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THE UNFINISHED BUSINESS OF COPYRIGHT REVISION

Barbara Ringer*

INTRODUCTION**

On the morning of September 30, 1976, the day before the 94th Congress reached its final adjournment, Senator John C. McClellan laid before the Senate the Conference Report on copyright law revision. He introduced it with these words:

The long journey of this legislation in the Senate began on August 18, 1965, when the Subcommittee on Patents, Trademarks, and Copyrights commenced hearings on a bill for the general revision of the copyright law. I said at that time that my sole objective "was to devise a modern copyright statute that would encourage creativity and protect the interests which the public has in the subject matter of this legislation." I believe these goals have been substantially accomplished in the conference report.

This is not the proper occasion to review the protracted and, at times, acrimonious history of this legislation. Much will be written on that subject in the future. Rather, I believe it is appropriate today to take satisfaction in the successful completion of this monumental legislative project, which is entirely the work product of the legislative branch. Considering the controversies that existed on certain issues in the past, it is gratifying that S. 22 passed the Senate in this congress by a vote of 97 to 0.¹

As Senator McClellan's statement implies, there were many times over the years when it seemed that the project for general revision of the copyright law could never succeed. Each fresh legislative effort ran headlong into one or another seemingly in-

* Register of Copyrights. The assistance of Lewis I. Flacks in the preparation of this introductory article is gratefully acknowledged. The views expressed in this article are personal and do not reflect official positions of the Copyright Office or the Library of Congress. No copyright is claimed in this article.

** Certain citation conventions are used throughout this Symposium. These conventions are presented at page vii.

¹ 122 CONG. REC. S17,251 (daily ed. Sept. 30, 1976).

tractable problem requiring Herculean efforts to bring private (and public) interests together and to compromise differences, often in an atmosphere of considerable hostility.² Yet, as tenuous as it sometimes seemed, the copyright bill's grip on life was strong. Toward the end of the process, exhaustive hearings in the House of Representatives in 1975³ and Senate passage of the bill in early 1976⁴ generated great pressure on the disputants to compromise their differences.

Finally, on October 19, 1976, President Ford brought over 22 years of legislative work to a successful conclusion with the simple but essential act of signing the bill into law.⁵ For most

² For instance, the 1964 copyright revision bill, S. 3008, H.R. 11947, 88th Cong., 2d Sess. (1964), did not contain an express provision covering cable television. The 1965 bill, S. 1006, H.R. 4347, 89th Cong., 1st Sess. (1965), regarded cable retransmissions as within the scope of the right of public performance. See SUPP. REP. REG. at 42. By 1968 the cable controversy had reached the courts, and two separate but related cases involving the copyright liability of CATV operators forced the revision effort to a halt. See *Teleprompter Corp. v. CBS*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, *rehearing denied*, 393 U.S. 898 (1968). Although cable, copyright, and broadcasting interests were negotiating sporadically over copyright legislation during this period, they were doing so in a bewildering variety of contexts, including not only copyright law and policy but also the scope of FCC regulatory authority over cable and proper communications policies as seen by the Commission, the Office of Telecommunications Policy, the Congress, and the courts. See 2d SUPP. REP. REG. at ch. V. Although an accommodation involving a compulsory licensing scheme for cable retransmissions seemed to have been reached in 1971 and 1972, the agreement proved shaky and eventually broke down. It was not until 1976 that a means for establishing and reviewing the statutory royalty rates was agreed upon. NEW ACT § 111(d).

The issues of library photocopying and educational uses of copyrighted works also threatened to abort the final drive toward copyright law revision. Both issues were rather lightly treated in the 1961 Report of the Register. 1961 REP. REG. at 24-26. The vagaries of the "fair use" doctrine satisfied neither copyright proprietors nor educational and library groups. See SUPP. REP. REG. at 25-28. The task of elaborating the doctrine to provide predictability, while at the same time maintaining flexibility in applying "fair use" to future situations, was monumental. By 1973, the lines were sharply drawn and the Senate held two days of hearings devoted primarily to library photocopying, educational uses, and CATV royalties. *Copyright Law Revision, Hearings on S. 1361 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 93rd Cong., 1st Sess. (1973) [hereinafter cited as *1973 Hearings*]. The process of compromise that followed these hearings went on until the eleventh hour and involved the language of the Conference Report itself. See CONF. REP. at 72.

³ Beginning in May 1975, the House held extensive hearings touching every major issue in the copyright bill. *Copyright Law Revision, 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. (1975) [hereinafter cited as *1975 Hearings*].

⁴ The Senate passed its version of the revision bill, S. 22, 94th Cong., 1st Sess. (1975), on February 19, 1976, by a unanimous vote. 122 CONG. REC. S2047 (daily ed. Feb. 19, 1976).

⁵ NEW ACT.

purposes, the new copyright law will come into effect on January 1, 1978.⁶ The period of a little more than one year that remained between the date of enactment and the first day of 1978 is none too long to provide the necessary transition. During 1977 a number of things will need to be accomplished: affected industries and organizations will have to prepare for the new law, the legal profession will need to be reeducated and to reeducate its clients, and the Copyright Office must completely overhaul its own operations to meet the new or enhanced functions imposed upon it by the new law.⁷

The articles in this symposium demonstrate convincingly the number, variety and significance of the changes wrought by the new copyright law. Nothing much remains as it was. But at the same time it would be wrong to assume that, on January 1, 1978, sixty-nine years of jurisprudence under the 1909 Copyright Act⁸ will become irrelevant. Much that is "new" in the 1976 statute arises directly from problems that had to be faced and resolved under the inadequate 1909 statute; many of the definitions of section 101 echo very specific questions raised under the old law.⁹ The network of limitations and exemptions in sections 107 through 118 did not spring out of a mad rush for preferential treatment. Very often they were designed to maintain exemptions or limitations

⁶ *Id.* § 301.

⁷ The intense interest in the new copyright law has been reflected in a remarkable number of professional conferences, symposia, and seminars. Early this year, the Register of Copyrights established within the Copyright Office a comprehensive internal organization to examine every function of the Office in light of the new copyright law, and to prepare detailed recommendations for dealing with all of the problems that will be created by a massive increase in the Office's responsibilities and workload.

⁸ 1909 Act.

⁹ For example, the definition of "children" appearing in § 101 is a partial response to the absence of uniformity flowing from the Supreme Court's decision in *De Sylva v. Ballentine*, 351 U.S. 570 (1956). The definition of "joint work" is largely a codification of decisional law. See M. NIMMER, *NIMMER ON COPYRIGHT* §§ 67-74 (1976) [hereinafter cited as NIMMER]. The definition of "publicly" responds in part to dissatisfaction with the judicially fashioned test of *Metro-Goldwyn-Mayer Distributing Corp. v. Wyatt*, 21 C.O. Bull. 203 (D. Md. 1932). See S. REP. at 60-61; H. REP. at 64. An interesting example of the interplay of 1909 jurisprudence and 1976 amendments concerns the "work made for hire" doctrine which, insofar as it deals with works made within the traditional scope of employment, is interpreted in much the same fashion as existing law. With respect to "commissioned works," however, the new definition substantially narrows the situation in which a work can be considered "made for hire" merely because the author has signed a contract declaring this to be the case. See S. REP. at 104-05; H. REP. at 121. For the background of the new law's treatment of works made for hire and on commission, see B. VARMER, *WORKS MADE FOR HIRE AND ON COMMISSION*, COPYRIGHT OFFICE STUDY NO. 13 (1960), reprinted in 1 *Studies on Copyright* 717 (Copyright Soc'y of the U.S.A. ed. 1963); 1961 REP. REG. at 85-87; SUPP. REP. REG. at 66-68; 2d SUPP. REP. REG., ch. XI, at 6.

expressed or implied under the old statute,¹⁰ or to mitigate the effects of new liabilities.¹¹

At one extreme, the 1976 Copyright Act contains provisions that mark a radical break with the past or that have no precedent in American copyright tradition.¹² Other provisions represent de-

¹⁰ Several specific exemptions in the 1976 Act stem from the early decision to state the rights of the copyright owner in unqualified terms, deleting the broad "for profit" limitation on rights of public performance. Under the "for profit" limitation of the 1909 Act, the right of copyright proprietors to control the performance of musical works applied only if the performance was "public" and "for profit." The right with respect to dramatic works extended to "public" performances without any requirement that they be "for profit." See generally B. VARMER, *LIMITATIONS ON PERFORMING RIGHTS*, COPYRIGHT OFFICE STUDY No. 16 (1958), reprinted in 2 *STUDIES ON COPYRIGHT* 835 (Copyright Soc'y of the U.S.A. ed. 1963). The 1961 Report of the Register recommended maintaining the for-profit limitation for musical and certain other works. It expressed a preference for this approach over the system in effect under a number of foreign laws, on the ground that "any attempt to specify the various situations in which the principle applies would be likely to include too much or too little, and raise new uncertainties." 1961 REP. REG. at 27. The 1964 preliminary draft law, prepared by the Copyright Office, set out alternative drafts of the public performance right. U.S. COPYRIGHT OFFICE, *COPYRIGHT LAW REVISION*, pt. 3, at 5, 7 (Comm. Print 1964). By 1965 the position of the Register had changed, and the approach of specifying express limitations on the performing rights was accepted. See SUPP. REP. REG. at 31; S. REP. at 59; H. REP. at 62-63.

