 1955. It can be summarized as follows:

1. Works covered:

a. Books and periodicals in English, except where the work is exempted under the U.C.C. As a practical matter, this means that the requirement now applies almost entirely to works by American authors.

b. Certain works of the graphic arts, with exceptions. Again, the U.C.C. exemption limits the application of the requirement almost entirely to works created by Americans.

2. Manufacture required: The 1909 language describing the manufacturing processes that must be performed in the U.S.A. is still in effect, and advances in printing technology have opened an apparent loophole. As stated in the 1965 Supplementary Report of the Register:

... At present, under what they believe to be a loophole in the manufacturing clause of the 1909 statute, a number of book publishers are sending their manuscripts abroad for composition, importing reproduction proofs, and then manufacturing their copies "by lithographic process * * * wholly performed in the United States." The language of the present law is unclear on this point, and the book manufacturers have argued that this practice violates the manufacturing requirements. The Copyright Office will make registration in cases where this practice has been followed, but does so on the basis of the doubt and without taking a final position on the question.

[359] 3. Ad interim exception: For books and periodicals by U.S. citizens first manufactured and published abroad, and for the few foreign works still failing to qualify under the U.C.C., a five-year "ad interim" copyright can be secured by making registration and deposit within six months after first publication. This temporary copyright can be extended to the full term by manufacture and registration of a U.S. edition within the five-year period.

4. Importation: Within the five-year term of an ad interim copyright, up to 1,500 copies of the foreign edition can be imported.

C. DEVELOPMENT OF SECTION 601

The Copyright Office had taken an active role in the 1949 amendment, and particularly in the development and implementation of the Universal Copyright Convention in the 1950's. It was not surprising, therefore, that the 1961

Register's Report took a fairly strong position favoring elimination of the manufacturing clause as a condition of copyright protection:

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.

[360]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 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.

The expressed hope of the Copyright Office that "economic factors had changed sufficiently to permit the dropping of domestic manufacture as a condition of copyright" was dashed to earth by the book manufacturing industry, whose representatives, in the words of the 1965 Supplementary Report of the Register:

... took a very strong position against complete elimination of the manufacturing requirements in the copyright law. They argued that the American printing industry faces a serious threat of foreign competition from countries with lower wage rates, and that the manufacturing clause offers the only effective form of protection against this competition. In the course of the discussions it became apparent that, for the sake of the program for general revision of the copyright law, an effort should be made to seek a compromise on this difficult problem.

In the 1963 Preliminary Draft the Copyright Office put forward two alternatives on this issue: one opted for outright repeal, and the other for a 1,500-copy limitation upon the importation of certain copyrighted material manufactured abroad, with the following subsection:

[361](d) Importation of copies in violation of the provisions of this section shall in no case invalidate protection for a work under this title. However, it shall be a complete defense to any action for infringements of the exclusive right to distribute visual copies of the work if the defendant proves that the owner of said exclusive right had authorized or knowingly acceded in the importation of copies in violation of such provisions.

With many changes in language and specific content reflecting a long series of compromises, this second alternative remains the basic approach of section 601 of the 1975 bill: domestic manufacture should no longer be a condition of copyright, and the ad interim and other formalities connected with deposit and registration would be eliminated. However, with many limitations and exceptions, the copyright owner would be prohibited from importing more than a certain number of copies manufactured abroad; this would be enforced by offering a complete defense to infringers who can prove violation of the import restrictions.

Vigorous efforts to achieve a compromise provision on which agreement could be reached had begun before the 1965 House hearings, and continued after them. The main stumbling block at the time was the so-called "reproduction proof" loophole in the 1909 Act, under which American publishers claimed the right to have the text of their books composed abroad, to import "repro-proofs" from which an offset master could be reproduced, and then to print copies in the United States by photolithography from the offset plates.

[362]Because of the failure to resolve this issue, the 1965 House hearings on the manufacturing requirements appeared as a sharp and fundamental confrontation, but beneath the surface a current of compromise was still flowing. The House Judiciary Committee, in its 1966 and 1967 reports, adopted language intended to resolve the "repro-proof" controversy in favor of the publishers. This action, which was adopted when the revision bill passed the House on April 11, 1967, formed the basis for further compromises on the repro-proof issue and on section 601 as a whole.

Representatives of publishers and manufacturers reached a formal agreement in 1968 as to the contents and wording of section 601, and have continued to adhere to that agreement to the present time. Because of this factor the hearings on the manufacturing clause before the House Judiciary Subcommittee in 1975 approached some of the problems obliquely, and did not dig very deeply into the basic issues. It may therefore be useful to reprint here the summary of arguments from the House Judiciary Committee reports of 1966 and 1967:

An impressively broad range of organizations and interests, spearheaded by various groups of authors and book publishers, supported elimination of the manufacturing requirement on grounds of economics and public policy. Their principal arguments can be summarized as follows:

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

[363]2. Even as rewritten, section 601 of the bill as introduced places unjustified burdens on the American author, who is treated as a hostage. It hurts the author most where it benefits the manufacturer least: in cases where the author must publish abroad or not at all. It unfairly discriminates between American authors and other authors, and between authors of books and authors of other works.

3. The modifications in the bill are desirable as far as they go, but they still violate the basic principle that an author's rights should not be dependent on the circumstances of manufacture, and they still fail to settle the uncertain status of reproduction proofs, the major practical problem under the present law. In addition to solving that problem, complete repeal would substantially reduce friction with foreign authors and publishers, increase opportunities for American authors to have their works published, encourage international publishing ventures, and eliminate the tangle of procedural requirements now burdening authors, publishers, the Copyright Office, and the Bureau of Customs.

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

[364]With some differences in emphasis, all witnesses representing segments of the U.S. printing industry, including printing trade unions, book manufacturers, and typographers, expressed themselves as strongly opposed to outright repeal and generally in favor of section 601. The following were their principal arguments:

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

2. The differentials between U.S. and foreign wage rates in book production are extremely broad and are not diminishing; Congress should not create a condition whereby work can be done under the most degraded working conditions in the world, be given free entry, and thus exclude American manufacturers from the market. The manufacturing clause has been responsible for a strong and enduring industry. Repeal would destroy small businesses, bring chaos to the industry, and catch manufacturers, whose labor costs and break-even points are extremely high, in a cost-price squeeze at a time when expenditures for new equipment have reduced profits to a minimum.

3. The high ratio of exports to imports could change very quickly without a manufacturing requirement. Repeal would add to the balance-of-payments deficit since foreign publishers never manufacture here. The U.S. publishing industry **[365]**has large investments abroad, and attacks on the manufacturing clause by foreign publishers show a keen anticipation for new business. The book publishers' arguments that repeal would have no real economic impact are contradicted by their arguments that the manufacturing requirement is stifling scholarship and crippling publishing; their own figures show a 250 percent rise in English-language book imports in 10 years.

The Committee concluded, on the basis of these contradictory arguments, that:

... although there is no justification on principle for a manufacturing requirement in the copyright statute, there may still be some economic justification for it. Section 601, as amended by the committee, represents a substantial liberalization that will remove many of the inequities of the present manufacturing requirement. The real issue that lies

between section 601 and complete repeal is an economic one, and on purely economic grounds the possible dangers to the American printing industry in removing all restrictions on foreign manufacture outweigh the possible benefits repeal would bring to American authors and publishers.

The following paragraph from the House Judiciary Committee's 1966 report, which was repeated in its 1967 report and again in the 1974 Senate report, is of special significance nearly ten years after it was written:

The committee is aware that the concern on both sides is not so much with the present but with the future; and, because new machines and devices for reproducing copyrighted text matter are presently in a stage of rapid development, the future in this area is unpredictable. Outright repeal of the manufacturing requirement should be accomplished as soon as it can be shown convincingly that the effects on the U.S. printing industry as a whole would not be serious. Meanwhile the best approach lies in the compromise embodied in section 601 as amended.

[366]On October 14, 1966, two days after the House Judiciary Committee reported the general revision bill, Congress enacted Public Law 89-651, implementing the "Florence Agreement" for the United States. This was followed by a Presidential Proclamation on November 31, 1966, which, in effect, removed all U.S. tariff barriers on the importation of the great bulk of books and educational materials. As a practical matter this left the manufacturing clause of the copyright statute as the only trade barrier to the importation of English-language books manufactured abroad.

The Senate Judiciary Subcommittee held hearings on section 601 on April 6, 1967, five days before the House passed the general revision bill. It was obvious that there had been a rapproachement since the 1965 House hearings and that a compromise was within reach. James H. French, representing the Book Manufacturers' Institute, testified:

We still feel, as we told the House Committee, that the manufacturing clause should be strengthened. On the other hand, representatives of both of the major publisher organizations, as well as the spokeswoman for the Authors' League, have stated their groups' willingness to accept the compromise embodied in section 601. In addition, we recognize that the House Committee has presented a compromise of the clashing economic interests involved that imposes the lease hardship on all involved groups -- manufacturers, authors, and publishers.

Accordingly, the book manufacturing industry herewith states its willingness to try to live with the section 601 compromise, and we urge that the Senate agree with the House Judiciary Committee in adopting section 601 as proposed in S. 597. Needless to say, failure to adopt this provision would place much of the book manufacturing industry in jeopardy.

[367]Let me just add that, with the one exception which I am now about to discuss, we certainly hope and trust that no more exemptions or debilitating amendments will be added to section 601. ... [W]e urge that a provision be written into S. 597 excluding works manufactured in Canada from the application of the manufacturing clause. This could be accomplished by the simple insertion of an additional exemption in subsection (b) of existing section 601 of the bill. In effect, it would provide that the basic requirements of the manufacturing clause set forth in subsection (a) do not apply "to any work manufactured either wholly in Canada or partly in Canada and partly in the United States."

