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FIRST THOUGHTS ON THE COPYRIGHT ACT OF 1976

BARBARA RINGER*

All government, indeed every human benefit and enjoyment, every virtue and prudent act, is founded on compromise and barter.¹

This introduction to the second issue of the *NEW YORK LAW SCHOOL LAW REVIEW*'s Copyright Symposium is being written during an uneasy transitional period in the history of American copyright law. The efforts to achieve copyright reform have been so protracted, the struggle so intense, and the outcome so precarious that the realities of the present situation are hard to grasp.² Over-

Due to an error, a copyright notice improperly appears on page 477 of the article authored by Hon. Barbara Ringer, U.S. Register of Copyrights. This article was prepared by Ms. Ringer during the course of her official duties, and therefore, no exclusive rights exist therein.

A tension between the Constitution's aim—"To promote the Progress of Science and useful Arts"—and its chosen means—a limited monopoly in individual "Authors and Inventors" (U.S. CONST. art I, § 8), *i.e.*, between the monopoly controls of copyright and the broad needs of the public for access to information, was noted by Representative Robert Drinan.

As one examines this lengthy bill and even longer report [H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976)], these divergent strains can be seen. The tension between competing values we all share emerges quite clearly. . . . Of necessity it strikes balances between social goals equally high in value. It is always difficult to legislate on matters in which the opponents have sound arguments. Seeking and finding accommodations of such rational views is a hard task.

night, it has become necessary to stop thinking in terms of what the new law might or should contain, and to begin a process of evaluation and implementation of provisions that now exist as statutory law.

President Ford's signature on the new Copyright Act on October 19, 1976³ brought with it a combined sense of gratification and anxiety, relief and disorientation of the sort that inevitably accompanies the sudden achievement of long-sought goals. Yet successful implementation of the many changes wrought by the revised statute is in many ways as important as enactment itself; and, for some, the task that lies ahead is more demanding than what has already been accomplished.

Unlike most legislation of comparable length and scope, the new statute does not give itself a short title. S. 22, the last of a long series of comprehensive copyright revision bills going back to 1924,⁴ was entitled "A bill for the general revision of the Copyright

Id. at 10880 (remarks of Rep. Drinan).

Similarly, the length and intensity of the discussions leading to the new law were unusually protracted and at times acrimonious. Finally, many of the compromises in the bill are "open-ended"; they anticipate on-going processes of review, evaluation and possible change. 122 CONG. REC. 11728, 11730 (daily ed. Sept. 29, 1976).

3. Pub. L. No. 94-553, §§ 101 *et seq.* (Oct. 19, 1976) [hereinafter referred to as the New Act and cited as Pub. L. No. 94-553]. For the full text of the New Act see Appendix, *infra* at 811.

4. The history of efforts to revise the copyright laws in the first half of this century is discussed in Goldman, *Study No. 1, The History of U.S.A. Copyright Law Revision from 1901 to 1954*, in 2 STUDIES ON COPYRIGHT 1101 (Copyright Office, Arthur Fisher Mem. Ed. 1963). This was the first of 35 studies prepared under the supervision of the Copyright Office which laid the groundwork for the present revision effort. As a result of these studies, a preliminary draft bill was prepared in 1963. REGISTER OF COPYRIGHTS, COPYRIGHT LAW REVISION, Pt. 3 PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW AND DISCUSSIONS AND COMMENTS ON THE DRAFT 88th Cong., 1st Sess., at 1-36 (Comm. Print 1964) [hereinafter cited as PRELIMINARY DRAFT]. In 1964, the first copyright revision bills were introduced in Congress. H.R. 12354, S. 3008; 88th Cong., 2nd Sess. (1964). In 1965, five bills for the general revision of the copyright law were introduced. H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835, S. 1006; 89th Cong., 1st Sess. (1965). Extensive hearings were held in both the House and Senate. *Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965); *Hearings on S. 1006 Before the Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary*, 89th Cong., 1st & 2d Sess. (1966). In 1967, new bills for copyright law revision were introduced. One, H.R. 2512, 90th Cong., 1st Sess. (1967), was passed by the House in April of that year. *Hearings on S. 597 Before the Subcomm. on Patents, Trademarks and Copyrights, of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 915-66 (1967). The obvious impasse that the revision effort reached in 1967 did not prevent the later introduction of several bills for general copyright reform. *See, e.g.*, S. 543, 91st Cong., 1st Sess. (1969); S. 644, 92d Cong., 1st Sess. (1971); S. 1361, 93d Cong., 1st Sess. (1973). Further, in

Law, title 17 of the United States Code, and for other purposes.”⁵ However, the terms “general” and “revision,” broad as they are, do not sufficiently describe the relationship between the new statute and the Copyright Act of 1909.⁶ The revisions contained in the New Act are certainly “general” in scope; they substantially revise the provisions of that antiquated law under which we have been struggling to operate for sixty years. Little has remained the same. But the New Act is not a “general revision” in the same sense that the 1909 Act was, *i.e.*, a bringing together of scattered statutory provisions with relatively few changes or innovations. The New Act is rather a completely new copyright statute, intended to deal with a whole range of problems undreamed of by the drafters of the 1909 Act.⁷ Even more important, the new statute makes a number of fundamental changes in the American copyright system, including some so profound that they may mark a shift in direction for the very philosophy of copyright itself. Properly designated, the New Act is not a “general revision,” but is as radical a departure as was our first copyright statute, in 1790.⁸

When it was originally drafted in the early 1960's, the bill⁹ that eventually became the Act of 1976 was not based on preexisting legislation, least of all the Act of 1909. Before embarking on its drafting efforts, the Copyright Office had engaged in an extensive research project, which produced a series of thirty-five studies analyzing what were then considered the major problems in copyright revision.¹⁰ These studies included consideration of, among

1973, the Senate held two days of important hearings on four troublesome issues in revision: library photocopying, educational exemptions, cable television and sports blackouts. *Hearings on S. 1361 Before the Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973).