¹¹ The new law repeals the 1909 statute's outright exemption for performances of copyrighted music on coin-operated machines ("jukeboxes"), but substantially reduces the economic impact of repeal by providing, in § 116, for a compulsory license with specified royalty payments of \$8 per box per year. So, too, with cable television, where retransmission activities were held not to be "performances" under the 1909 law. *Teleprompter Corp. v. CBS*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968). The new law establishes, in § 111, a complex compulsory licensing scheme under which the copyright liability for cable retransmissions is discharged by periodic payment of a royalty calculated, in part, on the basis of a percentage of gross receipts. The new statute, in § 118, follows the same general approach, with some variations, in its treatment of performances of music and displays of graphic works by means of noncommercial public broadcasting.

¹² Nevertheless, some of the most dramatic of these changes have been the subject of debate for generations. As Professor Brown notes in this issue, "[t]he greatest change in the 1976 Act has been attained with the least controversy. Common-law copyright, the protection by state law of unpublished works, effectively disappears." Brown, *UNIFICATION: A CHEERFUL REQUIEM FOR COMMON LAW COPYRIGHT*, 24 UCLA L. REV. 1070, 1070 (1977). While it is true that the elimination of common law copyright has provoked little controversy in recent years, it was hotly debated in the early years of the revision program. See, e.g., SUPP. REP. REG. at 81. The length of the term provoked even more dispute; the Supplemental Report of the Register noted that "the duration of copyright represents the single most important issue in copyright law revision" but that there was "almost unanimous disagreement" with the Copyright Office's 1961 proposals on the subject. *Id.* at 86. It described the sentiment in favor of a life-plus-fifty term as "overwhelming (though not unanimous)." As events proved, there were dissenters to the bill's provisions on duration up to its final passage. See, e.g., 1973 *Hearings*, *supra* note 2, at 205; 1975 *Hearings*, *supra* note 3, at 133-34; 141-42; 122 CONG. REC. S2034-36 (daily ed. Feb. 19, 1976).

tailed responses to the problems of the 1909 law.¹³ Between these extremes there are provisions that reflect what might be called "interim" legislative decisions. In some cases Congress was unwilling or unable to make a final determination, but sought to reserve the right to do so at a later date. In others, Congress appeared to be seeking to induce private solutions to particular problems. In still other cases a congressional decision was made subject to review and change without resort to further legislation. These provisions in the aggregate might be called "the unfinished business of copyright revision."

After so long a wait for a new copyright law, it may seem untimely, if not ungrateful, to call attention to work that clearly remains to be done. But it is necessary to do so if one is to understand the essential nature of the 1976 Copyright Act; it is much more than merely a new set of rules to deal with difficult areas where the old law proved ineffective. The 1909 Act was written at a time when America was evolving from an agricultural to an industrial society, and in its arbitrary preciseness it failed to provide the resilience needed for changing conditions. Congress in 1976 recognized that the new law will come into effect during an era of accelerating technological developments in communications, and that it would have to be flexible enough to allow the copyright law of the United States room enough to blossom, to grow, and to mature during the last quarter of the twentieth century. Through foresight, not ignorance, the 1976 legislators consciously left certain issues open for further interpretation or later consideration.¹⁴

I. COPYRIGHT PROTECTION FOR WORKS OF THE U.S. GOVERNMENT

Section 105 of the 1976 Act deals with a much-disputed question in American copyright law: the protection, if any, to be offered to U.S. Government works. The section, in combination with the definition of "works of the United States Government" in section 101,¹⁵ continues the 1909 statute's prohibition against copyright in published works prepared by U.S. Government officials

¹³ See notes 9-10 & accompanying text.

¹⁴ In the 1975 *Hearings*, note 3 *supra*, the Acting Librarian of Congress, John G. Lorenz, pointed out that the bill "does not provide all of the answers, but it does provide a modern framework for growth and change: New tools for the courts, the Copyright Office, for the authors and the users of copyrighted materials, to meet the challenges of the future." *Id.* at 92.

¹⁵ "A 'work of the United States Government' is a work prepared by an officer or employee of the United States Government as part of that person's official duties." NEW ACT. § 101.

or employees as part of their official duties or employment, and extends the prohibition to all U.S. Government works, whether published or unpublished.¹⁶

Congress deliberately postponed decision on a controversial question regarding section 105 that arose late in the consideration of the bill: whether an exception should be made to allow the Department of Commerce's National Technical Information Service (NTIS) to secure limited copyright protection for some of its publications. The proposal for such an exemption originated during House hearings on the bill in 1975.¹⁷ In 1976, after the Senate had passed the bill without any exceptions to the prohibition, the House Judiciary Committee added the following proviso: "[T]he Secretary of Commerce may secure copyright for a limited term not to exceed five years, on behalf of the United States as author or copyright owner in any National Technical Information Service publication, which is disseminated pursuant to the provisions of chapter 23 of title 15."¹⁸ In conference, however, the opposition of the Senate conferees was sufficiently strong to secure the deletion of the proviso.¹⁹ Noting that Senate hearings had not been held on the issue, the Conference Committee agreed to remove the proviso, and to hold hearings on the issue "early in the next session."²⁰

As accepted by the House, the amendment would have given NTIS the right not only to secure five-year copyrights in any of its publications, but also to exercise its copyrights to their full extent within the United States.²¹ However, the statement of the

¹⁶ The lack of any definition of the term "publication of the United States Government" in the 1909 Act proved extremely troublesome. See, e.g., *Public Affairs Associates, Inc. v. Rickover*, 177 F. Supp. 601 (D.D.C. 1959), *rev'd*, 284 F. 2d 262 (D.C. Cir. 1960), *vacated and remanded with direction*, 369 U.S. 111 (1962), *on remand*, 268 F. Supp. 444 (D.D.C. 1967); *Scherr v. Universal Match Corp.*, 297 F. Supp. 107 (S.D.N.Y. 1967), *aff'd*, 417 F. 2d 497 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970). The legislative reports on the bill state that "[t]he basic premise of section 105 of the bill is the same as that of section 8 of the present law—that works produced for the U.S. Government by its officers and employees should not be subject to copyright." S. REP. at 56; H. REP. at 58.

¹⁷ See 1975 Hearings, *supra* note 3, at 60, 178; H. REP. at 59-60.

¹⁸ H. REP. at 5; See 122 CONG. REC. H10,878 (daily ed. Sept. 22, 1976) (statement of Rep. Railsback).

¹⁹ CONF. REP. at 69-70.

²⁰ *Id.* at 69.

²¹ The House Report states the rationale for the amendment in terms of protection both in the United States and abroad:

Under its statute, NTIS is required to be as self-sustaining as possible, and not to force the general public to bear publishing costs that are for private benefit. The Department urged an amendment to section 105 that would allow it to secure copyright in NTIS publications both in the United States and abroad, noting that a precedent exists in the Standard Reference Data Act (15 USC § 290(e)).

Id. at 60.