The conditions which the manufacturing clause is needed to remedy are nonexistent in the case of Canada. The manufacturing clause is needed to protect the employees and proprietors of the American book manufacturing industry against foreign competition based on wages and costs far below American standards. Because of the monopolistic nature of copyright and the high labor component of the cost of producing books, the American book manufacturer would otherwise have no effective means of combating such competition.

However, where -- as in the case of Canada -- no such wage or cost disparity exists, the protection of the clause is not required. The Canadian and U.S. printing industries are substantially identical in all important respects. Thus, the application of the manufacturing clause to Canada is anomalous.

Moreover, Canada, alone among all nations, suffers significant disadvantages from the manufacturing clause. ... [I]t imposes a unique and unfair disadvantage on Canadians to require in effect that the books being read equally by the citizens of both countries, and written by the authors of both countries (who are as likely to be domiciled in the United States as in Canada and vice versa) be manufactured only in the United States.

[368]On April 10, 1967, Chairman McClellan of the Senate Judiciary Subcommittee wrote to the Department of State, requesting its views on the proposed Canadian exemption from the manufacturing requirements. The Department's response, dated September 19, 1967, was negative. It took the view that the proposal presented serious, if note insurmountable, legal problems and would conflict with government policy goals: "to maximize international trade

through the most-favored-nation principle and to maintain the strength of the GATT organization." The State Department summarized its position as follows:

[A]s long as the manufacturing clause remains a part of the copyright law, it would not be proper to except any nation from its provisions. We therefore would advise against the amendment proposed by Mr. French.

On October 11, 1967, Mr. French wrote to Senator McClellan taking strenuous issue with this position. Speaking for "all representatives of the United States book manufacturing industry and the international trade unions representing the graphic arts workers in the United States and Canada," Mr. French stated the view that "in this case the Department has made an incorrect interpretation of the provisions of the General Agreement on Tariffs and Trade (GATT) and of bilateral commercial treaties to which the United States is a party." He elaborated his reasons for this position in his letter, and further in a technical memorandum which concluded as follows:

[369]The sole substantive reason given by the Department for its position in the present case is that to seek a waiver would conflict with the U.S. goal of maximizing international trade through application of the most-favored-nation principle. It is submitted that this reasoning is based upon a misconception of the role of the manufacturing clause as a limitation upon extension of the copyright monopoly to foreign printers. The Department has incorrectly viewed the Manufacturing Clause as a restriction on free trade, not as what it really is, a limitation on copyright.

By letters dated April 1, 1968, Robert W. Frase, representing the American Book Publishers Council and the American Textbook Publishers Institute transmitted to the Chairmen of the House and Senate Judiciary Subcommittees, and to various government officials, a memorandum headed "Agreement of Toronto." This document described an understanding resulting from a meeting held in Toronto on February 16, 1968. On behalf of the U.S. groups represented at the Toronto meeting, Mr. Frase urged that Canada be exempted from the U.S. manufacturing clause.

The text and signatories of the "Agreement of Toronto" are reproduced here:

[370]AGREEMENT OF TORONTO

Representatives of the U.S. and Canadian business and labour organizations concerned with printing and publishing met in Toronto on February 16, 1968 to discuss three interrelated issues of mutual interest, namely, an exemption for Canada from the U.S. manufacturing clause, Canadian acceptance of the Florence Agreement, and effective resistance to weakening of international copyright protection.

After a thorough discussion of all aspects of these interrelated issues, the following courses of action were unanimously agreed upon:

(1) The Canadian group will promptly inform the Canadian Government of the Toronto meeting and of the agreement to take parallel action on both sides of the border to bring about exemption for Canada from the U.S. manufacturing clause and the acceptance by Canada of the Florence Agreement. The Canadian group will urge the Canadian Government to accept the Florence Agreement as soon as exemption for Canada has been adopted by the U.S. Congress. It is noted that the acceptance of the Florence Agreement can be accomplished in Canada without the necessity of an Act of Parliament.

(2) The U.S. and the Canadian groups will co-operate closely in urging their respective governments to consult and work together to oppose the Stockholm Protocol or similar actions weakening international copyright protection which may be proposed under the Universal Copyright Convention.

(3) The U.S. group will do its utmost to obtain incorporation of an exemption for Canada in the manufacturing section of the bill to revise the U.S. copyright law (S.597) now being considered by a U.S. Senate Subcommittee. Specifically, the U.S. group will inform the Department of State of the Toronto meeting and will urge the Department (a) not to oppose an exemption for Canada from the U.S. manufacturing clause, and (b) to work closely with the Government of Canada in opposing weakening of international copyright protection under the Berne Convention or the Universal Copyright Convention. The U.S. group will also bring to the attention of the appropriate subcommittee of the Senate and House Judiciary Committees the recommendations of the Toronto meeting with respect to the manufacturing clause amendment.

[371] (4) It is anticipated that co-operative efforts on, and resolution of, the foregoing issues in a mutually satisfactory manner will lead promptly to definite future co-operation between the United States and Canadian groups on the removal of any remaining barriers to trade between the two countries affecting the printing and publishing industries.

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[372]The revision bill as introduced in 1969 (S. 543, 91st Cong., 1st Sess.) retained the manufacturing clause in the form in which it passed the House of Representatives in 1967. However, when the Senate Judiciary Subcommittee reported the 1969 bill to the full Senate Judiciary Committee on December 10, 1969, it made one technical and one important substantive amendment. The technical change involved a rewording of the "repro-proof" clause to make clearer that the use of imported reproduction proofs made by foreign compositors would be permitted in the case of offset and gravure printing, as long as the intermediate and final stages of the book manufacturing process -- platemaking, printing, and binding -- were done in the United States. The following interpretation of the revised provision appears in the 1974 Senate report:

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

[373]The Senate Subcommittee also accepted the "Agreement of Toronto," insofar as it called for equating Canadian with U.S. manufacture. No reference was made to the State Department's opposition; in explaining this change, the 1974 Senate report merely states:

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

When it was introduced on February 8, 1971, the 1971 revision bill (S. 644, 92nd Cong., 1st Sess.) added another change, this time to subsection (b)(1). The language of the amendment is as follows:

... in the case of work made for hire, the exemption provided by this clause does not apply unless a substantial part of the work was prepared for an employer or other person who is not a national or domiciliary of the United States or a domestic corporation or enterprise.

The purpose of this amendment was explained in the 1974 report in the following way:

In order to make clear the application of the foreign-author exemption to "works made for hire"--of which the employer or other person for whom the work was prepared is considered the "author" for copyright purposes -- the committee adopted an amendment which provides that the exemption does not apply unless a substantial part of the work was prepared for an employer or other person who is not a national or domiciliary of the United States, or a domestic corporation or enterprise.

[374]The provisions of section 601 have remained unchanged in the Senate versions of the bill since 1971, and passed the Senate in that form on September 9, 1974. The 1975 bill, as introduced in both Houses and as reported by the Senate Judiciary Subcommittee on June 13, 1975 and by the full Senate Judiciary Committee on October 7, 1975, has kept the wording of section 601 intact.

D. COMPARATIVE SUMMARY OF SECTION 601

Like the law it is intended to revise section 601 itself is the product of a long series of compromises. The following somewhat oversimplified comparative table is intended to show how the 1975 version differs from both the present law and the 1967 House version.

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[378]E. COMMENTS AND RECOMMENDATIONS

1. RETENTION OF MANUFACTURING REQUIREMENT

A commentator on the manufacturing clause, writing of the situation as he saw it in 1959, said:

Compromise has been the bloodline of the manufacturing requirement. It was compromise that originally injected the clause into the law, and as demonstrated through its long history, it was compromise after compromise that sustained it. * * * It is difficult to see how the remaining shell of the once powerful manufacturing clause can survive further revision of the act, as is presently contemplated.n*

After 16 more years of further compromises, this comment remains apt. The manufacturing clause has never been defensible on principle, and of the many blots on our international copyright escutcheon it has traditionally been the biggest and the dirtiest. As it now stands, section 601 is far less objectionable than the present manufacturing requirement and its many predecessors, but the question remains: do economic factors justify any provision conditioning the exercise of rights under a copyright upon the place where copies were manufactured?

[379]During the House Subcommittee hearings in May, 1975, the representatives of the Departments of State, Justice, and Commerce, along with the Copyright Office, all opposed the manufacturing clause on principle. Mr. Kastenmeier, Chairman of the Subcommittee, asked Joel W. Biller, Deputy Assistant Secretary for Commercial Affairs and Business Activities of the Department of State, whether "it might be useful for our purposes internationally to place a further restriction on that section which could ... actually limit the effect of the manufacturing clause to a term certain, for example, six years ... or some other such specific period of time whereinafter it would no longer have any force or effect." Mr. Biller replied:

Yes, sir, I think it would. We fully realize that there could be a difficulty posed for some American manufacturers if protection like this, which has existed in legislation for many years, were suddenly terminated.

If the Congress should decide that in order to achieve a desirable transition that some sort of phase out period is necessary, we would support such a position.

In later testimony on the same day the representative of the Department of Commerce supported this view.

The Copyright Office is familiar with the process of compromise that produced the present text of section 601, and we believe that all of those who participated in it deserve commendation for their reasonable attitudes and spirit of give-and-take. We also respect the willingness **[380]**of various groups to remain committed to their agreements despite the passage of nearly a decade since the compromise began to emerge. Assuming that some sort of restriction on manufacture must remain in the copyright statute, the general approach of section 601 appears satisfactory.

At the same time, we believe that the time has come to think seriously about a phase-out. If, as Chairman Kastenmeier suggested, a terminal date for section 601 could be set now, it could provide a reasonable transitional period during which there could be an opportunity to study the actual economics of the situation during a time of great technological change in book manufacturing.

2. PROPOSALS FOR FURTHER LIBERALIZATION OF SECTION 601

In his presentation of testimony to the House Judiciary Subcommittee on September 18, 1975, Irwin Karp, Counsel of the Authors League of America stated:

Although American authors are primary victims of the manufacturing clause, they are innocent casualties of an economic conflict between publishers and the American printing industry and unions. The present clause, and the proposed modification, seek to compel publishers to manufacture U.S. editions of American authors' books in this country. Both use the author's rights as a hostage for that purpose.

