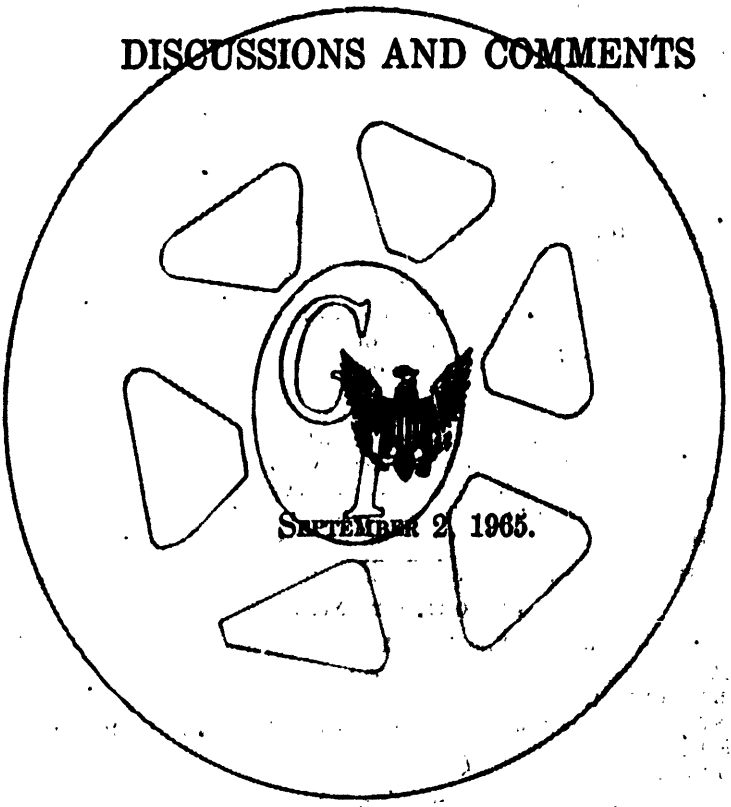
89th Congress
1st Session } HOUSE COMMITTEE PRINT

COPYRIGHT LAW REVISION
Part 5

1964 REVISION BILL

WITH

DISCUSSIONS AND COMMENTS



SEPTEMBER 2, 1965.

Printed for the use of the House Committee on the Judiciary

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FOREWORD

This print, Part 5 in the "Copyright Law Revision" series issued by the House Committee on the Judiciary, completes the record of the proposals, discussions, and comments relating to the general revision of the U.S. copyright law, from the initial Report of the Register of Copyrights issued in July 1961 up to the introduction in the 89th Congress on February 4, 1965 of the bill, H.R. 4347, on which hearings before Subcommittee No. 3 of this Committee began on May 26, 1965.

The Register's Report of July 1961 and the discussions and comments it elicited are contained in the first two parts of the series. Parts 3 and 4 consist of a preliminary draft of provisions for a general revision bill, prepared by the Copyright Office in 1963, and the discussions and comments on that draft. Next came the bill, H.R. 11947, introduced in the 88th Congress on July 20, 1964, as a basis for further discussion; the present Part 5 contains the text of that bill and the discussions and comments on it.

All of the material in these five parts, together with the Copyright Law Revision Studies which preceded the Register's Report of July 1961, representing altogether almost ten years of work, has served as the basis for preparation of the bill, H.R. 4347 and its companion S. 1006, now pending in the 89th Congress.

Part 6 in this series, which comes later in the chronology of events but has already been issued, is the Supplementary Report of the Register of Copyrights, released in May 1965, explaining the bill now pending.

In issuing the material in the present print, as in the others, the committee neither approves nor disapproves any of the views expressed therein.

EMANUEL CELLER,
Chairman, Committee on the Judiciary.

SEPTEMBER 2, 1965.

LETTER OF TRANSMITTAL

COPYRIGHT OFFICE,
THE LIBRARY OF CONGRESS,
Washington, D.C., July 26, 1965.

THE HONORABLE EMANUEL CELLER,
Chairman, Committee on the Judiciary,
U.S. House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: On July 20, 1964, H.R. 11947, a bill for the general revision of the copyright law, was introduced by you in the 88th Congress, for purposes of discussion and comment as a basis for the preparation of a revised bill for the 89th Congress.

I am pleased to send you herewith the transcripts of a two-day meeting of an advisory panel held in August 1964, at which representatives of many interested groups discussed H.R. 11947, and copies of comments sent to us on that bill.

Incorporation of the discussions and comments on H.R. 11947 as Part 5 in the series of prints on Copyright Law Revision issued by your committee will complete the valuable record of the years of work to which so many contributed. Part 5 and the other committee prints show the foundation for H.R. 4347, introduced by you in the 89th Congress on February 4, 1965.

Sincerely yours,

ABRAHAM L. KAMINSTEIN,
Register of Copyrights.

cc: Librarian of Congress.

CONTENTS

	Page
1964 Revision Bill	1
Transcript of Meeting:	
August 6, 1964	33
August 7, 1964	139
Comments Received From:	
Abeles, Julian T., October 5, 1964	221
Ad Hoc Committee of Educational Institutions on Copyright Law Revision:	
August 6, 1964	98, 110
December 17, 1964	222
American Book Publishers Council, Inc. and American Textbook Publishers Institute, December 17, 1964	223
American Newspaper Publishers Association, November 19, 1964	228
American Textbook Publishers Institute:	
October 28, 1964	232
February 1, 1965	233
Association of American University Presses, Inc., November 20, 1964	236
Authors League of America, Inc.:	
November 17, 1964	237
November 23, 1964	254
December 18, 1964	256
Azaroff, Leonid V., December 15, 1964	257
Babbitt, Harold E., December 24, 1964	258
Barker, Ronald E., November 24, 1964	258
Blanchard, Ralph H., December 21, 1964	261
Bredehoft, Charles M., February 4, 1965	262
Cahn, Joshua Binion, August 7, 1964	209
Chodorov, Jerome, November 29, 1964	263
Coleman, James J., August 6, 1964	84
Diamond, Sidney A., January 12, 1965	203
Elkus, Jonathan, January 18, 1965	266
Finkelstein, Herman, December 15, 1964	267
General Electric Company, December 4, 1964	269
Gray, Peter, December 15, 1964	280
Grossberg, David, December 4, 1964	280
Hardy, Arthur C., December 15, 1964	281
Hedrich, J. O., December 14, 1964	282
Hill, Helen D. (Mrs.), December 27, 1964	282
International Brotherhood of Electrical Workers, December 28, 1964	283
Jablow, Richard B., November 9, 1964	283
Jackson, Joseph Gray, August 24, 1964	285
Johnson, Lee H., January 11, 1965	286
Kellman, Leon, September 15, 1964	286

COMMENTS RECEIVED FROM—Continued Page

Kendrick, M. Slade, December 16, 1964 289
Kohlbrenner, Bernard J., December 14, 1964 289
Krooss, Herman E., December 14, 1964 290
LaBrant, Lou, January 19, 1965 290
LaBrum, J. Harry, September 8, 1964 291
Lazarus, Richard S., December 30, 1964 291
Lee, James Michael, December 21, 1964 292
Maher, Brendan A., December 22, 1964 293
Mallinson, George G., January 12, 1965 295
Matson (Harold) Company, Inc., December 16, 1964 296
Maynard, H. B., December 11, 1964 296
Mercey, Arch A., September 16, 1964 297
Meyers, Ernest S., August 6, 1964 73
Miller, Neal E., January 11, 1965 297
Morgan, Joseph, December 14, 1964 298
Motion Picture Association of America, Inc., Copyright Committee, January 26, 1965 298
Music Operators of America, Inc., August 6, 1964 70
National Audio-Visual Association, Inc., November 24, 1964 311
National Joint Apprenticeship and Training Committee for the Electrical Industry, December 30, 1964 313
Nmumer, Melville B., November 3, 1964 313
Noble, J. Kendrick, Jr., September 28, 1964 319
O'Brien, Neil, December 15, 1964 320
Oldenberg, O., December 17, 1964 320
Panshin, A. J., December 14, 1964 321
Patterson, Edwin W., December 18, 1964 322
Rees, Norma S., December 22, 1964 322
Riehl, Herbert, December 19, 1964 322
Rieman, Wm., III, December 14, 1964 323
Robbins, Jerome, January 11, 1965 324
Rodell, Marie, August 11, 1964 324
Rosenfield, Harry N.:
August 6, 1964 46
September 15, 1964 325
Rothermich, John A., February 2, 1965 325
Schiffer, George, January 28, 1965 326
Schneider, Nina, December 18, 1964 329
Shigley, Joseph E., December 15, 1964 330
Siegman, A. E., December 14, 1964 331
Slingland, Robert P., August 25, 1964 332
Smith, Helen P. (Mrs. Gilbert M.), December 13, 1964 332
Street, W. E., October 9, 1964 333
Sutton, George P., December 29, 1964 333
Thomsen, Frederick L., December 19, 1964 334
Tocchini, John, December 16, 1964 334
Waddell, Joseph J., December 16, 1964 335
Wagner, J. A., December 18, 1964 335
Waldheim, Franklin, August 31, 1964 336
Wattenberg, Philip B., January 4, 1965 338
Whicher, John F., August 24, 1964 338
Whittier, C. Taylor, September 15, 1964 341

COMMENTS RECEIVED FROM—Continued Page
Wiltermood, Walter, January 9, 1965 341
Wolf, Miriam Bredow, December 12, 1964 342
Wood, Joseph M., October 9, 1964 342
Writers Guild of America, September 14, 1964 343
SUBJECT INDEX 347

1964 REVISION BILL

Three identical versions of the 1964 bill were introduced during the second session of the 88th Congress: S. 3008 (Mr. McClellan) and H.R. 11947 (Mr. Celler) on July 20; and H.R. 12354 (Mr. St. Onge) on August 12. The text of the bill is as follows:

A BILL

For the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 17 of the United States Code, entitled "Copyrights," is hereby amended in its entirety to read as follows:

TITLE 17—COPYRIGHTS

Sec.

1. Subject matter of copyright: in general.
2. Subject matter of copyright: compilations and derivative works.
3. Subject matter of copyright: national origin.
4. Subject matter of copyright: United States Government works.
5. Exclusive rights in copyrighted works.
6. Limitations on exclusive rights: fair use.
7. Limitations on exclusive rights: effect of transfer of particular copy or phonorecord.
8. Limitations on exclusive rights: exemption of certain performances and exhibitions.
9. Scope of exclusive rights in pictorial, graphic, and sculptural works.
10. Scope of exclusive rights in sound recordings.
11. Scope of exclusive rights in nondramatic musical works: compulsory license for making and distributing phonorecords.
12. Scope of exclusive rights in nondramatic musical works: performance by means of coin-operated machine.
13. Limitations on exclusive rights: public communication of broadcasts.
14. Ownership of copyright.
15. Ownership of copyright as distinct from ownership of material object.
16. Termination of transfers of copyright ownership.
17. Execution of transfers of copyright ownership.
18. Recordation of transfers and other documents.
19. Pre-emption with respect to other laws.
20. Duration of copyright: works created after July 1, 1967.

Sec.
21. Duration of copyright: works created but not published or copyrighted before January 1, 1967.
22. Duration of copyright: subsisting copyrights.
23. Duration of copyright: terminal date.
24. Notice of copyright: visually-perceptible copies.
25. Notice of copyright: phonorecords of sound recordings.
26. Notice of copyright: contributions to collective works.
27. Notice of copyright: omission of notice.
28. Notice of copyright: error in name or date.
29. Deposit of copies or phonorecords for Library of Congress.
30. Copyright registration in general.
31. Application for registration.
32. Registration of claim and issuance of certificate.
33. Registration as prerequisite to infringement suit.
34. Registration as prerequisite to certain remedies for infringement.
35. Infringement of copyright.
36. Remedies for infringement: injunctions.
37. Remedies for infringement: impounding and disposition of infringing articles.
38. Remedies for infringement: damages and profits.
39. Remedies for infringement: costs and attorney's fees.
40. Criminal offenses.
41. Limitations on actions.
42. Notification of filing and determination of actions.
43. Manufacture and importation of certain copies.
44. Infringing importation of copies or phonorecords.
45. Importation prohibitions: enforcement and disposition of excluded articles.
46. The Copyright Office: general responsibilities and organization.
47. Copyright Office regulations.
48. Effective date of actions in Copyright Office.
49. Retention and disposition of articles deposited in Copyright Office.
50. Copyright Office records: preparation, maintenance, public inspection, and searching.
51. Copies of Copyright Office records.
52. Copyright Office forms and publications.
53. Copyright Office fees.
54. Definitions.

§ 1. Subject matter of copyright: in general.

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include, but are not limited to, the following categories:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) choreographic works and pantomimes;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures;
(7) sound recordings.

§ 2. Subject matter of copyright: compilations and derivative works.

(a) The subject matter of copyright as specified by section 1 includes compilations and derivative works, but protection for a work employing pre-existing material in which copyright subsists is available only to the extent that such material has been used lawfully.

(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the pre-existing material employed in the work, and shall not imply any exclusive right in the pre-existing material. The copyright in such work shall be independent of, and shall not affect or enlarge the scope, duration, ownership, or subsistence of any copyright protection in the pre-existing material.

§ 3. Subject matter of copyright: national origin.

(a) UNPUBLISHED WORKS.—The works specified by sections 1 and 2, while unpublished, are subject to protection under this title without regard to the nationality or domicile of the author.

(b) PUBLISHED WORKS.—The works specified by sections 1 and 2, when published, are subject to protection under this title if:

(1) on the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a national, domiciliary, or sovereign authority of a foreign nation that is a party to a copyright convention or treaty to which the United States is also a party; or

(2) the work is first published in the United States or in a foreign nation that is a party to the Universal Copyright Convention of 1952; or

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

(4) the work comes within the scope of a Presidential proclamation. Whenever he finds it to be in the national interest, the President may in his discretion extend, by proclamation, protection under this title to works of which one or more of the authors is, on the date of first publication, a national, domiciliary, or sovereign authority of any designated foreign nation, or which are first published in any designated foreign nation, and he may revise, suspend, or revoke any proclamation or impose any conditions or limitations on protection under a proclamation.

§ 4. Subject matter of copyright: United States Government works.

(a) Except as provided by subsections (b) and (c), copyright protection under this title is not available for any published work of the United States Government, but the United States Government is not

precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

(b) As an exception to the provisions of subsection (a), the Postmaster General may secure copyright on behalf of the United States Government in the whole or any part of the publications authorized by section 2506 of title 39.

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

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

(e) A "work of the United States Government" is a work prepared by an officer or employee of the United States Government as part of his official duties.

§ 5. Exclusive rights in copyrighted works.

(a) GENERAL SCOPE OF COPYRIGHT.—Subject to sections 6 through 13, the owner of copyright under this title has the exclusive rights to do or to authorize any of the following:

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

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

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

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

(5) in the case of pictorial, graphic, or sculptural works, to exhibit the copyrighted work publicly.

(b) DEFINITIONS OF CERTAIN EXCLUSIVE RIGHTS.—

(1) To "perform" a work means to recite, render, play, act, or represent it, either directly or by means of any device or process, or, in the case of a motion picture, to show its images or to make the sounds accompanying it audible.

(2) To "exhibit" a work means to show a copy of it, either directly or by means of motion picture films, slides, or any other device or process.

(3) To perform or exhibit a work "publicly" means:

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

(B) to broadcast a performance or exhibition of the work to the public, or to transmit to the public a broadcast of any performance or exhibition otherwise than as a common carrier;

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

§ 6. Limitations on exclusive rights: fair use.

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

(1) the purpose and character of the use;

(2) the nature of the copyrighted work;

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

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

§ 7. Limitations on exclusive rights: effect of transfer of particular copy or phonorecord.

(a) Notwithstanding the provisions of section 5(a)(3), the owner of a particular copy or phonorecord lawfully made under this title is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

(b) Notwithstanding the provisions of section 5(a)(5), the owner of a particular copy of a pictorial, graphic, or sculptural work lawfully made under this title is entitled, without the authority of the copyright owner, to exhibit that copy publicly by showing it to viewers present at the place where the copy is located.

(c) The privileges prescribed by subsections (a) and (b) do not extend to any person who has acquired possession of the copy or phonorecord by rental, lease, loan, or any method of disposition except sale or other lawful transfer of ownership.

§ 8. Limitations on exclusive rights: exemption of certain performances and exhibitions.

Notwithstanding the provisions of section 5, the performance of a nondramatic literary or musical work, or the exhibition of a pictorial, graphic, or sculptural work, is not an infringement of copyright in any of the following cases:

(1) performance or exhibition of the work by instructors or pupils in the course of face-to-face teaching activities;

(2) performance or exhibition of the work by or in the course of a broadcast or other transmission made for reception solely within nonprofit educational institutions;

(3) performance or exhibition of the work in the course of services at a place of worship or other religious assembly;

(4) performance of the work, otherwise than in a broadcast to the public, without any purpose of direct or indirect commercial advantage and without payment of any salary, fee, or other compensation to the performers, if:

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

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

§ 9. Scope of exclusive rights in pictorial, graphic, and sculptural works.

(a) Subject to the provisions of clauses (1) and (2) of this subsection, the exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work in copies under section 5 includes the right to reproduce the work in any kind of article, whether useful or otherwise.

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

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

(b) A "useful article" is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a "useful article."

§ 10. Scope of exclusive rights in sound recordings.

(a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1) and (3) of section 5(a), and do not include any right of performance under section 5(a)(4).

(b) The exclusive right of the owner of copyright in a sound recording to reproduce it under section 5(a)(1) is limited to the right to duplicate the sound recording in the form of phonorecords that directly or indirectly recapture the actual sounds fixed in the recording. This right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.

(c) This section does not limit or impair the exclusive right to perform publicly, by means of a phonorecord, any of the works specified by section 5(a)(4).

§ 11. Scope of exclusive rights in nondramatic musical works: compulsory license for making and distributing phonorecords.

In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 5(a), to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.

(a) AVAILABILITY AND SCOPE OF COMPULSORY LICENSE.—

(1) When phonorecords of a nondramatic musical work have been distributed to the public under the authority of the copyright owner, any other person may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. A person may obtain a compulsory license only if his purpose in making phonorecords is to distribute them to the public.

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

(b) NOTICE OF INTENTION TO OBTAIN COMPULSORY LICENSE.—

(1) Any person who wishes to obtain a compulsory license under this section shall, before making any phonorecords of the work, serve notice of his intention to do so on the copyright owner. If the registration or other public records of the Copy-

right Office do not identify the copyright owner, it shall be sufficient to file the notice of intention in the Copyright Office. The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyright shall prescribe by regulation.

(2) Failure to serve or file the notice as required in clause (1) forecloses the possibility of a compulsory license and, in the absence of a negotiated license, renders the making and distribution of phonorecords fully actionable as acts of infringement under section 35.

(c) ROYALTY PAYABLE UNDER COMPULSORY LICENSE.—

(1) To be entitled to receive royalties under a compulsory license, the copyright owner must be identified in the registration or other public records of the Copyright Office. The owner is entitled to royalties for phonorecords made after he is so identified but he is not entitled to recover for any phonorecords previously made.

(2) The royalty under a compulsory license shall be payable for every phonorecord made in accordance with the license. With respect to each work embodied in the phonorecord, the royalty shall be either three cents, or one cent per minute of playing time or fraction thereof, which ever amount is larger.

(3) Royalty payments shall be made quarterly, in January, April, July, and October, and shall include all royalties for the three months next preceding. Each quarterly payment shall be accompanied by a detailed statement of account which, upon written demand by the copyright owner, shall be certified as correct by a certified public accountant licensed to practice in the United States.

(4) If the copyright owner does not receive the quarterly payment and statement of account when due, he may give written notice to the licensee that, unless the default is remedied within thirty days from the date of the notice, the compulsory license will be automatically terminated. Such termination renders the making and distribution of all phonorecords, for which the royalty had not been paid, fully actionable as acts of infringement under section 35.

§ 12. Scope of exclusive rights in nondramatic musical works: performance by means of coin-operated machine.

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

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

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

§ 13. Limitations on exclusive rights: public communication of broadcasts.

Notwithstanding the provisions of section 5, the following are not infringements of the exclusive right to perform or exhibit a copyrighted work:

(1) communication of a broadcast embodying a performance or exhibition of the work to the private rooms of a public establishment by means of a system of loudspeakers or other devices, unless the person responsible for the communication or the operator of the establishment alters or adds to the content of the material included in the broadcast;

(2) reception of a broadcast embodying a performance or exhibition of the work on a single receiving apparatus of a kind commonly used in private homes, unless a direct admission fee is charged to see or hear the broadcast, or unless the receiving apparatus is coin-operated.

§ 14. Ownership of copyright.

(a) INITIAL OWNERSHIP.—Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.

(b) WORKS MADE FOR HIRE.—In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and owns all of the rights comprised in the copyright unless the parties have expressly agreed otherwise.

(c) CONTRIBUTIONS TO COLLECTIVE WORKS.—Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work and any revisions of it.

(d) TRANSFER OF OWNERSHIP.—

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights comprised in the copyright, including any subdivision of the rights specified by section 5, may

be transferred and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

§ 15. Ownership of copyright as distinct from ownership of material object.

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any exclusive rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

§ 16. Termination of transfers of copyright ownership.

(a) CONDITIONS FOR TERMINATION.—In the case of any work other than a work made for hire, a transfer by the author after January 1, 1967, otherwise than by will, of copyright or of any exclusive right under a copyright is subject to termination under the following conditions.

(1) At any time after 35 years from the date of its execution, the transfer may be terminated by the author who executed it or, if he is dead, by his legal representatives, legatees, or heirs. The termination may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any other future transfer.

(2) The termination shall be effected by serving a written notice, stating the effective date of termination, upon the transferee at least two years before that date, and recording a copy of the notice in the Copyright Office before that date. The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(b) EFFECT OF TERMINATION.—Upon the effective date of termination, ownership of all exclusive rights under this title that were covered by the terminated transfer reverts to the person or persons who effected the termination, but with the following limitations.

(1) After the termination of a transfer under this section, a derivative work prepared before the termination under the authority of the transfer may continue to be utilized under the terms of the transfer, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated transfer.

(2) No transfer of or agreement to transfer, for any period of

time after the termination, any exclusive right covered by the terminated transfer, is valid unless:

(A) it is made after the effective date of termination; or

(B) it is made to a person who was the transferee under the terminated transfer.

§ 17. Execution of transfers of copyright ownership.

(a) A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or his duly authorized agent.

(b) A certificate of acknowledgment is not required for the validity of a transfer, but is prima facie evidence of the execution of the transfer if:

(1) in the case of a transfer executed in the United States, the certificate is issued by a person authorized to administer oaths within the United States; or

(2) in the case of a transfer executed in a foreign country, the certificate is issued by a diplomatic or consular officer of the United States, or by a person authorized to administer oaths whose authority is proved by a certificate of such an officer.

§ 18. Recordation of transfers and other documents.

(a) CONDITIONS FOR RECORDATION.—Any transfer of copyright ownership or other document pertaining to a copyright may be recorded in the Copyright Office if the document filed for recordation bears the actual signature of the person who executed it, or if it is accompanied by a sworn or official certification that it is a true copy of the original, signed statement.

(b) CERTIFICATE OF RECORDATION.—The Register of Copyrights shall, upon receipt of a document as provided by subsection (a) and of the fee provided by section 53, record the document and return it with a certificate of recordation.

(c) RECORDATION AS CONSTRUCTIVE NOTICE.—Recordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document, but only if:

(1) the document, or material attached to it, specifically identifies the work to which it pertains so that, after the document is indexed by the Register of Copyrights, it would be revealed by a reasonable search under the title or registration number of the work; and

(2) registration, as provided by section 30, has been made for the work.

(d) RECORDATION AS PREREQUISITE TO INFRINGEMENT SUIT.—No person claiming by virtue of a transfer to be the owner of copyright or of any exclusive right under a copyright is entitled to institute an

infringement action under this title until the instrument of transfer under which he claims has been recorded in the Copyright Office, but suit may be instituted after such recordation on a cause of action that arose before recordation.

(e) PRIORITY BETWEEN CONFLICTING TRANSFERS.—As between two conflicting transfers, the one executed first prevails if it is recorded within two months after its execution in the United States or within four months after its execution abroad, or at any time before recordation of the later transfer. Otherwise the later transfer prevails if recorded first, and if taken in good faith, for valuable consideration or on the basis of a binding promise to pay royalties, and without notice of the earlier transfer.

(f) PRIORITY BETWEEN CONFLICTING TRANSFER OF OWNERSHIP AND NON-EXCLUSIVE LICENSE.—A non-exclusive license, whether recorded or not, prevails over a conflicting transfer of copyright ownership if:

(1) the license was taken before execution of the transfer; or

(2) the license was taken in good faith before recordation of the transfer and without notice of it.

§ 19. Pre-emption with respect to other laws.

(a) On and after January 1, 1967, all rights in the nature of copyright in works that come within the subject matter of copyright as specified by sections 1 and 2, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to copyright, literary property rights, or any equivalent legal or equitable right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the law of any State with respect to:

(1) unpublished material that does not come within the subject matter of copyright as specified by sections 1 and 2;

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

(3) activities violating rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 5, including breaches of contract, breaches of trust, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation.

§ 20. Duration of copyright: works created after January 1, 1967.

(a) IN GENERAL.—Copyright in a work created after January 1, 1967, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 50 years after his death.

(b) JOINT WORKS.—In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a

term consisting of the life of the second of the authors to die and 50 years after his death.

(c) ANONYMOUS WORKS, PSEUDONYMOUS WORKS, AND WORKS MADE FOR HIRE.—In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 75 years from the year of its first publication, or a term of 100 years from the year of its creation, whichever expires first. If, before the end of such term, the identity of the author of an anonymous or pseudonymous work is revealed in the registration or other public records of the Copyright Office, the copyright in such work endures for the term specified in subsections (a) or (b).

(d) RECORDS RELATING TO DEATH OF AUTHORS.—Any person having an interest in a copyright may at any time record in the Copyright Office a statement of the date of death of the author of the copyrighted work, or a statement that the author is still living on a particular date. The statement shall identify the person filing it, the nature of his interest, and the source of his information, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation. The Register shall maintain current records of information relating to the death of authors of copyrighted works, based on such recorded statements and, to the extent he considers practicable, on data contained in any of the records of the Copyright Office or in other reference sources.

(e) PRESUMPTION AS TO AUTHOR'S DEATH.—After a period of 75 years from the year of first publication of a work, or a period of 100 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 in subsection (d) disclose nothing to indicate that the author of the work is living, or died less than 50 years before, is entitled to the benefits of a presumption that the author has been dead for at least 50 years. Reliance in good faith upon this presumption shall be a complete defense to any any action for infringement under this title.

§ 21. Duration of copyright: works created but not published or copyrighted before January 1, 1967.

Copyright in a work created before January 1, 1967, but not theretofore in the public domain or copyrighted, subsists from January 1, 1967, and endures for the term provided by section 20. In no case, however, shall the term of copyright in such a work expire before December 31, 1990; and, if the work is published before December 31, 1990, the term of copyright shall not expire before December 31, 2015.

§ 22. Duration of copyright: subsisting copyrights.

(a) COPYRIGHTS IN THEIR FIRST TERM ON JANUARY 1, 1967.—The duration of any copyright, the first term of which is subsisting on

January 1, 1967, is governed by the provisions of the following two clauses.

(1) The copyright shall endure for twenty-eight years from the date it was originally secured: *Provided*, That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of forty-seven years when application for such renewal and extension shall have been made to the Copyright Office and duly registered therein within five years prior to the expiration of the original term of copyright: *And provided further*, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of forty-seven years when application for such renewal and extension shall have been made to the Copyright Office and duly registered therein within five years prior to the expiration of the original term of copyright: *And provided further*, That in default of the registration of such application for renewal and extension, the copyright in any work shall terminate at the expiration of twenty-eight years from the date copyright was originally secured.

(2) Subsisting copyrights originally registered in the Patent Office prior to July 1, 1940, under section 3 of the act of June 18, 1874, shall be subject to renewal for a further term of forty-seven years in behalf of the proprietor upon application made to the Register of Copyrights within five years prior to the expiration of the original term of twenty-eight years.

(b) COPYRIGHTS IN THEIR RENEWAL TERM ON DECEMBER 31, 1965 OR RENEWED BEFORE JANUARY 1, 1967.—The duration of any copyright, the renewal term of which is subsisting on December 31, 1965, or which is renewed between December 31, 1965 and January 1, 1967, is extended to endure for a term of 75 years from the date copyright was originally secured.

(c) OWNERSHIP OF EXTENDED RENEWAL TERM.—In the case of any copyright subsisting in either its first or renewal term on January 1,

1967, a transfer of the renewal copyright, or of any exclusive right under it, made before January 1, 1967 by any of the persons designated in the second proviso of subsection (a)(1) of this section is subject to termination in accordance with the following provisions.

(1) At any time after 56 years from the date copyright was originally secured, the transfer may be terminated by the person who executed it or, if he is dead, by his legal representatives, legatees, or heirs. The termination may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any other future transfer.

(2) The termination shall be effected by serving a written notice, stating the effective date of termination, upon the transferee at least one year before that date, and recording a copy of the notice in the Copyright Office before that date. The notice shall comply, in form, content, and manner of services, with requirements that the Register of Copyrights shall prescribe by regulation.

(3) Upon the effective date of termination, ownership of all exclusive rights under this title that were covered by the terminated transfer reverts to the person or persons who effected the termination, but with the following limitations.

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

(B) No transfer of or agreement to transfer, for any period of time after the termination, any exclusive right covered by the terminated transfer, is valid unless:

(i) it is made after the effective date of termination; or

(ii) it is made to a person who was the transferee under the terminated transfer.

(4) Unless and until termination is effected, the transfer, if it does not provide otherwise, continues in effect during the remainder of the extended renewal term.

§ 23. Duration of copyright: terminal date.

The term of copyright provided by sections 20 through 22 runs to the end of the calendar year in which it would otherwise expire.

§ 24. Notice of copyright: visually-perceptible copies.

(a) GENERAL REQUIREMENT.—Whenever a work protected under this title is published in the United States or elsewhere by authority

of the copyright owner, a notice of copyright as provided by this section shall be placed on all publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device.

(b) FORM OF NOTICE.—The notice appearing on the copies shall consist of the following three elements:

(1) the symbol © (the letter C in a circle), the word "Copyright," or the abbreviation "Copr.";

(2) the year of first publication of the work; in the case of compilations or derivative works incorporating previously published material, the year date of first publication of the compilation or derivative work is sufficient;

(3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner.

(c) POSITION OF NOTICE.—The notice shall be placed on the copies in such manner and location as to give reasonable notice of the claim of copyright. The Register of Copyrights shall prescribe by regulation, as examples, specific methods of affixation and positions of the notice on various types of works that will satisfy this requirement, but these specifications shall not be considered exhaustive.

§ 25. Notice of copyright: phonorecords of sound recordings.

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

(b) FORM OF NOTICE.—The notice appearing on the phonorecords shall consist of the following three elements:

(1) the symbol Ⓟ (the letter P in a circle);

(2) the year of first publication of the sound recording;

(3) the name of the owner of copyright in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner; if the record producer is named on the record labels or containers, and if no other name appears in conjunction with the notice, his name shall be considered a part of the notice.

(c) POSITION OF NOTICE.—The notice shall be placed on the surface of the phonorecord, or on the label or container intended to remain with it, in such manner and location as to give reasonable notice of the claim of copyright.

(d) EFFECTIVE DATE OF REQUIREMENT.—The requirements of this section apply to all phonorecords publicly distributed on or after January 1, 1967.

§ 26. Notice of copyright: contributions to collective works.

(a) A separate contribution to a collective work may bear its own notice of copyright, as provided by sections 24 and 25. However, a single notice applicable to the collective work as a whole is sufficient to satisfy the requirements of sections 24 and 25 with respect to the separate contributions it contains (not including advertisements inserted on behalf of persons other than the owner of copyright in the collective work), regardless of the ownership of copyright in the contributions and whether or not they have been previously published.

(b) Where the person named in a single notice applicable to a collective work as a whole is not the owner of copyright in a separate contribution that does not bear its own notice, the case is governed by the provisions of section 28(a).

§ 27. Notice of copyright: omission of notice.

(a) EFFECT OF OMISSION ON COPYRIGHT.—The omission of the copyright notice prescribed by sections 24 and 25 from copies or phonorecords publicly distributed by authority of the copyright owner does not invalidate the copyright in a work if:

(1) the notice has been omitted from no more than a relatively small number of copies or phonorecords distributed to the public; or

(2) registration for the work under section 30 has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies or phonorecords that are distributed to the public after the omission has been discovered.

(b) EFFECT OF OMISSION ON INNOCENT INFRINGERS.—Any person who innocently begins an undertaking that infringes a copyright incurs no liability for damages or profits under section 38 if he proves that he was misled by the omission of notice and if he undertook the infringement before receiving actual notice that registration for the work had been made under section 30. In a suit for infringement in such a case the court may require, as a condition for enjoining the completion of the undertaking, that the infringer be reimbursed for any reasonable expenditure incurred by him, and the court may require, as a condition for permitting the infringer to complete his undertaking, that he pay the copyright owner a reasonable license fee in an amount and on terms fixed by the court.

(c) REMOVAL OF NOTICE.—Protection under this title is not affected by the removal, destruction, or obliteration of the notice, without the authorization of the copyright owner, from any publicly-distributed copies or phonorecords.

§ 28. Notice of copyright: error in name or date.

(a) ERROR IN NAME.—Where the person named in the copyright notice on copies or phonorecords publicly distributed by authority of the copyright owner is not the owner of copyright, the validity and ownership of the copyright is not affected. In such a case, however, any person who innocently begins an undertaking that infringes the copyright has a complete defense to any action for such infringement if he proves that he was misled by the notice and began the undertaking in good faith under a purported transfer or license from the person named therein, unless before the undertaking was begun:

(1) registration for the work under section 30 had been made in the name of the owner of copyright; or

(2) a document executed by the person named in the notice and showing the ownership of the copyright had been recorded as provided by section 18.

The person named in the notice is liable to account to the copyright owner for all receipts from purported transfers or licenses made by him under the copyright.

(b) ERROR IN DATE.—Where the year date in the notice on copies or phonorecords distributed by authority of the copyright owner is earlier than the year in which publication first occurred, any period computed from the year of first publication under section 20 is to be computed from the year in the notice. Where the year date is more than one year later than the year in which publication first occurred, the work is considered to have been published without any notice and is governed by the provisions of section 27.

(c) OMISSION OF NAME OR DATE.—Where copies or phonorecords publicly distributed by authority of the copyright owner contain no name or no date that could reasonably be considered a part of the notice, the work is considered to have been published without any notice and is governed by the provisions of section 27.

§ 29. Deposit of copies or phonorecords for Library of Congress.

(a) Except as provided by subsection (c), the owner of copyright or of the exclusive right of publication in a work published with notice of copyright in the United States shall deposit, within three months after the date of such publication:

(1) two complete copies of the best edition; or

(2) if the work is a sound recording, two complete phonorecords of the best edition, together with any printed or other visually-perceptible material published with such phonorecords.

This deposit is not a condition of copyright protection.

(b) The required copies or phonorecords shall be deposited in the Copyright Office for the use or disposition of the Library of Congress. The Register of Copyrights shall, when requested by the depositor

and upon payment of the fee prescribed in section 53, issue a receipt for the deposit.

(c) The Register of Copyrights may by regulation exempt any categories of material from the deposit requirements of this section, or require deposit of only one copy or phonorecord with respect to any categories.

(d) At any time after publication of a work as provided by subsection (a), the Register of Copyrights may make written demand for the required deposit on any of the persons obligated to make the deposit under subsection (a). Unless deposit is made within three months after the demand is received, the person or persons on whom the demand was made are liable:

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

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

§ 30. Copyright registration in general.

(a) REGISTRATION PERMISSIVE.—At any time during the subsistence of copyright in any published or unpublished work, the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 31 and 53. Subject to the provisions of section 27(a), such registration is not a condition of copyright protection.

(b) DEPOSIT FOR COPYRIGHT REGISTRATION.—Except as provided in subsection (c), the material deposited for registration shall include:

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

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

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

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

Copies or phonorecords deposited for the Library of Congress under section 29 may be used to satisfy the deposit provisions of this section, if they are accompanied by the prescribed application and fee, and by any additional identifying material that the Register may, by regulation, require.

(c) ADMINISTRATIVE CLASSIFICATION AND OPTIONAL DEPOSIT.—The Register of Copyrights is authorized to specify by regulation the administrative classes into which works are to be placed for purposes

of deposit and registration, and the nature of the copies or phonorecords to be deposited in the various classes specified. The regulations may require or permit, for particular classes, the deposit of identifying material instead of copies or phonorecords, the deposit of only one copy or phonorecord where two would normally be required, or a single registration for a group of related works. This administrative classification of works has no significance with respect to the subject matter of copyright or the exclusive rights provided by this title.

(d) CORRECTIONS AND AMPLIFICATIONS.—The Register may also establish, by regulation, formal procedures for the filing of an application for supplementary registration, to correct an error in a copyright registration or to amplify the information given in a registration. Such application shall be accompanied by the fee provided in section 53, and shall clearly identify the registration to be corrected or amplified. The information contained in a supplementary registration augments but does not supersede that contained in the earlier registration.

(e) PUBLISHED EDITION OF PREVIOUSLY REGISTERED WORK.—Registration for the first published edition of a work previously registered in unpublished form may be made regardless of whether the work as published is substantially the same as the unpublished version or contains material on which to base a new copyright.

§ 31. Application for registration.