5. Title of S. 22.

6. Act of March 4, 1909, ch. 320, 35 Stat. 1075, now 17 U.S.C. § 1 *et seq.* (1970) [hereinafter referred to as the 1909 Act].

7. The sections of the New Act dealing with fair use and library and archival reproductions obviously involve technologies substantially unknown in 1909. Pub. L. No. 94-553, § 107, 108. So, too, do the highly complex provisions concerning exempt performances and displays, *id.* § 110(1), (4), (5), (8), (9); the copyright liability of cable television retransmission, *id.* § 110; and noncommercial public broadcasting. *Id.* § 118. Indeed, the present and future scope of some technologies, for example, the use of copyrighted works in computer and similar information systems, are so uncertain and shifting in 1976 as to make immediate resolution of their copyright status or impact impractical. *Id.* § 117.

8. Act of May 31, 1790, ch. 15, 1 Stat. 24.

9. PRELIMINARY DRAFT, *supra* note 4.

10. The studies are reproduced in the two-volume *STUDIES ON COPYRIGHT* (Copyright Office, Arthur Fisher Mem. Ed. 1963).

other topics, the history and wording of the copyright statutes of other countries,¹¹ of international conventions on copyright,¹² and of the long series of earlier revision bills,¹³ beginning in 1924 and climaxed by the famous "Shotwell bill" of 1940.¹⁴

11. The following discussions of foreign copyright laws appear in STUDIES ON COPYRIGHT (Copyright Office, Arthur Fisher Mem. Ed. 1963): Derenberg, *Study No. 3, The Meaning of "Writings" in the Copyright Clause of the Constitution* at 46-47 (history of Copyrights in England); Henn, *Study No. 5, The Compulsory License Provisions of the United States Copyright Law* at 914-19 (foreign laws on compulsory licensing); Doyle, et al., *Study No. 7, Notice of Copyright* at 252-62; Berger, *Study No. 10, False Use of Copyright Notice* at 303; Kaminstein and Bogsch, *Study No. 11, Divisibility of Copyrights*, Supplement 2: *Divisibility in the Laws of Foreign Countries* at 681-87; Cary, *Study No. 12, Joint Ownership of Copyrights* at 706-11; Varmer, *Study No. 13, Works Made For Hire and on Commission* at 727-31; Latman, *Study No. 14, Fair Use of Copyrighted Material* at 802-07; Varmer, *Study No. 15, Photoduplication of Copyrighted Material by Libraries* at 822-28; Varmer, *Study No. 16, Limitations on Performing Rights* at 847-51; Kaplan, *Study No. 17, The Registration of Copyright* at 384-89; Dunne, *Study No. 20, Deposit of Copyrighted Works* at 413-21; Dunne and Rogers, *The Catalog of Copyright Entries* at 466-67; Strauss, *Study No. 22, The Damage Provisions of the Copyright Law* at 1009-15; Strauss, *Study No. 24, Remedies Other Than Damages for Copyright Infringement* at 1039-40 and 1042-43 (dealing with injunction, impounding and destruction of infringing copies and criminal penalties respectively); Latman and Tager, *Study No. 25, Liability of Innocent Infringers of Copyrights* at 1061-63; Ringer, *Study No. 26, The Unauthorized Duplication of Sound Recordings* at 156-62; Strauss, *Study No. 27, Copyright in Architectural Works* at 94-96; Varmer, *Study No. 28, Copyright on Choreographic Works* at 110-11; Strauss, *Study No. 29, Protection of Unpublished Works* at 207-09; Guinan, *Study No. 30, Duration of Copyright* at 477-79; Ringer, *Study No. 31, Renewal of Copyright* at 600-15; Bogsch, *Study No. 32, Protection of Works of Foreign Origin* at 746-47; Berger, *Study No. 33, Copyright in Government Publications* at 180-82; McCannon, *Study No. 35, The Manufacturing Clause of the United States Copyright Law* 1159-65 (restrictions on the book trade).

12. The following discussions of international conventions on copyright appear in STUDIES ON COPYRIGHT (Copyright Office, Arthur Fisher Mem. Ed. 1963): Henn, *Study No. 5, The Compulsory License Provisions of the United States Copyright Law*, at 919-22 (International Agreement on Compulsory Licensing); Doyle et al., *Study No. 7, Notice of Copyright*, at 241, 249-52; Kaminstein, *Study No. 11, Divisibility of Copyrights*, at 651-52; Latman, *Study No. 14, Fair Use of Copyrighted Works*, at 807; Varmer, *Study No. 16, Limitations on Performing Rights*, at 851-52; Ringer, *Study No. 26, The Unauthorized Duplication of Sound Recordings*, at 162-64; Strauss, *Study No. 27, Copyright in Architectural Works*, at 94; Varmer, *Study No. 28, Copyright in Choreographic Works*, at 110; Strauss, *Study No. 29, Protection of Unpublished Works*, at 205-07; Guinan, *Study No. 30, Duration of Copyright*, at 479-80; Ringer, *Study No. 31, Renewal of Copyright*, Appendix B, at 598-600; Bogsch, *Study No. 32, Protection of Works of Foreign Origin*, at 743-46; Berger, *Study No. 33, Copyright in Government Publications*, at 181; McCannon, *Study No. 35, The Manufacturing Clause of the United States Copyright Law*, at 1128-30 and 1165-69 (history of international copyright movement and agreements on book trade, respectively).

