HOUSE COMMITTEE PRINT
(89th Congress, 1st Session)

MAY 1965

Printed for the use of the House Committee on the Judiciary

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§ [V] FOREWORD

[V] FOREWORD

The House Committee on the Judiciary has heretofore issued four prints in the "Copyright Law Revision" series, covering the progress of the revision program from the initial *Report of the Register of Copyrights* issued in July 1961 up to the preparation of the bill (H.R. 11947 and S. 3008, 88th Cong.) introduced on July 20, 1964. The discussions and comments on the 1964 bill are in the process of being assembled for issuance as part 5 in the series.

The 1964 bill was modified in the light of these discussions and comments, and a new bill was introduced on February 4, 1965 (H.R. 4347 and S. 1006, 89th Cong.). The Register of Copyrights has now submitted his *Supplementary Report* which explains the 1965 bill in detail. Because of its immediate importance in connection with forthcoming hearings on the 1965 bill, the *Supplementary Report* is being issued at this time as part 6 in the "Copyright Law Revision" series, preceding the release of part 5.

In issuing this material the committee neither approves nor disapproves any of the views expressed therein. It is believed that this material will be valuable, both now and in the future, to all persons concerned with the copyright law.

EMANUEL CELLER,
Chairman, Committee on the Judiciary.

[May 26, 1965]

§ [VII] LETTERS OF TRANSMITTAL

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THE LIBRARIAN OF CONGRESS,
Washington, D.C., May 13, 1965.

THE HONORABLE JOHN W. MCCORMACK,
Speaker of the House of Representatives,
Washington, D.C.

SIR: In 1955, under an authorization by Congress, the Copyright Office undertook a program of studies and legislative drafting aimed at the general revision of the copyright law, title 17 of the United States Code. So far this program has produced: a series of 35 studies, all but one of which were published in the form of committee prints issued by the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary; the 1961 *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, containing detailed recommendations for a revised statute; the 1963 preliminary draft of a revision bill, issued for discussion by the Panel of Consultants on General Revision of the Copyright Law; three volumes of transcripts of discussions and written comments on the 1961 *Report* and the 1963 preliminary draft; the copyright law revision bill of 1964 (H.R. 11947, H.R. 12354, S. 3008, 88th Cong., 2d sess.); and the copyright law revision bill of 1965 (H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835, S. 1006, 89th Cong., 1st sess.). A volume of discussions and comments on the 1964 bill is still in preparation, and will be issued as "Copyright Law Revision, Part 5."

As explained in the attached letter of transmittal from the Register of Copyrights, the Copyright Office has prepared a *Supplementary Report* to accompany the 1965 bill. This report not only contains a detailed explanation of the provisions of the pending bills, but also includes, as an appendix, a comparative table consisting of a section-by-section reprint of the present law, the 1965 and 1964 bills, and the preliminary draft of 1963.

I am pleased to submit this *Supplementary Report of the Register of Copyrights on General Revision of the U.S. Copyright Law* to you and to the Vice President for consideration and use by the Congress.

Very truly yours,
L. QUINCY MUMFORD,
Librarian of Congress.

Enclosures:

Transmittal letter from Register of Copyrights.

Supplementary Report.

[VIII] OFFICE OF THE REGISTER OF COPYRIGHTS,

COPYRIGHT OFFICE,
THE LIBRARY OF CONGRESS,
Washington, D.C., May 13, 1965.

HONORABLE L. QUINCY MUMFORD,
Librarian of Congress,
Washington, D.C.

SIR: This report is a supplement to the *Report of the Register of Copyright on the General Revision of the U.S. Copyright Law*, submitted to the Congress in July 1961. As explained in the preface, the purpose of the *Supplementary Report* is to set forth the reasons for changing a number of the recommendations in the 1961 *Report*, and to clarify the meaning of the provisions of the copyright law revision bill of 1965.

The *Supplementary Report* represents an effort to state, as frankly as we can, the thinking behind the language of the 1965 bill and, in many cases, the arguments for and against particular provisions. We also point to language in the 1965 bill which requires further study, and it should be clear that we envisage the possibility of amendments as the legislative inquiry proceeds. What success the revision program has achieved so far is the result of a willingness on the part of a number of people to enter into a continuing dialog in which alternative solutions were scrutinized and debated. A decade of this kind of thorough exploration has convinced me that, while the problems in copyright law revision have no simple or ineluctable solutions, none of them are irreconcilable.

In the last 5 years my colleagues on the Copyright Office General Revision Steering Committee, now including George D. Cary, the Deputy Register of Copyrights, Abe A. Goldman, General Counsel, Barbara A. Ringer, Assistant Register of Copyrights for Examining, and Waldo H. Moore, Chief of the Reference Division, have spent endless hours on revision. A temporary illness has forced me to the sidelines since March, but in my absence George Cary has actively and effectively carried the work forward. The very difficult task of putting precisely what we had in mind into words, both in the *Report* of 1961 and the *Supplementary Report* of 1965, has fallen to the gifted pens of Barbara Ringer and Abe Goldman.

I am proud to submit this *Supplementary Report* to you for transmittal to the Congress, as a part of our continuing obligation to work toward the formulation of a new copyright law.

Sincerely yours,
ABRAHAM L. KAMINSTEIN,
Register of Copyrights.

Enclosure:

Supplementary Report.

§ [IX] PREFACE

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THE PROGRAM FOR GENERAL REVISION SINCE 1961

Introduction.--While some consider it strange that it took this long and others marvel that it got this far, the program for general revision of the copyright law has finally entered its legislative phase. The program started with a study phase which began in 1955 and lasted 6 years. This first phase ended in July 1961, when we submitted to Congress the *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*,n* containing detailed recommendations for an omnibus statute. The next phase, which was devoted to discussion, debate, and drafting, lasted for 3 years and culminated in the introduction of a revision bill in both Houses of the 88th Congress for purposes of further discussion and comment.

Then followed an interim period of about 6 months during which the Copyright Office redrafted the bill in the light of the detailed comments and suggestions it had received. The final, legislative phase of the program began on February 4, 1965, when Senator McClellan and Representative Celler introduced the bill with the expectation of active congressional consideration during the current session of the 89th Congress. This supplementary report is intended both as an end product of the drafting phase and as an introduction to the legislative phase of the revision program.

The Development of a Draft Bill.--The *Register's Report* of 1961 was intended as a means and not as an end. Its tentative recommendations were considered carefully and advanced seriously, but their purpose was not to state a final Copyright Office position or even to argue the ultimate merits of a particular point of view. The purpose of the *Report* was to furnish a tangible core around which opinions and conclusions could crystallize, thus forming the basis for agreement on the principles to be embodied in a bill. Despite the criticism provoked by some of its proposals, and despite the radical differences between its recommendations and the bill now pending, I believe the *Report* accomplished what it set out to do.

We had expected the *Report* to be controversial, but I cannot honestly say that we were prepared for the fervent opposition to some of its major recommendations. At the same time the *Report* had the effect of prodding a good many people out of their seemingly list**[X]**less attitude toward copyright revision. At 4 full-day meetings of the Panel of Consultants on General Revision, held from September 1961 to March 1962, to discuss the *Report*'s recommendations in detail, there was little evidence of apathy or indifference. And, along with the free-swinging attacks and complaints, there were also a number of constructive, well-reasoned arguments. Most of the statements at the Panel meetings, as well as a substantial body of written comments, deserved and received serious consideration.

The focal point of opposition to the *Report* was its proposal on the start and length of the copyright term, which lay at the heart of the entire revision program. We had recommended that copyright begin with the "public dissemination" of a work--a concept that would include public performance as well as the distribution of copies and sound recordings--and that it last for a first term of 28 years, renewable for a second term of 48 years. There was very little support for these recommendations, and there was strong sentiment favoring copyright from creation of the work, and the term most common in foreign copyright laws, based on the life of the author and a period of 50 years after his death.

Changes on matters of substance as fundamental and as important as these could not be undertaken lightly. It required a good deal of time to absorb and analyze the body of comments we received and to come to decisions as to which recommendations we were going to abandon or revise and what new recommendations we were going to make. Moreover, the intensity and force of the controversy stirred up by the *Report* made it imperative that we remain detached from the conflicts while we were reviewing the issues in dispute. There was a period during which the revision program, on the surface at least, appeared to be in a state of suspended animation. What we were doing in the Copyright Office at this time, in addition to allowing the flames to burn down a little, was trying to decide what the next steps in copyright law revision ought to be; but our apparent inactivity and our silence as to our intentions made some people very restless, and there were suggestions that we were being stubborn or aloof.

The hardening of opposition and the aura of controversy that surrounded the *Report* became apparent toward the end of 1961, and it is no exaggeration to say that during 1962 the revision program went through a serious crisis. Fortunately, the program emerged from this stormy period considerably stronger and better founded than before. For its part the Copyright Office was quite properly spurred on to reach decisions, and to speed up its action toward preparing a finished bill. On the part of those who did the spurring, there was a new realization of the immensity of this task. On all sides there was increased respect, understanding, and a recognition of the need for **[XI]** flexibility and compromise. Although we have been over some bumpy roads since 1962, from that time on I have never doubted that we were traveling forward.

In November 1962, I announced that the Copyright Office was prepared to change its position on some debatable questions and to draft alternative language on others. I indicated, for example, that the Office contemplated revising its recommendations concerning "public dissemination" in the light of the justifiable criticism that had been directed against it, that the Office's draft bill would be based on the concept of a single federal system of copyright from creation, and that it would present alternative proposals with respect to the length of the copyright term.

During the following year, beginning in January 1963 and ending in January 1964, the Office held another series of 7 full-day meetings and an eighth 2-day meeting with a greatly enlarged Panel of Consultants consisting, in effect, of anyone with sufficient interest to be heard on the subject. At each meeting we presented preliminary drafts, including alternatives in some cases, covering virtually all of the provisions of a new law. These draft provisions were prepared on the basis of an intensive analysis and evaluation of the comments received on the appropriate section of the *Register's Report*, and of any equivalent language in foreign laws and previous revision bills.

Like the *Register's Report*, the preliminary draft was an experimental device for provoking discussion and suggestions. In many of the sections we were trying out ideas, and throughout the draft we deliberately laid out the provisions in more detail than necessary in order to direct attention to as many problems of content and language as possible.

Again, although various provisions of the preliminary draft attracted considerable adverse criticism and opposition at the time, the draft as a whole served its intended purpose. It laid the foundation for a consensus on some of the issues previously in controversy. It elicited a large number of meaningful and constructive comments and suggestions, both at the Panel meetings and in written statements. It also formed the basis for meetings, discussions, and exchanges of correspondence with the various subcommittees of American Bar Association Committee 304 (under the notably competent chairmanship of John Schulman), and with many interested organizations and individuals. All of this contributed materially to the bill.

During the 6 months following the last of the Panel meetings on the preliminary draft the Copyright Office undertook a complete review and revision of the draft, section by section. Every comment or suggestion we had received was given consideration. On questions of substance the Office reviewed all of the policy arguments that had **[XII]** been presented, and in some cases modified the provisions of the draft or adopted an entirely new approach. On matters of language there was very extensive redrafting and boiling down of wordage with the thought of making the bill as brief, simple, and clear as the inherently complex subject matter permits. The outcome of all this concentrated effort was the copyright law revision bill of 1964, introduced in both Houses of Congress on July 20, 1964.

A full week of discussions on the new bill, including a 2-day meeting of the Panel of Consultants, were held in New York early in August 1964. On the whole the response was gratifying: a great many of the earlier detailed substantive issues and technical drafting questions had simply dropped out of the discussions. At the same time it became clear that several major issues remained to be settled, and this was borne out by the written and verbal comments made to the Copyright Office during the remaining months of 1964. Not all of these issues were capable of reconciliation, but part of the Office's effort in redrafting the bill was to work toward fair and acceptable compromises on as many of them as possible.

THE COPYRIGHT LAW REVISION BILL OF 1965

With his usual wisdom and foresight, Arthur Fisher, my predecessor as Register of Copyrights who died in 1960, planned the revision program as a long-range project involving nearly unlimited amounts of time and effort. He realized that unless we first knew what we were talking about and then drafted a bill that was general enough to be comprehensible and detailed enough to hold water, there would be little purpose in bringing a bill to the point of congressional hearings. Most important, he recognized the need for reconciling the fierce conflicts between the many special interests in the field; he knew that stubborn opposition on a few fundamental issues could doom this revision program as surely as it has all of the past efforts. To bring the program to this point we have had to explore every question, analyze every argument, discuss, consult, confer, and look for workable compromises on issues that some people claimed were irreconcilable.

It has been said that laws, like children, often turn out to be quite different from what their parents expected, and it is possible that Arthur Fisher might not recognize the bill now pending in Congress as the culmination of his efforts. There have been a great many changes, some of them on matters of fundamental importance, from the recommendations in the *Register's Report*.

While the actual drafting of the bill was done by the Copyright Office without direct consultation with anyone outside the Government, we have consistently tried to obtain and consider the viewpoints of **[XIII]** every group concerned in copyright. Most of the changes in the bill were made because the Copyright Office was persuaded that, on balance, the arguments for them were valid. Other changes represent carefully worked-out compromises in the public interest, between legitimate but opposing points of view; while they may not represent the ideal solution to a particular problem, I believe that these compromises are necessary, desirable, and worthy of support. I also hope I am correct in my conviction that all the changes reflect, not vacillation or indifference, but a painstaking, persistent, open-minded effort to achieve the best copyright statute we can get. This was Arthur Fisher's goal, and for that reason I believe he would be proud of what has been accomplished so far.

The introduction of bills for hearings in 1965 is, of course, a milestone in the revision program, but it is not the end of the road. It should be obvious by now that neither the bill nor this supplementary report represents any final statement of the fixed views of the Copyright Office. Our purpose is the enactment and implementation of a good, clear, practical copyright law that will reward authors and thereby encourage the arts and humanities; and we are aware that further changes will undoubtedly need to be considered.

SCOPE OF THIS SUPPLEMENTARY REPORT

A number of the recommendations in the *Register's Report* of 1961 have been incorporated without substantial change in the Copyright Law Revision Bill of 1965. Except where they have been retained in the face of strong opposition, there seems no point in repeating the reasoning behind these recommendations. The main purpose of this supplementary report is to explain why we modified or completely changed many of our earlier recommendations and, in a few cases, why we have included provisions on points not covered by the 1961 *Report*,

We have decided not to burden this supplement by attempting to trace in detail how the language and content of the current bill evolved through the intermediate stages of the preliminary draft of 1963 and the bill of 1964. The comparative tables in Appendix B, which show the language of the present law, the 1965 and 1964 bills, and the 1963 draft on every provision, can be used for this purpose. Taken together with the original *Register's Report* of 1961, this supplementary report is intended to explain the thinking that went into the 1965 bill and to illuminate some of its language.

THE CONTINUING PROBLEM OF COPYRIGHT LAW REVISION

At the groundbreaking ceremony for the John F. Kennedy Center for the Performing Arts on December 2, 1964, President Johnson **[XIV]** opened his remarks by recalling President Kennedy's memorable address at Amherst College the month before his death, in which he said:

I look forward to an America which will reward achievement in the arts as we reward achievement in business or statecraft.

I look forward to an America which will steadily raise the standards of artistic accomplishment and which will steadily enlarge cultural opportunities for all of our citizens.

And I look forward to an America which commands respect throughout the world not only for its strength but for its civilization as well.

President Johnson pointed to the Kennedy Center as symbolizing "our belief that the world of creation and thought are at the core of our civilization":

Only recently in the White House, we helped commemorate the 400th anniversary of Shakespeare. The political conflicts and ambitions of his England are known to the scholar and the specialist. But his plays will forever move men in every corner of the world. The leaders that he wrote about live far more vividly in his words than in the almost forgotten facts of their own rule.

Our civilization, too, will survive largely in the works of our creation. There is a quality in art which speaks across the gulf dividing man from man, nation from nation and century from century. * * *

[I]t is important to know that the opportunity we give to the arts is a measure of the quality of our civilization. It is important to be aware that artistic activity can enrich the life of our people; which is the central object of government. It is important that our material prosperity liberate and not confine the creative spirit.

This unreserved recognition by the heads of our Government of the importance of creative endeavor in our national life is one of the most striking and encouraging of the trends that have emerged since 1961. At the same time it would be delusive to assume that there has been any general realization on the part of Government officials or the public that copyright is no less than the life's blood of this endeavor. Too many people still think of copyright law as the esoteric sporting ground of an "elite cadre," and regard its impact as confined to a handful of unimportant industries and special interests. They have not yet seen that the interrelation between copyright and the communications revolution is fully as important to our age as the interrelation between copyright and the revolution brought on by the printing press was to an earlier one. Somehow people must be made to realize that the copyright statute of a country not only shapes its cultural and intellectual development, but actually penetrates into the lives and thinking of every citizen.

Speaking of automation someone observed recently that "invention is the mother of necessity": and in the copyright field this necessity is reaching crisis proportions. In recent years we have seen, among a multitude of technological developments, the introduction of com**[XV]**munications satellites, the tremendous growth in information storage and retrieval devices, changing patterns in broadcasting including the emergence of educational television and community antenna systems, radical changes in teaching methods by the use of new audio-visual devices, the proliferation of copying machines, and remarkable developments in the use of video tape. Not only is the 1909 statute dismally inadequate to deal with what is happening; we now find that even our 1961 recommendations were not flexible and forward-looking enough.

I realize, more clearly now than I did in 1961, that the revolution in communications has brought with it a serious challenge to the author's copyright. This challenge comes not only from the ever-growing commercial interests who wish to use the author's works for private gain. An equally serious attack has come from people with a sincere interest in the public welfare who fully recognize (in the words of Sir Arthur Bliss) "that the real heart of civilization, the letters, the music, the arts, the drama, the educational material, owes its existence to the author"; ironically, in seeking to make the author's works widely available by freeing them from copyright restrictions, they fail to realize that they are whittling away the very thing that nurtures authorship in the first place. An accommodation among conflicting demands must be worked out, true enough, but not by denying the fundamental constitutional directive: to encourage cultural progress by securing the author's exclusive right to him for a limited time.

Since 1961 I have also acquired a deeper understanding of the importance of American copyright law revision throughout the world. The days when the United States could play a lone hand in international copyright have been over for quite a while, but it is not enough for us merely to seek and extend as much international cooperation as possible.

It is startling to realize, in an era when copyrighted materials are being disseminated instantaneously throughout the globe, that the United States has copyright relations with less than half of the world's nations. The injustice of this situation to authors here and abroad is obvious, but equally serious to our national interest is the lack of the cultural bridge between countries that copyright furnishes. And, even where copyright relations exist, the lack of uniformity in the scope and standards of protection results in unfairness and endless confusion.

The United States can, if it will, offer leadership in the effort to evolve a truly universal copyright system that takes account of national interests while at the same time offering effective uniformity and a fair reward to all authors. Many of the newly-independent **[XVI]** nations are at a turning point in the development of their own copyright systems, and suggestions have been made for bridging the gap between the Berne and Universal Copyright Conventions. Copyright law revision is the first necessary step we can take in meeting this tremendous challenge.

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

§ [XVII] THE 1965 BILL IN SUMMARY

The following summary is intended to indicate the structure of the 1965 bill and to outline its principal provisions. Since no attempt is made here to describe the background on development of the bill or to analyze its language and content in detail, this summary is necessarily oversimplified. The provisions of the bill are thoroughly reviewed in the chapters of the *Supplementary Report* itself, and the text of the bill will be found in Appendix B.

SUBJECT MATTER OF COPYRIGHT

Basic requirements of copyright. In defining the general subject matter of copyright, section 102 drops the present reference to "all the writings of an author" and substitutes the phrase "original works of authorship." It also requires that protected works be "fixed" in a "tangible medium of expression." The manner or medium of fixation is irrelevant as long as it is tangible enough for the work to be perceived or made perceptible to the human senses, directly or with the aid of any machine or device "now known or later developed."

Categories of copyrightable works. Section 102 also includes an "illustrative and not limitative" listing of seven categories of copyrightable works. This list covers all classes of works that are copyrightable under the present law, designates "pantomimes and choreographic works" as a specific category, and adds a new category of "sound recordings."

National origin. Under section 104, as under the common law at present, protection would be granted to unpublished works without regard to the nationality or domicile of the author. As under the present statute, with relatively minor changes, published works of foreign origin would be protected only if the country of origin were covered by a treaty or a Presidential proclamation. The authority of the President would be broadened, however, to allow him to issue proclamations without regard to reciprocity "whenever he finds it to be in the national interest."

United States Government works. The bill retains the present prohibition against copyright in "publications of the U.S. Government" and expands it to cover any published or unpublished "work of the United States Government," which is defined as "a work prepared by an officer or employee of the United States Government within the scope of his official duties or employment." This definition would **[XVIII]** permit copyright to be secured in works prepared independently by private persons under a Government contract or grant, but section 105 contains no provision that would allow copyright to be secured in a "work of the United States Government" under any circumstances.

EXCLUSIVE RIGHTS UNDER COPYRIGHT

General scope of copyright. The approach followed by the bill is to mark out the perimeter of copyright protection in broad terms in section 106, and to define the scope of copyright and specify its limitations in particular situations and for particular kinds of works in sections 107 through 114. Under section 106, the five basic exclusive rights given to the owner of a copyrighted word are: (1) the right to reproduce the work in copies or phonorecords; (2) the right to prepare derivative works based on the work; (3) the right to distribute copies or phonorecords of the work to the public; (4) the right to perform the work publicly; and (5) the right to exhibit the work publicly. Instead of the blanket "for profit" limitation, which the present law imposes on the right of public performance in some works, specific limitations would be spelled out in section 109 as noted below. The bill would add a right of public exhibition (i.e., showing or display of a copy), which is not specifically recognized under the present law.

Fair use. The bill would add a provision to the statute specifically recognizing the doctrine of fair use, but without any attempt to indicate the application or define the scope of the doctrine.

Effect of transfer of particular copy or phonorecord. Section 108 reaffirms the principle that, when the copyright owner has sold or otherwise transferred ownership of a particular copy or phonorecord of his work, the person who has acquired ownership of that copy or phonorecord is entitled to dispose of it by sale, rental, or any other means of disposition. Under section 108(b) the owner of a copy would also be free "to exhibit that copy publicly to viewers present at the place where the copy is located," although he would not be entitled to show the copy over television.

Face-to-face teaching activities. Section 109(1) exempts from copyright control "performance or exhibition of a work by instructors or pupils in the course of face-to-face teaching activities in a classroom or similar place normally devoted to instruction." This particular exemption would apply to all types of works.

Educational broadcasting. The bill would exempt performances of nondramatic literary and musical works, and exhibitions of any works, "by or in the course of a transmission, if the transmission is made primarily for reception in classrooms or similar places normally de**[XIX]**voted to instruction and is a regular part of the systematic instructional activities of a nonprofit educational institution." This exception would cover closed-circuit broadcasting within a school and also open-circuit "in-school" instructional broadcasts. It would not apply where the principal purpose of the transmission is reception by the public.

Religious services. Clause (3) of section 109 would exempt from copyright control performances of nondramatic literary or musical works and dramatico-musical works, and exhibitions of any works, "in the course of services at a place of worship or other religious assembly."

Certain performances for educational, religious, or charitable purposes. Under section 109(4), the performance of a nondramatic literary or musical work, "otherwise than in a transmission to the public," would be exempt if:

--there is no "purpose of direct or indirect commercial advantage" and no "payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers"; and

--there is either no admission fee, or, if there is, the net proceeds are used exclusively for bona fide educational, religious, or charitable purposes.

Retransmission to the public: community antennas and other systems. The bill does not exempt community antennas and other commercial systems that retransmit broadcasts of copyrighted material to the public. It would, however, under section 109(5), exempt operators of nonprofit "boosters" or "translators" who retransmit, "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."

Further transmission exclusively to private rooms of hotels, etc. Where broadcasts or other transmissions are merely relayed to "the private rooms of a hotel or other public establishment," the retransmission would be exempted by section 109(6) unless the transmission is altered or a direct fee is charged for seeing or hearing it.

Mere reception in a public place. Under clause (7) of section 109 it would not be 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 home use.

Ephemeral recordings. Unlike the present law, the bill in section 110 would recognize the right of a broadcasting organization to make no more than one copy or phonorecord of a copyrighted work for use solely in its own lawful transmissions within a period of six months.

Reproduction of pictorial, or sculptural works in useful articles. The basic purpose of section 111 is to make clear that there is no intention to change the present law, as it has evolved in the court **[XX]** decisions, concerning the copyright status of a work that is employed as the design of a useful article, or concerning the rights of the owner of copyright in a "pictorial, graphic, or sculptural work that portrays a useful article as such" with respect to "the making, distribution, or exhibition of the useful article so portrayed."

Rights in sound recordings. Although the bill would add sound recordings to the list of protected works, the exclusive rights in a sound recording would be limited under section 112 to protection against "dubbing," that is, duplication of the actual sounds fixed in that recording, and against public distribution of "dubbed" records. The copyright owner would not be given a right of public performance in his sound recording, nor would he have a right of action against someone who merely imitates his recording without recapturing the same sounds.

Compulsory license. While retaining the present compulsory license for the making and distribution of phonorecords of copyrighted music, the bill in section 113 would modify or clarify a number of the statutory requirements. In particular it would raise the present statutory royalty ceiling for each composition from a flat rate of two cents per record to a rate of three cents per record or one cent per minute of playing time, whichever amount is larger. Instead of the special limits on liability under the present law, the bill provides that the failure to obtain either a compulsory or a negotiated license makes the user fully liable as an infringer, and the same result would follow from a default in payments under a compulsory license.

Jukebox exemption. The bill includes in section 114 the text of the jukebox bill which was favorably reported by the Judiciary Committee of the House of Representatives in 1963 and has been reintroduced in the 89th Congress as H.R. 18. It would repeal the present exemption of jukebox operators from payment of performance royalties.

OWNERSHIP AND TRANSFER OF COPYRIGHT

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 **[XXI]** prepared by any 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.

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.

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 **[XXII]** 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.

FEDERAL PRE-EMPTION AND DURATION OF COPYRIGHT

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 works, 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 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 date when a particular author died.

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 **[XXIII]** length of the renewal term from 28 to 47 years (making a total term 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.

NOTICE OF COPYRIGHT

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 and position. Sections 401 through 405 of the bill represent an effort to preserve the values of the copyright notice by inducing its use, while substantially ameliorating the effects 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.

Contributions to collective works. Section 403 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 404, 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. In either case an innocent infringer who was misled by the omission would be shielded from monetary liability under certain circumstances.

Error with respect to name or date. Section 405(a) makes clear that the use of the wrong name in the copyright notice will not affect **[XXIV]** 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 AND REGISTRATION

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 406 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 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 406 and

as the deposit required for registration under section 407. The Register of Copyrights would be authorized to establish optional deposit requirements for certain classes of material. Section 409 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 410 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 411 would deny the extraordinary remedies of statutory damages and attorney's fees for infringements occurring before registration.

§ [XXV] COPYRIGHT INFRINGEMENT AND REMEDIES

Parties to infringement suits. Under 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.

Remedies for infringement. Except for the provisions on damages and profits, 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 right to elect to recover 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." The $ 10,000 maximum could be increased to $ 20,000 in certain cases of willful infringement, and the $ 250 minimum could be reduced to $ 100 where "the infringer sustains the burden of proving that he was not aware and had no reason to believe that his acts constituted an infringement."

MANUFACTURING REQUIREMENT AND IMPORTATION

Manufacture of certain copies in the United States. The present law requires, with a number of exceptions and qualifications, that English-language books and periodicals must be manufactured in the United States in order to be entitled to full-term copyright protection. The main impact of this requirement today falls on works by American authors, which in some cases are thrown into the public domain as a result of the failure to comply with the law's strict requirements. Section 601 would retain a manufacturing requirement, but with substantial changes that would make its results less drastic. In particular, the scope of the works covered by the requirement would be narrowed, violation would result in the possible loss of certain rights against infringers rather than the complete loss of protection, the special affidavit and "ad interim" requirements would **[XXVI]** be abolished, and the ceiling on importation of a foreign edition would be raised from 1,500 to 3,500 copies. A dispute has existed under the present law as to whether the printing of copies in the United States from imported "reproduction proofs" constitutes a violation of the manufacturing clause; section 601(c) is intended to preserve the present law as to what constitutes "manufacture in the United States," leaving this question for determination by the courts.

Infringing importation. Section 602 provides that, except in the case of certain libraries, the unauthorized importation of copies or phonorecords for the purpose of public distribution constitutes an infringement. An unauthorized importer could be enjoined and sued for damages both where the copies or phonorecords he was importing were "piratical" (that is, where their making would have constituted an infringement if the U.S. copyright law could have been applied), and where their making was "lawful." However, the Bureau of Customs would have power to exclude only "piratical" copies.

ADMINISTRATIVE PROVISIONS

In general. The administrative provisions in *Chapter 7* of the bill are, for the most part, restatements of provisions in the present statute.

Retention and disposition of deposited articles. Section 704 expresses the policy that deposited items are to be retained for as long as possible, but preserves the discretion of the Register of Copyrights and the Librarian of Congress to dispose of them ultimately under proper safeguards. It also provides for the setting up of a new procedure, involving the payment of additional fees, under which the retention of a particular deposit for the full term of copyright could be requested.

Catalog of copyright entries. Section 707(a) provides for the continued publication of catalogs of copyright registrations, but would give the Register of Copyrights a more flexible authorization to determine the form and frequency of publication of each part of the catalog.

Copyright Office fees. The fee schedule in section 708 is in line with the fees provided in a separate bill now pending in Congress (H.R. 2853), which would raise the present fees. It sets the basic registration fee at $ 6 and the fee for renewal of subsisting copyright at $ 4.

SUBJECT MATTER OF COPYRIGHT
OUTLINE

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§ [3] Chapter 1 SUBJECT MATTER OF COPYRIGHT

A. BASIC REQUIREMENTS OF COPYRIGHT

1. "ORIGINAL WORKS OF AUTHORSHIP"

The 1961 *Report* pointed out that "original creative authorship" is a fundamental criterion of copyright protection under the present law, and recommended that this requirement be specified in the statute. However, when it came to drafting, a great deal of concern was expressed about the dangers of using a word like "creative" in this context. It was argued that the word might lead courts to establish a higher standard of copyrightability than that now existing under the decisions, and that any effort to define "original" could bring about the same undesirable result.

In recognition of these arguments, section 102 of the bill specifies the subject matter of copyright simply as "original works of authorship," without further attempt at definition. Our intention here is to maintain the established standards of originality without implying any further requirements of aesthetic value, novelty, or ingenuity.

For the reasons advanced in the *Report*, the bill uses the term "original works of authorship" rather than the phrase "all the writings of an author" now in the statute. While superficially there might seem to be advantages in using the broad language of the Constitution, we believe that they are greatly outweighed by the dangers of exhausting the power of Congress in this field. As has always been true in the past there are particular kinds of subject matter on the fringes of copyright which may be the "writings of an author" in the constitutional sense and which Congress might one day want to protect, but which it does not see fit to protect now. Typography, certain industrial designs, and broadcast emissions are possible examples of this today. The present language of the copyright law has forced the courts to hold that "writings" means one thing in the statute and something else in the Constitution, as an alternative to holding that certain subject matter is entirely beyond the power of Congress to provide for constitutionally. We have no wish to perpetuate this dilemma.

[4] 2. "FIXED IN ANY TANGIBLE MEDIUM OF EXPRESSION"

The *Report* also recommended that the present implicit requirement of fixation "in some tangible form from which the work can be reproduced" be made explicit in the bill, and that it be stated broadly enough to cover "any new forms or media [of fixation] that may be developed." The language adopted in section 102 to carry out this recommendation is: "* * * fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."

Although unfixed works such as improvisations and unrecorded performances would not be subject to statutory protection, they would continue to be protected at common law, a point to be discussed further in connection with section 301. No particular form of fixation is required as long as the work is capable of being "retrieved" (to use a term popular at the moment). For example, a musical composition would be copyrightable if it is written or recorded in words or any kind of visible notation, in Braille, on a phonograph disk, on a film sound track, on magnetic tape, or on punch cards. The manner or medium of fixation is irrelevant as long as it is tangible enough for the work to be

perceived or made perceptible to the human senses, directly or with the aid of any machine or device "now known or later developed" (sec. 101).

A consistent effort has been made in this section and throughout the bill to distinguish between the "original work" which is the product of the author's creative intellect and which is the real subject of copyright protection and "copies" or "phonorecords" (which are the material objects embodying the work). Failure to draw this distinction under the present law has resulted in a great deal of unnecessary confusion, and has led to results in individual cases that were unpredictable or unfair. To avoid these difficulties the bill, for example, uses the term "literary works" rather than "books" or "periodicals" in referring to one of the classes of copyrightable works; and, as another example, it attempts to draw a careful distinction between "sound recordings" (which are copyrightable works) and "phonorecords" (which are material objects). Taken together, the definitions of "copies" and "phonorecords" in section 101 are intended to cover all of the material objects in which a copyrightable work of any sort can be fixed.

B. CATEGORIES OF COPYRIGHTABLE WORKS

The list of seven categories of copyrightable works in section 102 of the bill, supplemented by the definitions in section 101, is intended **[5]** to carry out our 1961 recommendation that the categories "be stated in broad terms to cover all the classes of works now included under section 5 and any others that Congress may wish to add * * *." According to the bill, "[w]orks of authorship include the following categories:

(1) Literary works;

(2) Musical works, including any accompanying words;

(3) Dramatic works, including any accompanying music;

(4) Pantomimes and choreographic works;

(5) Pictorial, graphic, and sculptural works;

(6) Motion pictures;

(7) Sound recordings."

Under the definition of "including" in section 101, this listing is "illustrative and not limitative." It is intended, without being exhaustive, to cover all classes of works that are copyrightable under the present law, to designate "pantomimes and choreographic works" as a specific category, and to add the new category of "sound recordings." Moreover, while separately listed, the items are overlapping and not mutually exclusive. It is quite conceivable, for example, that within itself a motion picture might encompass copyrightable works falling into all of the other six categories.

Definitions of "literary works," "pictorial, graphic, or sculptural works," "motion pictures," and "sound recordings" are included in section 101, primarily in an effort to clarify their scope and to underline the distinction between "works" and "material objects." For example, the definition of "literary works" is intended to avoid any qualitative limitations implied by the word "literary" and is broad enough to cover every possible form of verbal or numerical expression including, for example, computer programs fixed on punchcards, magnetic tape, or any other media. "Pictorial, graphic, or sculptural works" are defined to include "works of fine, graphic, and applied art," thus encompassing the entire range of artistic expression copyrightable under the present law and including works of art embodied in useful articles, designs of nonfunctional architectural works, technical drawings and models, and commercial prints and labels.