The application for copyright registration shall be made on a form prescribed by the Register of Copyrights and shall include:

(1) the name and address of the copyright claimant;

(2) in the case of a work other than an anonymous or pseudonymous work, the name and nationality or domicile of the author or authors and, if one or more of the authors is dead, the date of their deaths;

(3) if the work is anonymous or pseudonymous, the nationality or domicile of the author or authors;

(4) if any part of the work was made for hire, a statement to this effect;

(5) if the copyright claimant is not the author, a brief statement of how the claimant obtained ownership of the copyright:

(6) the title of the work, together with any previous or alternative titles under which the work can be identified;

(7) the year in which creation of the work was completed;

(8) if the work has been published, the date and nation of its first publication;

(9) in the case of a compilation or derivative work, an identification of any pre-existing work or works that it is based on or incorporates, and a brief, general statement of the additional material covered by the copyright claim being registered; and

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

§ 32. Registration of claim and issuance of certificate.

(a) When, after examination, the Register of Copyrights determines that the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met, he shall register the claim and issue to the applicant a certificate of registration under the seal of the Copyright Office. The certificate shall contain the information given in the application, together with the number and effective date of the registration.

(b) In any case in which the Register of Copyrights determines that the material deposited does not constitute copyrightable subject matter or that the claim is invalid for any other reason, he shall refuse registration and shall notify the applicant in writing of the reasons for his action.

(c) In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.

(d) The effective date of a copyright registration is the day on which an acceptable application, deposit, and fee have all been received in the Copyright Office.

§ 33. Registration as prerequisite to infringement suit.

No action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his option, become a party to the action with respect to the issue of registrability of the copyright claim by entering his appearance within sixty days after such service, but his failure to do so shall not deprive the court of jurisdiction to determine that issue.

§ 34. Registration as prerequisite to certain remedies for infringement.

In any action under this title, no award of statutory damages or of attorney's fees, as provided by sections 38 and 39, shall be made for any infringement commenced before registration.

§ 35. Infringement of copyright.

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 5 through 18, or who imports copies or phonorecords into the United States in violation of section 44, is an infringer of the copyright.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of sections 18(d) and 33, to institute an action for any infringement of that particular right committed while he is the owner of it. The court may require him to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright.

§ 36. Remedies for infringement: injunctions.

(a) Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 27(b) of this title and of section 1498 of title 28, grant injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

(b) Any such injunction may be served anywhere in the United States on the person enjoined; it shall be operative throughout the United States and shall be enforceable, by proceedings in contempt or otherwise, by any United States court having jurisdiction of that person. The clerk of the court granting the injunction shall, when requested by any other court in which enforcement of the injunction is sought, transmit promptly to the other court a certified copy of all the papers in the case on file in his office.

§ 37. Remedies for infringement: impounding and disposition of infringing articles.

(a) At any time while an action under this title is pending, the court may order the impounding, on such terms as it may deem reasonable, of all copies or phonorecords claimed to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

(b) As part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all copies or phonorecords found to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

§ 38. Remedies for infringement: damages and profits.

(a) IN GENERAL.—Except as otherwise provided by this title, an infringer of copyright is liable for either:

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

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

(b) ACTUAL DAMAGES AND PROFITS.—The copyright owner is entitled to recover the actual damages suffered by him as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

(c) STATUTORY DAMAGES.—Instead of actual damages and profits, the copyright owner is entitled, at his election, to an award of statutory damages for all infringements of any one work for which the infringer is liable, in a sum of not less than $250 or more than $10,000 as the court considers just. In a case where the copyright owner proves that infringement was committed willfully after service upon the infringer of a written notice to desist, the court in its discretion may award statutory damages of more than $10,000. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

§ 39. Remedies for infringement: costs and attorney's fees.

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

§ 40. Criminal offenses.

(a) CRIMINAL INFRINGEMENT.—Any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be fined not more than $2,500 or imprisoned not more than one year, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than three years, or both, for any subsequent offense.

(b) FRAUDULENT COPYRIGHT NOTICE.—Any person who, with fraudulent intent, places on any article a notice of copyright or words of the same purport that he knows to be false, or who, with fraudulent intent, publicly distributes or imports for public distribution any article bearing such notice or words that he knows to be false, shall be fined not more than $2,500.

(c) FRAUDULENT REMOVAL OF COPYRIGHT NOTICE.—Any person who, with fraudulent intent, removes or alters any notice of copyright appearing on a copy of a copyrighted work shall be fined not more than $2,500.

(d) FALSE REPRESENTATION.—Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 31, or in any written statement filed in connection with the application, shall be fined not more than $2,500.

§ 41. Limitations on actions.

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

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

§ 42. Notification of filing and determination of actions.

(a) Within one month after the filing of any action under this title, the clerks of the courts of the United States shall send written notification to the Register of Copyrights setting forth, as far as is shown by the papers filed in the court, the names and addresses of the parties and the title, author, and registration number of each work involved in the action. If any other copyrighted work is later included in the action by amendment, answer, or other pleading, the clerk shall also send a notification concerning it to the Register within one month after the pleading is filed.

(b) Within one month after any final order or judgment is issued in the case, the clerk of the court shall notify the Register of it, sending him a copy of the order or judgment together with the written opinion, if any, of the court. Upon receiving the notification the Register shall enter the pertinent information in the public records of the Copyright Office.

§ 43. Manufacture and importation of certain copies.

(a) Except as provided by subsection (b), the importation into the United States of copies of a work consisting preponderantly of nondramatic literary material that is in the English language and is protected under this title is prohibited unless the portions consisting of such material have been wholly manufactured in the United States.

(b) The provisions of subsection (a) do not apply:

(1) where, on the date when importation is sought, the author of any substantial part of such material is neither a citizen nor a domiciliary of the United States;

(2) where the Bureau of Customs is presented with an import statement issued under the seal of the Copyright Office, in which case a total of no more than 3,500 copies of any one such work shall be allowed entry; the import statement shall be issued upon request to the copyright owner or to a person designated by him at the time of registration for the work under section 30 or at any time thereafter;

(3) where importation is sought under the authority or for the use, other than in schools, of the government of the United States or of any State;

(4) where importation, for use and not for sale, is sought:

(A) by any person with respect to no more than one copy of any one work at any one time;

(B) by any person arriving from abroad, with respect to copies forming part of his personal baggage; or

(C) by an organization operated for scholarly, educational, or religious purposes and not for private gain, with respect to copies intended to form a part of its library.

(5) where the copies are reproduced in raised characters for the use of the blind.

(c) A copy has not been wholly manufactured in the United States if any step in the process of its reproductive manufacture, including but not limited to the composition of type and the preparation of sheets, film, plates, mats, reproduction proofs, tapes, or other devices for the reproduction of copies by any process, the presswork or other process for duplicating copies, and the binding, if any, took place outside the United States.

(d) Manufacture or importation of copies in violation of this section does not invalidate protection for a work under this title. However, in any action for infringement of the exclusive rights to make and distribute copies of the work, the infringer has a complete defense if he proves:

(1) that the owner of such exclusive rights had authorized or knowingly acceded in the importation of copies in violation of this section; or

(2) that more than 3,500 copies not wholly manufactured in the United States had been publicly distributed in the United States by authority of the owner of such exclusive rights.

§ 44. Infringing importation of copies or phonorecords.

(a) Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work for the purpose of distribution to the public is an infringement of the exclusive right to distribute copies or phonorecords under section 5, actionable under section 35.

(b) Where the making of the copies or phonorecords would have constituted an infringement of copyright if this title had been applicable, their importation is prohibited; but the Bureau of Customs has no authority to prevent importation when the copies or phonorecords were lawfully made. In either case, the Secretary of the Treasury is authorized to prescribe, by regulation, a procedure under which any person claiming an interest in the copyright in a particular work may, upon payment of a specified fee, be entitled to notification by the Bureau of the importation of articles that appear to be copies or phonorecords of the work.

§ 45. Importation prohibitions: enforcement and disposition of excluded articles.

(a) The Secretary of the Treasury and the Postmaster General shall separately or jointly make regulations for the enforcement of the provisions of this title prohibiting importation.

(b) These regulations may require, as a condition for the exclusion of articles under section 44:

(1) that the persons seeking exclusion obtain a court order enjoining importation of the articles; or

(2) that he furnish proof, of a specified nature and in accordance with prescribed procedures, that the copyright in which he claims an interest is valid and that the importation would violate the prohibition in section 44; he may also be required to post a surety bond for any injury that may result if the detention or exclusion of the articles proves to be unjustified.

(c) Articles imported in violation of the importation prohibitions of this title are subject to seizure and forfeiture in the same manner as property imported in violation of the customs revenue laws. Forfeited articles shall be destroyed as directed by the Secretary of the Treasury or the court, as the case may be; however, the articles may be returned to the country of export whenever it is shown to the satisfaction of the Secretary of the Treasury that the importer had no reasonable grounds for believing that his acts constituted a violation of law.

§ 46. The Copyright Office: general responsibilities and organization.

(a) All administrative functions and duties under this title, except as otherwise specified, are the responsibility of the Register of Copyrights as director of the Copyright Office in the Library of Congress. The Register of Copyrights, together with the subordinate officers and employees of the Copyright Office, shall be appointed by the Librarian of Congress, and shall act under his general direction and supervision.

(b) The seal used in the Copyright Office on December 31, 1966 shall continue to be used to authenticate all certified documents issued by the Office.

(c) The Register of Copyrights shall make an annual report to the Librarian of Congress of the work and accomplishments of the Copyright Office during the previous fiscal year. The annual report of the Register of Copyrights shall be published separately and as a part of the annual report of the Librarian of Congress.

§ 47. Copyright Office regulations.

The Register of Copyrights is authorized to establish regulations not inconsistent with law for the administration of the functions and duties made his responsibility under this title. All regulations established by the Register under this title are subject to the approval of the Librarian of Congress.

§ 48. Effective date of actions in Copyright Office.

In any case in which time limits are prescribed under this title for the performance of an action in the Copyright Office, and in which the last day of the prescribed period falls on a Saturday, Sunday, holiday or other non-business day within the District of Columbia or the Federal Government, the action may be taken on the next succeeding business day, and is effective as of the date when the period expired.

§ 49. Retention and disposition of articles deposited in Copyright Office.

(a) Upon their deposit in the Copyright Office under sections 29 and 30, all copies and phonorecords, including those deposited in connection with claims that have been refused registration, are the property of the United States Government.

(b) In the case of published works, all copies and phonorecords deposited are available to the Library of Congress for its collections, or for exchange or transfer to any other library. In the case of unpublished works, the Library is entitled to select any deposits for its collections.

(c) Deposits not selected by the Library under subsection (b), or identifying portions or reproductions of them, shall be retained under the control of the Copyright Office or in Government storage facilities for the longest period considered practicable and desirable by the Register of Copyrights and the Librarian of Congress. After that period it is within the joint discretion of the Register and Librarian to order their destruction or other disposition; but, in the case of unpublished works, no deposit shall be destroyed or otherwise disposed of during its term of copyright without specific notice to the copy-

right owner of record at his last address given in the public records of the Copyright Office, permitting him to claim and remove it.

§ 50. Copyright Office records: preparation, maintenance, public inspection, and searching.

(a) The Register of Copyrights shall provide and keep in the Copyright Office records of all deposits, registrations, recordations, and other actions taken under this title, and shall prepare indexes of all such records.

(b) Such records and indexes, as well as the articles deposited in connection with completed copyright registrations and retained under the control of the Copyright Office, shall be open to public inspection.

(c) Upon request and payment of the fee specified by section 53, the Copyright Office shall make a search of its public records, indexes, and deposits, and shall furnish a report of the information they disclose with respect to any particular deposits, registrations, or recorded documents.

§ 51. Copies of Copyright Office records.

(a) Copies may be made of any public records or indexes of the Copyright Office; additional certificates of copyright registration and copies of any public records or indexes may be furnished upon request and payment of the fees specified by section 53.

(b) Copies of deposited articles retained under the control of the Copyright Office shall be authorized or furnished only under the conditions specified by the Copyright Office regulations.

§ 52. Copyright Office forms and publications.

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

(b) OTHER PUBLICATIONS.—The Register shall furnish, free of charge upon request, application forms for copyright registration and general informational material in connection with the functions of the Copyright Office. He also has authority to publish compilations of information, bibliographies, and other material he considers to be of value to the public.

(c) DISTRIBUTION OF PUBLICATIONS.—All publications of the Copyright Office shall be furnished to depository libraries as specified under the Depository Library Act of 1962 (76 Stat. 353, 44 U.S.C. 82), and, aside from those furnished free of charge, shall be offered for sale

to the public at prices based on the cost of reproduction and distribution.

§ 53. Copyright Office fees.

The following fees shall be paid to the Register of Copyrights:

(1) for the registration of a copyright claim or a supplementary registration under section 30, or for the registration of a claim to renewal of a subsisting copyright in its first term under section 22(a), including the issuance of a certificate of registration, $6;

(2) for the issuance of a receipt for a deposit under section 29, $2;

(3) for the recordation, as provided by section 18, of a transfer of copyright ownership or other document of six pages or less, covering no more than one title, $5; for each page over six and for each title over one, 50 cents additional;

(4) for the filing, under section 11(b), of a notice of intention to make phonorecords, $3;

(5) for the recordation, under section 20(d), of a statement relating to the death of an author, $5;

(6) for the issuance, under section 43, of an import statement, $3;

(7) for the issuance, under section 51, of an additional certificate of registration, $2;

(8) for the issuance of any other certification, $3; the Register of Copyrights has discretion, on the basis of their cost, to fix the fees for preparing copies of Copyright Office records, whether they are to be certified or not;

(9) for the making and reporting of a search as provided by section 50, and for any related services, $5 for each hour or fraction of an hour consumed;

(10) for any other special services requiring a substantial amount of time, such fees as the Register of Copyrights may fix on the basis of the cost of providing the service.

§ 54. Definitions.

As used in this title, the following terms and their variant forms mean the following, unless the context clearly indicates otherwise:

— An "anonymous work" is a work on the copies or phonorecords of which no natural person is identified as author.

— The "best edition" of a work is the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.

— A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

— A "compilation" is a work formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

— "Copies" are material objects, other than phonorecords, in which a work is fixed or reproduced by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

— "Copyright owner," with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

— A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

— A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, or any other form of adaptation by which a work may be recast or transformed. A work consisting of editorial revisions, annotations, elaborations, or similar modifications which, as a whole, represent an original work of authorship, is a "derivative work."

— A "joint work" is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.

— "Literary works" are 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, or film, in which they are embodied.

— "Motion pictures" are works that consist of a series of images imparting an impression of motion, together with any accompanying sounds, regardless of the nature of the material objects, such as films or tapes, in which they are embodied.

— "Phonorecords" are material objects in which sounds, other than those accompanying a motion picture, are fixed or reproduced by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

— "Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, plans, diagrams, and models.

— A "pseudonymous work" is a work on the copies or phonorecords of which the author is identified under a fictitious name.

— "Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending.

— "Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

— "State" includes the District of Columbia and any territories to which this title is made applicable by an act of Congress.

— A "transfer of copyright ownership" is an assignment, exclusive license, or any other conveyance or alienation by which ownership of a copyright or of any of the exclusive rights comprised in a copyright changes hands, whether or not it is limited in time or place of effect, but not including a non-exclusive license.

— The "United States," when used in a geographical sense, comprises the several States, the District of Columbia, and the organized territories under the jurisdiction of the United States Government.

— A "work made for hire" is a work prepared by an employee within the scope of his employment, or a work prepared on special order or commission if the parties expressly agree in writing that it shall be considered a work made for hire.

TRANSITIONAL AND SUPPLEMENTARY PROVISIONS

SEC. 2. This act becomes effective on January 1, 1967, except as otherwise provided by section 22(b) of title 17 as amended by this act.

SEC. 3. This act does not provide copyright protection for any work that goes into the public domain before January 1, 1967. The exclu-

sive rights, as provided by section 5(a) of title 17 as amended by this act, to reproduce a work in phonorecords and to distribute phonorecords of the work, do not extend to any nondramatic musical work copyrighted before July 1, 1909.

SEC. 4. All proclamations issued by the President under section 9(b) of title 17 as it existed on December 31, 1966 or under previous copyright statutes of the United States shall continue in force until terminated, suspended, or revised by the President.

SEC. 5. The last sentence of section 52 of the Printing Act, approved January 12, 1895 (28 Stat. 608; 44 U.S.C. 58) is hereby repealed.

SEC. 6. In any case where, before January 1, 1967, a person has lawfully made parts of instruments serving to reproduce mechanically a copyrighted work under the compulsory license provisions of section 1(e) of title 17 as it existed on December 31, 1966, he may continue to make and distribute such parts embodying the same mechanical reproduction without obtaining a new compulsory license under the terms of section 11 of title 17 as amended by this act. However, such parts made after January 1, 1967 constitute phonorecords and are otherwise subject to the provisions of said section 11.

SEC. 7. In the case of any work in which an ad interim copyright is subsisting or is capable of being secured on December 31, 1966, under section 22 of title 17 as it existed on that date, copyright protection is hereby extended to endure for the term or terms provided by section 22 of title 17 as amended by this act.

SEC. 8. The notice provisions of sections 24 and 25 of title 17 as amended by this act apply to all copies or phonorecords publicly distributed on or after January 1, 1967. However, in the case of a work published before January 1, 1967, compliance with the notice provisions of title 17 either as it existed on December 31, 1966, or as amended by this act, is adequate with respect to copies publicly distributed after December 31, 1966.

SEC. 9. The registration of claims to copyright for which the required deposit, application, and fee were received in the Copyright Office before January 1, 1967, and the recordation of assignments of copyright or other instruments received in the Copyright Office before January 1, 1967, shall be made in accordance with title 17 as it existed on December 31, 1966.

SEC. 10. All causes of action that arose under title 17 before January 1, 1967, shall be governed by title 17 as it existed when the cause of action arose.

SEC. 11. If any provision of title 17, as amended by this act, is declared unconstitutional, the validity of the remainder of the title is not affected.

TRANSCRIPT OF MEETING ON 1964 REVISION BILL

New York, N.Y., August 6, 1964.

Present:

Abraham L. Kaminstein, chairman.
Stanley Adams, American Society of Composers, Authors and Publishers.
Eugene N. Aleinikoff, National Education Television and Radio Center.
Nicholas E. Allen, Music Operators of America.
Douglas A. Anello, National Association of Broadcasters.
Diana J. Auger.
J. S. Barnes, John Wiley & Sons, Inc.
Leon Brachman, United Artists.
Mauck Brammer, American Book Company.
Thomas C. Brennan, U.S. Senate Judiciary Committee.
John A. Bresnahan, Printing Industry of America.
Henry Brief, Record Industry Association.
Emerson Brown, American Textbook Publishers Institute.
Harry Buchman; Stern & Reubens.
Evelyn F. Burkey, Writers Guild of America, East, Inc.
Robert Jay Burton, Broadcast Music, Inc.
Samuel J. Buzzell.
Joshua Binion Cahn.
Bernard S. Carrey; Webster, Sheffield, Fleischmann, Hitchcock & Chrystie.
George D. Cary, Copyright Office.
S. T. Chiantia, Leeds Music Corp.
Richard Colby, Twentieth Century-Fox Film Corp.
James J. Coleman; Clay, Coleman, Dutrey & Thomson.
J. M. Collins, American Society of Composers, Authors and Publishers.
John J. Cooke, McGraw-Hill Book Company.
Richard B. Davis, Universal Pictures Company, Inc.
Lee C. Deighton; Joint Copyright Committee, Book Publishing Industry.
Walter J. Derenberg, New York University Law School.
Sidney A. Diamond, American Bar Association Committee No. 302.
Jean Dorfman.
Walter G. Douglas, Music Publishers Protective Association.
Lewis A. Dreyer, Hill & Range Songs, Inc.

Joseph S. Dubin, Universal Pictures Company, Inc.
Michael Dufinecz; Cooper, Dunham, Dearborn & Henninger.
Omar F. Elder, Jr., American Broadcasting Company.
C. Lyman Emrich, Jr.; Brown, Jackson, Boettcher & Dienner.
H. Richard Etlinger, RCA Victor.
Robert V. Evans, Columbia Broadcasting System, Inc.
John B. Farmakides, National Aeronautics and Space Administration.
Frank H. Ferguson, Twentieth Century-Fox Film Corp.
Herman Finkelstein, American Society of Composers, Authors and Publishers.
Arthur L. Fishbein.
James H. French, Book Manufacturers Institute.
Max Freudenberg, U.S. Air Force.
James A. Gammon, National Association of Educational Broadcasters.
John Gardiner, Broadcasting Magazine.
Morton David Goldberg; Foster, Ginsberg & Schwab.
Abe A. Goldman, Copyright Office.
Charles F. Gosnell, American Library Association.
Herbert N. Gottlieb, American Society of Composers, Authors and Publishers.
Mike Gross, Billboard.
William G. Harley, National Association of Educational Broadcasters.
A. H. Helvestine, Department of Defense.
Michael E. Hobbs, Ad Hoc Committee on Copyright Law Revision.
Daniel Huttenbrauck; Mendes & Mount.
Richard B. Jablow; Butler, Jablow & Geller.
Theodore R. Jackson; Gilbert & Gilbert.
Siegrun Kane; Kane, Dalsimer & Kane.
Irwin Karp, Authors League of America.
Sndney M. Kaye, Broadcast Music, Inc.
Leon Kellman, American Guild of Authors and Composers.
Peter T. Kennedy, Christian Science Church.
John M. Kernochan, Columbia University.
Bernard Kohn, Music Publishers Association.
Bernard Korman, American Society of Composers, Authors and Publishers.
Harry L. Kownatsky, Music Library Association.
J. M. Kraft, RCA Victor Record Division.
William Krasilovsky, Music Publishers Holding Corp.
Taimi Lahti, National Education Association.
Robert J. Landry, Variety.

Alan Latman; Cowan, Liebowitz & Latman.
Max K. Lerner.
Elliott H. Levitas; Arnall, Golden & Gregory.
Bella L. Linden, American Textbook Publishers Institute and Linden & Deutsch.
George E. Long, Bureau of Customs.
Horace S. Manges, American Book Publishers Council.
Abraham Marcus; Marcus & Kahn.
Alfred M. Marks; Davis, Gilbert, Levine & Schwartz.
Isabelle Marks, Decca Records, Inc.
Paul Marks, American Society of Composers, Authors and Publishers.
Michael Masnik, General Electric Co.
Austin J. McCaffrey, American Textbook Publishers Institute.
James C. McConnon; Paul & Paul.
Justin Menus, MGM.
Ernest S. Meyers, Record Industry Association of America.
Edward A. Miller, National Library of Medicine.
Bernard Moss, National Arts Trust Fund.
Morton Miller, Kapp Records, Inc.
Spencer Olin, Walt Disney Productions.
Harry R. Olsson, Jr., American Broadcasting Company.
Harold Orenstein; Orenstein, Arrow & Lourie.
Robert C. Osterberg, Music Publishers Protective Association.
Averill C. Pasarow; Pasarow, Watkin & Ehrmann.
Joseph Paull, The Washington Post.
Sigrid H. Pedersen, Paramount Pictures.
E. Gabriel Perle, Time, Inc.
John R. Peterson, Christian Science Church.
Harriet Pilpel; Greenbaum, Wolff & Ernst.
Dana J. Pratt, Association of American University Presses, Inc.
Lawrence H. Reed, Doubleday & Co., Inc.
Barbara A. Ringer, Copyright Office.
Saul N. Rittenberg, MGM.
Harry N. Rosenfield, Ad Hoc Committee on Copyright Revision.
Gertrude Rosenstein, Paramount Pictures.
Stanley Rothenberg; Margulies, Heit & Rothenberg.
Edward A. Sargoy, American Bar Association.
Morton Schaeffer; Schaeffer & Schaeffer.
Edith Schaffer, ABC-Paramount Records.
George Schiffer, National Community Television Association.
Adolph Schimel, Universal Pictures.
Sidney Schreiber, Motion Picture Association of America.

John Schulman, Consultant on Copyright to Christian Science Church.
Robert Shafer, National Council of Teachers of English.
Jacob Shearer.
Paul Sherman, General Artists Corp.
Fred Siebert, American Council on Education.
E. Stratford Smith, National Community Television Association.
Sigmund Steinberg; Steinberg, Richman, Price & Steinbrook.
Miriam Stern, American Guild of Authors & Composers.
Samuel W. Tannenbaum; Johnson & Tannenbaum.
Joseph P. Thorne, IBM Corp.
J. E. Toomey, American Bar Association.
Emmett E. Tucker, Jr.; Hanson, Cobb, O'Brien & Tucker.
Adolph Vogel, American Society of Authors, Composers and Publishers.
Franklin Waldheim, Walt Disney Productions.
Philip B. Wattenberg.
John F. Whicher; Sargoy & Stein.
Harold Wigren, National Education Association.
Richard Wincor; Stern & Wincor.
Harvey J. Winter, Department of State.
Walter Yetnikoff, Columbia Records.
Theodora Zavin, Broadcast Music, Inc.
Leonard Zissu; Zissu, Marcus & Stein.

KAMINSTEIN. Ladies and gentlemen, we now enter a third phase of the revision program. The first phase consisted of the preparation and publication of some 35 revision studies, leading up to the Register's Report in 1961. Then came the comments and discussions on the Report, leading to the preparation and discussion of draft sections. July 20, 1964 marks the opening of the legislative phase of the revision program, with the introduction for study and comment, of S. 3008 by Senator McClellan and of H.R. 11947 by Representative Celler. It is now nine years, to the week, since the revision program began.

I should like to express my appreciation for the tremendous amount of work already done by the Panel of Consultants, both at Panel meetings and in correspondence. In addition, the subcommittees of Committee 304 of the American Bar Association, under the very able chairmanship of John Schulman, have produced a body of reports on the principal problems in revision which have helped greatly in crystallizing opinion and working out language. And I thank the A.B.A. Section for making this large room available.

I also wish to express my appreciation for the dedicated work of the General Revision Steering Committee of the Copyright Office. The Committee has been meeting for years, but never so continuously as in

the months preceding July 20. Among the current members of the Committee are the people you see at the front table—Barbara Ringer, George Cary, and Abe Goldman—and Waldo Moore, the Chief of our Reference Division. Most specifically, I want to thank Barbara Ringer and Abe Goldman for the really incalculable amount of time and knowledge they both put into the continuous drafting and redrafting of each section of the bill submitted to Congress.

For those who have not attended earlier Panel meetings, I request that you state your name whenever you speak, and that you state your representation or association the first time you speak. I will also ask you to limit your remarks to three minutes, although in special cases we will be glad to indicate a longer period. You will, of course, be free to extend your remarks or to put an entire statement into the record, and we will leave the record open for at least a month after the meeting.

Please refer to the draft sections the Panel discussed during the past year as "the preliminary draft," and to H.R. 11947 and S. 3008 as "the bill." This will avoid some confusion in the transcript. We also request that you submit any technical changes and form changes in writing, either during or after the meeting.

A printed transcript of the first four Panel sessions during the past year, together with a compilation of a number of written comments on the draft, is now in proof. It will be published as "Copyright Law Revision, Part 3," by the House Committee on the Judiciary, and should be ready within the month. Part 4, which will contain the transcripts of the remaining meetings and additional comments, is in preparation, but probably will not be issued for a few months.

I now call on Abe Goldman to talk to sections 1 and 2 of the bill.

GOLDMAN. Sections 1 and 2, dealing with the works to be protected under the statute, are very much the same in substance in the bill as they were in the preliminary draft. There have, however, been a number of changes in form, which reflect suggestions that were made to us at the meeting of our Panel on the preliminary draft, in letters we received from members of the Panel and others, and in suggestions offered to us by Committee 304. I would like to point out just a few of the changes; I am not going to take the time to indicate every change of form, because there has been a good deal of rearrangement and a number of changes in wording. As I mentioned at the outset, we have intended to keep in the bill the substance of these two sections in the preliminary draft.

The opening clause in the preliminary draft referred to the fixation of works "in any tangible medium of expression" from which the work "can be visually or aurally perceived." At our Panel meeting a number of persons suggested that the phrase "visually or aurally" might

have a limiting effect which was not intended. In the bill "visually or aurally" has been dropped out, and section 1 refers to the fixation of works "in any tangible medium of expression . . . from which they can be perceived, . . . [and so on]," without qualification.

In the preliminary draft the last sentence of the opening clause said: "The subject matter of copyright shall include the following categories of works: . . ." It was suggested to us at the Panel meeting that we insert, after the word "include," the phrase "but are not limited to." We have done this in the bill, making it clear that the enumeration of categories following is not an exclusive enumeration but is an enumeration by way of illustration.

In the preliminary draft we included some definitional material in the enumeration of categories. In the interest of simplifying section 1 and making it more readable, we have placed the definitional material relating to this as well as to other sections in a special section on definitions—section 54 of the bill. In addition, we have included a definition of "motion pictures," in accordance with a suggestion made at our Panel meeting, to make it clear that motion pictures are not limited to films but would include, for example, such things as video tapes. You will find in the definition section definitions of "literary works," "pictorial, graphic, and sculptural works," "motion pictures," and "sound recordings."

Turning to section 2, here again we had no intention of changing the substantive effect of what we had in the preliminary draft. This section relates to the extension of copyright protection to "compilations and derivative works." We have rearranged some of the provisions in the preliminary draft, but without any intention of changing the meaning, and we have placed in section 54, the definitions section, the definitions of "compilations" and "derivative works" that formerly appeared in the preliminary draft in section 2.

WALDHEIM. In section 2(a) there is a clause reading, ". . . protection for a work employing pre-existing material in which copyright subsists is available only to the extent that such material has been used lawfully." Now, if a work consists one-half of original material, one-fourth of pre-existing copyrighted material used lawfully, and one-fourth of pre-existing copyrighted material used unlawfully, this clause would seem to mean that you could only get copyright protection in one-fourth of the work and not in that part of the work which is original. I suggest that that clause should read ". . . protection for a work employing pre-existing material in which copyright subsists is not available as to any portion thereof using such material unlawfully."

SARGOY. While definitions are being discussed here, I would like to refer to the definition of "motion pictures" and make a comment sim-

ilar to that which Horace Manges made yesterday in respect of the definition of "literary works" and the use of the phrase "such as books, periodicals, manuscripts, or film . . ." The definition of "motion pictures" includes the phrase "such as films or tapes, . . ." I think it would be much preferable if we used "including but not limited to." My feeling is that "such as" is an invitation to the *ejusdem generis* rule, while I think the other phrase would clearly show an intention not to have it construed that way. Motion pictures may possibly in the future be made on wire or by many other means that we don't know about.

KAMINSTEIN. I should indicate that the definitions, of course, will be reconsidered with the rest of the bill, and that in the form in which it will be resubmitted to Congress in January the definitions will probably come at the beginning rather than at the end, in accordance with preferred legislative draftsmanship. We had special permission to have the bill introduced in this form, because it follows the pattern we followed in the preliminary draft. The final bill will be broken down into parts or chapters, as the present law is.

EVANS. Robert Evans, Columbia Broadcasting System. With respect to section 2(b), it states that copyright in a derivative work extends only to the material contributed by the author, as distinguished from pre-existing material that he may have employed. In the definitions in section 54 we are told that a sound recording is a derivative work. I have this question for the Copyright Office: in drafting the bill, did you consider what material a phonograph record company contributes to a sound recording; and is it the intention of the Copyright Office to recognize neighboring rights by implication? Thank you, Mr. Chairman.

KAMINSTEIN. Mr. Evans, I would like to leave that question for a more extensive discussion under section 10. However, I think it is obvious that we did not intend to cover neighboring rights in the usually accepted sense in this bill.

Section 3 deals with the questions of national origin and protection of works originating abroad, and I would like to call on Barbara Ringer to speak on that section.

RINGER. In the preliminary draft of section 3 distributed in January 1963, the Office offered two alternatives concerning the protection of works of foreign origin. Under Alternative A, protection would have been available without regard to the citizenship or nationality of the author, the domicile of the author, or the place of first publication, but the President would have been given discretion to withhold or limit protection with respect to works originating in certain countries. There was some support for this proposal, but it appears that the definite consensus was in favor of Alternative B, which with some relatively minor changes has become section 3 of this bill.

Under section 3 protection would be granted to unpublished works without regard to the nationality or domicile of the author. Published works would be protected if: (1) the author is a citizen or domiciliary of the United States or of a country with which the United States has established copyright relations by virtue of a treaty; (2) if the work is first published in the United States or in a U.C.C. country; or (3) if the work is covered by a Presidential proclamation.

You will note that, under subsection (b) (4), the President may issue a proclamation extending protection under this act without regard to reciprocity. In other words, even if you have a country which does not grant protection to American authors or does not grant equivalent protection to American authors, the President could still find it within his discretion to grant protection if it is in the national interest.

Note also that, although the preliminary draft referred to stateless persons, they are not mentioned specifically in this draft. The thought here was that the effect of this bill would be to make domicile much more important as a criterion of protection than it is under the present law, and that as a result most stateless persons would be lumped in. Our assumption was that protection for stateless persons who are not domiciled in a country with which the United States has copyright relations is more or less an accident under the present law.

I would like to comment on one question raised at the meeting of Committee 304 of the American Bar Association which was held on Monday, Tuesday, and Wednesday of this week. The question was why, under subsection (a) of this section, unpublished works should be protected without regard to the nationality or domicile of the author. The point was made that, for example, if a work by a Russian author is performed widely in Russia or elsewhere but never published, the United States would be obliged to give protection to that work under this subsection. A vote was taken at that meeting, and there seemed to be a pretty clear-cut consensus in favor of combining subsections (a) and (b) of this section.

I am not saying that it would be impossible to do this, but I would like to point out that the technical difficulties of doing it would be overwhelming. Under subsection (b), which refers to published works, you have a fixed point of time at which to establish the status of a work: namely, the date of first publication; if such-and-such is true on the date of first publication, the work is either protected or it is in the public domain. Under subsection (a) you have absolutely no point of time at which you could fix the status of the work.

I would also remind you that, under the U.C.C., we are obliged to protect works of U.C.C. nationals and works first published in U.C.C. countries. Suppose, for example, that a work of a Russian national is not protected in unpublished form; if that work is then first published

in a U.C.C. country, we would be obliged to protect it. You would then have a very peculiar situation that would require the most intricate and complicated drafting to try to work out, and I am not sure you could even do it satisfactorily. I would also remind you that it is the general assumption that these works are now protected fully under the common law of the United States, and in my opinion, if you establish a criterion of citizenship for unpublished works, you would be introducing something that doesn't exist under the common law now.

KAMINSTEIN. I might add that we have consulted with the State Department on this particular provision, and that Harvey Winter, who is here today, can speak for the Department.

DUBIN. Joseph Dubin, Universal Pictures. Barbara Ringer has expressed the comments that were raised at the meeting of Committee 304. I have very little to offer except just a few notations. Under the U.C.C. and under the Berne Convention, unpublished works are protected if they are works of nationals of those countries. There appears to be no logical reason why the same provision should not apply here, and I see no reason why it could not be put into that form.

There's no objection to the work of a Russian national, when first published in a U.C.C. country, being protected in the United States. There would likewise appear to be no reason why the unpublished works of nationals of a particular U.C.C. country should not be protected as far as the United States is concerned. But there is one greater objection that I see to giving protection without regard to the nationality or the domicile of the author, and that is that, under this clause as it reads, we would be giving protection to the works of a national of a country when he might not be getting protection for his own works in that particular country.

For example, in Russia there is no right of translation. Therefore, if there is a translation without the consent of the author in Russia, that translator has no obligation as far as payment to the author of the original work is concerned. We would be protecting that in this country when there would be no protection in Russia.

The application, as far as a national of a particular country is concerned, could be made very, very evident under clause (4) of subsection (b); the President could within his discretion apply the provisions of this law. I would recommend strongly, therefore, that unpublished works be placed within the same category as published works as far as protection is concerned.

TUCKER. I have what is primarily a question. I am opposed to the granting of copyright to Government agencies or to the Government generally, and for that reason I would appreciate your touching briefly on the provisions of section 3(b) (3), granting protection to the United Nations and the Organization of American States.

KAMINSTEIN. That protection is required by the Universal Copyright Convention.

TUCKER. I suspected as much, but I just wanted to be sure.

SARGOY. I would see no reason why we should not take subsection (a) as it is. As I understand it that has been our existing common law for perhaps over a hundred years under *DeWitt* v. *Palmer*. We protect the personal property of any person of any nationality in this country, except only in times of war when we declare him an enemy alien. I think we would protect under common or State law the unpublished works of Russians now. I see no reason for departing from that particular policy, particularly if it's going to raise the type of complications that Barbara Ringer points out.

KAMINSTEIN. I think this would also have an effect on American citizens who own derivative works and who are using them in this country.

WINTER. Harvey Winter, State Department. We have no particular comments to make, Mr. Kaminstein, except to say that section 3 in its present form, we believe, will give the Government the flexibility to deal with various matters such as our relations with the Soviet Union in the copyright field.

KARP. Mr. Kaminstein, I would also urge that section 3(a) be retained in its present form. I think that the device of retaliation has only a limited effect on Russian foreign policy. I think that it is an extreme penalty to put upon Boris Pasternak: to deprive him of protection here because he happened to be born in Russia.

I think that we shouldn't lose sight of the fact—a fact which I believe was pointed out by you and other members of the Panel in the past three days—that this section would work an effect not only on Russians or Red Chinese but also upon the nationals of many of the new emerging nations in Africa. I think that a generous policy of protection by the United States for the work of nationals and domiciliaries of these new countries will encourage them to come into the international copyright community. I think a policy of non-protection will work no good at all.

KAMINSTEIN. Section 4 deals with the question of copyright in U.S. Government works, and I would like to call on George Cary to present that.

CARY. Perhaps one method of doing this would be to give you briefly some indications of how the present bill differs from the present law in title 17, and then to indicate some of the issues that have come up in the recent Committee 304 meetings.