13. Goldman, *Study No. 1, The History of U.S.A. Copyright Law Revision from 1901 to 1954* in 2 STUDIES ON COPYRIGHT 1101 (Copyright Office, Arthur Fisher Mem. Ed., 1963).

14. S. 3043, 76th Cong., 1st Sess. (1940). This bill, which was introduced by

Detailed comments on the issues raised by the Studies, the 1961 Register's Report¹⁵ and the 1965 Supplementary Report of the Register,¹⁶ as well as a mass of other primary and secondary materials were considered by the Copyright Office while preparing its initial drafts. The organization of the bill as a whole, and the wording and content of individual sections, reflected a synthesis of all these sources. Some were more useful than others in suggesting what should be put in or left out, how individual drafting problems might best be solved, and how a particular thought might best be phrased, but there was no single model for anything. The basic drafting approach was to decide what to say and then say it as clearly and consistently as possible, whether or not it had ever been said that way before.

In the sense that they reflected deliberate choices between alternatives, based on past proposals from contending interests, the Copyright Office's initial drafts were in fact compromises even before they met the light of day. In many cases alternative drafts were put forward to test reactions and to gauge what might lead to compromise solutions and what might not. Once the statutory drafts were issued for comment¹⁷ and congressional consideration, an extraordinary process of open compromise and barter began. This process continued for nearly fifteen years,¹⁸ down to the very

Senator Thomas, derived its popular name from Professor James T. Shotwell of Columbia University, Chairman of the National Committee of the U.S.A. on International Intellectual Cooperation, who, with Dr. Waldo G. Leland formed the Committee for the Study of Copyright. The Committee drafted the legislation introduced by Senator Thomas. No hearings were held on the bill, which was never reported out of committee. Goldman, *supra* note 4, at 1112-13.

15. REGISTER OF COPYRIGHTS, COPYRIGHT LAW REVISION, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE COPYRIGHT LAW, 87th Cong., 2d Sess. (Comm. Print 1961) [hereinafter referred to and cited as REGISTER'S REPORT].

16. REGISTER OF COPYRIGHTS, COPYRIGHT LAW REVISION, Part 6, SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL, 89th Cong., 1st Sess. (Comm. Print 1965).

17. PRELIMINARY DRAFT, *supra* note 4.

18. Compare, B. Ringer, *Draft Second Supplemental Report of the Register of Copyrights on Copyright Law Revision* (unpublished report submitted to the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess., 1975), with REGISTER'S REPORT, *supra* note 9, and 1965 SUPPLEMENTARY REPORT OF THE REGISTER, *supra* note 10. Indeed, the voluntary guidelines regarding library reproductions were agreed upon so late in the legislative process that they had to be included in the Conference Report immediately before final passage. CONF. REP. NO. 1733, 94th Cong., 2d Sess. 71-72 (1976) [hereinafter cited as CONF. REP.].

day the bill was finally passed by both Houses of Congress.¹⁹

Except for the most prescriptive and technical of its provisions, practically everything in the law is the product of at least one compromise, and many provisions have evolved from a long series of compromises reflecting constantly changing technology, competing commercial and financial interests, political and social conditions, judicial and administrative developments and—not least by any means—individual personalities. The law as a whole bespeaks concern for literally hundreds of contending and overlapping special interests from every conceivable segment of our pluralistic society. It was not enough to reach compromise on a particular point; all of the compromises had to be kept in equilibrium so that one agreement did not tip another over. It is a source of wonder that somehow all this succeeded in the end.

On the whole, the first reactions to enactment of the law have been the result of the process that produced it: parties to a genuine compromise are neither exultant nor mournful; since there are no winners or losers, no one is disposed either to rejoice or lament. And yet, on nearly all sides, there is a sense of satisfaction and accomplishment, a feeling that a necessary foundation has at last been well laid, and that now something worthwhile can be built upon it. Until the new law has actually been tested in practice, this is the only realistic test of its quality and value.

Viewed retrospectively, the initial drafts²⁰ of the bill may seem conservative and lacking in imagination, but they should not be judged too harshly. These early efforts were preceded by thirty years of total failure for more ambitious revision programs, and they were never regarded as more than a core around which a definitive statute could crystallize. The following comparison between some of the major recommendations of the 1961 Register's Report and the analogous final provisions of the New Act suggests, in a general way, the ontology of the legislation:

Basic copyright system and duration of copyright

1961 Register's Report: Proposed the retention of the dual system of common law and statutory copyright, expanding the present dividing line between common law and statutory protection, i.e.,

19. Last minute agreements on interpretations were reflected in the House floor proceedings. 122 CONG. REC. 10875 (daily ed. Sept. 22, 1976) (remarks of Rep. Kastenmeier).