Department of Commerce on behalf of the proposal had stressed that protection in the United States was needed in order to lay the basis for corresponding protection under foreign copyright laws.²² Congress recognized that, although it could grant or withhold protection within U.S. territory, it had no legislative jurisdiction over the protection a foreign government might choose to grant to or withhold from U.S. Government works. The 1976 House report probably went about as far as it could go in declaring:

The prohibition on copyright protection for United States Government works is not intended to have any effect on protection of these works abroad. Works of the governments of most other countries are copyrighted. There are no valid policy reasons for denying such protection to United States Government works in foreign countries, or for precluding the Government from making licenses for the use of its works abroad.²³

Despite this statement, and the breadth of the language of the proviso, the Conference Report characterized the NTIS amendment solely in terms of "foreign copying."²⁴ Whether aimed at foreign or domestic protection, the NTIS amendment was arguably consistent with the 1961 recommendation of the Register of Copyrights that copyright in U.S. Government works be permitted in exceptional cases.²⁵ The Register's Report cited, as an example of one of these exceptional cases, the situation "[w]here an agency seeks to operate a self-supporting program for the publication of its research reports."²⁶ The Register's 1961 proposal rec-

²² *Id.*; 1975 Hearings, *supra* note 3, at 164.

²³ H. REP. at 59.

²⁴ Because of the lack of Senate hearings on the issue, the conferees recommended that the NTIS request for limited copyright *in order to control foreign copying* be considered at hearings early in the next session. In the interim, consideration should also be given to compensatory appropriations to NTIS in lieu of revenues lost as a result of unauthorized foreign copying.

The Department of Commerce testified . . . that the lack of copyright protection in publications of its National Technical Information Service (NTIS) posed special problems, since NTIS is required (15 USC 1151-7) to be self-sustaining to the fullest extent feasible. Widespread copying of NTIS publications is especially prevalent in foreign nations. In Japan it is reported that NTIS reproductions are sold having a value of \$3,000,000 annually. A United Kingdom copier sells nearly twice as many copies of NTIS publications as NTIS does directly to the U.K. The USSR buys substantial volume [*sic*] of NTIS publications from European copiers for further copying in the USSR. The lack of copyright protection in NTIS publications also results in widespread foreign use of U.S. tax-funded research and development without any return to the U.S. U.S. organizations also sell NTIS publications to foreign buyers without recouping for the taxpayer, as represented by NTIS, monies adequately reflecting the value of the scientific, engineering, and technical information contained therein.

CONF. REP. at 69-70 (emphasis added).

²⁵ 1961 REP. REG. at 129-33.

²⁶ *Id.* at 131.

commended empowering a central agency to be responsible for deciding which particular U.S. Government works could be copyrighted. This aspect of the proposal encountered especially stiff resistance, and was dropped from the 1965 revision bill. There was strong testimony at the 1965 House hearings in support of retaining a provision allowing the opportunity to copyright U.S. Government publications.²⁷ It is interesting to note that the issue of protection for U.S. Government publications under foreign copyright laws was touched upon in this testimony. Commenting in support of a limited exception for U.S. Government publications, the National Aeronautics and Space Administration observed:

Permitting the issuance of copyrights to Government agencies in exceptional cases would also facilitate copyrighting of U.S. Government publications abroad. It is a commonly held opinion that the prohibition against obtaining copyright by the Government applies to domestic copyrights only. Thus, the Government may copyright abroad when that serves its best interests. While we feel that many foreign signatories to the Universal Copyright Convention would honor the copyright of the U.S. Government in their respective countries under the Convention, we are aware that article IV, paragraph 4 of that Convention provides, in essence, that the foreign country in which registration is sought is not obliged to grant protection for a period longer than that granted by the State in which the work is first published. Accordingly, if the United States does not protect its own Government publications a foreign nation may take the position that, since the U.S. Government publication cannot receive protection in the United States, such publications cannot receive protection elsewhere. Accordingly, it appears to be in the best interests of the United States to permit copyright in certain exceptional cases so as to provide opportunity for foreign copyright and to prevent loss of potentially valuable foreign rights.²⁸

²⁷ See, e.g., *Copyright Law Revision, 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, 84th Cong., 1st Sess. 1158-60, 1173-80 (1965)* [hereinafter cited as *1965 Hearings*].

²⁸ *1965 Hearings, supra* note 27, at 1183. The text of the fourth paragraph of Article IV of the UCC provides that a Contracting State is not "obligated to grant protection to a work for a period longer than that fixed for the class of works to which the work in question belongs, . . . in the case of published works by the law of the Contracting State in which the work has been first published." Although the point is certainly debatable, it seems strained to argue that works of the United States Government are a "class of works" for purposes of this provision. Whether a work is a "work of the U.S. Government" depends entirely on the contract relationships under which the work was prepared, and not on the nature or "class" of the work itself. Moreover, the prohibition applies only to works of the U.S. Government, and works of foreign governments are fully protected by copyright in the United States; it is hard to find any

The reaction in Congress to such testimony, however, was negative. The bill that passed the House in 1967²⁹ did not incorporate any special exemption.³⁰

In May, 1973, the Soviet Union adhered to the Universal Copyright Convention, and thus for the first time assumed copyright obligations with respect to works originating in the United States. The obligations were, of course, mutual; users of Soviet works in the United States, including the U.S. Government, were faced with the need to honor copyright restrictions in publications originating in the U.S.S.R., including many works that would be considered publications of the Soviet government. It is hardly a coincidence that, beginning in 1973, the question of securing foreign copyright protection reemerged as a quiet, but insistent, issue in government circles.³¹ Although the conclusions reached during discussions in these circles supported the argument that there should be nothing to prevent the U.S. government from claiming copyright protection for its publications abroad,³² uncertainty persists.

If, as seems probable, the primary purpose of the NTIS amendment was to improve the U.S. Government's position under foreign laws, then its language was overly broad. If the amendment is sufficiently narrowed to do no more than lay the basis for protection of U.S. Government works in foreign countries, it may be difficult to justify extending its benefits to NTIS and withholding them from other Government agencies. If the amendment remains worded in a way that would allow any degree of federal control over the use of Government works in the United States, it seems likely to attract opposition from private publishers, libraries, archives, and educators.³³ The practical desire of the Government to recover some of the costs of its own publishing endeavors from users through copyright licensing is met with serious concerns about Government encroachment into the sector of private publishing, and about the dangers of inhibiting freedom

moral justification on which a foreign government could base the withholding of copyright from U.S. Government works when its own works receive full copyright protection here.

²⁹ H.R. 2512, 90th Cong., 1st Sess. (1967).

³⁰ See H.R. REP. NO. 83, 90th Cong., 1st Sess. 22 (1967).

³¹ See OFFICE OF SCIENCE INFORMATION SERVICE, NATIONAL SCIENCE FOUNDATION, U.S.-U.S.S.R. COPYRIGHT NEGOTIATIONS ON SCIENTIFIC AND TECHNICAL JOURNALS, SURVEY REPORT (1974).

³² U.S. Copyright Office, U.S.S.R. Copyright and U.S. Government Publications (April, 1974) (unpublished memorandum submitted to the Office of Science Information, National Science Foundation), on file at the Copyright Office Library.

³³ See 2d SUPP. REP. REG., ch. I, at 9.

of the press and of shutting off public debate.³⁴ Full-scale congressional hearings on all aspects of this unresolved problem could be illuminating and ultimately productive.

II. PERFORMING RIGHTS IN SOUND RECORDINGS

A second issue on which Congress deliberately deferred decision concerns the scope of exclusive rights in sound recordings. Section 114 of the new copyright law establishes a framework for consideration of one of the most hotly debated issues in intellectual property.³⁵ This is the question whether the copyright law should recognize public performance rights in sound recordings, including rights of performers, rights of record producers, or both, to be paid for public performances, broadcasts, and transmissions of their recordings.³⁶

In 1971, the copyright law was amended to provide, for the first time, a limited copyright in sound recordings.³⁷ Tape piracy, the direct result of the growing consumer acceptance of eight-track tape cartridges for the performance of popular music, was then approaching its height. There was a general feeling among musical copyright owners, record producers, performers, and law enforcement officials that special copyright legislation in advance of general revision was urgently needed.³⁸ The tape pirates had

³⁴ A 1965 proposal offered by the Department of the Air Force contained a provision that "no copyright shall be secured . . . or enforced, which shall interfere with the freedom of the press in the United States to publish or reprint matters of public concern . . ." 1965 *Hearings*, *supra* note 27, at 1169.