Basically, the present section 4 of the bill retains substantially what is now in section 8 of title 17, with a few additions. For example, it is still provided generally that the Government cannot obtain a copyright. The right of the Postmaster-General to obtain copyright in

certain of his publications again is retained. The use by the Government of a copyrighted work is stated in title 17 not to be an abridgment of the copyright, and that is retained. The present bill makes no mention of the status of unpublished works, and this matter is also not mentioned in title 17.

There are also a few differences. You will find that in subsection (e) the bill contains a definition of a "work of the United States Government," while title 17 contains no definition. The term is defined in the bill as "a work prepared by an officer or employee of the Government as part of his official duties."

In title 17 there is a provision indicating that the Government cannot use a work without the consent of the author. This is tied in with the sentence which indicates that the use of that material will not result in any abridgment of the copyright. The bill does not include this particular provision in so many words, although it is intended to be there by implication.

One of the major differences between the bill and title 17 is that section 4(c) of the bill provides a method for the Government to obtain a copyright in some of its material in exceptional cases. Under the bill, the Government may obtain a copyright where, "because of the special nature of the work or the circumstances of its preparation," copyright will result in a greater dissemination or will otherwise be in the public interest.

The bill provides that an officer appointed by the President shall establish regulations which will lay down the ground rules, and then the head of each agency will act upon these ground rules and determine whether or not a particular work should be entitled to copyright under this provision. Then this agency head must publish, presumably in the *Federal Register* or elsewhere, a statement of the basis for determining that this particular work falls within the regulations. It is intended that under this provision each agency is going to have to exercise some care in determining what works will be copyrighted, and that this will prevent the wholesale, indiscriminate use of copyright.

Now, taking up a few of the points that were raised in the Committee 304 meeting, one of the points was whether or not the word "published" in section 4(a) of the bill should be deleted so as to provide that unpublished material as well as published material may not be copyrighted. The reason we left in the word "published" here is that, under the construction of the present title 17, we believe that unpublished works are not subject to this proscription.

Another item that came up in the meeting was the matter of the term of the Government copyright under subsection (c). There was some indication that there was no real way of determining what the term of the Government copyright would be. However, I suggest that,

under the definitions in section 54, a Government work in most instances will fall under the definition of an "anonymous work," which is "a work on the copies or phonorecords of which no natural person is identified as author." If you look at Government publications, very, very seldom will you find an author's name mentioned, so within the definition this will probably be an anonymous work, or, if not, a work made for hire. In either case, the term of copyright under the bill would be 75 years from publication, which would be the normal term of most Government copyrights. In the rare case where a Government publication does contain the name of an author and was not made for hire, then presumably the life of the author and fifty years would be the basis of determination. However, these cases are very rare, and we don't see any real problem there.

There was a suggestion in the Committee 304 meeting that subsection (c) might contain a specific statement that Government copyright should be limited to fifty years from publication. I doubt if there is any real need for this. I think the term would be 75 years from publication in most cases, and I see no particular reason for making any great distinction in term since in all probability these cases are not going to be too great in number.

There was also a brief mention made in the Committee 304 meeting of the question of who is to administer this provision. Some preference was expressed for having the entire work of administering this provision handled by one administrative agency rather than leaving it to the head of each agency under regulations. This is a matter about which, I think, there may be some doubt within the Government itself, and further consideration of course will be given to all of these possibilities.

KAMINSTEIN. Personally I may have some disagreement with George on the question of term. In the usual Government work I have assumed that the term would be 75 years from publication rather than the life of the author. We may be thinking of different kinds of works but this question should be clarified.

ROSENFIELD. Let me first say that on this particular item I am going to speak as an individual and not in the capacity in which I shall later speak on other items. In that respect, in this particular area I disagree vigorously with section 4, and regard it as a retrogression from the present law, which I prefer.

First of all, with respect to subsection (a) as to unpublished works: this, it seems to me, flies in the face of the very purpose of the act under subsection (a), which is to promote the public availability of works. Giving the Government the right to copyright unpublished works is an incentive to non-publication and, therefore, to withholding the work from the public.

Mr. Cary has indicated that 75 years is the period from publication. I call your attention to the fact that the same section says that the term is a hundred years from creation, and that would cover unpublished works. Mr. Cary has said that there was no particular reason for changing the present law on this. Therefore I suggest the elimination of the limitation to published works.

Secondly, with respect to subsection (c) permitting copyrighting of certain Government works, I respectfully suggest that this is a deliberate and patent device to evade and vitiate the basic principle of noncopyrightability. When "Editor and Publisher" editorialized on this particular kind of provision it said, "If the basic principle is a good one, then why water it down with exceptions and open the way for its destruction? No one needs a crystal ball to foresee the abuses to which such an exception can be put." In many respects the bill is worse in this section than the preliminary draft, because the draft would have given the right to an independent agency to make the determination as to when such exceptional cases could be copyrighted. Here, in the bill, you ask the fox to guard the chicken-house. This is not customarily the way of protecting chickens.

Section 4(c) also purports to make the public interest a consideration, but does not permit the public to speak on the issue. This is done hush-hush. Why? I call to your attention that the Senate just the other day, in approving a Freedom of Information bill, dealt precisely with this issue of the public interest. The Committee said that the law which now authorizes the withholding of information in the public interest contained a restriction so vague that it has been abused by merely withholding information which would embarrass some bureaucrat.

Ladies and gentlemen, we have here not the customary author, but the United States Government, the very party against whom the first amendment was designed as a protection. Freedom of press is not subject to sale because it is for the convenience or the expense of the Government to do otherwise. Therefore, I recommend the complete elimination of section 4(c).

In connection with section 4(e), the definition of a "work of the United States Government," I commend the Register for an effectively superior definition of the bill over the preliminary draft. I regret to say that I think we can do better, and that the Register himself has done better. Without expanding on this particular point I recommend that the definition that is used for private employees be used for public employees. Therefore, the terminology in section 54 should be used rather than that in section 4.

One final matter. The section ignores completely one of the major problems in this area today: the copyrighting of works which result

completely or wholly from Federal contracts under which the work is prepared. Failure to deal with this situation leaves a gaping loophole for deliberate evasion. We are dealing here with other people's money. When the Government commissions a report at public expense, why should a private producer have a private monopoly control over it? It is not merely a question of law or policy, but also of public morality.

For these reasons I recommend substantial amendments and deletions in section 4. Lacking these changes I urge the retention of section 8 of the present title. I should appreciate the privilege of submitting my full statement.

KAMINSTEIN. We will put the entire document into the transcript.

Section 4 [Government Publications]

H.R. 11947
S. 3008

Statement by

HARRY N. ROSENFIELD, ESQ.,
Washington, D.C.

before

Panel of Consultants to Register of Copyrights
New York, N.Y., August 6, 1964

I speak, as an individual, in opposition to Section 4 of H.R. 11947 and S. 3008, dealing with copyright in publications of the U.S. Government. The provision is a serious retrogression from the present law, 17 U.S.C. 8 which is far preferable to the proposed section.

1. *Subsection* (*a*) provides that there may be no copyright "for any published work of the United States Government." In the light of Section 3(a), the above-quoted language from Section 4(a) ostensibly permits copyright of all *un*published Government works which, if published, would not be copyrightable under Section 4(a). The provision authorizes even fuller monopoly than if you permit Government copyrighting of its published works as proposed under Section 4(c). This flies in the face of the very purpose for denying copyright to Government publications, *i.e.*, public availability. Giving to the Government the right to copyright unpublished material is an incentive to the nonpublication of such material and therefore to withholding the work from the public.

Such objectives as have been urged as the real justification for this proposal have no place in general copyright legislation:

(i) It may be perfectly legitimate and desirable for the Government to protect unpublished material from misuse and premature disclosure.

But this laudable objective does not require copyright monopoly; under existing laws, it can be achieved simply through effective personnel administration by an employer agency.

(ii) In common with all other citizens, I rejoice in the Library of Congress's effective efforts to build up a manuscript collection of unpublished works. If restriction is necessary here, why not provide it in direct specific terms rather than by general language which brings in other (and presumably unintended) material in evasion of the basic principle?

As valid as these two limited objectives may be, they do not justify the unwarranted, indefensible and inconsistent provision of Section 4(a) which would allow the copyrighting of unpublished works of the U.S. Government where such works, when published, are not copyrightable.

For the aforesaid reasons, I recommend deletion of the word "published" in Section 4(a) . . . and in Section 4(c) . . . and the necessary conforming changes elsewhere.

2. *Subsection* (*c*) is a patent device to evade and vitiate the basic principle of noncopyrightability of U.S. Government publications presumably announced in Section 4(a). As *Editor and Publisher* editorialized on September 2, 1961: "If the basic principle is a good one, then why water it down with exceptions and open the way for its destruction? No one needs a crystal ball to foresee the abuses to which such exceptions could be put." Public evidence in the last few years and the Register's own Report to the Congress in 1961 have shown how many government agencies have violated the present more rigorous "no copyright" rule by copyrighting or permitting the copyright of admittedly "Government publications." The political, organizational, personal and lobbying jockeying that would result in the so-called "exceptional cases" would make a shambles of the so-called basic principle. The current bill is even more undesirable in this regard than the Register's last previous draft which would have given to an independent agency the authority to determine when such "exceptional cases" prevailed. Under the present bill, the authority is given to the producing agency, to the very ones which have been at fault, even now, in egregious and admitted evasion of law. One does not ask the fox to guard the chicken house against marauders, and one should not ask the very agencies which, in violation of the current law, are offenders against the public interest to decide when a particular publication is copyrightable in the public interest.

It is also curious that Section 4(c) purports to make "the public interest" a consideration in such determination, but nowhere assures or permits the public any right to be heard, or even to be advised, of such matters. While regulations are provided for, no assurance

is given of notice and opportunity to be heard for those who might oppose possible abuses against the public interest. Why the "hush-hush" approach to the public interest?

Many of the so-called justifications for this extraordinary device either overlook or ignore the unique constitutional aspects involved in a work produced by the Federal Government. We have here not the customary author, but the Government, the very party the First Amendment of the U.S. Constitution was designed to guard against. As I said before this Panel in January of 1963, Freedom of Press is not subject to sale because it presumably might save money for the U.S. Government, nor even because it is inexpedient for the Government. The constitutional guarantee of Freedom of Press is directed *against* the Government and is designed to protect the American People's *right to know* what their Government is doing. It is irrelevant that the commercial copyrighted publication may be nicer looking, or more widely publicized, or that the document, once in the public domain, may be misquoted or sensationalized. The Constitution establishes a higher principle of values than "substantial savings to the United States Government."

Therefore, for reasons of policy, practice and constitutional principle, I recommend complete elimination of Section 4(c) from these bills.

3. *Subsection* (*e*) attempts to define the term "work of the U.S. Government." The Register is to be commended for developing a definition superior to that in his last prior draft, but I feel impelled to suggest that further improvement is not only possible, but is also necessary in the public interest.

A "work of the United States Government" is defined in Section 4(e) as

> "a work prepared by an officer or employee of the United States Government *as part of his official duties.*" (*emphasis added*)

I prefer the current construction by the Copyright Office of the present law, which is:

> "any work produced . . . within the scope of his employment." (Register's Report of 1961, p. 131.)

This phrasing consists of legal terminology that has often been subject to judicial and administrative construction, and no special valid reason has been adduced for changing it. As a matter of fact, Section 54 of these bills . . . define "work for hire" in the same terms (*i.e*, ". . . within the scope of his employment . . . ") as above suggested. There is no reason why this concept which is identical so far as this issue is concerned, should be differently defined in Section 4 and in Section 54; I recommend the Section 54 terminology be used, on this point, in Section 4.

If for some reason, the above proposal is not acceptable, and it is desired to use the language "as part of," rather than "within the scope of," then I suggest that the bill be amended to comport with language which appears in the Administration's bill enacted in September, 1960, 28 U.S.C. 1498(b) (second proviso), P.L. 86-726, as follows:

> ". . . work prepared by a person while in the employment or service of the United States, where the . . . work was prepared as a part of the official functions of the employee, or in the preparation of which Government time, material, or facilities were used . . ."

This is not new language; it is already in statute affecting copyright of government publications. Its adoption instead of the present language of Section 4(e) of the draft would provide consistency.

An additional matter merits consideration. The section ignores one of the major problems in this area today—the copyrighting of works which result completely or wholly from Federal contracts under which these works are prepared. If a Federal employee writes a document within the scope of his duties, or even "as part of his official duties" the work can not be copyrighted under present or under the proposed law apart from "exceptional cases." But if, for example, that employee resigns and obtains a Federal contract to prepare precisely the same document, the law is silent and the draft presumably would allow copyright. Failure to deal with this situation leaves a gaping loop-hole for obvious and deliberate evasion. There are quite a number of private organizations whose whole, or substantially entire, *raison d'être* is the preparation of reports for Government agencies on direct order. I recognize that there are arguments both ways on this question, but I strongly urge that it be dealt with. Anything less than this would be substantial mockery of the problem in view of the already substantial and ever-growing proportion of government funds that are expended on research. We are dealing here with "other people's money." When the Government commissions a report at public expense, why should a private producer have private monopoly control over it? This is not only a question of law, and of policy, but also of public morality.

For the above-indicated reasons, I believe that the public interest requires substantial amendment of Section 4 as indicated. Lacking such changes, I recommend retention of the present provision of law, 17 U.S.C. 8.

KAYE. I urge the inclusion of unpublished as well as published works in section 4(a). A very large number of important governmental pronouncements are made orally after the work has been placed in manuscript; it is therefore in tangible form but has not been

published. Under the bill, for the first time, all of these works will be entitled to automatic statutory copyright. The precedent established by the present law, therefore, does not help us. The public interest in the immediate dissemination of such oral pronouncements makes it, I think, essential that unpublished works should also be included in section 4(a).

SCHIFFER. I think that in its present form the section raises two serious constitutional problems other than the basic first amendment policy problem. In the first place, section 4(c) probably constitutes an unconstitutional delegation by Congress. It is not sufficiently set forth what the criteria for the exercise of the right reserved shall be.

Secondly, in the light of the criminal penalties, there would probably be a problem as to unconstitutional vagueness in that a person infringing and charged with criminal infringement could not tell from the law under what conditions the Government is entitled or is not entitled to copyright.

Finally, in general, I am particularly opposed to the granting of any copyright in Government works, more or less on the grounds already stated.

MANGES. Horace Manges, American Book Publishers Council. Mr. Rosenfield states that he speaks as a private citizen in this matter, and no doubt he does. However, I believe that he is also counsel for the Public Affairs Press of Washington, D.C., which has a slight interest in this situation. From the attack that Mr. Rosenfield has made here and from my cursory reading of the *New York Times* this morning, I take it that in the bill entitled H.R. 11947 "H.R." does not stand for "Harry Rosenfield." [Laughter]

This section, Mr. Kaminstein, is a matter of crucial interest to the book publishing industry. It is one that affects a very large segment of the industry. I heard this subject debated in an American Bar Association committee during the last couple of days and I limited my remarks there because I had in mind that I was going to speak again here. I now ask permission to give these views because at the end of Mr. Rosenfield's statement, after I had spoken, he said, "I want facts." Now I would like to give him some facts. And I think it's very important that the non-partisans and the more objectively-minded people here get those facts, since I represent interested parties and Mr. Rosenfield represents interested parties.

Since World War II, primarily as the result of tremendous increases in Federal expenditures for research, this matter has become of even more importance. The great majority of research in many fields of medicine and in many areas of physics and mathematics is now supported by the Federal Government. The question of publication policy with respect to the results of such Governmentally-supported or subsidized research really determines the whole question of how ad-

vancing knowledge, in these crucially important areas, shall be reproduced and disseminated. And this in turn depends on questions of the availability of copyright for publications in this field.

We believe that in this section the Register has made a notable contribution toward solving a difficult problem and that he has solved it very objectively. There are four reasons for the position that we think should be taken here.

First, publication by the Government may be less effective as a means for the dissemination of information. The Government Printing Office is a highly efficient instrumentality for the dissemination of pamphlets dealing with policies of the Government in their local areas. However, that Office does not have the means or the authority to achieve an effective job of book publication and book distribution. Works issued through the Government Printing Office are rarely reviewed in the standard review journals. That Office has no salesmen for distribution and no funds for general advertising. In general, its entire mechanism is one of a service not of a sales-promotion character. This is entirely as it should be, but it does necessarily limit the effectiveness of the staff of the Office in achieving the dissemination in printed book form of the results of research.

This is made evident, for example, in the case of the basic report on atomic energy issued shortly after the announcement of the first completion of the atom bomb. This report was prepared for the Atomic Energy Commission by Professor Smyth of Princeton, and the report was published by the G.P.O. in an inexpensive paperbound edition. In spite of the intense public interest in this matter, we understand that the G.P.O. edition sold about 40,000 copies. In order to achieve a larger sale the Princeton University Press undertook to issue a hardcover edition of the work and a more expensive paperbound edition. In spite of the fact that the Princeton Press editions specifically called attention to the availability of the cheaper Government edition, as it did in its advertising, they sold well over 125,000 copies.

Similar examples could be cited, especially the examples of the history of the Army and the history of the Navy in World War II. It may often be the sound judgment of Government agencies that a more effective dissemination to the appropriate public of scientific information in which the Government has an interest can be obtained only through private publication.

Secondly, Government publication may involve an unnecessary expenditure of Government funds, and indeed may be so costly to the Government agencies concerned that the publication of an important book may be impossible unless it can be privately done.

I want to call attention to another specific example, where the burden of publication can be quite heavy to a Federal agency. Recently in the case of the Radiation Laboratory series, published by one of

the leading book publishing firms for the Office of Scientific Research and Development, we had a total expenditure for producing the book, paid out by the publisher, of over $1,200,000. In addition, the publisher paid the Government royalties of $270,000, and the estimated Federal income taxes derived from the profits from the sale of the series amounted to about $125,000.

Thus, the result of private publication was to save the Government an expenditure of over $1,200,000, and to generate for the Government revenues of over $400,000. This total savings to the Government of over $1,600,000 is, of course, several times as large as any revenue that would come to the Government Printing Office from the sale of overrun copies.

Thirdly, the Government agency may not have a reason for the publication of research that it has helped to finance.

And fourthly, it is undesirable for the whole flow of information to the public in broad fields of critical knowledge to be totally subject to Government policy and interest in publication, which would be the case if the only possible publication of governmentally-supported or subsidized research is by Government action through the channels of the Government Printing Office. Private publication is difficult if not impossible unless the publisher, who is required to make an investment that may run into tens or hundreds of thousands of dollars for composition, printing, and other additional costs, is protected against competition from other publishers issuing the same document and from photo-reproduced piracy of the series he has produced. Important private investment in the dissemination of research can take place only under the legal protection of copyright.

I just want to say one more thing. It has been argued that copyright by the Government would be a means of creating censorship. Copyright under this section could be obtained by the Government only in the case of publication, and once that has taken place the information disclosed can be used by anyone, even though the particular words in which it is expressed cannot.

PETERSON. John Peterson, General Counsel of the Christian Science Church, but I am speaking in my capacity as a member of Committee 304 of the American Bar Association, the Committee on the Program for General Revision of the Copyright Law. These are just two minor points having to do with drafting, but I think it well to have them in the record. One has to do with section 4(e), which is a straight definition. It would seem advisable to have this combined with the other definitions which are now in section 54, and I think later most appropriately to appear at the beginning of the act.

Secondly, having to do with the term of copyright of Government publications, the fact that there can be any misunderstanding among the drafters of the act, however slight and however quickly composed,

would indicate the advisability of specifically covering the point in the section, and I respectfully suggest that this be done.

GOSNELL. Charles Gosnell, the American Library Association. The American Library Association has taken a position in opposition to having copyright for Government publications, and this would, of course, extend to unpublished material as well. I find myself confused this morning, because there are some publishers who can make money on Government publications without copyright and there are others who cannot. I would suggest that there must be ways of resolving this, but the basic principle on which the American Library Association stands is that works compiled at Government expense should not be restricted in this fashion.

SCHULMAN. I will speak only in the capacity of a copyright lawyer. To me it seems as though there is some misconception of what copyright is, how it works, and what it is all about. Under *Callaghan* v. *Myers*, the States have a right to secure copyright. That goes back a century. Now I don't know of any State of the Union of all the fifty States which has harmed the public interest by copyrighting its statutes and securing copyright on court reports. The Secretary of State of a State secures copyright on reports of the court decisions, the court opinions, and large publishing companies engage in publishing the opinions of the District Courts, Circuit Courts, and the Supreme Court. That process does not suppress anything. As a matter of fact, I think it makes more reports available to lawyers. Copyright has not discouraged the publication of these reports. On the contrary, encouraged it.

I agree with Mr. Manges that the copyrighting of a public document does not suppress it. The fact that it's published makes it public, so where can the suppression be? One may not be able to print the copyrighted document in full, but one may talk about it, tell about it, and tell what it says.

When you come right down to it, what does copyright protect? Copyright enables the Government to prevent distortion. That is one of the elements of the copyright philosophy. If anyone reprints something, he must reprint it the way it is; otherwise there is the risk of distortion of a Government document. To the extent that unpublished works are included, I should judge that there exist secret documents, or documents which involve public security, which should be protected against unauthorized use as well as distortion. The fact that Crown copyright is recognized in Great Britain has not subjected the British public to any great detriment.

When you come right down to it, if one appreciates the nature, extent, purpose, and effect of copyright, there cannot be any objection to this provision. Copyright protection stimulates publication. Copyright is intended to stimulate and increase communication. If the

Government can induce people to print books and distribute them generally and make a profit on them, that's exactly what we should want to accomplish.

ANELLO. Douglas Anello, National Association of Broadcasters. I must join the gentleman from the American Library Association, because at this point I am becoming a little confused. With due respect to my brother lawyer, Mr. Schulman, I don't understand how a copyright statute can either prevent or stimulate distortion. Certainly, if a person copies it exactly, this would be a copyright infringement if he doesn't have permission. Actually, then it would seem to me that quite the reverse would be true: that copyright might tend to cause people to distort, and thereby possibly eliminate any liability for copyright infringement.

Secondly, broadcasters are a news medium. We are constantly appearing before the Congress in order to liberalize the statutes dealing with restricting material. We want wider coverage of Government affairs. I am fearful that section 4(c) in effect negates the principle of section 4(a). Thus we believe it would be possible, under the guise of copyright protection, to embark upon a certain amount of censorship.

This is no criticism of Government workers; I was formerly one myself, and I know they are honorable men and women. But there could be occasions when I believe that resorting to copyright might be an excellent way of keeping certain materials from the public in news reporting.

LINDEN. Bella Linden, American Textbook Publishers Institute. I agree with Mr. Schulman that copyright does help prevent distortion. If a literary property is under copyright, the license to reproduce or copy it calls for the copier or reproducer to copy it as is. It does not permit him to create a derivative work unless expressly so authorized. Therefore, a copyright, under special circumstances, of Government publications would result in licensing the copying and dissemination of the material as is, and not by abridgments or condensations that may result in distortions.

There are two portions of section 4(c) which I would like to call to the attention of those individuals who fear that section 4(c) does not set forth sufficient standards upon which special circumstances could properly be based by a Government agency head, and also of those people who fear, as Mr. Gosnell does, that this would help certain publishers make money, whereas other publishers find they can make money without copyright of Government material. I have reference to . . . [the statement in subsection (c)], under which the subsection is applicable only if "it is determined that copyright protection would result in more effective dissemination of the work or for other reasons would be in the public interest." Therefore, the special

circumstances would have to be such that there would be a proper determination that this would serve the public interest.

I call attention further to [the statement] which sets forth that the basis for the agency findings that this would result in greater dissemination of the work or that it would be in the public interest would all have to be set forth in a published statement. Those people who fear abuse would thus have a double protection. One would be the psychological compulsion that a Government agency head would not be likely to set forth in a published statement reasons that would obviously subject him to personal attack. Another equally practical reason is that the published statement could be used to challenge the propriety of the claim to copyright in a specific Government publication.

KAMINSTEIN. May I say that, as dear as the entire field of copyright law is to all our hearts, I know of no subject on which anyone would sooner speak than that of Government publications. I urge you to limit the discussions in view of how much we have to cover elsewhere.

EMRICH. This is a very minor point, and possibly I am seeing a hobgoblin where none exists. Section 4(d), which I think has not been referred to, seems to me perhaps to be capable of misunderstanding. It does not talk about publication of a "published work of the United States Government," as the work is described up in . . . [section 4(a)] but it simply says, "Publication or other use by the United States Government of any material in which copyright is subsisting . . ." (which I take it might be read out of context to apply to any other work of any other author) ". . . does not authorize *further* use or appropriation of the material without the consent of the copyright owner." Thus, this implies that the Government may use, without the consent of the copyright owner, some works not prepared by a Government employee at all.

KAMINSTEIN. This is a protective device for authors. If the Government uses the work without permission it is subject to an infringement action. What this means is that, whether the Government has permission or not, someone else cannot claim the right to use the work simply because it has appeared in a Government publication.

JACKSON. I am speaking as a member of the copyright bar, and I just wanted to address myself to one point. That was the statement which I understood to say that copyright doesn't prevent distortion, and in fact encourages it, in that it permits copying with distortions without liability. I wanted to go on record as saying that I don't think that that is correct under the present law, and I don't think that it's correct under the law as it has been proposed.

JABLOW. Richard Jablow, Counsel for the Writers Guild of America. I would urge that in section 4(d) there be an affirmative state-

ment to the effect that the United States Government may not use or publish copyrighted material without the express consent of the copyright owner. I disagree that there is such a compelling implication in the language as written.

PILPEL. Harriet Pilpel, Society of Magazine Writers of America and Society of Magazine Photographers. I just want to ask whether there was any reason for the difference in wording between subsections (b) and (c) and, if not, to suggest a change. Subsection (b) refers to "the whole or part of publications . . .," whereas subsection (c) refers only to "in a published work." The problem of Government publications which has come to my attention most frequently has been the reluctance of people to permit an article which has not yet been published elsewhere to appear, for example, as part of a congressional hearing because then it becomes an official record. I would therefore suggest that the words "part of" also be included in subsection (c).

SIEBERT. Fred Siebert. At the moment I am representing the Inland Press Association. As a news reporter I would find myself in a position to make fewer errors or distortions in handling an uncopyrighted Government document than a copyrighted one, since in the latter case I might be limited to certain excerpts and would have to paraphrase and put in my own words the contents of the document.

TUCKER. I would like to comment very briefly that, if it is a fact that the United States Government Printing Office is ineffective, the answer is not to give the Government a copyright but rather to design new ways to make that part of the Government more effective.

We are told that it is too costly to take care of this problem except by granting copyright to the Government and its various agencies. This would be a single example where I think it would be wiser to spend more money. We are told that a distortion might occur. I would submit that the news media of the United States are entitled to report in full what the Government says rather than to be limited to criticism.

Finally, I think that, whatever might be said in favor of granting copyright to Government agencies, the disadvantages so far outweigh the advantages that those who are now free to speak to the public through the news media had best bring to the attention of those who would grant copyright to the Government the fact that there is more harm to be done than advantage to be gained.

KAMINSTEIN. I turn now to section 5, one of the core sections of the bill, dealing with exclusive rights, and call on Mr. Goldman to speak to it.

GOLDMAN. Section 5 is the first of a series of sections dealing with the exclusive rights that are comprised in copyright. I'd like to call your attention first to the opening words of section 5: "Subject to sections 6 through 13, . . ." In short, section 5 specifies what the basic rights of the copyright owner are, and then sections 6 through 13

proceed to specify the limits of those rights and the exceptions to those rights. In considering section 5 we must bear in mind that we're speaking of the basic specification of the rights, and that these rights are subject to the limitations and exceptions that we will be taking up in turn in sections 6 through 13.

Section 5 to a large extent follows in substance what we had in the preliminary draft. However, I do want to mention that in the preliminary draft we set forth alternative subsections (c) of section 5; clause (4) of section 5(a) of the bill selects one of those alternatives, and I'll come back to that in a moment.

Let me point out here a few of the changes in form, and there are quite a few. In the opening clause we refer to "the exclusive rights to do or to authorize any of the following: . . ." "Or to authorize" is a phrase that did not appear in the preliminary draft. At our Panel meeting it was suggested that we insert that phrase, and the subcommittee of the A.B.A. committee that dealt with this matter also suggested that this phrase be inserted. We have followed those suggestions in the bill.

With respect to the enumerated rights, clauses (1) through (5), we have recast the provisions of the preliminary draft to simplify the language and simplify the statement of rights. We have not purported to change the effect sought in the preliminary draft.

But, coming now again to clause (4), the preliminary draft presented two alternatives with respect to the right of public performance. One of the alternatives would have limited the right of public performance of nondramatic literary and musical works to public performances "for profit," which limitation is in the present law. The other alternative omitted the "for profit" limitation, and instead provided (in a section there numbered "8" and here also numbered "8") for the exclusions from the public performance right with respect to nondramatic literary and musical works. In short, instead of the general "for profit" limitation, the approach here is to specify what the limitations and exceptions are.

In the preliminary draft we had provisions with respect to the right to exhibit pictorial, graphic, or sculptural works publicly. There is no such express provision in the present law but, as in the preliminary draft, we do have it in the bill. Here one of the limitations that we had in the preliminary draft has been taken out of this section and placed elsewhere, in section 7, and we'll come to that later.

With respect to the definitions, we have again tried to simplify the complex language of the preliminary draft. In addition, we have tried to include in section 5 some of the provisions regarding broadcasting which we had covered in the preliminary draft in section 13. That section became very lengthy and complex, and here again we have tried to simplify and to cover the same general subject matter

without any real change in result. The definitions are changed somewhat in language; I don't think they represent any change in intent.

SARGOY. I would like to say that I am speaking here in my personal capacity as an attorney who has been very active, particularly with A.B.A. Committee 304, and who has been particularly concerned with this matter of exclusive rights in the work of one of its special subcommittees, Number 6. I want to say, first, that I admire the way in which the Copyright Office has simplified and framed this section. I think it is extremely useful to use the definitions. It is possible that the definitions may need some slight clarification, but the general set-up and purpose is good. Of course, as you will note, you have to go to the definitions for almost everything.

I would like to refer to clause (2) of section 5(a) . . . in connection with the exclusive right "to prepare derivative works based upon the copyrighted work." Of course "derivative works" are defined in the definitions, but the use of the word "works" is a little confusing. It implies something tangible; and throughout the bill and throughout the definitions the use of the word "works" implies something tangible.

Of course the definition was prepared in the sense of section 2, providing that "derivative works" might be copyrightable, and of course, in that particular connection, "derivative works" have to be tangible because our Constitution requires that a work must be in the form of a "writing." However, here in the exclusive rights we are not talking about copyrightability. We are talking about "infringability," and it is entirely possible for derivative material to be prepared which is not put into the form of any tangible work. A novel can be dramatized into the form of a ballet or pantomime, and be rehearsed and performed. Yet the dramatization may never be put into any form of tangible medium in which it could be copyrighted. There are ways of putting such dramatization into tangible form too; you could film it or write its choreography in the special language of the ballet.

But what we are really talking about here in section 5 concerning "exclusive rights" are "derivative utilizations" or "derivative appropriations." As long ago as 1911 the Supreme Court of the United States in *Kalem Co.* v. *Harper Bros.*, decided under the 1891 Act, held that when the novel "Ben Hur" was unauthorizedly made into a motion picture film and the motion picture film was concededly shown in 500 theaters, the Kalem Company was not liable for making the motion picture film, upon an analogy to the old pianola roll case, *White-Smith* v. *Apollo*, because there was no visual identity between the films and the pages of the novel. However, the Supreme Court of the United States also held that, when the 500 theaters showed this motion picture film upon their screens, they were unauthorizedly dramatizing this novel in pantomime upon their screens and thus infringing the exclusive right to dramatize a nondramatic copyrighted work. Thus

the only liability of the defendant Kalem Company, which made and distributed the films, was as a contributory infringer to the pantomimic and intangible dramatizations which took place on the 500 screens of these theaters.

So I would suggest that in section 5, instead of using the term "derivative works," we use a term such as "derivative utilizations" or "derivative appropriations" or some analogous type of word to express that meaning.

I would like to say generally that this section is in accord with the views of our Committee 304 in its voting. I would like to point out one other thing in connection with clause (3) of section 5(b), subclauses (B) and (C) . . . In the original draft it was made clear, in connection with broadcasting, that the language was intended to cover among exclusive rights transmission by wireless by wires or similar lines, or by any combination of systems. Those things have been taken out. Perhaps they now come under clause (C) . . .: "to communicate a performance or exhibition of the work to the public by means of any device or process."

But there is an element of confusion with the introduction of a new phrase, ". . . otherwise than as a common carrier." Now if that is intended to cover a company like A.T. & T., which passes signals along by authority of the broadcasting station over wires, to other stations or otherwise, I don't think it's necessary to protect A.T. & T. in such regard because they are not communicating to the public at all. They are not broadcasting to the public or performing to the public. They are merely a common carrier conveying signals from one authorized source to another authorized place, not to the general public.

But what happens here, by the use of this language, is the possibility that you are going to bring community antennas into an exempt category, and there is a serious question as to whether this should come in in this rather unusual way. I understand that community antennas, which serve to amplify the signals and send them by wire to their subscribers, are now making applications for regulation in certain States as common carriers. Now that is a different situation entirely from the telephone company. They are reaching the consuming public by picking up and transmitting the signals. If they were doing so with the consent of the broadcasting station, that is one thing; but they are amplifying the signal and then over their wires sending it to the public who are their subscribers and pay substantial fees for the service.

KAMINSTEIN. Mr. Sargoy, I do want to say that the problem of the language ". . . otherwise than as a common carrier" was called to our attention immediately after the bill was printed, and we have discussed this both with F.C.C. and others interested. We realize that there have been some efforts to have community antenna systems designated as common carriers, and we will make a further study of this situation.

I would like to ask you to condense your remarks. I think we all benefited from your very precise explanation of the subcommittee's views during the A.B.A. discussions earlier this week, and I would hope that they can be published as well as made available to us. However, there are so many people who want to speak on this section that I would appreciate your finishing as soon as possible.

SARGOY. I have nothing further to say, other than to suggest the possibility of combining clauses (B) and (C) . . . into a single clause, with the addition of further clarifying language that will cover wired communications that are diffused or broadcast.

KAMINSTEIN. We understood, too, that you are suggesting particular language to the A.B.A. Committee, and we would welcome copies of your suggestions.

SCHIFFER. George Schiffer, N.C.T.A. We expect to file extended comments concerning the community antenna position in due course, and have already filed comments in the past which have been circulated quite widely.

The community antenna position is a very simple one. There are some three or four million people in this country who use community antennas rather than some other device to secure television reception in areas where such reception is not possible with the use of the simple indoor antenna. A community antenna is a technical device which simply replaces other forms of antennas.

Under those conditions the imposition of a copyright payment on those subscribers would work a material hardship and a material discrimination, since the bulk of the television audience and the users of other types of equipment in the same areas in which the community antennas operate are not forced to make such a payment. Further, the payments made by those subscribers would be double payments, in that the broadcasters of the works in question would already have paid copyright fees. Under all of those conditions it would appear that the imposition of such an obligation is quite beyond the scope of any proper public purpose of a copyright law.

In addition, the language as it now stands is indeed quite ambiguous. In its present form it does not, in our opinion, directly deal with the community antenna situation. We trust that this will be clarified by exempting community antennas, just as other devices have been exempted in this bill under conditions remarkably similar. I refer particularly to provisions regarding uses of performances in the home and in similar circumstances, educational uses, and matters of that kind.

We are particularly concerned with the clarification of this problem, because we have just completed several years of litigation with broadcasters on unfair competition issues. The Ninth Circuit recently

held that there was no basis for any claim of unfair competition against a community antenna.

It does not, in our opinion, matter whether the community antenna is or is not a common carrier. It is quite significant that the community antenna operates in a particular fashion to enable home owners to receive television broadcasts for which copyright royalties have already been paid. We ask that this be considered, and that the appropriate exempting language be inserted.

KARP. Mr. Kaminstein, I would like to call attention to two points. One arises under section 5(b)(2), which protects the right of an artist to exhibit a copy of his work, but somehow neglects to protect his right to exhibit the original. I would suggest that the original is deserving of as much protection as the copy.

Secondly, I would like to comment, but briefly, on the omission of a lending right for books and other published material. In section 5(a)(3) it would appear that such a right would be granted in the new act. However, in section 7 the right is taken away. In other words, once the copy of a book is sold, the author or publisher would have no right to control its further exploitation by the lending of copies. I would hope that the position taken by the Authors League of America (which is already in the record and which I will not repeat) will be given further consideration by the Copyright Office.

I am hopeful that, on further study of the sound reasons which we have advanced for the lending right, the Copyright Office will see fit to reverse its position on this point.

ROSENFIELD. Mr. Kaminstein, I am going to speak, in connection with section 8, on the elimination of the "for profit" provision in section 5(a)(4). So as not to duplicate, I hope you will permit me the time that I might otherwise have had here.

KAMINSTEIN. Gladly.

ANELLO. I won't speak to the ambiguities contained in section 5. The Copyright Office already has our views on this. I do, however, wish to supplement what Mr. Schiffer said by pointing out that, while it is true that the Ninth Circuit said that no unfair competition remedy would lie, I wish to quote one paragraph in that same decision: "All this is not to say that appellees are necessarily without remedy. They may be able to maintain an action for infringement of those programs protected by statutory copyright, and to prosecute a claim for common law copyright violation as to any others which they contend have not yet been published within the contemplation of the law of common law copyright."

I think the decision speaks for itself. We don't need any further explanation of it. Furthermore, I think there is one aspect of CATV operations that some of the people in this group might not under-

stand: it is one thing for a person to put up an antenna and receive a program in his own home; it is quite another thing for somebody else to put up an antenna and relay those programs a thousand miles through a microwave system and then redistribute them to homes a thousand miles away from the originating point.