20. See, e.g., PRELIMINARY DRAFT, *supra* note 11, at 1-36.

publication of copies, and registration in unpublished form of certain works, to include the public distribution of sound recordings, public performance, and registrability of *all* works.²¹ The term of copyright would generally have been twenty-eight years from first public dissemination, subject to renewal for a second term of forty-eight years, allowing a maximum possible term of seventy-six years.²²

New Act: Abolishes the dual system by preemption of all state (common or statutory) laws equivalent to copyright.²³ In its place, there is substituted a single federal system of copyright protection, attaching from the creation (first fixation)²⁴ of a work, with a term lasting for the life of the author plus fifty years.²⁵ For certain works, the term is to be seventy-five years from publication or one hundred years from creation, whichever is shorter.²⁶

Works Protected

1961 Register's Report: Generally recommended that the subject matter already protected by the 1909 Act continue to be protected under the new statute,²⁷ and that choreographic works be expressly included as distinctly copyrightable subject matter,²⁸ but refrained from making such a recommendation for sound recordings.²⁹ No mention was made of protecting either audiovisual works or computer programs.

New Act: The 1961 recommendations have generally been adopted. The New Act follows the 1971 amendment³⁰ to the 1909

21. REGISTER'S REPORT, *supra* note 9, at 43.

22. *Id.* at 49-53.

23. Pub. L. No. 94-553, § 301(a).

24. The New Act provides:

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

Id. § 101.

25. *Id.* § 302(a).

26. *Id.* § 302(c). This is in the case of an anonymous work, a pseudonymous work, or a work made for hire. *Id.*

27. REGISTER'S REPORT at 11.

28. *Id.* at 17.

29. *Id.* at 17-18.

30. 17 U.S.C. § 1(f), *as amended* (Supp. V 1975).

Act by maintaining sound recordings as copyrightable subject matter.³¹ Statutory protection is limited to the unauthorized duplication of records, providing no rights against unlicensed broadcasting or other performances.³² The New Act recognizes computer programs and databases as copyrightable works, but freezes their copyright protection with respect to uses "in conjunction with automatic systems capable of storing, processing, retrieving, or transferring information"³³ to that available under the law in effect on the day before the new law comes into force.³⁴

Exclusive rights in general

1961 Register's Report: Would have retained the approach of the 1909 Act, by tying broad limitations on exclusive rights (such as the "for profit" limitation on performing rights)³⁵ to the same sections in which the rights themselves are enumerated.³⁶ No mention was made of the right of display.

New Act: All exclusive rights are stated in unqualified terms in one section, 106,³⁷ and limitations are spelled out in detail in succeeding sections.³⁸ An exclusive right of display is specified.³⁹

Performing and broadcasting rights

1961 Register's Report: Recommended retaining the limitation on the copyright owner's exclusive performance right in non-dramatic literary and musical works to public performances for profit,⁴⁰ and continuing the protection of dramatic works against all

31. Pub. L. No. 94-553, § 102(a)(7).

32. *Id.* § 114. Section 114(d) of the New Act, however, indicates congressional intent to consider, based in part on a report to be submitted by the Register, amending the new law so as to provide an express performer's right in sound recordings. *Id.* § 114(d).

33. *Id.* § 117.

34. *Id.* § 117. The effective date of the New Act is January 1, 1978. *Id.* § 301(n).

35. See note 26 *infra* and accompanying text.

36. REGISTER'S REPORT, *supra* note 9, at 21-24.

37. Pub. L. No. 94-553, § 106.

38. Sections 107-18 set out the limitations to the basic rights of section 106. *Id.* §§ 107-18.

39. *Id.* § 106(5).

40. REGISTER'S REPORT, *supra* note 9, at 27-28. The origin of the 1909 Act's "for profit" limitation in nondramatic works and its rationale is discussed in Varmer, *Study No. 16, Limitations on Performing Rights*, in 2 STUDIES ON COPYRIGHT 837-40 (Copyright Office, Arthur Fisher Mem. Ed. 1963). The reasons provided in the REGISTER'S REPORT for the different treatment of dramatic and nondramatic works were:

The audience at a nonprofit performance of a dramatic work is less likely

public performances, whether for profit or not.⁴¹ All motion pictures were considered "dramatic works" for this purpose, and it was made clear that "semi-public" performances in places such as camps, clubs, and schools would be covered by the statute, while purely private performances would not.⁴² With respect to the mere reception of broadcasts by means of receiving sets in public places such as hotels and restaurants,⁴³ the Report recommended a statutory exemption "except where the receiver makes a charge to the public for such reception."⁴⁴

New Act: A general right of public performance^{44A} is provided for "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works"⁴⁵ The performance right is not limited by a "for profit" requirement but is subject to certain specific exemptions⁴⁶ as well as to compul-

to pay to attend another performance than is the case with non-dramatic works.

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

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

REGISTER'S REPORT, *supra* note 9, at 28.

41. *Id.* at 27-28.

42. *Id.* at 28-30. The Report recognized that one of the difficulties of the 1909 Act was the absence of an express performance right for motion pictures. *Id.* at 28. Courts successfully analogized dramatic films to traditional dramatic works; however, nondramatic motion pictures posed special problems as to whether they were to be afforded the same performance right as dramatic motion pictures. *See Patterson v. Century Productions, Inc.*, 93 F.2d 489 (2d Cir. 1937), *cert. denied*, 303 U.S. 655 (1938).