The definition of "motion pictures" specifically includes sound tracks, and makes clear that for copyright purposes it is irrelevant whether the motion picture is captured on film, video tape, or otherwise. "Sound recordings" are defined as works, other than motion picture sound tracks, "that result from the fixation of a series of musical, spoken, or other sounds." Thus, while one of the major innovations of the bill is to make sound recordings copyrightable as works in themselves, the bill leaves open the question of whether the performers whose performance has been fixed on the recording, the record producer who fixed the sounds, or both of them, may claim authorship of the work and ownership of the copyright.

[6] The other terms listed in section 102 are used in the sense in which they are commonly understood, and do not seem to require definition. Since, for example, the form of fixation of copyrightable works would no longer be of any significance, there appeared to be no need to specify the copyrightability of electronic or concrete music. Similarly, since "choreographic works" has a fairly definite meaning that excludes social dance steps and simple routines, and

since the phrase recommended by the *Report*, "prepared for presentation to an audience," might be unnecessarily restrictive, we decided against any definition of the term.

Proposals have been advanced for identifying fictional characters as copyrightable works in themselves under the bill. There are undoubtedly some characters that are developed in detail and with such breadth and depth that they emerge as separately identifiable parts of the copyrighted works in which they appear. Others, perhaps the large majority, cannot be said to represent independent creations apart from the particular literary or pictorial works depicting them. As is equally true in the case of detailed presentations of plot, setting, or dramatic action, we believe it would be unnecessary and misleading to specify fictional characters as a separate class of copyrightable works.

C. COMPILATIONS AND DERIVATIVE WORKS

Section 103 of the bill deals with the important and frequently misunderstood problem of copyright in "compilations and derivative works." As recommended in the *Report*, it is intended to make clear that the standards of copyrightability set forth in section 102 apply equally to works that are wholly original and those that employ pre-existing material. In addition, the provision attempts to sharpen and clarify the language of section 7 of the present law in describing the relationship between protection for "old" and "new" material in a work.

The terms "compilations" and "derivative works," which are defined in section 101, are intended to cover all types of copyrightable works that incorporate previously existing material or data. While the terms overlap to some extent, they actually represent different concepts: "compilation" covers the authorship involved in choosing, gathering together, and arranging any kind of material or data, whether copyrightable subject matter or not, while "derivative work" refers to the authorship involved in recasting, transforming, or adapting one or more pre-existing works, whether under copyright or in the public domain. In both cases the author of the "new version" secures protection only for the material he himself has added, without affecting the copyright or public domain status of the pre-existing material.

[7] Section 103(a) provides that "protection for a work employing pre-existing material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully." For example, the author of an anthology that includes an unauthorized translation of a copyrighted poem could secure no copyright protection for the translation, and would be liable as an infringer to the owner of the copyright in the poem; he could, however, secure copyright for the rest of the "new matter" in his anthology. Note also that the language used in this connection is "unlawfully" rather than "without the consent of the copyright owner." There may be cases where copyrighted material can be used lawfully without the owner's consent (for example, under the doctrine of fair use or under the provisions of some foreign laws) and it would seem unfair to narrow or deny copyright protection in those cases. A special provision requiring consent for the copyrighting of a musical arrangement made for use under a compulsory license is included in section 113(a)(2).

D. NATIONAL ORIGIN

The 1961 *Report* proposed that protection under the revised law be available for all works without regard to the citizenship or domicile of the author or the place of first publication, but recommended that the President be given discretion to withhold or limit protection for works originating in certain countries. Although there was some support for our proposal, there appeared to be a definite consensus in opposition to providing this "automatic" protection to published works of foreign origin. It was argued that an underpinning of reciprocity may still be necessary in order to insure adequate protection for American works in some foreign countries, and that it would not be in the national interest to place the President in the position of making negative declarations denying protection to works originating in those countries designated by him.

Under section 104 of the bill protection would be granted to unpublished works without regard to the nationality or domicile of the author. Published works would be subject to protection under one of four conditions:

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

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

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

(4) If the work is covered by a Presidential proclamation extending protection to works originating in a specified country.

[8] As under the present law, published works of foreign origin would still have to come within the scope of either a treaty or a Presidential proclamation to be protected in the United States. The Presidential authority would be broadened, however, to allow the issuance of proclamations without regard to reciprocity: the President would have discretion, "whenever he finds it to be in the national interest," to extend protection to works originating in any country, whether or not that country grants equivalent protection to American authors. The bill would also follow the *Report* in authorizing the President to revise, suspend, or revoke any existing proclamations, or to impose conditions or limitations on the protection extended by a proclamation.

Largely because of the peculiar wording of the present law, works of stateless persons are now subject to copyright protection in the United States without regard to the author's former nationality, his domicile, or the place of first publication. The bill would greatly expand the importance of the author's domicile as a criterion of protection, and would extend protection to most stateless persons by virtue of their domicile in a country with which the United States has copyright relations. For this reason there seems no need for a special provision dealing with stateless persons in section 104.

Whatever the citizenship or domicile of their authors, unpublished works are now given protection under common law in the United States, and subsection (a) of section 104 is intended to continue this protection under the statute. Suggestions have been made for establishing the same requirements of national origin for unpublished as for published works, but we believe they are ill-founded. To set up citizenship and domicile criteria for unpublished works would not only narrow the present scope of common law protection without any demonstrated reason for doing so, but it would also present overwhelming technical difficulties. Citizenship and domicile are, of course, things that can change, and there is no point of time at which it would be practical to fix the status of unpublished works. Moreover, under the Universal Copyright Convention the United States is obliged to protect works first published in U.C.C. countries; if unpublished works were subjected to the conditions in subsection (b) of section 104, it would be necessary to provide a procedure for retrieving a work by a non-U.C.C. national from the public domain at the time of its first publication in a U.C.C. country. There is no necessity or justification for burdening the provision with these complications.

E. UNITED STATES GOVERNMENT WORKS

The 1961 *Report* recommended that "the general prohibition against copyright in 'publications of the U.S. Government' should be retained in the copyright statute," and that the similar provision in the Printing **[9]** Law be repealed as redundant and confusing. The 1965 bill implements these recommendations (in sec. 105 and in SEC. 5 of the Transitional and Supplementary Provisions) and carries them a step further: it provides that "[c]opyright protection under this title is not available for any work of the United States Government," thus denying protection both to "publications" and to unpublished works. We found persuasive the arguments that the same policy considerations against Government copyright apply to unpublished and published material, and that control over unauthorized dissemination of unpublished Government works should be dealt with as a matter of security rather than literary property.

The *Report* proposed to define the scope of the prohibition as applying generally to "published works produced for the Government by its officers or employees." Section 105 of the bill defines a "work of the United States Government" as a "work prepared by an officer or employee of the United States Government within the scope of his official duties or employment," and also specifies that the "Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise." Thus, a Government official or employee would not be prohibited from obtaining copyright protection for any work he produces in his private capacity outside the scope of his official duties. The use of Government time, material, or facilities would not, of itself, determine whether something is a "work of the United States Government," but the Government would then have the privilege of using the work in any event *(28 U.S.C. § 1498*(b)), and the unauthorized use of Government time, material, or facility could, of course, subject an employee to disciplinary action.

The 1964 bill had adopted a proposal that the definition read "* * * a work prepared by an officer or employee of the United States Government as part of his official duties." This language was criticized on the ground that, since it differed from the definition of a "work made for hire," it raised questions as to whether the two concepts should be construed differently. No difference in meaning was intended between a work prepared "as part of his official duties" and a work prepared "within the scope of his employment," and to avoid confusion we have made the language uniform

in the 1965 bill. The term "employee" has been supplemented by "officer" to make clear that it includes elected and appointed officials of all branches of the United States Government.

Under the definition in section 105(b) there would be nothing to prohibit an independent contractor or grantee from securing copyright in works prepared by him under a Government contract or grant, as long as the contract or grant permits it. We believe that it is important to preserve the basic right of private authors to secure copyright in these situations, and that any cases in which it is considered **[10]** desirable to deny or limit protection should be dealt with by agency regulations or contract provisions, or by separate legislation.

One of the most controversial recommendations of the 1961 *Report*, which was carried over with some changes into the preliminary draft of 1963 and the 1964 bill, was that copyright in Government works be permitted in exceptional cases in which the special circumstances are found to justify the securing of exclusive rights. This proposal was supported by some Government agencies and book publishers, primarily on the ground that there are a few Government works which would be given broader and more effective dissemination through commercial channels, and that the public interest would therefore be served by allowing copyright to be claimed in them. The recommendation was strenuously opposed, by newspaper and periodical publishers among others, on the ground that a provision allowing exceptions is unnecessary and would be open to abuse.

In the light of the arguments for and against allowing copyright in Government works under exceptional circumstances, we undertook a further exploration of the actual need for exceptions and of the possibility of establishing effective administrative safeguards to insure that the exceptions would not be abused. Our conclusions, based on the information we received, were that there are undoubtedly a few isolated cases in which copyright in a Government work would do no harm and might actually benefit the public, but that these cases are quite rare. On the other hand, to set up administrative machinery effective enough to prevent the granting of copyright to Government works in cases where it is not warranted would require extremely elaborate procedures and detailed safeguards. The few cases where copyright would be justified do not, we believe, warrant the establishment of these complex procedures, and we have therefore dropped the provision allowing exceptions from the bill.

Section 8 of the present statute contains a provision which is intended to make clear that the copyright in a private work is not affected if the work is published by the Government. Although the 1961 *Report* recommended that this saving clause be retained and clarified, the provision no longer appears to us to be necessary and we have omitted it from the 1965 bill. Under the present law, which uses the term "any publication" of the Government without definition, there might be questions as to the status of private works published under Government auspices. The bill, in contrast, uses the comprehensive term "work of the United States Government" and defines it in such a way that privately written works are clearly excluded from the prohibition. No special provision is necessary, therefore, to make clear that the Government must secure permission in order to publish a copyrighted work, and that Government publication of a private work has no effect upon its copyright protection.

[11] *Chapter 2*

EXCLUSIVE RIGHTS UNDER COPYRIGHT

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§ [13] Chapter 2 EXCLUSIVE RIGHTS UNDER COPYRIGHT

A. BASIC APPROACH OF THE BILL

It is hard to predict which provisions of the bill will ultimately be most significant in the development of the copyright law, but on the basis of our discussions there is no question as to which group of sections is most important to the interests immediately affected. The nine sections setting forth the scope and limitations on the exclusive rights of copyright owners represent a whole series of direct points of conflict between authors and their successors on the one side, and users, both commercial and noncommercial, on the other. Moreover, of the many problems dealt with in the bill, those covered by the exclusive rights sections are most affected by advancing technology in all fields of communications, including a number of future developments that can only be speculated about. It is not surprising, therefore, that these sections proved extremely controversial and difficult to draft.

In a narrow view, all of the author's exclusive rights translate into money: whether he should be paid for a particular use or whether it should be free. But it would be a serious mistake to think of these issues solely in terms of who has to pay and how much. The basic legislative problem is to insure that the copyright law provides the necessary monetary incentive to write, produce, publish, and disseminate creative works, while at the same time guarding against the danger

that these works will not be disseminated and used as fully as they should because of copyright restrictions. The problem of balancing existing interests is delicate enough, but the bill must do something even more difficult. It must try to foresee and take account of changes in the forms of use and the relative importance of the competing interests in the years to come, and it must attempt to balance them fairly in a way that carries out the basic constitutional purpose of the copyright law.

Obviously no one can foresee accurately and in detail the evolving patterns in the ways author's works will reach the public 10, 20, or 50 years from now. Lacking that kind of foresight, the bill should, we believe, adopt a general approach aimed at providing compensation to the author for future as well as present uses of his work that materially affect the value of his copyright. As shown by the jukebox **[14]** exemption in the present law, a particular use which may seem to have little or no economic impact on the author's rights today can assume tremendous importance in times to come. A real danger to be guarded against is that of confining the scope of an author's rights on the basis of the present technology so that, as the years go by, his copyright loses much of its value because of unforeseen technical advances.

For these reasons, we believe that the author's rights should be stated in the statute in broad terms, and that the specific limitations on them should not go any further than is shown to be necessary in the public interest. In our opinion it is generally true, as the authors and other copyright owners argue, that if an exclusive right exists under the statute a reasonable bargain for its use will be reached; copyright owners do not seek to price themselves out of a market. But if the right is denied by the statute, the result in many cases would simply be a free ride at the author's expense.

We are entirely sympathetic with the aims of nonprofit users, such as teachers, librarians, and educational broadcasters, who seek to advance learning and culture by bringing the works of authors to students, scholars, and the general public. Their use of new devices for this purpose should be encouraged. It has already become clear, however, that the unrestrained use of photocopying, recording, and other devices for the reproduction of authors' works, going far beyond the recognized limits of "fair use," may severely curtail the copyright owner's market for copies of his work. Likewise, it is becoming increasingly apparent that the transmission of works by nonprofit broadcasting, linked computers, and other new media of communication, may soon be among the most important means of disseminating them, and will be capable of reaching vast audiences. Even when these new media are not operated for profit, they may be expected to displace the demand for authors' works by other users from whom copyright owners derive compensation. Reasonable adjustments between the legitimate interests of copyright owners and those of certain nonprofit users are no doubt necessary, but we believe the day is past when any particular use of works should be exempted for the sole reason that it is "not for profit."

As possible methods of solving the practical difficulties of clearance with respect to both commercial and noncommercial uses, various suggestions have been advanced for voluntary clearinghouses or for systems of compulsory licensing under the statute. All of these suggestions deserve consideration, but we are inclined to doubt the present need to impose a statutory licensing system upon the exercise of any of these rights. We believe that the work already in progress toward developing a clearinghouse to license photocopying offers the basis for a workable solution of that problem, and, if found necessary, could be expanded to cover other uses.

[15] B. COPYRIGHT OWNER'S
EXCLUSIVE RIGHTS IN GENERAL

1. GENERAL SCOPE OF COPYRIGHT

In very general terms the 1961 *Report* recommended that, "[s]ubject to certain limitations and exceptions ..., the statute should continue to accord to copyright owners the exclusive rights to exploit their works by (1) making and publishing copies, (2) making other versions, (3) giving public performances, and (4) making records of the work," and that the language of the provision setting forth these rights be simpler and clearer than that used in the present law. Section 106(a) of the bill follows all of these recommendations, and also specifies a fifth exclusive right--that of public exhibition--not now explicitly recognized in the statute:

Subject to sections 107 through 114, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) To reproduce the copyrighted work in copies or phonorecords;

(2) To prepare derivative works based upon the copyrighted work;

(3) To distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) In the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures, to perform the copyrighted work publicly;

(5) In the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, to exhibit the copyrighted work publicly.

Copyright has often been called a bundle of rights, and the five clauses of section 106(a) represent a general statement of what that bundle would consist of under the bill. These rights are cumulative and to some extent overlapping: for example, the preparation of a derivative work would usually also involve its reproduction, and hence the reproduction of the basic work, in copies or phonorecords. The rights as stated may also be subdivided without limitation, and each of the subdivided rights may be owned and enforced separately, as explained further in chapter 3.

It is vital to an understanding of the bill to note that all of the exclusive rights specified in section 106 are "[s]ubject to sections 107 through 114," and to realize that all of these sections provide limitations, qualifications, or outright exceptions with respect to the copyright owner's exclusive rights. Section 106 is intended to mark out the perimeter of copyright in broad terms, and the remaining sections in the chapter are intended to define its scope in particular situations and for particular kinds of works. Thus, for example, section 106(a)(3) gives the copyright owner the exclusive right to lend copies of his work, but section 108(a) makes clear that, when a library has acquired ownership of a copy, it would be free to lend that copy without any obligation to the copyright owner. Every provision of section **[16]** 106(a) must be read in conjunction with the provisions of sections 107 through 114 in order to determine the scope of the exclusive rights under a copyright in a particular case.

Under the language of section 106 a copyright owner "has the exclusive rights to do and to authorize" any of the activities specified in the five numbered clauses of subsection (a). The right "to do" something is probably broad enough to include the right "to authorize" that the thing be done, but we have added the phrase "and to authorize" in order to avoid possible questions as to the liability of contributory infringers. One example cited was of a person who legally acquires an authorized print of a copyrighted motion picture but who then engages in the business of renting it to others for purposes of unauthorized public performance. There should be no doubt that this kind of activity constitutes infringement.

2. RIGHTS OF REPRODUCTION, PREPARATION OF DERIVATIVE WORKS, AND PUBLICATION

a. In general

The rights covered by the first three clauses of section 106(a) encompass all of the author's rights except those of performance and exhibition, and are known very generally today as "reproduction," "recording," "adaption," and "publishing" rights. They are, of course, closely interrelated, since typically a publisher must "reproduce" copies in order to "distribute" them, and in the process he may prepare a "derivative work" as well. On the other hand these rights are not interdependent: a distributor of copies may be an infringer even if he had no connection with their reproduction, a person may infringe by preparing a derivative work even if he reproduces no copies, and the mere duplication of a copy may constitute an infringement even if it is never distributed. Note in this connection that although clauses (1) and (3) refer to "copies or phonorecords," the use of the plural here, as elsewhere, is intended to include the singular.

One of the principal issues in the entire dispute over educational and scholarly use of copyrighted material involves the extent to which reproduction of copies and records of copyrighted works, and their distribution to students and library users, should be permitted. Since this is essentially a question of the scope of "fair use," we shall defer our discussion of it until later in this chapter.

b. Reproduction

As noted in chapter 1, "copies" and "phonorecords" together are intended to comprehend all forms of material objects in which copyrightable works are capable of being fixed. Thus, the right "to reproduce the copyrighted work in copies or phonorecords" means the right **[17]** to produce a material object in which the copyrighted work is duplicated, transcribed, counterfeited, imitated, or simulated in a fixed form from which (as stated in the definitions in sec. 101) it "can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." As

under the present law, the exclusive right of reproduction would apply to a copyrighted work as a whole and to any substantial part of it; it would cover not only cases of exact duplication but also cases where, despite wide departures, the author's "expression" rather than merely his "ideas" have been taken.

The touchstone here is the fixation of the work in a tangible object; the showing of images on a screen or television tube would constitute an exhibition under clause (5) but not a reproduction under clause (1). On the other hand, as long as there has actually been a fixation in some sort of material object, it would not matter if the fixation were impermanent; for example, reproduction on magnetic tape would come within clause (1) even though the tape is later erased.

c. Preparation of Derivative Works

It could be argued that, since the concept of "reproduction" is broad enough to include adaptations and recast versions of all kinds, there is no need to specify a separate right "to prepare derivative works based upon the copyrighted work." As indicated in the 1961 *Report*, however, this has long been looked upon as a separate exclusive right, and to omit any specific mention of it would be likely to cause uncertainty and misunderstanding. We have therefore included it as clause (2) of section 106(a).

Moreover, there is one area in which the right "to prepare derivative works" may be broader than the rights specified in clause (1). Those rights are limited to reproduction in copies and phonorecords, and it is possible for a "derivative work," based on a copyrighted work, to be prepared without being fixed in a copy or record; examples are ballets, pantomimes, and impromptu performances. It is true that a derivative work would not itself be protected by statutory copyright if it were not fixed in a "tangible medium of expression" as required by section 102 of the bill. Nevertheless, since there is no requirement under the definition in section 101 that a "derivative work" be fixed in tangible form, clause (2) of section 106(a) would make the preparation of "derivative works" an infringement whether or not any copies or phonorecords had been produced.

To come within section 106(a)(2) the "derivative work" must be "based upon the copyrighted work," and the definition in section 101 gives as examples of "derivative works": "* * * a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensa**[18]**tion, or any other form in which a work may be recast, transformed, or adapted." Hence, in order to violate clause (2), some copyrighted portion of the work must actually have been appropriated as a basis for the infringing work. It would normally not be infringement, for example, for a critic to write a detailed commentary on the work or for an artist to draw illustrations inspired by a textual description.

Close questions can arise as to whether the preparation of material such as indexes, tests, answers to tests, study guides, work sheets, etc., constitutes an infringement of the work to which they are related. In some cases the dependence on the copyrighted source may be so great as to constitute infringement, and in others the only things taken may be uncopyrightable elements such as ideas or isolated facts. We believe that the definition of "derivative work" is broad enough to cover those works that appropriately come within the concept, and that the application of the definition in borderline situations of this sort must be left to the courts.

d. Use in Information Storage and Retrieval Systems

An important question that has emerged since publication of the *Report* in 1961 involves computer uses of copyrighted materials. Mainly in an effort to stimulate a discussion of the issue, the preliminary draft of 1963 contained a provision granting an exclusive right "to reproduce [the work] in any form in the programming or operation of an information storage and retrieval system." We became convinced, however, that it would be a mistake for the statute, in trying to deal with such a new and evolving field as that of computer technology, to include an explicit provision that could later turn out to be too broad or too narrow. A much better approach, we feel, is to state the general concepts of copyright in language, such as that in section 106(a), which would be general in terms and broad enough to allow for adjustment to future changes in patterns of reproduction and other uses of authors' works.

At the same time, we should emphasize here that, unless the doctrine of "fair use" is applicable in a particular case, the bill contemplates that certain computer uses would come within the copyright owner's exclusive rights. It seems clear, for example, that the actual copying of entire works (or substantial portions of them) for "input" or storage in a computer would constitute a "reproduction" under clause (1), whatever form the "copies" take: punchcards, punched or

magnetic tape, electronic storage units, etc. Similarly, at the "output" end of the process, the "retrieval" or "print-out" of an entire work (or a substantial part of it) in tangible copies would also come under copyright control.

[19] More difficult questions arise with respect to the detailed indexing or abstracting of a work for use in a computer program, and the reference use of the work in the course of the computer's operations. An index or abstract so complete and detailed that it could replace the work on which it is based should probably be regarded as an "abridgment" or "condensation," and hence a "derivative work" covered by section 106(a)(2). On the other hand we do not believe that the mere use of a work by the computer as a reference source in solving problems or compiling data should be regarded as within the scope of copyright, any more than the use of books in a library is now.

There is little question that in many cases in the future the end product of a computer process will not be a tangible "print-out" but will be a visual image or sometimes even a performance. The problems raised by this prospect will be discussed below.

e. Public Distribution

Clause (3) of section 106(a) would give the copyright owner the exclusive right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." The language of this clause is virtually identical with that in the definition of "publication" in section 101, but for the sake of clarity we have restated the concept here. And, lest there be any possible misunderstanding because of the language of the preceding clauses, the right of public distribution would apply to all types of copyrighted works, including derivative works.

Under the bill the copyright owner would not only have the exclusive right to sell or give away copies to the public, but also to rent or lend them. Thus, where copies or records have been made unlawfully, he could restrain their unauthorized distribution to the public in any manner. The representatives of the authors have argued that, in addition, the copyright owner should be given a "public lending right": in effect, a right to remuneration for library loans of authorized copies. This right would be denied under section 108, and we will discuss the question later in that context.

3. PUBLIC PERFORMANCE AND EXHIBITION RIGHTS

a. In General

The general right of public performance embodied in clause (4) of section 106(a) is unlimited by any "for profit" requirement, and extends to "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures." As recommended by the 1961 **[20]** *Report*, this express recognition of performing rights in choreographic works and motion pictures would remove uncertainties that exist under the present law. Note also that the bill does not extend the right of public performance to sound recordings, a point to be discussed further in connection with section 112.

Clause (5) would add an explicit provision, not found in the present law or referred to in the 1961 *Report*, recognizing the right of public exhibition in "literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works." There is some authority for the existence of a right of exhibition under the existing law in the much-criticized decision of the Second Circuit Court of Appeals in *Patterson v. Century Productions, Inc. , 93 F.2d 489 (1937),* which suggests that, at least under the special circumstances in that case, the projection of the images of a motion picture on a screen constitutes a "copying." This view has little support and it is certainly arguable that, for example, the showing of a copyrighted photograph or musical score on television or a projector is not infringement today.

Since the *Report* was issued in 1961 we have become increasingly aware of the enormous potential importance of showing, rather than distributing, copies as a means of disseminating an author's work. In addition to improved projection equipment, the use of closed-and open-circuit television for presenting images of graphic and textual material to large audiences of spectators could, in the near future, have drastic effects upon copyright owners' rights. Equally if not more significant for the future are the implications of information storage and retrieval devices; when linked together by communications satellites or other means, these could eventually provide libraries and individuals throughout the world with access to a single copy of a work by transmission of electronic images. It is of inconceivable that, in certain areas at least, "exhibition" may take over from "reproduction" of "copies" as the means of presenting authors' works to the public, and we are now convinced that a basic right of public exhibition should be expressly recognized in the statute.

In our earlier drafting efforts we had assumed that, since the bill considers the showing of a motion picture as a "performance" rather than an "exhibition," the only classes of works that needed the exhibition right were those created to be looked at ("pictorial, graphic, and sculptural works"), as distinguished from works intended to be read or performed. We have now come to realize, however, that in the future, textual or notated works (books, articles, the text of the dialogue and stage directions of a play or pantomime, the notated score of a musical or choreographic composition, etc.) may well be given wide public dissemination by exhibition on mass communications devices. The 1965 bill therefore enlarges the right of public **[21]** exhibition to cover all classes of works except motion pictures and sound recordings; the bill regards the showing of motion pictures as a "performance" rather than an "exhibition," and an exhibition right would, of course, be inapposite with respect to sound recordings which are purely aural in nature.

b. The "For Profit" Limitation

In the case of nondramatic literary and musical works, the present statute contains blanket provisions exempting all performances that are not "for profit" from the copyright owner's control. The question of whether to retain, abandon, or modify this exemption has been one of the most controversial issues in the revision program.

In discussing this question the 1961 *Report* noted that "[m]ost foreign laws do not contain an express 'for profit' limitation on the public performance right, but specify in considerable detail the situations in which a public performance is freely permissible (e.g., for charitable, educational, religious, or civic purposes where no one derives financial gain)," and observed that "[t]hese specifications have substantially the same effect as the 'for profit' limitation in our present law." It concluded that the "for profit" limitation, as applied by the courts, appears to "strike a sound balance between the interests of copyright owners and those of the public," and recommended retaining the limitation as it exists today.

For the reasons advanced fully at the beginning of this chapter, the bill departs from this recommendation and imposes no blanket "for profit" limitation on the right of public performance. In view of the recent upsurge in the number and importance of nonprofit 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. We have therefore adopted the approach, like that taken in foreign laws, of stating the public performance right in broad terms in section 106, and of providing the specific exemptions for educational and other nonprofit uses in section 109. These exemptions will be discussed below in that context.

c. Definitions

The operative terms used in clauses (4) and (5) of section 106(a)--"perform," "exhibit," and "publicly"--are not self-defining, and the drafting of workable definitions for them has given us a good deal of trouble, largely because of the many complex ways through which a performance or exhibition can now reach the public. The general approach adopted in section 106(b) of the bill is to indicate, first of all, what the basic acts of performing or exhibiting a work consist of, **[22]** and then to make clear that any further act by which that initial performance or exhibition is transmitted or reproduced constitutes an additional performance or exhibition. For example, a singer would be performing when he sings a song; a broadcasting network would be performing when it transmits his performance, whether it is live or on records; a local broadcaster would be performing when he transmits the network broadcast; a community antenna service would be performing when it retransmits the broadcast to subscribers over wires; and any person would be performing a work whenever he plays a phonorecord of it or reproduces a performance of it on his radio or television set. The definition of "publicly" in subsection (b) would, in general, exempt private performances and exhibitions from the copyright owner's control, and the limitations in the remaining sections of the chapter, especially section 109, would further narrow the scope of his rights.

Under clause (1) of section 106(b), to "perform" a work means "to recite, render, play, dance, or act it." This includes, for example, the reading aloud of a literary work, the singing or playing of music, the dancing of a choreographic work, and the acting out of a dramatic work or pantomime. A work may be performed "either directly or by means of any device or process," and these devices or processes would encompass sound or visual reproduction equipment of all kinds, amplifying systems, radio and television transmitting and receiving apparatus, electronic retrieval devices, and a host of other techniques, undoubtedly including some not invented yet. In the case of a motion picture, performance would mean "to show its images or to make the sounds accompanying it audible." It would be clear under this language that the purely aural performance of a motion picture sound track would constitute a performance of

the motion picture; but, if the sounds on the soundtrack are reproduced on an authorized phonorecord, performance of the phonorecord would not be a performance of the motion picture.

In general the concept of "performance" must be distinguished sharply from the reproduction of copies on the one hand and the exhibition of copies on the other. It has been suggested that some of the internal operations of a computer, such as the scanning of a work to determine whether it contains material the user is seeking, is closely analogous to a "performance." We cannot agree, and for this reason we deleted from the definition of "perform" the ambiguous term "represent" which appeared in the 1964 bill. A computer may well "perform" a work by running off a motion picture or playing a sound recording as part of its output, but its internal operations do not appear to us to fall within this concept.

Section 106(b)(2) defines "exhibit" as meaning "to show a copy of [the work], either directly or by means of motion picture films, slides, **[23]** television images, or any other device or process." Since the definition of "copy" in section 101 includes the material object in which the work was first fixed, this right of exhibition applies to an original work of art as well as to any reproductions of it. It would also apply to individual frames or stills from a motion picture since individually they represent "pictorial" or "graphic" works; however, as mentioned earlier, the showing of the frames of the motion picture in sequence would constitute a "performance" of the motion picture and not an "exhibition." Under this definition it would be an "exhibition" to show a copy of a work directly, to project an image of it on a screen by means of any device, including opaque, overhead, and motion picture projectors, or to transmit an image of the copy by any electronic or other means.

Since introduction of the 1965 bill a problem has been raised in connection with this definition which deserves further consideration. It arises from the well-established use of the word "exhibit" in the motion picture industry to refer to the performance of a motion picture. As used in the bill the word "exhibit" is intended to refer to the display of a copy of the copyrighted work or of an image of a copy of it, but not including the performance of a motion picture. We agree that using this term in a sense contrary to its usage in the film industry is likely to result in confusion and misunderstandings, especially in connection with the limitations and exemptions provided in sections 108 and 109. For this reason we agree that "display" might be a better operative word than "exhibit" in section 106(a)(5) and elsewhere in the bill.

The definition of "publicly" in connection with the rights "to perform" and "to exhibit" was a particularly difficult nut to crack. The 1961 *Report* agreed generally with the view that performances in "semi-public" places such as clubs, lodges, factories, summer camps, and schools should be regarded as "public," and noted its disagreement with the decision in *Metro-Goldwyn-Mayer Distributing Corp. v. Wyatt* , 21 C.O. Bull. 203 (D. Md. 1932) which suggested otherwise. It despaired, however, of being able to draft a definition that would draw a satisfactory line between public and private performances.

We were encouraged to attempt a statutory definition by a number of persuasive arguments that the question is too important to leave open, and that the decision in the *Wyatt* case should be expressly overturned by defining "publicly" to include performances in "semi-public" places. The result of these arguments appears in clause (3) of section 106(b):

To perform or exhibit a work "publicly" means:

(A) To perform or exhibit it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of family and social acquaintances is gathered;

(B) to transmit or otherwise communicate a performance or exhibition of the work to the public by means of any device or process.

[24] Under the first part of clause (A) a performance or exhibition would be "public" if the place where it occurred is "open to the public," regardless of the number of persons present at the particular time. The second part of the clause is based on provisions found in several foreign copyright laws, which define "public" in terms of assemblages of a substantial number of persons other than those constituting a family or social circle. As it appeared in the 1964 bill the phrase read: "* * * any place where a substantial number of persons outside of a normal circle of *a* family and *its* social acquaintances is gathered; * * *." It was pointed out, however, that at least technically this language would not include the social acquaintances of a single individual, and the words "a" and "its" were dropped in an effort to meet this point. This change has in turn been criticized as broadening the concept too much, and the definition could probably stand some further revision to make clear that it would include performance and exhibitions before a substantial gathering in clubs and lodges as well as in camps, schools, and factories.

Clause (B) of section 106(b)(3) is intended to make clear that, in addition to performances and exhibitions occurring in a public place as defined in clause (A), it is also a public performance or exhibition "to transmit or otherwise communicate a performance or exhibition of the work to the public by means of any device or process." Section 101 provides:

"To 'transmit' a performance or exhibition is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent."

Clause (B) and the definition of "transmit" replace language in earlier drafts employing phrases such as "broadcast," "retransmitted," "over wires or otherwise," "rebroadcasting," "diffusing," and "rediffusing." Not only was the use of many different terms confusing, but the meanings ascribed to them did not always correspond with their usage in the communications industry in this country. In particular, we were urged not to use the word "broadcast" in a sense different from its meaning in the Federal Communications Act.

We have therefore adopted the phrase "transmit or otherwise communicate * * * to the public" to cover every method by which the images or sounds comprising a performance or exhibition can be picked up and conveyed to the public. This concept would include, among other things: direct amplification (as over a loud speaker system); transmission over wires or other connections; wireless transmission by the originating transmitter and by any other transmitter who picks up his signals and passes them on; and further transmission, over wires, of a wireless transmission. Likewise, although probably also covered under clause (A), it would include performances in public **[25]** places resulting from the playing of records on jukeboxes and other sound reproducing equipment and from the reception of wired or wireless transmissions.

In effect, the definition is intended to cover every transmission, retransmission, or other communication of a performance which reaches "the public." The 1964 bill contained language exempting transmissions by someone acting, "as a common carrier," the thought being that a corporation merely leasing wires or equipment for the intermediate transmission of signals to other transmitters, rather than to the public, should not be subjected to liability to the copyright owner. It was pointed out that the concept of "common carrier" might be extended unjustifiably to some commercial transmitters to the public, and we have therefore dropped this exception as ill-advised. We are convinced that purely intermediate transmissions should be exempt, but that an express exemption is not necessary to exclude them.

As already noted, section 109 provides a number of limitations on the rights of copyright owners, including exemptions for certain types of broadcasts and transmissions. Involved in these exemptions are some extremely controversial issues, especially those involving educational broadcasting and community antenna systems. These and related questions will be discussed in Part E of this chapter.

C. FAIR USE

Although it is not mentioned in the present statute, the doctrine of fair use, as it has been developed in a long line of court decisions, is probably the most significant and widely applicable of the limitations on the copyright owner's exclusive rights. The 1961 *Report* described the general scope of the doctrine and gave a number of examples of cases where the concept would be relevant. It was acknowledged, however, that fair use "eludes precise definition" and that, because of the number and variety of situations in which fair use could be involved, "it would be difficult to prescribe precise rules suitable for all occasions."