KAMINSTEIN. Thank you. In my remarks to the Copyright Symposium on Saturday morning I expect to ask the members of the bar to send us their briefs in copyright cases for preservation in the Copyright Office library, and I guess there is no point in rearguing the *Cable Vision* case here.

JABLOW. I would like to direct my remarks to section 5(b)(3). The word "publicly" is defined by referring back again to the word "public." You have just transformed an adverb into a noun. I still would like to see some definition of the word "public."

In clause (A) some of the curse is taken off this, because you have a disjunctive phrase stating ". . . or at any place where a substantial number of persons . . . [etc.]." But in clause (B) we are right back where we started from, because it says, ". . . to broadcast a performance . . . of the work to the public . . . ," but there is no definition of what "the public" is. Could this be a sales conference? Could this be a club? A closed circuit television communication to a fraternal organization? I think that either we should use that clause (A) phrase ". . . or at any place . . . ," with modifications to make it fit in clauses (B) and (C), or have some further definition of "public" in section 5(b).

GOLDBERG. With respect to section 5(a), I would like to inquire concerning the use of copyrighted works in computers—information storage and retrieval units. When I refer to "copyrighted works" I include not only copyrighted works as we customarily know them but also computer programs, which I think under the definitions contained in the bill will attain much broader copyright status than under the present Act.

Section 5(a)(1) talks about the right "to reproduce the copyrighted work . . ." I wonder whether that includes reproduction in the storage unit of an information storage and retrieval device. Section 5(a)(2) deals with the right "to prepare derivative works . . ." It seems to me that the fixation of a work fed into a computer—the fixation of magnetic impulses in the storage unit—may constitute a derivative work.

With respect to section 5(a)(4): I think that computer programs would fit within the definition of "literary works" under the definitions section, section 54. The performing right in a computer program would thus be limited under section 5(a)(4) to a *public* performance right. I therefore ask—and not facetiously—whether the performance of a copyrighted computer program in a public showroom of

I.B.M. at 57th and Madison, or in any of the other computer showrooms which are to a large extent public, constitutes a public performance, and whether this is a performance right that is intended to be granted to computer programs.

Essentially, I would like to ask clarification from the Copyright Office of what was intended with respect to copyrighted works in relation to their use in information storage and retrieval units.

KAMINSTEIN. I don't think there are any more difficult or important problems than the ones you've just raised, Mr. Goldberg. As you undoubtedly noted, we deliberately avoided any specific references to "computers" or "information storage and retrieval units" in this clause. We think that there are many developments that are going to come in the immediate future, and we think it is safer to draft general language which can be interpreted by the courts to apply to particular usages.

FINKELSTEIN. I represent the American Society of Composers, Authors and Publishers. I would like to speak to the subject of community antennas. No one seems to question that this is a public performance. The only questions is, As between the broadcaster and the CATV operator, who ought to pay?

CATV is not a small enterprise. Outfits like RKO-General, the Cox stations, and the Storer Broadcasting Company, are substantial enterprises. They are engaged in community antenna operations. If anybody wants to know what a community antenna operation is worth, just look at *Broadcasting Magazine* sometime and see what these systems sell for.

Now the question is, Should the broadcaster or the community antenna operator pay for the use of copyrighted material? The broadcaster has no privity with the community antenna operator. The community antenna operator takes this material willy-nilly. Should the copyright owners be required to say to the broadcaster, "You shall pay for this use made by the community antenna over which the broadcaster has no control"? Or should the copyright owner have an opportunity to negotiate with the operator of the community antenna? It seems clear that under these circumstances the obligation would seem to rest on the community antenna operator.

EMRICH. Again I have a very small point. It would appear to me that in section 5(a), clauses (3) and (4), we might conside. including "derivative works," or "derivative utilizations" as has been suggested. In other words, if the copyright owner has the right to reproduce the copyrighted work in copies, including photocopies, and to prepare derivative works, shouldn't this protection extend beyond the mere distribution of copies or phonorecords and also cover the distribution of derivative works? And, in the case of public performance, shouldn't the right include derivative utilizations?

GOSNELL. Charles Gosnell, American Library Association. In reference to section 5(a)(3), it seems to be so tightly drawn that I see no provision for public or college or school libraries to lend books or phonorecords to their readers—unless under the section on fair use, section 6, which I doubt.

Again, on behalf of the American Library Association, I would like to express the thought that we are generally disturbed at the whole tone of the bill, and particularly at some of the discussions at this Panel and previous Panels. The consumer has been forgotten altogether. The A.B.A. committee, which we hear about, is composed of representatives of the private interests. The consumer has not been represented at all. At least that Committee was frank enough to say that they had sewed up everything but smells and extra-sensory perception as a means of communication. I am glad that mind reading is still exempt.

But no John Greenleaf Whittier's "Barefoot Boy" could walk down a path and whistle without committing some kind of infringement, the way this thing is going. I must say that we are profoundly disturbed, and in many respects would join with the group yesterday which expressed itself so strongly in opposition to this bill in so many respects.

KAMINSTEIN. Mr. Gosnell, I think some of the points you raise will be covered in the later discussions of section 6 and 7.

ALEINIKOFF. I represent National Educational Television, and I merely want to note something that I noted before in these discussions. That is that educational television is much concerned with the elimination of the "not-for-profit" exemption under which so many of our television stations and educational stations have operated.

I don't think we are concerned with the elimination of this phrase from section 5, if that is only being done as a drafting matter. As I understood from Mr. Goldman, there is a statement of rights and then there are limitations. I think our only objection to that is that we view proper education as being not "for profit," not a commercial use, not as a limitation on exclusive rights, but as something that should never have been included at all if our Constitution is observed.

I do want to say this though. If the elimination of the "not-for-profit" exemption in section 5 indicates an evolution of thought on the part of the Copyright Office, then we are concerned. Originally the Register advocated continuation of the exemption. At a later Panel meeting and in an earlier draft he presented alternatives, one of which would have exempted educational broadcasting under section 5 and the other of which would not have exempted it under sections 5 and 8. If this present draft indicates a change in his thinking to the effect that educational broadcasting—noncommercial and not for profit—is

not to be included in any of the exemptions from the act, then of course we are very much opposed to it.

JACKSON. Again I am speaking merely as a member of the copyright bar. I should in candor say that all of my practice is on behalf of people who are either publishers or authors. I don't think that is anything to apologize for. After reading the article on page 26 of this morning's *Times*, I had the impression that there were some people who yearned for the old days when authors were not paid at all for their works and felt that the public benefited from that. But I think that we have done pretty well having a copyright law, and that strengthening it benefits the public as well as the authors.

I would like to comment specifically on section 5(b) and the phrase "otherwise than as a common carrier" which occurs in clause (3)(B) of section 5(b). First I would like to repeat a question that I raised earlier at the Panel discussions, which is that I would trust I am right in assuming that there is no intention to include in the definition of "common carrier" television or radio networks as they are presently constituted or as they might be reconstituted so as to fit within a new statutory definition.

I also would like to raise a question as to the statement made that if this bill were passed it would cover wire services. It seems to me that, with the development of technologies, there may be very substantial uses of copyright material by means of wire services covering short and long distances. There have been all sorts of copying machines and what-not developed. Perhaps the time will come before very long when infringers who actually use duplicating equipment and what-not will have relatively inexpensive machines. They will be impossible to locate except through wire services or other communications media of that nature that they use, and I wonder whether it would be wise to relieve "common carriers" (if that is what is intended by "common carriers") from all liability. I wonder whether, under the concept of contributory infringement which was referred to in connection with the *Kalem* case, this shouldn't as a matter of policy be a very appropriate liability.

GOLDMAN. Several of you have referred to the reference in the bill to a "common carrier." What we had in mind was somebody like A.T. & T., a coaxial cable, or a microwave relay. We did not have CATV in mind as a "common carrier." It is not our intention to exempt CATV. May I just say that we also intended that clause (C), which talks about communicating "a performance or exhibition of the work to the public by means of any device or process," would cover wire communications.

KAMINSTEIN. In fact, the phrase was originally intended to please me, since someone had accused me of feathering A.T. & T.'s nest. [Laughter]

I am now going to skip one or two sections and come back to them again a little later. I should like to ask Miss Ringer to cover sections 7, 9, 10, and 12, which we think can appropriately be grouped together.

RINGER. Section 7 in the preliminary draft dealt in general with the question of library photocopying. It was dropped entirely because of strong opposition on both sides (or, I might say, on all sides) to any provision of that sort. I might also say that if any of you want to speak to the library photocopying problem I think the time to do it would probably be in connection with the next segment of sanctions rather than here.

Instead of the old section 7, we have substituted an entirely new provision which, as suggested by Mr. Sargoy's subcommittee 6 of Committee 304, combines provisions from the old sections 5(b) and 5(d) of the preliminary draft with some substantial revisions in language. These revisions were made in an effort to meet objections that were raised, quite properly, on both technical and substantive grounds.

I suggest that you note particularly the change in what is now subsection (b) of section 7. Under the provisions of the previous draft the owner of a copy of a pictorial, graphic, or sculptural work—the owner of a physical object embodying the work of art—could have shown it freely without the permission of the copyright owner by any method, including broadcasting. There were very strenuous objections to this on the part of graphic artists and photographers, who felt that this would substantially cut down their rights. In particular, they claimed the privilege of being able to control the television use of their pictorial works.

As a result of their representations, this bill would provide [in section 7(b)] that the privilege of exhibiting a copy publicly would be limited . . . to showing it to viewers present at the place where the copy is located. In other words, this would permit you to put a filmstrip on a projector and show it in a public place, but it would not permit you to use it on television.

The basic purpose of section 7 is to make clear that full ownership of a lawfully-made copy authorizes its owner to dispose of it freely, and that this privilege does not extend to copies obtained otherwise than by sale or other lawful disposition. In other words, if you obtain a copy by loan or by rental, you are not free to dispose of it freely or to use it in any way you see fit.

At the meeting on Tuesday, however, questions were raised as to whether, for example, this section would or should permit a company to engage in the rental of tape recordings made under a compulsory license. The point was made that someone could, under section 11 of this bill, make a tape recording of musical compositions without the authority of the copyright owner, and then engage in the business

of renting the tapes while retaining ownership in them, thus making a continuous profit from the musical works without paying additional royalties. Another question that was raised was whether, if broadcasters should be given an ephemeral recording right (a right they are not given under this bill), section 7 would permit them to traffic in the recordings that they make for that purpose.

I think these are good questions. Assuming that it was decided to do so, you might be able to take care of this by changing "lawfully made under this title" in subsections (a) and (b) to "made under the authority of the copyright owner." But I think this raises a substantive question and probably deserves some discussion.

Passing on to section 9, this involves the extent of protection in pictorial, graphic, and sculptural works with respect to their reproduction in useful articles. This is the complex of questions raised by the *Mazer* case and involved in the design bill which is now pending in Congress.

Subsection (a) states the very general proposition that "the exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work in copies . . . includes the right to reproduce the work in any kind of article, whether useful or otherwise." However, there is a serious and quite important question of whether, for example, when you make an automobile from copyrighted drawings, you would be reproducing the copyrighted work in a useful article under this section and thereby infringing a copyright.

This is just one example of a common problem. It has arisen in quite a few cases, and the courts have been pretty successful in dealing with it. They have managed to sort out the various types of problems that arise, and have reached a fairly reasonable conclusion. However, we feel it is necessary to make clear that, under this new law which uses considerably broader language as to what the exclusive rights are, we do not intend to go beyond what the courts have established as the dividing line between what you can control in the useful article area and what you can't control.

We tried in the preliminary draft to work out some language to express the courts' basic rationale in this area. We have come to the conclusion, however, that it is better to state this proposition directly—namely, that we are simply trying not to extend the present law—rather than trying to interpret or to spell out the rather difficult theoretical concepts on which these court decisions are based. I think probably the rest of the section speaks for itself.

With respect to section 10, all I need to say is that this is the same as the equivalent section in the preliminary draft, and that it appeared to meet with general approval there. There have been some simplifications in language, but if I recall correctly I don't think there are any substantive changes.

However, the jukebox provision, section 12, does present a problem. The group of sections of the preliminary draft incorporating section 12, which was issued April 1963, did not include language on the jukebox problem. It merely stated that jukebox bills were pending in Congress, and that we wanted to wait until the situation developed before drafting anything to go into this bill. Later on, in September 1963, the House Judiciary Committee issued a favorable report on H.R. 7194, which contains substantially the language that we now incorporate in section 12.

Therefore, when we got to the point of having to prepare this bill, we were faced with at least three alternatives. If we left out any mention of jukeboxes whatever, presumably we would be taking a rather strong stand and repealing the exemption (which is what we had, in fact, recommended in the Register's Report). A second alternative was that we retain the jukebox exemption as it is now written in section 1(e). Third, we could follow the language of the pending bill, which has the imprimatur of the House Judiciary Committee.

We chose the latter alternative, but I want to make clear that in doing so we certainly have no intention of affecting the possibility of congressional action on jukebox legislation separately and in advance of general revision. We have no desire to inject this difficult problem into revision if a satisfactory solution can be worked out by Congress under the present law, and we feel that that result would be distinctly preferable.

KAMINSTEIN. I would like to change the order of the material a little and to deal with section 12 first, since Mr. Nicholas Allen is here now and has asked for time to present a statement on that section.

ALLEN. You are very kind, Mr. Chairman. Thank you very much. I have a written statement which I would like to leave with you and I shall simply reduce my oral remarks to the highlights of the statement. I represent the Music Operators of America, who are the operators of jukeboxes. We have several reasons which I would like to leave with you why we oppose section 12 of both bills.

First, to be clear about it, we would propose that the language of section 12 be deleted, and that the third paragraph of section 1(e) of the present Act be substituted therefor.

Second, we believe that one copyright royalty is sufficient with respect to the coin-operated phonograph industry. If there is to be a manufacturing fee or compulsory license, we say that this should be the only one. Our basic reason is that the operators are bulk buyers of records. They are the largest group of buyers of records. They account for some one-fourth of all records manufactured in the United States.

The history of the manufacturing license or the compulsory license demonstrates the validity of the present law and our proposal in the

general revision. If you will recall, back in 1909 the manufacturing fee or compulsory license was first granted by Congress. It was granted on the condition, first, that the compulsory license would accompany the manufacturing fee, and second, that musical copyright would not be extended to the performance of music on coin-operated machines, with certain minor exceptions. This was called the great compromise of 1909. It was said to be the most controversial feature of that law at the time. The solution that Congress reached at that time, we believe, is the equitable and the appropriate solution under the new law.

Third point: in our view the performance of music on the coin-operated phonograph is a private, not a public, performance. As we've said many times, the one who pays for the music is the one who selects it. No one else has a choice in this. Others listen or not, regardless of the wishes of the one who has the performance played.

Fourth, performance fees, if added to manufacturing fees, would be disruptive—I say destructive—of this industry, comprising several major manufacturers of phonographs, many distributors of phonographs throughout the country, and thousands of operators. Thousands of families—employees and their dependents—would be affected by this disastrously.

Fifth, only the manufacturing fee is feasible with respect to this industry. The manufacturing fee has been generated for all these years by this industry. It is paid as the records are manufactured. The manufacture of one-fourth of these records, as I said, is attributed to this industry. The mechanism exists for this fee to be paid periodically in a very simple fashion, as the records are manufactured, by the manufacturer to the copyright owner.

Sixth, we have opposed H.R. 7194 which, as has just been said, is substantially the same as section 12 of the proposed bill. Our reasons for this are that, first, no hearing was held on the bill as reported out by the Committee, and no public consideration has been given to the provisions in section 12 of this bill. Second, the removal of the exemption would subject operators, those engaged in this industry, to exorbitant performance fees—the sky could be the limit—and also to exorbitant penalties for unintentional infringement. Third, this industry now generates two million dollars a year, the statistics indicate, in manufacturing fees; these, we say, compare favorably with fees that are paid by other segments—comparable segments, if you will—of the music industry now. Under this bill these manufacturing fees would be increased. Fourth, we say that H.R. 7194 and the provision following it here are really special interest legislation. They are not in the public interest. They would benefit performing rights societies in preference to the creators of the music that is played on these machines.

Finally, I would like to address myself to my brother-members of the organized bar and to the others who are here representing the general public interest. I would like to call on all of these representatives to re-examine their position, to reassess this bill, and to do so, not in the interest of the proprietary interests of musical copyright, but in the general public interest. I remind you all that, with the removal of the exemption and the extension of performance fees to this industry, we will be further compounding antitrust difficulties which have plagued the Government of the United States for a long period of time. I also remind you that the principal beneficiaries of this legislation, the major performing rights societies, both now operate under antitrust decrees which would call for further consideration, I am sure, by the committees of Congress and the Register of Copyrights.

That's all I have, sir.

Statement of Nicholas E. Allen
In Behalf of
Music Operators of America, Inc.
Panel Consultants
General Revision of the Copyright Act
New York City
August 6, 1964

My remarks are addressed to the proposed General Revision of the Copyright Act as introduced in Congress July 20, 1964, S. 3008 and H.R. 11947. As these bills are identical, my remarks are addressed to both of them.

1. Section 12 of the bills should be amended by deleting everything now included in that section and substituting for it the language of the third paragraph of Section 1(e) of the present Act which reads as follows:

> "The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs."

2. These bills would give copyright owners double royalties on records played on coin-operated machines. If copyright owners are to be given increased mechanical royalties on the great quantities of records purchased for play on coin-operated machines, they should not be allowed also to receive performance fees when records are played on coin-operated machines. The bulk buying of records by operators of these machines makes them the largest group of purchasers of records and, so, distinguishes them from all other members of the public. This distinction was the basis for the great compromise of 1909 when the mechanical fee was first granted and must still be a

controlling consideration in extending the grant of mechanical fees under the new bills.

3. Performance of music on coin-operated machines is not a public performance. The individual invariably selects his record, it is his choice, he pays for it, no other person has the choice in the selection. It is, therefore, a private performance and should not be subjected to performance fees.

4. The present exemption of coin-operated machines is the legal foundation for the entire industry and must be continued unless Congress is willing to disrupt the businesses and livelihood of many thousands of people, including the manufacturers, the distributors, and the thousands of operators, and all of their employees, representing many thousands of families and many more thousands of citizens throughout the nation.

5. The mechanical or compulsory license royalty is the most appropriate method of compensating owners of musical copyrights and if it is to be a key provision of these bills, them reliance for royalties from the coin-operated phonograph industry must be from this source exclusively.

6. The contents of Section 12 are similar to H.R. 7194, of the present Congress, which was reported out by the Willis Subcommittee of the House Judiciary Committee in September 1963. H.R. 7194 is completely different from H.R. 5174, the bill on which the Subcommittee held public hearings in the spring of 1963. We are opposing H.R. 7194 (1) because no hearings were held on it; (2) because it would subject operators to exorbitant performance fees and penalties (for unintentional infringements); (3) because the $2 million or more per year of mechanical fees now generated by operators on records they buy are adequate and fair compensation to copyright owners when compared with royalties paid by other segments of the entertainment industry; and (4) because this is "special interest" legislation, not in the public interest, which is beneficial to the performing rights societies rather than to the creators of music which is played on automatic phonographs.

All of these arguments against H.R. 7194 are equally applicable against Section 12 of this General Revision in its present form.

KAMINSTEIN. I think we might as well conclude the discussion of section 12 before we go on to the other sections. Is anyone else interested in speaking on section 12?

FINKELSTEIN. I will keep my remarks as brief as possible, certainly no longer than Mr. Allen's. I do want to congratulate him on his success over the years in enabling the largest users of music in the United States to continue to pay nothing whatsoever to the people who write and publish this music. He has done a most effective job.

Now who are the people Mr. Allen represents? Where were they in 1909? What was the situation in 1909? Mr. Allen refers to this as the great compromise of 1909, but I am sure that if anybody were here who was around at that time he just wouldn't know what Mr. Allen was talking about. Back in 1909 the only reference by the Currier Committee to coin-operated machines was to a statement by a publisher that the use of music in these machines in "penny parlors" advertised the music.

A contemporary work refers to the kind of device available at that time as one that had ten sets of earphones, and says that the amusement on the part of those who dropped their penny into the slot was in watching the faces of each of the other nine as they listened to the same thing being reproduced. [Laughter]

Now in 1935—that was sometime after 1909—there first emerged the electronic device which we today call the jukebox. The price to hear a performance at that time was a nickel. In 1947 Mr. Allen's predecessor stood before a committee of Congress and said, "These people supply the poor man's music, and if they have to pay a copyright royalty the price will jump from a nickel to a dime."

That price jumped from a nickel to a dime, however, without any enactment in favor of composers or authors; and the current advertising of the jukebox people refers to all the *half dollars* that are dropped into these machines. Anybody who is around a jukebox knows that there may be a lot of simultaneous deposits of those half dollars, but there is only one set of plays that the public hears.

Who are these people? There are only four manufacturers of jukeboxes in the whole United States, and there haven't been more or less than four for many decades. There is the large Wurlitzer Company, the Seeburg Company, the Rockola Company, and A.M.I. Those four control this whole industry.

It is a cash industry that yields almost a billion dollars a year in 500,000 jukeboxes. It is by far the largest user of music. And these people come in here and say that the record manufacturer ought to pay. Well, the record manufacturer records under a compulsory license. He pays two cents when he records a work. The author will share in the two cents with the publisher. Usually there are two writers of a song, so each of two writers will get half a cent. This device, with the present vinylite record, may play 2,000 times. At a dime a play each record can yield as much as $200; yet the author, they say, should be satisfied with only half a cent. When the jukebox operators get through with these records, they sell them in the used-record market, so they don't even stand the mechanical license royalty. In spite of all this, they come in and they say they should pay nothing for the use of music.

There was recently a bill before Congress that would have required them to pay only $5.00 per box per year, and yet the jukebox people came in and opposed that. The writers and publishers stood up and said that even though it would cost $5.00 to administer this, they were for the bill just to let the money go to the Copyright Office so as to make an investigation as to what ought to be done, what would be a fair solution to this problem. After observing the intransigence of the people representing the jukebox industry, the Judiciary Committee just scrapped the bill that was before it, involving $5.00, and came to the conclusion that the only satisfactory solution here was the elimination of this exemption. As Miss Ringer has mentioned, that's carried over in this bill.

Now who opposes this provision? Just the jukebox people. I am amazed at their success, being the only opponents, and having the interest they do. Who supports it? The American Bar Association has gone on record supporting this provision. The State Department is embarrassed at the fact that the great United States, the champion of culture, permits foreign works to be used on jukeboxes with no payment for them while American works used abroad on jukeboxes are being paid for. The National Federation of Music Clubs, the General Federation of Women's Clubs—every impartial body that had addressed itself to this problem—has felt that this law should be changed and that this exemption should be eliminated. I want to compliment the Register of Coyprights on going along with enlightened thinking on this subject.

MEYERS. Ernest Meyers, speaking for the Record Industry Association of America. With regard to the proposal of the music operators to increase the mechanical rate, the views of the Record Industry Association have been lodged with the Judiciary Committee, and I ask you to incorporate that statement, or we shall be glad to resubmit it to you, Mr. Kaminstein.

To correct a statement that may have been unintentionally made by Mr. Allen, I gathered he said that the music operators purchase some 25 percent of all records that are sold in the United States. They do not purchase any more than 25 percent of a specific popular record. If a record sells a million copies and there are 250,000 jukeboxes, then they might buy as many as 25 percent. It is just not correct to say that they purchase 25 percent of all records manufactured in the United States, because the preponderant number of the records made in the United States are not played on jukeboxes.

Ernest S. Meyers' Statement to the House Judiciary Committee

My dear Congressman Celler:

I understand that at the recent hearings held on the subject of the repeal of the Juke-Box exemption contained in Section 1(e) of Title

17, United States Code, a suggestion was made to increase the statutory royalty from 2 cents to 4 cents on each phonograph record part that is used by or upon coin-operated machines.

It would appear that this proposal is based upon the misconception that the record companies manufacture some records expressly for use on juke boxes. This is not so. Record manufacturers hope that each record released will find general acceptance for all purposes, and particularly in the home, which is the principal market for all records. The juke box operators select for their use only such records as they believe will be played frequently, and it often happens that a record will be on the market for several weeks before it is purchased by a juke box operator. Although they are substantial record purchasers, juke box operators buy only a small percentage of all records released, and there is no possible means by which any one can foretell which records they will purchase and which records they will not purchase.

The above proposal would necessarily make the record manufacturing industry a guarantor, insurer and collecting agency of royalties for the holders of copyrights on records played in coin-operated machines. In my opinion, these obligations are unsound, unreasonable and unworkable. In the first place, the record manufacturer does not know whether his records are played in juke boxes. Juke box operators buy records from retailers or wholesalers. They do not buy records from the record manufacturer. Record manufactures do not sell records directly either to consumers or to juke box operators. The record manufacturer, the distributor and the retailer do not know in advance which records may be sold and to whom records may be sold. As a practical matter there are no known mechanics by which the Record Industry is able to identify with any degree of accuracy the specific ultimate purchasers or consumer markets of its products. In the second place, the House Judiciary Committee several years ago considered a similar proposal which would have also required the record manufacturer to put a different or specially colored label on records intended for sale to and use by juke box operators. (Hearings on H.R. 5473, 82nd Congress, Second Session, Serial No. 11, Part 2). It soon became established at those hearings that such a requirement was fundamentally and economically unsound, principally because it would require duplicate facilities for the manufacture of the same records and would seriously burden the wholesale and retail distribution of records because of the onerous requirement of maintaining two inventories of the same record.

The matter of public taste in music is the great risk involved in the record business. It is impossible to identify a hit record in advance of exposure to the public, and consequently the record business becomes largely a business of trial and error. Obviously, therefore, unsaleable inventory represents a more than ordinary hazard in the

record business, and if this risk is doubled through the necessity of supplying with a different label or with some other distinguishing mark a quantity of each record released, then the burden becomes intolerable. The record business is risky enough without adding these further hazards. In sum, in an attempt to solve an alleged injustice, the aforementioned proposals would create and multiply new injustices.

In essence, the proposal does not meet the problem of the performance right, and simply would impose burdens on the whole record industry, thereby affecting the general consumer, and further, in my view, would invite record bootlegging.

Because of the drastic nature of this proposal, I assume that your Committee will give the Record Industry an opportunity to be heard on it if it should be introduced in the 88th Congress.

Yours faithfully,

(S) Ernest S. Meyers.

Schiffer. George Schiffer, N.C.T.A. We have a technical problem with section 12, despite Mr. Finkelstein's representations of the clarity and simplicity of these problems. The coupling of the performance sections with coin operation as a criterion for infringement is a step in a direction which I am sure Mr. Finkelstein would like to follow, just as GEMA is trying to follow it in Germany. That is, ultimately, the imposition of copyright royalties and collections directly in the home.

Now there are coin-operated machines which are operated in the home. Television sets have in the past been sold, and presumably will in the future be sold or leased, on a coin-operated basis. There are other devices similarly utilized. I think that, as a basic proposition, this bill should make it clear that under no circumstances should the home owner, the private individual, pay a copyright royalty other than a royalty which might be incorporated in a physical object such as a book which he purchases.

I believe that the loose language in certain sections of this bill, including section 12 in that reference, lays open a path which we will see followed in the next few years—of attempting to collect on tape recorders and other devices which are owned by individuals who use them for their own amusement and pleasure. This concept is foreign to this country. This concept is foreign to our idea of copyright and the function of copyright, and the way in which the public's right with respect to copyright balances with the author's rights.

Kaminstein. If this language is loose, I suggest that what you've just said is quite broad. [Laughter]

Burton. I wish, of course, to adopt wholeheartedly what Mr. Finkelstein has said. I think there are two points that Mr. Allen made

which would suggest at least a re-examination of copyright by him. By the very constitutional provision which is the basis for copyright, it is, indeed, intended for a special interest—namely, authors—and every provision of the Copyright Act is, of course, special-interest legislation if you will accept the fact that American authorship includes a limited number of our total population.

Now, specifically, in the field of music he speaks of performing rights societies. What he overlooks is the fact that the performing rights societies now represent, according to the best information we have, literally tens of thousands of people in this country who would share the fruits of their labor. So I think we must have regard for this as a much broader concept, keeping in mind, of course, that copyright, as is the patent law, by its nature is special-interest legislation.

Now one further word on the subject of equity. The hearings that have taken place over the years on jukebox bills have given everyone a fair shot at stating their views. Therefore, I do not subscribe to the proposition that there has been no opportunity for the public to be heard. As a matter of fact, many public organizations—federations of music clubs, women's clubs—have supported elimination of the jukebox exemption.

And I would assume, after having heard some of the statements made here since Monday, that when this bill reaches that fine day we look forward to, there will also be some public hearings. I don't think that Mr. Kaminstein would just have it introduced on the floor of Congress and that it would be passed without hearings. I think that Mr. Allen's point is, indeed, that of the true special pleader. I believe that Mr. Finkelstein's point, and the point which I have to some degree reiterated, is, indeed, the public-interest point of view.

SCHULMAN. Mr. Chairman, I hope you'll forgive me if I rise at this juncture, not to speak on the bill, but to speak about some of the statements which have been made concerning the assistance given by the American Bar Association Committee to the Register, his Office and Congress in trying to formulate a bill.

I am the Chairman of Committee 304. I don't have to defend the legal profession; I just want to explain how Committee 304 has operated. It has not operated *in camera*. It has not functioned as a secret organization. It hasn't been restricted to a small group. Over seventy people engaged in practicing law, in all branches of the law, have participated in the work of the Committee this year.

We are not all representatives of predatory interests. Mr. Rosenfield is a member of that Committee; he represents the educational group. Mr. Aleinikoff is a member of that Committee or a participant in our work; he represents educational television. We have amongst us others who are law professors—Professor Derenberg of N.Y.U., Professor Nimmer of California, Professor Mueller of California, are

examples—who represent nobody but their own consciences and their own belief or what is good for the public interest.

As for the private lawyers, those in private practice, I am proud to say that they are upstanding citizens, representative of all groups. I myself have the privilege of being consultant to the Christian Science Church on copyright matters, as well as a representative of other private interests—and by "private interests" I mean magazine publishers, authors, composers. I have done that kind of work during most of my professional life.

Now the difference between us and some of the people who come here and plead a special interest is that we have had a wider and broader experience. We've had wider experience than the people who think only in terms of the teaching profession. We've had wider experience than those who think only in terms of a library activity. And because we've had that wider experience, we have a greater appreciation of what is good for the public; what is good for the public is good for our clients in the overall picture. Our clients do not live in a vacuum.

We were helpful in formulating and securing the adoption and the ratification of the Universal Copyright Convention, not because we were trying to help private interests. We thought it was good for the country. I was proud to be a member of the delegation, as were Sydney Kaye, Ed Sargoy, and Herman Finkelstein. We labored there in the public interest.

I wish that, in thinking of the work of Committee 304, it would be remembered that we in turn all realized that we are members of the public. I lecture, I teach, I write, associated with the work of educational institutions such as the City College, and Columbia, of both of which I am a graduate. We do not think in terms of selfish predatory interests in these areas; we think in terms of what is good for the entire community.

KAMINSTEIN. I find that we will have to adjourn by 12:15, and I will now ask for any comments on sections 7, 9, and 10.

ANELLO. The National Association of Broadcasters is against the extension of copyright protection to records unless this protection is limited to the making of copies for the purpose of resale, rental, lease, or lending. As Miss Ringer stated, this bill, while giving protection to record companies, will not permit a broadcaster to make what is termed an ephemeral recording. We need the right to make these recordings because without them the whole face of broadcasting would have to be changed. Our reason for this is that, when a radio station broadcasts a record, it is helping not only the authors but also the record manufacturers. It is through broadcasting that songs and particular records become popular. This is why so many stations receive records free of charge.

As a matter of fact, as I read the bill, it would not only preclude radio stations from making copies of records solely for the purpose of retransmission, but I think the bill would preclude a home owner from making a recording that he hears over a radio station. This, I believe, would be encompassed within some of the exclusive rights to be given to record manufacturers. Now I know that record manufacturers would have no intention of prosecuting a claim against these people. I also feel reasonably certain that record manufacturers do not wish to deny to broadcasters the right to make re-recordings. However, I don't think that $250 minimum statutory damages should be left at the discretion or the mercy of any particular individual. The law should spell out these rights explicitly.

DIAMOND. I represent London Records, Inc. I won't attempt to answer Mr. Anello at this point, but I have a different comment to make on section 10, which also would refer back to section 5(a)(4).

It will have been noticed that the right of performance is specifically denied under section 10(a). This puts sound recordings in a different category from all other types of works which, for all practical purposes, come in the same general group. The new bill recognizes the fact of life that sound recordings are important today and would provide copyright protection for them, but it would not provide for a performing right in what the bill calls "phonorecords" or, more precisely, in the underlying work which is called the "sound recording."

We all know that, when somebody buys a book which contains the text of a dramatic work, he does not buy the right to perform that play publicly. When somebody buys the score of a musical composition, he does not buy the right to perform that work publicly. That is a separate intangible right which remains after the sale. I see no reason why, in simple logic, when anybody buys a phonorecord of a sound recording, he should obtain the right to perform that sound recording.

KAMINSTEIN. I think we are back to the question that Mr. Evans raised earlier. I would like to say only that this was done quite deliberately, and that we have heard very little comment or discussion from the record industry on the suggestion you have made.

KARP. Mr. Kaminstein, Mr. Diamond's suggestion is based on the premise that "heads I win, tails you lose." He would like to have the benefits of a compulsory license provision to the extent that it permits the record company to use an author's work without his consent. He then wants to move one step further and exercise performance rights, and control performance rights, and interfere with the composer's control of his performance rights.

Now there would be no objection, I think, to providing for the performance right in a recording if the creator of the recording had been required first to deal with the composer, and to let the composer decide all of the terms on which he would license a use of his work. In that

event the composer would be able to protect his vital interests in his work. The compulsory license section deprives the author of this right. I think that, so long as we have a compulsory license provision in the copyright act and so long as the creators of recordings, unlike any other users, are permitted to take an author's work without his permission and at a statutorily fixed rate, it ill-behooves them to ask for this special privilege.

GOSNELL. I have been reading and rereading section 7, trying to find out how our libraries may lend books, unless we assume it comes under the wording . . . "dispose of the possession," or . . ., "exhibit that copy publicly by showing it to viewers present at the place where the copy is located." Certainly the language in section 7 is not parallel to section 5(a)(3), and I find difficulty in justifying the long-established procedures of libraries in lending and occasionally renting books, or collecting fines on overdue books. May I ask for a clarification there?

KAMINSTEIN. It seems to me that you certainly have that right now, and there was no intention to affect that situation. In fact, I think that, as Mr. Karp has pointed out, there is no lending right in this bill.

MARKS. Isabelle Marks, Decca Records, Inc. I want to go on record as concurring with Sidney Diamond's remarks. I believe that we are now faced with the situation in which we have a Neighboring Rights Convention which the whole of the United States has wanted to put under the rug for a long time. Now that it is in effect, and will affect the record industry to such a great extent, there should be some consideration given to the right to control the public performance of records in this country.

KAMINSTEIN. We have four minutes to go.

STEINBERG. I have had some experience in the record industry and also represent a few record companies, and I should like to concur and second the remarks made both by Mr. Diamond and by Miss Marks. Merely repeating them will not add to the weight of them, but I do believe they are correct and I second them wholeheartedly.

MILLER. Morton Miller, Kapp Records. I also want to concur and, without repeating, say that this has been a discussion which I think has been long overdue. I concur completely with Mr. Diamond and Miss Marks in the remarks that they have made.

KELLMAN. I believe that the idea of the record people of being able to acquire a compulsory license for the manufacture of records, and then to manufacture the record and thereby acquire the performing right, is a fantastic concept. The idea of having the compulsory license is purely so that record companies cannot exclusively dominate the possession of musical compositions for that purpose. That is the only purpose of it. There is no purpose behind the compulsory license, directly or indirectly, to accord to companies any performing rights, nor is there any reason why they should have such performing rights.

The record industry people have claimed that the existence of the compulsory license in its present form has caused the industry to thrive, and they have bitterly opposed its elimination. I don't think that they can now say that they now require something in addition: the performing right. Certainly the acquisition of a performing right under compulsory license would be tantamount to depriving the authors of the music and the publishers of the music of tremendous sources of revenue. I do not think any such right has ever been contemplated by the copyright law, and I do not think any such right should ever be contemplated.

KAMINSTEIN. Mrs. Linden, for one minute.

LINDEN. Well, no one can say I get preferential treatment.

KAMINSTEIN. I have just had fifteen minutes of this morning's meeting taken away from me by the management, so I sympathize with you.

LINDEN. I was interested in Isabelle Mark's comment, and the concurrence of the remaining members of the record industry who spoke up in that regard. Miss Marks used the phrase "neighboring rights." This is the first time that I have been made aware that the purpose of sections 10 and 11 was to give recognition to "neighboring rights" in our copyright law.

I had previously been assured, on raising the question, that neighboring rights was not to be introduced *sub rosa* or directly into our copyright law. If section 10 in any way confers neighboring rights, then I submit that section 10 ought to be deleted and the subject of neighboring rights considered separately.

KAMINSTEIN. I thought I had assured the meeting this morning that this did not introduce "neighboring rights" into the bill, unless you interpret "neighboring rights" as anything affecting records. This provides for a dubbing right. It does not provide a performance right, which is the basis of neighboring rights. I see no purpose in getting into that hassle again.

I'll conclude now and, facilities permitting, will start promptly at 2:30.

AFTERNOON SESSION

KAMINSTEIN. Mr. Anello has asked for another minute to speak on section 10. Then I would suggest that anyone who wants to file additional comments on this point send them to us. Is Mr. Anello here? Well, I will give him the opportunity to speak a little later. I have another request to speak from Harry Rosenfield.