43. For a discussion of whether a separate performance is involved, *see Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975); *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931).

44. REGISTER'S REPORT, *supra* note 9, at 30-31.

44A. Public performances are defined broadly to include most situations involving live, recorded, and transmitted performances that are not strictly private. Pub. L. No. 94-553, § 101. Section 101 provides:

To perform or display a work publicly, means—

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

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or different times.

45. *Id.* § 106 (4).

46. The New Act's approach is that of providing specific exceptions for edu-

sory licensing in the case of certain cable transmissions⁴⁷ and jukebox performances.⁴⁸ Some other exceptions to the performing right are made under specified conditions for nonprofit instructional and religious purposes,⁴⁹ live nonprofit performances where none of the performers or organizers is paid,⁵⁰ performances at nonprofit annual agricultural or horticultural fairs,⁵¹ nonprofit performances promoting retail sales of copyrighted works⁵² and broadcasts aimed at the visually or aurally handicapped.⁵³ A further exception is made for public communication of a transmission received on an ordinary receiving set, unless a direct charge is made or the transmission "is further transmitted to the public."⁵⁴ The New Act contains provisions allowing the making, use, and, in some nonprofit situations, the distribution and limited retention of recordings made for broadcasting purposes.⁵⁵

Compulsory licensing and Royalty Tribunal

1961 Register's Report: Would have repealed the 1909 Act's compulsory license for the making of sound recordings of music⁵⁶ after a one-year transitional period.⁵⁷ With respect to jukebox performances, the Report recommended that the 1909 Act's exemption⁵⁸ be repealed, or at least "replaced by a provision requiring

cational and other nonprofit uses rather than a "for profit" limitation. The major exceptions are contained in Section 110 of the New Act. *Id.* § 110. Not all of the exceptions cover situations which necessarily involve *public* performance, such as classroom instruction. *Id.* § 110(1)-(2). Nevertheless, such exceptions are necessary in light of section 101's definition of public performance or display. See note 44A *supra*.

47. *Id.* § 111(c)-(d).

48. *Id.* § 116(b)(1).

49. *Id.* § 110(1)-(3).

50. *Id.* § 110(4).

51. *Id.* § 110(6).

52. *Id.* § 110(7).

53. *Id.* § 110(8). With reference to exempt reproductions and performances of television programs for the deaf and hearing-impaired, Representative Kastenmeier, during floor considerations of S. 22, stated that such reproductions are sufficiently non-commercial in nature to come within the fair use exemption of section 107 if strictly limited to the "learning environment within an institution." 122 CONG. REC. 10875 (daily ed., Sept. 22, 1976). This interpretation was confirmed in the CONFERENCE REPORT accompanying S. 22. CONF. REP. at 70.

54. Pub. L. No. 94-553, § 110(5).

55. *Id.* § 118(d).

56. 17 U.S.C. §§ 1(e), 101(e) (1970).

57. REGISTER'S REPORT, *supra* note 9, at 36.

58. 17 U.S.C. § 1(e) (1970).

jukebox operators to pay reasonable license fees”⁵⁹ No reference was made to cable television or to “educational” or “public” broadcasting as such.

New Act: The 1909 Act’s compulsory license for mechanical reproduction of music,⁶⁰ has been retained, but with tightened procedural safeguards and an increased royalty rate.⁶¹ The New Act further establishes three new compulsory licenses: for jukeboxes,⁶² with annual reporting and a royalty of eight dollars per box;⁶³ for cable retransmissions,⁶⁴ with semi-annual reporting and a complex payment formula based on the number of distant signals retransmitted;⁶⁵ and for noncommercial (*i.e.*, “public”) broadcasting,⁶⁶ with terms and rates for the use of published nondramatic musical, pictorial, sculptural and graphic works to be determined by the Copyright Royalty Tribunal on the basis of proposals from the interests affected.⁶⁷ The Tribunal, a permanent governmental body of five members, is established to settle disputes concerning the distribution of cable and jukebox royalties and, under certain conditions, to review and, if appropriate, adjust the royalty rates for all four compulsory licenses.⁶⁸

Fair use and photocopying

1961 Register’s Report: Without making a specific reference to nonprofit or educational photocopying, the Report recommended a statutory provision “affirming and indicating the scope of the principle that fair use does not infringe the copyright owner’s rights.”⁶⁹ With respect to the particular problem of photocopying by libraries, the Report recommended that the statute permit the supplying of single photocopies of articles, excerpts, or complete works under certain specified conditions.⁷⁰

59. REGISTER’S REPORT, *supra* note 9, at 3

60. 17 U.S.C. §§ 1(e), 101(e) (1970).

61. Pub. L. No. 94-553, § 115(c)(2). *See* H.R. REP. NO. 1476, 94th Cong., 2nd Sess. 107-11 (1976).

62. Pub. L. No. 94-553, § 116(b)

63. *Id.* § 116(b)(1)(A).

64. *Id.* § 111.

65. *Id.* § 111(d).

66. *Id.* § 118.

67. *Id.* § 118(b).

68. *Id.* § 801 (b)(1)(2).

69. REGISTER’S REPORT, *supra* note 9, at 25.

70. *Id.* at 26.