The *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." As a spacial aspect of fair use the *Report* also discussed the problem of photocopying by libraries for research purposes, and recommended that the statute include provisions permitting a library to supply single photocopies under specified conditions and within certain limits.

[26] These recommendations were carried over into the preliminary draft of 1963. Section 6, dealing with the general concept of fair use, provided:

All of the exclusive rights specified in section 5 shall be limited by the privilege of making fair use of a copyrighted work. In determining whether, under the circumstances in any particular case, the use of a copyrighted work constitutes a fair use rather than an infringement of copyright, the following factors, among others, shall be considered: (a) the purpose and character of the use, (b) the nature of the copyrighted work, (c) the amount and substantiality of the

material used in relation to the copyrighted work as a whole, and (d) the effect of the use upon the potential value of the copyrighted work.

Section 7 was a rather elaborate provision which, in general, would have permitted libraries to supply a single photocopy of one article (or other contribution or excerpt) from a copyrighted work, or a single photocopy of an entire work if it were out of print.

The language of section 6 met with a certain amount of favor, but section 7 was strenuously opposed on all sides. 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 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.

In a way the comments on section 7 of the preliminary draft represented an interesting case study. 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. We also became convinced that the provision would be a mistake in any event. At the present time the practices, techniques, and devices for reproducing visual images and sound and for "storing" and "retrieving" information are in such a stage of rapid evolution that any specific statutory provision would be likely to prove inadequate, if not unfair or dangerous, in the not too distant future. As important as it is, library copying is only one aspect of the much larger problem of changing technology, and we feel the statute should deal with it in terms of broad fundamental concepts that can be adapted to future developments.

The decision to drop any provision on photocopying tended to increase the importance attached to including a general section on fair use in the statute. Thus, in the 1964 bill, further language was added **[27]** to section 6 in an attempt to clarify the scope of the doctrine of fair use but without freezing or delimiting its application to new uses:

Notwithstanding the provisions of section 5, the fair use of a copyrighted work to the extent reasonably necessary or incidental to a legitimate purpose such as criticism, comment, news reporting, teaching, scholarship, or research is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

(1) the purpose and character of the use;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

This language elicited a large body of comments, most of them critical. Without reviewing the arguments in detail, it can be said in general that the author-publisher groups expressed fears that specific mention of uses such as "teaching, scholarship, or research" could be taken to imply that any use even remotely connected with these activities would be a "fair use." On the other side, serious objections were raised to the use of qualifying language such as "to the extent reasonably necessary or incidental to a legitimate purpose" and "the amount and substantiality of the portion used * * *."

In addition to opposing this language as unduly restrictive, a group of educational organizations urged that the bill adopt a new provision which would specify a number of activities involved in teaching and scholarship as completely exempt from copyright control. In broad terms, and with certain exceptions, the proposal as it evolved would permit any teacher or other person or organization engaged in non-profit educational activities to make a single copy or record of an entire work, or a reasonable number of copies of "excerpts or quotations," for use in connection with those activities. It was argued that these privileges are a necessary part of good teaching, and that it is unjustifiable to burden educators with the need to buy copies for limited use or to obtain advance clearances and pay royalties for making copies. These proposals were opposed very strongly by authors, publishers, and other copyright owners on the ground that in the short run the reproduction of copies under this proposal would severely diminish the market for their works, and that the ultimate result would be to destroy the economic incentive for the creation and publication of the very works on which education depends for its existence. It was suggested that a clearinghouse for educational materials, through which it would be possible to avoid problems of clearances, is a practical possibility for the near future.

For reasons we have already discussed at some length, we do not favor sweeping, across-the-board exemptions from the author's ex**[28]**clusive rights unless an overriding public need can be conclusively demonstrated. There is hardly any public need today that is more urgent than education, but we are convinced that this need would be ill-served if educators, by making copies of the materials they need, cut off a large part of the revenue to authors and publishers that induces the creation and publication of those materials. We believe that a statutory recognition of fair use would be sufficient to serve the reasonable needs of education with respect to the copying of short extracts from copyrighted works, and that the problem of obtaining clearances for copying larger portions or entire works could best be solved through a clearinghouse arrangement worked out between the educational groups and the author-publisher interests.

Since it appeared impossible to reach agreement on a general statement expressing the scope of the fair use doctrine, and since in any event the doctrine emerges from a body of judicial precedent and not from the statute, we decided with some regret to reduce the fair use section to its barest essentials. Section 107 of the 1965 bill therefore provides:

Notwithstanding the provisions of section 106, the fair use of a copyrighted work is not an infringement of copyright. We believe that, even in this form, the provision serves a real purpose and should be incorporated in the statute.

The author-publisher interests have suggested that fair use should be treated as a defense, with the statute placing the burden of proof on the user. The educational group has urged just the opposite, that the statute should provide that any nonprofit use for educational purposes is presumed to be a fair use, with the copyright owner having the burden of proving otherwise. We believe it would be undesirable to adopt a special rule placing the burden of proof on one side or the other. When the facts as to what use was made of the work have been presented, the issue as to whether it is a "fair use" is a question of law. Statutory presumptions or burden-of-proof provisions could work a radical change in the meaning and effect of the doctrine of fair use. The intention of section 107 is to give statutory affirmation to the present judicial doctrine, not to change it.

D. EFFECT OF TRANSFER OF PARTICULAR COPY OR PHONORECORD

1. EFFECT ON FURTHER DISPOSITION OF COPY OR PHONORECORD

Section 108(a) restates in existing principle, which is somewhat ambiguously expressed in section 27 of the present law but which has been firmly established by the court decisions: that, when the copyright owner has sold or otherwise transferred ownership of a copy **[29]** of the work, the person who has acquired ownership of that copy is entitled to dispose of it. The bill would extend that principle to phonorecords as well as copies:

Notwithstanding the provisions of section 106(a)(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by him, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

Thus, under section 108(a), the copyright owner's exclusive right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending" would have no effect as against anyone who owns a "copy or phonorecord lawfully made under this title" and who wishes to sell, lend, rent it, give it away, or destroy it. For example, once the owner of copyright in a book has sold a copy he cannot control the resale price or impose any other conditions on its future disposition; if the owner of the copy is a library, it may lend the copy as it sees fit. As explained further in section 202, however, the owner of the copy or phonorecord acquires no exclusive rights under the copyright, and his ownership of a material object embodying the copyrighted work does not entitle him to reproduce the work or perform it publicly.

To come within section 108(a) a copy or phonorecord must have been "lawfully made under this title," but not necessarily "under the authority of the copyright owner." Thus, for example, the disposition of a phonorecord manufactured in compliance with section 113 of the bill would be outside the copyright owner's control. To prevent possible abuse of the copyright owner's rights where copies or phonorecords are lawfully made without his authorization, safeguards have been written into section 110 (restricting the use of ephemeral recordings), and into section 113 (allowing a compulsory license for the making of phonorecords only where the maker's "primary purpose * * * is to distribute them to the public for private use").

2. EFFECT ON EXHIBITION OF COPY

Earlier in this chapter we discussed the uncertain status of rights of "public exhibition" under the present law, and the bill's proposal to create, "in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works," an exclusive right to "exhibit the copyrighted work publicly." An obvious question underlying the explicit recognition of this right is whether it would continue after the sale or other transfer of ownership of a copy embodying the copyrighted work. Would the owner of a lawfully made "copy" (which, under section 101, would include the original painting, manuscript, photographic negative, etc., in which **[30]** the work was first fixed) be prevented from showing it to the public without permission of the copyright owner.

As a general principle, we believe that anyone who owns a copy of a work should be free to put that copy on public display without first obtaining authorization from the owner of copyright in that work. Thus, for example: the owner of a painting should be able to hang it in a public gallery; a bookseller or sheet music dealer should be free to display his stock; and people should be entitled to use various types of projection equipment to show lawfully made copies, slides, and filmstrips that they own.

There were, however, very strenuous protests, particularly from graphic artists, photographers, and publishers, against extending this principle to television broadcasting. They argued that the use of their works in broadcasting (particularly works such as maps, photographs, illustrations, charts, and filmstrips) could be a prime source of revenue to them, and also that the showing of these works to audiences unlimited in size could seriously curtail their market for the sale of copies. In response to this argument, section 108(b) provides:

Notwithstanding the provisions of section 106(a)(5), the owner of a particular copy lawfully made under this title, or any person authorized by him, is entitled, without the authority of the copyright owner, to exhibit that copy publicly to viewers present at the place where the copy is located.

Under this provision the owner of a filmstrip, for example, could put it on a project and show it in a public place, but he would be required to obtain permission in order to transmit its images to the public over open- or closed-circuit television, by wire transmission, etc.

3. EFFECT OF MERE POSSESSION OF COPY OR PHONORECORD

Subsection (c) of section 108 contains an important qualification on the privileges specified in subsections (a) and (b). It makes clear that these privileges would not apply to anyone who has merely obtained possession of a copy or phonorecord from the copyright owner by some method short of acquiring ownership. It provides:

The privileges prescribed by subsections (a) and (b) do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.

For example, where a person has rented a print of a motion picture from the copyright owner, he would have no right to lend, rent, sell, or otherwise dispose of the print without first obtaining the copyright owner's permission. As long as the copyright owner retains ownership of the copy or phonorecord, his full control over its disposition and exhibition would be preserved.

[31] 4. PROPOSAL FOR A "PUBLIC LENDING RIGHT"

The representatives of authors' organizations have pointed out that, although section 106(a)(3) gives the copyright owner the exclusive right "to distribute copies or phonorecords * * * by rental, lease, or lending," section 108(a) takes this right away with respect to a particular copy or phonorecord as soon as he parts with ownership of it. The "lending right" afforded by the bill is of practical value in those cases, such as motion pictures and some musical scores, where the copyright owner retains ownership of the copies or records and distributes them under rental or loan arrangements; and there may well be more of these cases in the future. It is quite true, however, that the ownership of most copies and phonorecords is transferred outright when they are publicly distributed, and this leaves their owners free to rent them for a fee or to lend them to persons who might otherwise buy their own copy or phonorecord.

A "public lending right" which, subject to various conditions and limitations, would entitle authors to some remuneration when libraries rent or lend copies of their works, has been adopted in Scandinavia and given serious consideration in other countries, including the German Federal Republic and the United Kingdom. We believe that in this country, at the present time at least, the enormous practical difficulties of working out such a system without hampering library services would outweigh its advantages to authors.

E. EXEMPTION OF CERTAIN PERFORMANCES AND EXHIBITIONS

1. IN GENERAL

For the reasons explained earlier in this chapter, the bill's general approach is to state the exclusive rights of public performance and public exhibition with no "for profit" limitation, and then to set forth those specific performances and exhibitions that by their nature justify being exempted from copyright control. Section 109 of the bill is the provision containing those exemptions, and all of its seven clauses have been, and still are, the subject of controversy.

The provisions of section 109 fall roughly into two categories: first, performances and exhibitions that are now for the most part exempted from copyright liability under the "for profit" limitation or other provisions of the copyright law, and that on balance we believe should continue to be exempt; and second, special situations involving secondary uses of broadcasts and other transmissions where, because of the nonprofit and essentially private character of the use or its remoteness from the copyright owner, or for other reasons, we believe exemption would be justified. The first four clauses of section **[32]** 109 fall into the first category, and clauses (5), (6), and (7) fall into the second.

2. FACE-TO-FACE TEACHING ACTIVITIES

Leaving aside the question of educational broadcasting, there seems to be general agreement that most ordinary instructional activities in classrooms should be exempt from copyright control, but we have found the scope of this exemption difficult to define. The language of the preliminary draft, which referred to performances "in the course of normal teaching activities," was rightly attacked as too vague. The 1964 bill would have exempted "performance [of a non-dramatic literary or musical work] or exhibition [of a pictorial, graphic, or sculptural work] by instructors or pupils in the course of face-to-face teaching activities." In criticism of this language the point was made that, although classroom performances may not be regarded as "public" under the present law, they would be covered by the definition of "publicly" in section 106(b)(3); hence, a classroom performance or reading of a dramatic work, which would not be an infringement now, would probably have been regarded as one under the 1964 bill. We were also urged to confine the permissible "teaching activities" to those taking place in a classroom, thus avoiding the argument that a performance before a large audience in an auditorium, stadium, or the like, would be exempt because it constituted "teaching activities."

The exemption in section 109(1) of the 1965 bill reads: "* * * performance or exhibition of a work by instructors or pupils in the course of face-to-face teaching activities in a classroom or similar place normally devoted to instruction." There is no limitation on the types of works covered by this exemption, which would mean that a teacher or student in a classroom situation would be free to read from copyrighted text material, to act out a dramatic work, or to perform a musical work. Under this language it would also be possible for the instructor to perform a copyrighted motion picture by showing it to his class, or to exhibit copyrighted text or graphic material by means of projectors.

The broadening of the language of this clause has caused some concern among copyright owners, especially playwrights and motion picture producers, and there have been suggestions that the scope of the exemption be narrowed, or that "face-to-face teaching activities" be clearly defined in such a way as to avoid possible abuses of their rights. We doubt whether a further statutory definition is necessary, and we shall try to make clear here what is intended in section 109(1):

(1) The performance or exhibition must be "by instructors or pupils." This would rule out, for example, performances by actors, **[33]** singers, musicians, etc., who are brought in from outside the school to put on a performance. On the other hand, it would be broad enough to include guest lecturers as long as their activities are confined to a classroom situation. The term "pupils" is intended to refer generally to the enrolled members of a class.

(2) The performance or exhibition must be "in the course of face-to-face teaching activities." This language would exclude closed- and open-circuit television broadcasting but, as long as the instructor and pupils are in the same classroom or similar place, it would not rule out, for example, amplification of the teacher's voice or the use of projection devices. The phrase "teaching activities" is intended to cover systematic instruction of a very wide variety of subjects, but it is not broad enough to exempt performances, whatever their cultural value or intellectual appeal, that are given for the recreation or entertainment of any part of their audience.

(3) The "teaching activities" must be "in a classroom or similar place normally devoted to instruction." The last part of this clause is not intended to allow performances in an auditorium in the case of school assemblies, class plays, and the like, where the audience includes persons other than members of a particular class. (Note, however, that some such performances would be exempted under clause (4) of section 109.) The "similar place" referred to in clause (1) is a place

which, although not a "classroom" in they physical sense, is "normally devoted to instruction" in the same way that a classroom is; examples would be a studio, a workshop, a gymnasium, a training field, a library, the stage of an auditorium, or the auditorium itself if it is actually used as a classroom for systematic instructional purposes.

(4) Most of the performances and exhibitions covered by the clause would be considered "not for profit" under the present law. As written, however, the clause might be read as exempting performances or exhibitions in profit-making educational institutions (such as dance studios, language schools, etc.), and even as permitting an admission fee to be charged the pupils for the performance or exhibition, over and above their ordinary tuition fees. This was not the intention, and clause (1) should be amended to make clear that it would apply only where the teaching activities take place in a nonprofit educational institution and where no admission fee is charged.

As pointed out in Part D of this chapter, section 108 of the bill would permit anyone to exhibit a "lawfully made" copy "publicly to viewers present at the place where the copy is located." Thus, even without clause (1) of section 109, an instructor would be free to show copies of copyrighted works to his class by means of an opaque projector, and also to project any slides, filmstrips, or other transparencies that had been made and distributed under the authority of the copyright owner. He would not, under section 106(a)(1), be **[34]** entitled to make copies for this purpose without the copyright owner's permission; and if he did he would infringe the owner's copyright--unless for some reason, such as the relative insignificance of the excerpt copied, the doctrine of fair use were applicable.

Book publishers have expressed apprehension over the potential dangers of allowing classroom projection of lawful copies of copyrighted material without the copyright owner's consent. They point out that an image can be projected for viewing by a large group of students for substantial periods of time, thus effectively taking the place of (and avoiding the need to buy) copies of the work. Special concern was expressed with respect to maps, charts, and "consumable" materials such as workbooks, practice books, laboratory manuals, and answer sheets to standardized tests, which now represent something like 20 percent of school textbook expenditures. The point was made that, if one copy of these materials can be made to do the work of hundreds through classroom projection or through exhibition on educational television, the market for them will be curtailed and their creation and publication discouraged.

On the other side, one of the greatest fears expressed by classroom teachers and other educational groups is that, unless copyright restrictions are removed, they will be denied use of the new audio-visual aids available in modern education, and that students and the public will suffer as the result. On balance, while recognizing the legitimate arguments on both sides, we do not believe that the use of "any device or process" for the showing of lawfully made copies to students in a classroom should be subjected to copyright restrictions. The making of unauthorized copies for this purpose, beyond the limits of fair use, could and should be restrained under section 106(a)(1).

3. EDUCATIONAL BROADCASTING

One of the most important issues in general revision involves the extent to which the copyright owner's exclusive rights should apply to "educational" and other nonprofit broadcasting. Under the present law, as long as no "copy" or "record" is made, a performance of a nondramatic literary or musical work in a broadcast to the public by an educational or other nonprofit radio or television station is not an infringement of copyright where, as is usually assumed to be true of such stations, no commercial element is involved in its broadcasts. Educational broadcasters and others in the field of education would like to see the present "for profit" limitation retained, at least as far as it applies to them. They would like to see an exemption for performances on educational broadcasting extended to all other types of works, including dramas and motion pictures; and they also seek an "ephemeral recording" right which would permit them to record their pro**[35]**grams embodying copyrighted works in advance and to use these recordings for any number of rebroadcasts over a period of time. Our discussion of the general problem of "ephemeral recordings" will be found in Part F of this chapter.

We have already discussed why we believe that blanket exemptions from the copyright owner's exclusive rights, such as the present "for profit" limitation, should generally be avoided, and why specific exemptions should be provided only if shown to be required by a clear public interest outweighing the reasons for protecting the author's rights. All broadcasting, commercial as well as noncommercial, can be said to serve the public interest to some extent, but it also cannot be denied that educational broadcasting is in a special category. Its general aim is public and community service, and some of its instructional activities are essentially an extension, to a larger audience, of what schools have been doing for centuries.

Here is a case where balancing the scales is a delicate undertaking. Fully acknowledging the unique public value of educational broadcasting and its need for financial support, we must also recognize the large public audiences it is now

reaching, the vast potential audiences that are awaiting it, and the fact that, as a medium for entertainment, recreation, and communication of information, a good deal of educational programming is indistinguishable from a good deal of commercial programming. The time may come when many works will reach the public primarily through educational broadcasting. In terms of good education it is certainly true that the more people reached the better; but in terms of the author's rights it is equally true that the more people reached the more he should be compensated. It does not seem too much to ask that some of the money now going to support educational broadcasting activities be used to compensate authors and publishers whose works are essential to those activities.

Thus, as it has evolved in the 1965 bill, clause (2) of section 109 draws a line between educational broadcasting as an adjunct to the actual classwork of educational institutions, and broadcasting by educational stations intended for the enlightenment, edification, or instruction of the public at large. It would exempt:

Performance of a nondramatic literary or musical work, or exhibition of a work, by or in the course of a transmission, if the transmission is made primarily for reception in classrooms or similar places normally devoted to instruction and is a regular part of the systematic instructional activities of a nonprofit educational institution; * * *

The intention behind this language can be summarized as follows:

(1) With respect to performances, the exemption would apply only to "nondramatic literary or musical works." The performance on educational television or radio of a dramatic work, of a dramatico-musical work such as an opera or musical comedy, or of a motion **[36]** picture would not be permitted under section 109(2) unless the copyright owner's permission had been obtained. Likewise, the clause is not intended in any way to limit the copyright owner's right to make dramatizations, adaptations, or other "derivative works" under section 106(a)(2); for example, although a performer could read a nondramatic literary work aloud under section 109(2), he would have no right to act it out in dramatic form.

(2) With respect to exhibition, the exemption would apply to any kind of work to which the right "to exhibit * * * publicly" applies under section 106(a)(5): "literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works." As already indicated, we recognize the ambiguity of the term "exhibit," especially in connection with motion pictures, and we would now favor the use of another term for this purpose, possibly "display." Let us make clear again, however, that there was no intention in this clause to exempt the showing (i.e., the "performance") of a motion picture, or a dramatic work incorporated in a motion picture. The word "exhibit" is intended to mean the nonsequential display, directly or by the projection of an image, of a physical object embodying the work. Thus, for example, an educational broadcaster might be able, under section 109(2), to show ("exhibit") some of the printed text of a play in a broadcast to schools, but he could not have a reading ("performance") of the text given in the broadcast.

(3) Under section 109(2), a performance or exhibition "by or in the course of a transmission" would be exempted if the transmission meets two specified conditions. It has been pointed out that under this language, as long as the transmission meets both of the two stated requirements, it could be exempted even though the "transmitter" himself is in business for profit. In the light of this argument, consideration might be given to limiting the exemption to cases where the transmission was "without any purpose of direct or indirect commercial advantage."

(4) The first condition that the transmission must meet is that it be "made primarily for reception in classrooms or similar places normally devoted to instruction." The scope of "classrooms or similar places" has already been discussed in connection with clause (1) of section 109, and it is intended to have the same meaning here. The word "primarily," which has been the subject of some comment, replaced the word "solely" in a similar phrase in the 1964 bill. Under the earlier version of the bill, virtually the only educational broadcasts that would have been exempted were closed-circuit transmissions to schools. However, we found persuasive the arguments that this exemption would be unduly restrictive, and that it should be expanded to include open-circuit "in school" instructional broadcasts. Under **[37]** the language of the 1965 bill an educational broadcast made with the chief or principal purpose of reception in classrooms would, assuming it also meets the second requirement, be exempted even though members of the general public could also receive it, and an indeterminate number of them did. The word "primarily" is intended to make clear that the exemption would not apply where the principal purpose of the transmission is reception by the public, even if the transmission is also received in classrooms. The content of the program, and the time when it is broadcast, would be among the major factors to consider in determining the "primary" purpose of the transmission.

(5) The second condition that the transmission must meet is that it be "a regular part of the systematic instructional activities of a non-profit educational institution." The phrase "systematic instructional activities" is roughly equivalent to

"curriculum," although it might be somewhat broader in the case, for example, of institutions using systematic teaching methods not related to specific courses. The transmission must be a "regular part" of these activities in the sense that it conforms with an established pattern of teaching in the particular institution. Note also that the "educational institution," whether public or private, must be "nonprofit," and that the word "institution," while broad enough to cover a wide range of establishments engaging in teaching activities, is not intended to cover "organizations," "foundations," "associations," or similar "educational" groups not primarily and directly engaged in instruction.

(6) Finally, it should be emphasized again that the conjunction in the last part of clause (2) is "and" and not "or." In other words, it is not enough for a transmission to be part of nonprofit, systematic instructional activities; it must also be "made primarily for reception in classrooms or similar places * * *." The exception would, therefore, not encompass "educational" or "cultural" programs aimed at the general public or formal courses in adult education aimed primarily at home viewers.

4. RELIGIOUS SERVICES

The present law has two provisions bearing on the status of performances of copyrighted works in the course of religious services: (1) those of section 1 exempting nonprofit public performances of nondramatic literary and musical works but extending copyright control over public performances of dramatic and dramatico-musical works, whether for profit or not; and (2) those of section 104 exempting "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 **[38]** performance is given for charitable or educational purposes and not for profit." The language of section 104, while somewhat obscure, might be construed as allowing performance of some dramatico-musical works during religious services that would otherwise be prevented under section 1.

The 1964 bill would have limited the exemption for religious performances to nondramatic literary and musical works. However, we were very strenuously urged to expand the exemption to include dramatico-musical works such as cantatas, oratorios, musical settings of the mass, choral services, and other pieces of sacred music which might be regarded as "dramatic" in character. Section 109(3) of the 1965 bill therefore would exempt:

Performance of a nondramatic literary or musical work or of a dramatico-musical work, or exhibition of a work, in the course of services at a place of worship or other religious assembly; * * *.

Some concern has been expressed about the breadth of the phrase "dramatico-musical work" in this context, the fear being that it might allow unauthorized performances of all or part of a secular opera or musical play under the color of it being "in the course of religious services." This was not the intention, and it might therefore be wise, as suggested, to qualify "dramatico-musical work" with/a phrase such as "of a religious nature."

A performance or exhibition exempted under clause (3) would have to be "in the course of services," thus excluding any social, entertainment, educational, or fund-raising activities at a place of worship. (As explained below, however, these activities may be covered by clause (4) of this section.) The performance or exhibition must also be given "at a place of worship or other religious assembly," thus ruling out religious broadcasts or other transmissions but including regular or special religious services conducted in auditoriums, outdoor theaters, stadiums, and the like.

5. CERTAIN PERFORMANCES FOR EDUCATIONAL, RELIGIOUS, OR CHARITABLE PURPOSES

Over an above the educational and religious exemptions provided in clauses (1), (2), and (3), clause (4) of section 109 contains a general exception to the right of public performance which, though by no means as broad as the present "for profit" limitation, would still cover some of the same ground. The intended scope and effect of this exemption can be summarized as follows:

(1) The exemption would apply to the same general activity (public performance) and the same subject matter (nondramatic literary and musical works) as those covered by the "for profit" limitation today. However, the effect of the clause would be limited to public perform**[39]**ances given directly in the presence of the audience, since it refers specifically to a "performance * * * otherwise than in a transmission to the public."

(2) In general, and subject to the further limitations specified in the clause, the performance must be "without any purpose of direct or indirect commercial advantage." This is intended to express the familiar principle established by the courts in construing the "for profit" limitation under the present law: that a public performance given or sponsored in

connection with commercial or profit-making enterprises is subject to copyright control even if no charge is made to the public for seeing or hearing the performance.

(3) In addition, to be exempt the performance must be "without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers." In the 1964 bill the equivalent phrase read: "* * * without payment of any salary, fee, or other compensation to the performer." Two principal objections were lodged against this language: first, it could mean that the exemption would not apply, for example, where a school orchestra is conducted by a teacher who receives an annual salary, or where the members of an armed service band perform as part of their assigned duties for which they receive regular military pay; and second, it could mean that the exemption would apply, for example, where a promoter or theater owner collects a percentage of the paid admissions in excess of his reasonable costs, thus hiding a commercial purpose behind the guise of a charitable performance. We felt that both of these points were well taken, and we therefore broadened the exemption in one respect and narrowed it in the other. Since the word "salary" has been deleted, and since the "fee or other compensation" must be "for the performance," the clause as now written is intended to exempt cases where, assuming the other conditions are met, the performers may be paid salaries for duties encompassing the performance but are not paid directly for the performance itself. And, since "promoters" and "organizers" have been added to "performers," a performance would not be exempt if compensation (over and above reimbursement of reasonable costs) were paid to those responsible for putting on the performance.

(4) Even assuming that the live performance involves no commercial motive and that no one involved gets paid, it must still meet one or the other of two remaining conditions in order to qualify for an exemption under clause (4). It would be exempt only if:

(A) there is no direct or indirect admission charge, or

(B) the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain * * *.

[40]In other words, assuming that all of the other conditions are met, the performance would be exempt if there is no admission fee or, even if there is, the net proceeds are used entirely for bona fide educational, religious, or charitable purposes.

6. SECONDARY USES OF TRANSMISSIONS

a. In General

Under the general concept of "transmission" discussed earlier in this chapter, not only the original transmission of a performance but every further transmission by which it reaches the public would be regarded as a "performance." Accepting this concept as a starting point, the next question is where, if anywhere, in a chain of transmissions and public reception, the copyright owner's control should stop. Are there situations where, because of their nonprofit nature, their essentially private character, their remoteness from the copyright owner, or other reasons, the secondary use of a transmission should be exempted from the exclusive rights under a copyright? These questions, which have no easy answers, are dealt with in clauses (5), (6), and (7) of section 109. The problems here are not only manifold, but many of them are also complicated and highly controversial.

b. Retransmission to the Public: Community Antennas and Other Systems

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.

Typical community antenna systems are operated in areas where, because of the terrain, the height of buildings, or other physical or technical conditions, special antennas are needed for the satisfactory reception of television broadcasts. A CATV system consists basically of a central antenna which receives and amplifies television signals, and a network of cables through which the signals are then transmitted to the receiving sets of individual subscribers who thereby get better reception and more channels to choose from. The subscribers pay fees for this service, usually an initial installation charge and thereafter a service charge of a few dollars a month, and most CATV systems are operated as

commercial enterprises for profit. The number of these systems, which at present is around 1,500 in the United States, has been growing very rapidly; they now bring the broadcasts of more than 400 television stations to well over a million and **[41]**a half subscribers. The industry is reported to have generated income last year in excess of $ 100 million, and much more is anticipated for the future.

Although at least two cases are now pending in the courts, there has not yet been a ruling on the specific question of whether the transmission by a CATV system of broadcasts embodying performances of copyrighted works constitutes a "public performance" and hence an infringement under the present law. This is an important and difficult question which is outside the administrative concern of the Copyright Office, and it would be inappropriate for us to speculate about the outcome of the current litigation or to offer any definite opinion as to the proper construction of the statute now in effect. We shall therefore confine this discussion to the question of what rights, if any, a copyright owner should be given under the revised law with respect to transmissions of his works by community antenna systems.

The arguments advanced in support of an outright exemption of transmissions by CATV can be summarized as follows:

(1) A CATV system does nothing more than to provide its subscribers with a service for improving their television reception. Home viewers are entitled to free reception and, since the cost of copyright royalties would necessarily be passed on to the individual CATV subscribers, copyright control would discriminate between those viewers who need no special equipment and those who do.

(2) A community antenna operator has no control over the content of the broadcasts he passes on to his subscribers, and does not even know in advance what works will be performed in the broadcasts. To obtain blanket clearances in advance would be virtually impossible, and the establishment of a clearinghouse system large enough to insure against multiple suits for copyright infringement would result in a giant monopoly of copyright owners.

(3) Performance royalties now being paid by broadcasters include compensation to copyright owners for further transmission to CATV subscribers, since those royalties are based on the size of the ultimate audience receiving the broadcast, including those subscribers. Community antenna operators actually benefit copyright owners today by expanding the advertising revenue of broadcasters, and hence the copyright royalties paid by them. To require further payment would constitute an unwarranted double reward.

Balanced against these arguments are those of a wide range of interests, including copyright owners such as authors, publishers, and motion picture companies, together with broadcasting networks and local broadcasters. Their arguments can be summed up as follows:

(1) A community antenna system is much more than a "passive device" or service. It is an extremely complex transmission system **[42]**which does essentially what a broadcaster does: it transmits television programs to the public. It not only takes a free ride on what the broadcaster has produced, but it does something the broadcaster does not do: it makes a direct charge to the public for the reception of its transmissions. If a theater owner piped broadcasts of copyrighted material into a theater and charged the public directly to see them, there could be little doubt as to his copyright liability; the CATV operator does exactly the same thing, the only difference being that his audience is not assembled in one place.

(2) Community antenna systems effectively deprive the copyright owner of control over his work. In many cases (for example, motion pictures or syndicated series) where the broadcasting of a work is licensed for a particular limited territory and audience, a CATV transmission of the broadcast to subscribers in another area can mean the actual loss of the market for broadcasts of the work in that other area. Multiplied many time throughout the country, this loss can be very serious.

(3) The many hundreds of community antenna systems are prosperous business enterprises which neither need nor deserve a free ride at the expense of copyright owners, or in competition with local broadcasters, wired music services, and other users who must pay royalties for similar uses. The activities of the CATV operators constitute a "clear moral wrong" comparable to the old practice of "bicycling" movies from one theater to another in order to get two performances out of one license. CATV shows signs of changing the face of broadcasting in this country, and as new patterns emerge it is essential that the copyright owner's rights be protected.

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 **[43]**"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:

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; * * *.

c. Further Transmission Exclusively to Private Rooms of Hotels, etc.

The 1961 *Report* reviewed the Supreme Court's 1931 decision in *Buck v. Jewell-LaSalle Realty Co. , 283 U.S. 191,* in which a hotel operator who received broadcasts and relayed them to the various public and private rooms of his hotel was held to infringe the right of public performance in the musical works contained in the broadcasts. The *Report* dealt only with the possible implication, going beyond the facts of that case, that the mere reception of a broadcast in a public place might of itself be considered a public performance. This question is covered in clause (7) of section 109, discussed later.

Clause (6) is concerned with another situation specifically involved in the *Jewell-LaSalle* case: the further transmission of a broadcast program, received in a public establishment such as a hotel, to its private rooms. Since the audience represented by the occupants of private rooms is ordinarily limited to a relatively small number of separate individuals, we have felt that an exemption in this situation is justified, if the broadcast program is piped into the private rooms without change and the occupants are not charged for this service. The exemption in section 109(6) would therefore apply to:

The further transmitting of a transmission embodying a performance or exhibition of a work by relaying it to the private rooms of a hotel or other public establishment through a system of loudspeakers or other devices in such rooms, unless the person responsible for relaying the transmission or the operator of the establishment:

(A) alters or adds to the content of the transmission; or

(B) makes a separate charge to the occupants of the private rooms directly to see or hear the transmission; * * *.

The term "private rooms" in this clause was intended to cover rooms engaged by guests for their living quarters or for private parties. It was not intended to cover dining rooms, meeting halls, ballrooms, auditoriums, and similar rooms in the establishment which are open to the general public or which represent a "place where a substantial number of persons outside of a normal circle of family and social acquaintances is gathered" (section 106(b)(3)(A)). It should also be made clear that a person "alters or adds to the content of the transmission" if he cuts out commercial advertising or puts in new commercials.

[44]*d. Mere Reception of Transmission in a Public Place*

The 1961 *Report* noted that, "[a]lthough the *Jewell-LaSalle* case involved a retransmission, the effect of this decision may be that any business establishment that operates a radio or television receiving set for the entertainment of its patrons--including hotels, restaurants, taverns, barber shops, etc.--could be required to procure performing licenses for all copyrighted works in the broadcasts it receives." The *Report's* general conclusion, with which we still agree, was 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." Clause (7) of section 109 would therefore exempt:

Communication of a transmission embodying a performance or exhibition of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless:

(A) a direct charge is made to see or hear the transmissions; or

(B) the transmission thus received is further transmitted to the public.

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.

F. EPHEMERAL RECORDINGS

Throughout the discussions on revision of the copyright law, two groups of broadcasters have urged, strongly and repeatedly, that the statute should give them the right to make "ephemeral recordings" of their broadcast programs:

(1) The representatives of educational organizations have maintained that the recording of programs containing copyrighted material used in instruction is essential to educational broadcasting, since repetition of the same material by the same instructors is required when, for example, a class is scheduled to be repeated at different hours throughout the school-day or on different days.