[381]Mr. Karp questioned the constitutional justification for the manufacturing clause under the Fifth and First Amendments and urged:

... that the manufacturing limitations should be phased out of the Copyright Act, eliminated before a specified date -- e.g. December 31, 1982.

In addition, the Author's League put forward two specific proposals. The first was that section 601 should be made inapplicable to works by American authors first published abroad by foreign publishers. As explained in Mr. Karp's statement:

As we have noted, the primary purpose of the manufacturing clause is to compel book publishers to manufacture here the copies they distribute in this country. That purpose is not served by prohibiting the importation of foreign-made copies of books by American authors which are published abroad by foreign publishers. American authors do not have their works published abroad to obtain lower printing costs, or to deprive American printers of work. Those consequences occurred when American publishers arranged for the foreign composition and printing of books they produced for sale in the United States. So long as the manufacturing clause remains in the Copyright Act, it should be limited to those circumstances. Therefore, the Authors League recommends that Sec. 601 (b) be amended by adding a new clause reading:

"(7) where the copies were produced by a publisher who had previously published the work outside the United States and is not a national or domiciliary of the United States or a domestic corporation or enterprise."

[382]This clause would permit the American author who had published his book abroad, by a foreign publisher, to authorize the importation and distribution of that publisher's copies in the United States without limitation on the number of copies, and without losing protection for his publishing or other rights.

The Copyright Office agrees with the principle of this proposal, although not necessarily with the language of the suggested amendment.

The Authors League's second specific proposal was to exempt periodicals and contributions to periodicals from section 601. An outright exemption for "periodicals" (a widely-disputed term which is used only illustratively in the bill) would do considerable damage to the compromise on which section 601 rests. The Copyright Office also doubts whether a complete exemption would be necessary to protect the interests of individual authors since they are already protected in this situation. Instead, we suggest that the report make clear: (1) that section 601 imposes no restrictions on the importation of an issue of a foreign periodical if, as is almost universally the case, any substantial part of the text was written by a foreign author; and (2) that, as long as the copies of such a foreign periodical issue as a whole have been imported legally, the rights of an individual American author of a particular contribution are not affected in any way.

[383]In a letter dated March 7, 1975 to the Register of Copyrights, Dan Lacy, Senior Vice President of McGraw-Hill, Inc., raises a difficult question that requires consideration. To understand Mr. Lacy's point it is first necessary to realize that there are many cases under the present manufacturing clause where more than 1,500 copies of a work protected by ad interim copyright arrive at Customs and are held up. The ad interim copyright owner has a choice in this situation: either he gives up his effort to import any copies over the 1,500 limit, or he deletes the copyright notice on all of the copies and records an abandonment of copyright in the Copyright Office.

Mr. Lacy states that the compromise on which section 601 is based included two presuppositions, among others:

1) there would be cases, as today, when the American copyright owner would want to import more than the 2,000 copy limit for distribution in the United States, and would be willing to forfeit reproduction and distribution rights (though not any other "subsidiary" rights) in order to do so; and

[384] 2) the American copyright owner should also be permitted to import a limited number of copies over the 2,000 allowed -- not for distribution in the U.S.A. but for re-export to other countries.

The Copyright Office agrees that these are practical problems, and that sections 601 and 603 (dealing with enforcement of the importation prohibitions) do not contain satisfactory answers to them. Mr. Lacy assumes that the two points are still viable parts of the over-all compromise embodied in section 601; is he is right, they should be dealt with by specific amendments in section 601, section 603, or both.

3. OTHER PROPOSED AMENDMENTS

At the House Judiciary Subcommittee hearings on September 18, 1975, Jack B. Sandler, representing the Book Manufacturers Institute, put forward a proposal for amendment of the last clause in section 601(b)(1), dealing with

works made for hire, and for changes in certain parts of the legislative report dealing with the interpretation of the terms "literary material" and "preponderantly." The proposed amendment is to the provision added to the Senate bill in 1971, which as amended would read as follows:

[385]in the case of work made for hire, the exemption provided by this clause does not apply unless a substantial part of the work was prepared for an employer or other person who is not a national or domiciliary of the United States or a domestic corporation or enterprise or a foreign subsidiary or affiliate thereof. (New language underlined.)

The Copyright Office has some technical difficulties with the drafting of the 1971 Senate amendment. For example, what does "or other person" mean? What does "a domestic corporation or enterprise" add? The wording of the proposed amendment seems to make the possible ambiguity worse, as a technical matter only. On the substance, the Copyright Office has no objection to the purpose of the 1971 amendment, which was to close a loophole in the present law, and we support the proposed amendment for the same reason.

The Copyright Office has no objection to clarifying the meaning of "literary material" and "preponderantly" in the report, though not necessarily by means of the precise language suggested by Mr. Sandler.

4. THE CANADIAN EXEMPTION

Whether manufacture in Canada should be equated with manufacture in the United States is probably the easiest question to state and the most difficult question to answer in the entire revision bill. Obviously the Canadian exemption is a pivotal part **[386]**of the compromise underlying section 601. It was accepted by the Senate when it passed the revision bill on September 9, 1974, and was accepted again by the Senate Judiciary Committee when it reported the bill on October 7, 1975. At the September 18, 1975 House Judiciary Subcommittee hearings on section 601 there was no opposition to the Canadian exemption, and Gerhard Van Arkel, General Counsel of the International Typographical Union, testified specifically in favor of it. Noting the provisions of the "Agreement of Toronto" (reproduced verbatim above) and the developments since its adoption, Mr. Van Arkel stated:

We have every reason to believe that, if this provision is retained in the bill as it is finally approved, Canadian acceptance of the Florence Agreement will follow shortly thereafter. In the unexpected event that it would not, we would surely then urge the Congress to withdraw the exemption.

In urging this exception for Canada, we do not mean to gloss over the existing irritants between Canada and the United States in the field of publishing and printing. However, we earnestly believe that the best chance of removing some or all of these irritants lies in improving the relationship between the two countries in the areas of printing and publishing. This can best be done, in our view, by carrying out the remaining objectives of the Toronto Agreement in the sequence there intended, i.e., by Canadian exemption from the manufacturing clause, followed promptly by Canadian acceptance of the Florence Agreement. The atmosphere would then be propitious to carry out the final objective of the Toronto Agreement -- the removal of any remaining barriers to trade between the two countries affecting the printing and publishing industries.

[387]On the other hand, in their testimony before the House Subcommittee on May 8, 1975, the representatives of both the Department of State and the Department of Commerce opposed not only the manufacturing clause as a whole but also the exemption of Canadian manufacture from it. The State Department's position was stated as follows:

[T]he exception for Canada introduced by this bill into the manufacturing clause would violate our obligations under the GATT and various bilateral treaties. The U.K. has protested and we expect that other foreign countries which are being discriminated against by this measure will protest, thereby introducing another element of discord and potential retaliation into relations with those countries. Specifically, the exception would violate our obligation under Article XIII of the GATT which require non-discriminatory application of quantitative restriction. Although the U.S. could seek a waiver from the GATT Contracting Parties to permit this exception, this would require us to make trade concessions in other areas to compensate our trading partners who were injured. In any event this procedure would be particularly undesirable at this time in view of the opening of the new round of multilateral trade negotiations at Geneva. The exception would also violate commitments in various FCN treaties, which we have concluded with most of the other industrialized nations.

These treaties normally impose obligations on the U.S. before it introduces non-tariff barriers on important products of the other country, and forbids the prohibition of the other country's products unless the product of third countries are similarly prohibited.

[388]The statement of Rene D. Tegtmeyer, Assistant Commissioner of Patents, for the Department of Commerce is to the same effect, although the emphasis is somewhat different:

We are opposed to the inclusion of Canada in this provision. Such an inclusion would be a unilateral concession which we believe should be withheld for possible use by the United States as negotiating leverage in seeking compensating benefits during multilateral trade negotiations. We note that both houses of Congress indicated forcibly that United States negotiators should obtain reciprocity for United States concessions when they enacted the Trade Act of 1974.

Additionally, including Canada in this provision would raise problems in our relations with other nations, in view of the "most favored nation" obligations in the General Agreement on Tariff and Trade (GATT) and other treaties. Thus, enactment of the bill containing this provision might bring about the possibility of retaliation against the United States from countries other than Canada and might otherwise hamper our efforts to eliminate non-tariff trade barriers in the interest of our overall international trade objectives.

In replying to these objections in his statement of September 18, 1975, Mr. Van Arkel first referred to the 1967 position of the State Department on the proposed Canadian exemption. He described the Department's objections at that time as having been "even broader and more basic," and stressed that these had been completely disregarded at all levels in the Senate. Mr. Van Arkel's **[389]**statement then sought to state and refute the technical arguments against the exemption put forward by the State Department. Mr. Van Arkel's final point was stated as follows:

The State Department representative referred in his testimony on May 8, 1975, to a protest by the United Kingdom against the exception for Canada. We understand that, when the United Kingdom made this protest, it was unaware of the longstanding, and recently reaffirmed, position of the British Publishers Association expressing its lack of objection to an exemption for Canada from the U.S. manufacturing clause.

Attached to the statement were copies of letters to Robert W. Frase from Ronald E. Barker, Secretary of the [British] Publishers Association, dated January 3, 1968 and May 6, 1975. The second of these letters reads as follows:

This is to confirm that my Association has and would not have any objection to book importations from Canada being exempted from the manufacturing provisions currently contained in Section 16 of the present US Copyright Law, due to be confirmed by Section 601 of the Copyright Revision Bill now before Congress.