New Act: Despite all the intervening ups and downs, the 1976 Act does not differ in principle from the 1961 recommendations. A general statutory provision recognizing fair use expressly refers to the making of multiple copies for classroom use and to the special relevance of either the commercial nature or nonprofit educational purpose of the use.⁷¹ The library photocopying provision, on the other hand, is long and detailed.⁷² Essentially it allows the making and supplying of single photocopies of specified kinds of material under appropriate safeguards and conditions, as long as the activity is not "systematic."⁷³ The provision expressly declares that inter-library arrangements for the exchange of photocopies are not "systematic" as long as the library receiving the reproductions for distribution does not do so in such aggregate quantities as to substitute for a subscription to or purchase of the work.⁷⁴

Ownership and termination of transfers

1961 Register's Report: Would have made the employer in the case of a work made for hire the first owner, but not the legal "author" of the work.⁷⁵ The Report further urged that copyright ownership be completely divisible,⁷⁶ and that special provision protecting the rights of contributors to periodicals and collections be included.⁷⁷ Instead of the reversionary renewal under the 1909 Act,⁷⁸ a limitation on the duration of lump-sum assignments was recommended.⁷⁹ Any assignment by an author or his or her heirs would not be effective after twenty years unless it provided for continuing royalties based on use or revenue from the work.⁸⁰

New Act: Retains the provision of the 1909 Act⁸¹ making the

71. Pub. L. No. 94-553, § 107. This brief, rather straight-forward statutory provision must be read with the exhaustive legislative reports, fleshing out the probable application of the "fair use" doctrine in classroom situations. See H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 65-74 (1976); and S. REP. NO. 473, 94th Cong., 1st Sess. 61-67 (1975).

72. Pub. L. No. 94-553 § 108.

73. *Id.* § 108(g)(2).

74. *Id.* A definition of the critical term "aggregate quantities" is provided in a set of private, voluntary guidelines negotiated between copyright proprietors, authors' groups and librarians, set out in CONF. REP. at 72-74.

75. REGISTER'S REPORT, *supra* note 9, at 87.

76. *Id.* at 92.

77. *Id.* at 88. The Report recommended that the publisher of a composite work "hold in trust" the rights of an author for works not individually copyrighted. *Id.*

78. 17 U.S.C. § 24 (1970).

79. REGISTER'S REPORT at 93-94.

80. *Id.*

81. 17 U.S.C. § 26 (1970).

employer the "author" of a work made for hire,⁸² but the New Act defines the latter term to prevent converting commissioned works into "works made for hire" by agreement except in limited situations.⁸³ The New Act makes copyright completely divisible⁸⁴ and adopts provisions protecting authors' rights in contributions to periodicals and collective works.⁸⁵ As a logical outgrowth of the new durational term, it provides for optional termination of all transfers and licenses by the author or certain of the author's heirs after thirty-five years.⁸⁶

Formalities and manufacturing requirement

1961 Register's Report: Would have retained the requirement for a copyright notice on published works, but with liberalized provisions concerning the form and position of the notice, with greater opportunities to correct errors and omissions.⁸⁷ The Report proposed that the deposit of copies for Library of Congress be made mandatory,⁸⁸ but that the failure to deposit and register would result only in a limitation on civil remedies for infringement rather than a complete forfeiture of copyright.⁸⁹ It recommended repeal

82. Pub. L. No. 94-553, § 201(b).

83. Section 101 provides:

A "work made for hire" is—

(1) a work prepared by an employee within the scope of his or her 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 or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for test, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

Id. § 101.

84. Section 101 defines "[c]opyright owner" in the following manner, "with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right." *Id.*

85. *Id.* § 201(c).

86. *Id.* § 203. With respect to works in the extended renewal term, see section 304(c). See generally Melniker, *Termination of Transfers and Licenses under the New Copyright Law*, 22 N.Y.L.S.L. REV. 589 (1977) (Copyright Symposium—Part II).

87. REGISTER'S REPORT, *supra* note 9, at 63-65.

88. *Id.* at 79.

89. *Id.* at 76-77.

of manufacturing requirements,⁹⁰ since their effect on authors was severe and benefits to the printing industry were minimal.⁹¹

New Act: Generally follows the 1961 recommendations for notice, deposit, and registration⁹² and liberalizes the manufacturing requirement for a period ending on July 1, 1982, whereupon the requirement will be completely repealed.⁹³

This summary suggests that, although the 1961 recommendations represented a general step toward the formula finally adopted in 1976, they were tentative at best. The 1961 approach actually appears closer to the 1909 Act than to the New Act which evolved from it. People have forgotten how long a distance we have come in fifteen years.

As it stands, I believe the New Act compares favorably with many recent copyright laws of other countries, and it comes close to the international norms established, at least for industrialized countries, by the Brussels text of the Berne Convention in 1948 and its Paris text of 1971.⁹⁴

In particular, there has been a shift in the philosophical base on which the copyright law of the United States rests. This change may not be readily apparent. Many people regard the establishment of a single federal system as a purely procedural matter, the change in the term of copyright as merely adding years, and the revisions in the sections on ownership and formalities as mere legalistic tinkering. But, taken as a whole, these changes mark a break with a two-hundred-year-old tradition that has identified copyright more closely with the publisher than with the author.

90. *Id.* at 124.

91. *Id.* at 122-24.