(2) The representatives of local commercial broadcasting organizations have urged that a limited right to make recordings for broad**[45]**cast purposes is essential to their operations. They have pointed out that, while copyright owners have for the most part been complaisant about the practice commonly followed by broadcasters of recording their programs, there is no assurance under the present law that infringement suits will not be brought against them. Their concern has been deepened by the bill's provision which would give a new statutory right of reproduction to sound recordings as copyrightable works in themselves.

These arguments of the two groups of broadcasters should be viewed in the light of the provisions in a number of foreign statutes (and in the 1948 Brussels revision of the Berne Convention) permitting broadcasting organizations to make "ephemeral recordings" for their own authorized broadcasts under various conditions and limitations. 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.

Neither the preliminary draft of 1963 nor the bill introduced in 1964 contained any section on ephemeral recordings, and for this reason there has not yet been any opportunity for a public discussion of the detailed provisions or specific language of such a section. We have been persuaded, however, that 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. Section 110 of the bill, which is patterned to some extent on equivalent sections in foreign statutes, therefore provides:

Notwithstanding the provisions of section 106, it is not an infringement of copyright for an organization lawfully entitled to transmit a performance or exhibition of a copyrighted work to the public to make no more than one copy or phonorecord of the work solely for purposes of the organization's own lawful transmissions or for archival preservation, if the copy or phonorecord is not used for transmission after six months from the date it was first made, and is thereafter destroyed or preserved for archival purposes only.

As was to be expected, questions have been raised on both sides as to the scope and language of this provision. The following is a summary of the intention behind the present provision and the issues it raises:

(1) The ephemeral recording privilege would be available only to "an organization lawfully entitled to transmit a performance or exhibition of a copyrighted work to the public." On behalf of authors and publishers the fear has been expressed that the word "organization" might cover a group of several transmitters. It was in**[46]**tended that the privilege

could be exercised only by any one transmitter with respect to its own transmissions, and this would seem to be the effect of the references in the provision to the "organization entitled to transmit" and "the organization's own lawful transmissions." Questions have also been raised as to the meaning of "lawfully entitled" in this context; the intention was to permit ephemeral recordings not only for transmissions licensed by the copyright owner, but also for transmissions authorized by law such as those exempted from copyright control by section 109 of the bill.

(2) The privilege would apply to any kind of copyrighted work encompassed in a lawful transmission including works, such as motion pictures and sound recordings, which are themselves recordings. Although representatives of motion picture producers have expressed some uneasiness about the possible implications of such a provision, we do not believe it would be practical to exclude motion pictures from its scope. The recording of programs has become an essential feature of broadcasting, and material in a motion picture is often a part of a program to be recorded as a unit. Since the motion picture itself could be used for the broadcasts, the limitations on ephemeral recordings would seem to be adequate as safeguards for the copyright owner of the motion picture.

(3) The privilege would allow the transmitting organization "to make no more than one copy or phonorecord of the work." This limitation has been criticized on behalf of broadcasters as unduly restrictive if it means that, in the case of a hit song for example, a broadcaster is not permitted to include the work in separate recordings of different programs. While the language of section 110 should probably be clarified on this point, the intention was to permit a single recording of any one program, even though it included a work that was also part of another recorded program.

(4) The ephemeral recording must be made "solely for purposes of the organization's own lawful transmissions or for archival preservation." Under this provision there would be nothing to prevent a broadcasting organization from having a recording made by means of facilities other than its own. However, it would not be permissible under the provision for anyone else to make a recording on his own initiative for possible sale or lease to a broadcaster. The ephemeral recording privilege would extend to pre-recording for later broadcast, as well as to the recording of a program, while it is being broadcast, for deferred transmission or for preservation.

(5) Under section 110 the copy or phonorecord may be used for transmissions for a period of "six months from the date it was first made," and must thereafter be "destroyed or preserved for archival purposes only." These requirements, defining the ephemeral nature **[47]**of an "ephemeral recording," vary in foreign laws: the periods during which the recording may be used range from 24 hours to 1 year, and some statutes also add restrictions as to the number of possible uses. We believe that 6 months represents a reasonable period for the use of an ephemeral recording in the United States, and that it would be unrealistic to limit the number of possible uses during that period. However, it is argued on behalf of educational organizations that the period should be extended, and on behalf of authors and publishers that only a single deferred broadcast within 30 days should be permitted.

(6) Concern has been expressed on behalf of motion picture companies as to the possible dangers of "archival" reproductions finding their way into the bootleg film market. However, the imminent development of home video tape recordings seems likely to make ephemeral recordings by authorized transmitters a minor source of danger. In any case, we would be opposed to a provision requiring the destruction of ephemeral recordings; many of them will constitute an irreplaceable record of a historic event, a creative work, or a virtuoso performance of incalculable value to future generations.

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

A subject discussed at considerable length in the 1961 *Report* was the protection to be afforded works of "applied art." The *Report* pointed to the Supreme Court's decision in *Mazer v. Stein , 347 U.S. 201 (1954),* as a major turning point in the American law on this subject. It recommended in effect that the revision bill give statutory recognition to the principle enunciated in that decision: That copyright in a pictorial, graphic, or sculptural work will not be affected if the work is employed as the design of a useful article, and will offer protection against unauthorized reproduction of the work in useful as well as non-useful articles. Subsection (a) of section 111 carries out the *Report's* recommendations by providing generally:

Subject to the provisions of clauses (1) and (2) of this subsection, the exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work in copies under section 106 includes the right to reproduce the work in or on any kind of article, whether useful or otherwise.

The principle enunciated here is also embodied in the design bills now pending in Congress (H.R. 450, H.R. 3366, and S. 1237, 89th Cong., 1st sess., 1965) and, as indicated in the 1961 *Report*, we are in full accord with it. Subsection (b)

also adopts the carefully drafted and thoroughly considered definition of "useful article" incorporated in those bills: "* * * an article having an intrinsic utilitarian function **[48]**that is not merely to portray the appearance of the article or to convey information."

These provisions, coupled with the broad language of section 106(a)(1), raise the serious and important question of whether the exclusive right to reproduce a "pictorial, graphic, or sculptural work" in copies, including useful articles, means that, for example, copyright in a drawing or model of an automobile would protect the artist against the making of automobiles of the same design. The 1961 *Report* pointed out, on the basis of court decisions under the present law, that "* * * copyright in a pictorial, graphic, or sculptural work, portraying a useful article as such, does not extend to the manufacture of the useful article itself." A number of examples were given illustrating "the distinctions drawn in this area by existing court decisions,"n* and the *Report* recommended specifically that the statute "should not alter" these distinctions.

In the preliminary draft of 1963 we attempted to state, in explicit statutory language, the rather difficult theoretical concepts on which these court decisions are based. This attempt proved abortive, and we have been unable to find any statutory formulation that would express the distinction satisfactorily. Thus, since the real need is to make clear that there is no intention to change the present law with respect to the scope of protection in a work portraying a useful article as such, we have accepted the suggestion that the bill simply state that proposition directly. Section 111(a)(1) therefore provides:

This title does not afford, to the owner of copyright in a work that portrays a useful article as such, any greater rights with respect to the making, distribution, or exhibition of the useful article so portrayed than those afforded to such copyrighted works under the law in effect on December 31, 1966.

The second clause of section 111(a) deals with a separate problem which, though not considered in the 1961 *Report*, has been the subject of considerable uncertainty under the present law. We believe that, where a copyrighted work has been employed as the design of a useful article, and articles embodying the design have been offered to the public with the copyright owner's consent, it should not **[49]**generally constitute an infringement to publish pictures of the articles containing the design in advertising, in feature stories about the articles, in news reports, and the like. Clause (2) therefore provides:

In the case of a work lawfully reproduced in useful articles that have been offered for sale or other distribution to the public, copyright does not include any right to prevent the making, distribution, or exhibition of pictures of photographs of such articles in connection with advertisements or commentaries relating to the distribution or exhibition of such articles, or in connection with news reports.

H. RIGHTS IN SOUND RECORDINGS

1. GENERAL OBSERVATIONS

As explained in *chapter 1* of this *Supplementary Report*, an important change contemplated by the bill would be the addition of "sound recordings," to the subject matter of copyright. "Sound recordings" would be considered copyrightable in themselves, as "works that result from the fixation of a series of * * * sounds" (other than those accompanying a motion picture). They are to be carefully distinguished from "phonorecords," which are material objects in which sounds are fixed.

"Sound recordings" as copyrightable works must also be distinguished from any musical, literary, or dramatic works that are reproduced on "phonorecords." Thus, a phonorecord (a disk or tape, for example) of a popular song would usually constitute a reproduction of two copyrighted works under the bill: the song and the sound recording of it. Where, on the other hand, the composition recorded is a work in the public domain, the phonorecord would reproduce only one copyrighted work: the sound recording.

2. DEVELOPMENTS SINCE 1961

Our earlier *Report* reviewed the legal situation with respect to the protection of sound recordings as of 1961, and noted that their unauthorized duplication had reached serious proportions. It concluded that the situation then existing in the United States was unsatisfactory, and recommended in general that sound recordings be given Federal statutory protection "within appropriate limits" under "the principles of the copyright law." However, the *Report* deferred detailed recommendations because too many of the complex issues underlying the problem had not then crystallized. One of the

unresolved questions specifically mentioned in the *Report* was the scope of the protection to be accorded to sound recordings.

[50]Three developments in this field since the *Report* was issued in July 1961, should be mentioned here:

(1) On October 26, 1961, the International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations (usually called the "Neighboring Rights Convention") was signed at Rome. The Convention, which is now in effect among seven countries including the United Kingdom, Sweden, Mexico, and Czechoslovakia, requires its member countries to protect sound recordings against unauthorized reproduction. The United States has not ratified the Convention and, because of controversy over some of its other provisions, no legislative action has been initiated to do so. On the other hand, there are provisions in the Convention under which American record producers can, and undoubtedly will, obtain protection for their records in member countries.

(2) On September 28, 1962, Congress enacted Public Law 87-773, an amendment to the Criminal Code *(18 U.S.C. § 2318)* aimed at combating record counterfeiting. This act, which provides criminal penalties for the fraudulent transportation or sale of records bearing forged or counterfeit labels, does not deal with the problem of the unauthorized duplication of the sound recording itself. The point was made during congressional consideration of the measure, however, that the problem of record duplication should be taken up in connection with general revision of the copyright law.

(3) On March 9, 1964, the Supreme Court handed down two landmark decisions-- *Sears, Roebuck & Co. v. Stiffel Co. , 376 U.S. 225,* and *Compco Corp. v. Day-Brite Lighting, Inc. , 376 U.S. 234*--involving the relationship between Federal and State law in the whole area of intellectual and industrial property. It is not yet clear what the full meaning and impact of these decisions, which will be referred to again in the next chapter, will ultimately turn out to be. However, by severely limiting the ambit of State power in the field of copyright and intellectual property, the decisions may well affect the extent of common law protection against the unauthorized duplication of sound records which, although subject to considerable uncertainty, has been accorded in some cases.

3. LIMITED SCOPE OF EXCLUSIVE RIGHTS

We believe that, leaving aside cases where sounds have been fixed by some purely mechanical process involving no originality whatever, the aggregate of sounds embodied in a sound recording is clearly capable of being considered the "writing of an author" in the constitutional sense. The analogies between motion pictures and sound recordings in this connection are obvious and inescapable. Thus, as **[51]**indicated in the 1961 *Report*, we favor extending statutory copyright protection to sound recordings.

There is little dispute with this principle when the exclusive rights under a copyright are extended no further than the unauthorized reproduction of a sound recording in phonorecords under section 106(a)(1) and the unauthorized distribution of phonorecords under section 106(a)(3)--activities known popularly as "dubbing," "record piracy," or "record counterfeiting." 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 sound recording itself, as well as to the owner of copyright in the recorded musical composition.

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 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.

Section 112(a) of the bill would limit the exclusive rights of the owner of copyright in a sound recording "to the rights specified by clauses (1) and (3) of section 106(a)," and would specifically exclude "any right of performance under section 106(a)(4)." This limitation is not meant to imply any disparagement of sound recordings as creative works

or any doubt 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 **[52]**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.

A source of great confusion during earlier efforts to secure statutory protection for sound recordings arose from the lack of a provision making clear that the copyright would extend only to the particular sounds of which that recording consists, and that it would not offer any protection against a separate recording of another performance in which those sounds are imitated. Subsection (b) of section 112 is intended to clarify this important point:

The exclusive right of the owner of copyright in a sound recording to reproduce it under section 106(a)(1) is limited to the right to duplicate the sound recording in the form of phonorecords that directly or indirectly recapture the actual sounds fixed in the recording. This right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.

As long as the actual sounds constituting a copyrighted sound recording are reproduced in phonorecords by any method--repressing, electrical transcription, recapturing off the air, etc.--the copyright would be infringed. However, even in the so-called "mirror record" situation where one performer deliberately sets out to simulate another's performance as closely as possible, there would be no infringement of the copyright in the sound recording.

Under the language of section 112(a) the owner of copyright in a sound recording is given no exclusive right "to prepare derivative works based upon the copyrighted work" under section 106(a)(2). This does not mean, for example, that someone could take the sounds from a copyrighted recording and by rearranging, editing, or combining them with other sounds produce a "derivative work" that would be free of the copyright owner's control. On the contrary, any substantial reproduction in phonorecords of the sounds constituting a copyrighted sound recording would be an infringement under section 106(a)(1), even if those sounds were used together with others to make a "derivative work." No reference was made in section 112 to the exclusive right of making "derivative works," in order to avoid any implication that the owner of copyright in a sound recording has rights against unauthorized imitation or simulation of the performance embodied in his recording.

Because of the constant danger of confusion between rights in a sound recording and rights in the musical composition or other work performed in the recording, section 112(c) makes explicit something that is already implicit in the bill: that the limitations on the exclusive rights in sound recordings provided in section 112 do not **[53]**"limit or impair the exclusive right to perform publicly, by means of a phonorecord, any of the works specified by section 106(a)(4)."

I. COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS OF MUSICAL WORKS

1. IN GENERAL

Another controversial issue of great importance was the question of what to do with the compulsory licensing provisions of sections 1(e) and 101(e) of the present law. Very generally, these sections provide that, when the copyright owner of a musical work has once permitted its use in a phonorecord, anyone else may use the work in another phonorecord upon notifying the copyright owner and paying a specified royalty.

The compulsory licensing provisions, which were introduced in the U.S. copyright law as a compromise in 1909, were unique at the time, but served as the pattern for similar provisions in other countries. There is no question that they have had a profound effect upon the development of the American record industry, and that many of the present practices in the industry are directly related to them. It is not surprising, therefore, that proposals to abandon or substantially change the present provisions were sharply contested, and that it became necessary to work toward a compromise of the issue.

After reviewing the arguments for and against the retention of a compulsory license, the *Report* of 1961 recommended, rather too hopefully as it turned out, that the compulsory licensing provisions be completely eliminated. Recognizing, however, that the chances for acceptance of this proposal were problematical, the *Report* added: "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 provision." Among the problems

to be considered in that event, the *Report* mentioned the royalty rate, the "notice of use" formalities, the mechanics of payment, and the remedies against those who fail to comply with the compulsory licensing requirements.

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 com**[54]**panies, an 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.

A subcommittee of American Bar Association Committee 304 undertook to compromise as many of the issues in this area as possible, and section 113 of the bill reflects some of the results of their efforts. That section provides, in general, that the exclusive rights to make and distribute phonorecords of nondramatic musical works are subject to compulsory licensing under certain carefully specified conditions.

2. AVAILABILITY AND SCOPE OF COMPULSORY LICENSE

The present law is not clear on two important questions: (1) the nature of the original recording that will make the copyrighted work available to others for recording under a compulsory license, and (2) the nature of the recordings that can be made under a compulsory license. Subsection (a) of section 113 attempts to answer these questions as clearly as possible.

Clause (1) of subsection (a) provides, first of all, that "[w]hen phonorecords of a nondramatic musical work have been distributed to the public under the authority of the copyright owner, any other person may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work." Thus, it is the act of authorized public distribution of phonorecords (including disks and audio tapes but not motion picture sound tracks) that determines the availability of a compulsory license. It has been pointed out that, because of extremely complex methods of distribution now employed in the record industry, the point at which "public distribution" takes place may not be clear in come cases. On balance, however, we believe that this concept is fairer and clearer than the present law, which apparently bases compulsory licensing on the making or licensing of the first recording, even if no authorized records are ever distributed to the public.

The second sentence of clause (1) provides: "A person may obtain a compulsory license only if his primary purpose in making phonorecords is to distribute them to the public for private use." Thus, **[55]**no compulsory license would be valid unless the licensee's "primary purpose" is to distribute records for ordinary use in private homes. The validity of a compulsory license would not be affected because some of the records are sold to broadcasters, jukebox operators, etc., but the provision would not apply, for example, to reproduction in a motion picture sound track or recording primarily for use in broadcasts, wired music transmissions, or jukeboxes. To make this distinction clearer, consideration might be given to adopting suggestions that the last part of the sentence be amended to read: "only if his primary purpose in making the *particular* phonorecords is to distribute them to the public for private *home* use."

The second clause of subsection (a) deals with a doubtful question under the present law: the extent to which a compulsory licensee can depart from the composition as written or recorded without violating the copyright [sic] owner's exclusive right to make "arrangements." Clause (2) reads:

A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.

This provision is intended to recognize the practical need for some privilege of arrangement in this situation, but without permitting distortions or travesties. It would also prevent the compulsory licensee from claiming an independent copyright in his arrangement as "a derivative work" without the express consent of the copyright owner.

3. NOTICE OF INTENTION TO OBTAIN COMPULSORY LICENSE

Section 113(b)(1) resembles the provisions of the present law in requiring someone who wishes to exercise the compulsory license to given notice of his intention to the copyright owner, and for the most part differs only in procedural details. It was pointed out in our discussions, however, that under prevailing industry practices it would be unrealistic to require notice in advance of making a recording. Clause (1) therefore requires service of the notice of intention "* * * before or within 30 days after making, and before distributing any phonorecords of the work."

Section 113(b)(2) would make an important change in the present law. Today, if a record maker fails to give the required notice, his liability to the owner is limited to the statutory royalty of 2 cents per record plus an award of not more than 6 cents per record as damages. Representatives of the copyright owners have complained that **[56]**in most cases these awards are grossly inadequate either to compensate the copyright owner for his damages or to deter infringement. Clause (2) therefore provides that "[f]ailure to serve or file the notice as required in clause (1) forecloses the possibility of compulsory license and, in the absence of a negotiated license, renders the making and distribution of phonorecords fully actionable as acts of infringement under section 501." The remedies provided in section 501 are those applicable to infringements generally.

4. ROYALTY PAYABLE UNDER COMPULSORY LICENSE

a. Identification of Copyright Owner

The present law requires the copyright owner, as a condition of recovery against an unauthorized record manufacturer, to file a "notice of use" in the Copyright Office stating that the initial recording of the copyrighted work had been made. This added requirement seems burdensome and purposeless in the usual case where the copyright owner has registered his claim or recorded his assignment in the Copyright Office. The first sentence of section 113(c)(1) therefore provides: "To be entitled to receive royalties under a compulsory license, the copyright owner must be identified in the registration or other public records of the Copyright Office."

On the other hand, in order to give effect to the requirement that the owner identify himself in the Copyright Office records, and in line with the decision in *Norbay Music, Inc. v. King Records, Inc. , 290 F.2d 617 (2d Cir. 1961),* clause (1) also provides that the "owner is entitled to royalties for phonorecords made after he is so identified but he is not entitled to recover for any phonorecords previously made."

b. Basis and Rate of Royalty

Accepting that the compulsory licensing system is to be retained, two of the most important issues it presents are:

(1) whether the royalty should be based on the number of phonorecords made (as under the present law) or on the number distributed; and

(2) what royalty rate should be fixed.

Under section 1(e) of the present statue the specified royalty is "two cents on each such part manufactured," and this is the basis for royalties paid when a record manufacturer avails himself of the compulsory license. However, when, as in most cases, a recording license is negotiated, the royalty is generally based on the number of records sold. Representatives of the record companies have argued that distribution rather than manufacture should be made the basis for royalty payments under the statute, especially in view of the problem of "returns" from dealers and unsold warehouse inventories. On **[57]**the other hand, in the absence of a negotiated agreement to the contrary, we believe that liability for royalties should attach at the time when the right to make phonorecords is exercised; we do not think that a record maker should be free to make all the phonorecords he pleases without authority from the copyright owner, and then be obliged to pay a royalty only with respect to those he is later able to dispose of to the public. Clause (2) of section 113(c) would therefore make the royalty under a compulsory license "payable for every phonorecord made in accordance with the license."

The amount of the royalty to be paid remains a lively issue. The rate provided in clause (2) would apply to "every phonorecord" of "each work embodied in the phonorecord," and would be "either three cents or one cent per minute of playing time or fraction thereof, whichever amount is larger." This is the formula that had been put forward as part of the compromise proposal by the subcommittee of American Bar Association Committee 304 appointed to consider the

compulsory license, but of course it did not necessarily represent the views of all of the individual members of the subcommittee, including those representing record companies.

The representatives of record producers have argued that no economic justification has been shown for raising the present statutory rate of 2 cents per phonorecord for each composition recorded. That rate, fixed in the statute in 1909, is what they are generally paying now. Although price and cost of living indexes have risen greatly since 1909, the price of records has decreased substantially since that time, and most long-playing records of popular music today offer the public at least 12 tunes while most records of 1909 had only 1. Thus, it is contended, the recordmaker now commonly pays 24 cents in mechanical royalties for a $ 3.98 record, as contrasted with 2 cents for a record costing the buyer from $ 1.50 to $ 7.00 in 1909.

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 **[58]**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.

(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.

c. Accounting and Payment of Royalties

While quarterly accounting and payment is the practice under negotiated licenses today, the present law requires that the statements of account and payment of royalties under compulsory licenses be made monthly. The requirement for monthly payments has been criticized as unduly burdensome and as serving little purpose, and section 113(c)(3) therefore provides that "[r]oyalty payments shall be made quarterly, in January, April, July, and October, and shall include all royalties for the three months next preceding."

One of the principal complaints of copyright owners with respect to the operation of the present compulsory licensing provisions has been the irresponsibility or negligence of some record producers in filing statements of account under the compulsory license, and the impossibility of assuring the accuracy of these statements. Thus, although it has been criticized as too stringent, clause (3) of section 113 also provides: "Each quarterly payment shall be accompanied by a detailed statement of account which, upon written demand by the copyright owner, shall be certified as correct by a certified public accountant licensed to practice in the United States." It has also been suggested that the statute might authorize the Register of Copyrights **[59]**to issue regulations dealing with the nature and content of the "detailed statement."

d. Effect of Default

Another basis for criticism against the compulsory licensing provisions of the present law is that the sanctions against defaulting licensees are too flimsy to be of any practical effect. Clause (4) of section 113(c) therefore permits the copyright owner to serve written notice on a defaulting licensee, and provides for termination of the compulsory license if the default is not remedied within 30 days of the notice. Under this clause, "[s]uch termination renders the

making and distribution of all phonorecords, for which the royalty had not been paid, fully actionable as acts of infringement under section 501."

J. PUBLIC PERFORMANCE BY COINOPERATED MACHINES

The "jukebox exemption" of the present law has been the subject of so much discussion and debate over the years that it is tempting to pass over it very briefly here. Since 1947 there have been some 25 days of congressional hearings on bills to remove the present paragraph of section 1(e) providing that 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." As recently as September 10, 1963, the issues were carefully reviewed and the arguments on both sides analyzed in the Statements of Majority and Minority Views of the House Judiciary Committee accompanying its Report on H.R. 7194 (H.R. Rep. No. 733, 88th Cong., 1st sess.). That bill, which was favorably reported by the Committee but failed to reach the floor of Congress, has been reintroduced in the present Congress (H.R. 18), and is also incorporated, with minor technical changes, as section 114 of the 1965 general revision bill:

The proprietor of an establishment in which a copyrighted nondramatic musical work is performed publicly by means of a coin-operated machine is not an infringer unless:

(1) alone or jointly with others he owns the machine or has the power to exercise primary control over it; or

(2) he refuses or fails, promptly after receipt by registered or certified mail of a request by the copyright owner, to make full disclosure of the identity of the person who owns the machine or has power to exercise primary control over it.

The difference now, of course, is that the question of removing the jukebox exemption must be looked at, not simply in terms of the present law, but in terms of all the changes that would be brought about by general revision. It also means that the concerted and un**[60]**yielding opposition of the jukebox operators and manufacturers, which has been successful in staving off any change in one paragraph of the present law, will now be directed at the entire revision effort. 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 performances of his work from the records, whether the performances are broadcast over the air, transmitted over wires, played publicly in a discotheque or theater, 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. After those hearings the House Committee on the Judiciary reported favorably on H.R. 7194, as mentioned above.

Like H.R. 7194, the general revision bill is intended to allow more than a year to elapse after its enactment before the repeal of the jukebox exemption would become effective. Although we believe that this would give the operators and the copyright owners' licensing organizations time enough to negotiate agreements as to the rates and other **[61]**terms of performing licenses, consideration might be given to extending the period or working out other safeguards.

However, as we have already indicated, we believe the jukebox exemption cannot be allowed to remain as it is, and that a solution to this problem must be part of a revised law.

[63] *Chapter 3*

OWNERSHIP AND TRANSFER OF COPYRIGHT

OUTLINE

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§ [65] Chapter 3 OWNERSHIP AND TRANSFER OF COPYRIGHT

A. COPYRIGHT OWNERSHIP

1. INITIAL OWNERSHIP

a. In General

Subsection (a) of section 201 of the bill states the fundamental principles, long established under the common law, that copyright ownership originates in the author, and that two or more authors of a "joint work" are co-owners of the copyright.

b. "Joint Work"

The term "joint work" is defined in section 101 of the bill as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." This definition carries out the recommendation of the 1961 *Report*, which took the position that under the present law the courts have broadened the concept of joint authorship beyond its reasonable limits. Although some sentiment has been expressed for defining "joint work" simply as "a work prepared by two or more authors," we believe that it would be a serious mistake to create a tenancy-in-common situation, with its important legal consequences, from the mere bringing together of two or more authors' works.

Under the definition a work would not be "joint" unless its authors collaborated among themselves or unless each of the authors knew, at the time the work was being written, that his contribution would be integrated as an "inseparable" or "interdependent" part of a "unitary whole." Common examples of "inseparable" parts would be the contributions of co-authors to a short story or novel, while the words and music that comprise a song, or the many contributions that go to make up a motion picture, would be examples of "interdependent parts." The definition of "joint work" should be compared with that of "collective work" which, under section 101, involves the assembly of "a number of contributions, constituting separate and independent works in themselves * * * into a collective whole."

[66]*c. Co-ownership of Copyright*

The only reference to co-ownership in the bill is in subsection (a) of section 201, in the context of initial ownership of joint works. However, as the 1961 *Report* pointed out, co-ownership may also result from a transfer of copyright or from the inheritance of a copyright by two or more heirs. The bill, like the present statute, is silent as to the rights of co-owners to use and authorize the use of a work, thus leaving in effect the rulings of the courts which generally treat co-owners of copyright as tenants-in-common. The intention, as recommended by the *Report*, is to leave undisturbed the decisions holding "that any one co-owner may use or license the use of the work, but that he must account for profits to the other co-owners."

2. WORKS MADE FOR HIRE

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.

The 1961 *Report* recommended, in the case of a work made for hire, that the present rule vesting all rights initially in the employer be retained, but without identifying the employer as the "author." In the course of drafting, however, it

became clear that there are great advantages of convenience and simplicity in assimilating employers to "authors" for all purposes. It was also pointed out that failure to identify the employer as "author" might have unintended consequences as, for example, with respect to the protection of motion pictures in foreign countries. Thus, since the advantages of making the employer an "author" for purposes of the statute outweigh any conceptual difficulties involved in doing so, subsection (b) of section 201 provides 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 for purposes of this title * * *."

The 1961 *Report* noted that the courts "have not generally regarded commissioned works as works 'made for hire,' " and the preliminary draft in 1963 defined a work "made for hire" as "a work prepared by an employee within the scope of the duties of his employment, but not including a work made on special order or commission." The last phrase of this definition was strongly opposed by book publishers, among others, on the ground that there are a great many works which **[67]**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 considerations dictating special treatment of "works made for hire" apply 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.

It is generally conceded that there are many works, such as serious music and choreography, that are written "on special order or commission" but that should not be regarded as "works made for hire." Thus, the problem was how to draw the proper definitional line, and the 1964 bill tried to solve this problem by including in the definition "a work prepared on special order or commission if the parties expressly agree in writing that it shall be considered a work made for hire." 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.

In an effort to reconcile these conflicts the 1965 bill defines a "work made for hire" as:

(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, or as a supplementary work, if the parties expressly agree in writing that the work shall be considered a work made for hire.

The term "supplementary work" is in turn defined as:

* * * a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, illustrating, explaining, commenting upon, or assisting in the use of the other work, such as forewords, introductions, prefaces, pictorial illustrations, maps, charts, tables, editorial notes, tests and answers, bibliographies, appendixes, and indexes.

The thought here is that, in the four special cases specifically mentioned (contributions to collective works and motion pictures, translations, and supplementary works), the work will be considered a "work made for hire," but only if it is in fact "specially ordered or commissioned" for that purpose and if there is an express agreement in writing that the work be considered "made for hire." Other work **[68]**made on special order or commission would not come within the definition.

Section 201(b) also provides that, "unless the parties have expressly agreed otherwise," the "employer or other person for whom the work was prepared * * * owns all of the rights comprised in the copyright." This would mean that the employer and employee could agree to any disposition between them of the exclusive rights under the copyright, but it would not allow them to change the status of a "work made for hire" under the statute. It was argued that there are some cases where a work must be written for hire (for example, because of collective bargaining agreements), but where the parties should be able by agreement to avoid some of the legal consequences of that status, particularly with respect to the length of the copyright term. There is no question that the parties to an employment contract should be able to agree as to the ownership of rights between themselves. However, if the work is in fact "prepared by an

employee within the scope of his employment," we believe that its status as to third persons should be fixed under the statute and should not depend upon a private agreement between the employer and employee.

3. CONTRIBUTIONS TO COLLECTIVE WORKS

The first sentence of section 201(c) of the bill provides: "Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution." This is intended to establish the significant principle that the copyright in a contribution and the copyright in the collective work in which it appears are two different things, and that the usual rule with respect to initial ownership applies to the contribution.

The term "collective work" is defined in section 101 as "a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." As stated in the definition of "compilation" in the same section, a "collective work" is one kind of compilation, but it is a special kind. A "collective work," like any "compilation," must include "a number of contributions," thus ruling out, for example, the words and music of a song, a novel published with a preface, or a musical composition published with a picture on the cover. The contributions must constitute "separate and independent works in themselves," thus excluding, for example, lists of data or a work published with editorial revisions. Finally, the contributions must be assembled into a "collective" as distinguished from a "unitary" whole, thus leaving integrated works such **[69]**as the usual motion picture, sound recording, or dramatico-musical work outside the definition.

Under the present law, the owner of the copyright in a collective work as a whole is also the owner of copyright in the elements of compilation and editing, in any contributions that were made for hire by his employees, and in any contributions in which all of the author's rights have been transferred to him. The bill would leave this situation undisturbed but, as recommended in the 1961 *Report*, would clarify and simplify the extremely confused and unsatisfactory situation now existing with respect to individual contributions that were not made for hire.

In conjunction with the notice provisions of section 403, the second sentence of section 201(c) would preserve the author's copyright in his contribution without requiring a separate notice in his name or an unqualified transfer of all his rights to the publisher. It would also establish a presumption that, in the absence of an express transfer, the author retains all rights except "the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series." Under this presumption, for example, an encyclopedia publisher would be entitled to reprint an article in a revised edition of his encyclopedia, and a magazine publisher would be entitled to reprint a story in a later issue of the same periodical. However, the privleges [sic] under the presumption are not intended to permit revisions in the contribution itself or to allow inclusion of the contribution in anthologies or other entirely different collective works.

4. TRANSFER OF OWNERSHIP

a. In General

The first clause of section 201(d) states the fundamental rule that ownership of all or any part of a copyright is fully transferable from one owner to another by any form of assignment or conveyance or by operation of law, and that, upon the death of an owner, the rights he owned under a copyright are fully transmissible to his legatees or heirs. The statement of this principle is supplemented by the definition of "a transfer of copyright ownership" in section 101: "* * * an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a non-exclusive license." This definition is intended, among other things, to dispel any doubts as to whether mortgages or other hypothecations, discharges of mortgages, and exclusive licenses come within the meaning of a "transfer of copyright ownership."

[70]*b. Divisibility of Copyright*

The 1961 *Report* pointed out the difficulties that have arisen under the present law because of the theory that copyright is indivisible and that a transfer of less than all of the rights under a copyright constitutes a license rather than an assignment. It proposed that copyrights be made divisible under the statute by specifically permitting the separate assignment of "any of the various rights comprised in a copyright." The second clause of section 201(d), which provides

that "[a]ny of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred * * * and owned separately," is intended to carry out this recommendation.

Under section 201(d)(2) any one of the exclusive rights specified in the bill could be subdivided further for purposes of transferring ownership. For example, the right to distribute copies of a novel under section 106(a)(3) could be broken up into the separate rights to publish the work serially in a magazine, to bring out a hard-cover trade book edition, to reprint it in a paperback edition, to include it in an anthology, and so forth; each of these exclusive rights under the copyright could be transferred and owned separately. Note that section 101 provides that the term " '[c]opyright owner,' with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right."

Some concern has been expressed about the disadvantages of "fragmenting" a copyright, primarily the danger that, in an action for copyright infringement brought by one owner of exclusive rights, the rights of other owners would be adversely affected. We believe it would be a mistake to place artificial limitations on the extent to which ownership of exclusive rights can be subdivided; any particular right may be capable of exploitation in a variety of ways, including some now unforeseen. However, we agree that safeguards should also be provided to assure that all of the exclusive rights under a copyright are fairly protected when any one of them is in litigation, and that an alleged infringer will not be subjected to a multiplicity of suits. Section 501(b), which is intended to accomplish these purposes, will be discussed below in connection with copyright infringement and remedies.

B. DISTINCTION BETWEEN OWNERSHIP OF COPYRIGHT AND MATERIAL OBJECT

Section 202 of the bill is intended to restate and clarify a basic concept now embodied in section 27 of the statute: that "[o]wnership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is **[71]**embodied," that transfer of a material object embodying a copyrighted work therefore does not necessarily convey rights under the copyright, and that conversely a transfer of copyright does not by itself convey rights in any material object. The term "material object" covers any "copy" or "phonorecord" in which the copyrighted work has been fixed, including, under section 202 and the definitions of section 101, the original "copy" or "phonorecord" in which the work is first fixed as well as any copies or phonorecords of the work reproduced thereafter.