³⁵ "Neighboring rights" is the slightly patronizing term coined by traditional copyright savants to cover the rights of performers, record producers, and broadcasters in their respective performances, recordings, and emissions. Obviously the terms "copyright" and "neighboring rights" are synonymous for many purposes. A full-scale effort to deal comprehensively at the international level with the problems of "neighboring rights" produced the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, signed at Rome on October 26, 1961. The United States had played a significant role in the development and adoption of this treaty (famously known as the "Rome Neighboring Rights Convention"). However, the strong and persistent hostility of various private interests, notably the broadcasting industry, has impeded any efforts to put the Rome Convention before the Senate for advice and consent. This hostility stemmed, in major part, from the provisions of the convention dealing with performance rights in sound recordings.

³⁶ For a general review of this question, see 2d SUPP. REP. REG. at ch. VIII.

³⁷ Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391. This statutory enactment, which for the most part became effective on February 15, 1972, amended §§ 1, 5, 19, 20, 26, and 101 of the then existing copyright law, 17 U.S.C. Under the 1971 Act all of the amendments except that of § 101 were scheduled to expire on January 1, 1975, but they were extended and made permanent by the Act of Dec. 31, 1974, Pub. L. No. 93-573, § 101, 88 Stat. 1873.

³⁸ See generally *Prohibiting Piracy of Sound Recordings: Hearings on S.*

been able to flourish openly and to obtain a strong competitive foothold in the record industry largely because of the inadequacies of the 1909 law.

The title of the 1971 amendment identified its primary purpose as that of "protecting against unauthorized duplication and piracy of sound recordings." Owners of the newly-created copyrights were accorded exclusive rights, but only to control unauthorized reproduction and distribution.³⁹ The legislative reports on the amendment made clear that, because its sole aim was to suppress tape piracy, it did not "encompass a performance right so that record companies and performing artists would be compensated when their records were performed for commercial purposes."⁴⁰

The committee reports on the amendment addressed both the questions of constitutionality and the beneficiaries of the new protection. Of the constitutional validity of the legislation the reports expressed no doubt:

The committee believes that, as a class of subject matter, sound recordings are clearly within the scope of the "writings of an author" capable of protection under the Constitution, and that the extension of limited statutory protection to them is overdue. Aside from cases in which sounds are fixed by some purely mechanical means without originality of any kind, the committee favors copyright protection that would prevent the reproduction and distribution of unauthorized reproductions of sound recordings.⁴¹

The amendment did not expressly identify the "authors" of a sound recording or the owners of the newly-created copyrights, but the reports made clear that in most cases protection was intended to go both to the performers and to the record producers.⁴²

646 and H.R. 6927 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 92d Cong., 1st Sess. (1971).

³⁹ The 1971 Act added to the exclusive rights of the copyright owner, set out in § 1 of the 1909 law as amended, a new subsection (f) according to the copyright owner the exclusive right—

To reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease, or lending, reproductions of the copyrighted work if it be a sound recording: *Provided*, That the exclusive right of the owner of a copyright in a sound recording to reproduce it is limited to the right to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording: *Provided further*, That 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; or to reproductions made by transmitting organizations exclusively for their own use.

⁴⁰ S. REP. NO. 92-72, 92d Cong., 1st Sess. 3 (1971); H.R. REP. NO. 92-487, 92d Cong., 1st Sess. 3 (1971).

⁴¹ S. REP. NO. 92-72, *supra* note 40, at 4-5; H.R. REP. NO. 92-487, *supra* note 40, at 5.

⁴² The enactment of S. 646 will mark the first recognition in American copyright law of sound recordings as copyrightable works. The copy-

By enacting the tape piracy amendment in 1971, Congress thus recognized the creative authorship of performers and record producers and the copyrightability of their contributions as the "writings of an author" under the Constitution. This makes it difficult, though perhaps not impossible, to argue the unconstitutionality of copyright protection for the public performance of records while accepting the constitutional validity of anti-piracy copyright legislation.⁴³

The basic question with respect to protection for sound recordings under the general revision bill was not whether it could grant rights against public performance, but whether it should. This fundamental issue, and the ways it has been dealt with by the parties, the courts and the legislatures over the past forty years in various state, federal, foreign, and international contexts, has produced an enormous and fascinating literature.⁴⁴ In the United

rightable work comprises the aggregation of sounds and not the tangible medium of fixation

The copyrightable elements in a sound recording will usually, though not always, involve "authorship" both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording. There may be cases where the record producer's contribution is so minimal that the performance is the only copyrightable element in the work, and there may be cases (for example, recordings of birdcalls, sounds of racing cars, et cetera) where only the record producer's contribution is copyrightable. As in the case of motion pictures, the bill does not fix the authorship, or the resulting ownership, of sound recordings, but leaves these matters to the employment relationship and bargaining among the interests involved.

Id.

⁴³ When the issue was debated in the Senate in 1974, Senator Sam Ervin, a determined opponent of a performance royalty for sound recordings, sought to make a case against the constitutionality of the legislation. 120 CONG. REC. 30,406-08 (1974). Senator Hugh Scott countered with arguments in support of constitutionality, relying in part upon an analysis of the issue prepared by the Copyright Office. 120 CONG. REC. 30,482-83 (1974). See also 1975 *Hearings*, *supra* note 3, at 1366-69, 1377 (testimony of Vincent T. Wasilewski).

⁴⁴ The mass of documentary material and scholarly writing on this subject, beginning in the 1930's when the technological displacement of live performers by recordings began to be felt, is staggering in its size and variety. The following sampling of articles will furnish an introduction to the subject: Bard & Kurlantzick, *A Public Performance Right in Recordings: How to Alter the Copyright System Without Improving It*, 43 GEO. WASH. L. REV. 152 (1974); Bass, *Interpretative Rights of Performing Artists*, 42 DICK. L. REV. 57 (1938); Clineburg, *Protection Afforded by the Law of Copyright to Recording Artists in their Interpretation of Musical Compositions*, 20 NEB. L. REV. 79 (1941); Hodgson, *Intellectual Property—Performer's Style—A Quest for Ascertainment, Recognition, and Protection*, 52 DEN. L.J. 561 (1975); Kaplan, *Performer's Right and Copyright: The Capitol Records Case*, 69 HARV. L. REV. 409 (1956); Lang, *Performance and the Right of the Performing Artist*, 21 ASCAP COPYRIGHT L. SYMP. 69 (1974); Young, *Copyright Law—Musical Style Piracy—Possible Methods of Legal Protection for the Musical Stylist*, 28 KY. L.J. 447 (1940); Comment,

States the issue was addressed actively during consideration of the revision bill, but proved once again to be extremely controversial.⁴⁵

In the end Congress simply postponed its decision on the point. Section 114 of the new law preserves the "anti-piracy" copyright already introduced into the law in 1971 and, while denying any rights for performances of sound recordings, expressly obligates the Register of Copyrights, after consultation with a wide variety of affected interests, to "submit to the Congress a report setting forth recommendations as to whether this section should be amended to provide for performers and copyright owners of copyrighted material any performance rights in such material."⁴⁶ On the surface, this provision may appear to do no more than authorize the latest in a series of "studies" designed to manage a problem, rather than solve it. As the official charged with responsibility for carrying out this mandate, however, I am determined to make the report as thorough, unbiased, and meaningful as possible. Since, as Register of Copyrights, I have gone on record publicly as favoring the principle of a compulsory licensing system

The Twilight Zone: Meandering in the Area of Performers' Rights, UCLA L. REV. 819 (1962); Note, *Protection of the Performing Artist's "Interpretative Rendition" through the Arranger's Copyright*, 37 ILL. L. REV. 245 (1942).