While I have not been able to find my copy of the letter I know I wrote to you about this sometime early in 1968, when you were with the American Book Publishers Council, our view now, as it was then, is that the manufacturing provisions of US copyright legislation are out of date, providing a form of protection which has long ceased to be necessary (if it ever was), and that, in consequence, anyone who can be exempted from these provisions should be. Because of the **[390]**intimate relation between printers in the USA and in Canada, there seems to us every reason for making an exception in the respect of Canada, until such time as the manufacturing provisions can be done away with altogether. In the meantime, some of our own members might benefit from this exception because, of course, many of them are, like many US publishers, Canadian publishers in their own right.

To give you the assurance I think you want: we should certainly not object to any exemption made in Canada's favour in this respect.

On October 17, 1975, Robert J. McCloskey, Assistant Secretary of State for Congressional Relations, forwarded to Chairman Rodino of the House Judiciary Committee a letter dated October 7, 1975 to Joel W. Biller, Deputy Assistant Secretary for Commercial Affairs and Business Activities, from Thomas Sharp, Commercial Counsellor of the British Embassy in Washington. Mr. Sharp's letter refers to the last paragraph of Mr. Van Arkel's statement (quoted above), and states:

We do not feel that we should allow to pass unchallenged the implication in it that Her Majesty's Government's earlier objection to the proposed exceptional treatment for Canada would have been different, or indeed withdrawn, if we had been aware at the time of the British Publishers Association's support for such exemption for Canada. The fact is that HMG do not share the views of the Publishers Association, a non-official body, but adhere to the line that preferential treatment for Canada, as you yourself testifies on 8 May, would be inequitable and contrary to the United States's international obligations. We should be most grateful if you would bring the above comments to the attention of the Subcommittee.

[391]No one is actually opposing the Canadian exception, considered solely on its own merits. All of the private interests that have spoken on the matter favor it, either because they believe it advantageous or justified, or because they regard it as a fundamental part of the whole manufacturing clause compromise. It should not be forgotten that a major part of the "Agreement of Toronto" involved Canadian adherence to the Florence Agreement, which would mean a complete withdrawal of tariff barriers to the importation of American books into Canada. Paragraph 1 of the "Agreement of Toronto" stated:

The Canadian group will urge the Canadian Government to accept the Florence Agreement as soon as exemption for Canada has been adopted by the U.S. Congress. It is noted that the acceptance of the Florence Agreement can be accomplished in Canada without the necessity of an Act of Parliament.

Opposition to the Canadian exemption is entirely governmental. The State Department opposed it on the ground that it violates U.S. international obligations and runs counter to U.S. trade policy. The Commerce Department agrees, though its statement suggests less certainty about the violation and more concern about unilaterally giving up a trade preference without first negotiating something in return. The British Government wants the manufacturing clause deleted for all purposes; it opposes any partial deletion that, in effect, would discriminate in favor of Canadian manufacture and against manufacture in the United Kingdom.

[392]There is no question that, as a purely theoretical matter, the provisions of section 601 as a whole, including the discriminatory provisions in favor of Canadian manufacture, violate the spirit of U.S. foreign trade agreements and policy. Indeed, the mere concept of a manufacturing clause runs counter to the spirit of a whole range of post-World War II international agreements involving cultural interchange, including the various copyright conventions, the Florence and Beirut Agreements on tariff barriers, and the recent "Final Act" of the Conference on Security and Cooperation in Europe signed at Helsinki on August 1, 1975. Section 601 could not be enacted as completely new legislation today, and this is a good thing.

But Congress is not writing section 601 on a new, clean slate. As this chapter has attempted to show, the slate on which it must be written is older, messier, and more unclear than anything else in the present copyright law. The Canadian exemption must be judged in this context: as the latest in a very long string of compromises that have produced the present manufacturing clause and section 601. The Copyright Office has sought to view the issue in this light and, assuming that section 601 must remain in the copyright law at least temporarily, we have no practical or philosophical objection to making the Canadian exemption a part of it.

[393]The basic question remaining is whether or not the Canadian exemption actually violates the letter, as distinguished from the spirit, of international obligations of the United States. We have studied the technical arguments made by the Book Manufacturer's Institute, the Department of State, and the International Allied Printing Trades Association on this issue since 1967, and we have sought to study the question ourselves. To say that the answer is unclear is a considerable understatement,

The State Department argues that the Canadian exemption would violate the nondiscrimination or "most favored nation" (MFN) requirements of the General Agreement on Tariffs and Trade (GATT) and of various bilateral commercial trade treaties (called Friendship, Commerce, and Navigation or "FCN" treaties). The basic issue is whether the Canadian exemption violates the GATT itself.

Because of its origins in 1947 as a stop-gap measure, the General Agreement on Tariffs and Trade is a peculiar international instrument. The GATT was drafted in parts, all supposedly leading to the creation of an International Trade Organization which, it was planned, would renegotiate and integrate the parts of GATT into a new general agreement. This never came off, and the GATT has continued in force as the major institution operating to lower international trade **[394]**restrictions of all kinds. Its structure is so complicated, and some of its language is so ambiguous, that we find the disputants on the Canadian issue arguing less over interpretation and more over the applicability of various articles.

It is hopeless to try to review the various technical arguments concerning the Canadian exemption and the GATT in a report of this sort; there may even be confusion as to whether some of the arguments were addressed to the right questions. The following is not a summary, but represents some broad observations drawn from the debate:

1. The manufacturing clause itself is not in violation of the GATT. The Protocol of Provisional Application, which is attached to the GATT, allows laws creating non-tariff trade barriers, such as the manufacturing clause, to remain in force if they were in effect on October 30, 1947.

2. The manufacturing clause can be re-enacted, and it can also be revised, as long as the revision amounts to a liberalization. The Protocol does not say this directly, but it is the accepted interpretation for laws in effect on October 30, 1947.

3. Looked at in one way, the Canadian exemption can be viewed as a "liberalization," since it narrows the areas affected by the manufacturing requirement by removing one country.

[395]4. However, the GATT also contains provisions prohibiting discrimination among trading partners and laying down the principle of "most favored nation." The disputants have put forward an array of technical arguments as to why one or more of these provisions do or do not apply to the Canadian exemption. No clear-cut answer can be drawn from these arguments.

5. Neither the manufacturing clause in effect on October 30, 1947, nor the present law, contain an exemption for Canadian manufacture or any other provision discriminating among foreign nations for this purpose. Put in very general terms, the question is whether the discriminatory exemption is saved from being a violation by being part of a "liberalized" manufacturing clause, which is itself acceptable under the GATT protocol.

6. The State Department argues that the Canadian exemption is new and must be viewed alone, not as part of legislation already in effect. It thus cannot be saved by the Protocol, and it violates the language of one or another article of GATT.

7. The book manufacturing industry argues that the Canadian exemption is an integral and liberalizing part of the manufacturing clause, and is thus saved by the Protocol. It also argues that the provisions of GATT establishing the "most favored nation" principle and requiring "non-discriminatory administration of quantitative restrictions" do not, by their terms, cover things like a manufacturing restriction in a copyright law.

[396]8. The GATT organization incorporates a procedure whereby waivers can be granted in cases that might otherwise be considered a violation. The State Department would clearly prefer not to ask for a waiver in a case such as this, but the possibility is there.

It should be added that the GATT is not like a statute, laying down rules that cover specific cases and that can be definitively interpreted and enforced by the courts. There must be, and there is, a great deal of flexibility and give-and-take in the practical operation of the GATT.

It is by no means clear to us that the State Department is correct in its interpretation of the GATT's provisions. Moreover, the manufacturing clause of the U.S. copyright law is an old, familiar monster on the international scene, and section 601 will remove a good many more of the relatively few teeth it still has. Considering the doubt on the question and the very great liberalization of the manufacturing clause in section 601 as a whole, the chances of one or more Contracting States of the GATT making a formal protest over the Canadian exemption do not seem great. These chances would be further reduced if section 601 were to be phased out entirely over a period of time.

[397]5. IMPORTATION OF "PIRATICAL" COPIES BY LIBRARIES

Section 602, which has nothing to do with the manufacturing requirement, deals with two separate situations: (1) importation of "piratical" copies (copies made without any authorization of the copyright owner); and (2) unauthorized importation of lawfully-made copies. Both situations constitute copyright infringement under section 602, but the Bureau of Customs is authorized to bar importation only in the first case.

No questions have been raised about this provision before any Congressional body in recent years, but a special situation has presented itself that may require a new look at clause (3) of section 602(a). This is an exemption allowing libraries to import up to 5 copies, for their "library lending or archival purposes," even where "the making of the copies ... would have constituted an infringement of copyright if this title had been applicable."

Within the past year or so the British Lending Library at Boston Spa has become a major supplier of unauthorized photocopies of journal articles to libraries throughout the world. This service is becoming very widely used by libraries in the United States. It can be assumed that the great majority of journal articles supplied by this service are copyrighted in the United States, and that a large number of them are of American origin. The activities of the British Lending Library could be considered a violation of section 108(g)(2) of the bill in its present form, were that section applicable.

[398]The Copyright Office has no suggestions for changes in section 602. However, it believes that, in view of the controversy over section 108(g)(2) and the emergence of the Boston Spa operation, the practical effect of the library exemption in section 602(a)(3) should be carefully examined in connection with the whole problem of library photocopying.

§ [116]CHAPTER V SECONDARY TRANSMISSIONS, INCLUDING CABLE TELEVISION Form § [399]CHAPTER XV COPYRIGHT OFFICE AND COPYRIGHT ROYALTY TRIBUNAL

Sections Considered:

Chapter 7 - Copyright Office

H. R. 7149 (94th Cong., 1st Sess.) -- A bill to amend title 17 of the United States Code with respect to registration for unpublished works and with respect to the fees of the Copyright Office, and for other purposes

Chapter 8 - Copyright Royalty Tribunal

Issues:

1. Should the Register of Copyrights be required expressly to give advance notice of proposed changes in Copyright Office regulations, and to establish procedures for hearings or comments on such proposals?