A point worth noting is that, as the result of the interaction of this section, of the provision of section 204(a) requiring transfers of copyright ownership to be in writing, and of section 301 pre-empting common law copyrights, a much-criticized doctrine of the common law would be changed by the bill. Under decisions such as that in *Pushman v. New York Graphic Society, Inc. , 287 N.Y. 302, 39 N.E. 2d 249 (1942),* an artist or other author is generally presumed to have parted with his common law literary property rights when he sells an original work of art or manuscript, unless he specifically reserves his rights at that time. The bill would reverse this presumption by requiring, in effect, a specific written conveyance of rights in order for a sale of any material object to include a transfer of copyright.

C. TERMINATION OF TRANSFERS AND LICENSES

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 "reversion 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 an relatively poor bargaining position * * * some other provision should be made to permit them to renegotiate their transfers that do not give them a reasonable share of the economic return from their works."

To implement this recommendation the *Report* proposed "that any assignment by an author or his representatives or heirs shall not be effective for more than 20 years from the date of its execution, unless it provides for the continuing payment of royalties based on the uses **[72]**made of the work or the revenue derived from it." This specific proposal met with little favor from either side.

While strongly supporting the principle of reversion, the representatives of authors' organizations opposed any exemption of assignments providing for continuing royalties. They argued that, because most authors are in no position to insist on favorable conditions at the time they transfer their rights, and because the profit potential of a work is generally unknown at that time, the right to renegotiate their assignments is essential to the authors' interests. They

urged, however, that a provision exempting royalty agreements from the right of reversion would render the right illusory, since it could easily be evaded by provisions for nominal royalties.

On the other side, representatives of publishers and motion picture producers, among others, denied that authors generally are in a poor bargaining position, especially since the authors assume none of the risk of loss involved in the exploitation of their works. They argued that a reversion provision would violate the freedom of the parties to contract among themselves without limitations, and they objected particularly to a system under which assignments would automatically terminate by operation of law, thus placing the burden on the publisher, producer, or other user to seek out the author or his heirs in order to continue using the work. They also insisted that the proposed 20-year limitation would often be much too short for the adequate exploitation of a work.

During the course of the protracted discussions on this subject we in the Copyright Office have remained firmly committed to the general principle of reversion as one of the most important elements of the copyright law revision program. At the same time, we have recognized that there are legitimate arguments on both sides of this question, and that a reconciliation between the conflicting interests is necessary and desirable. Rather than clinging stubbornly to any particular formula for implementing the principle of reversion, we have sought actively and persistently to find a basis for agreement that would be a practical benefit to authors and their families without being unfair to publishers, film producers, and other users.

Section 203 represents a compromise which, we hope, will accomplish this purpose. It differs in a number of important respects from the specific recommendations of the 1961 *Report*, but we believe it preserves the basic proposal of the *Report* in a way that would work out in practice. The following summarizes and comments upon the main features of the provision:

1. Scope of the Provision

(a) Under section 203 the termination of a transfer or license would not be automatic. It would require the serving of an advance notice **[73]**within specified time limits and under conditions set out in Copyright Office regulations. The right to effect a termination could not be waived in advance, however.

(b) The right of termination would apply only to *inter vivos* transfers or licenses granted by the author. We believe that the reasons behind the reversion provision do not apply to the author's bequests, and that they are much less compelling in the case of transfers by the author's successors in interest, even those by his widow and children. Confining the right of termination to grants made by the author avoids needless complications and would, we believe, accomplish th real purpose of the provision.

(c) The right of termination would apply to "the exclusive or non-exclusive grant of a transfer or license of copyright or of any right under a copyright." Non-exclusive grants were included in the right on the strength of the argument that, otherwise, there would be nothing to prevent a transferee from avoiding the effect of the provision by compelling the author to grant him a perpetual non-exclusive license along with a statutorily limited transfer of exclusive rights.

(d) The right of termination would not be retroactive. It would apply only to transfers and licenses executed after the new law comes into effect.

(e) Section 203 would have no application in the case of a work made for hire. As explained earlier in this chapter, this would exempt works "prepared by an employee within the scope of his employment," and also certain works prepared on special order or commission.

2. Who Can Terminate a Grant

(a) Section 203(a)(1) provides that a grant can be terminated "by the author who executed it" or, if he is dead, "by his widow (or her widower) and children"; it also specifies that "the children of any dead child of the author succeed to the right of their parent for this purpose." This represents a change from the 1964 bill, which would have given the reversionary rights of a dead author to his "legal representatives, legatees, or heirs." Part of the reason for the change was to provide a clearer, more determinate class of beneficiaries consisting of the author's immediate family, but equally important was the desire to keep the right of reversion out of the author's estate so that it would not be subject to the claims of creditors.

(b) Section 203(a)(3) requires that the notice of termination be "signed by the author or, if he is dead, by all of those entitled to terminate his grant under clause (1) of this subsection, or by their duly authorized agents." In requiring all of the beneficiaries to sign, we recognize that there are problems to be faced, including the danger of one of the beneficiaries being paid to "hold out," and the possibility of an unknown illegitimate child turning up later. But the alterna**[74]**tives also seem to have serious disadvantages. If termination by one member of the class were to bind all of the other members against their will, there would be real danger of unfairness and abuse. On the other hand, if termination by one member did not bind the other members, the result would be the divided ownership and loss of exclusivity that bothers the owners of "split renewals" today. A requirement for all beneficiaries to join in a termination does have advantages of simplicity and certainty, but we have been persuaded that some solution should be sought to take care of the special problems of "holdouts" and unknown heirs. Such a solution will require careful working out, but one suggestion--that termination by a majority of the beneficiaries be permitted under certain conditions--deserves further consideration. Similarly, further thought should be given to the question of whether, in a case where joint authors of a work have signed a transfer or license jointly, they (or their beneficiaries) should all be required to sign the notice of termination. This would probably be the effect of the present bill, although its language on the point could be clearer.

(c) Section 101 defines the author's "widow" or "widower" as "the author's surviving spouse under the law of his domicile at the time of his death, whether or not the spouse has later remarried," and defines a person's "children" as "his immediate offspring, whether legitimate or not, and any children legally adopted by him." Illegitimate children are included in the definition in an effort to avoid the uncertainties, confusion, and possible injustices that would arise if the question were left entirely to a determination under the various State laws.

3. When a Grant Can Be Terminated

(a) In understanding the requirements for termination under the bill, it is important to bear in mind the distinction between the date on which the termination becomes effective and the earlier date on which the advance notice of the termination is served. With respect to the former, section 203(a)(2) contains two provisions: first, that termination generally "may be effected at any time during a period of five years beginning at the end of 35 years from the date of execution of the grant"; and second, as an exception, that "if the grant covers the right of first publication of the work, the period begins at the end of 35 years from the date of first publication of the work or at the end of 40 years from the date of execution of the grant, whichever term ends earlier." Take, for example, a case in which a book-publication contract is signed on July 1, 1970 while the book is in the process of being written, and in which publication does not take place until May 1, 1976. Since the grant covers the right of first publication, the 5-year period during which the contract could be terminated would begin on July 1, 2010 (40 years from the date of execution) rather than on July 1, 2005 **[75]**(35 years from the date of execution) or on May 1, 2011 (35 years from the date of publication).

(b) The basic 35-year figure represents a compromise which, we believe, is short enough to be of benefit to authors and long enough to avoid unfairness to publishers and other users. The book publishers, among others, have argued that in many cases a straight period of 35 years from the execution of the grant would be illusory, since a number of publication contracts are signed before the work is written, and it may be years before it is completed and published. For this reason we have added the alternative period of 35 years from publication or 40 years from execution, thus, in effect, adding up to 5 years to the operative period in cases where the contract is signed long before publication.

(c) The effective date of termination must fall within the 5 years following the end of the specified 35- or 40-year period, but the "advance notice" of termination must be served earlier: "not less than two or more than ten years" before the effective date. In the example given above, the end of the 40-year period would fall on July 1, 2010; thus the termination could be made effective at any time between July 1, 2010 and July 1, 2015. Assuming in the example that the effective date chosen is the earliest possible--July 1, 2010--the advance notice would have to be filed after July 1, 2000 and before July 1, 2008. The thought behind the 2-to-10 year limitation on the time for serving a notice was to establish a definite period for filing the notice toward the end of the 35- or 40-year term, thus avoiding earlier, indiscriminate terminations, and to provide a fair period of advance notice to the grantee that his rights are to be terminated.

4. Effect of Termination

(a) Since termination is not automatic, all rights under the existing transfer or license continue unless they are effectively terminated during the 5 years allowed. Section 203(b)(4) also makes clear that termination affects only those

rights arising under the U.S. copyright statute and has no effect, for example, on foreign rights that may be covered by the same contract.

(b) Section 203(b) provides that, with certain exceptions, "all rights under this title that were covered by the terminated grant revert," on the effective date of termination, "to the author or, if he is dead, to all of those entitled to terminate his grant under clause (1) of subsection (a)." Clause (3) of subsection (b) specifies that the "future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served * * *," and goes on to provide for the division of reverted rights among the author's widow (or widower), children, and grandchildren.

[76](c) Section 203(b)(1) contains a very important limitation on the right of reversion:

A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

For example, if a novelist transferred to a film company the exclusive rights to make, distribute, and perform a motion picture version of his novel, termination of his transfer would not prevent the company from continuing to distribute and perform its film, but the company would no longer have any right to make another motion picture based on the novel. The term "derivative work," under the definition in section 101, includes works such as translations, arrangements, and dramatizations, in which a single pre-existing work is "recast, transformed, or adapted"; it also includes works, such as motion pictures and sound recordings, possibly representing the aggregate of a number of pre-existing works some of which may be "derivative works" themselves.

(d) There is nothing in section 203 to prevent the parties to a transfer or license from voluntarily agreeing between themselves to terminate an existing agreement and to negotiate another one, thus starting another 35-year period running. However, to avoid trafficking in future interests by third parties, which would deprive the original grantee of the opportunity to negotiate a further transfer, section 203(b)(2) provides that a "further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination." There is an exception to this rule which is intended to give the original grantee (or his successor) the equivalent of a right of "first refusal": "an agreement for such a further grant may be made between the persons effecting the termination and the original grantee or his successor in title, after the notice of termination has been served as provided by clause (3) of subsection (a)."

D. EXECUTION OF TRANSFERS

Section 204, by retaining the present requirement that transfers of copyright ownership be in writing and signed by the owner, and by broadening and liberalizing the provisions concerning acknowledgement of the execution of transfers, carries out two of the recommendations of the 1961 *Report*. The section also provides that a transfer may be executed by either "the owner of the rights conveyed" or "his duly authorized agent," and it conditions the validity of a transfer **[77]**upon the existence of "an instrument of conveyance" or, alternatively, of "a note or memorandum of the transfer."

This section of the bill attracted little attention in the course of our discussions, but its practical consequences may be substantial. With the bringing under the statute of all unpublished works now protected by the common law, the requirement that all transfers of copyright be in writing will have a much broader application.

E. RECORDATION OF TRANSFERS

In accordance with the recommendations of the *Report*, section 205(a) of the bill provides for the recordation in the Copyright Office of "[a]ny transfer of copyright ownership or other document pertaining to a copyright," and requires that the document filed for recordation bear the "actual signature of the person who executed it" or that it be "accompanied by a sworn or official certification that it is a true copy * * *." Subsection (c) of section 205 implements another recommendation of the *Report* by providing that recordation of a document constitutes constructive notice of the facts it states only if "the document, or material attached to it, specifically identifies the work to which it pertains so that, after the document is indexed by the Register of Copyrights, it would be revealed by a reasonable search under the title or registration number of the work; * * *."

The bill adds, as another condition for according a recorded document the effect of constructive notice, that registration for the work has been made. This would establish the basis of the copyright covered by the document, and would enable persons searching the records to trace title to the copyright from the original owner.

Section 205(d) would require a transferee to record his instrument of transfer as a condition to bringing an infringement suit, and thereby to place on public record the basis on which he claims ownership. The subsection also makes clear that a delay in making recordation until after an infringement has occurred will not affect the transferee's rights or remedies against the infringer.

The 1961 *Report* recommended that:

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

This recommendation, which modifies the present law in some respects, has been adopted in section 205(e) with two relatively minor changes:

(a) The 1- and 3-month grace periods were criticized as too short to be practical and have been increased to 2 and 4 months; and

[78](b) Since the courts have held that "valuable consideration" in this context does not include an agreement to pay royalties, the concept has been enlarged to include a transfer taken for "valuable consideration or on the basis of a binding promise to pay royalties."

Finally, despite some arguments to the contrary, section 205(f) carries out the *Report*'s proposal with respect to the priority to be given non-exclusive licenses. Whether recorded or not, a non-exclusive license taken without notice of a prior unrecorded transfer would be valid as against the transferee, and an unrecorded non-exclusive license would be valid as against a subsequent transfer.

[79] *Chapter 4*

FEDERAL PRE-EMPTION AND DURATION OF COPYRIGHT

OUTLINE

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§ [81] Chapter 4 FEDERAL PRE-EMPTION AND DURATION OF COPYRIGHT

A. FEDERAL PRE-EMPTION OF RIGHTS EQUIVALENT TO COPYRIGHT

1. SINGLE FEDERAL SYSTEM

Perhaps the most fundamental issue underlying the entire revision program is whether it should retain the present dual system of "common law copyright" for unpublished works and statutory copyright for published works, or whether it should adopt a single system of Federal statutory copyright from creation. The present law, like every previous U.S. copyright law, makes "publication" the dividing line between common law protection under State law and statutory protection under the Federal copyright law. In general a work has been published if "copies" have been made unconditionally available to the public at large, and in this country a "published" work must either be protected by Federal statutory copyright or else it is in the public domain.

At one time "publication" furnished a practical boundary line between common law and statutory protection, but during the past half century is has become less and less satisfactory for this purpose. Today, to take only one example, a work could be thrown into the public domain or subjected to the limitations of the Federal copyright statute if one copy of it is sold, whereas it could continue to be protected under common law copyright, perpetually and without limitations, if it is performed before 50 million people on television. The concept of "publication" has not only been outstripped by the revolution in communications during the past 50 years, but its meaning has also become increasingly obscure. The word is used in several different senses in the present statute, but is left undefined. The courts have evolved different concepts of "limited" and "general" publication and of "investitive" and "divestitive" publication, all with different

consequences. Whether "publication" results from the sale of phonograph records, the exhibition of art works, or the deposit of copies in a public office, is unclear. The present situation is chaotic, and it is becoming worse all the time.

The 1961 *Report*, while recognizing how unsatisfactory the present concept of "publication" is, recommended broadening and clari**[82]**fying it rather than abandoning it as a dividing line between forms of protection. Instead of "publication" the *Report* proposed to substitute a concept of "public dissemination" which would have included public performance and the public distribution of records as well as the distribution of visual copies. The *Report* suggested that common law literary property rights be retained for works that had not been "publicly disseminated," primarily on two grounds:

(1) Most undisseminated works are of a private nature, and to throw them into the public domain after a fixed statutory period could result either in their destruction or in unwarranted invasions of privacy; and

(2) Since undisseminated works are primarily "of a private and local concern," it is more appropriate to leave their protection to State law and the State courts.

The *Report* proposed that, unlike the present law, the securing of statutory copyright by voluntary registration be permitted for all classes of undisseminated works, and also contained special recommendations for dealing with manuscripts in libraries and other archival institutions.

Very strong objections were lodged against a dual common law-statutory copyright system based on "public dissemination" as outlined in the *Report*. Although there was some support for retaining common law copyright, the overwhelming sentiment was definitely in favor of a single Federal copyright system with protection starting upon creation and with a limited term for all works, published or unpublished, disseminated or undisseminated. The 3 principal advantages of a uniform national system, which had also been recognized by the *Report*, can be summarized as follows:

(1) A single Federal system would clear up the confusion, uncertainty, and capriciousness that results under the present law. It was urged that the current imbroglio of "publication" would be made considerably worse by superimposing the new concept of "public dissemination" upon it, and that the difficulties of proof resulting from the bewildering vagueness of the present law would be increased under the proposal. Strong arguments were made in favor of adopting a system that would be compatible with the technological developments that have taken place in the various methods of making authors' works available to the public.

(2) A single Federal system would carry forward the basic purposes of the Constitution which, as Madison's famous statement in *The Federalist* shows, was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States. Today, when works can be disseminated instantaneously throughout the world, this uniformity is not only a positive advantage with respect to the use of works on a national scale, but it also has tremendous importance when it comes to international dealings. A single national system of copyright from the creation of a work is now universal in foreign countries.

(3) The adoption of a single Federal system would carry forward the "limited times" provision of the Constitution which has become distorted under the historic concept of "publication." It would fit much more con**[83]**sistently with the copyright term based on the life of the author than would a dual system, and would also aid scholarship and the public's "right to know" by making unpublished, undisseminated manuscripts available for use after a reasonable period.

In addition to these policy arguments there was very widespread opposition to the concept of "public dissemination" on both technical and practical grounds. It was pointed out that under the proposed definition an isolated public performance might constitute "public dissemination" with important consequences as to the length and scope of protection, and that this could present insuperable problems of proof years later. The difficulties arising from improvisatory or impromptu performances, from revisions during rehearsals, and from the development of successive versions of a work, were emphasized, and the confusing use of a new term, "public dissemination" (which was required by a narrower definition of "publication" in the Universal Copyright Convention), was forcefully criticized. The proposals concerning the deposit of manuscripts in libraries were also attacked as overcomplicated and rigid, and as possibly discouraging the preservation of manuscript material of a personal nature.

In the light of these arguments we came to the conclusion that the criticisms of our proposals were generally well founded, and that the advantages of simplicity and uniformity in a single Federal system outweigh the advantages of

preserving common law copyright for undisseminated works. Section 301 of the bill therefore adopts the approach of extending statutory protection to a work as soon as it is "created"--that is, under the definition in section 101, as soon as "it is fixed in a copy or phonorecord for the first time." The statute would apply to all works created after its effective date, whether or not they are ever published or disseminated. Moreover, under section 303, works created before the effective date of the statute and still under common law protection would be governed by the statute from then on, and would be guaranteed a minimum period of statutory copyright.

2. PRE-EMPTION OF STATE LAW

The statute is intended to pre-empt and abolish any rights under State law (whether common law or statutory) that are equivalent to copyright and that extend to works coming within the scope of the copyright law. The purpose is to state this principle as clearly and as explicitly as possible in order to avoid any misunderstanding as to Congress's intention to act pre-emptively, and in order to prevent the development of any hazy borderland areas between State and Federal protection. Section 301(a) provides:

On and after January 1, 1967, all rights in the nature of copyright in works that come within the subject matter of copyright as specified by sections 102 **[84]**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 copyright, literary property rights, or any equivalent legal or equitable right in any such work under the common law or statutes of any State.

With respect to any work of a kind covered by the statute, "all rights in the nature of copyright"--that is, "copyright, literary property rights, and any equivalent legal or equitable right"--are governed exclusively by the Federal copyright law, and all corresponding State laws are pre-empted. Thus, whenever a work was created, and whether it is published or unpublished, disseminated or undisseminated, in the public domain or under Federal statutory protection, the States cannot offer it protection equivalent to copyright. And, under section 1338 of title 28 of the United States Code, all actions concerning rights under the Federal copyright law would come within the exclusive jurisdiction of the Federal courts.

The scope of the pre-emption extends to "works that come within the subject matter of copyright as specified by sections 102 and 103 * * *." The use of the phrase "* * * come within the subject matter" rather than a phrase such as "subject to protection" is intended to rule out any argument that a work clearly falling within one of the categories listed in sections 102 and 103 is still entitled to common law copyright protection because it is too minimal or lacking in originality to qualify for protection under the statute. However, since "the subject matter of copyright as specified" in those sections covers only "works of authorship fixed in any tangible medium of expression, now known or later developed * * *" the pre-emptive effect of section 301 is not intended to extend to unfixed works such as, for example, a piece of choreography that has never been notated or filmed, an impromptu speech, or a musical composition that has been performed from memory but never written down or recorded. These would continue to be protected indefinitely at common law until fixed in some form "from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."

The pre-emption is intended to be complete with respect to any work coming within the scope of the bill, even though it would not be given as broad protection as might otherwise be available to it under the common law. For example, since sound recordings are now to be made copyrightable works, it would not be possible to afford them any rights of public performance under State law even though they are denied these rights under section 112 of the statute.

Subsection (b) of section 301 is intended to make clear that, consistent with the 1964 Supreme Court decisions in *Sears, Roebuck & Co. v. Stiffel Co. , 376 U.S. 225,* and *Compco Corp. v. Day-Brite Lighting, Inc. , 376 U.S. 234,* the pre-emption does not extend to causes of **[85]**action or unpublished subject matter outside the scope of the new Federal copyright statute. It provides that "[n]othing in this title annuls or limits any rights or remedies under the law of any State with respect to:

(1) unpublished material that does not come within the subject matter of copyright as specified in sections 102 and 103;

(2) any cause of action arising from undertakings commenced before January 1, 1967;

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

The word "unpublished" in clause (1) of section 301(b) deserves special note. In the United States, under the doctrine established by the Supreme Court in *Wheaton v. Peters , 33 U.S. (8 Pet.) 591 (1834),* common law copyright protection has consistently been held to terminate upon publication of the work. The word "unpublished" was therefore added to this clause to avoid any implication that common law protection equivalent to copyright, for material not coming within the subject matter of the statute, might continue after its publication. What constitutes "publication" for this purpose, which is now a matter of some uncertainty, would be governed by the definition of that term in the statute.

While the third clause of section 301(b) is not intended to represent an exhaustive listing, its purpose is to illustrate rights and remedies that are different in nature from copyright and that are preserved under State common law or statute. Some examples might include, depending upon the particular circumstances in the case:

The unauthorized exploitation of a person's name or photograph for commercial advertising;

The unauthorized use of the title of a work in such a way as to constitute passing off or fraud;

The unauthorized disclosure and exploitation of a trade secret.

The language of clause (3) has been worded very carefully in an effort to avoid saying too much or too little. In particular, we have resisted use of the ambiguous term "unfair competition," which in recent years has gone through some wide shifts in meaning. In some States it was greatly broadened to become, under the name "misappropriation," the virtual equivalent of a copyright; and it has been cut back, by the Supreme Court's decision in *Sears, Roebuck & Co. v. Stiffel Co.* , to the traditional concept of "passing off." There is no intention to pre-empt causes of action for unfair competition involving false labeling and fraudulent representation but, to the extent that a right against "unfair competition" is merely copyright by another name, section 301 is intended to abolish it as a common law cause of action.

[86]3. MANUSCRIPTS

The problem of how to deal with manuscripts and other unpublished works deposited in libraries and similar institutions, which was dealt with specially in the *Report*, drops out under the single Federal system proposed by the bill. Unpublished works, including letters, photographs, diaries, memoranda, home movies, tape recordings, and other personal material, would be protected by the statute under section 301, and would go into the public domain when the statutory copyright expires at the end of the term provided in sections 302 or 303. We believe the terms provided in those sections are long enough to avoid any questions of invasion of privacy.

4. STATE REGULATION OF TRADE IN COPYRIGHTS

It has been suggested that the language of section 301 be broadened to include a prohibition against the enactment of State legislation that, under the guise of regulating combinations (such as performing rights societies) which are claimed to be in restraint of trade, impose added registration requirements or other restrictions on the rights accorded by the Federal copyright law. There appears to be no question, on the one hand, of the general power of a State to regulate activities in restraint of trade within its borders in the absence of pre-emptive Federal regulation, or, on the other hand, of its lack of power to impinge directly upon the rights granted by a Federal statute. However, we believe that section 301 goes as far as it should in stating the limits of State power in this area, and that any further definition of these limits should be left to separate legislation or the courts.

B. DURATION OF COPYRIGHT

1. IN GENERAL

To many people, especially authors and their representatives, the duration of copyright represents the most important single issue in copyright law revision. The *Register's Report* in 1961 recognized the urgency of this problem and recommended that the term be lengthened, although there was almost unanimous disagreement with its specific proposals for doing so. There is no question that the differences between those proposals and the provisions on the length of the copyright term now in the 1965 bill are far-reaching and significant, but we believe that they represent changes in approach and not in result. The Copyright Office has never doubted the need to lengthen the term of copyright, and the only question we have had is how to do it most effectively.

[87]One of the most frequent criticisms of the *Report*'s recommendations on duration was directed to their "appalling complexity," which was partly the result of the difficulties of conforming a straight-term copyright system

with our treaty obligations under the Universal Copyright Convention. There seems little point now in outlining those recommendations in detail or in reviewing the specific arguments for and against them. It is enough to say that, in general, the *Report* recommended lengthening the present maximum term of 56 years from publication to a total term of 76 years from "public dissemination." It would have kept the present initial term of 28 years and lengthened the second period to 48 years, retaining the requirement for renewal as a basis for adjusting the term but greatly liberalizing and simplifying the renewal requirements.

There was practically no support for these recommendations, and the overwhelming (though not unanimous) sentiment favored a copyright term based on the author's life plus 50 years. The arguments in support of a life-plus-50 system can be summarized as follows:

(1) The present term not only needs to be lengthened to take account of the substantial increase in life expectancy since 1909, but as a matter of fairness it should insure that an author during his lifetime, and his dependents after his death, get the economic benefits available from his works. Within limits a longer term is no disadvantage to the public, which pays the same for copyrighted works and works in the public domain: in fact, the absence of copyright protection can actually restrain dissemination in some cases, since an entrepreneur might not be able to risk an investment in a work unless he can be assured of exclusive rights. The fact that less than 15 percent of copyrighted works are renewed is not illuminating, since the remaining 85 percent primarily represent ephemera which no one is interested in using in any case.

(2) A copyright term of the life of the author and 50 years after his death has been adopted in the very large majority of foreign countries outside the Communist bloc. The ease and rapidity with which copyrighted materials can be transmitted across national boundaries are growing tremendously, and it is therefore increasingly important to have the duration of U.S. copyright conform to that prevalent abroad. At present American authors are often protected longer in foreign countries than they are in their own, leading to understandable resentment and occasional threats of retaliation. In addition to the advantages of certainty and simplicity in business dealings, a change in the basis of the copyright term could not fail to improve our international copyright relations and lead to closer ties that would directly benefit American and foreign authors alike.

(3) A life-plus-50 term would largely avoid the confusion and uncertainties involved in vague concepts such as "publication" or "public dissemination," and would provide a much simpler, more clearly understood system for computing the term. Since the copyrights in all of an author's works would expire at once there would generally be only one date to worry about, and an elderly author would not be put in the unfair position of competing with his own early works, or those of his contemporaries, that have fallen into the public domain. In the case of a work successively revised by the same author, **[88]**a single expiration date would avoid questions of what parts of a revised edition were published when. The problems of determining when an obscure author died could be solved by maintaining a registry of death dates in the Copyright Office and by establishing a system of presumptions.

(4) The present renewal provision is extremely burdensome, not only as a needless formality and as an expense, but also as the cause of inadvertent and unjust loss of copyright in a number of cases. Under a term of life-plus-50 years the renewal device would be inappropriate and unnecessary.

In general we agree with these arguments and we find the second one--the effect on our international relations of adopting of life-plus term--of compelling importance. The 1965 bill therefore adopts a basic term of copyright beginning upon the creation of a work and enduring for the life of its author and for 50 years after his death.

2. WORKS CREATED AFTER NEW LAW'S EFFECTIVE DATE

a. In General

Section 302(a) sets forth the basic term for "a work created on or after January 1, 1967," which is the date used throughout the bill to represent the date when the revised statute comes into effect. It provides that copyright in such a work "subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 50 years after his death." Section 101 makes clear that "[a] work is 'created' when it is fixed in a copy or phonorecord for the first time"; before it is fixed (as in the case, for example, of an impromptu speech), the work is subject to common law protection, but thereafter it is automatically protected by the statute and subject to its requirements.

Under some foreign laws the life-plus-50 term applies only to works published during their authors' lifetimes, and posthumous works are accorded a special copyright term based on the date of their first publication. The result of this, much like our present common law copyright system, is to give perpetual rights to works that remain unpublished. We believe that the "limited times" requirement of the Constitution prohibits our adoption of any provision that gives statutory protection to unpublished works without a time limit, and we can see no need to deal with "posthumous works" as a special class for purposes of computing the term. Thus, as a general rule, the life-plus-50 terms would apply equally to unpublished works, to works published during the author's life, and to works published posthumously.

b. Joint Works

Section 302(b) provides, in the case of "a joint work prepared by two or more authors who did not work for hire," that "the copyright endures for a term consisting of the life of the second of the authors **[89]**to die and fifty years after his death." This is in contrast to the provisions in many foreign laws which measure the term from the death of the last survivor of a group of joint authors, no matter how many of them there are. The result under these laws is to extend the copyright term in all parts of a joint work beyond the limits that would normally apply to some parts if separated: for example, a joint work written in 1970, in part by an author who died in 1980 and in part by a younger author who dies in 2035, would be protected in its entirety until 2085.

It has been argued that, if this result is provided for, an old author could be induced to set up dubious "collaboration" arrangements with a much younger person simply in order to prolong his copyrights. Although this may be true, we believe it would more often be unfair to the survivor of two joint authors, and to his family, if the term were computed from the date the first author died.

One reason for not adopting the rule in effect in other countries, that the death of the last survivor is the base point for computing the term, arises from the differing concepts of "joint works" under U.S. law and under the laws of most foreign countries. Even under the bill's definition of "joint work" (which, as pointed out in chapter 3, is more limited than that implied in some court decisions), the concept is much broader than that adopted in other countries where a work having separable parts is not a joint work: to take one famous example, the works of Gilbert and Sullivan were not considered "joint" under foreign laws. In consequence, many "joint works" under the bill would not be considered such in other countries; and this would be true especially of works, such as musical plays, of which three or more authors write parts.

That was not, however, our basic reason for rejecting the last-to-die rule. Much more important in our view are the practical problems that would face users many years from now: not only would they have to determine the identity of all of the authors of "joint work," but they would have to make sure that all of them had been dead for at least 50 years. Our thought in ending the term 50 years after the death of the second author was to enable a user to proceed when he has determined that any two of the authors had died more than 50 years earlier.

Under the bill a "joint work" written by "two or more authors who did not work for hire" is covered by the term provided in section 302(b), even if other contributions to the "joint work" were "made for hire." However, the bill does not explicitly cover the case where a "joint work" was written by two persons, one of whom was an employee for hire. In this situation the provisions of subsection (b) would not apply; the term would be based on subsection (a) (the life **[90]**of the individual author plus 50 years) or on subsection (c) (75 years from publication or 100 years from creation), whichever is longer. Although this situation is by no means rare, it seemed unnecessary to burden the bill with a special provision dealing with it.

c. Anonymous Works, Pseudonymous Works, and Works Made for Hire

A term based on the author's death cannot be applied when, as in the case of a work made for hire, the "author" is not an individual, or when the identity of the individual author is not revealed. Accordingly, section 302(c) of the bill provides that, in the case of an "anonymous work, pseudonymous work, or a work made for hire, the copyright endures for a term of 75 years from the year of its first publication, or a term of 100 years from the year of its creation, whichever expires first." Section 101 defines an "anonymous work" as "a work on the copies or phonorecords of which no natural person is identified as author," and a "pseudonymous work" as "a work on the copies or phonorecords of which the author is identified under a fictitious name." If, under section 302(c), "the identity of one or more of the authors of an anonymous or pseudonymous work is revealed in the registration or other public records of the Copyright Office" before expiration of the term specified in that subsection, the copyright will endure for the ordinary "term

specified in subsections (a) or (b), based on the life of the author or authors whose identity has been revealed." Thus, although a work written under a wellknown pseudonym would still be a "pseudonymous work" under the definition, it would not be governed by the 75/100-year term provisions of subsection (c) as long as any of the public records of the Copyright Office reveal the author's identity.

The term for anonymous and pseudonymous works and for works made for hire is set forth in the alternative: either 75 years from publication or 100 years from creation, whichever is shorter. Under subsection (c), for example, copyright in a work created in 1970 and published in 1980 would expire in 2055 (75 years from publication), whereas copyright in a work created in 1970 and published after 2005 (or never published) would expire in 2070 (100 years from creation).

Establishment of an alternative to "publication" as the base point for computing the term in these cases is not only desirable in order to set some limit on exclusive rights in unpublished manuscript material, but it is also required by the "limited times" provision of the Constitution. The only alternative base point that can serve for this purpose is "creation," which section 101 defines as the act of fixing the work "in a copy or phonorecord for the first time." While it is true enough that proof of the precise time of an event such as "creation," which is usually private in nature, is likely to involve problems, it is important **[91]**to remember that the question would arise only where a work has remained unpublished for more than 25 years after it was created. The primary importance of "creation" would probably be to scholars who, upward of a century later, need to determine a work's copyright status; their task would not be to establish the exact date of creation, but simply to determine whether the work had been created more than 100 years earlier.

The definition of "creation" also comes to grips with the problem of works that take some time to complete or that go through various revisions or versions. It provides that, "where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work." This means that a potential user, wishing to establish whether a particular work (or part of a work) is still under copyright or is in the public domain, need only look to the version he wishes to use, and need not concern himself as to whether that version is complete or may have been revised later.

Although the definition of "publication" in section 101 is significant not only with respect to the copyright term but also in connection with a number other provisions of the bill, it no longer has the paramount importance that attaches to the concept of "publication" under the present law. The term is defined as "the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending." In other words, the placing of one or more tangible objects embodying a work in the hands of "the public" constitutes "publication," regardless of whether the objects are sold, given away, lent, or distributed under some sort of rental or lease arrangement. "The public" in this context is intended, very generally, to refer to persons who are under no express or implied restrictions with respect to the disclosure of a work's contents, but we believe that the situations here are so variable that this particular concept of "the public" is better left undefined in the statute. On the other hand, the definition is intended to make clear that the distribution of phonorecords is a "publication" under the statute, and that the performance or exhibition of a work is not.

Some questions have been raised concerning the length of the 75- or 100-year periods provided in section 302(c), especially when compared with the usual period of 50 years from publication provided for anonymous and pseudonymous works under the Berne Convention and many foreign laws. This contrast becomes much less striking when one realizes that, as under our common law, foreign laws usually place no limitation on the duration of protection up to the time of publication, and that the 50-year period does not apply to works made for hire unless they also happen to be anonymous or pseudonymous. **[92]**Something like 40 percent of copyrighted works today are "made for hire," and we believe that they are as worthy of protection as works written by authors as an independent enterprise. Often whether or not a work is "made for hire" turns entirely on the particular way a contract is worded. Our research, as outlined in the 1961 *Report*, disclosed that, on the average, a life-plus-50 term is roughly equivalent to a straight term of 75 years from publication, and we believe that the copyright term of works made for hire should approximate that of other works.