⁴⁵ See generally 2d SUPP. REP. REG. at ch. VIII. Beginning in 1967, the traditional alliances in the struggle over public performance rights in sound recordings began to change. Most significantly, performers and record producers made common cause in a concerted effort to establish performance royalties through a compulsory licensing system. This became apparent on July 23, 1975, when the House Subcommittee, as part of its consideration of general revision, held hearings on H.R. 5345, 94th Cong., 1st Sess. (1975), Representative Danielson's separate bill to provide a performance royalty for sound recordings. 1975 *Hearings*, *supra* note 3, at 1297-1392. On the following day, the Senate Judiciary Subcommittee held hearings on S. 1111, 94th Cong., 1st Sess. (1975), Senator Scott's identical bill for the same purpose. *Performance Royalty: Hearings on S. 1111 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975). Despite the added strength of the support for the principle of performance royalties that seemed to be demonstrated at these hearings, it was also clear that the opposition of the broadcasters was equally strong and determined. As Representative Danielson, a persistent and articulate spokesman for performers' rights in the House, observed:

I was the author of a bill which was considered in conjunction with the principal bill which would have provided royalties for performers' rights. We have not included them in the final bill for a very good reason; namely, we have not had time to conduct a full study of the proposal for performers' rights, and rather than jeopardize the legislation, we decided to leave that subject out of this bill and take it up at a future time.

122 CONG. REC. H10,879 (daily ed. Sept. 22, 1976). Mr. Danielson also noted that both the 1976 Republican and Democratic Party Platforms supported the principle of a performance royalty. *Id.* A new bill for the protection of performance rights was introduced by Representative Danielson in the current Congress. H.R. 6063, 95th Cong., 1st Sess. (1977).

⁴⁶ See H. REP. at 106.

under which performers and record producers would be paid for public performances of their recordings,⁴⁷ the objectivity of the study and its conclusions are likely to be challenged automatically. This makes the Office's task under section 114 a difficult one, but our goal is simple: to provide a full-scale, comprehensive, and objective summary of all the facts and opinions Congress will need to avoid further temporizing and at long last to make a definitive decision on this important question.⁴⁸

III. COMPUTER USES OF COPYRIGHTED WORKS

A third item of "unfinished business" concerns the use of copyrighted works in connection with computer-based information storage and retrieval systems. The legislative reports on the revision bill noted,

As the program for general revision of the copyright law has evolved, it has become increasingly apparent that in one major area the problems are not sufficiently developed for a definitive legislative solution. This is the area of computer uses of copyrighted works: the use of a work "in conjunction with automatic systems capable of storing, processing, retrieving, or transferring information."⁴⁹

⁴⁷ See 2d SUPP. REP. REG., ch. VIII, at 26-28; 1975 Hearings, *supra* note 3, at 1905-09; *Performance Royalty: Hearings on S. 1111 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 10-17 (1975).

⁴⁸ Although the Rome Neighboring Rights Convention of 1961, *supra* note 35, got off to a slow start, largely as a result of opposition from broadcasters in a number of countries, it has gained adherents in recent years, and remains an important instrument in the international protection of intellectual property. The international aspects of the problem have been complicated by the world-wide phenomenon of tape piracy and the dangers of "signal-poaching" in international satellite transmissions. The Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, 25 U.S.T. 309; T.I.A.S. No. 7808, was signed at Geneva on October 29, 1971, and entered into force for the United States on March 10, 1974. It attempts to provide an international framework to combat record piracy without prejudicing the Rome Convention. Similarly, the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (signed at Brussels on May 21, 1974) is not intended to prejudice the growth of the Rome Convention. Even more, the negotiations leading to the drafting of the Brussels Convention were predicated to some extent upon an understanding that broadcasting organizations would abandon their opposition, at the national level, to adherence to the Rome Convention. See Masouyé, *A New International Convention*, 25 E.B.U. REV., Sept. 1974, at 46, 49. Increasingly it may be recognized that the Brussels, Geneva Phonogram, and Rome Conventions are complementary regimes. This was the view expressed at the pioneering Latin American and Caribbean Seminars on the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations. See *Latin American and Caribbean Seminar on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, 9 UNESCO COPYRIGHT BULL. No. 4, at 7, 8-9 (1975) (final statement).

⁴⁹ S. REP. at 99; H. REP. at 116. The 1961 Report of the Register, 1961 REP. REG., did not specifically address the question of protection for computer programs or the legal implications of the use of copyrighted works in conjunc-

The approach taken by the 1976 Act to the question of computer uses of copyrighted works is unusual and not entirely free from constructional difficulties,⁵⁰ but is nonetheless sound. Section 117, intended to preserve the status quo,⁵¹ provides that the new Copyright Act

does not afford to the owner of copyright in a work any greater or lesser rights with respect to the use of the work in conjunction with automatic systems capable of storing, processing, retrieving, or transferring information, or in conjunction with any similar device, machine, or process, than those afforded to works under the law, whether title 17 or the common law or statutes of a State, in effect on December 31, 1977, as held applicable and construed by a court in an action brought under this title.

The principal responsibility for framing legislative recommendations in this area has been entrusted by Congress to the National Commission on New Technological Uses of Copyrighted Works (CONTU).⁵² Created in 1974, but not actually constituted until late in 1975, the Commission has the broad mandate to "study and compile data" on:

(1) the reproduction and use of copyrighted works of authorship—

(A) in conjunction with automatic systems capable of storing, processing, retrieving, and transferring information, and

...

tion with computer storage, internal manipulation, and retrieval. The 1965 Report sought to deal with the first issue. SUPP. REP. REG. at 5. The assumption of the 1965 Report that computer programs should be protected as a form of "literary works" carried over into the new law. Section 101 of the 1976 Act defines "literary works" as "works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied." The House Report declares: "The term literary works . . . includes computer data bases, and computer programs to the extent that they incorporate authorship in the programmer's expression of original ideas, as distinguished from the ideas themselves." See H.R. 4836, 95th Cong., 1st Sess. (1977).

⁵⁰ The basic intent of § 117 is to avoid changing the law, pending further study of the computer-copyright "interface" by the National Commission on New Technological Uses of Copyrighted Works (CONTU). Despite the clear intent and relatively clear language of § 117, in other contexts the legislative reports make reference to at least certain computer uses. See, e.g., H. REP. at 75, which interprets § 108(b) as not covering the reproduction by libraries and archives of certain works in "machine-readable" language for storage in an information system."

⁵¹ S. REP. at 99; H. REP. at 116.

⁵² The House Report observes that the Commission "is now engaged in making a thorough study of the emerging patterns in this field and it will, on the basis of its findings, recommend definitive copyright provisions to deal with the situation." H. REP. at 116.

- (2) the creation of new works by the application or intervention of such automatic systems ⁵³

In recent months the members of CONTU have been actively considering these questions⁵⁴ and are expected to issue draft reports on the questions of protection for computer software and data bases for public comment in the near future. A bill⁵⁵ to extend the life of the Commission until the fall of 1978 passed the House on April 19, 1977,⁵⁶ and is expected to encounter no difficulty in the Senate.

IV. REPRODUCTION AND DISTRIBUTION BY LIBRARIES AND ARCHIVES

A fourth item of unfinished business concerns the reproduction and distribution of copies and phonorecords of copyrighted works by libraries and archives under section 108 of the new copyright law. Section 108 is usually referred to as the "library photocopying" section, since the debate over its provisions has revolved around current library practices of supplying users with electrostatic facsimiles, mainly of articles from scientific, technical, and medical journals. However, it is important to remember that the section deals not only with photocopies, microforms, and all other copies made by any method of reprographic reproduction, but also with audio recordings of all sorts and with videorecords of news broadcasts.

James Treece's article, *Library Photocopying*,⁵⁷ is an excellent and thoughtful survey of the history of the struggles that led to the present formulation of section 108, and I will not cover that ground again here. The important point for present purposes is that Congress obviously was concerned lest the untried provisions of section 108 tip the scales too far in one direction or another. In effect, it wrote into the law a framework assuring continual oversight and review of the practical operation of the provision, and committing Congress to take a hard look at the situation existing at five-year intervals.⁵⁸

⁵³ Act of Dec. 31, 1974, Pub. L. No. 93-573, § 201(b), 88 Stat. 1873. The Commission was also mandated to study uses of copyrighted material "by various forms of machine reproduction, not including reproduction by or at the request of instructors for use in face-to-face teaching activities." *Id.* This provision was aimed primarily at library photocopying, one of the most pressing issues during the year before final enactment of the revision bill. Much of CONTU's first year was devoted to this problem, particularly the question of interlibrary arrangements involving exchanges of photocopies. See H. REP. at 116.