2. Are the provisions of sections 704 and 705, dealing with Copyright Office deposits and records, sufficiently broad and flexible?

3. To what extent, if any, should the Copyright Office fees provided by section 708 be increased?

4. Should the bill provide for a voluntary licensing system, to be combined with copyright registration, covering reproductions for the use of the blind and physically handicapped?

[400] 5. Should H.R. 7149 be enacted in advance of the general revision bill?

6. Are the provisions of *Chapter 8*, establishing the duties, powers, and procedural framework of the Copyright Royalty Tribunal, completely satisfactory from the legal and practical viewpoints? If not, to what extent should changes be made?

7. Does the doctrine of separation of powers under the U.S. Constitution require that the Copyright Office and the Copyright Royalty Tribunal be transferred from the Legislative to the Executive Branch?

[401]A. BACKGROUND AND SUMMARY

1. COPYRIGHT OFFICE (CHAPTER 7)

The provisions of *Chapter 7*, dealing with the Copyright Office and its functions, have not been controversial, and with minor changes have remained as drafted in 1963. The only real issues raised have been over the level of Copyright Office fees.

The first eight sections of H.R. 2223 and S. 22, as introduced in January, 1975, are essentially the same as those in the revision bill passed by the House on April 11, 1967. In 1974 a new section 709 was added in the Senate. In the words of the 1974 and 1975 Senate Judiciary Committee reports:

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

On November 20, 1975, the Senate Judiciary Committee reported S. 22 with a new provision at the end of Chapter 7. Its text reads as follows:

[402]

§ 710. Reproductions for use of the blind and physically handicapped: Voluntary licensing forms and procedures

The Register of Copyrights shall, after consultation with the Chief of the Division for the Blind and Physically Handicapped and other appropriate officials of the Library of Congress, establish by regulation standardized forms and procedures by which, at the time applications covering certain specified categories of non-dramatic literary works are submitted for registration under section 408 of this title, the copyright owner may voluntarily grant to the Library of Congress a license to reproduce the copyrighted work by means of Braille or similar tactile symbols, or by fixation of a reading of the work in a phonorecord, or both, and to distribute the resulting copies or phonorecords solely for the use of the blind and physically handicapped and under limited conditions to be specified in the standardized forms.

The 1975 bill as reported by the Senate Judiciary Committee on November 20, 1975 also amends the fee schedule in section 708, raising the basic registration fee from $ 6 to $ 10.

2. "FEE BILL" (H.R. 7149)

In 1974 the Librarian of Congress wrote on behalf of himself and the Register of Copyrights, to the Chairman of the House and Senate Judiciary Committees, urging separate enactment of amendments to the present copyright law. The draft bill submitted with the Librarian's letter, among other things, would have raised Copyright Office fees from the level established by an earlier amendment in 1965. In response to **[403]**this request bills were introduced in the House of Representatives by Mr. Kastenmeier (H.R. 16601, 93d Cong., 2d Sess., September 11, 1974) and in the Senate by Mr. McClellan (S. 3960, 93d Cong., 2 Sess., September 4, 1974).

Following further discussions, particularly between the Copyright Office and Irwin Karp, Counsel of the Authors League of America, the so-called "fee bill" was again revised. On April 28, 1975, John G. Lorenz, Acting Librarian of Congress, wrote to Peter W. Rodino, Jr., Chairman of the House Judiciary Committee, submitting a substantially revised version of the fee bill and, on behalf of himself and the Register of Copyrights, urging its introduction and approval. On May 20, 1975, Mr. Kastenmeier introduced the proposed bill as H.R. 7149 (94th Cong., 1st Sess.)

As explained in Mr. Lorenz's letter, H.R. 7149 is aimed at accomplishing certain formal and procedural reforms in the present copyright law in advance of, but completely consistent with, enactment of the general revision bill. As Mr. Lorenz stated:

The primary purpose of the proposed bill is to increase the fees payable to the Copyright Office for registration of claims to copyright and other services, in order to bring the cash receipts of the Office more nearly in line with its expenditures.

Since the enactment of the present copyright law in 1909, the Congress has revised the schedule of Copyright Office fees three times, in 1928, 1948 and 1965. From 1909 until the fiscal year 1942 the **[404]**the [sic] applied fees of the Office exceeded its expenditures. This relationship was reversed beginning with fiscal year 1943, and the ratio of fees to costs continued to decline until the enactment of the 1948 fee schedule. In the next year, Copyright Office income exceeded expenditures for the last time. Thereafter, the ratio of applied fees to expenditures declined again. For fiscal 1974 the ratio was 43 percent. If we include the estimated value of deposit materials selected by the Library of Congress, the ratio of income to obligations reaches 114 percent.

This decline in the ratio of cash receipts to expenditures has occurred principally because of salary increases of employees of the Office, which itself is a reflection of the marked increase in the level of prices in our economy as a whole. Other factors are major cost increases in supplies, printing, and mailing.

A second major purpose of H.R. 7149 is to eliminate the existing barrier to voluntary registration for a large range of works in unpublished form. In Mr. Lorenz's words:

... There is no longer any valid reason to permit voluntary copyright registration in advance of publication, for the words and music of a song or for the text of a play, but to deny this privilege to the authors of poems, short stories, and essays and cartoon artists. The Copyright Office is forced to refuse registration for a large number of claims because of this distinction, which we consider to be arbitrary and unfair to individual authors. We believe that this barrier should be removed now, as part of the fee increase, rather than awaiting its elimination under S. 22, the bill for general revision of the copyright law, and we are proposing a simple amendment of section 12 to accomplish this change.

[405]Third, the bill is intended to permit grouping of registrations in certain cases. As explained in Mr. Lorenz' letter:

There are two situations, both involving individual contributions to periodicals, including newspapers, which we believe deserve exceptional treatment. It is a substantial financial burden on individual authors and artists who contribute small or short works to a variety of daily newspapers and other periodicals to register and renew each copyright separately. Special provisions allowing grouping of contributions for registration and renewal purposes have therefore been added to our proposal for section 215. The twelve-month period does not refer to a calendar year, and a variety of group registrations may be made in a given year provided the stated conditions are met.

Additional technical amendments in the existing fee schedule are proposed in the bill, which would also add the sections of the revision bill dealing with postal disruptions (section 708) and voluntary licensing of reproductions for the blind and physically handicapped (section 709 of S. 22 as reported on November 20, 1975) to the present law. The bill would become effective six months after its enactment.

On September 22, 1975, the Register of Copyrights wrote to Mr. Kastenmeier urging separate consideration and favorable consideration of H.R. 7149 as soon as possible. The letter stated, in part:

[406]I am writing to urge separate enactment of this badly-needed measure as soon as possible, and apart from the bill to effect a general revision of the copyright law (H.R. 2223). It is, of course, true that H.R. 2223 is under active consideration, and that it incorporates all of the provisions of H. R. 7149. However, I believe that advance enactment of H.R. 7149 would greatly aid the Copyright Office in administration of the present statute and eventual implementation of the revised law.

As the Acting Librarian of Congress, John Lorenz, explained in his letter to Chairman Rodino requesting introduction of H.R. 7149, the last increase in the fees of the Copyright Office occurred in 1965. We are all too familiar with the inflationary spiral of the last decade. I share the philosophy that Copyright Office fees should never be so high as to discourage registration or to impose an economic burden on creative individuals. However, the ratio of expenses recovered by registration fees to costs has fallen so low (approximately 40 percent in fiscal 1975), that we have been compelled by economic realities to propose the increases set out in H.R. 7149.

I am confident that the general revision bill will be enacted during the current Congress. This will involve enormous changes in the copyright law and the copyright system, and as a practical matter the effective date of the omnibus legislation will need to be at least one year after enactment in order to plan and prepare for implementation of the law. Thus, assuming the revision bill is enacted next year, the fee schedule of the bill would not go into effect until approximately January 1, 1978. On the other hand, if H.R. 7149 could be enacted this year, and assuming it provides a six-month period for implementation, we would start receiving the additional fees by the middle of next year, at least 18 months before the effective date of the revision bill.

[407]In addition to the new fee schedule, H.R. 7149 contains several other important proposals, which Mr. Lorenz discussed in his letter to Chairman Rodino. Among these are proposals to eliminate the present barrier to unpublished registration for a large number of works, principally book material, and to permit a single registration for a group of contributions to periodicals by the same individual authors under specified conditions. These proposals in particular have the support of the Authors' League of America and I understand that enactment of H.R. 7149 is favored by the Authors' League because of these proposals ... .

A particularly important advantage of early enactment of H.R. 7149 would be the headstart it would give us in implementing some of the procedural changes called for by general revision. We are now registering well over 400,000 claims each year, and even minor changes in the formal processing of applications cause major disruptions. We will need all the time we can reasonably expect to get to implement the revision bill, and early enactment of H.R. 7149 would help us a good deal in this connection.

On September 25, 1975, Irwin Karp, Counsel of the Authors League of America, also wrote to Mr. Kastenmeier urging immediate approval of the measure. The following are excerpts from Mr. Karp's letter on behalf of the league:

H.R. 7149 would increase the Copyright Office fees for registrations of original and renewal copyrights, assignments, searches and other services. Needless to say, authors would prefer to pay $ 6 instead of $ 10 to register a copyright, $ 4 instead of $ 6 to register a renewal copyright. However, the Copyright Office has described the economic conditions which compelled it to request these increases; and present policy requires it to look at its fees as one of its major sources of funding.

[408]As the national society of professional writers and dramatists, the Authors League firmly supports H.R. 7149 because it eliminates a glaring inequity of the present Act which imposes a heavy financial penalty on authors who write

works which are first published in periodicals and newspapers. During a 12 month period: a poet may have several poems published in various journals; several articles or short stories by the same author may appear in periodicals or many cartoons or drawings by an artist may be published in a magazine or newspaper.