The alternative term of 100 years from creation for unpublished works is, of course, much more limited than the perpetual protection now available under the common law. We believe that it is long enough to insure against unjustified invasions of privacy and that, in conjunction with the 75-year term from publication, it is not so long as to discourage the publication of a work. Although the Universal Copyright Convention is unclear with respect to unpublished works where an individual person's life cannot be used in computing the term, we also believe that a provision cutting off protection if a work has not been published within 100 years amply fulfills our treaty obligations in this respect.

d. Records and Presumption as to Author's Death

Subsections (d) and (e) of section 302 are aimed at furnishing an answer to the most serious argument against a copyright term based on the life of the author: the difficulty, and in a number of cases the impossibility, of determining the date of death for lesser-known authors. Subsection (d) sets out a procedure under which statements of the date of an author's death, or statements "that the author is still living on a particular date," could be recorded in the Copyright Office, and also requires the Register of Copyrights to maintain "current records of information relating to the death of authors of copyrighted works * * *." Subsection (e) provides that, after 75 years from first publication or 100 years from creation, whichever is earlier, anyone "who obtains from the Copyright Office a certified report that the records provided by subsection (d) disclose nothing to indicate that the author of the work is living, or died less than 50 years before, is entitled to the benefits of a presumption that the author has been dead for at least 50 years." Taken together we believe that these two subsections would largely surmount the practical problems arising from a life-plus-50 term.

3. PRE-EXISTING WORKS UNDER COMMON LAW PROTECTION

Consistent with the preemption of common law rights and the new copyright term based on the life of the author, section 303 provides **[93]**that "a work created before January 1, 1967, but not theretofore in the public domain or copyrighted"--that is, all existing works under common law protection on December 31, 1966--will be protected instead by statutory copyright beginning on the effective date of the new law (January 1, 1967) and enduring "for the term provided by section 302." For example, an unpublished work written in 1940 whose author dies in 1975 would be protected under the statute from 1967 through 2025, 50 years after his death.

There is, of course, a constitutional problem involved in substituting statutory copyright, which must necessarily be limited in time, for perpetual common law rights in unpublished works that are already in existence. We believe that it is within the power of Congress under the Constitution to cut off existing common law rights in a work as long as it accords the work protection under the statute for a reasonable time. In the case of unpublished works created in recent years the terms provided in section 302 will be long enough for this purpose, but for many other works the applicable terms under section 302 will already have expired or will be nearing expiration when the new statute becomes effective. Under the present law these works can acquire a 56-year statutory copyright at any time by publication (or in some cases by registration, and it would be unfair if not unconstitutional to throw them all into the public domain when the statute comes into effect.

To meet this problem, section 303 assures that statutory copyright in a work previously under common law protection will in any event endure until December 31, 1990; and, to encourage publication, the minimum term would be extended for 25 years more, until December 31, 2015, if the work is published before the end of 1990. For example, if the author of an unpublished, uncopyrighted work died in 1935, the statutory copyright would not expire in 1985; it would last at least until 1990 or (if the work is published between 1967 and 1990) until 2015.

4. SUBSISTING COPYRIGHTS

a. In General

On the effective date of the new law there will be two kinds of subsisting copyrights: those still in their first term and those that have already been renewed. We believe that in both cases the duration of copyright should be extended, but in such a way as will not destroy existing renewal expectancies or hopelessly confuse the length of the term in individual cases. To accomplish these purposes the bill deals separately with first-term and renewal copyrights in subsections (a) and (b) of section 304. Subsection (c) concerns the termination of transfers and licenses covering the extended term provided under both subsections (a) and (b).

[94]*b. Copyrights in Their First Term*

As pointed out in the 1961 *Report*, works in their first term are now subject to specific renewal expectancies, many of which have been bargained for and sold. We believe it would be unjust to destroy these expectancies, whether transferred or not, and section 304(a) therefore follows the *Report*'s recommendation that the present renewal provision be preserved for these works.

Although this means perpetuating the complexities, uncertainties, and ambiguities of the renewal section for another 28 years, there has been general acceptance and support for this proposal. Most people have recognized that any attempt to improve the language now in effect would compound the present confusion, and that it would be better to retain the present language which at least has a background of many years of interpretation and practice. Therefore, aside from a change in the length of the renewal term and some very minor changes in terminology which are without substantive significance, the provisions of sections 24 and 25 of the present Title 17 of the United States Code have been made to govern the "duration of any copyright, the first term of which is subsisting on January 1, 1967, * * *."

The *Report* recommended increasing the period during which renewal registration could be made from 1 to 5 years, and that recommendation was adopted in the preliminary draft of 1963 and the bill introduced in 1964. It was pointed out, however, that this would be likely to create serious problems in practice: it is now unclear when a renewal "vests" and, since there would be many more changes in the classes of renewal beneficiaries (through death, birth, marriage, divorce, etc.) during a 5-year period, the uncertainty would be greatly increased. The 1965 bill therefore retains the 1-year period for renewal registration provided in the present law.

The bill would add 19 years to the present 28-year renewal term, thus providing a renewal lasting 47 years and a total copyright term of 75 years. As already noted, 75 years is roughly the equivalent of a life-plus-50 term, and is consistent with the other periods provided in section 302.

c. Copyrights in Their Renewal Term

Subsisting copyrights that have already been renewed would likewise be extended, under section 304(b), to run for a total of 75 years, the same term provided in section 304(a) for first-term copyrights that are renewed under the new law. Note that in those cases where the renewal term has already been extended (to December 31, 1965 under the act of Sept. 19, 1962, Public Law 87-668, 76 Stat. 555, and possibly to a later date under H.J. Res. 431, introduced in the present Congress), the additional extension of the renewal term will be less than **[95]**19 years, but the total period of protection will be 75 years, the same as for other copyrights extended under subsection (b).

If a longer term is to be given to subsisting copyrights that are renewed, the basic question is whether to make it a mere extension of years or to change the entire basis of computing the term by adopting the life-plus term provisions of section 302. Merely adding years to the term in these cases has great advantages of simplicity and certainty and, on the average, it is equivalent to the terms provided elsewhere in the bill. To adopt a life-plus term for these works, with the exceptions and special conditions that would have to accompany it, would be, as one commentator said, "unspeakably confusing and complicated." It would require detailed and intricate statutory provisions, would open the length of a great number of existing copyrights to question, and would ultimately serve little purpose.

d. Termination of Grants Covering Extended Term

Whether now in their first or renewal terms, subsisting copyrights would be extended from 56 to 75 years under section 304. An important question arises as to whether, in a case where their rights have already been transferred, the statute should give the author or his dependents an opportunity to benefit from the extension. The reasons for allowing a termination of transfers and licenses, as under section 203, are particularly strong in the case of the extended term: the extension is a new right that Congress is creating for the first time, and the stated objective of the constitutional clause is to secure copyright protection to authors.

Section 304(c) closely parallels section 203 by providing an opportunity to terminate an "exclusive or nonexclusive grant of a transfer or license of the renewal copyright or of any right under it, executed before January 1, 1957, * * *" under the same conditions and with the same limitations provided in the earlier section. The 5-year period during which the termination can be made effective is to start "at the end of 56 years from the date copyright was originally secured."n*

However, instead of being limited to transfers executed by the author, the right of termination under section 304(c) would extend to grants executed "by any of the persons designated in the second proviso of subsection (a)(1) of this section"--that is, the author or his widow and children, executors, or next of kin, these **[96]**being the persons who can claim renewal today. The reason for the difference is that, as a direct result of the present renewal provisions, a large number of binding transfers and licenses covering renewal rights have been executed by the author's widow, children, and other statutory beneficiaries, as well as by the author himself. We believe that, for example, where the author's

widow was the proper renewal claimant but had previously executed a transfer of her renewal rights, she should be able to gain the extended term after the present 28-year renewal period is over.

5. YEAR-END EXPIRATION OF TERMS

Carrying out a recommendation of the *Report*, section 305 provides: "All terms of copyright provided by sections 302 through 304 run to the end of the calendar year in which they would otherwise expire." Even this provision, which is intended to simplify computation of the term and which looks so straightforward on the surface, has its own special problems.

Since the section applies only to the copyright terms "provided by sections 302 through 304," it has no effect on the other time periods provided throughout the bill. It would extend the total terms of subsisting copyrights covered by subsections (a) and (b) of section 304 to the end of the 75th year from the date copyright was secured. Under subsection (a) it would also extend the first term to the end of the 28th years of the copyright, thus altering the period for renewal registration. Since all copyrights under the bill would expire at the end of the year, the renewal year under section 304(a) would run from December 31 through December 31 in all cases. This is likely to produce some confusion and will mean the bunching at one time of a substantial workload in examining renewals, but these are problems that can be solved administratively. Finally, since section 305 applies only to "terms of copyright," it does not change the time periods provided in section 304(c) with respect to termination of transfers and licenses.

[97] *Chapter 5*

NOTICE OF COPYRIGHT

OUTLINE

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§ [99] Chapter 5 NOTICE OF COPYRIGHT

A. THE NOTICE REQUIREMENTS IN GENERAL

One of the principal criticisms of the present copyright statute has been directed at the rigidity and unfairness of the provisions requiring a notice of copyright as a condition of protection. 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.

In general, sections 401 through 405 of the bill represent an effort to preserve the values of the copyright notice by inducing its use, while substantially ameliorating the effects of accidental or even deliberate errors or omissions. Subject to certain safeguards for innocent infringers, protection would not be lost by the complete omission of notice from large numbers of copies or from a whole edition, if registration for the work is made before or within 5 years after publication. Errors in the name or date in the notice would not be fatal and could be corrected under the bill.

Section 401(a) sets forth the basic notice requirement: that, whenever a protected work "is published in the United States or elsewhere by authority of the copyright owner, a notice * * * shall be placed on all publicly distributed copies from which the work can be visually **[100]**perceived, either directly or with the aid of a machine or device." In general this restates the scope of the present notice requirements, which apply only to authorized "copies" of published works from which the work can be perceived by the eye.

Section 402(a) establishes a new notice requirement which, paralleling section 401(a), covers the new subject matter of sound recordings:

Whenever a sound recording protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section shall be placed on all publicly distributed phonorecords of the sound recording.

For the reasons already outlined in chapters 1 and 2, the bill would extend copyright protection to sound recordings as works in themselves, separate and distinct from the literary or musical works they embody. Because of this distinction and the obvious danger of confusion if the notice were the same for both, the notice to appear on the "phonorecords" of "sound recordings" would differ from that to appear on the "copies" of other works under section 401. Since "phonorecords" are not "copies," there would be no need to place a section 401 notice on "phonorecords" to cover the literary or musical work embodied in the record.

Three general points should be emphasized with respect to both sections 401(a) and 402(a):

(1) The bill requires a notice only on copies or phonorecords that have been "publicly distributed." Thus, for example, the mere public exhibition of a visually perceptible copy, whether directly or by means of projectors, television, or other devices, would not require a notice. This would resolve an unsettled question under the present law, which seems to point in the direction of requiring a notice whenever a copy is exhibited to the public without restrictions as to copying.

(2) The intention behind the language of both subsections is that where the copyright owner has authorized publication of a work, the public distribution of copies or phonorecords without a notice will not meet the requirements of sections 401(a) and 402(a). As under the present law, this would be true even if the author expected a notice to be used, as long as the use of the notice was not an actual condition of his authorization. On the other hand, where the owner authorized publication only on the express condition that the publicly distributed copies or phonorecords bear a prescribed notice, publication without that notice would not be authorized and would have no effect upon his rights.

(3) Both subsections require use of a notice whenever the work "is published in the United States or elsewhere * * *." Under section 10 of the present statute, as interpreted by the Copyright Office Regulations, a work first published abroad must generally bear a notice at the time of its first publication in order to secure copyright protection in the United States; however, there have been court decisions indicating that, once copyright has been secured, any copies later distributed outside the United States need not bear a notice. Thus, in this one respect, the proposed requirement may be tighter than under the present law; it has been argued very **[101]**strenuously that, since foreign publishers sometimes ignore the need to use a notice, the requirement could work a hardship on American authors and publishers. While this argument has validity, there are several factors to consider:

(a) In view of the valuable purposes served by the notice, it would be unwise to eliminate it for the vast body of works published abroad unless there were overwhelming reasons for doing so.

(b) Many copies of works published abroad find their way into the United States where, if they bore no notice, they might induce innocent infringements.

(c) The consequences of failure to use a notice would be much less drastic under the bill than they are now: for the most part they pertain to limitations on remedies against innocent infringers rather than a forfeiture of rights.

(d) Under section 9(c) of the present law a notice must appear on all copies of a work distributed anywhere in the world in order to be entitled to the special benefits of the Universal Copyright Convention. As a result, a great many foreign publishers have become accustomed to the use of the notice, and their numbers are increasing. With the breaking down of national barriers with respect to intellectual materials, and the free flow of copies and phonorecords across boundaries, the need for a notice on foreign works becomes more urgent than ever before. To throw away the gains that have been made in the use of the notice under the Universal Copyright Convention would seem unwise and shortsighted.

(e) An American author or publisher can guard himself against a foreign grantee of publishing rights who carelessly omits the notice, by making the use of notice a condition of the grant.

Aside from the requirement for registration before or within 5 years of publication, the principal consequence of omission of notice is the loss of some remedies against innocent infringers provided in section 404. That section, which

is discussed below, is intended to preserve the copyright when notice has been omitted, and to allow remedial action against infringers except for infringements committed innocently by a person who was misled by the absence of notice. It is true that, where the notice is left off of foreign copies, the copyright owner might occasionally suffer a loss under section 404 if one of those copies comes into the hands of someone who is misled by the omission and infringes innocently in the United States. Whatever the solution under section 404, however, we do not believe the risk of loss is so great as to justify abandoning the general requirement that copies published abroad bear the notice.

B. FORM AND POSITION OF NOTICE

1. VISUALLY PERCEPTIBLE COPIES

The form of notice prescribed by section 401(b) is generally in accord with the recommendations of the 1961 *Report*, but with some **[102]**minor changes and clarifications. In addition to the symbol "(c)" or the word "Copyright" the alternative of using the abbreviation "Copr." has been retained; the use of this form is frequent enough today that its abandonment as an acceptable alternative would be confusing and might have unfair results in some cases. Common problems now encountered with respect to the appropriate date to use in the notice on compilations and derivative works, and with respect to the acceptability of variant designations of the copyright owner, are also dealt with specifically in section 401(b).

As recommended in the *Report*, the year date of publication would be required in the copyright notice on the copies or phonorecords of all categories of copyrightable works, and the exemption from this requirement, now applicable generally to pictorial, graphic, and sculptural works, would be dropped. (SEC. 8 of the Transitional and Supplementary Provisions would allow continued use of a form of notice acceptable under the present law with respect to works already published when the new statute comes into effect.) Even though the date of publication will no longer be the starting point for copyrights under this bill, it will still have great significance in computing the term under sections 302(c) and 303, in determining the status of a work under sections 302(e), 409(c), and 411, among others, and in informing the public of how recent the work is.

The provision on the position of the notice, as the *Report* proposed, adopts the flexible approach of the Universal Copyright Convention by providing simply that the notice "shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright." However, in order to offer guidance and avoid uncertainty as much as possible, the subsection provides: "The Register of Copyrights shall prescribe by regulation, as examples, specific methods of affixation and positions of the notice on various types of works that will satisfy this requirement, but these specifications shall not be considered exhaustive." Under this provision a notice placed in one of the positions or affixed by one of the methods prescribed in the regulations would clearly meet the requirements, but a notice in some other location or affixed in some other way might also meet the requirements if it were found to "give reasonable notice of the claim of copyright."

2. PHONORECORDS OF SOUND RECORDINGS

As already explained, section 402 contains special provisions with respect to the form and position of the notice to appear on phonorecords with respect to the copyright in the sound recording. Subsection (b) specifies a form of notice to consist generally of three **[103]**elements: (1) the symbol e; (2) the year of first publication of the sound recording; and (3) the name of the copyright owner (or an acceptable variant).

There are three principal reasons for adopting the symbol e rather than the usual symbol "(c)," for the notice of copyright in a sound recording:

(1) To avoid confusion between the claim to copyright in the sound recording and the claim to copyright in the visually perceptible literary or pictorial material (on the label, album cover, liner notes, etc.) that often accompanies a phonorecord. Since section 402(c) permits the notice for the sound recording to appear on the record label or container, the chances for misunderstanding are obvious;

(2) To avoid confusion between the claim to copyright in a sound recording and in the literary or musical composition embodied in it;

(3) To use the symbol adopted by the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the "Neighboring Rights Convention") as the international symbol for the protection of sound recordings. The United States is not a party to this Convention, but, aside from the possibility of its

becoming a party in the future, there may well be cases in which, for example, Americans will be able to take advantage of its benefits in foreign countries.

It is now not clear whether sound recordings that have been published by the public distribution of phonorecords are in the public domain or are still under common law copyright protection. The bill makes no effort to decide that question with respect to sound recordings published before the effective date of the new law; but, taking account of the possibility that some of those sound recordings may be entitled to statutory protection after that date under section 303, the bill makes clear that the notice requirements have no retroactive effect with respect to phonorecords that have already been distributed. Subsection (d) of section 402 provides that "[t]he requirements of this section apply to all phonorecords publicly distributed on or after January 1, 1967."

C. CONTRIBUTIONS TO COLLECTIVE WORKS

In chapter 3 we have already noted the interaction between sections 201(c) and 403 in attempting to remedy the problems of ownership and notice now existing with respect to contributions to periodicals and other collective works. Concerning the notice, the 1961 *Report* recommended that a "single notice in a collective work should be sufficient notice for the work as a whole and for each of the component works, including those previously copyrighted," and that the "single notice should be presumed to apply to all the component works for which no separate notice is given."

[104]In implementing this proposal section 403 provides, first of all, that a "separate contribution to a collective work may bear its own notice of copyright," but then goes on to specify that, with one exception,

* * * a single notice applicable to the collective work as a whole is sufficient to satisfy the requirements of sections 401 and 402 with respect to the separate contributions it contains * * *, regardless of the ownership of copyright in the contributions and whether or not they have been previously published.

Thus, as long as there is a notice covering the collective work as a whole, the rights in any individual contributions would not, in general, be affected by the failure to use separate copyright notices on them, regardless of whether they have been published before or who owns the rights in them.

The exception to this rule would apply to "advertisements inserted on behalf of persons other than the owner of copyright in the collective work." Magazines, newspapers, and some other types of "collective works" are, of course, among the principal media for advertising, and it is common for the same advertisement to be published in a number of different periodicals. Under the present law it seems clear that, for example, the general copyright notice in a particular issue of a magazine--which would usually name that magazine publisher as the copyright owner--would not cover the material placed in that issue by other persons as ordinary advertising. Relatively few advertisements are copyrighted today, and those that are have their own separate copyright notices, usually in the name of the advertiser. We believe that there are good reasons for preserving this situation in the new law and that, as a general rule, a separate notice should be required for advertisements published in collective works.

Although, under section 403(a), the notice for a collective work as a whole will serve as the notice relating to a separate contribution that does not bear its own notice, the provisions of section 201(c) will mean that in a great many cases the author will remain the owner of the contribution. The question then arises as to the position of a third person who, relying on the notice, deals in good faith with the publisher for use of the contribution. Section 403(b) treats this situation, in effect, as a case where the wrong name has been used in the notice, and specifies that "the case is governed by the provisions of section 405(a)." Those provisions will be discussed later in this chapter, but it should be noted here that their main impact would probably be felt in the case where "the person named in a single notice applicable to a collective work as a whole is not the owner of copyright in a separate contribution that does not bear its own notice."

[105] D. OMISSION OF NOTICE

1. EFFECT OF OMISSION ON COPYRIGHT

Although sections 401 and 402 speak of the provisions on copyright notice as "requirements," when these sections are read in conjunction with section 404 it becomes clear that the "requirements" are no longer absolute. Taken together, the bill's notice provisions represent a substantial liberalization of the present law, under which omission of the notice from published copies generally results in forfeiture. They also go further in this direction than the recommendations of the 1961 *Report*, which would have preserved the copyright only if the notice had been omitted inadvertently and if certain rather strict formalities were also complied with.

In the discussions of the *Report*'s proposals (and of the 1963 preliminary draft which to some extent adopted them) it was urged that, to make the validity of a copyright turn on the question of whether the omission of notice was "deliberate" or "unintentional" would involve impossible problems of proof and would result in uncertainty and injustice. After considering these arguments we concluded that questions involving the subjective state of mind of one or more persons and their ignorance or knowledge of the law should be avoided if at all possible. Assuming that it also contains proper safeguards to protect the public and to keep the notice requirements from becoming meaningless, we decided that the bill should drop any distinction between "deliberate" and "inadvertent" or "unintentional" omission and, subject to certain conditions, should preserve the copyright in all cases.

Section 404(a) provides that "[o]mission of the copyright notice prescribed by sections 401 and 402 from copies or phonorecords publicly distributed by authority of the copyright owner does not invalidate the copyright" if one of two conditions is met:

(1) if "the notice has been omitted from no more than a relatively small number" of publicly distributed copies or phonorecords, or

(2) if "registration for the work * * * has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered."

In other words, under the general scheme of the bill, copyright is secured upon the creation of a work and is not lost by the omission of notice on the copies or records as first or later published, regardless of whether or not the omission is wholesale or deliberate. However, if the notice is omitted from "more than a relatively small number," **[106]**the continued validity of the copyright would depend upon compliance with two conditions subsequent:

(1) Registration, if not already made, would have to be made within 5 years after the distribution without notice, and

(2) There would have to be a reasonable effort to correct the omission, after it is discovered, by adding the notice to copies or phonorecords later distributed in the United States.

Thus, if the notice is omitted from a number of copies or records, copyright will not be lost immediately, but the work will go into the public domain if there is no effort to correct the error or if no registration has been made for the work within 5 years.

The only omission that this section deals with is an "omission of the copyright notice prescribed by sections 401 and 402 from copies or phonorecords publicly distributed by authority of the copyright owner." As we have explained earlier in this chapter, the requirements of sections 401 and 402 apply only in cases where the copyright owner has authorized the publication, and it should therefore be doubly clear that the omission of notice by someone who had no authority from the copyright owner to publish the work, or whose authority was conditioned on the use of a notice, would have no effect upon the owner's rights.

Under clause (1) of section 404(a), omission from "no more than a relatively small number of copies or phonorecords" will, subject to the safeguards for innocent infringers provided in subsection (b), leave the copyright owner fully protected without the need for registration or correction of the error. The phrase "relatively small number" is intended to establish that the number must be small in an absolute sense and not merely in relation to the size of the entire edition. For example, this requirement would not be satisfied if the notice were omitted from 1,000 copies out of an edition of 100,000.

Where the notice has been omitted from more than a "relatively small number" of copies or phonorecords, clause (2) first requires, as a condition of curing the error, that registration be made by the end of a period of 5 years after the defective publication. To be effective for this purpose the registration need not explain the circumstances of the error and, in fact, may be made before the error occurs. The period of 5 years was the subject of some dispute, some users arguing that it would leave the status of copyrights in doubt for too long and urging that the *Report*'s recommendation for a 1-year period be retained. Author groups, in particular, argued that the period is too short, since a copyright owner may not discover omissions by remote licensees for many years. We have concluded that 5 years is a reasonable period for this purpose, and it also has the advantage of being consistent with the period provided in section 409(c) with respect to the evidentiary **[107]**weight to be given to a certificate of registration issued more than 5 years after publication.

Under the second condition specified by clause (2), the copyright owner has the obligation, after discovering the error, of making a "reasonable effort" to add the notice to "all copies or phonorecords that are distributed to the public in the United States." Note that this requirement does not apply to the distribution of copies and phonorecords in foreign countries, the thought being that it would be burdensome and impractical to force an American copyright owner to police the activities of foreign licensees in this situation.

2. EFFECT OF OMISSION ON INNOCENT INFRINGERS

Along with the requirements of clause (2) of section 404(a), which we have just discussed, the main sanction for the use of a notice is found in subsection (b) of section 404, which limits the rights of the copyright owner against "[a]ny person who innocently begins an undertaking that infringes a copyright," provided that person "proves that he was misled by the omission of notice," and "undertook the infringement before receiving actual notice that registration for the work had been made * * *." This provision, which finds some of its origins in section 21 of the present statute, is based on the premise that a person acting in good faith, and with no reason to think otherwise, should generally be entitled to assume that the absence of notice on an authorized copy or phonorecord means that the work is in the public domain, and should be shielded from unreasonable liability resulting from his reliance on that assumption. The provisions of subsection (b) would be applicable to any case where notice has been omitted, whether the omission was from "a relatively small number of copies or phonorecords" or not.

The principal controversy over subsection (b) has involved the clause exempting an innocent infringer, who was misled by the omission, from monetary liability if he "undertook the infringement before receiving actual notice that registration * * * had been made." It was pointed out, with reason, that in the large majority of cases it would be impossible to give notice of registration to a potential infringer before he begins an infringing use, since there would be no way of knowing when an unknown person is about to infringe. This point was coupled with the arguments against requiring a notice on any copies or records published abroad; fears were expressed that subsection (b) would permit a user to escape liability by claiming that he had been misled by the absence of notice on an obscure foreign edition and that, although he could have found a registration for the **[108]**work by checking with the Copyright Office, he had received no actual written notice of registration.

For the reasons already outlined in this chapter we believe that it is desirable to retain the notice requirements for copies and phonorecords distributed abroad. With respect to the requirements for actual notice before the infringer innocently began his undertaking, the problem is how to balance the interests: on the one side, the interests of the copyright owner who has registered his claim and tried in good faith to insure use of a notice, and on the other side the interests of the truly innocent infringer (the teacher, the librarian, the newspaper publisher, the television newscaster, etc.) who believes he is entitled to use a work because the only copy he sees contains no notice, and who has not time or facilities for a search in the Copyright Office in every such case.

In the light of the arguments made to us since the 1965 bill was introduced, we believe that this problem needs further consideration. In particular, we think the bill should not require, in all cases, that actual notice of registration must be given before the infringing undertaking is begun, as a condition of any monetary recovery whatever. As we now see it, the best general approach would involve a differentiation between infringing acts committed before and those committed after actual notice of registration. Thus, where an infringer proves that the notice had been omitted, that he acted innocently as a result of being misled by its absence, and that his infringement had been completed before he received actual notice of registration, we believe it would be appropriate to limit his monetary liability to any profits he received from his infringement.

On the other hand, in the case of continuing infringements of the kind that are involved in an enterprise running over a period of time, such as a publication program or the production of a motion picture, the copyright owner should be able, after he has given actual notice of the registration, to enjoin the continuation of the infringing enterprise and to recover fully for all infringing acts committed after notice. It can be argued with reason that persons engaging in enterprises of this character could normally be expected to check the registration records before they begin the undertaking, even where copies have been published without notice.

The second sentence of section 404(b) would permit the issuance of an injunction against continuing an infringement, even where monetary damages had been denied because of the omission of the notice. In line with the comments in the preceding paragraph, further consideration should be given to dropping the provision for issuance of injunctions on condition "that the infringer be reimbursed for any reasonable expenditure incurred by him, * * *." It has also been **[109]**argued that "expenditure" in this clause should be expanded to include outlays of time as well as money; however, while we think that "expenditure" is broad enough to include certain nonmonetary outlays that can be

translated readily into monetary terms, we doubt the wisdom of treating voluntary investments of time equally with the actual outlay of money for this purpose.

Under section 404(b) the court would also have discretion to permit "the infringer to complete his undertaking," on condition "that he pay the copyright owner a reasonable license fee in an amount and on terms fixed by the court." This proposal did not appear in the 1961 *Report*, but if the court, after balancing the equities, allows the innocent infringer to continue his enterprise, it should also be permitted to require him to pay a reasonable fee for doing so.

3. REMOVAL OF NOTICE BY OTHERS

Subsection (c) of section 404 provides that protection "is not affected by the removal, destruction, or obliteration of the notice, without the authorization of the copyright owner, from any publicly distributed copies or phonorecords." The problem here is not the one we have discussed earlier: what happens when the copyright owner authorizes publication and the copies or records come out without a notice. This subsection is intended to deal with the situation that arises when there has been an authorized publication with notice, and someone later in the chain of commerce cuts off, tears off, marks out, or covers over the notice. The courts that have dealt with this problem in recent years (notably in connection with notices on the salvage of textile fabrics) have held that, in general, a notice is valid if it is securely affixed to the copies when they leave the control of the copyright owner, even though it is removed from the copies at some later stage in their use. We believe that this is a reasonable solution to a difficult practical problem, and subsection (c) is intended to incorporate it in the statute.

E. ERROR WITH RESPECT TO NAME OR DATE

1. ERROR IN NAME

The 1961 *Report* recommended that, although "[a]n erroneous name * * * in the notice should not invalidate the copyright," a "person not actually informed otherwise should be entitled to act on the assumption that the name * * * given in the notice [is] correct." The preliminary draft of 1963, in implementing this recommendation, proposed that, unless a document showing the true ownership has **[110]**been recorded, "the person named in the notice * * * be entitled, as trustee for the true owner, to execute binding transfers * * *, subject to an accounting for all profits, * * *." This draft provision was roundly attacked as "dangerous and inequitable" on the ground that it could enable an unscrupulous user to dispose of an author's rights against his will merely by placing his name in the notice. It was also criticized as leading to confusion and uncertainty over the actual ownership of rights.

These arguments struck us as valid, and the bill therefore adopts a different approach. Section 405(a) first reaffirms the principle that, where the person named in the notice is not in fact the owner of the copyright (or of a particular right under the copyright), neither the validity of the copyright nor the ownership of rights under it would be affected; under this language it would no longer be a defense for an infringer merely to prove that the notice contained the wrong name. The subsection then goes on to deal with the situation where a third person, acting in good faith, uses the work in reliance on an authorization from the person named in the notice. It provides that, in general, "any person who innocently begins an undertaking that infringes the copyright has a complete defense to any action for such infringement if he proves that he was misled by the notice and began the undertaking in good faith under a purported transfer or license from undertaking in good faith under a purported transfer or license from the person named therein, * * *."

On the other hand, in accordance with the principles of constructive notice, this defense would not be allowed if a search of the public records of the Copyright Office would have shown that the owner was someone other than the person named in the notice. The subsection makes the infringer's defense inapplicable if, "before the undertaking was begun":

(1) registration for the work under section 407 had been made in the name of the owner of copyright; or

(2) a document executed by the person named in the notice and showing the ownership of the copyright had been recorded as provided by section 205.

The last sentence of section 405(a) reads: "The person named in the notice is liable to account to the copyright owner for all receipts from purported transfers or licenses made by him under the copyright." This does not mean, of course, that someone who publishes a work without the copyright owner's consent is liable only for an accounting and can avoid full liability as an infringer simply by placing his name in the copyright notice on the infringing copies. In the situation here the true copyright owner is related contractually with the person named in the notice; he has authorized the publication, and is assumed to have acquiesced in the use of the wrong name. True ownership of a copyright is not

always clear under a contract, and the person named in the notice may be acting in good faith or under **[111]**a misapprehension when he grants a request for use of the work. He should not be held as an infringer unless, for example, he acts completely outside his authority under the contract, or the contract has been rescinded. On the other hand, under the language used in the subsection, he would be liable to account "for all receipts"; under this language the person making the transfer or license would be fully accountable for his gross receipts and would have to justify any deductions for costs.

2. ERROR IN DATE

Section 405(b) generally adopts the proposal of the *Report* that "[a]n erroneous date in the notice should not invalidate the copyright," but with some changes in the *Report*'s detailed recommendations. The first sentence of the subsection embodies the familiar principle established under the court decisions that, when the year date in the notice is earlier than the year of publication, any statutory term measured from the year of publication will be computed from the year given in the notice. This provision on antedated notice is intended to apply to the computation not only of the copyright terms for anonymous and pseudonymous works and works made for hire under section 302(c), but also of the presumptive periods established in section 302(e).

The decisions upholding antedated notices are based on the assumption that the error is harmless since it is in favor of the public. The judicial thinking on postdated notices has naturally run the other way: where the date in the notice is later than that of publication, the public is led to think that the term is longer than that authorized by the statute and the copyright is forfeited. These principles are not as fully applicable to the bill as they are to the present law, but for obvious reasons the use of a postdated notice cannot generally be treated as if it were correct, and it should be discouraged.

Subsection (b) therefore provides: "Where the year date is more than one year later than the year in which publication first occurred, the work is considered to have been published without any notice and is governed by the provisions of section 404." On the basis of experience the bill would allow a leeway of 1 year to avoid unnecessarily harsh results in individual cases: a substantial number of works, especially serials, are published inadvertently with postdated notices around the end of every year, and the present Copyright Office Regulations (*37 C.F.R. sec. 202.2(b)(6)*) offer registration in this situation as a doubtful case. Where the notice is postdated more than 1 year the copyright would not be lost, but the work would be treated under section 404 as if the notice had been omitted entirely.

[112] 3. OMISSION OF NAME OR DATE

Where, according to subsection (c) of section 405, "copies or phonorecords publicly distributed by authority of the copyright owner contain no name or no date that could reasonably be considered a part of the notice," the result is the same as if the notice had been omitted entirely and the work "is governed by the provisions of section 404." The bill contains no requirement that the elements of the notice "accompany" one another, and section 405(c) recognizes that, even though a name or date may be separated to some extent from the rest of the notice, it would be adequate if the elements could reasonably be read together. This would avoid the danger, now a real one under the present law, that a notice would be held inadequate simply because its elements are not contiguous. On the other hand, where the elements are too widely separated to be related to each other, or where other names or dates would create uncertainty as to which are intended as a part of the notice, the case would have to be treated as if the notice had been omitted altogether.

[113] *Chapter 6*

DEPOSIT AND REGISTRATION

OUTLINE

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§ [115] Chapter 6 DEPOSIT AND REGISTRATION

A. IN GENERAL

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.

These proposals caused relatively little controversy or adverse criticism. With a few changes in details they have been adopted in the 1965 bill.

B. DEPOSIT FOR THE LIBRARY OF CONGRESS

With respect to deposit, section 406 of the bill follows almost all of the *Report*'s recommendations by providing that:

(1) within three months after publication of a work with notice of copyright in the United States, two copies or phonorecords of the work must be deposited in the Copyright Office;

(2) the Register of Copyrights may exempt certain categories of material from these requirements; and

(3) if deposit is not made, the Register may demand it, and the penalty for failure to comply would be the imposition of a fine consisting of a specific amount plus the cost of the copies or records.