⁵⁴ NATIONAL COMMISSION ON THE NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, PRELIMINARY REPORT 19-25 (Oct. 8, 1976).

⁵⁵ H.R. 4836, 95th Cong., 1st Sess. (1977).

⁵⁶ 95 CONG. REC. H3221 (daily ed. Apr. 19, 1977).

⁵⁷ 24 UCLA L. REV. 1025 (1977).

⁵⁸ The commitment is embodied in section 108(i), which states:

By far the most controversial provision in section 108 was the declaration in subsection (g)(2) that none of the exemptions of the section would be available if the library or archive "engages in the systematic reproduction or distribution of single or multiple copies or phonorecords."⁵⁹ In an effort to abate, if not compromise, the differences over this provision, the House Subcommittee added a kind of negative definition of "systematic" in the form of a proviso:

[N]othing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.⁶⁰

At the same time it adopted this language, the House Subcommittee gratefully accepted an offer by the National Commission on New Technological Uses of Copyrighted Works (CONTU) to provide its good offices in working out quantitative guidelines under this proviso that would be acceptable to the parties.⁶¹ CONTU's efforts were successful, and the Conference Committee not only accepted the amendment of section 108(g)(2), but it endorsed the CONTU guidelines as well.⁶² Item 5 of the guidelines states: "As part of the review provided for in subsection 108(i), these guidelines shall be reviewed not later than five years from the effective date of this bill."⁶³

On the whole, it is probably fair to say that the congressional solution to the library photocopying problem means maintaining the issue as "unfinished business" for quite some time. But, ultimately, whose business? Not that of the Congress itself; while agreeing to look at the problem every five years, Congress in enacting section 108 did not intend to reenact a new section 108 every five years. And not that of the Copyright Office; the Register is given responsibility to observe, consult, and report, but not to regulate.

Five years from the effective date of this Act, and at five-year intervals thereafter, the Register of Copyrights, after consulting with representatives of authors, book and periodical publishers, and other owners of copyrighted materials, and with representatives of library users and librarians, shall submit to the Congress, a report setting forth the extent to which this section has achieved the intended statutory balancing of the rights of creators, and the needs of users. The report should also describe any problems that may have arisen, and present legislative or other recommendations, if warranted.

⁵⁹ See S. REP. at 70-71.

⁶⁰ NEW ACT § 108(a)(2).

⁶¹ See H. REP. at 78.

⁶² See CONF. REP. at 71-73.

⁶³ *Id.* at 73.

It seems clear that the unfinished business of section 108 is intended ultimately to be the responsibility of the parties themselves. If the libraries and archives on the one side make a good faith effort to put section 108 and the CONTU guidelines into practice, if the authors and publishers on their side are reasonable in their demands and expectations, and if both sides can approach the problem in a spirit of comity and good will, then section 108(i) will have served its purpose.

V. NONCOMMERCIAL BROADCASTING

The fifth item on this expanding list concerns the extent to which noncommercial broadcasters may utilize copyrighted works in their programming under special provisions reducing the burden of seeking multiple clearances. The formative years of the revision program were also the formative years of noncommercial broadcasting in the United States, and it is therefore not surprising that the issue of compulsory licensing⁶⁴ for noncommercial "public broadcasting" did not come to a head until the early 1970's.⁶⁵

On July 3, 1974, when the Senate Judiciary Committee reported the revision bill⁶⁶ to the full Senate, its report⁶⁷ explained why it had rejected an "amendment to provide a compulsory license at regulated rates for the use of copyrighted material in the programs of public television which are intended for reception by a general audience." The report declared:

The programming of public television includes an increasing emphasis on programs of an entertainment or general cultural nature. The committee is not unaware of the financial strains of many public broadcasting stations. Such stations may deserve greater financial assistance, but they should not be subsidized by this country's creative talent.

The Senate Report went on to urge the parties to "promptly undertake efforts to improve procedures whereby public television may secure copyright clearances."⁶⁸

On August 19, 1974, Senator Mathias introduced an amendment⁶⁹ that would have added to the bill a new section 118, providing for compulsory licensing of the "public broadcast of non-dramatic literary and musical works, sound recordings, and pictorial, graphic, and sculptural works." The Mathias amendment was not adopted when the full Senate passed the revision bill on

⁶⁴ A compulsory license is a license imposed by the terms of the statute normally entitling the copyright owner to the right to compensation for the use of his work but denying him the right to prohibit the use.

⁶⁵ See generally 2d SUPP. REP. REG., ch. VI, at 8-21.

⁶⁶ S. 1361, 93d Cong., 1st Sess. (1973).

⁶⁷ S. REP. NO. 93-983, 93d Cong., 2d Sess. (1974).

⁶⁸ *Id.* at 128.

⁶⁹ S. 1361, 93d Cong., 2d Sess. (1974) (amend. no. 1815).

September 9, 1974,⁷⁰ but the remarks of Senator McClellan implied that the amendment would be considered further.⁷¹

In 1975 a number of meetings were held in an effort to resolve the problem through negotiations aimed at voluntary blanket licensing, but they proved unsuccessful. The 1975 House hearings reflected an increasing polarization of positions,⁷² and a revised Mathias amendment was reported favorably by the Senate Judiciary Committee on October 7, 1975⁷³ and was adopted by the Senate on February 19, 1976.⁷⁴ The revised version of section 118 covered only "nondramatic literary or musical work, pictorial, graphic, or sculptural work."

The House of Representatives in 1976 substantially changed the Senate version of section 118. It accepted the arguments of the authors and publishers of nondramatic literary works "that a compulsory licensing system would deny them the fundamental right to control the use of their works and protect their reputation in a major communications medium."⁷⁵ The House also rejected a straight compulsory license for musical and graphic works and instead adopted a system aimed at minimizing governmental control over licensing and encouraging the private parties to reach voluntary agreements.⁷⁶ The House version of section 118 was

⁷⁰ 120 CONG. REC. 30,496-97 (1974).

⁷¹ *Id.*

⁷² 1975 *Hearings*, *supra* note 3, at 857-989.

⁷³ S. REP. at 100-03. The report noted that, while the amendment was being considered in subcommittee, Senator McClellan urged representatives of public broadcasting and copyright proprietors "to explore the possibility of achieving agreements outside the copyright legislation . . ." *Id.* at 100. Although some progress was made in these private negotiations, the report continued:

When the Committee on the Judiciary met on S. 22 on October 7, 1975, several issues still remained unresolved. . . . [T]he committee by majority vote decided to incorporate in S. 22 a public broadcasting Amendment proposed by Senator Mathias. While adopting this section, the Committee nevertheless still strongly urges the parties to continue negotiations to reach private agreements wherever possible. The Committee believes that this section should be appropriately modified to reflect such agreements as may be reached prior to enactment.

Id.

⁷⁴ 132 CONG. REC. S2047 (daily ed. Feb. 19, 1976). The Senate version, although a "straight compulsory license" in form, did not establish a royalty schedule; this was to be left to the Copyright Royalty Tribunal. S. 22, 94th Cong., 1st Sess. § 118(c) (1975); S. REP. at 102.

⁷⁵ H. REP. at 117.

⁷⁶ Under § 118, the Copyright Royalty Tribunal, within thirty days of its constitution, is required to initiate royalty rate-making procedures with respect to the use of nondramatic musical, pictorial, sculptural and graphic works by public broadcasting. These proceedings would, if possible, be based upon the terms of licenses proposed by "any owner of copyright in a work specified in this subsection or any public broadcasting entity." NEW ACT § 118(b)(1). Further, voluntary licenses negotiated "at any time" supersede Tribunal determinations, if recorded with the Copyright Office under time limits imposed. The actual collection and distribution of royalties is left to the private sector.

accepted by the Conference Committee⁷⁷ and was enacted into law.

As it emerged in section 118 of the Act of 1976, the role of the compulsory license with respect to public broadcasting conceptually stands somewhere between the licenses for cable and jukeboxes under sections 111 and 116, and that for sound recordings of music under section 115. The former are clearly intended to preclude voluntary licensing; the latter has, in practice under the 1909 Act, provided a statutory basis upon which voluntary, negotiated agreements rest.⁷⁸

Under section 118, voluntary licensing is encouraged under the aegis of the newly-created Copyright Royalty Tribunal. The hope is that the parties will reach agreements without Tribunal intervention, and that the Tribunal would establish the rates and terms of licenses on its own initiative only when voluntary negotiations completely break down.