Under the present Copyright Act, the author, poet or cartoonist must file a separate copyright renewal application and pay a separate fee for each story, article, poem or cartoon; the same requirement applies to his registration of original copyrights. Thus, a poet must pay as much to register the renewal copyright in a one-page poem as a large motion picture company pays to register the renewal copyright in GONE WITH THE WIND. The author of a five-page short story or article must pay as much to register its renewal copyright as a publisher pays to register the renewal copyright in a 1,000 page encyclopedia.

Authors of poetry, articles, short stories and cartoons must write and publish several short works each year to earn a living. The requirement that the copyright and renewal copyright in each work be registered and paid for separately imposes a heavy and discriminatory burden on them. Frequently an author or his/her surviving family must spend large sums each year to register renewal copyrights in several short works. Over a period of years, the cost of preserving renewal copyright protection may mount to hundreds of dollars. This cost cannot be escaped since some of these short works earn a significant portion of their modest income in the latter part of an author's life through licenses to reprint them in anthologies and other collections. The author or family must renew copyright in all of them, to make sure that those that may be productive will be protected.

[409]H.R. 7149 will rescue such authors from this onerous and discriminatory burden. The Bill incorporates a reform suggested by the Authors League to the Copyright Office. Adopting this suggestion, the Bill prepared by the Copyright Office would permit an author of poems, articles, short stories and other periodical contributions to group together several of his works published in the same 12 month period and register them at one time for a single fee. For example, six short poems originally published in periodicals during a 12 month period could be registered for renewal at the same time for a $ 6 fee, rather than $ 36 in separate fees. More than one such group registration could be made in the same 12 month period ...

The Bill makes another needed change in the present provision. It would permit authors of books and other literary works to secure copyright by registration, prior to publication. Under the present law, these works can only be copyrighted by publication with notice of copyright -- while composers, playwrights and other authors are permitted to secure copyright either by publication, or by registration of an unpublished work. There is no reason for this discrimination and it ultimately would be cured by the Revision Bill.

As the Copyright Office makes clear, there are sound reasons for adopting H.R. 7149 now, rather than waiting for the enactment of the Revision Bill to accomplish changes in fees, group registrations of periodical contributions and registration of unpublished literary works. Even if passed sooner than anticipated, the Copyright Revision Bill could not take effect for at least a year thereafter, to give the Copyright Office time to prepare for administration of the new law. This means that authors of short stories, articles, poems and other periodical contributions would have to pay inordinately high registration fees, for renewal copyrights maturing during the next 18 to 24 months. There is no reason to prolong this inequity.

[410]The separate "fee bill" has not been introduced in the Senate in 1975. However, as noted above, in reporting the general revision bill (S. 22) on November 20, 1975 the Senate Judiciary Committee adopted amendments to sections 408, 708, and 710, that exactly parallel the provisions of H.R. 7149.

C. COPYRIGHT ROYALTY TRIBUNAL (CHAPTER 8)

The general revision bill as reported by the House Judiciary Committee in 1967 contained in effect, three compulsory licensing systems: 1) the original compulsory license for the "mechanical reproduction" of music on sound recordings in section 115; (2) a compulsory license for jukebox performance of music in section 116; and (3) a kind of compulsory license for certain secondary transmissions by cable systems under section 111. The concept of a tribunal to handle disputes over distribution of fees and possible changes in royalty rates had not emerged in the hearings or discussions. Instead, the mechanics of the three systems were to be handled in three very different ways:

1) "Mechanical royalty" (section 115)

a) Flat rate ceiling set at 2 1/2 cents per song per record (with variations based on playing time).

b) Accounting and payments to be handled entirely between the parties.

[411]

2) Jukebox (section 116):

a) Flat rate ceiling of 3 cents per song, per box, per quarter (with variations).

b) Jukebox operator required to record his boxes annually with the Copyright Office and to file an annual list stating the songs available for performance in each box during a quarter.

c) Payment to be handled entirely between the parties.

3) Cable (section 111):

a) No flat rate

b) All cable systems required to be recorded annually in the Copyright Office;

c) For certain secondary transmissions (mostly of local signals), copyright liability would have been so sharply limited as to amount to a compulsory license. Voluntary licensing at reasonable rates was supposed to be compelled, in this situation, by limiting recovery in an infringement suit to "a reasonable license fee, as found by the court under the circumstances of the case," with provisions for increasing or withholding monetary recovery if the court found either party to have been recalcitrant in negotiations.

All this had been worked out in a way that avoided any necessity for government involvement in the actual receipt and disbursement of royalty fees. It was also assumed that, if the flat rates under sections 115 and 116 were to be changed, Congress would have to do so by statutory amendment.

[412]On April 11, 1967, the House of Representatives passed the revision bill, but with radical amendments that brought the government directly into the system of accounting and disbursement of royalties under a compulsory license, and set the stage for administrative rate-making. The cable section (section 111) was deleted entirely, leaving it to the Senate to rebuild the provision along different compulsory licensing lines.

As for the jukebox provision (section 116), it was drastically altered as follows:

a) Flat rate (not a ceiling) of $ 8 per box per year;

b) Jukebox operator required to record his boxes annually with the Copyright Office, and to pay into the Office an annual fee of $ 8 per box;

c) The Copyright Office, acting solely as a "passive trustee," required to file an interpleader action in federal court, leaving it to the court to distribute the fees. A copyright owner not affiliated with a performing right society was to receive the "pro rata share" to which he "proves his entitlement"; the performing rights societies were to receive the remainder "in such pro rata shares as they shall by agreement stipulate among themselves, or, if they fail to agree, the pro rata shares to which such ... societies prove their entitlement."

[413]When Senator McClellan reintroduced the general revision bill on January 22, 1969, (S. 543, 91st Cong., 1st Sess.) he restored the cable and jukebox provisions as they had been reported by the House Judiciary Committee. However, on December 10, 1969, when the Senate Judiciary Subcommittee reported S. 543 to the full Committee, it recommended certain sweeping amendments which, as a whole, have altered the character of the bill. To summarize them very briefly:

1) Mechanical royalty (section 115): Unchanged, but 2 1/2 cent ceiling subject to periodic readjustment by new Copyright Royalty Tribunal

2) Jukebox (section 116).

a) Flat rate (not a ceiling) of $ 8 per box per year, subject to periodic readjustment by Royalty Tribunal;

b) Jukebox operator required to record his boxes annually with the Copyright Office, and to pay into the Office an annual fee of $ 8 per box;

c) Copyright Office would receive annual claims to payment from copyright owners who, without regard to antitrust laws, "may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf." The Register of Copyrights would determine annually whether a controversy exists as to distribution. He would distribute all royalties not in dispute, in accordance with the criteria established for distribution by the court under the 1967 bill passed by the House. For fees in dispute, he would "constitute a panel" of the Copyright Royalty Tribunal under section 803.

[414] 3) Cable (section 111):

a) Percentage rate (not a ceiling): a sliding scale of 1-5 percent based on gross receipts per quarter from subscribers, subject to periodic readjustment by Royalty Tribunal;

b) All cable systems required to be recorded annually in the Copyright Office;

c) Compulsory licensing for a wide range of secondary transmissions with quarterly accounting and payment to the Copyright Office. Claims and disbursement would be handled as with jukebox royalties, including constituting of the Royalty Tribunal to settle disputes.

4) "Performance royalty" (section 114):

a) A new compulsory license covering certain public performances of sound recordings. The rate, based on a complicated formula of percentages and alternatives, was not intended to be a ceiling, and would be subject to periodic readjustment by the Royalty Tribunal;

b) The broadcaster, or other user under a compulsory license, was required to record his identity at periodic intervals with the Copyright Office and, to pay the appropriate fees annually into the Copyright Office;

c) Claims and disbursement would be made through the Copyright Office, generally as in the jukebox and cable situations. The section specified that royalties were to be divided 50-50 between the copyright owners of the sound recording and the performers on the recording.

[415]5) Copyright Royalty Tribunal (Chapter 8):

a) A whole new chapter was added to the bill, creating a Copyright Royalty Tribunal in the Library of Congress, whose duties were: "(1) to make determinations concerning the adjustment of the copyright royalty rates specified by sections 111, 114, 115, and 116 so as to assure that such rates continue to be reasonable; and (2) to determine in certain circumstances the distribution of the royalty fees deposited with the Register of Copyrights under section 111, 114, and 116."

b) The rate adjustments for sections 111 (cable) and 114 (performance royalty) were supposed to be undertaken in 1974 and at 5-year intervals thereafter, and those for sections 115 (mechanical royalty) and 116 (jukebox) in 1976 and thereafter at 5-year intervals.

c) The Tribunal would consist of three-member panels appointed, following an opportunity for objections, from lists supplied by the American Arbitration Association.

d) In cases involving rate adjustments the Tribunal would report to Congress, and its determination would become final unless voted down in either House within 90 days.

For the most part the compulsory licensing Royalty Tribunal provisions in the 1971 revision bill (S. 644, 92nd Cong., 1st Sess., February 8, 1971) and the 1973 bill as introduced (S. 1361, 93d Cong., 1st Sess., March 26, 1973), were the same as in the December 10, 1969 **[416]**version of S. 543. However, two new sections were added in 1971 at the end of Chapter 8: section 808, providing for an effective date of royalty distributions made under a Tribunal determination, and section 809, providing for judicial review of Tribunal decisions on royalty distributions, but only in cases of corruption, fraud, evident partiality, or prejudicial misconduct.

As has been described above in connection with the cable section (Chapter 5), the performance royalty (Chapter 8), the mechanical royalty (Chapter 9), and the jukebox section (Chapter 10), all of these provisions underwent changes

during legislative consideration of the bill in the Senate during 1974. What finally emerged when the Senate passed the bill on September 9, 1975, insofar as it affects the operators of the compulsory licensing systems and the Copyright Royalty Tribunal, can be summarized briefly as follows:

1) Mechanical Royalty (section 115): Rate raised to 3 cents, but still subject to Tribunal readjustment.