ROSENFIELD. Mr. Kaminstein, I am grateful to you for permitting me to make an observation concerning an exchange made earlier this morning relative to the American Bar Association committee. As one of the people who is a member of that committee and bespoke the in-

terests of education, I want this body, its Chairman, and its various members to know that I have been personally treated with the utmost consideration. I have been given every opportunity, written and oral, to express my view—albeit, I must confess, unsuccessfully, but that is part of the process. I have never been given more opportunity to express a view than by that body, and I want to express public appreciation for it.

I must say, however, that although the educational groups—and we think that they're quite representative of education in America—did have an opportunity to be heard through the courtesy accorded to me, I still think that, for whatever reason I do not know, there were many other groups of equal importance (such as the scientific community and the library community) which did not have that opportunity. But, so far as the educational group is concerned, I want publicly here to express to John Schulman and his colleagues our appreciation for the opportunities we have had to express ourselves thoroughly. Thank you, John.

KAMINSTEIN. I think some of that may be due to the fact that there are relatively few librarians or scientists who are also lawyers and thus members of the American Bar Association. We have tried to invite representatives of both of these groups to the Panel meetings. Of course, one difficulty is that many of these representatives are so busy they can't devote as much time to this problem as members of the copyright bar.

Before going on to the next group of subjects, which are covered in sections 6, 8, and 13, I have also been asked to give Mr. James Coleman, who represents the Christian Science Church, an opportunity to present a proposal which has been presented to the A.B.A. but which has not yet been presented to this Panel.

COLEMAN. Thank you, Mr. Chairman. Mr. John Peterson is the General Counsel of the Church; I would like to submit a proposal, though.

Revision, I think, already recognizes the constitutional religious rights by allowing the use of certain copyrighted works during religious services; that's as outlined in section 8(3). The purpose of my appearance is to recommend the inclusion of an additional clause in section 19, which clause in my opinion supports the same basic constitutional principle. The clause I refer to would be added to section 19 as subsection (c). I will read the clause first and then discuss it.

Section 19 is entitled "Pre-emption with respect to other laws." My hope is that this proposal will be introduced as subsection (c), reading as follows:

Nothing in this title interferes with or limits the free exercise of an individual's religion, therefore, the term of copyright of any religious textbook, whether the copyright is in a work created before January 1, 1967, or after,

endures for a term consisting of the life or existence of the religious organization whose principles are presented therein.

All religions would thus be included in that provision.

I would also like to suggest amending section 54—the section which is entitled "Definitions" and which will come first in the revised bill—to add a definition of "religious textbook" as follows:

A religious textbook is a literary work containing a presentation of the principles of a religion, and used as a basis of instruction or to present and teach its doctrine.

I would just like to make a few comments on the reasonableness of this clause and the reason for including it, because it may sound at first as if it confers some special preference or right. In truth it appears to us that in copyright, since the Statute of Anne in 1709, legislative bodies have assumed and have been sustained in their power to deprive an individual of his common law right to published literary works after a stipulated period of copyright protection. The Constitution of the United States gave the same power to Congress to restrict ownership of literary works for "limited times." There is no authority, though, for time limits on individual's religious freedom, as the first amendment specifically prohibits Congress from passing any law that would interfere with the free exercise of an individual's religion.

Webster's *New Collegiate Dictionary* defines the word "textbook" as "Any manual of instruction; a book containing a presentation of the principles of a subject, used as a basis of instruction."

A book playing such a vital part in the denominational activities of a religion must retain its integrity and its purity in order for an individual to correctly practice his religion. There are perhaps many religions which use textbook instruction in the presentation of their principles, but I should like to take for an example the one which I am best acquainted with: Christian Science. This textbook, "Science and Health with Key to the Scriptures," by Mary Baker Eddy, along with the King James version of the Bible, has been ordained according to the church rules, the Church Manual, as a pastor. In fact, it's the only pastor to preach for the church at all church services; it's read at every Christian Sciences Church service on Sunday that "the Bible and the Christian Science textbook are our only preachers." ("Christian Science Quarterly")

Because of of this dual capacity of "Science and Health," namely, a textbook and an ordained preacher, it occupies a unique position necessary to the free exercise of the Christian Science religion. Scriptural texts, along with correlative passages from the textbook, comprise the only sermon that is preached in a Christian Science Church. There are no ministers or clergymen of any type; there are just readers that are elected to read from the books. This type of a sermon, where the books are the sole preacher, constitutes for Christian Scientists (and

I am quoting now from the "Christian Science Quarterly"), "a sermon [which they feel is] undivorced from truth, uncontaminated and unfettered by human hypotheses, and divinely authorized."

A law that would sanction depriving a religion of the integrity of its pastor after a limited period by permitting its revision and alteration by those of differing views clearly would directly interfere with an individual's religious freedom. A preacher, be he rabbi, priest, or minister, who has had half-truths—by statements taken out of context, by distortion, by misrepresentation, and so on—attributed to his sermon would certainly claim direct interference with the individual religious rights of his congregation. And we feel that the same situation would be possible if the present copyright revision put religious textbooks that were indispensable to a religion in the same category as all other books, thereby throwing them into public domain during the life or existence of the religion.

Though the effect on one religion only has been dealt with in some detail, the proposed provision would uphold the individual religious liberty of all denominations using the written published word to present and teach its tenets without distortion.

I would like to make another point as a matter of national policy: that religion, I think, today stands as the greatest deterrent to, and the chief challenger of, Communism. Everyone knows the use that Communism makes of propaganda and of the great art of distortion, so it seems to me that the times dictate the importance of not allowing a religion through its religious textbooks to be falsely propagandized, misrepresented, or distorted. In religion's purity lies its strength, and I think our forefathers have guaranteed this by the first amendment.

I could read to you many cases—starting out from the *Bible Reading Cases* on back (and even forward)—that I think would substantiate the position that the Supreme Court has revealed that its main purpose in determining any of the cases under the first amendment is to secure and assure individual religious liberty and freedom. I would just like to read a short quotation from Mr. Justices Harlan and Goldberg in the 1963 *Bible Reading Cases.* They said:

> The basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attaining that end.

One more thought may be presented to you, and that is on the question of limitation. Just briefly to touch on that, we submit that the limitation placed on religious textbooks for the life or existence of the religious organization meets the constitutional requirement of Article 1, section 8. Of course, there are no cases on the special words "limited times," and neither do the commentaries by the framers of

the Constitution on its drafting offer any assistance since the committee proceedings of the Constitutional Convention were conducted in secret and the final form of the copyright clause was approved without debate. (Madison, *Debates in the Federal Convention of 1787.*) (It is certainly interesting how there is no secret about this present revision going on.)

But Webster, in his *New Collegiate Dictionary*, states that "limit implies a point in . . . time . . . beyond which a person or thing cannot go or is not permitted to go." The "limited," or point in time, beyond which the copyright protection would not be permitted to go is the termination of the human existence of the religious organization copyrighting the textbooks. Exactness of termination date is not a criterion for limitation with a religious organization any more than it is for, say, the granting of copyright for the life of a human plus fifty years. The sole test is that there is a point beyond which the copyright is not permitted to go.

Now, in conclusion, as a matter of precedent, it's interesting to note that the English precedent recognized the importance of religious textbooks by authorizing a perpetual copyright to the King James Authorized Version of the Bible and the Book of Common Prayer. Historically, when printing and copyrighting reached the stage where it was considered in England as a matter of State, the Crown—as the religious head—retained the exclusive right to print and give patents for the printing of these two books to the Universities of Oxford and Cambridge.

Briefly, in summarizing, it seems to me that this proposal can certainly do injury to no man at all and be a blessing to all mankind. And I sincerely hope that the Register considers including it in his final draft in January.

I have prepared a legal brief covering the pertinent cases in regard to the proposed religious textbook amendment and I would appreciate it if you would make the brief part of my written statement. Thank you.

KAMINSTEIN. As I have said, this proposal has not been presented to the Panel before. Are there any comments? If not, we will include Mr. Coleman's full statement in the transcript of this meeting and will entertain written comments.

STATEMENT OF JAMES J. COLEMAN IN REGARD TO A PROPOSED RELIGIOUS TEXTBOOK AMENDMENT TO THE GENERAL REVISION OF THE COPYRIGHT LAW

The purpose of my appearance is to recommend the inclusion of a clause in the general revision of the Copyright Law which, in my opinion, is necessary to protect its complete constitutionality. The

clause I refer to is one that would prohibit religious textbooks necessary to an individual's free exercise of his religion from being legislated into public domain during the life or existence of the religious organization.

Since the Statute of Anne, in 1709, legislative bodies have assumed and been sustained in their power to deprive an individual of his common law right to published literary works after a stipulated period of copyright protection. (*Millar* v. *Taylor*, 4 Burr. 2303, 2345, 98 Eng. Rep. 201, 224 (K. B. 1769), and *Donaldson* v. *Beckett*, 2 Bro. 129, 1 Eng. Rep. 837 (1774)). The Constitution of the United States gave the same power to Congress to restrict ownership of literary works for "limited times." There is no authority, though, for time limits on an individual's religious freedom, as the First Amendment specifically prohibits Congress from passing any law that would interfere with the free exercise of an individual's religion.

Webster's New Collegiate Dictionary defines the word "textbook" as "Any manual of instruction; a book containing a presentation of the principles of a subject, used as a basis of instruction."

A book playing such a vital part in the denominational activities of a religion must retain its purity in order for an individual to correctly practice his religion. There are perhaps many religions who use textbook instruction in the presentation of their principles, but I shall take for an example the one with which I am best acquainted—Christian Science. This textbook, "Science and Health with Key to the Scriptures," by Mary Baker Eddy, along with the King James version of the Bible, has been ordained by the Church Manual as the only pastor to preach for the church at all church services. Because of this dual capacity of Science and Health, namely, a textbook and an ordained preacher, it occupies a unique position necessary to the free exercise of the Christian Science religion. Scriptural texts, along with correlative passages from the denominational textbook, comprise the only sermon each Sunday in every Christian Science church throughout the world. This type of sermon, where the books are the sole preacher, constitutes for Christian Scientists "a sermon undivorced from truth, uncontaminated and unfettered by human hypotheses, and divinely authorized." (Explanatory Note, *Christian Science Quarterly*)

A law that would sanction depriving a religion of the integrity of its pastor after a limited period by permitting its revision and alteration by those of differing views clearly would directly interfere with an individual's religious freedom. A preacher, be he rabbi, priest, or minister, who had half-truths—by statements taken out of context, by distortion, by misrepresentation, and so on—attributed to his sermon would certainly claim direct interference with the individual religious rights of his congregation. The same situation would be possible if the present copyright revision put religious textbooks in the same cate-

gory as all other books, thereby throwing them into public domain seventy-five years after first publication in many cases.

Though the effect on one religion only, namely, Christian Science, has been dealt with in some detail, the proposed provision would uphold the individual religious liberty of all denominations using the written published word to present and teach its tenets without distortion.

Religion stands today as the greatest deterrent to, and the chief challenger of, the growth of Communism. The times dictate the importance of not allowing a religion through it religious textbooks to be falsely propagandized or misrepresented. In religion's purity lies its strength, and our forefathers have wisely guaranteed in the First Amendment that no law can be passed to interfere with its purity.

The general revision, as presently introduced, in effect recognizes the basic constitutional principle of religious freedom in exempting from copyright infringement the "performance or exhibition of the work in the course of services at a place of worship or other religious assembly." (Section 8(3)).

With this basic constitutional principle in mind it is clearly apparent that the general Copyright revision must be further revised in such a manner that it will in no way violate the religion clause of the First Amendment. A study of the cases decided by the United States Supreme Court concerning the First Amendment reveals that its main purpose is to secure and assure individual religious liberty and freedom. No matter whether its attention has centered as the main issue on Establishment, or on Free Exercise, the Court has never lost sight of this purpose. Mr. Justices Harlan and Goldberg said in the 1963 *Bible Reading Cases*, *School Dist. of Abington* v. *Schempp* and *Murray* v. *Curlett*, 374 U.S. 203, 83 Sup. Ct. 1560 (1963):

> "The basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attained of that end." (p. 1615.)

To achieve this single purpose it is important to note and remember that the First Amendment contains not just one, but two prohibitions directed to Congress. As Mr. Justices Harlan and Goldberg in the same opinion point out:

> "The First Amendment's guarantees . . . foreclose not only laws 'respecting an establishment of religion' but also those 'prohibiting the free exercise thereof'. These two proscriptions are to be read together, and in light of the single end which they are designed to serve."

The Supreme Court has interpreted in the cases of *McCollum* v. *Bd. of Educa.*, 333 U.S. 203 (1948), *Engel* v. *Vitale*, 370 U.S. 421 (1962) and the *Bible Reading Cases* (supra), the Establishment Clause to mean that any law passed by Congress which has as its primary pur-

pose or effect a religious goal, aim, or result rather than a secular one, is unconstitutional as an establishment of religion in violation of the Establishment Clause. Under this concept, Congress is required in its legislation to maintain a position of neutrality, neither preferring nor disparaging (interfering with) any religion. This secular purpose test or requirement of neutrality of the Establishment Clause finds its best expression in *Bible Reading Cases*, *Schempp* and *Murray*, when Mr. Justice Clark, speaking for the majority, said: (p. 1571)

> ". . . this Court . . . has consistently held that the clause (Establishment Clause) withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

Concerning the Free Exercise Clause, Mr. Justice Clark continues:

> ". . . the Free Exercise Clause . . . withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion."

A brief look at past cases concerning the Free Exercise Clause will illustrate how careful the Supreme Court has been in making sure that Congress or a state made no law prohibiting the free exercise of religion. Beginning in 1918 in the *Selective Draft Law Cases*, 245 U.S. 366 (1918), the Supreme Court held that exemptions to the selective draft laws for ministers and theological students and provisions relieving members of certain pacifist religious sects from combatant duty, were not laws "respecting the establishment of religion," but were provisions preventing the selective draft laws from prohibiting the free exercise of religion and were therefore certainly constitutional.

In *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), a Connecticut law prohibiting religious solicitation without a license was found unconstitutional as a law prohibiting the free exercise of religion for those who practiced their religion by means of solicitation. Concerning the Free Exercise Clause the Court in *Cantwell* said: (p. 303–04)

> "The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by the law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion."

In *West Va. Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943), a school board resolution making it compulsory for all children to salute and

pledge the American flag each morning was held unconstitutional as a law prohibiting the free exercise of religion.

A requirement of a declaration of a belief in the existence of God as a prerequisite for state office was found a violation of both the Establishment and Free Exercise Clauses in *Torasco* v. *Watkins*, 367 U.S. 488 (1961).

In *Commonwealth* v. *Arlan's Dept. Store, Inc*, 357 S.W. 2d 708 (Ky. Ct. App. 1962), appeal dismissed, 371 U.S. 218 (1962), the Supreme Court in a memorandum decision upheld the constitutionality of exemptions from the requirement of the Kentucky Sunday closing laws for those who observe a Sabbath other than Sunday, as provisions protecting the free exercise of religion. The notion that such exemptions were establishments of religion in violation of the Establishment Clause was rejected.

Finally, in the most recent case decided by the Supreme Court on the Religion Clause, *Sherbert* v. *Verner*, 374 U.S. 398 (1963), the Supreme Court held that an individual (a Seventh Day Adventist) could not be disqualified from receiving unemployment benefits under the South Carolina Unemployment Compensation Act simply because religious scruples prevented her from working on Saturday. The Court reasoned that the law would be unconstitutional as a prohibition of the free exercise of religion if it was intended or interpreted to apply so as to make her ineligible for the benefits because of her religious beliefs and practices. As in the *Commonwealth* case (supra), the claim that such exemption or application was an establishment of religion was properly rejected.

It is clear that for the present Copyright Law, or any revision of it, to avoid violation of the First Amendment, it can be neither a law "respecting the establishment of religion," nor a law "prohibiting the free exercise thereof." Applying the secular purpose test of the Establishment Clause to the present Copyright Law and proposed religious textbook revision, the legitimate secular purpose is clear. The Article of the Constitution which authorizes the granting of copyright states it is "to promote the progress of science and useful arts." The requirement of a primary secular effect is achieved by the Copyright Law through the protection of private property rights for a limited period by means of criminal prohibition of their violation, and the promotion of the general welfare and public policy by means of the passage of a work into public domain.

The introductory statements pointed out how enactment of general revision without religious textbook consideration would operate against an individual in the practice of his religion. Mr. Justice Clark in the *Bible Reading Cases*, *Schempp* and *Murray*, said: (p. 1571)

"The Free Exercise Clause . . . withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion.

> Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." (Emphasis added.)

The argument may be presented that the constitutional proscription against a law prohibiting the free exercise of religion is not absolute. This is true. There are two well-defined exceptions to the protection afforded the free exercise of religion. (See *Sherbert* v. *Verner* at p. 1793.) Both find their basis in overwhelming public policy and general welfare considerations. The first is that, where an individual's exercise or practice of his religion is such that it is a substantial threat to public safety, peace, order or good morals, that exercise or practice is subject to governmental regulation in spite of the fact that such regulation is a restriction or prohibition of the free exercise of religion. The Supreme Court in *Reynolds* v. *U.S.*, 98 U.S. 145 (1879), applied this exception and refused to condone and protect the practice of polygamy, even though it was a religious practice, because of its immorality and offensiveness to public order and morals.

The second exception is that governmental restriction of an individual's exercise or practice of his religion is permissible if the restriction of or burden on the exercise of religion is incidental or indirect and if it can be justified by a compelling governmental interest in the regulation of an area (or subject) within its constitutional power to regulate. The Supreme Court applied this exception in the *Sunday Closing Law Cases*. It found that the Sunday closing laws of Maryland, Massachusetts, and Pennsylvania were expressions of a compelling governmental interest in providing a uniform day of rest for the welfare of the people and that any incidental, indirect or, in reality, financial burden or inhibition they placed upon the free exercise of religion of those who did not happen to observe Sunday as the Sabbath and a day of rest was justified by the government's compelling interest in promoting the welfare of the people as a whole.

Neither of these exceptions applies to the prohibition that the Copyright Law without the provision for religious textbooks places on an individual's free exercise of religion. The first exception clearly does not apply. An individual's exercise of his religion by means of a textbook without which he could not practice his religion cannot be said by any reasonable person to be of such a nature as to constitute a substantial threat to public safety, peace, order, or good morals. As to the second exception, we have already discussed in detail the direct bearing a textbook has on an individual's religious rights.

An examination of the decisions of the Supreme Court, in which a compelling government interest and the Free Exercise Clause have competed, reveals that only in the *Sunday Closing Law Cases* has the compelling government interest prevailed, and in that case only be-

cause of the indirectness and financial nature of the burden on the free exercise of religion.

In all the other cases, the Supreme Court has found the protection of the free exercise of religion of overriding and primary importance. For example, the claims of compelling governmental interests in achieving public good such as the attainment of local revenues in *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943), the promotion of public peace in *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), the restriction of the use of public parks for recreation in *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953), and the promotion of national unity in *West Va. Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943), could not justify the inhibitions or impositions they placed on an individual's free exercise of religion. The inhibitions that general revision in its present form places on an individual's free exercise of religion by making possible the adulteration of the textbook without which he cannot practice his religion cannot be justified. The simple method of avoiding such prohibition of the free exercise of religion is to include in the revision of the Copyright Law the proposed provision for religious textbooks.

It may be argued that the religious textbook provision is an establishment of religion designed to aid and benefit religion and that it has no secular purpose or effect but, rather, a religious purpose and effect, and therefore is unconstitutional as a violation of the First Amendment. This argument is based on a misunderstanding of the basic purpose and meaning of the First Amendment and its two religion clauses, as well as the decisions of the Supreme Court upon these clauses. In the *Bible Reading Cases* of *Schempp* and *Murray*, Mr. Justice Clark set out the secular purpose and effect test as the meaning of the Establishment Clause. Mr. Justices Harlan and Goldberg, in a concurring opinion, emphasized that the basic purpose of both the Establishment Clause and the Free Exercise Clause is to work toward the single goal of promoting and assuring the fullest possible scope of religious liberty and tolerance for all.

It is in the concurring opinion in this same case by Mr. Justice Brennan that the relationship of the Establishment and the Free Exercise Clauses in their attempt to fulfill their common purpose was clearly enunciated. Said Mr. Justice Brennan:

> *"Nothing in the Establishment Clause forbids the application of legislation having purely secular ends in such a way as to alleviate burdens upon the free exercise of an individual's religious beliefs.* Surely the Framers would never have understood that such a construction sanctions that involvement which violates the Establishment Clause. Such a conclusion can be reached . . . only by using the words of the First Amendment to defeat its very purpose." (p. 295—Emphasis added.)
>
> *"I cannot . . . accept the suggestion, . . . that every judicial or administrative construction which is designed to prevent a public welfare program*

from abridging the free exercise of religious beliefs, is for that reason, ipso facto, an establishment of religion." (p. 303—Emphasis added.)

"Such a construction would . . . require government to impose religious discriminations and disabilities, thereby jeopardising the free exercise of religion, in order to avoid what is thought to constitute an establishment." (p. 302)

In essence, what Mr. Justice Brennan has made clear is that in legislation having a secular purpose and effect, governmental accommodations, exemptions or provisions which are designed to protect the free exercise of religion are not violations of the Establishment Clause. The cases decided by the Supreme Court bear out the truth of this statement. For example, the *Selective Draft Law Cases* involved exemptions to the selective draft laws for ministers and theological students and provisions relieving members of certain pacifist religious sects from combatant duty; *Commonwealth* v. *Arlan's Dept. Store, Inc.*, involved exemptions from the requirement of the Kentucky Sunday closing laws for those who observe a Sabbath other than Sunday; and the most recent case decided by the Supreme Court on the Religion Clause, *Sherbert* v. *Verner*, involved the application of the South Carolina Unemployment Compensation Act in such a way so as not to disqualify an individual from receiving unemployment benefits simply because religious scruples prevented her from working on Saturday.

In all these cases the Supreme Court found the exemptions constitutional as provisions or accommodations protecting the free exercise of religion and rejected any claim that they were establishments of religion. In fact, an analysis of all the cases, that is, *McCollum*, *Torasco*, *Engel*, and the *Bible Reading Cases*, held unconstitutional as violations of the Establishment Clause, reveals that each case in reality also involved a threat to the free exercise of religion.

McCollum involved a plan of released time for religious training in the major religious faiths in public schools. The practical effect of this plan was to threaten the free exercise of religion of some of the public school pupils not members of major religious faiths, since the nature of the plan was such that it involved subtle indirect pressures to conform to the prevailing religious beliefs.

Torasco involved the requirement of a declaration of a belief in the existence of God as a prerequisite for holding state office. This requirement was, in effect, a threat to the free exercise of religion since it attempted to force a person to profess a belief or disbelief in any religion.

Engel involved the required recitation in public schools each morning of a non-sectarian prayer written by the New York State Board of Regents; and the *Bible Reading Cases*, *Murray* and *Schempp*, involved state laws requiring the daily reading of the Bible in public

schools. The laws in both *Engel* and the *Bible Reading Cases* were, in effect, threats to the free exercise of religion because, as in *McCollum*, the natures of the requirements were such that they involved subtle pressures on the school children to conform to prevailing religious beliefs. Such uses of the Establishment Clause to implement the Free Exercise Clause are not misapplications of the Clause. Rather, they are in complete harmony with the fulfillment of the single and common purpose of both clauses—that is, to promote and assure religious freedom and liberty for all.

Examining the proposed provision for religious textbooks necessary to an individual's free exercise of his religion in the light of the above principles, we find that it, too, in no way constitutes an establishment of religion (violates the Establishment Clause). Thus, as part of the Copyright Law, the provision does share its secular purpose and effect. But, in addition, the provision has a specific purpose. That purpose is simply to protect the free exercise of religion—to prevent Congress from mistakenly enacting a copyright law which could prohibit the free exercise of religion. This purpose cannot be construed to be an establishment of a religion. To do so would make a mockery of the First Amendment or, in the words of Mr. Justice Brennan, would be "using the words of the First Amendment to defeat its very purpose."

Finally, the limitation placed on religious textbooks for the life or existence of the religious organization meets the constitutional requirement of Article I, section 8, clause 8 that copyright be granted only for "limited times". There are no cases on the copyright clause interpreting the meaning of the words "limited times". Neither do the commentaries by the Framers of the Constitution on its drafting offer any assistance since the committee proceedings of the Constitutional Convention were conducted in secret and the final form of the copyright clause was approved without debate (Madison, Debates in the Federal Convention of 1787, at 512–13 (Hunt & Scott ed. 1920)). Webster's New Collegiate Dictionary states that:

> "'Limit' implies a point in . . . time . . . beyond which a person or thing cannot go or is not permitted to go."

The "limited", or point in time, beyond which the copyright protection will not be permitted to go is the termination of the human existence of the religious organization copyrighting the textbook. Exactness of termination date is not a criteria for limitation with a religious organization any more than it is for the granting of copyright for the life of a human plus fifty years. The sole test is that there is a point beyond which the copyright is not permitted to go.

In conclusion, it is interesting to note the English precedent recognizing the importance of religious textbooks by authorizing a perpetual copyright to the King James Authorized Version of the Bible and

the Book of Common Prayer. Historically, when printing and copyrighting reached the stage where it was considered in England as a matter of State, the Crown—as titular religious head—retained the exclusive right to print and give patents for the printing of these two books to the Universities of Oxford and Cambridge. Their exclusive right to protect the integrity of these religious denominational books by preventing others from printing these works is now well established by jurisprudence. (*Universities of Oxford and Cambridge* v. *Richardson* (1813) 6 Ves. 689. *Manners* v. *Blair* (1828) 3 Bli. (n.s.) 391; *Red Letter Testament* (1900) 17, T.L.R. 1)

The general revision of the Copyright Law under Article I, section 8, clause 8, of the United States Constitution can simply be written without violating the constitutional powers and principles contained in the Bill of Rights (First Amendment) by merely extending the term of copyright for religious textbooks necessary to the free exercise of an individual's religion for the lifetime or existence of the religious organization.

Respectfully submitted,

JAMES J. COLEMAN.

August 4, 1964.

PROPOSED AMENDMENT TO
H.R. 11947—88TH CONGRESS
2d SESSION

A BILL
FOR THE GENERAL REVISION OF THE COPYRIGHT LAW, TITLE 17 OF THE UNITED STATES CODE, AND FOR OTHER PURPOSES.

Amend Section 19, entitled "Pre-emption with respect to other laws," by adding . . . a new sub-section, as follows:

(c) NOTHING IN THIS TITLE INTERFERES WITH OR LIMITS THE FREE EXERCISE OF AN INDIVIDUAL'S RELIGION, THEREFORE, THE TERM OF COPYRIGHT OF ANY RELIGIOUS TEXTBOOK, WHETHER THE COPYRIGHT IS IN A WORK CREATED BEFORE JANUARY 1, 1967, OR AFTER, ENDURES FOR A TERM CONSISTING OF THE LIFE OR EXISTENCE OF THE RELIGIOUS ORGANIZATION WHOSE PRINCIPLES ARE PRESENTED THEREIN.

Amend Section 54 . . . entitled "Definitions", by adding the following:

A RELIGIOUS TEXTBOOK IS A LITERARY WORK CONTAINING A PRESENTATION OF THE PRINCIPLES OF A RELIGION, AND USED AS A BASIS OF INSTRUCTION OR TO PRESENT AND TEACH ITS DOCTRINE

KAMINSTEIN. I will now ask Mr. Anello if he wants to speak to the dubbing provision, section 10.

ANELLO. Thank you, Mr. Kaminstein. I'm sorry that I was late.

I just wanted to address myself briefly to the question raised by the record people regarding performing rights. Since this was not in the Register's draft I did not consider it pertinent to speak to it. However, I would suggest to Mr. Diamond that, while I would agree that if I purchase a play at a bookstore that does not give me the right to perform, I never thought that the right to perform had to be secured from the publisher unless the author of the play himself granted those rights to the publisher.

Secondly, once having secured performing rights from the author. I don't believe that a second performing right would be in order. This is precisely what the record people seem to be seeking. We secure our performing right from the author of the song, and I don't think that justice would be served by also paying a second performing right merely because somebody happened to put a particular piece on a record.

KAMINSTEIN. We now intend to combine the discussion of sections 6, 8, and 13, and I will ask Mr. Goldman to speak to those sections.

GOLDMAN. Section 6 deals with fair use. In the Report of the Register, issued back in July of 1961, it was recommended that the doctrine of fair use, which is now a development of the courts in judicial pronouncements, be confirmed expressly in the statute, although it was recognized that any attempt to define fair use with any precision would not be possible.

Section 6 is our attempt to express in the statute the doctrine of fair use. It differs in the bill from the section in the preliminary draft in two respects. In the preliminary draft the opening sentence said, in effect, that fair use is not infringement. Then it went on in the next sentence to say that, in determining whether a particular use made of a work is a fair use, there were four criteria to be considered, among others, and then listed the four.

In the bill, in the first sentence, we have inserted a phrase saying that fair use "to the extent reasonably necessary or incidental to a legitimate purpose such as criticism, comment, news reporting, teaching, scholarship, or research is not an infringement of copyright." That's an attempt to give a little more guidance as to what is fair use. We think that we have embodied in the provision the doctrine of fair use in about the same manner as it has been developed in the court decisions.

We have dropped out of the bill the words "among others" preceding the four criteria, not with the idea that these were to be the sole criteria, but merely because we assumed it to be understood that "include" here did not necessarily mean that nothing but the four criteria could be considered. Those who suggested at the meetings earlier this week that we insert again "include without limitation"

or "among others" are, I think, suggesting what was the intent, and I suppose the language could be clarified in that respect.

Turning to section 8, this is the section that provides for the limitations on the rights of public performance and public exhibition, and it replaces, in effect, the provision of the present law which limits the right of public performance of nondramatic literary and musical works to public performances "for profit." As indicated earlier, the "for profit" language was dropped from section 5 and the limitations are now specified in section 8. Note that section 8 relates not only to the performance of a nondramatic literary or musical work but also to the exhibition of a pictorial, graphic, or sculptural work. This provision is not in the present law, because the present law doesn't specify the right of exhibition with respect to these works.

The exemptions are stated somewhat differently from the way they were stated in our preliminary draft. The first two exemptions relate to teaching or education. The first one deals with "performance or exhibition of the work by instructors or pupils in the course of face-to-face teaching activities"—that is, in the classroom. The second relates to "performance or exhibition of the work by or in the course of a broadcast or other transmission made for reception solely within nonprofit educational institutions."

We've been asked whether this clause (2) means closed circuit television. I think the answer to the question, as stated, is that it does. If there is room for argument that it might include more, I would say that nobody can assume that it includes more. If there was any thought that it should include more, I would say that the language would have to be changed to accomplish that. In short, I think the effect of clause (2) is limited to closed circuit transmission.

Clause (3) refers to "performance or exhibition in the course of services at a place of worship or other religious assembly." I don't think that needs any further explanation. Clause (4) is the broad catch-all clause which relates generally to performances that are made without any purpose of "commercial advantage and without payment of any salary, fee, or any compensation to the performers, if: (A) there is no direct or indirect admission charge, or (B) the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes . . ." That is very much what we had in the preliminary draft, with one exception. We have made it clear in clause (4) that this exemption relates to performances other than in "a broadcast to the public."

Section 13 in the preliminary draft contained all of the provisions that related to the extent of the broadcasting right and the limitations on the broadcasting right. We have placed most of the substance of what was section 13 in the preliminary draft in section 5 with respect

to specifying what the right is. And, with respect to limiting the right, you will find most of the limitations either in section 5 or 8.

What is left in section 18 are two of the provisions that were formerly in that section of the preliminary draft. The first of these is the exemption of the "communication of a broadcast embodying a performance or exhibition of the work to the private rooms of a public establishment by means of a system of loudspeakers or other devices, unless . . ." (and the exemption would not apply if) ". . . the person responsible for the communication or the operator of the establishment alters or adds to the content of the material included in the broadcast." Second, we have exempted the "reception of a broadcast embodying a performance or exhibition of the work on a single receiving apparatus of a kind commonly used in private homes, unless . . ." (and here again the exemption would not apply if) ". . . a direct admission fee is charged to see or hear the broadcast, or unless the receiving apparatus is coin-operated."

KAMINSTEIN. A number of suggestions have been put forward in the last three days on these provisions, and we would like to consider them after this meeting. However, we would like you to state the propositions in general so that they are made a part of the record of this meeting, and then to amplify them in written statements.

WATTENBERG. Philip Wattenberg, Music Publishers Association. At the risk of being repetitious, I will say again that, with respect to section 6, I am against inclusion of a fair use provision. Fair use to my mind is a judicial concept, not a legislative one, and it cannot be defined in a law. If this provision is included it will mean tests of innumerable uses, some of which will be uneconomical to test, so that you will find rights being waived by inactivity.

If this section is to be included, I suggest that . . . after the words "the fair use of," we insert "a portion of." This would tie in with clause (3), which refers to "the portion." Also . . . I would take out "such as" and insert "of" so that we are limiting fair use to the specific uses there—criticism, comment, news reporting, teaching, scholarship, or research—so as not to have it so broad that we can expect every type of conceivable use being defended as a fair use.

At the present time teachers reproduce copies of entire musical compositions and defend that as being not for profit. In other words, they are bringing over the "profit" limitation from section 1(e) and applying it to other uses. If we are to leave the words "teaching" and "fair use" here, we have got to limit them somehow.

KAMINSTEIN. I had forgotten that Mr. Rosenfield had waived his time before. Would you like to speak now?

ROSENFIELD. Mr. Chairman, my waiver related to section 8. I would like first to discuss section 6. This may come as odd from me, but I would like to compliment the Register for the changes in section

6 because of the special recognition given to the needs of teaching, scholarship, and research, among other areas. This is an important change, in the public interest, and justifies making "fair use" a statutory doctrine.

However, it would be a serious mistake for anyone to believe that such specification of "teaching" in this section either alone or in conjunction with section 8 meets the needs of education under the copyright law. Apart from such comments as I will make on section 8, and other comments, section 6 raises three problems for us, language-wise as well as policy-wise. Mr. Goldman has already referred to one: the limitation to the four specified criteria. We would feel more comfortable with the insertion of "among others."

But there are two other factors, language-wise. We are not at all sure whether fair use, as judicially interpreted now, would not be wider than the limitation of the language "to the extent reasonably necessary . . . to a legitimate purpose." If this be true, then section 6 would place education in a worse situation than prevails under existing law.

The fair use doctrine has been developed in the factual context of commercial rivalry between commercial competitors. Thus, the entire framework of fair use under section 6 is wholly inapplicable to education's use of copyrighted material for completely nonprofit purposes.

What education needs is a statute which will enable teachers easily to know when they can use copyrighted materials. Proposed section 6 does not give this certainty, but means that a teacher in preparing every single lesson must either consult a lawyer or act at her risk. The fair use doctrine both under present law and proposed section 6 not only fails to give assurance when copyrighted matter can safely be used, but also fails to give assurance as to how much can be copied or how many copies can safely be made. If fair use can be the controversial bone of contention that it is among sophisticated copyright lawyers, in this room and elsewhere, is it any wonder that teachers find less practical value in the application of fair use in education than might be deemed to be the case?

I would like to make it clear that "fair use" is, of course, better than nothing, and that we are in favor of the concept and additions in section 6; but its meaning under both the present law and the proposed section 6 is still uncertain and risky in individual circumstances. Therefore, while we applaud the Register's recognition of education, scholarship, and research as elements of "fair use," and favor section 6 as far as it goes, we believe that the doctrine as stated in the section is inadequate, alone and without the concept of "for profit" now in the law, to meet the public interest as expressed in the needs of education, scholarship, and research, and may conceivably be more restrictive than the present law.

One final observation: "fair use" is an affirmative defense in a law suit, and the one claiming its protection has the burden of proof. The competitive commercial effect of an alleged "fair use" is the most decisive criterion. Such proof is peculiarly in the hands of the copyright owner, and consequently he should have the burden of proof. Therefore, we propose for your consideration, Mr. Kaminstein, an added provision to section 6, as follows: "*Provided*, that non-commercial use by a nonprofit educational institution or organization for nonprofit educational purposes shall be presumed to be such 'fair use' unless the contrary be proved."

With your permission, I should like to submit my entire statement for the record. I should also like to have time for section 8 when that's up for discussion.

Section 6 ["Fair Use"]
H.R. 11947
S. 3008

Statement by

AD HOC COMMITTEE ON COPYRIGHT LAW REVISION

Before

Panel of Consultants to Register of Copyrights
New York, N.Y., August 6, 1964

Submitted by

Harry N. Rosenfield, Esq.,
Washington, D.C.

The Register is to be complimented for the changes in section 6, "fair use," because he has given special recognition to the needs of "teaching, scholarship, or research," among other areas of use of copyrighted materials. This is an important change, in the public interest.

However, it would be a serious mistake for anyone to believe that such specification of "teaching" in the "fair use" section meets the needs of education under the copyright law. Elsewhere, in connection with Sections 5 and 8, the Ad Hoc Committee on Copyright Law Revision expressed its view on this subject. Furthermore, as written, Section 6 raises the question whether "fair use" as now judicially applied is to be subject to a narrower series of criteria, and is to be limited further by the language "to the extent reasonably necessary" and "to a legitimate purpose." To the extent these possibilities prevail, Section 6 would place education in a worse situation than prevails under existing law.

"Fair use" now is, and under Section 6 will continue to remain, a judicial determination. This doctrine has been developed in the factual context of commercial rivalry between commercial competitors.

Thus, the entire framework of "fair use" under Section 6 is wholly inapplicable to education's use of copyrighted material for completely nonprofit purposes. It is prejudicial error to attempt merging education's nonprofit "fair use" activities within a completely commercial doctrine.