92. Pub. L. No. 94-553, §§ 401-04. These sections set forth the basic requirement for notice of copyright on published works, including sound recordings, works which reproduce United States government works, and contributions to collective works. *Id.* Sections 405 and 406 respectively cover the omission of a copyright notice or an error in the notice as to the name of the copyright owner or date of first publication. *Id.* §§ 405-06. Sections 407 and 408 respectively deal with deposit for the Library of Congress and registration and deposit with the Copyright Office. *Id.* §§ 407-08. The Register shall, by regulation, establish requirements under which compliance with the mandatory deposit provisions of section 407 may satisfy the deposit called for under the optional registration regime of section 408. *Id.* § 408(b).

93. *Id.* § 601.

94. The Berne Convention for the Protection of Literary and Artistic Works came into existence in 1886. Subsequent revisions occurred in 1908 (at Berlin), 1928 (at Rome), 1948 (at Brussels), 1967 (at Stockholm) and in 1971 (at Paris). These revisions do not have the effect of repealing their predecessors, and nations may adhere to any particular revision. The full texts of the various revisions of the Berne Convention are reproduced in *Copyright Laws and Treaties of the World* (UNESCO ed. 1974).

Consider the most obvious change, that in the duration of copyright. In the future, the bulk of copyrights will last for the life of an individual author and for a term of years after that individual's death. For the first time in American law, the crucial facts surrounding the length of most copyrights will involve the identity and existence of the individual author⁹⁵ rather than the activities of a publisher or producer in disseminating copies. This basic indentification of copyright with the author rather than the publisher should in time affect the way people look at copyright law in general.

Consider also the practical effects of the preemption of common law copyright and the establishment of a single federal copyright system based on the act of creation. Under the law up to now, unless the work is dramatic, musical, prepared for oral delivery, or within other small classes of pictorial or artistic nature, it cannot be registered for federal statutory copyright in unpublished form.⁹⁶ Under the 1909 Act, for the work to secure a federal copyright it must be published, and this has usually required the author to transfer rights, including publishing rights and the initial right to secure federal statutory copyright, to the publisher. Since the beginning of our copyright system, the act of publication has been regarded as the pivotal act in securing copyright protection. Since it is usually the publisher who secures the copyright initially, it is the publisher who has been regarded as the fountainhead of copyright protection.

95. This important fact is reflected in several provisions in the law, largely touching upon the role of the Copyright Office as an office of public record. Section 302(c) contains special provisions under which statements revealing the identity of authors of anonymous or pseudonymous works can be recorded with the Office and how the term of copyright is computed on the basis of these facts. Pub. L. No. 94-553, § 302(c). Even with respect to authors whose identity has not been withheld, the new law provides for the recordation of statements of the date of death of an author of a copyrighted work, or of a statement that he is still living. *Id.* § 302(d). This latter form of statement would be required to offset the effect of section 302(e), which provides:

After a period of seventy-five years from the year of first publication of a work, or a period of one hundred years from the year of its creation, whichever expires first, any person 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 fifty years before, is entitled to the benefit of a presumption that the author has been dead for at least fifty years. Reliance in good faith upon this presumption shall be a complete defense to any action for infringement under this title.

96. 17 U.S.C. §§ 5, 10-12 (1970).

These conceptions and interrelationships could be radically altered under the new statute. All works will receive federal statutory copyright from the moment of their creation, without regard to when or whether they are ever published. Creation (the act of the author) will supersede publication (the act of the publisher or producer) as the crucial copyright act. The author is clearly identified in the statute as the first owner of copyright,⁹⁷ and there will no longer be anything to prevent authors from making copyright registration for their unpublished works in their own names.⁹⁸ The Copyright Office expects an influx of unpublished material it cannot now accept for registration: manuscripts of poems, articles, stories, novels, reports, monographs, advertising copy, song lyrics, tapes of unpublished sound recordings, and masses of other unpredictable and virtually unclassifiable works that may be considered creative brain children by someone. Certificates of copyright registration have been increasingly important to the bargaining position of authors of unpublished musical and dramatic works, and the same may prove to be true in the future with respect to authors of other sorts of unpublished works.⁹⁹

The shift in direction toward the individual author and away from the publisher or other initial disseminator of the work can be seen throughout the sections of the new law dealing with ownership. The following review of some of these provisions should suggest how much more the individual author's rights will be safeguarded under the new law:

- The author is the first owner of all rights under a copyright in every case.¹⁰⁰
- The author can divide the rights up in any way he or

97. Pub. L. No. 94-553, § 201(a).

98. The New Act abolishes the artificial distinction the 1909 Act made between works being produced for sale and those not being produced for sale. 17 U.S.C. §§ 10, 12 (1970). Under the New Act, registration is allowed "[a]t any time during the subsistence of copyright in any published or unpublished work. . . ." Pub. L. No. 94-553, § 408(a).

99. For example, while under the 1909 Act unpublished treatments for screenplays did not qualify as dramatic works, these may well be submitted for registration under the New Act. Similarly, unpublished material containing business or technical ideas or processes might be submitted. Registration of such works could be considered on the basis of their expression, as opposed to their non-copyrightable elements. There may be advantages in having a claim to copyright, setting out the facts of creation on a public record, perhaps even for non-copyright purposes.