2) Jukebox (section 116): Rate left at flat $ 8, but removed from Tribunal review entirely; Tribunal would still settle disputes over distribution of jukebox royalties.

3) Cable (section 111): Radical changes in scope of compulsory licensing but basic procedures for collecting and disbursing royalties unchanged; percentages on which royalty rates computed cut in half, but rates still subject to Tribunal readjustment.

[417] 4) "Performance Royalty" (section 114): Knocked out entirely, leaving only exclusive rights in sound recordings against unauthorized duplication.

5) Royalty Tribunal (Chapter 8): Scope of activities narrowed as a consequence of changes outlined above; rate adjustment proceedings to start almost immediately upon enactment of bill; Tribunal given authority to adjust not only the rate but also the basis for computing it; subsection added to section 804 requiring Tribunal to reach a final decision in a particular proceeding within one year, but allowing the Judiciary Committee of either House to waive this requirement in particular proceedings.

Further changes in the bill, as also noted above, have been made during the 1975 legislative process in the Senate. To summarize the amendments approved by the full Senate Judiciary Committee when it reported the bill on November 20, 1975:

1) Mechanical royalty (section 115): Rate again set at 2 1/2 cents, but still subject to Tribunal readjustment.

2) Jukebox (section 116): $ 8 rate again subject to Tribunal readjustment.

3) Cable (section 111): Amendments in section 111 itself do not affect operation of compulsory licensing system, but "stretch-out" of Tribunal rate-adjustment proceedings under section 802 important in connection with this issue.

4) "Performance royalty" (section 114): Not restored.

5) Public broadcasting (section 118):

a) A new compulsory license covering public broadcasting of nondramatic literary and musical works and graphics. No **[418]**rates are provided; section 118(c) places the full responsibility for establishing "reasonable royalty fees," and the "appropriate" basis for calculating them, upon the Copyright Royalty Tribunal, and specified that negotiated licenses can be substituted for compulsory licensing. The rates, needless to say, are subject to readjustment by the Tribunal at the stated intervals.

b) As under the other compulsory licenses except the "mechanical royalty" provided in section 115, the public broadcaster would periodically record its identity with the Copyright Office and make payments at intervals, but instead of being specified in the statute these intervals are to be prescribed by the Register.

c) Claims and disbursement would be made by the Copyright Office, generally as in the jukebox and cable situations.

5) Copyright Royalty Tribunal (Chapter 8):

a) Initial rate review and intervals for later rate-adjustment proceedings stretched out: initial review to begin about two years after effective date of bill and later reviews at ten-year intervals.

b) Scope of Tribunal's work increased by return of jukebox rate review and addition of public broadcasting rate establishment, review, and distribution of royalties.

[419]B. COMMENTS AND RECOMMENDATIONS ON SPECIFIC ISSUES

1. COPYRIGHT OFFICE RULE-MAKING PROCEDURES

In a letter dated October 31, 1975 to Peter W. Rodino, Chairman of the House Judiciary Committee, Stephen E. Kelly, President of the Magazine Publishers Association, made the following recommendation:

Sec. 702 of the Revision provides that the Register of Copyrights is authorized to establish regulations not inconsistent with law for the administration of the functions and duties made his responsibility under this title, and further provides that all such regulations established by the Register are subject to the approval of the Librarian of Congress. Other sections of the Revision confirm the intent of the Bill to enlarge not only the administrative responsibility but also the quasi-legislative authority of the Copyright Office in the entire area of statutory copyright protection.

The present Register of Copyrights has adopted the laudable practice of publishing proposed changes in regulations in the Federal Register and requesting comments and suggestions from all parties concerned. The Register has also on one occasion held public hearings on proposed changes in regulations. The MPA feels that the Register of Copyrights is to be commended on affording interested parties the right to be heard on proposed changes in the regulations, and would like to insure that such practice is continued in the future. There is, however, no statutory provision requiring that the Register publish for comment or hold public hearings on any changes in or additions to regulations, and there is no assurance that future Registers of Copyright would follow the precedents set by the present Register in this regard. The MPA believes that this procedural protection is necessary and desirable addition to, and should not be omitted from, this Legislation.

[420]Accordingly, the MPA recommends that, to the extent not covered by existing statutes, the adoption or amending of matters of substance in the rules and regulations of the Copyright Office be accompanied by advance public notice and publication of the proposed rules or regulations, and that a procedure for public hearings and/or comment on such proposed rules be instituted.

The Copyright Office fully endorses this proposal, and recommends that section 702 be amended accordingly.

2. COPYRIGHT OFFICE DEPOSITS AND RECORDS

In his testimony before the House Judiciary Subcommittee on June 5, 1975, Donald D. Merry, President of Sicom Electronics Corporation, made the following observations:

Regarding Section 705, some consideration should be given to providing additional data to the public by the Library of Congress. If, in fact, the primary purpose of the copyright scheme is to benefit the public then an effort should be made to make it easy for the public to avail themselves of that which is theirs. To accomplish this is relatively simple. In addition to the aforementioned file reflecting the copyright holder, the data and renewal date of the copyright should be shown. A separate file containing works on which the copyrights have expired should be provided so it may be used by the society which paid for it with a limited monopoly.

The Copyright Office believes that the bill goes about as far as it should in the information it requires the Office to compile and present. On the basis of experience with the hundreds of variables that can exist in a particular case, we doubt the wisdom of providing information based **[421]**on legal assumptions or conclusions. The Copyright Office should continue to keep as full and accurate records as possible, and to report the information it finds straightforwardly and without comment as to its meaning.

At the same time, a number of recent problems involving copies deposited for copyright registration have caused the Copyright Office to take a new look at the provisions of section 704. We feel it is essential for the deposit provisions to be sufficiently strong to guarantee the availability of some physical record of a work deposited for registration throughout its term of copyright. On the other hand, the physical record should not necessarily be the actual copy deposited; the Register should have enough flexibility, in preparing a permanent record of the work deposited as part of the registration process, to be able to use other advanced techniques of information storage and image reproduction.

We are concerned that, under section 704(b), deposit copies, phonorecords, and identifying material of copyrighted works will, after transfer to the Library of Congress or other libraries, become completely lost and that no record will exist of the particular work covered by a particular copyright registration. The law should be flexible enough to allow the Register to make some, at least partial, physical, record of the work before transferring the deposit copies to the Library, whether at the time of registration or later. Similarly, the Register should be authorized to regain, **[422]**as

copyright records, deposit copies which have already been transferred to the Library but which the Library does not want, no longer needs, or can store in its collections.

It may be that section 704 is broad enough to provide the needed authority and flexibility, and that an interpretation in the legislative report will serve the purpose. We prefer, however, the addition of an explicit paragraph to section 704.

3. COPYRIGHT OFFICE FEES

As the Register's Supplementary Report pointed out in 1965, the annual fees received by the Copyright Office exceeded its expenditures from 1909 until 1942. They continued to lag behind until 1948, when a fee increase brought them above 100 percent of costs, for one year only and for the last time. The proportion of fees to costs declined to about 64 percent in 1965, when Congress enacted the present fee schedule, centering around a basic $ 6.00 registration fee. The decline in cost recovery from fees during the past ten years has been precipitate, and is now at an all-time low of about 40 percent. When the estimated value of deposits taken into the collections of the Library of Congress, is added to the fees received, the total sum is still over 100 percent of costs, but even this ratio is rapidly declining.

[423]The following are the fee increases embodied in the revision bill as reported by the Senate Judiciary Committee on November 20, 1975:

	Old	New
1) Registrations	$ 6	$ 10
2) Renewals	$ 4	$ 6
3) Receipt for deposit	$ 2	$ 2
4) Recordation of transfers	$ 5	$ 10
a)extra pages	$ .50	$ 1
b)extra titles	$ .50	$ 1
5) filing § 115 notice	$ 3	$ 6
6) statements of authorship	$ 5	$ 10
a)extra pages	$ .50	$ 1
b)extra titles	$ .50	$ 1
7) import statement	$ 3	$ 3
8) additional certificate	$ 2	$ 4
9) other certifications	$ 3	$ 4
10) searching (per hour)	$ 5	$ 10

Corresponding increases are embodied in the "fee bill," H.R. 7149 now pending.

We estimate that the cost recovery from this fee schedule will be less than 70 percent from its inception. Nevertheless, we do not recommend any higher increase at this time, nor do we favor giving the Register of Copyrights discretionary authority to set fees on the basis of actual administrative costs. The Copyright Office believes that fees should never be so high as to discourage registration or to work **[424]**a hardship on individual authors, and that the over-all value of deposits should always be taken into account when judging the fiscal position of the Copyright Office.

On the basis of a recent systems analysis of the Copyright Office's fiscal control and accounting activities, we recommend one addition to the fee schedule. The Copyright Office currently rejects roughly 2.5 percent of the applications it receives, which amounts to about 10,000 rejections annually. This is an astonishingly costly process which, under the present law, is entirely uncompensated. We recommend that a basic fee of $ 10 be imposed for processing every application received, whether it is accepted for registration or not. However, to avoid unfairness where a number of related applications are submitted and rejected as a group, even for varying reasons, the Register should be given discretion to waive part of the total fee in such situations.

4. VOLUNTARY LICENSING SYSTEM FOR BLIND AND PHYSICALLY HANDICAPPED

The Copyright Office strongly endorses section 710 of the revision bill as reported by the Senate Judiciary Committee on November 20, 1975. We also note that, in *Chapter 6* above, we suggested the possibility of expanding

this section to cover voluntary clearances for open-circuit, nonprofit broadcasting of literary works intended primarily for blind listeners.

[425]5. "FEE BILL" (H.R. 7149)

For the reasons already stated in this chapter, we strongly urge enactment of H.R. 7149, with a few technical amendments, as soon as possible.