What education needs is a statute which will enable teachers easily to know when they can use copyrighted materials. The proposed Section 6 does not give any such certainty, but rather means that a teacher must either consult a lawyer before preparing each lesson or risk a law suit, since good intentions or ignorance are no excuse under the statutory damages section. The "fair use" doctrine as contemplated in Section 6 not only fails to give assurance of *when* copyrighted matter can be safely used by teachers, but also fails to give any assurance whatsoever as to *how much* may be safely used. When the Register, in his tentative draft report (April 1961) cited, as an example of "fair use" under the present law, "reproduction by a teacher or student of part of a work to illustrate a lesson," the American Book Publishers Council took exception and said that "the doctrine of fair use was never intended to cover" such use which "at the least . . . would seem to be highly controversial." In the 1961 Report, the Register changed the above draft statement so as to read "small part" for "part". If this kind of highly technical argument can be a bone of contention among such sophisticated copyright lawyers, is it any wonder that teachers find little practical value in the application of "fair use" in education?

The Register has officially advised people that

> "When it is impractical to obtain permission, use of copyrighted material should be avoided unless it seems clear that the doctrine of 'fair use' would apply to the situation. If there is any doubt or question, it is advisable to consult an attorney." (Copyright Office, Circular 20, paragraph 5., June 1962.)

Since the Register has himself said that "the line between 'fair use' and infringement is unclear and not easily defined" (ibid, paragraph 3.), how can the classroom teacher be expected to know when "it seems clear that the doctrine of 'fair use' would apply to the situation"? In actual operation "fair use" is only of minimal value for the classroom teacher.

Therefore, while "fair use" is of course better than nothing, its meaning under either the present law or the proposed Section 6 is still uncertain and risky in individual cases. Consequently, while we applaud the Register's recognition of education, scholarship and research as elements of "fair use," we believe that the doctrine as stated in Section 6 is inadequate to meet the public interest as expressed in the needs of education, scholarship and research, and may even be more restrictive than present law.

One final observation: "fair use" is a defense in a law suit, and the one claiming its protection has the burden of proof. As a practical matter, this is an unfair and unreasonable burden to place on education. The competitive commercial effect of an alleged "fair use" is the most decisive criterion, according to the Register's 1961 Report to the Congress, p. 24. The data relevant to such proof is peculiarly in the hands of the copyright owner, and consequently the burden of proof should properly be placed on him by an *added* provision as follows:

> "*Provided* that non-commercial use by a nonprofit educational institution or organization for nonprofit educational purposes shall be presumed to be such 'fair use' unless the contrary be proved."

KAMINSTEIN. We'll try to give you another opportunity to speak on section 8 in just a little.

OLSSON. Probably many others like myself have sat this morning and decided to remain silent with respect to points that we've gone over once or more in the past. I know in my own case I had thought of commenting several times, and then realized that I had made the same speech on earlier occasions to the same audience. However, in the particular case of section 6, I feel I should say something, even though I have said substantially the same thing before.

Four criteria are set forth in section 6 with respect to whether the use is a fair use. The fourth is one that I have objected to on many previous occasions: "... the effect of the use upon the potential market for or value of the copyrighted work." It seems to me that the arguments I have made before have gained additional force since the "legitimate purpose" clause has been added here. Looking at the "legitimate purposes" enumerated—they are "criticism, comment, news reporting, teaching, scholarship, or research"—it seems to me that, if comments which otherwise would be fair use resulted in the complete destruction of the copyrighted work in a commercial sense, that destruction should not result in the use being an unfair use as opposed to a fair use. For example, if the criticism of a work is so biting and so effective that the commercial value of the criticized work is destroyed, it seems to me that, in our system, that is precisely what the criticized work deserved and that result should follow.

I submit that the criterion set forth in clause (4) is properly a "damages" criterion, and that, in a court's consideration of whether a particular use is fair, clause (4) should have no application or place whatsoever. If the use is not a fair use, then the damage to the work is a criterion for the court to consider.

SCHIFFER. With respect to section 6: the section strikes me as having two basic problems. I have talked to many educators who, on

the one hand, complain about the small editions of their works and, on the other hand, explain how they find it necessary to mimeograph substantial excerpts of scholarly works for distribution to their classes rather than requiring the purchase of books. This is one problem: that is, that this fair use section as it now stands, instead of solving problems for the teacher, on the contrary encourages him to do acts which would probably be held to be infringements.

Secondly, the inclusion of terms such as "research" in the section lays the entire section open to abuse by computer research devices and other large scale mechanical devices, which are really now only being developed and which in the future will (if our expectations have any value at all) largely replace printed copies of works for many purposes. Consequently, in its present form, the entire section constitutes a very dangerous trap for authors.

LERNER. Ladies and gentlemen, after having heard the morning session, I have been dying to say that my name is Max Lerner, I am an independent lawyer, and I take all clients who are willing to pay and not pay. I thought I would get a laugh there. [Laughter] That's a little better. I think we take ourselves a little too seriously here.

With respect to section 6 as a whole, I am not going to restate the objections raised by Committee 304 and the consensus there, because Mr. Kaminstein has stated that that will be taken into consideration, and the drafting committee will submit its report. However, I am very much concerned with section 6 as it presently stands, and express this thought: was it the intent of the Copyright Office in drawing section 6 to allow parody in its entirety? Is that a proper subject for discussion at this point?

KAMINSTEIN. I don't think so, Max. I think you ought to look at the provision and try to decide whether you think that is covered.

LERNER. I think it is. But is it now the position of the Office not to take any stand on that particular subject?

KAMINSTEIN. We intentionally did not include the word "parody." We think that a general provision is better than a specific provision in this case. But I say this: if you think it should be included, and that this does not do it, you ought to say so.

LERNER. You've answered my question. Thank you.

ROTHENBERG. I agree with Mr. Lerner that we should determine whether or not section 6 includes or excludes parody and burlesque; and I would submit that, as presently worded, it might exclude from the doctrine of fair use the entire area of entertainment. For that reason I would recommend deleting that portion . . . which appears to restrict the doctrine of fair use to scholarship and research.

GOLDBERG. I made a suggestion at the meetings of Committee 304 earlier this week, which may be worth restating for the Panel meeting. I've heard no one indict the fair use doctrine *per se* which operates under the present Act. As I understand it, the sole purpose for inserting the provision which appears in section 6 in the bill is not to restrict the doctrine, not to expand it, but rather to *declare* it: in other words, to remedy an anomaly of the present Copyright Act, one of whose most important features does not appear explicitly in the statute. This is a feature, of course, which has operated most significantly in the interpretation of the Copyright Act for many years.

I therefore suggest that a provision be inserted in section 6 somewhat similar to that which presently appears in section 9(a)(1) of the bill: namely, to the effect that section 6 is not intended to change the fair use doctrine under the law as it existed and as it was interpreted under the law in effect prior to the date of enactment of the new bill.

SCHULMAN. I was one of those who in the comments upon the earlier drafts suggested that the doctrine of fair use should not be included in the statute. That is why I am speaking now. I congratulate the Register for not accepting my suggestion. My reason is this. We as lawyers sometimes believe that the whole world knows what we know, and it seemed ridiculous to write into a statute something which is so well ingrained in the jurisprudence of copyright that it would be the equivalent of saying that yesterday was Wednesday. But, after hearing various debates, I came to the conclusion that it was essential to reassure many people that there is a doctrine of fair use which goes back a hundred years or more, one which was well expressed in Drone's treatise written almost a hundred years ago, and which is part of the copyright law.

I just want to point this out to Harry Rosenfield. He talks about this provision being indefinite. It's a formula for the doctrine of fair use, and Harry, I don't know of any teacher who has been sued under the doctrine which has been part of copyright law even though it didn't appear in the statute itself. And there is only one answer which can be given. The basic criteria for the application of the doctrine of fair use will now expressly be written into the statute.

We have, in various branches of the law, doctrines such as that of the reasonable man, of reasonable care, and all formulae which are not crystallized but are allowed to develop. And there is one measure which can always be applied: just do to other people what you'd have others do to you; don't use any more of their writings than you would have them use of yours. If you follow that golden rule you will never get into trouble.

GOSNELL. The American Library Association has taken a very strong position on the matter of fair use, and I should like to congratulate

the Register and his staff on the definition as developed here. It's far better than any we have seen, and far better than we imagined could be done.

I do have a question about it, though: whether it actually is as wide as the practice has been in the past. I certainly assume that it covers photocopying as it is practiced and advocated by the library people in their statement on the doctrine of fair use. I would suggest, however, the addition of two other criteria. One, which is particularly important to libraries is that of availability. Nowhere have I heard in these various meetings any statement of assumption of responsibility on the part of publishers and others of a responsibility of keeping their material available—both keeping books in print and keeping them so that they can be ordered on reasonably short notice. We do know that there is great difficulty in obtaining material, and some of it, of course, becomes unavailable.

I would like also to echo, in a sense, what Mr. Rosenfield has said for the education people: that there ought to be some reference here to "nonprofit" as another one of the criteria.

KAMINSTEIN. Mr. Gosnell, we did have a draft section earlier, which dealt with availability, but neither the authors, the publishers, nor the librarians liked it.

GOSNELL. I know. It is very difficult to define.

KAMINSTEIN. The same difficulty arises in this section.

KARP. Mr. Gosnell had a little difficulty interrelating sections 5 and 7 before lunch, and I tried to help him out; and I would like to help him out again. Just so that somebody doesn't go picking over the record of these proceedings ten years hence and find that Mr. Gosnell's statement went unchallenged, let me point out that his assumptions about the relationship of fair use to photocopying are entirely gratuitous and completely erroneous. Fair use doesn't cover photocopying, and I don't think that any court would hold that it did. Certainly those of us who were opposed to the photocopying section in the earlier draft do not assume for a moment that this section on fair use by any means permits the types of activities that were covered by that section.

In fact, I would like to repeat the suggestion that Mr. Wattenberg made, and that I have made in the past: that is that all of this discussion simply indicates that the doctrine of fair use is much better left to the courts, who have administered it fairly and intelligently and with all of the flexibility that proceedings in courts permit. I have no objection to the section as it appears here, unless we find embroidered onto it all of the little curlicues proposed by people like Mr. Rosenfield. These are not elaborations of what the law of fair use is; these are attempts to change it, and in that case we would be strenuously opposed to it.

KAMINSTEIN. Will the real General Counsel of the Christian Science Church step forward. [Laughter] My apologies, John.

PETERSON. Not at all, Kami.

This is just an individual comment, but I do share in the general feeling that the Copyright Office has brought out a definition of fair use which should be a very constructive contribution to the copyright law, as a codification of judicial doctrine usually is. But I do think that there is a danger in any codification of judicial doctrine that needs to be observed, right here particularly. That is: in the attempt to state what the judicial doctrine has reached through trial and error over many years, we must avoid crystallizing it into a position where it cannot continue to grow.

For that reason, I would like to suggest that, in . . . section 6, the words "such as" be changed to "including but not limited to," so as to recognized. In the same way . . . instead of the colon [after "in-addition to "criticism, comment, news reporting, teaching, scholarship, or research," there may be other areas of fair use that should be recognized. In the same way . . . instead of the colon [after "include"] I would suggest that we add the words "but not be limited to." I think that suggestion was made this morning. The purpose there is to permit the courts to continue to expand this doctrine as the public need requires.

I do feel that this section on fair use is capable of greater development. I think the points that Harry Rosenfield has made with respect to the legitimate needs of education are points that all of us inherently agree to. There has to be a proper balancing between the day-to-day needs of the educators and the proper incentive to authors to continue to produce the materials with which people can be educated, whether in the classroom or outside. There is a proper balance; that balance can be reached. It's part of our job to try to work it out. I am confident that we can do that.

I respectfully recommend to the educators, and the librarians, and so on, that they study this section carefully as a possible basis for a right balancing of those needs of the different sections of the public—which are, in reality, one, and which are interlocked in such a way that you cannot separate the interests of educators or authors. Many educators are authors. Many authors perform a very definite educational purpose. And their interests eventually are the same. I think that this section may provide a very useful means for doing that. I would respectfully recommend that the educators consider the possibility of submitting specific comments or recommendations on this section as a possible basis of adapting their needs.

KAMINSTEIN. I call on Mrs. Pilpel for the ultimate word on section 6, and then we will go on to the discussion of section 8.

PILPEL. It's a very small ultimate word, but since we are apparently going to specify criteria of fair use, I would suggest that clause (3) of section 6 should contain the additional criterion of "in relation to the work in which it is used." As the section reads now it says: "(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole." Well, one poem might be stolen, and it might be the entire infringing work, in which case it presumably would not be fair use. So, to repeat, I think there should be added, after the words "as a whole," the phrase "and in relation to the work in which it is used."

GOSNELL. Before leaving section 6 may I ask one more question, because this certainly is vital to the library people? Was it the intent of your Office to include photocopying in fair use, or was it not?

KAMINSTEIN. Our intention, I think, was pretty well stated by Mr. Goldberg. It was to embody in this provision the present law as developed by the courts. The interpretations that have been given here really reflect the positions of people who are engaged on both sides of the current controversy over photocopying.

KAYE. I suppose most of us would acknowledge that a broadcast use is likely to have more impact on the rights of an author than a use made merely in a classroom. But we find in section 8 that the limitations in clause (2) are less than those in the other clauses. As I read clause (2), as long as it was intended that the reception be originally on a campus there is no requirement that it should be in connection with teaching activities, no requirement that there shouldn't be a commercial purpose and advertising, no requirement that a charge shouldn't be made for reception.

With respect to clause (2) I would suggest, first of all, that it should be limited to transmissions capable of reception only on a campus. Whatever the ultimate purpose may be, an educational station which reaches a great city may affect the rights of an author very, very greatly if his textbook or symphony is used. Second, it seems to me that the performance by broadcasting for the campus should be solely for teaching, and not jazz programs intended in the evening to entertain the students. Third, it seems to me that the performances should be non-commercial and also that there should be no special charge for the reception.

When we get to clause (4) we have the unfortunate language that refers to "performance of the work, otherwise than in a broadcast." "Broadcast" is a very limited term. I think there we intend to exempt the performance of a work, or an exhibition of a work, which is perceptible only to the audience immediately present at the place of performance. And there too, I think, if we are going to provide that there

shall be no payment to performers, we should refer to "direct and indirect payment" and also to payment to promoters and to similar persons.

MANGES. The objections that have been raised by the education groups, as reflected in the news release in today's *Times*, challenge the whole conception of copyright protection. There are two issues involved. One, should educational TV obtain a free ride to use copyrighted material without the consent of the copyright owner? And, secondly, should the educators be allowed to copy freely excerpts not only from books but from copyrighted material in any medium, without consideration of the length of the excerpts?

In addition, the educators want to copy (again without the consent of the copyright owner) single copies of entire works. You can just imagine where "single copy" use would stop, where multiple copies would begin, and where multiple copying of excerpts from a single copy would begin and end.

To summarize, I would like to quote one paragraph from a statement filed recently with the Register: "The [American Book Publishers] Council and the [American Textbook Publishers] Institute believe that educational broadcasting of high quality should be nurtured, but that copyright owners should be fairly compensated for educational uses of their work as well as for other uses, whether that educational use be made by the application of ink to paper or by the dissemination of electromagnetic waves."

The publishers are not trying to nullify the use of copyrighted material for educational use. Very frequently it is to the advantage and interest of both author and publisher to have a copyrighted work used on educational television. However, such use, we say, should not and must not be made without the consent of the copyright owner. Otherwise you destroy the entire system of this country for protecting literary works.

The publishers have tried to be reasonable in this matter. In fact, they have already been working on a considerable scale to try to initiate a voluntary clearance system for use of works in educational broadcasting. In connection with children's books—which represent the majority of the present demands for educational TV use—the R. R. Bowker Company has already initiated a catalog setting forth the titles of children's books which publishers are willing to have used on educational TV without obtaining individual consents at the time.

The one change in the law that the publishers have been requesting is to rectify an inequity that has arisen by reason of changes in usage since the 1952 "nonprofit" amendment was passed. At that time ordi-

nary educational television, of course, was in its infancy. The ordinary nonprofit use in public was before face-to-face groups. Now, with educational broadcasting having expanded to the giant scale prevailing, such audiences are no longer face-to-face ones. Furthermore, you have works such as maps, poems and even installments of novels used before audiences of hundreds of thousands and capable of reaching millions of people.

We say that just using the banner of education, is not sufficient justification for appropriating the works of authors who have created these works. This is a very different situation from the one that was in vogue when the amendment was enacted.

The supplier of school books is compensated, the supplier of school supplies is compensated; why should the author's service be conscripted?

In addition to educational television, the other problem results from the extra amount of copying brought on by the advent of modern copying machines. We say that just because these machines are so efficient and easy to handle doesn't mean that the product of the author should be confiscated. There should be consent obtained unless the copying is *de minimis*. As to the question of availability of books, which has just been asked about, most book publishers authorize a firm like University Microfilms in Michigan to reproduce single copies of their out-of-print books, so that if books are not available, they can usually be obtained in that way. It is true that all publishers have not yet appointed such an agent, but the practice of doing so is growing. Moreover, there are some occasions when authors do not want books of theirs which are out of print to be copied. For example, there may be earlier versions of which the authors are not proud or for other reasons they may want their revisions of their books to be the only ones that are available to the public, not earlier ones. In other words, it should be the author who should be able to control whether his book should be available, so we see no reason for amending the law in that regard.

KAMINSTEIN. Horace, I would like to ask you to conclude and file the rest of your statement, because we are really running out of time.

MANGES. I'll stop here.

KAMINSTEIN. Thank you. I hesitate to limit any statements, but when you realize that we have only ten hours and two days, and that we have some 120 people here, I think you get some idea of the problem. In other words, I am going to begin applying time limitations.

FINKELSTEIN. I align myself with Mr. Kaye and his remarks, but I would like to add just one thing. Section 8(4)(B) . . . provides an exemption if "the proceeds, after deducting the reasonable costs of

producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private gain." It provides that that be exempt. We all know the rackets that go on under the guise of charitable performances.

Mr. Kaye suggests that the payments to a promoter take it out of the class; there would be no exemption if there are any such payments. But the owner of a hall might get a high school orchestra to perform, with the proceeds ostensibly going to charity but 75 percent going to the owner of the hall. I think that it would be desirable to put in a provision that at least "X" percent of the proceeds must go to the charity for this exemption to apply.

ROSENFIELD. Mr. Kaminstein, the Ad Hoc Committee on Copyright Law Revision submits this statement in behalf of 25 major American educational organizations, which are dismayed at the harm this bill would do to education and at its proposed elimination of education's rights under present law. Mr. Manges says that the only thing they ask for is the elimination of the only specific thing that education has under the present law.

Let me summarize the basic position of the Ad Hoc Committee. It believes that the present copyright law should be revised. It is unalterably opposed, however, to any revision which would deprive education of existing rights under the existing law and which would fail to protect and advance the vital rights of education under the copyright statute. Therefore, unless this bill is drastically amended to provide the necessary and suitable protection for the rights of the school children of our nation the Ad Hoc Committee will vigorously oppose its enactment and urge retention of the present Act.

Sections 5 and 8 deprive education of rights it has long had under the "for profit" clause of the Copyright Law. It also curtails the effective use of copyrighted material by classroom teachers and other essential forms of modern educational practice. Education represents the highest public concern of our nation—the school children of America. We object to their being short-changed by provisions which deprive them of existing legal rights under copyright law. I call to your attention that we are not asking for the elimination—that others are asking for the elimination—of provisions in the present law. In its present form this bill would represent a major setback for public and private education in the United States.

Subparagraph (1) and (2) of section 8 strait-jacket education and limit its pedagogic methods to the 1890s. Education is education, and it does not change because it goes on camera any more than when it goes on a printed page. It is absurd, in the middle of the 20th century,

to ignore the fact that educational broadcasting is an integral and inseparable part of the educational process. It has been so recognized by 35 States, by 84 major American metropolitan communities, and by the Congress of the United States. To separate "educational broadcasting" from "education" in 1964 is as unrealistic as it would have been for Congress to separate "textbooks" and "libraries" from "education" in the 1909 Act.

This bill would repeal the 20th century in education. If section 8(2) means only closed-circuit radio and TV, as we have been told, it commits mayhem on educational radio and educational TV. Most of ETV's use of copyrighted materials takes place in open-circuit broadcasts for in-school instruction in elementary, secondary, and higher education. The bill also eliminates adult education of a kind which has already demonstrated great promise in the current national effort to use TV for a frontal attack on some of the major problems facing American communities. It also eliminates educational programs of a cultural nature, undertaken as an integral and vital part of the regular school program.

One further matter needs to be noted. Sections 5 and 8 would seem to bar a teacher from making a single copy of a work (and we have been told that single copies should be barred), or even multiple copies of short excerpts or quotations for purely instructional purposes. The need for such copy or copies prevails throughout education in general. Suppose a teacher tonight reads a poem or a page which illustrates the lesson he is planning to give tomorrow. He types it out on a stencil and tomorrow morning gives it to the school clerk to run off thirty copies for his class, to be destroyed when the class is through. This is good education. But is it good law under this bill? He has no time to get permission; if he has to, he does not use the material, and the lesson is that much the worse.

At this point we are not talking about payment; at this point we are talking about availability. Why shouldn't he be able to use this legally for limited purposes? Take the music teacher who wants to record a performance tonight, which he will erase tomorrow after he gives it to this class.

The legal inability to prerecord on ETV for delayed use is almost tantamount to wrecking ETV altogether. It means using the entire day on ETV for one lesson because it cannot be reached in any other way. In other words, if you mean to give the right to use copyrighted materials even to closed-circuit (and we object to that limitation), to be meaningful this must also authorize pre-recording for delayed broadcast.

In conclusion—and I should like the permission to submit my entire statement—the Ad Hoc Committee recommends the elimination and deletion of clauses (1) and (2) of section 8, the renumbering of clauses (3) and (4), the renumbering of the remaining present section 8 as subsection (a), and the insertion of a new subsection (b) along the lines already submitted to the Register and in his possession—which, briefly, would permit performance rights now allowed under the "for profit" provision, and authorize extremely limited copying by educational institutions for strictly nonprofit purposes.

Mr. Kaminstein, lacking such provision, the Ad Hoc Committee and educational groups which it represents are opposed to this bill and would prefer the present "for profit" provision in the law to the provisions of section 8 of this bill.

Sections 5 and 8 [Rights]
H.R. 11947, S. 3008

Statement by

AD HOC COMMITTEE ON COPYRIGHT LAW REVISION

before

Panel of Consultants to Register of Copyrights
New York, N.Y., August 6, 1964

Submitted by

Harry N. Rosenfield, Esq.,
Washington, D.C.

The Ad Hoc Committee on Copyright Law Revision submits this statement in behalf of 25 major educational organizations of the United States which have sponsored its recommendations. This Committee and the 25 organizations composing it were described in my statement before the Panel on January 15, 1964. Since then, however, there have been vigorous and important discussions among educators and educational groups throughout the United States, and they have expressed alarm and dismay at the various proposals by the Register of Copyrights, the American Bar Association and various publishers groups, to eviscerate education's rights under the 1909 Act.

This dismay is even more pronounced now that the Ad Hoc Committee, in formal session, has seen what harm H.R. 11947 and S. 3008 have done to education. You will understand, of course, that our comments are directed to the Register and not to Congressman Celler and Senator McClellan since each of them has pointedly disclaimed commitment to the specific provisions of his bill and stated that the bill was introduced for discussion purposes only.

At the outset let me summarize the basic position of the Ad Hoc Committee with reference to copyright law revision:

(1) THE AD HOC COMMITTEE BELIEVES THAT THE PRESENT COPYRIGHT LAW SHOULD BE REVISED AND UP-DATED BECAUSE IT IS OUTMODED.

(2) THE AD HOC COMMITTEE IS UNALTERABLY OPPOSED TO ANY REVISION WHICH WOULD DEPRIVE EDUCATION OF EXISTING RIGHTS UNDER THE PRESENT LAW AND WHICH WOULD FAIL TO PROTECT AND ADVANCE THE VITAL RIGHTS OF EDUCATION UNDER THE COPYRIGHT STATUTE. FOR THIS REASON, THE AD HOC COMMITTEE ON COPYRIGHT LAW REVISION IS UNALTERABLY OPPOSED TO THE ENACTMENT OF H.R. 11947 AND S. 3008 (ESPECIALLY SECTION 5 AND 8) IN THEIR PRESENT FORM.

(3) THEREFORE, UNLESS H.R. 11947 AND S. 3008 ARE DRASTICALLY AMENDED TO PROVIDE NECESSARY AND SUITABLE PROTECTION FOR EDUCATION'S RIGHTS IN THE PUBLIC INTEREST OF THE SCHOOL CHILDREN OF OUR NATION, THE AD HOC COMMITTEE WILL VIGOROUSLY OPPOSE ENACTMENT OF THESE BILLS AND WILL MAKE ALL POSSIBLE EFFORTS TO URGE RETENTION OF THE PRESENT LAW WHICH PROVIDES TIME-TESTED (ALBEIT INADEQUATE) CONGRESSIONAL RECOGNITION FOR NONPROFIT EDUCATIONAL USES OF COPYRIGHTED MATERIALS.

To put it bluntly, the Ad Hoc Committee is vigorously opposed to the enactment of H.R. 11947 and S. 3008 while Sections 5 and 8 remain in their present form. These sections go out of their way to deprive education of rights it has had for a long time under the "for profit" clause of the Copyright Law. In their present form, these bills represent a major catastrophe for public and private education in the U.S.

Under existing law, Congress has promulgated a fundamental public policy giving education full and complete access to specified types of copyright materials. For example, America's public and private schools may perform (both in classrooms and through educational broadcasting) copyrighted historical, poetical, literary and musical materials, so long as such material is not dramatized and such performance is not "for profit." The Register's Report to Congress in 1961 recommended retention of the present "for profit" limitation as striking "a sound balance between the interests of the copyright owners and those of the public" (p. 27). However, on this issue H.R. 11947 and S. 3008 are a complete and violent departure not only from the current law, but also from the Register's Report of 1961. Instead of continuing and expanding the authorized use by education of copyrighted literary, musical, film, map, chart and pictorial works, among others, the bills enforce a drastic "cut-back" in permissible educational activity under the copyright law by total elimination of the "for profit"

provision and resultant rights to education. So far as we have been able to ascertain in these panel meetings and elsewhere, the only reason given for this revolutionary reversal is the din of opposition from various industries which have expressed themselves on this subject.

The Ad Hoc Committee decries these provisions of Section 5 and Section 8; their elimination of the "for profit" provision of the present law seemingly curtails the effective use of copyrighted material by classroom teachers and other forms of modern educational practice. Education represents the major public interest, and the highest public concern of our nation—the school children of America. We object to their being short-changed by provisions which deprive them of existing legal rights under copyright law. We call to your attention that, in interpreting the copyright law, the Supreme Court of the United States said that

> "The sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefit derived by the public from the labors of authors," *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, 127 (1932).

The provisions of Section 5 and Section 8 of H.R. 11947 and S. 3008 not only fail to confer any benefit on the public in its major educational interest, but actually eliminate benefits now conferred by the present copyright act under the "for profit" provision.

The effect of Section 8, subparagraphs (1) and (2), is to straightjacket education, to limit its pedagogic methods and to circumscribe its activities in such a way as to make it impossible for education to serve its vital national mission. In particular, this section proposes that one form of audio- and aural-education, specifically *educational* broadcasts, be defined by law as having second-class status. Education is education, and it does not change because it goes on camera any more than when it goes on a printed page. Perhaps we are victims of unfortunate semantics; what we call educational TV should really be called televised education. The TV camera, like the printed book, is only the "hardware," or the vehicle—what is involved is education. The Ad Hoc Committee respectfully suggests that it is both absurd and contrary to fact, in the middle of the 20th century, to exclude *educational* broadcasting from the range of the normal teaching program. Educational broadcasting is an integral and inseparable part of the educational process. It has been so recognized not only by educators, but also by 35 States which have established educational television commissions and by 84 major American metropolitan communities which have established educational television as a formal part of the structure and practice of their educational systems. This same recognition of the inseparability of educational television and education was shown by the Congress in enacting P.L. 87-447, providing Federal grants for the utilization of TV in the nation's schools and colleges.

Senate Report No. 67, 87th Cong., 2d Sess., on S. 205, which ultimately became law, said in part:

> ". . . television has the capability to expand a massive upgrading in the quality of American education . . . Educational television promises the first fundamental advance in instruction methods since the invention of the printing press 500 years ago. . . ." (1 U.S. Code Cong. and Adm. News 1962, at 1619.)

To separate "*educational* broadcasting" from "education" in any copyright act of 1964 is as incompatible with the realities of contemporary American life as it would have been for Congress to separate "books" or "libraries" from "education" in the Copyright Act of 1909 as amended. Congress did not make that mistake in the current law, and it should not make the proposed mistake in the new law. To adopt the provisions of Section 8 (1) and (2) would be to fly in the face of facts, to hamper and seriously cripple education, and to reverse a recently and deliberately enacted congressional policy specifically devoted to the inseparability of educational TV and education.

The language of Section 8(2) is not clear. It is capable of at least two conflicting interpretations: (1) that it is limited only to closed circuit educational TV and to microwave transmission of educational programs, or (2) that it extends also to educational TV which is restricted to instructional purposes within non-profit schools. In either event, education has been stripped and deprived of existing rights under existing copyright law. But if the first reading is correct, then the bill would put nonprofit educational broadcasting in the same category as commercial broadcasters—a conclusion which is completely inconsistent with congressional policy not only in the "for profit" provision of the present copyright law, but also in P.L. 87-447, providing for expanded educational use of nonprofit educational TV.

If Section 8(2) means only closed-circuit, it commits mayhem on educational TV. Most of ETV use of copyrighted materials takes place in open-circuit broadcasts for in-school instruction in elementary and secondary schools and in higher education. Thus, the bill decapitates ETV at the point where education most needs protection under the copyright law.

However, the internal structure of Section 8(2) gives reason to believe that it is not that much of a slap in the face to educational broadcasting, and that it cuts back existing law to open-circuit educational broadcasting which is for instructional purposes within schools. This is bad enough, but (1) it eliminates formal and informal adult education of a kind which has already demonstrated great promise in the current effort to use TV to make a frontal attack on some of the major problems facing American communities, and (2) it eliminates educational programs of a cultural nature, which many schools, col-

leges and ETV stations have undertaken as an integral and vital part of their program.

Thus we see the strange and unfortunate situation where two Federal agencies are in conflict. These bills represent an effort by the Register of Copyrights to downgrade adult education on educational broadcasting and to deprive it of existing rights under copyright. At the very same time that the Register is making a step-child of broadcast adult education, the Federal Communications Commission is strenuously trying to augment its role. For example, at the last annual convention of the National Association of Educational Broadcasters, FCC Chairman Henry exhorted educational broadcasters to fill the

> "vital need for broadcast facilities to provide for adult education in the home, after-school programming for children, and programs that serve the broad cultural and public affairs interests of the community."

He warned educational broadcasters

> "For you are not merely operators of film projectors or closed-circuit facilities; you are broadcasters, licensed to serve local needs of your community. . . . broader than the institutional needs of your community's school systems."

This statutory role of educational broadcasting, as seen by the FCC, is negated by the Register's proposed bill.

Why do I believe that the lesser evil of these two interpretations of Section 8 is proper? H.R. 11947 and S. 3008 do not define "broadcast" as it appears in the clause "in the course of a broadcast or other transmission." Consequently, recourse must be had to other germane statutory definitions of this special word of art. The Federal Communications Act, Section 3(o) provides:

> "'Broadcasting' means the dissemination of radio communications *intended to be received by the public*, directly or by the intermediary of relay stations." (*emphasis added*)

And the Federal Communications Commission has ruled that "broadcasting" involves "an intent for public distribution," and not only for service available to subscribers with specialized receivers. See *Telemusic*, 19 R.R. 35 (1959); *Scroggin*, 1 F.C.C. 194 (1935). Thus, the language "broadcast or other transmission" in Section 8(2) cannot be limited to closed circuit TV and must include open circuit educational TV since the word "broadcast" means "intended to be received by the public."

What then is the meaning of the language "made for reception solely within nonprofit educational institutions"? For reasons just stated this clause cannot relate to "broadcast," and therefore must refer to the

prior expression "performance or exhibition," as if the provision were punctuated thus:

> "performance or exhibition of the work, by or in the course of a broadcast or other transmission, made for reception solely within nonprofit educational institutions."

Thus the provision refers to a "performance or exhibition . . . made for reception solely within nonprofit educational institutions." If it is so made, it is not relevant that others may receive it than those for whom it is made. Thus it covers an open circuit "broadcast" of a 3rd grade arithmetic lesson even if a parent can tune in to see what Johnny is being taught. As so read and interpreted, the provision is internally consistent and meaningful. But as I have already indicated, even this less restrictive interpretation of Section 8(2) is a major set-back to education, and an unwarranted withdrawal of rights now available to education under the present law, and one which the Ad Hoc Committee rejects as totally inadequate to meet the public's educational needs.

One further matter needs to be noted. Section 8, as tied to Section 5, would seem to bar educators from making a single copy of an entire work, or multiple copies of an excerpt or quotation of a work, for purely instructional purposes. The need for such copy or copies prevails throughout education in general. Such needs arise, for example, in teaching English poetry, in reading of maps, in studying scientific charts and drawings, and in connection with musical scores for music appreciation or orchestra classes, to name but a few instances. Suppose a teacher is preparing his lesson for tomorrow and has just read a page or poem which is perfect to illustrate today's lesson or tomorrow's. He types it out on a stencil and tomorrow he will have the school clerk run off thirty copies for his class. This is good education. But is it good law under these bills? He has no time to get permissions—if he must do so, he cannot use the material, and the school children suffer. Why shouldn't he be able to use it legally? Or take the music teacher who wants to tape record part of a performance tonight to use in his music class tomorrow. Isn't it in the public interest to authorize such copies of excerpts?

In educational TV the inability to record or prerecord a program for delayed broadcast purposes can be almost wholly destructive of any ETV, *even* closed circuit. From a technical point of view, all TV (commercial as well as nonprofit) is becoming increasingly a matter of prerecorded and not live performances. Denying schools the right under copyright law to prerecord a program is, therefore, a serious handicap to efficient and technically feasible production. Furthermore, such legal inability to record an ETV program is almost tantamount to wrecking ETV altogether. Let us take a characteristic

school situation. The school system has six or seven class periodsd uring each school day, and it schedules Biology 1, the introductory course with large registration, all through the day, in each of the day's six or seven class periods, since it is impossible to give Biology 1 for the whole school in a single class period. If the school cannot prerecord its Biology 1 TV lesson for delayed broadcast, it must schedule Biology 1 for each educational telecast during the whole day. Not only would this be practically impossible for the teachers and producers of the program, but it would make it impossible for the school to use ETV for anything all day long except Biology 1. Obviously this does not make sense. Nor does it make sense for the school to be prevented from recording programs by outstanding teachers or lecturers for future school use. The bill's refusal to allow copies or recordings seems like throwing out the baby with the wash.

In other words, if H.R. 11947 and S. 3008 sanction *any* form of ETV, *even* if only closed circuit—and the Ad Hoc Committee vigorously disapproves of any such limitation—such sanction, if it is to be meaningful must also enable the school to record or prerecord for delayed broadcast purposes. Anything less would be self-destructive.

For the above-indicated, as well as many other equally valid, reasons the Ad Hoc Committee is opposed to H.R. 11947 and S. 3008 in its present form, and would prefer the present law with its "for profit" provisions.

The Ad Hoc Committee has previously submitted, on January 15, 1964 and June 11, 1964, its recommendations for inclusion in any revision of the present copyright law. Consonant with its prior recommendations, the Ad Hoc Committee urges and recommends that

(1) the proposed Section 8 of H.R. 11947 and S. 3008 be renumbered as Section 8(a), by inserting "(a)" prior to "Notwithstanding" . . . [in the first sentence];

(2) subparagraphs (1) and (2) of Section 8 be deleted entirely, and the remaining subparagraphs be renumbered accordingly; and that

(3) the following new subparagraph "(b)" be added to Section 8:

"(b) Notwithstanding the provisions of Section 5, recognized non-profit educational institutions or organizations may use for non-commercial educational purposes:

(1) non-dramatic copyrighted works, *provided* that no more than a single copy or recording of such copyrighted works is made in the course of such use;

(2) dramatic copyrighted works if no special admission fee is charged to the audience, *provided* that no more than a single copy or recording of such copyrighted works is made in the course of such use and then only where the performers are limited to students, faculty, or staff;

(3) excerpts or quotations from copyrighted works if such uses are for illustrative, critical or ancillary educational purposes, *provided* that such excerpts or quotations are identified as to source; where no such copyrighted material is sold or leased for profit, no commercial advertising is included, nor other private gain is involved.

For the purposes of this section, "Non-dramatic copyrighted works" shall include works in the categories listed in Section 1 (1), (2), (5), and (7) of this Act, and "dramatic copyrighted works" shall include works listed in the categories in Section 1 (3), (4), and (6) of this Act."

SCHIFFER. I would like to address myself briefly to a small problem with clause (4) of section 8. As we read that language it provides a complete exemption of community antennas with respect to musical works. Community antennas as a matter of law do not broadcast. Secondly, they do not perform or communicate, in that they merely transmit signals unrecognizable to the human eye across a piece of wire to a television set not owned or controlled by the community antenna, where there may or may not be a reception, depending on the wishes of the owner of that television set. The other language consequently is not applicable, but I might just simply say that there is neither a direct nor an indirect admission charge, and this subdivision (B) of clause (4), of course, has no application one way or another.

I gather that the intent was not to exempt community antennas, albeit we approve of the effect of this provision.

KAMINSTEIN. That's right. I think it would be a dangerous assumption otherwise, Mr. Schiffer. [Laughter]

HARLEY. I am William Harley, the President of the National Association of Educational Broadcasters, which represents closed as well as open circuit educational television operations and educational radio as well. Our organization is a member of the group for which Mr. Rosenfield spoke, and we endorse his presentation. I have a written statement to submit for the record, but will confine myself here to a brief supplementation of Mr. Rosenfield's remarks.