As already noted, one of the most significant changes the House made to section 118 was the deletion of nondramatic literary works from the scope of the compulsory license.⁷⁹ Although the House Committee was unwilling to impose a compulsory license on literary works, it was obviously concerned lest its action result in unreasonable withholding of works from the programming of public broadcasters. The report stated:

The Committee was assured by representatives of authors and publishers that licensing arrangements for readings from their books, poems, and other works on public broadcasting programs for reasonable compensation and under reasonable safeguards for authors' rights could be worked out in private negotiation. The Committee strongly urges the parties to work toward mutually acceptable licenses to facilitate their

⁷⁷ CONF. REP. at 77-78.

⁷⁸ It has long been recognized that the compulsory license for mechanical reproductions of music primarily shapes negotiated licenses; actual use of the statutory license is a matter of last resort. H. HENN, *THE COMPULSORY LICENSE PROVISIONS OF THE U.S. COPYRIGHT LAW*, COPYRIGHT OFFICE STUDY NO. 5 (1956), reprinted in 2 *STUDIES ON COPYRIGHT* 877 (Copyright Soc'y of the U.S.A. ed. 1963). For a further discussion of why negotiated licenses are the norm despite the statutory compulsory license, see S. SHELLEY & M. KRASILOVSKY, *THIS BUSINESS OF MUSIC* 124 (1st ed. 1964). See also, 1975 *Hearings*, *supra* note 3, at 1579-80 (testimony of Leonard Feist). But see *id.* at 1569 (testimony of John D. Glover).

⁷⁹ The Committee also concluded that the performance of nondramatic literary works should not be subject to [Tribunal] determination. It was particularly concerned that a compulsory license for literary works would result in loss of control by authors over the use of their work in violation of basic principles of artistic and creative freedom. It is recognized that copyright not only provides compensation to authors, but also protection as to how and where their works are used. H. REP. at 119.

negotiations and aid in the possible establishment of clearance mechanisms and rates, the Committee's amendment provides the parties, in section 118(e)(1), with an appropriately limited exemption from the anti-trust laws.⁸⁰

In addition to "urging" and "facilitating" private negotiations with respect to literary works, Congress adopted in section 118(e)(2) essentially the same device used in section 108(i) with respect to review of the practical operations of the library reproduction provisions. In another effort to blend private and public "law making," section 118(e)(2) requires the Register of Copyrights—after consultation with authors' groups, publishers, and public broadcasters—to report to Congress on "the extent to which voluntary licensing arrangements have been reached with respect to the use of nondramatic literary works by such broadcast stations."⁸¹ The Register's report is also asked to "describe any problems that may have arisen and present legislative or other recommendations, if warranted."⁸² The report is due on January 3, 1980.

This congressional call to action, directed at private interests, already appears to have borne fruit. Steps have been taken toward the establishment of a central clearinghouse for expeditious licensing of nondramatic literary works for use in noncommercial broadcasting. Whether this voluntary effort will succeed depends, as always, upon the good will of the parties.

VI. POSITION OF COPYRIGHT NOTICE

Each of the items of unfinished business discussed so far has concerned the extent to which the exclusive rights of the creator or copyright owner should be qualified. However, uncertainty or reluctance to set such volatile issues in concrete were not Congress' only reasons for leaving some important matters for further definition. Chapter 4 of the 1976 Act, concerning notice of copyright, registration, and deposit, represents a much needed liberalization of some of the more onerous formalities under the 1909 law. This liberalization has been achieved by special provisions permitting the copyright claimant to correct mistakes with respect to the copyright notice, and by providing flexibility in administration of the deposit and registration provisions.⁸³ Although Chapter 4 creates the most work for the Copyright Office, as an office

⁸⁰ *Id.*

⁸¹ NEW ACT § 118(e)(2).

⁸² *Id.*

⁸³ This flexibility is derived from regulatory authority accorded the Register of Copyrights to exempt certain kinds of works from mandatory deposit

of records, only one item of business in that Chapter is "unfinished" in the sense used here.

Section 401(c) requires that a copyright notice be affixed "to the copies in such manner and location as to give reasonable notice of the claim of copyright."⁸⁴ Instead of providing specific guidance as to what manner of affixing and positioning would "give reasonable notice," section 401(e) directs the Register of Copyrights to "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."

Problems of the proper position and method of affixing copyright notices have emerged most strikingly in the field of the fine arts, and here the Register's authority may provide an avenue for relief. Painters and graphic artists have objected strenuously to placing the notice on the front of their works, and "detachable" notices, not sanctioned under the 1909 law, might be useful in special circumstances.⁸⁵

VII. THE MANUFACTURING CLAUSE

Another job that remains for completion concerns the so-called "manufacturing clause," one of the most entrenched concepts in our copyright law.⁸⁶ This is not the place to examine in detail either the history of today's manufacturing clause or the greatly liberalized version in section 601 of the 1976 Act.⁸⁷

under § 407, or to modify the basic requirements for deposit in certain cases. A closely related authority is given to the Register in § 408 with respect to deposits for purposes of voluntary registration.

⁸⁴ See H. REP. at 143.

⁸⁵ The equivocal state of the law with respect to the proper placement of the copyright notice on works of graphic art, and the problems of "detachable notices," are well-summarized in NIMMER, *supra* note 9, at § 87.

⁸⁶ As Marjorie McCannon has pointed out, the so-called "clause" is actually an aggregate of various scattered provisions in the present law:

Interspersed throughout the copyright law (Title 17 of the U.S. Code) are references to the manufacturing requirements. The "manufacturing clause" as last amended in 1954 . . . is found in section 16 of the statute and is supplemented by sections 17, 18, 22, 23 and 107, with related references to it in section 9(c) and 13, forming an intricate tangle of general requirements, exceptions, special procedures for proof on compliance, special provisions for "ad interim" copyright, and import prohibitions and exceptions. These provisions abound in abstruse or ambiguous terms, making enforcement extremely difficult.

McCannon, *The Manufacturing Clause of the U.S. Copyright Law*, 2 STUDIES ON COPYRIGHT 1123, 1125 (Copyright Soc'y of the U.S.A. ed. 1963).

⁸⁷ The House Report summarizes the arguments for and against retention of a manufacturing clause, and outlines the provisions of § 601 of the 1976 Act. H. REP. at 164-69.

The manufacturing clause requires that, with numerous exceptions,⁸⁸ English-language books must be domestically manufactured to obtain full copyright protection. The opponents of the requirement were unsuccessful in convincing the Senate to delete the manufacturing clause in its entirety,⁸⁹ but their arguments in the House were more persuasive.⁹⁰

In 1976 the House of Representatives amended the Senate version of section 601 to provide for the retention of the manufacturing clause until January 1, 1981; thereafter, it would simply disappear from our law. The Conference Committee accepted the idea of phasing out the provision, but changed the date of outright repeal to July 1, 1982. Moreover, in a letter signed by Senators McClellan and Scott and printed in the Congressional Record, the Copyright Office was asked to undertake "a thorough study of the ramifications of removal of the so-called manufacturing clause of the Copyright Bill before July 1, 1982"⁹¹ The letter made specific suggestions as to the participants, subject matter, procedure, and timetable for the study, recommending that the Copyright Office begin its study around January 1, 1981 and complete its report to Congress, with recommendations, by July 1, 1981. It added: "This would allow the Congress approximately one year to analyze the report, conduct hearings, and make its decision whether the manufacturing clause protection should be continued beyond 1982."⁹²

The Copyright Office has indicated its willingness to undertake the study as envisioned, and will do so as objectively and thoroughly as possible.

VIII. COPYRIGHT ROYALTY TRIBUNAL

One of the most formidable pieces of unfinished business in the new copyright law concerns the new Copyright Royalty Tribu-

⁸⁸ By far the most important exception derives from U.S. adherence to the Universal Copyright Convention. The rather anomalous result is that most works of foreign origin are completely exempted from manufacturing requirements, while the brunt of the clause falls upon American nationals.