100. Pub. L. No. 94-553, § 201(a).

- she chooses, and all rights not expressly transferred are retained.¹⁰¹
- A transfer of any material object, including the manuscript or prototype art object in which the work was first embodied, does not of itself transfer any rights in the copyrighted work.¹⁰²
 - Only transfers made voluntarily by the author will be honored.¹⁰³
 - For works first published as contributions to periodicals or other collective works, there is a presumption that, in the absence of an express agreement providing otherwise, the publisher acquires only first serial and limited reprint rights.¹⁰⁴
 - No transfer of any of an author's rights will be valid unless a document evidencing it is in writing and signed by the author or the author's agent.¹⁰⁵
 - Transfers and licenses by an author or certain members of an author's family can be terminated after a specified period of years (usually thirty-five). This right of termination is optional, but cannot be waived or assigned away in advance.¹⁰⁶
 - The application for copyright registration must ordinarily identify the author. If the copyright claimant is not the author, the application must also contain "a brief statement of how the claimant obtained ownership of the copyright"¹⁰⁷

All of this points in a healthy direction. It can certainly be hoped that authors and their representatives will take full advan-

101. Section 101 defines a "transfer of copyright ownership" as an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or 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 nonexclusive license.

Id. § 101. Section 201, dealing with ownership of copyright, further supports the principle of divisibility of copyrights. *Id.* § 201(d).

102. *Id.* § 201. *See* H.R. REP. NO. 1476, 94th Cong., 2d Sess. 124 (1976).

103. Pub. L. No. 94-553, § 201(e).

104. *Id.* § 201(c).

105. *Id.* § 204(a).

106. *Id.* § 203(a).

107. *Id.* § 409(5).

tage of these provisions in business dealings, and that the provisions will provide the basis for further reforms.

At the same time, the new law contains a dark side, one not only hard to evaluate, but also frightening in some of its implications.

As it was written or interpreted, the 1909 Act gave no protection whatever for performances of music on coin-operated machines (jukeboxes)¹⁰⁸ or performances or displays of any copyrighted works by means of retransmissions of broadcasts aimed at the subscribers to cable television services (CATV).¹⁰⁹ As for noncommercial broadcasting (including "educational" and "public" radio and television) the rights of the owners of copyright in nondramatic musical, literary and graphic works against unauthorized performances and displays are problematical, and few if any royalties are being paid under the existing law.¹¹⁰ The right of a musical copyright owner to control the first recording of his or her work was established by the 1909 Act, but was subject to a compulsory licensing scheme for any later recordings which limited the owner's rights to a royalty of no more than two cents per song per record.¹¹¹

The New Act retains a compulsory license for the recording of music, and adds three new compulsory licenses for jukebox, CATV, and public broadcasting. Thus, four major rights of the copyright owner are granted under conditions that effectively deny the owner any right to control the use of the work, and merely guarantee a right to remuneration. The actual amounts of remuneration to be paid are also limited by the statute, and at least in some cases can hardly be considered munificent.¹¹²

108. 17 U.S.C. § 1(e) (1970).

109. See *Teleprompter Corp. v. Columbia Broadcasting Sys. Inc.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

110. Extended discussions took place at the 1975 House hearings of the so-called "Mathias Amendment" Amendment No. 1815 to S. 1361, 93rd Cong., 2nd Sess. (1974). The discussion is an excellent introduction to the problems faced by non-commercial broadcasting and copyright owners, in light of the New Act's elimination of the "for-profit" limitation. *Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess., ser. 36, pt. 2, at 857-989 (1975).

111. 17 U.S.C. § 1(e).

112. Section 111(d) contains the formula for computation of the CATV royalty. Pub. L. No. 94-553, § 111(d)(2)(B)-(D). It has been estimated that the total royalties from the cable licensing regime will amount to about \$8,500,000. 122 CONG. REC. 10903 (daily ed. Sept. 22, 1976) (remarks of Rep. Kastenmeier). The compulsory license royalty for public performance of music by means of coin-operated phono-

Viewed from one angle the new law unquestionably represents an improvement for copyright owners, who will begin receiving royalties for three uses that up to now have not remunerated at all, and in the case of musical recordings, will begin receiving a higher royalty. It is arguable that half-a-loaf, or even half-a-slice, is better than none.

From another angle, however, the interweaving of four full-scale compulsory licensing schemes into the main fabric of the United States copyright system may have ominous implications for the future. Copyright has heretofore been considered a bundle of exclusive rights that can be withheld or sold as the owner sees fit. Does our experience in the development of the 1976 Act suggest that in the future, whenever a new right is granted by Congress, it will necessarily be subject to compulsory licensing? Does this mean that eventually compulsory licensing will supplant traditional copyright, and that all rights under a copyright law will in time consist entirely of the right to collect royalties?

These troubling questions must be asked in the light of another, even more portentous development. The Copyright Royalty Tribunal is in many ways a sensible and ingenious device for making the various compulsory licensing schemes work efficiently and without constant and unwarranted litigation and need for congressional action. At the same time, the existence of a government body that is paying out royalties, settling disputes among copyright owners, reviewing royalty rates, and deciding the terms and rates of licenses, seems an open invitation to further government control. All this bears close watching in the months and years to come.

record players is not a sliding-scale royalty; neither does it distinguish between works performed on such players in terms of frequency of play or return to the operator. Instead, a flat yearly fee is imposed on a per-box basis. Pub. L. 94-553 § 116(b)(1)(A). Further, both the Copyright Office and Royalty Tribunal are authorized to deduct their reasonable administrative expenses from the royalty fund prior to distribution. *Id.* § 111(d)(3), (5)(B). Identical provisions are included regarding the jukebox license. *Id.* § 116(c)(1),(3).