Educational broadcasters have some serious problems with this bill. Under the present copyright law we are entitled to make public performance, not "for profit," of certain copyrighted materials. This applies across the board to educational television, both open and closed circuit, and to educational radio, because they are all nonprofit operations. Sections 5 and 8 would wrench the for profit limitation from the law and substitute nothing beneficial in its place.

If these provisions become law the following seriously deleterious consequences for educational radio and TV would occur:

First, closed circuit TV would be seriously handicapped, because such operations are heavily dependent upon pre-recording and record-

ing for repeat transmissions in order to meet the requirements of varied class schedules. The bill fails to recognize these practicalities.

Second, and even more seriously, this bill prevents the exempted use of any copyrighted materials for open-circuit educational broadcasting. Here the bill doesn't even begin to meet education's needs. Both educational radio and television would suffer severely from the stultifying frustrations and inhibiting burdens which obligatory clearance would impose.

Because such a high proportion of our programs are originated locally, consisting hour after hour, each day, of regularly scheduled, original, custom-built programs especially designed and created for specific local educational requirements, we are especially dependent upon the free and immediate access to a vast variety of supporting materials for the wide spectrum of subject matter treated from which to construct effective educational programs. Consequently, the restrictions contemplated here would be particularly burdensome and limiting to educational broadcasters.

Aside from the problem of royalty payments, which in themselves would constitute a very major deterrent in the use of copyrighted materials, we do not have and cannot afford the large staffs to handle complex clearance procedures. But, even more importantly, we can't wait days and weeks before putting together timely educational broadcasts. Our responsibility is to provide the best education possible at the time when it is needed.

Third, the line between exempted and non-exempted educational applications of modern transmission techniques is drawn in section 8 on the basis of how the message is distributed—that is, over the air or by closed circuit—or on the basis of where the recipient is located—within an educational institution, or in a home, or a factory, or a hospital, or wherever educational opportunities can be provided by radio and television. The worth and the purpose of the educational broadcasts or transmissions are disregarded. And, as my written statement outlines, the criteria in the bill result in short-sighted and unsupportable discrimination among the people who have a vital need for educational services through broadcasting.

Fourth, the very ownership and operation of educational radio and TV facilities in their future growth and development are threatened by the bill. The educators who operate and control these facilities would no longer so beneficially use them for the purposes for which they are constructed. Educational broadcasters need to utilize the highest quality materials available to do their job, and the burden which the bill would impose would oblige them largely to retreat to the use of public domain materials, outdated and not fully applicable, simply because they are available without cost or clearance. That

would result in serious impairment of the substantive quality and excellence of the educational programming.

In conclusion, the provisions of this bill not only fail to distinguish between educational and commercial broadcasting, but they fail to recognize educational broadcasting as a legitimate, integral part of education itself. And in so relegating educational broadcasting to a status wholly apart from education, these provisions deny education the full use of modern technology—which, we submit is truly a return to the 19th century thinking.

HARLEY. We would like to make it clear that, in our opinion, education and the copyright owner have a joint stake in education's wide but reasonable use of copyrighted materials, to the end that learning and culture are advanced. If the "for profit" limitation is now to be removed from the law, we submit that something should be substituted in the public interest, and that the carefully limited educational exemption of the Ad Hoc Committee is such a proposal.

STATEMENT OF POSITION ON BEHALF OF NATIONAL ASSOCIATION OF EDUCATIONAL BROADCASTERS BY WILLIAM G. HARLEY

It took 55 years for this generation to reach the point where substantial changes will finally be made in the Copyright Law. It is incumbent upon all of us to make sure we are providing for the needs of the foreseeable future.

On July 20, 1964, identical Bills were introduced in the House (H.R. 11947) and Senate (S. 3008), on behalf of the Register of Copyrights. In effect, these Bills (hereinafter referred to in the singular) seem to specify that only certain kinds of education should be fostered; namely, face-to-face teaching (§ 8(1)), and closed circuit television made for reception solely within non-profit educational institutions (§ 8(2)).* It is somewhat heartening to note that education is thus given explicit recognition; however, the form that recognition has taken so far can only inhibit and impede modern in-class instruction. This is so because the structuring of this Bill strikes at education with devastating impact, rendering ineffectual the dynamics of 20th century educational techniques. Along the way the Bill visits a *discrimination* never before contemplated, much less condoned, by

*In practical effect, however, the Bill would withhold from in-class instruction the modern technological advances of educational broadcasting which, in the advanced curriculum, supplement the teacher's efforts. And, in declining to permit a copy to be made of a closed circuit transmission, the Bill, contrary to best educational practice, would require poorer quality live transmissions, often of a complete re-make of the same program, and at times during school hours when the special instructor for the program may not be available to redo the complete presentation. Make no mistake about it, all education suffers at the hands of this Bill.

any thoughtful person. Consider, for example, the fact that the "permissible" closed circuit educational transmission—with its built in rigidity, and its necessarily limited numbers of recipients during some six hours of the school day—is employed by educators largely only at college and university levels. Consider, on the other hand, that the impermissible open circuit educational broadcasts are useful, practical and used largely at the lower levels of education. These realities bring the discrimination into sharp focus. Without discernible rationale or justification, the Bill decrees: that there should be less bars to education of the student attending college than the student not attending college, or one who relies instead on at home instruction via educational broadcast; that the well-to-do or the exceptionally bright (or the lucky) are more worthy of the best methods of instruction than the poor or the slow (or the unlucky).** We submit it is late in the day for this kind of theory—a theory of patent and undue discrimination—to gain a foothold in American education and American law.

The Bill's mistaken notion that educational broadcasting must specifically and purposely be given second class status, carries ramifications even further deleterious to the public interest. The law, as the Bill would write it, would effectively preclude substantially all instruction and enrichment of persons who could not come to "educational institutions" on a regular basis, or on any basis at all—*e.g.*, the retarded, the physically handicapped, and those in need of vocational rehabilitation—and those who decline, for obvious reasons, to come—*e.g.*, the illiterate.

The Bill would seriously jeopardize the continued existence of the 300 operating educational FM radio stations, which have pioneered in classroom and amphitheather instructional uses, such as providing two-way post graduate medical instruction (Albany Medical College). These services must now be imperiled because the FM signals go over the air and are not received "solely" within educational institutions. In this connection, the much acclaimed use of educational radio to meet the demands generated by the movement toward dispersal (decentralization) of our seats of higher learning, must fall by the wayside. (An example: the University of Wisconsin's use of a state FM network to extend faculty resources from its Madison campus to Milwaukee and nine extension centers).

**Consider the irreparable injury the Register's §8 would work upon the Chicago City Junior College which, since 1956, has been offering Chicago area residents a full two-year college curriculum on open circuit television through the facilities of the local ETV station. This organization has presented over the air more than 50 different full credit college courses, and the student need only appear within the walls of the "non-profit educational institution" a few times a semester. If this dramatic breakthrough in education is now to be discouraged, we have indeed handcuffed education.

The Bill also would disrupt the structure of the large number of educational television stations which are licensed to and/or programmed by and for educators. Obviously, if the public policy is no longer to allow educational television (and radio) to make wide use of copyrighted (*i.e.*, up to date) materials in their "not for profit" scope of activities, then the educators had best depart from broadcasting and channel their funds, ideas and talents back into the old "face-to-face" 19th century methods of in-class instruction. This would follow because *education* would be lifted out of non-commercial educational broadcasting and the non-commercial broadcaster would be forced drastically to restrict his scope of operations, being left to rely on poorer quality (*i.e.*, cheaper or so old they are in the public domain) materials.

WHY THIS DISCRIMINATION: WHY THIS REGRESSION? No discernible reason is given. The Bill is completely silent as to why it is necessary that the "for profit" limitation should be stricken from the law and nothing beneficial substituted in its place.

The only justification possible for overturning the long-standing public policy inherent in the "not for profit" limitation would seem to be on the basis of balancing the interests between free use by education of certain copyrighted materials, on the one hand, and the public policy in assuring to the copyright owner incentive and remuneration for his efforts, on the other. However, such a balancing cannot reasonably lead to the Bill's unsupportable conclusion. The cases are legion where educational broadcasting's use of nondramatic literary works has stimulated enthusiasm and interest on the part of the public which has benefited the copyright owner and the publishers of such works immensely. Educational broadcasting today is the most effective promotion possible for the copyright owner's works. And it is free of charge to the copyright owner. Moreover, the fact of the matter is that if educational broadcasting is to be restricted by being forced to seek time consuming and, often, long delayed clearances in order to use these materials, it simply cannot use them. Hence, both education *and* stimulation of artistic works would suffer.

It is unquestioned public policy that education is a life-long endeavor of universal responsibility. No one disputes that the social and economic knowledge of our citizens is not keeping pace with our technology, that our human resources are *not* developing rapidly enough. It is education's role in our national scheme of things, however, to make people more effective citizens, and educational broadcasting has been developed to the extent that it has been proved the most effective means of accomplishing this national purpose.

It is especially distressing that revisions have been proposed in the Copyright Law which would effect a return to 19th century edu-

cational methods at the same time that the Congress and the Administration, recognizing the vital importance of education to our national well-being, and even survival, are giving education special encouragement and support. The enactment of the Higher Education Facilities Act, the Vocational Education Act, and the extension of the National Defense Education Act are each recognitions by our Government of the *vital importance* in speeding the improvement of our educational system. Moreover, the Government has recognized the special nature and contribution of broadcasting to education by setting aside television and FM channels exclusively for education's use, and by authorizing $32 million to assist in expansion of educational television on a national basis. The Register's proposed Bill represents a single—the only—backward step in this steady implementation of our public policy.

Educational broadcasting cannot now be written out of the educational process. It cannot now validly be hamstrung by greater restrictions than are imposed by current Copyright Law. No other method of education so maximizes the efficient use of teachers and facilities by extending top teaching talent to more students; so enhances instruction by providing demonstrations, experiments, charts, graphs, films, guest experts and other supporting instructional material not normally feasible in conventional classroom situations; so provides ready access to a broad spectrum of resources, materials and data; so supplies opportunities for both large group instruction and highly individualized do-it-at-your-own-pace learning. And, just as important, educational broadcasting makes it possible for the teachers to devote more time to those things which only a teacher can do.

It is manifestly contrary to the national public purpose and public interest to stifle the educational process by substituting for the "not for profit" limitation the costs and delays inherent in the Bill. The cost is one thing and bad enough, but the delays in obtaining consents or refusals of clearance are, and have been, stultifying experiences. In the area of dramatic works this can, and has, caused meritorious programs not to be performed at all. Maximizing the value of modern instruction techniques absolutely requires that the recipient be reached by the most effective means possible at a time when his interest is piqued, when his enthusiasm is at a height. The delays necessarily inherent in seeking clearances for materials which would make an interesting and topical program simply cannot be tolerated in the educational process. In this regard it is a fortunate producer who has as much as two days to prepare an educational broadcast. The difficulty of scheduling personnel and pertinent up-to-date materials for an educational broadcast would be greatly increased, insurmountably so, if clearances are required for each piece of copyrighted ma-

terial to be used. The non-profit educational broadcaster simply does not have, and cannot afford, the large "clearance" staffs of the commercial broadcaster. The two operations are altogether different in scope as well as purpose. Any revision of the Copyright Law should, as does the present law, recognize this distinction.

We strongly support the carefully limited educational exemption of the *Ad Hoc Committee on Copyright Law Revision*. The exemption there detailed is indispensably requisite to the forward thrust of education in this Nation.

We are unalterably opposed to the Register's Bill in its present form.

LINDEN. I think it is obvious to all of us that, in the interest of public welfare, the efforts of creators, disseminators, teachers, and television stations are all important and significant and interrelated. One comment of Mr. Rosenfield's interested me enormously beyond all others, and I think I wrote it down accurately: "We are not talking about payment," said Mr. Rosenfield, "we are talking about availability."

If that is so, I submit that I have been authorized by the American Textbook Publishers Institute to extend—and I am sure the other publishers and other interested parties will join with us in extending—an invitation to the educators to help us set up a licensing system whereby there would be immediate, free (free, not in the sense of noncompensated, but of reasonably compensated), available use of copyrighted material. For example, under this system the teacher, the night before her intended classroom use of the material, would not have to worry as to whether the material was or was not in copyright.

I suggest that a clearing house of this kind can be set up. It can only be set up, however, if the law recognizes that there is a private proprietary right in the copyright claimant. If there is no recognition of the right, no one will be interested in acquiring licenses.

Now, with respect to educational TV, might I say that, in preparation for these Panel sessions, I reread a statement of Dean Siebert dated August 1, 1963, entitled "Report on Copyright Clearances and Rights of Teachers in All Educational Media." I would like to quote his recommendations. I would like to endorse them. I would like to urge that he represent authors and publishers, as well as teachers, in obtaining these terms and conditions in dealing with educational program producers. The recommendations are as follows:

"3. The arrangement between an educational program producer and the teacher (either by direct contract, by reference to an adopted set of by-laws or policies, or by collective bargaining agreement) should cover the following:

"a) initial compensation." That's all we ask.

"b) right to re-use both within and outside the originating organization." We agree with that.

"c) compensation for re-use both within and outside the originating organization." We concur.

"d) the right to specify the life of the program or length of time within which it may be used." We endorse that.

"e) right to revise a part or all of a program or series of programs." We will work that out with you too.

"f) right to withdraw the program based on termination of employment, death, reassignment, obsolescence." A most reasonable recommendation.

We urge, therefore, that an appropriate licensing clearing house be set up both with respect to educational TV, and with respect to photocopying and the use of all copyrighted materials necessary for the education of our children and the education of our adult population as well. I am certain I speak now on behalf of every single publisher and author—we are not interested in eviscerating the educational system in this country. We are interested in fostering it. And I join and concur with Mr. Rosenfield that if we are talking about availability, copyrighted material should be readily available. Please—and I speak now to the educators and educational TV representatives here—join with us at your earliest available time to arrange for appropriate licensing. We are eager to cooperate.

WATTENBERG. I just wanted to make this observation. The educators have said that they can't live without the pre-recording right. That, I believe, assumes that they have it now. Well, they don't have it now, and the new law wouldn't change that a bit.

ALEINIKOFF. I merely want to underline one or two points. The first point is that, as far as educational television is concerned, I don't think there is any question in anybody's mind that, if this law were enacted the form in which it is drawn, it would: (a) be completely unacceptable to educational television, since it would segregate it from the educational community; and (b) it would set it back about twenty years in the production of programs and the kind of programs that people want.

With due respect to Mr. Manges and Mrs. Linden, who I think believe sincerely in the availability of material, I've dealt with the publishing industry, both literary and musical. I think that we can spend many years constructing agencies and clearing houses, and I still don't think that we would obtain the right for the teacher in Dubuque to use the page she wants to use when she wants to use it. I don't care how many clearing houses are set up. As far as educational television is concerned, I think it can help somewhat. But I don't think it can help to the extent that is required, if educational television is to move forward.

One last point: I'd like to repeat something and explain something that Mr. Rosenfield said. Education does believe that teachers and

authors and composers and the rest of the creative people today should live, should earn fees, and should be able to eat their daily bread. We have never said otherwise. We are concerned, however, with making sure that these are the people who participate with us in this venture. We welcome them, and we hope that they will come along with us, and take a hand in it, and help us to do better than we have been doing.

I think a balance has to be struck; I agree with John Peterson that there is a place for a balance. I am afraid though, John, that that place is not in section 5 as it is now written, so long as section 8 stays the way it is. I think that we'll have to strike a different balance in section 8, which will give educational television and the rest of the educational community something a little bit more than the overweighted position they are in now.

SHAFER. Robert Shafer, representing the National Council of Teachers of English. I am an English teacher and I am very much interested in what has been said here today about teachers. It seems to me that one important thing to recognize immediately is that the teacher needs in order to do an effective job of teaching the right to copy excerpts or portions of copyrighted material, but not copyrighted material that is published in the form of a complete textbook. The teacher needs the right to copy copyrighted material that is published in such forms as newspapers, news magazines, and modern literature. If we expect teachers to deal with the immediacies of the contemporary world and to help students understand contemporary issues, then we cannot place restrictions on the teacher which would prohibit him from using modern media which represent the contemporary world. I think the same criterion should apply, obviously, for educational television.

Now it seems to me that we need to look more broadly, perhaps, than we have at what represents the public welfare and the public interest. The teachers are not, it seems to me, a "special interest group" in the sense that special interest groups such as jukebox operators have been discussed here today. The teacher is representing no other interest than that of instructing his students effectively. That is his only concern. As Mr. Gene Aleinikoff said, he is not trying to take away bread from the mouths of authors, or from publishers either. In the drafting of a new law we have a hope of striking a new balance which will be fair to both authors and educators. I would hope that the Register of Copyrights would give special attention to a special educational exemption that would allow teachers to copy copyrighted material for instructional purposes and therefore meet the needs of the broader public interest and the general welfare.

PERLE. I am Gabriel Perle, and I would like to think that I speak for the mass of humanity, but I don't. I am counsel for Time, Incorporated, and also for Silver-Burdett Company, which is a textbook publisher.

I am a little startled at the naiveté that is being expressed here in large measure by the educational broadcasters. If we were to regard section 8 (as much as they dislike it in its present form, and as much as they want to go further) in the context of technology today, and if we here look at this section together with a device I looked at last week—which is designed to make available to 100,000 students, if necessary, a single copy of a single work—what section 8 would do is totally destroy private textbook publishing in economic terms. And this is not parading horribles. Take, for example, projects such as the Teaching Environment Project, which is designed to allow each school to have little booths where the student can simply press a button and get page 42 of a given volume where there's only one copy of that volume.

Thus, we read in section 8 that "performance or exhibition of the work by or in the course of a broadcast or other transmission . . ." is not infringement. And what's the definition of "performance" or "exhibition"? Both of them include motion pictures, or tapes, or whatever electronic device there is.

Now it is an economic fact of life that a large portion of teaching materials, be they textbooks or otherwise, are produced by private parties for a profit, and that it's only the profit motive (or not even the profit motive but only the ability to earn money) that allows the research and the work that goes into the better educational projects. If one copy, through an electronic means of private transmission or closed-circuit broadcast, can take the place of the 20,000 copies that in turn pay for the research and development of educational materials, then we are not going to have any more privately-developed educational materials. This would defeat not just educational broadcasting but it would defeat ultimately the ends of all good education. I submit that education—good as it is and hard as it is to talk against it—should not be allowed to get the sort of privilege that is going to defeat its own ends.

KAMINSTEIN. Mr. Karp, for one minute.

KARP. Mr. Kaminstein, two of the speakers who preceded me, Professor Shafer and Mr. Rosenfield, have issued statements which are such smorgasbords of inaccuracy that I find it difficult to pick and choose which one I can savor in the one minute you are allowing me. I would say this, though: I think that Mr. Aleinikoff and Professor Shafer and all the others who pay such solemn tribute to the author's right to be compensated, and then stand to support amendments to your

bill which would absolutely make it impossible for him to be compensated for major uses of his work, are simply carrying out old Josh Billings' adage, "Remember the poor, it costs nothing." [Laughter] I would also like to point out, with respect to this whole attack which has been mounted by Mr. Rosenfield's Ad Hoc Committee, that Mr. Rosenfield tells us it numbers 25 organizations and Professor Shafer tells us it numbers 47 organizations. I wonder which organizations it doesn't number, and which groups of teachers and writers, teacher-writers and writer-teachers, would be outraged to hear the views that have been expressed by Mr. Rosenfield and Professor Shafer about the law.

Let me pick just one inaccuracy to show you why I think that this statement requires more than a minute. I don't intend to take more than four or five minutes, but I would like to point out just one inaccuracy, because this deals with the copyright act that you have drafted. On page 1 of his statement [distributed at the News Conference held at Carnegie International Center on August 5, 1964] Professor Shafer states: "If the Bill should be passed in its present form each teacher could be subjected to a court test each time she used copyrighted material not previously cleared by the copyright owner." Then, on page 2: "Under this proposed law any teacher using such reading matter without permission would be risking a violation of the law as an infringer each time he copied a portion or excerpt of a copyrighted work or read from such a copyrighted dramatic work to his students."

The bill doesn't propose to do this. It doesn't drag copyright back at all. On the contrary, sections 8 and 5 preserve basic rights which teachers have, and they also preserve the basic rights which authors require to be compensated for the use of their work. The failure on the part of Mr. Rosenfield and Professor Shafer to begin to recognize that the author is a member of the educational community just as much as the teacher, and that the publisher who disseminates the author's work is as much a member of the educational community and a part of the educational process as the television station which broadcasts that work, leads them to this unhappy conclusion.

I think it would behoove them well to go back and read the Act again, and read your draft, and learn what changes the draft actually proposes, and then to consider again the Constitution of the United States which provides that, for the purpose of promoting the progress of the arts, the author should be secured the exclusive right in his work. Mr. Rosenfield has adverted to the Constitution and to the purposes of copyright, and I suggest he read Article I, section 8 again, that he read the dictionary to discover the meaning of "exclusive," and that he ponder well on the proposals he has made, because they have no

sanction in the Constitution. They would defeat the very purposes of the clause which he invokes, and they would deprive the author of the opportunity of being compensated for major uses of his work by those people who should be most anxious and most interested to compensate him for creating symphonies, poetry, and serious works—the works which they are paid to read and transmit to their students.

KAMINSTEIN. Really, Irwin, I believe your difficulty is in trying to deal with smorgasbord verbally. [Laughter]

KAYE. Section 13 is based entirely on an economic assumption which is not wholly true today and which may be wholly false tomorrow. It is based on the assumption that an establishment which disseminates a broadcast in its private rooms need not pay, because payment has already been made at the point of broadcast. If you have a motion picture theater with ticket takers at three doors and one door open, a way will be found ultimately to come through that door. Today there are already small stations not selling much advertising and originating programs which are very largely used in those places. If the assumption is that the broadcaster has already paid, then this should be a contract matter between the licensor of the right and the broadcaster. We shouldn't allow a class of people to go free.

With respect to clause (2)—"reception of a broadcast embodying a performance or exhibition of the work on a single receiving apparatus of a kind commonly used in private homes"—this is a scientific instead of an economic assumption. If the reception is in a private home it is already taken care of. But in the future we may develop machinery which is used in theaters just the same way as in private homes, and to put that in the act seems to me to be running the risk of drawing a new jukebox clause.

SCHIFFER. I would agree with Mr. Kaye that the surrender of an existing right under copyright, in the first part of section 13, might be reconsidered. The second part of the section is, I take it, an attempt to recognize the right of reception on the part of the public.

Now again, as that language stands, I must point out that it could be interpreted quite easily as an exemption of community antennas; and, if so, we are quite for it. If it is not to be so interpreted, you must recognize that on the one hand you give a right of reception free from copyright royalty, and on the other hand you put the community antenna—which is a necessary device to enable these single receiving sets to be used for reception—in the position of paying a royalty which inevitably will be passed *in toto* to the owner of that single home television receiver. This is particularly deleterious since it is to be assumed that this language and the other sections could not be interpreted to apply to the sellers of, for example, roof-top antennas serving the identical technical function with respect to the identical home receiving set in the same community on the same street.

What you're doing here is really not creating a free right of public reception, but a right dependent wholly on the vicissitudes and accidents of television reception, which in turn are dependent upon such diverse and wholly irrelevant (from the copyright standpoint) factors of antenna height and power regulated by the Communications Commission, interference resulting from buildings and mountains, miscellaneous interference, atmospheric conditions that may exist in a particular part of the country, and so on.

In other words, all of us recognize, I think, that the public has a right of reception, and that that right should be recognized fully in this bill. But to give that right in a way which is, in effect, a kind of Russian roulette, where the public never knows whether it will or will not be paying and where the criteria of payment depend on factors wholly beyond the policy of copyright, does not make sense to us. Again we suggest that the way to deal with this is to exempt the community antenna.

EVANS. Mr. Chairman, there seems to be some uncertainty as to the exact meaning of section 13. Mr. Schiffer has suggested that clause (2) would give an exemption to community antenna systems, and he made the same observation with respect to section 8(4). I think this may be due to some of the langauge which appears there. Looking at it, the operative words seem to be "communication of a broadcast embodying a performance . . ."

In trying to discover what this means, I think it's fair to look back to section 5, because section 13 is intended to limit section 5. Turning back there, I find three other very similar clauses. I find "broadcast a performance," "transmit . . . a broadcast of [a] performance," and "communicate a performance." I am sure that something different is meant by each of these four clauses, but I confess I am not quite sure what is meant exactly by each one. For example, under which section could a broadcaster in a proper case sue a community antenna system for infringement? I think it would be helpful if you or someone on your staff could tell us precisely to what situation each of these words is intended to apply.

Finally, I think it would be helpful, and would clarify this whole thing if we had a definition of the word "broadcast," which appears in section 13, in section 5, and also in section 8. I'd suggest as a definition: "To broadcast, means to transmit a performance or exhibition of a work to the public by wire or radio communication, including television." This would be based on sections 3(a) and (b) of the Communications Act of 1934, and therefore has an already-established meaning. Thank you, Mr. Chairman.

KAMINSTEIN. Do you interpret this as exempting CATV under the present language, Mr. Evans?

EVANS. I am not certain, Mr. Chairman. I'd like your assurance. [Laughter]

GOLDMAN. I think I can say flatly that there was no intention of exempting CATV, and I will try to tell you the difference between "broadcast," "transmit" and "communicate." I think we all know what a "broadcast" is. A person who receives a broadcast might transmit it further, by wires or otherwise. Communication might be by wire or otherwise. When we talk about "broadcast," normally we don't think of communication by wire.

Perhaps I should say one word about clause (2) of section 13. Maybe that's inartfully drawn. People seem not to have understood what we were driving at there. The intention was to provide for an exemption in a case such as that of a restaurant, let's say, that is operating a single home-type radio receiving set, or a single home-type television receiving set, or to exempt the reception room of a doctor's office where there is a single home-type radio receiving set.

This may be a "performance in public" because the reception occurs in a public place, but the thought here was that, where nothing more is being done but to receive a broadcast in such a place on a single home-type receiving set—where there is no admission fee involved and no operation of a coin machine, so that no money is being taken in for the reception and nobody is being charged to hear the reception—a performance royalty should not be required.

ANELLO. I must confess that, when I first read this particular section that Mr. Goldman has just described, I thought it was susceptible to a dual interpretation. However, having talked with Mr. Goldman and having reread the section and talked with other lawyers, I think that CATV would not be included. Despite what Mr. Schiffer said, I don't think that a hundred-thousand dollar antenna is the kind commonly used in a single home receiving apparatus.

OLSSON. I haven't had this trouble with section 13(2) that other people have had. I've had trouble with other sections.

But perhaps this would help somebody like George Schiffer who has had trouble with it. It seems to me that clause (2) turns wholly on the word "reception," which is the first word in the paragraph. If you read that, everything else becomes clear. A community antenna system obviously is a receiver. It's also obviously a transmitter. In its receiving status, it seems to me, it's an entirely innocent establishment with regard to copyright infringement. In its transmitting status it is not. I think section 13(2) clearly has no application to its transmitting status.

RITTENBERG. The use of the words "coin-operated," I take it, was intended to include pay television, but I point out that there are methods of pay television which don't involve dropping a coin in the slot.

If that is the intention, I would suggest that the definition be re-examined.

KAMINSTEIN. This afternoon I would like to see if we can cover the questions presented in section 11 and then, skipping sections 14, 15, 17, and 18 for the time being, deal with one of the core problems: reversion. I would like to call on George Cary to deal with section 11, and I hope he can assume that most of you who are involved with this question have read the provision pretty carefully.

CARY. Mr. Chairman, I will so assume.

This section grants a compulsory license, with certain safeguards which do not exist in the present law and which we hope will improve the present compulsory licensing system. Originally the Register, as you know, recommended against this result and in favor of the complete elimination of the compulsory license. The Register's Report said, however, that if it was found desirable to retain the compulsory license, certain safeguards should also be provided. We have come to the conclusion that it should be retained, and safeguards are provided in the bill.

At the meeting of Committee 304 earlier this week, there were a number of suggestions for technical and administrative improvements, and perhaps some of them need discussion. There was considerable discussion, for example, of the problem of how royalties should be paid: whether on the basis of manufacture or on the basis of distribution. There was also the problem of the difficulty of filing the "notice of intention" before making a recording, and this perhaps may need further discussion. Mr. Finkelstein raised the problem of the rental of tapes instead of their sale, and he suggested that perhaps the compulsory license should be based upon records sold rather than records made. Then there was the problem that Mr. Anello raised of ephemeral recordings.

I think we can say that, as far as the Copyright Office is concerned, we will note and consider all of the suggestions that were made. If you speak to them this afternoon, we should like to ask that you make your remarks brief and that, if you wish to make any extension of your remarks, please do so in a written form.

STEINBERG. Supplementing what was said earlier in the week at the Committee meeting, I've given some consideration to a couple of the suggestions that were made. I should like to propose, in connection with the question of royalties, a modification and change . . . [in section 11(c)(2)]. It seems to me that today as a practical matter, particularly in the case of popular records, there is a great deal of inventory and also of distribution which comes back in returns, so that it isn't practical to pay upon the number of records made or manufactured.

I would suggest the addition, after the word "license" . . ., of the words "and sold or to which ownership has been transferred from the licensor." The latter portion takes care of the problem that was raised before concerning the so-called practice of free records. In other words, it seems to me that there should be adequate compensation for free records that were issued in connection with sale, and I think that the addition of the words, after "sold," "or to which ownership has been transferred from the licensor," would take of that, and would protect the author or the publisher.

Now, in connection with . . . [section 11(b)(1)], which requires that, before making any phonorecords of the work, a notice of intention be served upon the copyright owner: as a practical matter, it's not feasible and it isn't practical to serve that notice before making the recording, because they start working upon the recording immediately. Also, most legitimate houses try to get a license first. They usually request a license and, if it isn't forthcoming, then they serve the notice.

Therefore, to serve notice before recording is impractical. When that's coupled with section 11(b)(2) . . ., which provides that failure to serve or file the notice required in clause (1) forecloses the entire possibility of the compulsory license, then of course that becomes very serious. So, instead of the word "before" in . . . [section 11(b)(1)], I would suggest the insertion of "within thirty days after the making of any phonorecords of the work, serve notice of his action . . ." (insert the word "action" there) ". . . or of his intention to do so." In other words, that would permit thirty days' time in which to act, and that would be more practical.

STEINBERG. The only additional suggestion I have to offer is this. I don't know the reason for the change in the present Act, under which it would be required that notice be served only upon the copyright owner. Heretofore, as I understand the Act, notice is required both upon the owner and the Copyright Office. Since I have found in my experience that sometimes the addresses are wrong and things of that nature, I think that we ought to continue not only to serve notice upon the copyright owner but also to send a copy to the Copyright Office. Therefore, I would add . . . [at the end of the first sentence in section 11(b)(1)], the words "and a copy be filed with the Copyright Office."

DAVIS. Clive Davis. I am Counsel for Columbia Records. My company is certainly grateful for the decision to retain the compulsory license provision, but I am puzzled by, and question the basis for, the increase in the statutory rate. I realize this is an economic argument; but, having come to the legal decision, the substantive decision, to retain the compulsory license, I must ask what economic facts led to a decision to raise this rate. It must have been assumed that the statutory rate is out of line with today's dollar, but I think that an investigation of the facts would show otherwise.

Contrary to the cost of almost every other item, the cost of music to the public has declined since 1909 when measured either against the minutes of music which the consumer buys for his dollar or the number of songs. On the other hand, the composer's rate of return not only has not gone down, but it has multiplied tremendously when compared to the 1909 multiplier. For example, in 1909 the buyer paid $1.50 to $7.00 for two to four minutes of music. (I am now quoting from a statement that Ernie Meyers made some time ago when the matter of copyright law revision came up.) Today the consumer, if he is paying $3.98 (the suggested list price for the ordinary popular record), obtains 45 minutes of music. Sometimes the buyer paid this $1.50 to $7.00 for only one tune. Today there are usually at least twelve tunes on this $3.98 recording.

In addition, the economic facts would indicate that the price that record companies receive for recordings today has gone down. There has been greater discounting in the industry. There is tremendous ease of entry and the competition, with a number of companies competing for the public dollar, has grown quite severe. With a $3.98 record the distributor-cost ranges from $1.50 to $1.80. This is the price that the record company is receiving from independent distributors.

Therefore, today, the copyright proprietor is already receiving roughly 15% of the record company's dollar, which is greatly in excess of that which was paid to the copyright proprietor in 1909 or, indeed, just a little over twenty years ago when the long-playing record was introduced. I, or the R.I.A.A., will, of course, submit this further in writing with an elaborate report, but I did want to speak to this point as it was a new point raised in the bill.

KAMINSTEIN. I am glad you did, Mr. Davis. I think the economic arguments on the royalty rate should be fully presented to Congress. The figure we adopted for purposes of this bill was presented to us by a committee which included a good many record people, and we assumed that it had some economic validity. Further information on this question should be developed, but of course it also involves the entire question as to whether the compulsory license should continue or not.

DAVIS. We are fully aware of that.

CARY. Concerning Mr. Steinberg's first comment about the problem of basis for payment of royalties, I think you are entitled to an explanation of why we used the basis of "making" rather than "selling." You will recall that we had two alternatives in the preliminary draft: under Alternative B the basis would have been "every record distributed in the United States," and under Alternative C it would have been "every record either manufactured or distributed in the United States." However, we feel it is important to realize that a compulsory

license gives the author no chance to negotiate, and that the basis for payment should therefore be as broad as possible. We felt that, in all fairness, the placing of the royalty on the basis of "manufacture" was more appropriate in a system that places a statutory ceiling on royalties. Now in the industry, as I understand it, most records are not made on the compulsory license basis; and under a negotiated license, of course, the basis of payment can also be negotiated.

DAVIS. I just want to reply that, as far as my information is concerned, I would say that the people representing record interests at any previous meeting was less than ten percent of the record industry. I just want to correct that statement. It was not any sole absence of mine or on Columbia's part.

KAMINSTEIN. I understand.

DAVIS. We know that an invitation was extended at the R.I.A.A. by Harold Orenstein. It was the considered opinion of the R.I.A.A. and most of the companies there—I think almost all of the companies there—not to attend any such meeting and not to participate in the decision or the recommendation made.

KAMINSTEIN. Well, I assume that was a conscious decision.

FINKELSTEIN. I think Mr. Davis' remarks indicate the danger of continuing such a thing as this compulsory license provision. I had been of the understanding that a group on both sides—and I kept out of this one—had agreed that, notwithstanding there was no logical basis for the compulsory license provision, this was an economic means of satisfying two groups on a compromise basis, and that no harm to the public would result. But we now find that an organization as economically powerful as the Columbia organization—Columbia Broadcasting System, Columbia Records, Columbia Artists Bureau, and so forth—comes in and says that the two-cent provision ought to continue because in 1909 you could only record one work on a record and in 1964 you can record several.

Now actually you can record—and there have been recorded—as many as seven hundred compositions on a single tape. I see no reason whatsoever for extending the compulsory license provision to tapes. And I think that, if the majority of the record industry feels that this rather generous compromise offer—of people that I understand represented a substantial group of composers, authors, and publishers—isn't satisfactory, it would seem eminently desirable to me to have the phonograph record manufacturers negotiate with writers just the same as the publishers do.

DIAMOND. When I asked for the floor I didn't realize that the whole topic was going to be opened for debate. I think perhaps it would be a mistake if it were.

I would like to start, if I may, by correcting what I think is a mistaken impression that perhaps you had, Kami, about the report of that

special subcommittee of A.B.A. Committee 304. I don't recall the exact tally; it certainly was not unanimous, although there were members of the record industry represented on that committee. My recollection is that, although the vote was anonymous, it was reported that all representatives of the record industry fell into two groups: those who opposed the three-cent figure, and those who took the position that it was really not appropriate for the American Bar Association to get involved in the question of rate but that it should stick to the question of principle. I know that there were at least two special written comments to that effect.

I would like to make two other observations if I may. (I could go on—I have the smorgasbord trouble that Irwin Karp mentioned before.) There has been a lot of talk here today about the question of the need for availability of copyrighted material, whether to education or to other segments of the economy. It so happens that historically, in this country, small performing rights in music have become available on a very simple clearinghouse system through performing rights societies. It so happens that today work is in progress, as Mrs. Linden mentioned, toward the development of a clearinghouse for various types of literary material; and I have the feeling myself that somehow or other something of this sort is bound to happen because there is such a need for it. It also so happens historically that the availability of nondramatic musical works in copyright to phonograph record manufacturers has been taken care of, not by some kind of clearinghouse organization, but by a provision in the statute, and that is absolutely all that this compulsory license provision is.

I will take the liberty of prefacing my final point by saying that I admire the facility of some of my colleagues in this room for getting in answers to people who have disagreed with them or made statements disagreeing with them. I would just like to impose upon all of you for just another minute to say that those three speakers who, just before the luncheon break and just after it, made remarks about the proposal for a performing right in sound recordings did not correctly state the position, perhaps because they had failed to think the matter through carefully.

A sound recording, under this proposed statute, is a new type of derivative work. It will stand on its own feet, if the bill is passed in anything like its present form. It is not limited to copyrighted nondramatic musical works, whether recorded under a compulsory license or under a negotiated license. It includes dramatic works, dramatico-musical works, and literary works; it includes musical works that are in the public domain. And if somebody would think, as an example, of a performance of Beethoven's Fifth Symphony by the Boston Symphony Orchestra and a performance of Beethoven's Fifth Symphony by the New York Philharmonic-Symphony Society, I think maybe it

would be a little easier to understand what I was talking about when I referred to the desirability of having a performing right in the sound recording itself.