The principal issue raised by this provision was whether, as under section 14 of the present statute, failure to comply with a demand for deposit should result not only in a fine but also in the complete loss of copyright. The general reaction of this question, which the *Report* **[116]**deliberately left open, was very much opposed to any proposal under which failure to deposit would invalidate the copyright. We agree that a realistic fine is an adequate sanction for this purpose and that, especially under a system of divisible copyright, it would be unnecessarily harsh to destroy all rights under a copyright simply because someone ignored a demand for deposit. Section 406(a) therefore states explicitly that "[t]his deposit is not a condition of copyright protection."

Note that the requirements of section 406 apply only to works that have been published in the United States. This would include works first published abroad if and when publication in the United States takes place. The basic requirement is for the deposit of "two complete copies of the best edition" or, "if the work is a sound recording, two complete phonorecords of the best edition, * * *." The term "best edition," which has caused problems under the present law because of uncertainty as to its meaning, is defined in section 101 as "the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes." The intention here is to make clear that the Library of Congress is entitled to receive, out of the various editions published in the United States up to the time of deposit, copies or phonorecords of the edition that the Library itself believes best fits its own needs, regardless of whether those copies or records happen to be the most expensive, largest, rarest, etc., in existence. However, once the deposit requirement for a particular work has been fulfilled, the Library has no further claim on future editions unless, of course, they represent newly copyrightable "compilations" or "derivative works" under section 103.

In the case of sound recordings, the deposit requirement extends not only to "two complete phonorecords of the best edition," but also to "any printed or other visually perceptible material published with such phonorecords." Under this provision the deposit requirement would ordinarily not be satisfied merely by depositing two records or tapes, for example. Most phonorecords are publicly distributed in a sleeve or album container including text or pictorial material or both, and many are also accompanied by leaflets or booklets including notes, pictorial material, essays, librettos, etc. In these cases section 406(a)(2) would require deposit of the entire audiovisual "package" as it is distributed to the public.

Deposits under section 406 would be made in the Copyright Office but "for the use or disposition of the Library of Congress." Subsection (b) provides for the issuance, upon request and payment of a fee, of a receipt for the deposit, although this receipt would serve no purpose if the required deposit were made as a part of copyright registration under section 407(b), for which a certificate would be issued.

[117]Section 406(c) provides: "The Register of Copyrights may by regulation exempt any categories of material from the deposit requirements of this section, or require deposit of only one copy or phonorecord with respect to any categories." This would allow the Librarian of Congress (who under section 702 must approve all regulations established by the Register of Copyrights) to exempt entire categories of works from the deposit requirements or to establish categories in which only one copy need be deposited. The purpose is to make this provision as flexible as possible, so that deposit need not be required where it fails to serve any purpose for the Library, and so that reasonable

adjustments can be made to meet practical needs in special cases. We believe that this flexible approach would go some way toward meeting the concern expressed, for example, by the creators or producers of such copies as motion picture films, video tapes, and fine prints, who have argued that the deposit provision should contain special exemptions for them.

Where deposit has not been made as required in subsection (a) or section 406, subsection (d) empowers the Register of Copyrights to "make written demand for the required deposit on any of the persons obligated to make the deposit * * *." These persons are specified in subsection (a) as "the owner of copyright or of the exclusive right of publication in a work." The bill allows a period of "three months after the demand is received" to make the deposit, and then "the person or persons on whom the demand was made" became liable:

(1) to a fine of not more than $ 250 for each work; and

(2) to pay to the Library of Congress the total retail price of the copies or phonorecords demanded, or, if no retail price has been fixed, the reasonable cost to the Library of Congress of acquiring them.

There may be cases where not only has "no retail price * * * been fixed" but the copies or phonorecords are not available for sale on the open market. Perhaps the best examples are motion picture films and video tapes, which are publicly distributed under lease or similar arrangements. In these situations the last part of clause (2) is intended to cover the basic cost of duplicating the copies or phonorecords, plus a reasonable amount representing what it would have cost the Library to obtain them under its normal acquisitions procedures had they been available.

C. COPYRIGHT REGISTRATION

1. IN GENERAL

a. Permissive Registration

As recommended in the *Report*, section 407(a) of the bill would permit voluntary registration to be made for any work, whether pub**[118]**lished or unpublished, "[a]t any time during the subsistence of copyright" in it. "[T]he owner of copyright or of any exclusive right in the work" could register the copyright claim in the Copyright Office by depositing the copies, phonorecords, or other material specified in section 407 and by submitting an application and fee. The last sentence of subsection (a) makes clear that registration is permissive; it provides that, "[s]ubject to the provisions of section 404(a), such registration is not a condition of copyright protection." (Section 404 (a) requires, for continued protection of a work published without notice, that it be registered before or within 5 years after the omission.)

b. Deposit for Purposes of Registration

Section 407(b) then sets forth the basic requirements for what "the material deposited for registration shall include:"

(1) in the case of an unpublished work, one complete copy or phonorecord;

(2) in the case of a published work, two complete copies or phonorecords of the best edition;

(3) in the case of a work first published abroad, one complete copy or phonorecord as so published;

(4) in the case of a contribution to a collective work, one complete copy or phonorecord of the best edition of the collective work.

The 1961 *Report* had recommended retaining a provision in section 215 of the present statute which allows waiver of the registration fee for works published abroad if, within 6 months of first publication, two copies are deposited instead of the usual one copy. The present provision was enacted in 1949 to meet the serious postwar problems of transferring funds from foreign countries to the United States. However, while it undoubtedly served its purpose at the time, this waiver-of-fee option is administratively burdensome and appears to have outlived its usefulness. It has therefore been dropped from the bill.

The last sentence of section 407(b) makes clear that, with respect to works published in the United States, a single deposit could be made to satisfy both the deposit requirements of section 406 and the registration requirements of section 407:

Copies or phonorecords deposited for the Library of Congress under section 406 may be used to satisfy the deposit provisions of this section, if they are accompanied by the prescribed application and fee, and by any additional identifying material that the Register may, be regulation, require.

However, to accomplish this dual purpose, the deposit and registration would have to be made at the same time. A deposit made without registration under section 406 could no later be converted into a deposit for purposes of registration under section 407 by submitting an application and fee; and additional deposit for purposes of regis**[119]**tration would have to be made. Moreover, taking account of the different purposes served by deposit for the Library of Congress and deposit for purposes of identifying the material covered by a copyright registration, the bill empowers the Register of Copyrights to issue regulations requiring the deposit of "additional identifying material" in certain of these cases.

c. Administrative Classification

The list of classes of copyrightable works in section 5 of the present statute was supposed to be for purposes of registration only, and the section actually contains language specifying that the list is not exhaustive and that "any error in classification" does not "invalidate or impair the copyright protection secured under this title." It is, therefore, ironic that some courts have treated the listing as being limitative with respect to the scope of copyright, and that the Copyright Office now finds the classification unrealistic and burdensome for administrative purposes.

The lesson we have learned is that the section setting forth the subject matter of copyright should be entirely separate from any practical administrative classifications, and that it is much better to leave the latter to regulations which can be readily changed to meet changing needs. Thus, in line with the recommendation of the *Report*, section 407(c) provides that the "Register of Copyrights is authorized to specify by regulation the administrative classes into which works are to be placed for purposes of deposit and registration, * * *" and adds: "This administrative classification of works has no significance with respect to the subject matter of copyright or the exclusive rights provided by this title."

d. Optional Deposit

Section 407(c) is also aimed at giving the Register as much administrative flexibility as possible in adjusting the type of material deposited to the needs of the registration system. He is empowered "to specify by regulation * * * the nature of the copies or phonorecords to be deposited in the various classes specified" and to "require or permit, for particular classes, the deposit of identifying material instead of copies of phonorecords, the deposit of only one copy or phonorecord where two would normally be required, or a single registration for a group of related works."

Examples of cases where it would be preferable or desirable to have identifying material deposited instead of actual copies include not only jewelry, billboard posters, and unwieldy three-dimensional objects of various kinds, but also rare or extremely valuable copies which would be burdensome or impossible to deposit. Deposit of a single **[120]**copy would be sufficient where the Library of Congress has no need for any copies and the only purpose of the deposit is identification; it would also be appropriate, for example, in the case of most motion pictures. Examples of cases where it might be appropriate to allow the grouping of related works under a single registration are the various editions or issues of a daily newspaper, a work published in serial installments, a group of photographs by one photographer, or a group of poems by a single author. The Register would also have discretion, for example, to permit deposit of phonorecords rather than notated copies of musical compositions, to require the deposit of "print-outs" of computer programs under certain circumstances, or to allow deposit of a copy of one part of a multi-volume encyclopedia for purposes of registration of a single contribution.

e. Corrections and Amplifications

The present Copyright Office Regulations (*37 C.F.R. § 201.5(a)*) allow correction or cancellation of a completed registration only if "the facts therein stated" do not "agree with those supplied to the Office for the purpose of making such record"--in other words, if the Copyright Office itself made an error in registering the claim or failed to catch an error that should have been apparent during its examination of the claim. We believe that this basic rule should be continued, but that there is no need to set it out in the statute.

On the other hand, although the need arises quite often, the present statute has no provisions for correcting or amplifying the information given in a completed registration. The Copyright Office has adopted regulations and procedures to meet this problem but, because of the limitations imposed by the silence of the existing law, these are rather makeshift and unsatisfactory. Subsection (d) would give the Register authority to "establish, by regulation, formal procedures for the filing of an application for supplementary registration, to correct an error in a copyright registration or to amplify the information given in a registration." Under the subsection a "supplementary registration" would be subject to a fee, and would be required "clearly [to] identify the registration to be corrected or amplified."

Section 407(d) also provides that "[t]he information contained in a supplementary registration augments but does not supersede that contained in the earlier registration." Under the Copyright Office's present practices the original registration is not expunged from the records, and on the basis of experience we believe it important that this result be continued. For one thing, the applications may be submitted by different persons, and the Copyright Office is in no position to decide which is right and which is wrong. Moreover, even if the **[121]**applications for original and supplementary registration both come from the same person, the facts of the original registration would have been cataloged and made a matter of public record; search reports and business dealings may have been based on them, and the effective date of the registration, which is important for several purposes under the bill, could be opened to question. We believe that it is far wiser to leave both the original and the "supplementary" registrations in the records, tied together by appropriate indexing and annotations, so that the public can see the whole picture.

f. Published Edition of Previously Registered Work

The last subsection of section 407, which provides that "[r]egistration for the first published edition of a work previously registered in unpublished form may be made even though the work as published is substantially the same as the unpublished version," probably needs some explanation. Under the present statute a work registered in unpublished form must be registered again when it is published, whether the published edition contains additional material or is essentially the same as the unpublished version. Under the bill there would be no need to make another registration for the published edition unless additional copyrightable material has been added so that the published version would be considered a "derivative work" or a "compilation." In fact, where the unpublished and published versions were essentially the same, there would be no statutory authority for another registration were it not for section 407(e).

There are a number of cases in which a copyright owner would like to have a registration for his published edition, even though the work has already been registered in unpublished form. Moreover, under section 406 of the bill, he would be obliged to make deposit of copies or phonorecords of his edition if it is published in the United States. We believe that there are practical advantages in placing on public record the facts about a work in the form in which it actually was distributed to the public, and that subsection (e) is a justifiable exception to the ordinary rule against more than one registration for the same work.

2. PROCEDURES FOR REGISTRATION

a. Application for Registration

Section 408 of the bill is intended to implement the suggestion in the 1961 *Report* that "the specification of the information to be contained in applications, registration records, and certificates should be broad enough to elicit all relevant information, and flexible enough to fit **[122]**various and changing conditions." Thus, after listing 9 items of information which should be included in the applications for copyright registration covering all categories of works, the section adds, as a 10th item:

(10) Any other information regarded by the Register of Copyrights as bearing upon the preparation or identification of the work or the existence, ownership, or duration of the copyright.

Of the nine specific items, several include information not now requested in our application forms that would be relevant under the bill: the death dates of authors; a statement, where appropriate, that the work was made for hire; "any previous or alternative titles under which the work can be identified"; and "the year in which creation of the work was completed." Perhaps most noteworthy is clause (5), which would require, "if the copyright claimant is not the author, a brief statement of how the claimant obtained ownership of the copyright."

A proposal to add an item requiring identification of any "work of the United States Government" in the application was not adopted; in relation to the large volume of applications filed this information would be relevant so infrequently

that it would be a burden on the application form. However, the authority of the Register under clause (10) to elicit information "bearing upon the preparation * * * of the work or the existence * * * of the copyright" would be broad enough to allow him to seek this information whenever he feels it appropriate.

Suggestions have been made for omitting the enumeration of specific items to be included in an application and for simply giving the Register of Copyrights broad authority, such as that provided in clause (10), to request any information he regards as pertinent. Although this proposal would certainly simplify the provision, our experience under the present law indicates that there are positive benefits in having the statute set forth items of information to be included in the application. As long as the listing is not necessarily exhaustive, it offers advantages of clarity and certainty, and would provide needed administrative guidance.

b. Registration of Claim and Issuance of Certificate

Subsections (a) and (b) of section 409 carry out the recommendations of the *Report* that the statute specify not only the Register's duty to register copyright claims that appear to him to be valid, but also his authority to refuse to register claims that he determines to be invalid. With respect to the probative effect of registration the *Report* pointed out that, while the facts given in a certificate are gener**[123]**ally trustworthy, their reliability becomes "less certain when registration is made long after the copyright claim originated * * *, particularly when registration is made on the eve of an infringement suit, or is made by a claimant who is not the original owner." It therefore recommended that "the certificate should continue to be admitted in any court as prima facie evidence of the facts stated, if registration is made within one year" after first public dissemination, and that, where registration is made later, "the probative weight to be given to the certificate should be left to the discretion of the court."

Section 409(c) adopts these recommendations, but with two differences in details. As pointed out by a number of commentators, the 1-year period proposed by the *Report* seems unnecessarily short for purposes of judging the evidentiary value of a certificate. The bill has expanded this period to 5 years:

In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence * * *. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.

It is intended that not only any original registration under section 407(a) but also any supplementary registration under section 407(d) would have to be made within the 5-year period in order to be accorded automatic prima facie weight.

Subsection (c) also states that the certificate constitutes prima facie evidence not only of "the facts stated in the certificate" but also of "the validity of the copyright." This principle, although not expressed directly, has been held consistently in a long line of cases to be implicit under the present statute, and the desirability of making the point clear in the bill seems obvious.

Under existing law the date when a copyright registration becomes effective is not specified, although the language of section 409(d) of the bill is in line with the Copyright Office's present practice:

The effective date of a copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office.

This language recognizes the inevitable time lag between the filing of an application, deposit, and fee for registration, and the actual entry of the registration in the records of the Copyright Office. It also takes account of the possibility that the Register of Copyrights might be wrong in refusing to make a registration; if a court later determines that the application, deposit, and fee were acceptable, the registration is effective as of the date on which they (or the last of them) were received in the Copyright Office.

[124] 3. EFFECTS OF FAILURE TO REGISTER

a. Registration as Prerequisite to Infringement Suit

As did the 1961 *Report*, section 410 of the bill proposes to retain the requirement of the present law that copyright registration must be made before a suit for infringement of the copyright can be brought. This does not mean, of course, that the owner of an unregistered copyright cannot have a valid cause of action for infringements committed before registration, but it does mean that he must register his claim before he can enforce his rights in the courts.

The bill also follows the *Report*'s recommendation that the law as interpreted in *Vacheron & Constatin-Le Coultre Watches, Inc. v. Benrus Watch Co. , 260 F.2d 637 (2d Cir. 1958),* be changed to permit a claimant whose application has been refused to maintain a suit against an infringer "if the Register is notified and permitted to become a party to the suit." Section 410 provides that, "where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights." The last sentence of the section gives the Register the option, though not the duty, of entering the suit within 60 days, but makes clear that he may join the action only "with respect to the issue of registrability of the copyright claim" and that "his failure to do so shall not deprive the court of jurisdiction to determine that issue."

b. Registration as Prerequisite to Certain Remedies

Of the five sections on registration, the one that has attracted the most attention is section 411, which provides:

In any action under this title, no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for:

(1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or

(2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after its first publication.

This important provision, which perhaps does not yield its meaning at first glance, deserves careful analysis.

Although it differs substantially in its detailed provisions, section 411 adopts the general principle recommended in the 1961 *Report* that registration be induced by withholding certain special or "extraordinary" remedies in cases where infringement began before registration. As it has emerged from the drafting process, section 411 **[125]**is now a cornerstone of both the registration sections that precede it and of the provisions on infringement and remedies that follow it.

The *Report* (which was based on the premise that statutory copyright would start when the work was first "publicly disseminated") proposed generally that, if registration were made within 3 months after first "public dissemination," or at any time before the infringement commenced, all of the statutory remedies would be available. Otherwise, the copyright proprietor would be entitled only to actual damages and an injunction against future infringements; he would not be entitled to recover profits or statutory damages, and he could enjoin the infringer from completing his infringing undertaking only by reimbursing him for his outlay. The *Report* also recommended that these limitations on remedies not be applicable to foreign works entitled to protection under the Universal Copyright Convention.

The comments on these proposals stressed that the suggested limitations on remedies, especially those denying recovery of profits and requiring reimbursement as a condition of enjoining continuing infringements, were far more severe and drastic than necessary to induce registration, and that it would be fundamentally unfair to allow a willful infringer to retain his profits in any case.

The preliminary draft of 1963 omitted the recommended grace period for registration and the exemption for U.C.C. works, but also dropped any limitations with respect to the granting of injunctions. It would have denied statutory damages and attorney's fees for "any infringement commenced before registration," and provided that "no award of profits * * * shall be made for any such infringement unless it is shown to have been willful." This requirement for proof of willfulness as a condition for recovering profits where infringement preceded registration, and an equivalent provision in the remedies section, drew some of the sharpest criticism directed at the preliminary draft. The points most stressed were the practical problems of proving willfulness and the importance in many cases of allowing recovery of profits in order to make the copyright owner whole. Some sentiment was expressed for omitting altogether any limitations on remedies for infringement of unregistered works.

After carefully considering these and other comments on the provisions concerning registration, innocent infringement, and remedies, we concluded that in general it would be enough to induce registration if the statute made it a condition to the recovery of statutory damages and attorney's fees. These are the extraordinary remedies under the statute that are not usually available for injury to property. Since registration is not to be a condition of copyright protection, we believe that, even where infringement is begun before registration, the copyright owner should be entitled to the usual **[126]**remedies. He should be able to obtain an injunction on any terms the court considers fair, and "to recover the actual damages suffered by him as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages," as provided in section 504(b); but the special remedies of statutory damages under section 504(c) and attorney's fees under section 505 should be dependent on registration.

In the discussions of the 1964 bill, which embodied these principles, an argument was made in favor of restoring the grace period for registration after publication. It was pointed out that there are cases (newsworthy photographs or articles, for example) where "instant infringement" takes place immediately after publication and before the copyright owner has had time to register his claim. This proposal struck us as valid, and has been incorporated in the 1965 bill.

Under clause (1) of section 411 statutory damages and attorney's fees would be denied where the work infringed is unpublished and the infringement took place before registration. It should be emphasized that this section in no way narrows the remedies available under the present law, since common law copyright protection for unpublished, unregistered works does not entitle the owner to statutory damages or attorney's fees in any event. The bill may actually afford broader protection than that now available to unpublished works under the common law, since there is doubt as to whether profits can ordinarily be recovered in common law actions except as a measure of damages, and since there are often major procedural advantages in Federal jurisdiction and in the enforceability of Federal injunctions and judgments. Moreover, although the present law permits registration for only certain types of unpublished works, under the bill any kind of unpublished work could be registered and thereby acquire the right to recover full statutory remedies against an infringer.

With respect to published works, clause (2) of section 411 would deny statutory damages and attorney's fees for "any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after its first publication." In other words, those two special remedies would not generally be awarded where infringement of a published work takes place before its registration. However, as an exception, the bill provides a grace period of 3 months after first publication in which to make registration; full remedies could be recovered for any infringement begun during that period, as long as registration is made before the end of the period.

[127]Unlike the *Report*, the bill would treat foreign works entitled to protection under the Universal Copyright Convention in the same way as all other works for this purpose. In view of the stronger remedies available to unregistered works under the bill as compared to those recommended by the *Report*, we believe that there is no longer any need to make special rules for U.C.C. works. Awards of statutory damages and attorney's fees are not generally provided for under foreign copyright statutes, and the remaining remedies recoverable under the bill for infringements of unregistered copyrights are fully comparable to those granted under the laws of other countries. Statutory damages and attorney's fees would represent a bonus given for registration.

[129] *Chapter 7*

COPYRIGHT INFRINGEMENT AND REMEDIES

OUTLINE

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§ [131] Chapter 7 COPYRIGHT INFRINGEMENT AND REMEDIES

A. INFRINGEMENT IN GENERAL

1. WHAT IS INFRINGEMENT

It seems strange, though not very serious, that the present law lacks any statement or definition of what constitutes an infringement. Section 501(a) of the bill is intended to supply that lack by providing:

Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 114, or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright.

Note that, in addition to violations of the copyright owner's exclusive rights, an importation of copies or phonorecords may constitute an act of infringement under certain circumstances. This question will be discussed further in chapter 8.

2. PARTIES TO INFRINGEMENT SUITS

Subsection (b) of section 501 represents an effort to deal with a difficult practical problem: how, under a system of divisible copyright, to make it possible for the owner of a particular right to bring an infringement action in his own name alone, and at the same time to insure as far as possible that the owners of other rights which may be affected are notified of the suit and given an opportunity to become parties. As indicated in *chapter 3*, considerable concern has been expressed about the dangers to copyright owners when each of the exclusive rights under a copyright can be owned and defended separately in court. An example was given of the owner of an exclusive right who discovers too late that, as the result of a judgment in an action brought by the owner of another exclusive right in a remote jurisdiction, he can no longer enforce his rights because the defendant is judgment proof, because of the doctrines of *res judicata*, collateral estoppel, etc.

In line with the divisibility recommendations of the 1961 *Report*, the first sentence of section 501(b) would entitle the "legal or beneficial owner of an exclusive right under a copyright * * * to institute an action for any infringement of that particular right committed **[132]**while he is the owner of it." An example of a "beneficial owner" for this purpose would be an author who had assigned legal title to his copyright to a publisher in exchange for an agreement to pay him a percentage of all receipts; if for some reason the publisher would not bring an action against an infringer, the author could do so.

The last two sentences of section 501(b) are intended not only to protect the interests of other owners of exclusive rights but also to avoid a multiplicity of suits where an infringement action is brought by the owner of less than all of the exclusive rights under a copyright. Their provisions would supplement those of the Federal Rules of Civil Procedure, which already give the courts wide discretion to require or permit joinder of parties. Section 501(b) provides:

The court may require him [the plaintiff] to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

It has been suggested that the plaintiff should be required in all cases, without exception, to serve notice on "any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright." However, it seems to us that an absolute requirement such as this would be burdensome and would serve no purpose in most cases. It should be sufficient to require notice in those cases where the court has some reason to think that another person's "interest is likely to be affected by a decision in the case." Note also that the court has discretion to require joinder as under the Federal Rules, but that it must permit intervention of anyone "having or claiming an interest in the copyright" who wishes to intervene.

B. REMEDIES FOR INFRINGEMENT

1. INJUNCTIONS

Section 502(a) empowers "[a]ny court having jurisdiction of a civil action arising under this title * * *, subject to the provisions of section 404(b) of this title and of section 1498 of title 28, * * *" to "grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." This is simply a reaffirmation of the usual power of courts to grant injunctions and restraining orders, whether "preliminary," "temporary," "interlocutory," "final," or "permanent." The provisions of section 404(b), dealing with injunctions in actions against innocent infringers misled **[133]**by the omission of a copyright notice, were discussed in *chapter 5*. The reference to section 1498 of title 28 of the United States Code makes clear that section 502 of the bill would not permit the granting of an injunction against an infringement for which the Federal Government is liable under section 1498.

Subsection (b) of section 502 restates provisions found in sections 112 and 113 of the present statute, making it possible for a copyright owner who has obtained an injunction in one State to enforce it against a defendant located in another State. As recommended in the 1961 *Report*, these provisions have been "retained in substance."

2. IMPOUNDING AND DISPOSITION OF INFRINGING ARTICLES

The 1961 *Report* had also recommended retaining the substance of both section 101(c) of the present law, which deals with the impounding "during the pendency of the action," of articles alleged to be infringing, and of section 101(d), which concerns the destruction of "copies or devices." Section 503 carries out that recommendation with some changes in details.

Under subsection (a), the court is given discretion to order the impounding of "all copies or phonorecords claimed to have been made or used in violation of the copyright owner's exclusive rights," together with plates, molds, matrices, etc., for their reproduction. Subsection (b) authorizes the court, "[a]s part of a final judgment or decree," to "* * * order the destruction or other reasonable disposition" of copies, phonorecords, plates, molds, matrices, etc. Both provisions can apply to copies or phonorecords "made or used" in violation of the plaintiff's rights, thus allowing the court to deal as it sees fit with articles which, though reproduced and acquired lawfully, have been used for infringing performances, exhibitions, rentals, etc.

Impounding under section 503(a) may be done "[a]t any time while an action under this title is pending." This would permit the court to order the seizure of allegedly infringing articles as soon as suit has been filed, and without waiting for the issuance of an injunction.

We have been urged by representatives of the motion picture industry to delete from subsection (a) the phrase "on such terms as it may deem reasonable" in referring to the discretion of the court in impounding cases, and to substitute a clause reading: "under such special rules as may be promulgated by the Supreme Court of the United States in the Federal Rules of Civil Procedure or otherwise, for copyright seizure and impounding," It may well be that the problems of seizure and impounding in copyright cases are so special that separate, detailed rules governing the practices of all Federal courts are justified. However, the present statute contains no specific pro**[134]**vision referring to the Supreme Court rules, and we see no need to include one in the bill.

In connection with the disposition of infringing articles under section 503(b), it was pointed out that there may be cases where an order for destruction, as provided in the present law, could be wasteful or actually adverse to the plaintiff's best interests. We agree that the discretion of the court should be wide enough to permit, as part of the final judgment or decree, the sale of the infringing articles, their delivery to the plaintiff, or any other disposition it believes justified under the circumstances. Thus, under the subsection, the court may order destruction of the articles or any "other reasonable disposition" of them.

3. DAMAGES AND PROFITS

a. In General

Constant reminders of the trouble that careless legislative drafting can cause for future generations arise under the provisions dealing with damages and profits of section 101 of the present statute. In a detailed section having a direct and pervasive impact on the entire operation of the copyright law, it is remarkable how many of the most practical questions the statute leaves equivocal or unanswered. And, while one cannot blame the courts for going off in different directions, it is equally remarkable how many of these questions remain unsettled after 56 years. If for no other reason a revision of the copyright statute is badly needed to replace the ambiguity and uncertainty of section 101 with as clear and explicit a provision on damages and profits as possible.

At the outset two general questions, neither of which has been finally settled under existing law, need answers:

(1) Can actual damages and profits be recovered "cumulatively" or only "alternatively"?

(2) Is the plaintiff in an infringement suit free to elect whether he wishes to recover either actual damages and profits or, at his option, statutory damages with a fixed minimum?

On the first question the 1961 *Report* recommended that an infringer should be "liable for the actual damages suffered by the copyright owner, or the profits of the infringer attributable to the infringement, whichever is greater." As

explained more fully below, this recommendation for "alternative" recovery has been modified in section 504 of the bill to allow for "cumulative" recovery of damages and profits under certain circumstances. On the second question the bill would make clear that it is the plaintiff's right to elect recovery of **[135]**statutory damages if he chooses. The groundwork for these general principles is laid in section 504(a) as follows:

Except as otherwise provided by this title, an infringer of copyright is liable for either:

(1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or

(2) statutory damages, as provided by subsection (c).

b. Actual Damages and Profits

An award of damages basically serves a different purpose from an award of profits. Damages are awarded to compensate the copyright owner for all of the losses caused him by the infringement, while an award of profits is intended to prevent the infringer from unjustly benefiting from his wrongful act. Profits are often used as a measure of the copyright owner's damages and, where they coincide in this way, it would be appropriate to award either damages or profits, whichever is greater. In that situation it would be unfair to award damages and profits "cumulatively," since in effect it would mean that the plaintiff would be recovering the same amount twice. On the other hand, there are cases in which the plaintiff has suffered losses not reflected in the defendant's profits, and the defendant has enjoyed profits that are attributable to his use of the plaintiff's work but are not considered in assessing damages. In these cases, as section 504 of the bill provides, it would be appropriate for damages and profits to be awarded "cumulatively":

The copyright owner is entitled to recover the actual damages suffered by him as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.

Note that, under this language, only those profits of the infringer that are "attributable to the infringement" can be recovered. Where the court finds that some of the defendant's profits resulted from his infringing use of the copyrighted work and that his additional profits were the result of other factors, it should make its award on the basis of an apportionment.

In line with another recommendation of the 1961 *Report*, subsection (b) of section 504 also provides:

In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

c. Statutory Damages

A unique, valuable, and controversial feature of American copyright law under the present statute is the right of the plaintiff in **[136]**an infringement suit to recover, "in lieu of actual damages and profits," an award of statutory damages which, with some exceptions, "shall in no * * * case exceed the sum of $ 5,000 nor be less than the sum of $ 250." The 1961 *Report* dealt at length with this problem and, with some changes as noted below, its basic recommendations have been followed in the bill.

Clause (1) of section 504(c) provides generally that:

* * * the copyright owner may elect to recover, instead of actual damages and profits, an award of statutory damages for all 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, in a sum of not less that $ 250 or more than $ 10,000 as the court considers just.

This clause represents an attempt to come to grips with the whole complex of problems that arise when awards of minimum statutory damages are to be applied to "multiple infringement" situations. For example, should the minimum award of $ 250 be multiplied when more than one work is infringed? When there has been a series of infringements of the same work? When a single enterprise has infringed several different exclusive rights? When more than one infringer

is involved? These problems are intricate enough by themselves, and they usually arise in a variety of combinations. They can be crucial in a case where the court is not disposed to award more than the minimum recovery required under the statute.

In an action under the bill involving more than one infringement--whether the infringements are separate, isolated, or occur in a related series--a single award of statutory damages in the $ 250-$ 10,000 range could be made under the following circumstances:

(1) *Where the infringements are all of "any one work."* This marks a change from the 1961 *Report*'s recommendations, which would have provided a single recovery of statutory damages for all infringements for which the infringer is liable. Under the bill, where separate works are involved, separate awards of statutory damages could be made. However, the bill makes clear that, although they may constitute separate works for other purposes, "[f]or the purposes of this subsection, all the parts of a compilation or derivative work constitute one work." Note that the criterion here is the number of distinct "works" infringed, and not the number of copyrights, exclusive rights, owners, or registrations involved.

(2) *Where, with respect to the infringements in question, "any one infringer is liable individually, or * * * any two or more infringers are liable jointly and severally."* Where the infringements in suit were committed by joint tort-feasors, the bill specifies a single award of statutory damages for which they would be jointly and severally liable. Where, however, separate infringements, for which two or **[137]**more defendants are not jointly liable, have been joined in the same action, separate awards of statutory damages could be made.

A much-debated issue derived from the *Report*'s recommendation that in any case where the defendant proves he was an "innocent infringer"--that is, that he did not know and had no reason to suspect that he was infringing--the court should have discretion to award less than $ 250 or to withhold statutory damages altogether. In opposition to this proposal, copyright owner groups expressed the fear that any such provision would encourage copyright infringement and defeat the purposes of statutory damages. They pointed out that suits against genuinely innocent infringers are quite rare, and they argued very strenuously that, even if the burden of proving innocence is placed on the infringer, it would often be easy for the defendant to present a claim of his "innocence" and difficult for the copyright owner to disprove it. They maintain that $ 250, which (with certain exceptions) has been the minimum award against all infringers, innocent or otherwise, for over 50 years, does not represent an onerous amount, especially in view of the provisions in section 411 denying statutory damages where infringement of a work is commenced before registration has been made.

On the other hand, strong arguments were made by representatives of broadcasters and educational groups, among others, for a provision permitting the court to remit the $ 250 minimum in cases of genuinely innocent infringement except to the extent that actual damage to the copyright owner can be shown. In addition, representatives of newspaper publishers urged retention of the present provision limiting liability for statutory damages "in case of a newspaper reproduction of a copyrighted photograph" to a range of $ 50 to $ 200.

In the light of these arguments we have concluded that, in order for the copyright law to operate as an effective deterrent against numerous small, erosive violations of a copyright owner's rights, a minimum award of statutory damages should be available in all cases where infringement has occurred. However, where the defendant succeeds in proving his innocence, the court should be given discretion to reduce the ordinary minimum award of $ 250, and in those cases the bill would set the minimum at $ 100. Clause (2) of section 504(c) therefore provides:

In a case where the infringer sustains the burden of proving that he was not aware and had no reason to believe that his acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $ 100.

As a counterpart to this change, the bill would depart from another recommendation of the 1961 *Report* by providing that, where the infringement is proved to have been committed willfully after receipt **[138]**of a notice to desist, the court may increase the ordinary maximum award of $ 10,000 to $ 20,000:

In a case where the copyright owner sustains the burden of proving that infringement was committed willfully after service upon the infringer of a written notice to desist, the court in its discretion may increase the award of statutory damages to a sum of not more than $ 20,000.

As mentioned in the *Report*, an infringement may be committed after the infringer has received a notice to desist and still not be "willful." An example might be a case where notice is sent to a large retail store but fails to reach the individual employees responsible for the infringement for some time. Thus, to be entitled to an award of statutory damages over the ordinary maximum, the plaintiff would have to prove not only that written notice to desist had been served, but also that the infringement was committed "willfully" thereafter.

4. COSTS AND ATTORNEY'S FEES

Section 505 of the bill follows the 1961 *Report*'s recommendation for a provision permitting the discretionary award of costs and attorney's fees:

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

As noted in the *Report*, the language of the present law could be construed as making the allowance of "full costs" mandatory, and there was some sentiment for specifically adopting this construction in the bill. The prevailing view, however, favored leaving the award of costs and attorney's fees entirely to the court's discretion. The bill also makes clear that neither costs nor attorney's fees can be awarded to or against "the United States or an officer thereof."