⁸⁹ See S. REP. at 146-51. Essentially, the Senate version of § 601 was identical to that later passed by the House, with two significant exceptions. The first is the House provision phasing out the requirement on July 1, 1982. The second is found in §601(b)(7)(B), which permits individual American authors to authorize first publication of their works abroad, by foreign publishing companies, without being subject to the manufacturing requirements. This provision is an example of the often subtle ways in which the new copyright law reorients the focus of statutory copyright toward individual creators and away from proprietary copyright owners.

⁹⁰ See 2d SUPP. REP. REG. at ch. XIV, for a review of the testimony and arguments before the House Subcommittee in May 1975.

⁹¹ 122 CONG. REC. S17,252-53 (daily ed. Sept. 30, 1976).

⁹² *Id.* at S17,253.

nal. The Tribunal has been created by Chapter 8 of the 1976 Act as an independent agency in the Legislative Branch to perform two different functions under the various compulsory licenses in the new law. The first function is to set or adjust statutory royalty rates under varying circumstances with respect to all four licensing provisions.⁹³ The second is to settle disputes concerning the proper distribution of monies collected under the compulsory licenses for cable television and jukebox performances.

Although a fair amount of legislative direction is given to the Tribunal in rate-making activities,⁹⁴ the statute is quite vague as to how royalty distribution proceedings are to be carried out. In certain cases, equitable distribution of royalties collected under compulsory licenses is likely to be extraordinarily difficult. Witness the section 118 license for the use of, among other things, published pictorial, graphic and sculptural works. While music publishers and performing rights societies are quite familiar with the problems of both voluntary and compulsory licensing, no experienced collective counterpart exists to perform a similar function for the visual artist.

Even the experienced licensing organizations will be confronted with new problems. Section 111(d)(5)(A) provides that claimants, notwithstanding the antitrust laws, may "agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf." The interests of smaller claimants may be of special concern in considering the practical problems of working out such a division.

IX. AMERICAN TELEVISION AND RADIO ARCHIVES

One of the lesser-known pieces of unfinished business in the new copyright law involves the creation in the Library of Congress of the American Television and Radio Archives (which some have begun already to call "ATRA"). Section 113 of the Transitional and Supplementary Provisions of the 1976 Act, by establishing the Archive,⁹⁵ represents the first national recognition that the

⁹³ NEW ACT § 801(b).

⁹⁴ For example, § 801(2) provides that rate adjustments to the statutory schedule under § 111(d)(2)(B) may be made by the Tribunal either to reflect: 1) monetary inflation or deflation; or 2) change in average rates charged cable subscribers for basic retransmission services "to maintain the real constant dollar level of the royalty fee per subscriber." Rates may also be adjusted if the Federal Communications Commission changes certain of its rules affecting cable systems.

⁹⁵ The provision derives in part from an effort to come to grips with the

television and radio heritage of the United States is an essential tool for today's and tomorrow's scholars and deserves systematic preservation.⁹⁶

On the basis of the provisions in section 113, and of section 407(e) of the Act proper, the new Television and Radio Archive will be able to draw on a variety of sources for its collections. In addition to the traditional means of acquiring broadcast programming through exchange, gift, purchase or loan for reproduction, ATRA will draw upon copyright deposits and will be authorized to tape programs off-the-air. The express prerogative of off-the-air taping is particularly significant, though the precise way it will be used remains to be established.

Setting up the Archive will be no small task. Yet, it is especially gratifying to realize that this new system for preserving a record of television and radio once again demonstrates the wisdom of Ainsworth Spofford in 1870. It was he who sought to have the Copyright Office's functions located within the Library of Congress.⁹⁷ For over a hundred years, the fundamental operations of the Copyright Office—registration, recordation and deposit—have served to enrich, and in some cases to provide, the collections of our nation's greatest library.⁹⁸

X. DESIGN PROTECTION

The extensive subject of the protection of original ornamental designs of useful articles runs far too deeply into the history of copyright law revision and is too complex for adequate treat-

highly-publicized problems involved in the copyright infringement suit brought by CBS against Vanderbilt University for maintaining an unlicensed archive of videotapes of news telecasts. For the background to this interesting litigation, see *Vanderbilt U. Acts to End Suit by C.B.S. Against News Archive*, N.Y. Times, Mar. 30, 1974, at 63, col. 3-4; *Copyright Bill May Aid Archive*, Vanderbilt Hustler, Sept. 13, 1974, at 1. In 1970, Senator Baker introduced legislation which, among other things, would have created a television archive in the Library of Congress. S. 3720, 91st Cong., 2d Sess. (1970). Four years later, after no action had been taken on either S. 3720, or its successor, S. 2497, 93rd Cong., 1st Sess. (1973), Senator Baker offered an amendment to the copyright revision bill intended to insulate Vanderbilt's taping activities from liability under the new copyright law. 120 CONG. REC. S28,498 (1974). See also 2d SUPP. REP. REG., ch. III, at 43.

⁹⁶ See H. REP. at 182.

⁹⁷ See Cole, *Ainsworth Spofford and the Copyright Law of 1870*, 6 J. OF LIB. HIST. 34 (1971).

⁹⁸ See Breitenbach, *Picture Research at the Library of Congress*, 51 SPECIAL LIBRARIES 281 (1960); Cole, *Of Copyright, Men, and a National Library*, 28 Q.J. LIB. CONG. 114 (1971); Spofford, *Copyright in Its Relation to Libraries and Literature*, 1 AM. LIB. J. 84 (1876); Dunne, *Deposit of Copyrighted Works*, COPYRIGHT OFFICE STUDY NO. 20 (1960), reprinted in 1 STUDIES ON COPYRIGHT 409 (Copyright Soc'y of the U.S.A. ed. 1963).

ment in a brief introduction such as this.⁹⁹ It is enough to note that this "frontier" area of copyright law, pioneered by the landmark decision of the Supreme Court in *Mazer v. Stein*,¹⁰⁰ was the subject of special provisions in the Senate-passed version of the revision bill,¹⁰¹ which did not survive in the House.¹⁰²

Although the Copyright Office strongly favored the enactment of Title II,¹⁰³ the House felt more strongly that

the new form of design protection provided by Title II could not truly be considered copyright protection and therefore appropriately within the scope of copyright revision.

In addition, Title II left unanswered two fundamental issues which will require future study by the Congress. These are: first, what agency should administer this new design protection system and, second, should typeface designs be given the protections of the title.¹⁰⁴

Both issues, the House concluded, should be the subject of further, more complete hearings in the Ninety-fifth Congress.¹⁰⁵ In the meantime, the issue of copyright protection for original designs of typeface is the subject of on-going litigation. The full range of design protection issues, however, stands as one of the most significant and pressing items of unfinished business now on the Congressional agenda.

CONCLUSION

As I hope this introductory article has suggested, copyright law revision may be changing from a sexagenary event into something resembling a continuous process. In the course of the last twenty years, copyright has emerged as one of the most important areas of American property law. As this society moves deeper and deeper into that phase of economic life called "post-industrial," where livelihoods are earned predominantly through the sale of information, expertise, and personal services, the extent to which copyrightable creations are protected by exclusive property interests can become central to national growth.

The areas the new law leaves unsettled seem to mirror the movement toward post-industrial models: educational uses of

⁹⁹ For a full discussion see 2d SUPP. REP. REG., ch. VII, at 4-24.

¹⁰⁰ 347 U.S. 201 (1954).

¹⁰¹ S. 22, 94th Cong., 1st Sess., Title II, §§ 201-205 (1975).

¹⁰² See H. REP. at 50; CONF. REP. at 82.

¹⁰³ See 2d SUPP. REP. REG., ch. VII, at 21.

¹⁰⁴ H. REP. at 50; see 2d SUPP. REP. REG., ch. VII, at 15.

¹⁰⁵ H. REP. at 50. Testimony on Title II before the House Subcommittee was limited. See 1975 *Hearings*, *supra* note 3, at 991 (testimony of Alan Latman). The bulk of the Committee's attention to design issues was directed toward the special problems of typeface protection. *Id.* at 1014.

copyrighted works, the changing roles of libraries and information networks, special treatment of the growing not-for-profit sector of our economy, and a range of issues involving mass communications. However tired Congress may be of the intricacies of copyright law and the importunings of copyright lobbyists, it has probably not seen the end of copyright revision in this decade.