6. COPYRIGHT ROYALTY TRIBUNAL

The constitutional validity and practical efficacy of the provisions of *Chapter 8* dealing with the Copyright Royalty Tribunal must be judged in relation to what the Tribunal is called upon to do under Chapter 1 of the bill. This is by no means clear at present. The following seem to be the possibilities:

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On the basis of this summary it is a necessary conclusion that the proliferation of compulsory licensing systems under the bill mandates the establishment of a Royalty Tribunal. In the aggregate, the duties it seems likely to be called upon to perform are simply too large, complex, and specialized to be handled de novo by Congress and the courts.

[427]Assuming that a Royalty Tribunal is to be established under the revision bill, additional questions must be answered as to its constitutionality and practicality. In a memorandum dated October 14, 1975 and prepared at the request of the Teleprompter Corporation, Professor Ernest Gellhorn has raised questions as to the constitutionality of certain provisions of *Chapter 8* under the due process clause. His main points involve:

1) the lack of statutory standards for rate adjustments beyond the vague criterion of "reasonableness";

2) the lack of continuity of membership on the Tribunal;

3) the requirement that Tribunal members be selected from lists supplied by the American Arbitration Association;

4) the lack of provision for judicial review of rate adjustments;

5) the system by which a rate determination could be voted down by either House, without Presidential approval.

Each of these points was refuted in turn in a memorandum dated November 11, 1975 and prepared at the request of the Motion Picture Association of America by Professor Louis H. Pollack. Professor Pollack's conclusion is stated as follows:

[428]It is submitted that the provisions of H.R. 2223 discussed above constitute a fair, orderly and constitutional mechanism for periodic adjustment of royalty rates attendant on a system of compulsory licensing of copyrighted matter. The provisions both as applied to the new field of cable television and as applied to the old field of musical recordings, would be a distinct - and distinctly constitutional - improvement upon the rigid compulsory-license-with-fixed-royalty statutory model which has been an important feature of the present Copyright Law ever since 1909.

The Copyright Office believes that, if Chapter 8 were to be enacted in its present form, it would probably withstand a direct challenge to its constitutionality. However, we can see several areas in which the provisions concerning the Tribunal could be strengthened and improved from both legal and administrative standpoints:

1) Administrative structure

a) A distinction should be drawn between the Copyright Royalty Tribunal as a continuing institution and the Panels constituted under it to make determinations in specific cases.

b) The Copyright Royalty Tribunal itself should, for practical reasons, be an organizational unit of the Copyright Office. The Senate report makes clear that the Register of Copyrights is expected to establish the procedural framework of the Tribunal by regulation, and to provide the administrative support necessary for it to function as an office. Preferably, this should be stated in the statute itself.

[429]c) Within the procedural framework established by the Regulations of the Copyright Office, however, the Tribunal should operate on a basis of complete independence in substantive decision-making. Not only should the

decisions in specific cases by the 3-member Panels of the Tribunal be taken without regard to the Register of Copyrights or the Librarian of Congress; the staff work supporting the various Tribunal proceedings should also be autonomous.

d) To accomplish this result, the statute should establish an Executive Director or similar official who would be solely responsible for directing the staff work necessary to support the deliberations of the various Panels of the Tribunal. The Executive Director should function on a continuing basis, and the staff of the Tribunal should consist of a permanent group of experts who would be able to compile and make preliminary analyses of the masses of information necessary for decision-making.

e) As contemplated in the bill, the 3-member Panels should be constituted on an ad hoc basis. We see no constitutional difficulty with the use of lists furnished by the American Arbitration Association and we doubt if a fairer method of choosing panel membership can be found at present.

2) Standards for determinations

Once it has been decided exactly what decisions the Tribunal will be called upon to make, it would be wise to establish, in the statute, certain criteria beyond "reasonableness" that each Panel is to apply to its decision-making. Aside from strengthening the Tribunal constitutionally, the establishment of both general and specific standards would substantially help the Panels in deciding what to do and how to do it in particular cases.

[430]3) Timetables

a) Regardless of the dates finally settled upon for the Panels to undertake their initial proceedings and intervals at which later proceedings are to be undertaken, it would seem wise for the statute to establish the Executive Director and staff of the Tribunal at once, so that the fruits of their work would be available as soon as the proceedings start.

b) In the case of new section 118 (the compulsory license for public broadcasting), the initial rates are supposed to be set by the Tribunal. A sharply accelerated timetable would need to be adopted for this purpose.

c) Assuming that the Tribunal has continuing staff support, the extendable one-year deadline provided for the proceedings of individual Panels may be unnecessarily long. A deadline of six months, extendable to no more than one year, would seem preferable.

4) Judicial review of rate adjustments

In a memorandum dated October 2, 1975 and submitted to the House Judiciary Subcommittee, Jack Valenti, President of the Motion Picture Association of America, recommended that a system of judicial review of Tribunal decisions be substituted for the provision for legislative veto now provided by *Chapter 8*. The memorandum proposed a specific amendment, based on *39 U.S.C. § 3628* dealing with judicial review of postal rate decisions, which would provide for "direct review of Tribunal decisions to the United States Court of Appeals, based on the record before the Tribunal." The following is the text proposed by MPAA:

[431]

§ 806. Publication of royalty adjustment decisions

The Tribunal, immediately upon making a final decision in any proceeding for adjustment of a statutory royalty, shall transmit such decision, together with the reasons therefor, to the Office of the Federal Register. Each such decision and its reasons shall be published immediately in the Federal Register.

§ 807. Judicial review of royalty adjustment decisions

(a) A final decision of the Tribunal adjusting a royalty may be appealed to any court of appeals of the United States, within fifteen days after its publication in the Federal Register, by an aggrieved party who appeared in the proceeding of the Tribunal resulting in such final decision.

(b) The court shall review the decision, in accordance with section 706 of title 5, and chapter 158 and section 2112 of title 28, except as otherwise provided in this section, on the basis of the record before the Tribunal. The court may affirm the decision or order that the entire matter be returned for further consideration, but the court may not modify the

decision. The court shall make the matter a preferred cause and shall expedite judgement in every way. The court may not suspend the effectiveness of any royalty adjustment, or otherwise prevent it from taking effect until final disposition of the suit by the court. No court shall have jurisdiction to review a final decision of the Tribunal adjusting a royalty except as provided in this section.

On balance this method for assuring review of Tribunal decisions seems fairer and more practicable than that now provided by sections 806-808.

[432]7. SEPARATION OF POWERS QUESTION

In a statement before the House Judiciary Subcommittee on June 5, 1975, E. Fulton Brylawski questioned the constitutionality of the revision bill, and in effect of the present copyright law; he argued that, because the Copyright Office is called upon to perform functions that are "executive" in nature, the separation of powers doctrine underlying the U.S. Constitution requires that the office be moved to the Executive Branch.

A study prepared by Kent Dunlap, Attorney-Adviser on the staff of the General Counsel in the Copyright Office, refutes these arguments. Mr. Dunlap's study, dated August 20, 1975 and titled "The Effect of the Constitutional Principles of Separation of Powers in the Copyright Revision Bill," has been submitted to the House Judiciary Subcommittee with the request that it be included in the record of the 1975 hearings.

Mr. Dunlap has thoroughly examined the relevant constitutional authorities. His analysis is divided into three main topics: the separation of powers concept in general, its application to the functioning of the Copyright Office under the present law, and the constitutionality of the changes proposed in the revision bill relating to the responsibilities of the Copyright Office and the Copyright Royalty Tribunal.

[433]With respect to the separation of powers concept, Mr. Dunlap concludes that a clear line of authority, the Humphrey-Wiener cases, has established that administrative agencies which exercise quasi-legislative or quasi-judicial powers may constitutionally be placed outside the executive branch. Basically, Congressional discretion will be denied by the courts only where the agency would exercise executive functions specifically reserved to the President by the Constitution.

In analyzing the constitutionality of the present administration of the copyright law by a department of the Library of Congress, Mr. Dunlap first reviews the authorities that support the discretion of the Register to determine registrability under the statute. Then, he considers the separation of powers concent [sic] as it might be applied to the functions of the Copyright Office. He concludes that, under relevant Supreme Court decisions, Congress has discretion to create an entity to exercise the quasi-judicial registration function under the copyright law and place the entity in any one of the three branches of the federal government.

[434]Finally, Mr. Dunlap considers the impact of the separation of powers concept on the new functions of the Copyright Office under the revision bill and on the operations of the Royalty Tribunal. He concludes that the changes in the deposit-registration system would not materially alter the role of the Copyright Office and the conclusion in the preceding paragraph remains valid. The Royalty Tribunal would be an independent arbitration panel, although the Register would play a role in convening the Tribunal and would provide administrative support. Mr. Dunlap concludes that the delegation of quasi-legislative powers to the Tribunal to adjust statutory royalty rates is clearly constitutional under applicable precedents. In performing the quasi-judicial function of distribution of fees, the Tribunal's authority is supported by precedents such as the War Claims Commission and by the Humphrey-Wiener cases.

For 80 years after the enactment of the first copyright law the administration of the U.S. copyright system was transferred from department to department in the Executive Branch, with disastrous results. Jurisdiction over the copyright law was transferred to the Library of Congress in 1870, and the benefits of this union to both the U.S. copyright system and the Library have been incalculable. There is no constitutional or practical reason for changing the present status of the Copyright Office as a department of the Library of Congress, and there are a great many reasons for not doing so.

FOOTNOTES:

[n1] Footnote *. The range of problems arising under section 110 and 112 with respect to performances and recordings made for nonprofit broadcasting are dealt with in Chapter V. The question of cable television and other secondary

transmissions is covered in *Chapter VI*, that of performing rights in sound recordings is discussed in *Chapter VIII*, and the jukebox provision is the subject of Chapter X.

[n2] Footnote *. Paul, A Reappraisal of the Manufacturing Clause of the Copyright Act in Light of its History and the Universal Copyright Convention, *13 U. MIAMI L. REV. 315, 319 (1959).*