C. CRIMINAL OFFENSES

Section 506 of the bill specifies four types of activities which, as under the present law, would constitute criminal offenses:

(1) *Criminal infringement.*--Infringement of "a copyright willfully and for purposes of commercial advantage or private financial gain."

(2) *Fraudulent use of copyright notice.*--With fraudulent intent, either: (a) placing on an article a notice or "words of the same purport" that the defendant "knows to be false," or (b) publicly distributing or importing for public distribution "any article bearing such notice or words."

[139](3) *Fraudulent removal of copyright notice.*--With fraudulent intent, removing or altering "any notice of copyright appearing on a copy of a copyrighted work."

(4) *False representation.*--Knowingly making "a false representation of a material fact in the application for copyright registration * * * or in any written statement filed in connection with the application."

The extensive and spirited discussions of the criminal infringement provision reflect the importance many copyright owners attach to the criminal provisions as an effective sanction against infringement. Among the main points stressed were that the present penalties--a fine of $ 100 to $ 1,000 and imprisonment of up to one year--are not adequate to deter infringement, and that difficulties are sometimes encountered in inducing Federal prosecutors to bring criminal action because the relative weakness of the penalties makes them feel the offense is not very serious. Subsection (a) therefore provides that a person convicted of criminal infringement "shall be fined not more than $ 2,500 or imprisoned not more than one year, or both, for the first such offense." It also provides that, where the offense is repeated, the defendant may be fined up to $ 10,000 and imprisoned up to three years.

In each of the other three subsections the maximum fines have been increased to $ 2,500 and, in conformity with the provisions of the United States Criminal Code (title 18 of the United States Code), no minimum fines have been provided. Although, as pointed out in the 1961 *Report*, the Criminal Code contains a general provision penalizing the filing of false statements or documents in any Government agency, we believe that there are positive advantages in having the copyright statute itself call attention to the penalty for filing false information in connection with copyright claims.

D. LIMITATION ON ACTIONS

With some very minor improvements in language, section 507 of the bill is identical with section 115 of the present law. In general, it sets forth a 3-year statute of limitations for both criminal proceedings and civil actions:

(a) CRIMINAL PROCEEDINGS.--No criminal proceeding shall be maintained under the provisions of this title unless it is commenced within three years after the cause of action arose.

(b) CIVIL ACTIONS.--No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.

Up to 1958 the copyright statute contained no provision establishing a statutory limitation on the period for bringing civil actions, and to fill this gap the language of section 115 was amended by the Act of **[140]**September 7, 1957 (71 Stat. 633). At that time there was considerable debate on the precise wording of the provision, particularly the difference between the "arising of a cause of action" in a criminal case and the "accrual of a claim" in a civil case, and the question of tolling the statute in civil cases. The language finally adopted represents a reconciliation of views. (See H.R. Rep. No. 150, S. Rep. No. 1014, 85th Cong., 1st sess.) Thus, although the language of section 507 could undoubtedly be condensed and its structure improved, we decided it would be preferable not to reopen recently settled issues.

E. NOTIFICATION OF ACTIONS

Section 508 of the bill, which is patterned to some extent after a similar provision in the patent law, *35 U.S.C. § 290,* provides generally for a procedure under which the clerks of the Federal courts are to notify the Copyright Office of the filing of actions under the bill and of their final disposition, and the Copyright Office would make these notifications a part of its public records. We believe that these provisions would have a number of substantial advantages, and judging from the generally enthusiastic response to the section, the copyright bar agrees.

[141] *Chapter 8*

MANUFACTURING REQUIREMENT AND IMPORTATION

OUTLINE

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§ [V] FOREWORD [IX] PREFACE § [143] Chapter 8 MANUFACTURING REQUIREMENT AND IMPORTATION

A. MANUFACTURE OF CERTAIN COPIES IN THE UNITED STATES

1. IN GENERAL

The last of the major policy issues in general revision to be discussed in this *Supplementary Report* is whether to retain, in some form, provisions similar to the "manufacturing clause" of the present law. The problems of reconciling the interests of the American printing industry with those of American authors and publishers led to the adoption of the original "manufacturing clause" in 1891, and it is clear that these problems are still with us today.

In the hope that economic factors had changed sufficiently to permit the dropping of domestic manufacture as a condition of copyright, the 1961 *Report* recommended outright repeal of the manufacturing clause. It pointed out that authors suffer unfairly under the present requirements, and it concluded that the manufacture of copies abroad is no justification for denying copyright protection altogether, or for cutting it off after five years (as is now the case under the ad interim provisions of secs. 22 and 23 of the statute). The *Report* regarded the need for a limit on importation in order to protect the American book manufacturing industry as an "open question"; and it recommended that, if limitations on importation are considered necessary, they should be provided outside the copyright law.

In response to these proposals, representatives of the book manufacturing industry 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.

The interests opposed to those of the book manufacturers on this issue are primarily those of authors and book publishers, both of which have supported the recommendation for outright repeal. We still believe, as we indicated in the 1961 *Report*, that no reason can be found **[144]**to justify a manufacturing requirement that would deprive a copyright owner of rights, such as performing, dramatization, and motion picture rights, that are unrelated to the reproduction and distribution of copies.

Specifically with respect to publishing rights, we still believe that in principle they should not be made to depend upon compliance with manufacturing requirements. We recognize and sympathize with the arguments of book manufacturers, but it would be distinctly preferable if their asserted need for protection against foreign low-wage competition could be met without depriving copyright owners of their rights. The manufacturers maintain that this is not yet possible, and that a manufacturing requirement in the copyright statute is still essential to their interests. If this is true and the manufacturing clause must be retained, we believe that the requirement should be substantially narrowed so that rights are not destroyed in situations where the book manufacturing industry has no real need of protection. This is the thinking that has gone into the compromise proposal represented by section 601 of the bill.

It would be pointless and confusing for us here to attempt any detailed comparison of section 601 with the complex and abstruse manufacturing provisions in the present law. Instead we shall simply point out and comment on the salient features of section 601.

2. WORKS SUBJECT TO MANUFACTURING CLAUSE

Under subsections (a) and (b) of section 601, the manufacturing requirements would be much more limited in scope than those of the present law:

(1) The manufacturing requirements would apply only to "a work consisting preponderantly of nondramatic literary material that is in the English language and is protected under this title." They would not cover:

(a) Dramatic, musical, pictorial, or graphic works;

(b) Foreign-language, bilingual, or multilingual works;

(c) Material in the public domain; or

(d) Works consisting predominantly of material that is not subject to the manufacturing requirement.

(2) The manufacturing requirements would cover only those "portions [of the work] consisting of * * * material" that is subject to the requirements. For example, even if domestic manufacture were required for the text of a book, the illustrations could still be freely manufactured abroad without affecting their copyright status.

(3) The manufacturing requirements would not apply where "the author of any substantial part of [the work] is neither a citizen nor **[145]**a domiciliary of the United States." In other words, they would not apply to a work of which any substantial part was written by a foreign author. They would apply only to works of U.S. authors, and not then if one or more co-authors of the work were foreign.

3. LIMITATIONS ON IMPORTATION AND DISTRIBUTION OF COPIES MANUFACTURED ABROAD

The basic object of section 601 is to induce the manufacture of an edition of the book in the United States if more than 3,500 copies are to be distributed in this country. Thus, with respect to works that come within its scope, subsection (a) sets forth a general prohibition against "the importation into or public distribution in the United States of copies" unless the portions subject to the requirement "have been manufactured in the United States." Subsection (b) then sets forth the exceptions to this prohibition, and clause (2) would permit importation of up to 3,500 copies "where the Bureau of Customs is presented with an import statement issued under the seal of the Copyright Office." The 3,500-copy figure was suggested as the point, in the present book market, beyond which it is generally more costly for a publisher to import copies than to manufacture and edition here. As such it would be the equivalent of 1,500 copies in the market of 1949, when the statute was amended to provide a 1,500-copy limit on importation.

In addition to the 3,500 copies that could be imported under clause (2), clauses (3) and (4) of section 601 (b) would allow limited importation of copies, for use and not for sale, under certain special circumstances and conditions: for government, personal, or library use, etc. These exemptions are similar to those in section 107 of the present statute. Clause (5) offers a complete exemption from the manufacturing requirements of copies that "are reproduced in raised characters for the use of the blind." Clause (6) would permit the public distribution in the United States of copies imported in conformity with the other clauses of that subsection.

4. WHAT CONSTITUTES "MANUFACTURE IN THE UNITED STATES"

It has become apparent from our discussions that the most important practical issue in the current controversy over the manufacturing clause involves the extent to which the statute should impose restrictions on foreign typesetting or composition. At present, under what they believe to be 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 **[146]**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.

The book publishers have taken a very strong stand against any manufacturing provision, no matter how liberal in other respects, that would close this loophole and place restrictions on their use of imported reproduction proofs. They are also concerned lest the statutory definition of what constitutes "manufacture in the United States" prohibit them from taking advantage of new techniques and devices in book production, most particularly composition by means of computers. They argue that the present law would permit the use of imported computer tapes for composition here, and that the revised statute should do nothing to interfere with this practice.

Up to now this controversy has not been resolved. The book manufacturers have not so far indicated a willingness to accept an outright exemption of foreign composition from the manufacturing requirements. On the other hand, if the book publishers' construction of the disputed language in the present copyright statute is correct, it could be argued that a more restrictive provision in the revised law would violate the treaty obligations of the United States under the General Agreement on Tariffs and Trade (GATT).

Our decision, in redrafting the bill for introduction in 1965, was therefore to maintain the *status quo* on the issue of foreign composition. Unfortunately, the only way to accomplish this result was to preserve the ambiguous and awkward language of the 1909 statute as nearly as possible. Thus, section 601(c) of the bill reads:

The requirement of this section that copies be manufactured in the United States is satisfied where they have been printed from type set in the United States, either by hand or by the aid of any typesetting machine, or from plates made in the United States from type set therein, or, if the text has been produced by lithographic process, or photoengraving process, then by a process wholly performed in the United States, and where the printing of the text and binding of the copies have been performed in the United States. If the copies have been printed or produced by any process other than those specified in this subsection, the requirement is satisfied where every step in their reproductive manufacture took place in the United States.

The operative language of the first sentence of this subsection, including its possibly significant punctuation, is taken virtually intact from the basic statement of the manufacturing requirements in section 16 of the present statute. It is intended to mean here whatever it means there. The equivalent of the second sentence is found in the **[147]**extremely obscure provision of the first proviso of section 16, added by amendment in 1926, which refers to "works printed or produced * * * by any other process than those above specified in this section." The legislative history of that phrase makes clear that it was intended to cover copies reproduced entirely by methods--such as, for example, typewriting, mimeography or photography--which do not involve any of the processes specified earlier in the section. Thus, the second sentence of section 601(c) is not intended to enlarge the basic requirements of the first sentence or to apply in cases where all or any of the specified processes--typesetting, platemaking, lithography, photoengraving, printing, and binding--were employed.

It would be preferable, of course, if subsection (c) could say clearly what it means, rather than deliberately preserving the uncertainties of the present statute. However, as things now stand, further efforts at accommodation between the interests on both sides will be necessary to accomplish this result.

5. EFFECT OF VIOLATION

Subsection (d) of section 601 provides the sanctions for the manufacturing requirements:

Importation or public distribution of copies in violation of this section does not invalidate protection for a work under this title. However, in any action for infringement of the exclusive rights to reproduce and distribute copies of the work, the infringer has a complete defense if:

(1) he proves that copies of the work have been imported into or publicly distributed in the United States in violation of this section, and that the infringing copies were manufactured in the United States; and

(2) the owner of such exclusive rights then fails to sustain the burden of proving either

(A) that such importation or public distribution was without his authority or acquiescence; or

(B) that the infringement was commenced more than 3 months after the effective date of registration for an authorized edition of the work, the copies of which have been manufactured in the United States.

This would mean, in effect, that compliance with the manufacturing requirements would no longer represent a condition of copyright protection; and that there would no longer be any need to observe the special "ad interim" time limits and registration requirements of the present law. If copies are imported or distributed in violation of the requirements, the copyright owner's rights to reproduce the work in phonorecords, to make derivative works including dramatizations and motion pictures, and to perform or exhibit the work publicly, would not be affected.

[148]Violation of the manufacturing requirements would affect only the exclusive rights to reproduce and distribute copies and, even then, would not result in the complete loss of those rights. Under subsection (d) an infringer of the exclusive rights of making and distributing copies would be given a complete defense if: (1) the copyright owner authorized or acquiesced in an importation or public distribution of copies in violation of the manufacturing requirements, and (2) the infringing copies were manufactured in the United States. The subsection also provides, in effect, that a copyright owner can reclaim his full exclusive rights by manufacturing an edition in the United States; the infringer's defense would not be available if his infringement were commenced more than three months after registration for an authorized edition manufactured here.

The burden of proving a violation of the manufacturing clause as a defense would, of course, be on the infringer. However, an issue has arisen as to the burden of proof with respect to whether the copyright owner had authorized or acquiesced in the violation. The book manufacturers argue that this burden should be on the plaintiff, since evidence on the issue would be difficult for a defendant to obtain. Section 601(d)(2)(A) of the 1965 bill follows this suggestion, but the provision has been vigorously attacked in behalf of authors' groups. Their argument is that, where infringement has occurred, an infringer should not be freed completely of liability simply because the copyright owner is unable to prove that the importation or distribution of a few copies was made without his authority; the full burden of proving the defense that the manufacturing clause has been violated with the copyright owner's assent belongs on the infringer. On the basis of this argument, we would favor deleting clause (A) of subsection (d)(2), and rewriting subsection (d) accordingly.

B. INFRINGING IMPORTATION

1. IN GENERAL

Section 602, which is entitled "Infringing Importation of Copies or Phonorecords," deal with importations in violation of a copyright owner's rights, and has nothing to do with the manufacturing requirements of section 601. As chapter 6 of the bill is structured, the restrictions on importation in violation of the manufacturing clause are contained in section 601, the restrictions on importation of infringing copies or phonorecords are contained in section 602, and the enforcement of the importation restrictions of both sections 601 and 602 are laid out in section 603.

[149]Two separate situations are dealt with in section 602: (1) Importation of so-called "piratical" copies or phonorecords--those made without any authorization of the copyright owner--and (2) unauthorized importation of lawfully made copies or phonorecords. In general, the bill would make unauthorized importation of both kinds an act of infringement, but would permit the Bureau of Customs to prohibit importation only in the first situation.

Under section 602(a), "[i]mportation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work for the purpose of distribution to the public" would be an infringement of the "exclusive right to distribute copies or phonorecords." Thus, even before any public distribution of imported copies or phonorecords had taken place, an unauthorized importer whose purpose is to distribute them in the United States could be enjoined from distributing them and sued for damages. However, the section would not apply where the importer was "an organization operated for scholarly, educational, or religious purposes and not for private gain, with respect to copies or phonorecords intended to form a part of its library."

2. IMPORTATION OF "PIRATICAL" COPIES

As recommended in the 1961 *Report*, section 602 (b) would retain the present prohibition against the importation of copies or phonorecords whose making, in the words of the 1965 bill, "would have constituted an infringement of copyright if this title had been applicable." The prohibition would apply to all "piratical" copies or phonorecords. This would include not only those that were unlawful in the foreign country where they were made; it would also cover cases

where, even though the making of the copies or phonorecords is lawful under the domestic law of that foreign country, their making would have constituted an infringement if the U.S. copyright law could have been applied. Take, for example, a work by an American author which is in the public domain in another country because it does not have copyright relations with the United States: nothing could be done to prevent the making and publication of an unauthorized edition in that country, but section 602(b) would prohibit the importation of copies from that edition without the authority of the U.S. copyright owner.

3. IMPORTATION FOR INFRINGING DISTRIBUTION

In the second situation covered by section 602, the copies or phonorecords were lawfully made but their distribution in the United **[150]**States would violate the exclusive rights of the U.S. copyright owner. This would occur, for example, where the copyright owner had authorized the making of copies in a foreign country for distribution only in that country. The 1961 *Report* concluded that it would not be practicable for the Bureau of Customs to enforce a prohibition against importation in this situation, and section 602(b) provides that, except where a violation of the manufacturing clause is involved, the Bureau has no authority to prevent importation in a case "where the copies or phonorecords were lawfully made." On the other hand, as noted above, unauthorized importation in this situation for the purpose of public distribution in the United States would be an infringement and could be enjoined.

4. NOTIFICATION TO COPYRIGHT OWNERS

The last sentence of section 602(b) authorizes the Secretary of the Treasury to establish a procedure for notifying copyright owners of importations that may be infringing. This provision, which is patterned after a recent Treasury Regulation dealing with patents *(29 Fed. Reg. 4720),* would enable copyright owners to obtain the information needed to institute court proceedings, whether the copies or phonorecords in question are excluded or allowed entry.

C. ENFORCEMENT OF IMPORTATION PROHIBITIONS

Section 603, which would govern enforcement of the importation prohibitions of both sections 601 and 602, is similar to section 109 of the present statute. Subsection (a) would empower the Secretary of the Treasury and the Postmaster General to make regulations for this purpose, and subsection (c) deals with the disposition of excluded articles.

Section 603(b), which pertains only to the prohibition against importation of "piratical" copies or phonorecords, contains provisions not found in the present statute. The Bureau of Customs is often in no position to decide questions of law or fact involved in determining whether copies or phonorecords are "piratical." To meet this problem, subsection (b) would permit the Customs Regulations to require "that the person seeking exclusion" either: (1) "obtain a court order enjoining importation of the articles," or (2) furnish proof supporting his claim, and post bond. The provisions with respect to furnishing proof and posting bond are similar to an existing Treasury Regulation (*19 C.F.R. § § 11.18-11.*21) for enforcement of the prohibition against importation of "piratical copies" under the present law.

[151] *Chapter 9*

ADMINISTRATIVE PROVISIONS

OUTLINE

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§ [153] Chapter 9 ADMINISTRATIVE PROVISIONS

A. IN GENERAL

Chapter 7 of the bill, which is entitled "Copyright Office," contains what would be the administrative or "housekeeping" provisions of the new law. In the main these sections are restatements of the corresponding sections in the present statute, rearranged and reworded in an effort to present the organization, operating functions, and procedures of the Copyright Office as clearly and accurately as possible. Except on three points--disposition of deposits, the Catalog of Copyright Entries, and copyright fees--the provisions seem to be self-explanatory.

B. RETENTION AND DISPOSITION OF DEPOSITED ARTICLES

A practical problem of mutual concern to the Copyright Office and the copyright bar is that of reconciling the storage limitations of the Office with the need to retain copies and phonorecords for the identification of works in which a copyright has been registered. For the most part, copies of unpublished works have been retained indefinitely, but the

accumulation of published copies has been too great to make that practicable. At present the deposit copies of published works not selected by the Library of Congress and retained in the Copyright Office amount to about 200,000 items per year, and the limited storage facilities available in the Library of Congress have led to the disposal of most of the unselected published copies after they have been retained for a few years. We are fully aware, however, of the difficulties encountered when copies needed for identification in connection with litigation or other purposes have been destroyed; and our experience with the later discovery of the value of forgotten copyright deposits has shown that today's ephemera can become collector's items or irreplaceable social history in years to come.

At present we have no solution that would permit the retention of the mass of deposited material accumulating over many years. It is not inconceivable, however, that the problem might be capable of solution in the future through the use of new facilities and techniques such as information storage and retrieval devices. We believe that the statute should provide, as a statement of policy, that deposited **[154]**items are to be retained for as long as possible; but it is essential that the statute also preserve the discretion of the Register of Copyrights and the Librarian of Congress to dispose of them ultimately under proper safeguards.

Section 704 contains several provisions that should be specially noted in this connection:

(1) Under subsection (b), the Library of Congress would be entitled to select material deposited in connection with copyright registration of published works for its own collections "or for exchange or transfer to any other library." However, in the case of unpublished works, the Library would be entitled only "to select any deposits for its collections."

(2) Subsection (c) provides that "[d]eposits not selected by the Library under subsection (b), or identifying portions or reproductions of them, shall be retained under the control of the Copyright Office, including retention in Government storage facilities, for the longest period considered practicable and desirable by the Register of Copyrights and the Librarian of Congress." The aim of this provision is to preserve copyright deposits of all classes of material for as long a period as is reasonably possible by any practical means of storage or reproduction. The reference to "Government storage facilities" contemplates that "dead storage" available in or out of Washington would be considered preferable to outright destruction.

(3) When the Register and Librarian have decided that retention of the deposited articles is no longer "practicable and desirable," subsection (c) gives them "joint discretion * * * to order their destruction or other disposition." However, in the case of unpublished works, no deposit could be disposed of during the term of copyright "without specific notice to the copyright owner of record at his last address given in the public records of the Copyright Office, permitting him to claim and remove it."

(4) Subsection (d) of section 704 is a new provision aimed at setting up a procedure under which retention of a particular deposit could be specially provided for. It specifies that, under conditions and fees to be established by regulations, the depositor or the copyright owner "may request retention under the control of the Copyright Office of one or more of [the articles deposited] for the full term of copyright in the work."

C. CATALOG OF COPYRIGHT ENTRIES

The 1961 *Report* reviewed the rather rigid requirement of the present law with respect to the printing and periodic issuance of a catalog of all copyright registrations, and recommended a more flex**[155]**ible approach. It noted that the printed catalog is extremely expensive to prepare, and that some parts of it are used much less than others. In view of the new techniques of reproduction and dissemination of information, the *Report* suggested that the purposes of the catalog might be served better, and at less cost, if the Register of Copyrights were given discretion to decide when and in what form the various parts should be issued.

In the discussions of this question the unique value of the printed catalog, both as a source of information otherwise available only from a search in the Copyright Office and for general reference use, was emphasized very strongly. One frequent user of the catalog expressed concern lest the changes in the form or frequency of publication of the catalog might lead to its truncation or abandonment. We agree that the catalog is of irreplaceable value to the public and that, if anything, our efforts should be to make it even more widely available and useful. It seems clear that the rigidity of the present law results in a more costly product than is needed for some parts of the catalog. With the range of new technical devices that are now or will be available to us, a more flexible authorization to determine the form and frequency of publication of each part of the catalog is highly desirable. Section 707(a) therefore provides:

The Register of Copyrights shall compile and publish at periodic intervals catalogs of all copyright registrations. These catalogs shall be divided into parts in accordance with the various classes of works, and the Register has discretion to determine, on the basis of practicability and usefulness, the form and frequency of publication of each particular part.

D. COPYRIGHT OFFICE FEES

The annual fees received by the Copyright Office exceeded its expenditures from 1909 until 1942. They then lagged behind until 1948, when the enactment of a higher schedule again brought their annual total above expenditures. Since then the ratio of fees to expenditures has steadily declined, and was down to about 64 percent for the last 2 fiscal years. The estimated value of deposits taken into the collections of the Library of Congress, if added to the fees, would still produce a total sum about equal to the Office's expenditures. However, the House Subcommittee on Legislative Appropriations has indicated the belief that the fees alone should more nearly approximate the expenditures.

Special bills to increase the fees were introduced in March 1963 (H.R. 5136, 88th Cong., 1st sess.) and again in January 1965 (H.R. 2853, 89th Cong., 1st sess.). The fee schedule in section 708 of the general revision bill is in line with them.

[156]As recommended in the 1961 *Report*, section 708 authorizes the Register of Copyrights to fix fees, on the basis of costs, for any special services not covered by the statutory fee schedule. Departing from another of the *Report*'s recommendations, however, the bill would fix a lower fee for renewal registrations ($ 4.00) than that provided for original registrations ($ 6.00). Representatives of authors' groups have urged very strongly that a lower renewal fee is justified and necessary; they point particularly to the financial burden imposed on the authors of a number of short works (songwriters, poets, magazine writers, etc.) who must renew all their works, including some of little or no commercial value, in order to protect themselves fully. We agree that this argument has validity, and that the renewal fee should not be set so high as to make renewal registration a hardship.

[157] *Chapter 10*

TRANSITIONAL AND SUPPLEMENTARY PROVISIONS

OUTLINE

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§ [159] Chapter 10 TRANSITIONAL AND SUPPLEMENTARY PROVISIONS

A. EXPLANATION OF SECTION NUMBERS

The system employed in the bill for numbering sections is one generally used in bills that codify or revise an existing law. Since the numbering system in the bill has been puzzling to some people, however, perhaps it deserves an explanation. As a technical matter the general revision bill consists of 12 sections. SEC. 1 of the bill is the completely revised text of title 17 of the United States Code, which is itself divided into seven chapters that are subdivided into sections, running from § 101 through § 708. SEC. 2 through SEC. 12, coming at the very end of the bill, are "transitional and supplementary" provisions which would not be a part of the new title 17.

B. EFFECTIVE DATE

Section 2 of the Transitional and Supplementary Provisions, which would fix the date on which the revised title 17 would come into effect, provides: "This act becomes effective on January 1, 1967, except as otherwise provided by section 304(b) of title 17 as amended by this act." The date of "January 1, 1967" was chosen more or less arbitrarily to indicate when the new law should become effective if it were enacted during 1965. It is our thought that at least a year should be allowed after enactment to prepare for adjustments to the changes the new law would bring with it. The date which is finally chosen as the effective date of the act will therefore depend upon when the general revision bill is enacted.

The exception under section 304(b) which is referred to in SEC. 2 has to do primarily with the interim extension of subsisting renewal copyrights approved on September 19, 1962 (Public Law 87-668). Under that act, copyrights in their renewal terms that would otherwise have expired between September 19, 1962 and December 31, 1965, were extended to the latter date. Section 304 of the general revision bill would lengthen the renewal term of subsisting copyrights so that their total term would be 75 years. However, if the general revision statute were to be enacted in 1965 but with an effective date of "January 1, 1967," what would happen to the many renewal copyrights that were extended by Public Law 87-668 and are scheduled to expire on December 31, 1965?

[160]Thus, on the undoubtedly optimistic assumption that the revision bill will be enacted during 1965, section 304(b) would make the total 75-year term applicable to the "duration of any copyright, the renewal term of which is subsisting on December 31, 1965." Likewise, since they are not covered under section 304(a), subsection (b) also makes the longer term applicable to copyrights renewed between December 31, 1965 and December 31, 1966. The dates specified in section 304(b) would, of course, need to be changed if the revision bill is not enacted in 1965 or if, as proposed in H.J. Res. 431 which is now pending, Congress enacts another interim extension of subsisting renewal copyrights.

C. WORKS IN THE PUBLIC DOMAIN

The first sentence of SEC. 3 provides that the act "does not provide copyright protection for any work that goes into the public domain before January 1, 1967," thus making clear that in no case would a lost or expired copyright be revived by the bill. Under the second sentence, the "exclusive rights * * * to reproduce a work in phonorecords and to distribute phonorecords of the work, do not extend to any nondramatic musical work copyrighted before July 1, 1909." This provision is a vestige of the act of 1909, which in granting a "mechanical recording" right in music, expressly limited that right to compositions copyrighted after July 1, 1909. The provision of SEC. 3 is necessary to make clear that works copyrighted before that date could not acquire recording rights under the bill.

D. EXISTING PRESIDENTIAL PROCLAMATIONS

SEC. 4 concerns the status of proclamations with respect to the protection of foreign works, issued by the President under the copyright statutes existing before the effective date of the present bill. It is intended to make clear that these proclamations "shall continue in force until terminated, suspended, or revised by the President," and are not terminated by the revision of the statute.

E. SUPERSEDED PROVISION ON GOVERNMENT PUBLICATIONS

Section 52 of the Printing Act of 1895, which would be repealed by SEC. 5 of the bill, prohibits copyright in any "Government publication." Since this prohibition would be covered by section 105 of the bill, which uses the broader term "work of the United States Government," SEC. 5 carries out the 1961 *Report's* recommendation that the vestigial provision in the Printing Act be repealed "to avoid duplication and possible confusion."

[161] F. EXISTING COMPULSORY LICENSES FOR MECHANICAL REPRODUCTIONS OF MUSIC

Section 1(e) and 101(e) of the present statute provide for a compulsory license with respect to the making of "parts of instruments" (that is, "phonorecords") for the "mechanical reproduction" of a musical work, which can be obtained by serving a notice on the copyright owner. As explained in *chapter 2* of this *Supplementary Report*, section 113 of the revision bill would provide for a similar compulsory license, but with a number of changes in specific features. The most notable changes would involve the statutory royalty rate and the remedies of the copyright owner upon default in the payment of royalties.

SEC. 6 deals with the status of compulsory licenses that have already been obtained on the date when the revised law comes into effect. It is intended to permit a person who has obtained a compulsory license under the present statute to continue, after the revised statute becomes effective, "to make and distribute such parts embodying the same mechanical reproduction without obtaining a new compulsory license * * *." However, any new "mechanical reproduction" would be subject to the new provisions of section 113: if a compulsory licensee under the present law wished to make and distribute phonorecords of a different recording of the same song under the revised law, he would have to follow the procedure set out in section 113 for obtaining a compulsory license. Moreover, as SEC. 6 makes clear, any phonorecords "made after January 1, 1967" (including those for which a compulsory license had been obtained before that date) would be subject to the provisions of the new statute; unless he and the copyright owner agree otherwise, the compulsory licensee would be subject to the higher royalty rate, and the revised provisions on payment and default, with respect to any phonorecords he makes after the revised law becomes effective.

G. AD INTERIM COPYRIGHTS

The "ad interim" provisions in sections 22 and 23 of the present law represent an exception to the manufacturing requirements. Where an English-language book or periodical would otherwise not be protected under the statute because it has been manufactured abroad, a special procedure is provided under which temporary protection can be secured for an "ad interim" period of 5 years. The ad interim copyright is secured by registration in the Copyright Office within 6 months after first publication abroad. It can be extended to run for the full copyright term by publishing an

edition manufac**[162]**tured in the United States during the 5-year ad interim term, and by making another registration for that edition.

As explained in *chapter 7* of this *Supplementary Report*, the manufacturing requirements provided in the revised statute would not represent a condition of copyright protection, and all ad interim time-limits and procedural requirements have been dropped from the bill. Accordingly, "[i]n the case of any work in which ad interim copyright is subsisting or is capable of being secured on December 31, 1966, * * *" SEC. 7 provides that "copyright protection is hereby extended to endure for the term or terms" provided by section 304 of the revised statute. Thus, where a work is already covered by an ad interim copyright or where, having been published abroad during the 6 months before the date the new statute comes into effect, it is eligible for ad interim registration on that date, it would automatically be governed by the duration provisions of section 304 without the need to observe any special time limits or registration procedures.

H. NOTICE IN COPIES OF PREVIOUSLY PUBLISHED WORKS

As explained in *chapter 5* of this *Supplementary Report*, the provisions in the revised statute regarding the copyright notice differ in some respects from those in the present statute. The first sentence of SEC. 8 states the general rule that the notice provisions of the revised statute "apply to all copies or phonorecords publicly distributed on or after January 1, 1967."

In the case of a work first published before the effective date of the revision, however, the copies will necessarily have borne the notice called for by the present statute. In that situation the continued use of a notice that is now acceptable under the existing law should be permitted on the copies of the work publicly distributed after the revised statute comes into effect. The second sentence of SEC. 8 therefore, provides that "in the case of a work published before January 1, 1967, compliance with the notice provisions of title 17 either as it existed on December 31, 1966, or as amended by this act, is adequate with respect to copies publicly distributed after December 31, 1966."

I. OTHER TRANSITIONAL AND SUPPLEMENTARY PROVISIONS

The remaining four "transitional and supplementary provisions," which are contained in SECS. 9 through 12 of the bill, do not appear to require extended comment. SEC. 9 is intended to make clear that registration and recordation on the basis of materials received in the Copyright Office before the effective date of the new law are to be **[163]**made under the present law, even though the process is not completed until later. SEC. 10 deals with the case where the Register of Copyrights makes a demand, either before or after the effective date of the revision, for the deposit of copies of a work published before that date; it provides that the demand, and the effect of noncompliance with it, will be governed by the present statute but that any deposit, application and fee received after December 31, 1966, in response to the demand are to be filed in accordance with the revised statute. SEC. 11 makes clear that a cause of action existing when the revision becomes effective is to be governed by the law under which it arose, and SEC. 12 is the familiar constitutional clause commonly used in statutes.

Additional "transitional and supplementary" provisions will be needed to amend other Federal statutes which refer to particular sections of the existing copyright statute by number. Examples are *section 543(a)(4) of title 26* of the United States Code (the Internal Revenue Code), dealing with copyright royalties in the context of personal holding company income, and section 1498 of title 28 of the Code, dealing with the liability of the Government under the damage provisions of the present law.

[165] APPENDIXES

FOOTNOTES:

[n1] Footnote *. Citations to the *Report*, and to the later collections of comments and discussions published in connection with the program for general revision, will be found in App. A.

[n2] Footnote *. The distinctions in this area emerge from two lines of cases. One line includes *Lamb v. Grand Rapids School Furniture Co. , 39 F. 474 (W.D. Mich. 1889); National Cloak & Suit Co. v. Kaufman , 189 F. 215 (M.D. Pa. 1911); National Cloak & Suit Co. v. Standard Mail Order Co. , 191 F. 528 (S.D.N.Y. 1911); Jack Adelman, Inc. v. Sonners & Gordon, Inc. , 112 F. Supp. 187 (S.D.N.Y. 1934); Muller v. Triborough Bridge Authority , 43 F. Supp. 298 (S.D.N.Y. 1942); Fulmer v. United States , 103 F. Supp. 1021 (Ct. Cl. 1952); Kashins v. Lightmakers, Inc. , 155 F. Supp. 202 (S.D.N.Y. 1956); DeSilva Construction Corp. v. Herrald , 213 F. Supp. 184 (M.D. Fla. 1962);* and *PIC Design Corp. v. Sterling Precision Corp. , 231 F. Supp. 106 (S.D.N.Y. 1964).* The other line of cases includes *King*

Features Syndicate v. Fleischer , 299 F. 533 (2d Cir. 1924); Fleischer Studios, Inc. v. Freundlich, Inc. , 73 F.2d 276 (2d Cir. 1934); and *Jones Bros. Co. v. Underkoffler , 16 F. Supp. 729 (M.D. Pa. 1936).*

[n3] Footnote *. Sec. 304(c) needs to be amended with respect to the start of this 5-year period. In some cases where the regular 56-year term of copyright has been extended by interim legislation (Public Law 87-668 and any similar later enactment), the period of 5 years from the end of the 56-year term will nearly have expired on Jan. 1, 1967, when the new law becomes effective. We are, therefore, proposing that clause (2) of sec. 304(c) be amended to read:

"(2) Termination of the grant may be effected at any time during a period of 5 years beginning at the end of 56 years from the date copyright was originally secured, or beginning on Jan. 1, 1967, whichever is later."