KAMINSTEIN. I should say that I did not mean to imply that the recommendation of the committee bound anyone or represented the entire industry. We ourselves had suggested a possible rate in the preliminary draft, which was considered much higher than what is in H.R. 11947.

ORENSTEIN. As chairman of that now infamous committee on sound recordings which rendered the report, I believe that today we've turned the clock back about two years to the day after the Record Industry Association's report was issued. Or at least that's the impression that I've been given by Mr. Davis.

I don't believe this is true. As Mr. Davis so carefully pointed out, he and all the other attorneys representing the record industry were invited to participate in the discussions. Many did. One would assume, after the Record Industry's brief, that in participating in the discussions concerning the rates, concerning the other facets of the report and of the problem, they weren't there just to listen. They were not there like Joe Dubin: "I am just here to listen." [Laughter] They participated and they spoke and they argued and they voted. And we came up with something that we thought and still think is workable.

It was shocking to me, therefore, today to hear that not only is the compulsory license not acceptable at all, but that, in addition, a performing right is requested. Now the question of the performing right was also discussed at the very outset, and it was negated by those very same people who are now asking for it. They said, "Oh, we'll never get that." Well, all right, that's not in the draft. As I say, I am perfectly willing to go back two years and start arguing yes-or-no on the compulsory license. But I thought we were way past that when I came here today.

KARP. Mr. Kaminstein, speaking on behalf of some although not too many of the authors who are directly interested in this, I think I should point out that this proposal should be judged on its own merits, and not on the bargaining that took place between representatives of one group or another or the votes that were or were not cast.

This, I think, is a workable compromise to a very difficult problem. It is a difficult problem only because the compulsory license clause became entrenched in the Copyright Act. It has no place being there. There is no logical or moral justification for it. But there it has been since 1909, and there we've had to live with it.

Now all of the difficulties which some of the previous speakers have raised, I think, are completely illusory. We are dealing with

a section which fixes a maximum price at which anybody who wants to can take an author's work and use it. The Copyright Office is not fixing a price which a record company must pay. It's fixing the price which the author must take if the record company chooses to use his work and if a satisfactory contract cannot be negotiated on a voluntary basis.

The argument is spurious because as we know—the representatives of the record companies have told us this over and over again—most records are made on negotiated contracts at less than the compulsory fee. The terms that these people want to put into their contracts they can and do put into voluntarily-negotiated contracts, with the author and publisher having a chance to say yes or no.

We are talking about a compulsory clause and compulsory provisions. We're talking about a clause which has worked for the benefit of the record companies. It was for their benefit that it was put into the Act, and I think they grasp too much and manifest an excessive greed when, now having gotten this compromise, they begin reaching for more. I would say that you've worked out a very fair and reasonable compromise, much fairer and more reasonable from their point of view than the author's. I would hope that this stays in the Act as it is.

KELLMAN. In referring to the three-cent rate which is provided in the bill, I think that what has happened here is that room has been opened up for negotiation in each particular situation between the record company and the publishers. If a publisher can afford to pay three cents he will give notice if he cannot get it any other way, or pay three cents on the basis of a negotiated contract.

If he cannot pay three cents, then he can go to the publisher or to the publisher's representative. He is dealing with professionals; he is dealing with people who know the market. A lower rate will be and can be negotiated where the circumstances actually demonstrate that a lower rate must be paid and that the three-cent rate can't be paid. I will assume that, when a record company pays three cents, they can afford to pay three cents, because the way is open for them to negotiate a lower rate if the circumstances warrant it and if they can't pay the three cents. What the three-cent rate has done is to open a field, which didn't exist before, for legitimate negotiation.

DAVIS. I don't know which representatives of the record industry Mr. Karp was referring to as paying more frequently than not, or as generally paying lower than the statutory rate. That is not true. Columbia Records pays, in the large majority of cases—whether for single records or for albums—two cents per composition. Frequently when you're using more than one tune or several tunes of a publisher, you then get into negotiations. The fact that it's a negotiated rate

which results in a license agreement is merely reflective of the method of doing business, i.e. it is very, very rare for a company to account according to the compulsory licensing provisions of the statute. There is a license agreement between the parties, but the license agreement does specify the rate, and in a large majority of instances it is two cents.

I just want to repeat two facts. One is that already the copyright proprietors are usually receiving 24 cents on a $3.98 album. The performing artist gets between ten and fifteen cents, depending on his stature as a performer. What is being suggested by the fifty percent increase from two to three cents would mean a 36-cent rate; you're really setting the standards to rule the negotiations, which would mean that at least 25 percent of the monies that a record company receives would go to the copyright proprietor, considerably more than double that which the artist is receiving.

We certainly have to look carefully at the economic facts, if it means that we have to go back where we were two years ago. It is consistent with the record industry's position that the compulsory license provisions be retained and that two cents remains an extremely fair rate today to be used as the standard for negotiation between publishers and record companies.

WATTENBERG. When Mr. Davis said that his company pays two cents, he failed to say that it pays two cents on records sold. It doesn't pay two cents on records manufactured, in accordance with the law. Practically no record company does. The instances of record companies working under the compulsory licensing provision today are very, very rare. The two cents on records manufactured is a ceiling under which the rates and the terms are negotiated. I see no reason on earth why that ceiling cannot be lifted and the negotiations continue as in the past.

KARP. Mr. Kaminstein, I have one proposal to make. (I hate to use the phrase because of the connotations of "public interest.") We are talking about a statute which fixes prices. According to Mr. Davis it fixes them not only as a maximum but ultimately. It fixes the price which the author must accept from the record company in order to have his work used.

I would suggest that, if the record companies believe that price fixing is in the public interest, we seriously consider establishing in the Copyright Act a schedule of fixed prices for the records which they sell to the public. If you can fix the price of the music in the public interest, why not fix the price of the record?

MARKS. As co-chairman of the subcommittee I merely want to say that there was no negotiation as to actual rate. Those people who were on the subcommittee all refused to have the question of price,

which was one of economics, go into the report of this committee to the American Bar Association. I am a little disturbed that people are willing at this stage to say a compulsory licensing system is all right if I get more money, but that inherently it is terribly wrong if I don't.

KAMINSTEIN. Obviously we can't go any further today. We will start again tomorrow morning at 9:30. Thank you.

TRANSCRIPT OF MEETING ON 1964 REVISION BILL

New York, N.Y., August 7, 1964.

Present:

Abraham L. Kaminstein, chairman.
Mrs. Harriet S. Adams, Stratemeyer Syndicate.
Eugene N. Aleinikoff, National Educational Television and Radio Center.
Douglas A. Anello, National Association of Broadcasters.
Diana J. Auger.
J. S. Barnes, John Wiley & Sons, Inc.
J. G. Billo, Matthew Bender & Co., Inc.
Arpad Bogsch, United International Bureaux for the Protection of Intellectual Property, Geneva, Switzerland.
Mrs. Bourne, Bourne & Co.
Leon S. Brachman, United Artists.
Mauck Brammer, American Book Company.
Thomas C. Brennan, U.S. Senate Judiciary Committee.
John A. Bresnahan, Printing Industry of America.
Seymour Bricker.
Emerson Brown, American Textbook Publishers Institute.
Harry Buchman; Stern & Reubens.
Evelyn F. Burkey, Writers Guild of America, East, Inc.
Samuel J. Buzzell.
George D. Cary, Copyright Office.
J. M. Collins, American Society of Composers, Authors and Publishers.
John J. Cooke, McGraw-Hill Book Company.
Frederic S. Cushing, American Textbook Publishers Institute.
Richard B. Davis, Universal Pictures Co., Inc.
Lee C. Deighton, Joint Copyright Committee, Book Publishing Industry.
Walter J. Derenberg, New York University Law School.
Sidney A. Diamond, London Records, Inc.
Jean Dorfman.
Joseph S. Dubin, Universal Pictures Company, Inc.
Michael Dufinecz; Cooper, Dunham, Dearborn & Henninger.

Omar F. Elder, Jr., American Broadcasting Company.
C. Lyman Emrich, Jr.; Brown, Jackson, Boettcher & Dienner.
Robert V. Evans, Columbia Broadcasting System, Inc.
John B. Farmakides, National Aeronautics Space Agency.
Herman Finkelstein, American Society of Composers, Authors and Publishers.
Arthur L. Fishbein.
Donald C. Fitch, Jr.
James H. French, Book Manufacturers Institute.
Max Freudenberg, U.S. Air Force.
Gerald M. Ginsberg, Broadcast Music, Inc.
Morton David Goldberg; Foster, Ginsberg & Schwab.
Abe A. Goldman, Copyright Office.
Charles F. Gosnell, American Library Association.
Herbert N. Gottlieb, American Society of Composers, Authors and Publishers.
R. C. Harwood, American Book Publishers Council.
A. H. Helvestine, Department of Defense.
Michael E. Hobbs, Ad Hoc Committee on Copyright Law Revision.
Harry F. Howard, Book Manufacturers Institute.
Daniel Huttenbrauck; Mendes & Mount.
Richard B. Jablow; Butler, Jablow & Geller.
Theodore R. Jackson; Gilbert & Gilbert.
Siegrun Kane; Kane, Dalsimer & Kane.
William M. Kaplan, ABC-Paramount Records, Inc.
Irwin Karp, Authors League of America.
Sydney M. Kaye, Broadcast Music, Inc.
Mrs. Esther O. Kegan; Kegan, Kegan & Berkman.
Leon Kellman, American Guild of Authors and Composers.
Peter T. Kennedy, Christian Science Church.
John M. Kernochan, Columbia University.
Bernard Korman, American Society of Composers, Authors and Publishers.
William Krasilovsky, Music Publishers Holding Corp.
Alan Latman; Cowan, Liebowitz & Latman.
Max K. Lerner.
Elliott H. Levitas; Arnall, Golden & Gregory.
Bella L. Linden, American Textbook Publishers Institute and Linden & Deutsch.
George E. Long, Bureau of Customs.
Horace S. Manges, American Book Publishers Council.
Abraham Marcus; Marcus & Kahn.
Alfred M. Marks; Davis, Gilbert, Levine & Schwartz.
Isabelle Marks, Decca Records, Inc.

Michael Masnik, General Electric Co.
James C. McConnon; Paul & Paul.
Ernest S. Meyers, Record Industry Association of America.
Edward A. Miller, National Library of Medicine.
Morton Miller, Kapp Records, Inc.
Bernard Moss, National Arts Trust Fund.
Spencer Olin, Walt Disney Productions.
Harold Orenstein; Orenstein, Arrow & Lourie.
Robert C. Osterberg, Music Publishers Protective Association.
Averill C. Pasarow; Pasarow, Watkin & Ehrmann.
Joseph Paull, The Washington Post.
Sigrid H. Pedersen, Paramount Pictures.
Ralph Peer, II.
E. Gabriel Perle, Time, Inc.
John R. Peterson, Christian Science Church.
John Phillips, Book Manufacturers Institute.
Harriet Pilpel; Greenbaum, Wolff & Ernst.
Dana J. Pratt, Association of American University Presses, Inc.
Lawrence H. Reed, Doubleday & Co., Inc.
Barbara A. Ringer, Copyright Office.
Saul N. Rittenberg, MGM.
Harry N. Rosenfield, Ad Hoc Committee on Copyright Revision.
Gertrude Rosenstein, Paramount Pictures.
Stanley Rothenberg; Margulies, Heit & Rothenberg.
Edward A. Sargoy, American Bar Association.
Libby Schaeffer; Schaeffer & Schaeffer.
Morton Schaeffer; Schaeffer & Schaeffer.
Edith Schaffer, ABC-Paramount Records, Inc.
George Schiffer, National Community Television Association.
Adolph Schimel, Universal Pictures.
Sidney Schreiber, Motion Picture Association of America.
John Schulman, Consultant on Copyright to Christian Science Church.
S. Q. Shannon, The Greeting Card Association.
Jacob Shearer.
Paul J. Sherman, General Artists Corp.
D. Bruce Shine, Broadcast Music, Inc.
E. Stratford Smith, National Community Television Association.
Sigmund Steinberg; Steinberg, Richman, Price & Steinbrook.
Miriam Stern, American Guild of Authors and Composers.
O. R. Strackbein, International Allied Printing Trades Association.
Stuart F. Suchman, NET.
Samuel W. Tannanbaum; Johnson & Tannenbaum.
Emmett E. Tucker, Jr.; Hanson, Cobb, O'Brien & Tucker.

Franklin Waldheim, Walt Disney Productions.
Alfred H. Wasserstrom.
I. Watson, Stratemeyer Syndicate.
Philip B. Wattenberg, Music Publishers Association.
Harold Wigren, National Education Association.
Harvey J. Winter, Department of State.
Theodora Zavin, Broadcast Music, Inc.
Leonard Zissu; Zissu, Marcus & Stein.

KAMINSTEIN. A former member of our staff has just flown in from Geneva, and I'd like to give the Deputy Director of B.I.R.P.I., the organization that administers the Berne Union, an opportunity to talk to the Panel. Arpad Bogsch. [Applause.]

BOGSCH. It is, as you can very well imagine, a very great pleasure for me to attend this meeting which, after a decade of arduous preparatory work, now has before it the first complete embodiment of the results of your discussions. The Register of Copyrights was so good as to invite the International Secretariat of the Berne Union to attend, and I am here today as a representative of the Geneva Bureau.

Looking upon your work—that of the Government and that of the members of the Panel—from the international viewpoint, it would be difficult to exaggerate its importance. To put it mildly, the whole copyright world is watching you, your work, with great hopes and expectations. After all, the United States leads today in every field of activity connected with copyright. Its authors' societies collect more royalties than those of any other country. Its book and periodical industry, its motion picture and phonograph record industry, its radio and television networks are the largest in the world. Because of its leading position in new inventions, the new technical devices for copying and transmitting are first tried out here and the legal implications are first tested here. Consequently, your work will have a great impact on the development of the copyright law all over the world. The world looks to you for inspiration to find equitable and practical solutions.

The first reactions to the bill abroad are highly complimentary. The relaxation of formalities and the life-plus-fifty year term are considered as the most important provisions, and also as an expression of willingness to collaborate with the rest of the countries. They will bring the United States into the mainstream of international cooperation, and in this shrinking world, in this world where, both intellectually and commercially, international ties become more and more important, these features of the bill will greatly serve United States interests.

May I add that, if the bill is passed in time before the Stockholm Revision of the Berne Convention, which is scheduled for 1967, this

of course will have a most important influence on the revision of the Berne Convention itself.

May I conclude by congratulating you on your work and expressing the hope that, in its work, Congress will be as efficient as you have been. [Applause]

KAMINSTEIN. May I express my personal appreciation for your taking the trip. Arpad arrived last night and will probably leave tonight.

Mr. Rosenfield has asked for a minute and three-quarters to reply to a statement made yesterday.

ROSENFIELD. Mr. Kaminstein, thank you very much. Yesterday afternoon Mrs. Linden asked me a question, under circumstances not permitting a reply, concerning my earlier statement that education's problem was not solely costs but, equally importantly, the ready availability of copyrighted material. Apparently believing that I specified availability as our only problem, Mrs. Linden asked me about the acceptability of a clearinghouse without statutory protection for education.

To make our position and answer clear, let me say this. First, I intended to speak of two problems—costs and availability—and to stress availability at that point merely to emphasize that cost was not our only problem. It would be a misunderstanding for anyone to get the impression that availability is our only concern. Cost still remains a vital problem for education in this field, both in the classroom and in educational broadcasting, as Mr. Harley pointed out yesterday. In the latter case there is a fundamental difference between commercial and educational television. One is for profit and the other for service.

Second, without disrespect intended for Mrs. Linden, it is fair to note that she represents only a small part—although an important one—of education's availability problem. All sorts of other materials are also involved: other books and reference materials of various kinds, newspapers, magazines, prints, art, music, maps, scientific and professional periodicals, films, film strips and other audio-visual materials, to mention but a few.

And third, of course anything that can be done to expedite clearances is desirable. But unless the Copyright Act itself clearly gives rights to education, a voluntary clearinghouse is very little protection and is not acceptable in lieu of statutory protection. It is revocable at the whim and convenience of those who create it, and affords no protection against exorbitant or unreasonable costs.

Perhaps education may have some justifiable lack of confidence in the longevity and reliability of such a voluntary system, proposed by groups which have given vigorous support to proposals which education believes would substantially nullify its rights under present law.

We find little assurance in proposals whose timing and express conditions are tied to elimination of statutory protection for education in the Copyright Act. We believe that the public interest requires express statutory protection for education's rights, impervious to the caprice and commercial convenience of groups which have not thus far shown marked interest in protecting education's need for teaching America's school children and youth.

Thank you for the privilege, Mr. Kaminstein.

KAMINSTEIN. Thank you. I hope the conversations will continue beyond the meetings, and that this problem may be resolved.

We now tie together sections 14, 15, 17, and 18, dealing with ownership, transfer, and recordation, and I am going to call on Miss Ringer to present those.

RINGER. As you will note, there have been several largely technical changes in section 14 as a result of suggestions on the preliminary draft made by the Revision Panel and others. Subsection (d) (1) has been imported from section 17 simply for convenience and clarification, and to avoid duplication. The provision on divisibility, while no longer having a separate subheading, is still there as clause (2) of subsection (d). To anticipate a point that was raised earlier in the meetings of Committee 304, there was no intention to exclude mortgages or discharges of mortgages in the word "conveyance," but if the word is not broad enough for that purpose, I think that an amendment might be desirable.

Now there were two questions raised by this section that were discussed at length at the Panel. The provisions that raised these questions have now become the definitions of "joint work" and "work made for hire" in section 54, and I believe that this is an appropriate place to mention them.

The wording of the definition of "joint work" has been changed somewhat in the light of various suggestions, in order to make it more precise, but there really was no intention to change its basic substantive meaning. A question was raised as to whether, in order to constitute a "joint work," it is necessary for the authors to have any intention that their contributions be merged in any way. There was some sentiment for defining a "joint work" simply as "a work prepared by two or more authors," but this seems—at least to me—unacceptable under any legal theory. You are dealing here with ownership; and to create a tenancy-in-common situation with all of the consequences that flow from that, simply from the accident of bringing together two authors' works and without regard to the authors' intention that they be merged or anything else, doesn't appear to me to make any practical or theoretical sense.

The definition of "work made for hire" does raise a very serious substantive question. In the preliminary draft a work "made for

hire" was defined as "a work prepared by an employee within the scope of the duties of his employment, but not including a work made on special order or commission." As most of you know, strong objections were lodged against this last phrase, particularly by the book publishers but also by others. They objected on the ground that, for example, a number of books must be written on special order or commission as a practical matter, and encyclopedias and dictionaries, among others, were cited as examples.

This wouldn't make as much practical difference if there were no reversion provision. But, as was pointed out, under a reversion provision as now drafted in section 16, "works made for hire" are exempted, so that the practical consequences of whether or not a work is "made for hire" can be extremely great under this bill.

Now you simply cannot provide the reverse of what we had in the earlier draft; in other words, you can't just say that a "work made for hire" shall include a work made on special order or commission. There are commissioned works, such as operas and serious music, and various works of that sort, that most people would find hard to accept as "works made for hire." But it is true, and I think we have to accept the fact, that some works made on special order or commission have been construed by the courts as coming within the ambit of the "works made for hire" concept under the present law.

So we had a problem, and it was a definitional problem, but it had extremely important consequences. The definition that now appears . . . [in section 54] reflects this background. Under this, a "work made for hire" is "a work prepared by an employee within the scope of his employment, or a work prepared on special order or commission if the parties expressly agree in writing that it shall be considered a work made for hire."

This approach has been challenged on the ground that authors will simply sign these printed form contracts and thereby assign away their rights without realizing that they're doing so. This may be true. On the other hand, I would point out that it has to be "a work prepared on special order or commission" in the first place. It would not be considered a "work made for hire" if the contract were signed later on—after the work was written, for example. Moreover, and I think this was the basic reason for our acceptance of this compromise, at least there has to be a specific provision in the contract spelling this out. If the author can be presumed to read his contract—I see Irwin reacting, but anyway—and take in the consequences of what he's signing, at least this would be a red flag to him. I realize that there are two sides to this question, and I think this will probably be debated shortly.

As far as sections 15, 17, and 18 are concerned, we did make a few changes, but I think that if you compare the two drafts you will find

that they are technical. They are largely the results of comments and suggestions we received for clarification and improvement on technical matters, and I don't think they need detailing at this time.

JABLOW. I understand, under section 14(b), that even though you have an employment situation out of which a work is created, the parties in writing may agree that the author is still the copyright proprietor. My question, however, is whether or not the parties can expressly agree in writing that the work is not a "work for hire," even though it was created during the course of the employment. In other words, if you have an ordinary situation where X hires B to write a certain literary work, it would be a "work for hire." Can the parties nevertheless then agree between themselves in writing that it is not a work for hire, with the attendant consequences?

RINGER. Mr. Jablow, I think the answer may be implicit in the text of section 14 itself. You couldn't change the status of the work as a "work made for hire," but you could change the ownership situation.

JABLOW. Well, it's not just the ownership. For example, the term of copyright will be determined by whether or not it was a work for hire.

RINGER. A "work made for hire" is a work made within the scope of the employee's employment, and that would determine the copyright status of the work. But the parties can reach any agreement they wish to with respect to the disposal of the rights under that copyright.

JABLOW. And with respect to the term of copyright, let us say?

RINGER. The term of copyright would presumably be determined by the status of the work as a "work made for hire."

KARP. Mr. Kaminstein, first I'd like to address myself to two or more technical questions, which are raised by section 14(b). The section says, "In case of a work made for hire, the employer or other person for whom the work was prepared is considered the author . . . unless the parties have expressly agreed otherwise." Now the "other person" you're talking about here is the person, I assume, who has commissioned the work or had it prepared on special order.

You have, therefore, a flat contradiction between section 14(b) and your definition of "works made for hire" . . . [in section 54]. Under section 14(b), the person who commissions the work or orders it is considered the author, as I read this section, unless the parties agree otherwise. That's how it reads. If you go to your definition, it says that he is not considered the author unless the parties agree that he is.

I hope that before the draft is completely revised you make up your mind one way or another, and I hope you make it up the right way. However, I think that the problem can be cured by attacking a much more basic problem, and that is the whole concept, which is incorpo-

rated into the draft, that a work made on special order or commission should ever be considered a "work made for hire." I firmly suggest to you that it should not, and that the consequences are not limited to those that Barbara mentioned. That's one of the reasons I was vigorously shaking my head.

The consequences of this definition of "works made on special order or commission" being incorporated into the concept of "work made for hire" is not only that the author would lose his right of reversion, but also that he would lose the term of life-and-fifty years, as Mr. Jablow just pointed out in connection with "works made for hire." Once an author agrees that he has written a novel as a "work made for hire," the term of copyright on that novel is not life-plus-fifty years, but the term provided for "works made for hire" in the true sense, such as motion pictures (unless, of course, the agreement between the screen writer and the motion picture company provides otherwise). Now, with that consequence, you have largely defeated the whole purpose of granting copyright for life-and-fifty years.

I come now to the second reason for shaking my head so vigorously. The problem is partly that authors don't read contracts. In this they are not stupid or improvident. They just follow the same conduct which we as lawyers know most American businessmen and individuals follow. They don't read contracts, especially if you look at some of the publishing contracts which run as much as thirty pages. I can show you some that do.

Even the four- and six-page contracts are long and closely printed and hide many clauses that are detrimental to authors and which they don't read—and if they could read them they might not understand them. This, I assume, they could understand if they read it; but a lot of them wouldn't even know that by signing this clause they were giving up life-and-fifty years or the right of reversion, because even the organizations which those of us who speak for authors represent don't represent all authors in the United States, as Mr. Rosenfield I'm sure, would hasten to tell you, and he would be right. There are thousands of authors that don't belong to authors' organizations, that haven't been advised, that are never advised about the intricacies of copyright law. They are in the same position as Mr. Rosenfield's teachers, who sign contracts and then discover years later that clauses that they didn't understand may affect their rights under the copyright law. And you come to something as basic and fundamental as the term of copyright, to life-and-fifty years or to the right of reversion, the author's rights shouldn't depend on something as technical as this.

Now, what is "a work made on special order or commission"? This, Barbara, is the third point on which I would disagree with you. A contract for the publication of a book provides ordinarily for an ad-

vance against royalties or an account of royalties, and for the payment of royalties. That contract can be signed before the book is written, or after it is written, or while it is being written.

Under the definition that you have placed in the act, it is perfectly possible for the same author writing a book—a novel, a history, a textbook, or any other type of work—for the same consideration or the same compensation, and with the same degree of independence in the creativity of his work, to be considered as having written it "on special order or commission" if the contract was signed before the work was written. The same contract signed after the work was written would not be considered to make it a work "on special order or commission."

Many independent creative works are written by authors who say to a publisher, "I am about to write a novel. Would you like to publish it?" Or a publisher may say, "I'd like to publish your next novel. Will you publish with me?" And the author signs a contract before the work is written. That is not a work "on special order or commission" in any logical sense of the word as it relates to reversion or the duration of copyright.

The work is the independent creation of the author whether the publisher says "Why don't you write a novel about the Viet Nam conflict?" or "Why don't you write a history?" or "Why don't you write a textbook about science?" Whether he says it to the author and offers him a contract before the work is written or after the work is written, the author's rights should be protected, both as to the term of copyright and as to duration. And this definition, which you have put into the act, would convert many independent creative works into "works made for hire," because authors cannot resist the pressure of a publisher who says, "I want you to sign that clause." They don't resist the pressure of the publisher today when he says, "I want you to give me the copyright for the original term and for the renewal term." The tie-in assignment of a renewal copyright is the way in which the renewal clause of the Copyright Act, which was written by Congress to protect authors against this very economic pressure, has been defeated.

WASSERSTROM. I would like to address myself to subsection (c) of section 14. I would like to point out that I take the law to be that if a transfer is made, absent limitations, there is a transfer of all rights, and it seems to me highly undesirable to single out publishers of collective works and to treat them differently. Now there may be occasions when the author should be considered the darling of the law, as he is in many of these provisions, but in this particular context it seems to me undesirable to treat the relationship between the author on the one hand and the publisher of a collective work on the other as facing each other in a different context.

I think that you have done that by providing here a deviation from what I take to be the law today. You do that by providing that, in the absence of an express transfer, there are very limited rights granted to the publisher of a collective work—the publisher of a magazine or a periodical. I think it is undesirable to require an express transfer, not only because it runs counter to existing law, but because it runs counter to settled practice in the magazine and periodical publishing field. Therefore I would suggest that the requirement that there be an express transfer be omitted from subsection (c) of section 14.

The other point that I would like to address myself to is just a relatively minor one. If this second sentence of section 14(c) is to remain, it seems to me that there should be some clarification as to what is meant by the phrase "and any revisions of it" in connection with the reproducing and distributing of a contribution as a part of a particular collective work. Treating it in the terms of this sentence, I'm not at all sure that the draftsmen intended to limit, in the absence of an express transfer, the publication on the part of the publisher to a particular issue of a particular periodical, thereby eliminating the relatively simple and generally accepted right of republication in the same periodical.

LINDEN. So that Mr. Rosenfield would understand why I speak on behalf of encyclopedias and reference works as well as textbook publishers, I'd like to explain the name "American Textbook Publishers Institute." The American Textbook Publishers Institute encompasses the publishers of encyclopedias, reference works, scholastic magazines, maps, charts, graphs, and so forth. As a matter of fact, in dollars-and-cents volume they represent eighty percent of the entire reference and technical field—in dollars, eight hundred million out of a billion last year. And, Mr. Rosenfield, the offer of a meeting still stands.

With respect to Irwin Karp's comments on employment for hire (both the definition and section 14(b)) the encyclopedias, the reference works, the maps, the technical works—which operate and function and are created as composite works where the publisher participates creatively and orders and commissions segments, all of which are collated into the final work—are works made almost exclusively on special order or commission.

No publisher that I know of has a staff, for instance, of seven thousand top specialists in various fields of science, industry, philosophy, literature, and so forth, able to compile a first rate encyclopedia such as the kinds that are on the market today in the United States. No map publisher that I know of has a staff of top cartographers, artists, and art consultants to utilize in the making of the kinds of maps and varieties of maps that are available to the public for educational and all other purposes in the United States today.

To talk about employment for hire while excluding therefrom the concepts of special order or commission creates an illusory employment-for-hire situation, and would result in negotiations for reversion with respect to anywhere from five to seven to eight to ten thousand individual contributors to the kinds of composite works and collective works to which I made reference. I submit that it would not be feasible for those works to be published under the kind of system of reversion which, under what Irwin Karp advocates, would include special order or commission.

May I point out further that the definition, which includes special order or commission if the parties so agree, does not preclude—and I believe is intended to include—the evidentiary facts that the work was actually made on special order or commission of the publisher and that it is not a subterfuge. These words are being used in the statute, I believe, as words of art, and not as absolute terms for purposes of the definition.

ROSENFIELD. Mr. Kaminstein, with reference first to Mrs. Linden's comment, may I say that, prior to the discussion on this floor yesterday which involved Mrs. Linden's comments and mine, Doctor Wigren, who is head of the Ad Hoc Committee, had advised Mr. Deighton, one of the leading publishers and the head of the publishers group, of our intention to establish a task force to meet with them, and to sit down and discuss the matter with them. Lest Mrs. Linden feel that we are not on talking terms, quite the contrary is true. We wish to talk, and we had expressed this desire before this exchange. We would be delighted to talk with them, as we already have, and with any other group. But I want to make it perfectly clear that we don't propose in our talks to give up the principles that we indicated, and that was the purpose of my discussion. [Laughter] As to the question of clearances, we would be delighted to have any clearance system that is effective, but it is not a substitute, as I indicated in my remarks, nor would it be acceptable in lieu of statutory protection.

Secondly, with respect to Mr. Karp's comments, I hope this won't embarrass him, but I am delighted to associate myself with his remarks in connection with the definition of "for hire" which appears . . . [in section 54], and in particular connection with the language "a work prepared on special order or commission." I agree with him that this will become a *pro forma* provision of a contract and not represent the truthfulness of the actual facts, and I agree with him that this would in effect deprive teachers as well as other authors of rights under the copyright law to which they ought to be entitled. Irwin, I hope it doesn't embarrass you to have my support.

KAMINSTEIN. I think he can suffer through it. [Laughter]

MANGES. With reference to Mr. Karp's comments on the "works for hire" definition, a definition of this kind is absolutely necessary, we

think, in the book publishing industry. I do not see the great chance of abuse about which Mr. Karp talks, because it has to be a work actually prepared on special order or commission, as the definition says. The editions could not be published without the author's consent, and Mr. Karp's proposal would absolutely destroy the present way of doing business. So we say that this is absolutely fundamental.

KELLMAN. So far as special orders and commissions are concerned, I don't agree with Horace Manges that the statute provides that the definition applies only if the work was actually made by reason of special order or commission. It doesn't. Any little gesture of the right sort can bring a contract within the scope of this definition, and the proper wording—or the improper wording—in a contract, can make it a "work for hire."

Now I think that, by belaboring the words in the statute, Horace and Bella are not belaboring *their* problem—and they have a problem with respect to encyclopedias and compilations and such like works. They have to keep them for a very long time. The statute can, in one form or another, provide that there shall be no reversion for certain works, or that certain special categories of works will be given special treatment. It may solve their problem to leave the "commission and special order" wording in the statute, but it will also hurt many other people.

Their problem should be solved on its own terms. The "work for hire" problem should be solved on its own terms. I think the "special order or commission" wording as it stands now is highly dangerous, highly destructive, and would permit many, many abuses. But the problem can be solved.

MCCONNON. I would like to observe that, if there are any special problems in certain industries respecting works made for hire, I think it's better that their problems be dealt with specially somewhere else in the statute as in the case of the record industry, rather than in the section involving a definition. I think that the definition should not be warped to solve the problem of a particular industry.

I have a question with respect to the term "special order or commission." Is that intended to include work done on any other basis than employment?

KAMINSTEIN. Do you have a particular case in mind?

MCCONNON. Under the definition of a "work made for hire," is that intended to include any basis other than employment?

KAMINSTEIN. Yes.

MCCONNON. I suggest, then, that the statute say that it includes a work prepared by one party for another on any other basis, if the parties first expressly agree in writing that it shall be considered a "work made for hire."

SCHIFFER. I would just like to comment briefly on the "joint work" provision. Coupled with the definition it would appear that the inten-

tion is to preserve the existing law. The existing law is in a substantial state of confusion, having many unsettled questions.

One series of problems involves the situation of determining the intention and the right to treat separate contributions as a "joint work." In that respect, I wonder whether the definition, by simply stating that this is left to the intention of the authors, is sufficient protection for the authors in light of the cases indicating that such an intention may be spelled out from contracts that they separately make with a publisher.

The other problem is one in which I believe our bill should follow the recent foreign enactments, which rather carefully spell out the relationship between the co-owners and their respective rights against each other. Our law is not sufficiently clear to leave this simply in the phrase "co-owners." We should have a statutory provision with respect to obligations of cross-accounting and matters of that kind.

KAMINSTEIN. Well, as you know, there was considerable dispute about which way that sort of provision should be written.

PILPEL. There is obviously no provision of this proposed act of more importance to magazine writers and magazine photographers than section 14. Generally speaking, I think the Copyright Office has done an excellent job in setting forth what the law should be and, at the risk of disagreeing with Mr. Wasserstrom, also of what I think the law is. Mr. Wasserstrom referred to the law and settled practice today in terms of the ownership of all rights in a contribution to a collective work being acquired by the owner of the collective work. I will subsequently discuss the basis for that statemenet. In any event, this provision, which would continue the ownership of separate contributions to a joint work in the hands of each separate contributor, seems to me to reflect not only existing law but also the existing practice of all of the organized groups in the magazine industry and the newspaper industry.

I have but one question with reference to the wording, and that is with respect to the wording at the end of subsection (c): ". . . and any revisions of it." If that means "any revisions of the collective work" in terms of changing the contributions, or their order, or including different contributions, obviously the magazine writers and photographers would not object. But there is an implication, or at least an ambiguity, that somehow the owner of the collective work has a right to make revisions in the contributions to the collective work. This is not and should not be the law, and consequently I suggest that the wording at the end of subsection (c) be changed or eliminated to make that absolutely clear.

As far as collective works are concerned, it seems to me that Mr. Karp is quite right in the statements which he made on behalf of authors. In particular, I should like to point out that, where lump sums

are paid, there is a tendency to regard the transaction as an employment for hire although it may not be. It is in that situation particularly that greater definition and clarification are called for, and it is in that situation particularly that reversion is called for, because there is no continuing payment.

KAYE. Section 18 applies the penalties for failure to record, I think, to an impracticably broad spectrum of conveyances. Under the definition there would have to be a recordation of a transfer of any exclusive right, whether or not limited in time or place of effect. All of the motion picture contracts which give a week's exclusivity, all of the assignments of performing rights—these hundreds and hundreds of thousands of conveyances—would suffer a penalty if not recorded. It is not practicable to record them, and I would suggest that consideration be made to reducing the onerousness of the provision.

KAMINSTEIN. I turn now to one of the key provisions in the law, the section on reversion, and call on Mr. Goldman to introduce it.

GOLDMAN. Section 16 is the section dealing with reversion. There have been some controversies about it, and not everybody is in accord on it. It is based to a large extent on proposals that were discussed from time to time in the past, and is an attempt to write out a formula which is pretty close to what had been discussed as a possible solution in the past. I think it's worth trying to explain how we intended this to operate, because there have been two or three questions raised as to the meaning of some of the provisions of section 16.

I call to your attention first that, in the opening clause, "works made for hire" are excluded from the operation of the reversion provision. I also call to your attention that, under the opening clause, reversion is available only with respect to a transfer made by the author after January 1, 1967. In short, this would have no effect on contracts existing before the new law becomes effective; it would relate only to transfers made thereafter by the author.

Now the way this was intended to operate is this: the author if he is alive—or if the author is not alive, then the author's legatees or heirs or personal representatives as the case may be—would have the privilege of serving notice on the transferee, at any time during the 35 years from the time the transfer was executed, that he wanted to cancel that transfer. The termination, however, could not be made effective until at least 35 years had expired from the date of the transfer and until at least two years had expired from the time that the notice was served. The notice could be served at any time, but the transfer could not be effective until at least two years after the notice was served and until at least 35 years after the transfer had been executed.

The author if living, or his successor if the author is not living, could not transfer those same rights to anyone other than the holder of

the rights under the initial transfer, during the 35 year period. However, he could at any time make a new deal with the original transferee or his successor. This means that the only person to whom the author or his successor could assign, during the 35 years, rights with respect to the period following the 35 years, would be the original transferee. Any deal he purported to make with anybody else, if made during the first 35 years with respect to the succeeding period, would not be valid. The original parties would have to negotiate for new terms before the close of the 35 years, and no deal could be made by the author with anybody else during the 35 years.

I believe that I've answered all of the questions that have been raised. To make it clear that I've answered one, the expiration could be made effective at the close of the 35 years if notice were given at least two years in advance of that time.

WATTENBERG. I am fully in accord with the many previous arguments in favor of deleting the reversion provision. There have been really only two arguments for retention: one by Mr. Kellman and one by Mr. Karp. Among their arguments is a plea that without reversion the author would be in a poor bargaining position. I presume they speak of authors who are members of their clients.

Well, what are the facts? Mr. Kellman's client, the American Guild of Authors and Composers, which has been in existence since 1932, negotiated a Uniform Popular Songwriters Contract with the publishers in 1939, which granted to publishers the first term of copyright in the United States and the full term of copyright abroad. Although the publishers had sought the renewal copyright also, the A.G.A.C. was able to deny this right.

In 1947 a revised contract was negotiated, and in this the A.G.A.C. was able to improve its position. The term was cut down to 28 years, from publication or first copyright throughout the world. Thus, even though most foreign copyright laws grant copyright for the life of the author plus fifty years without a reversion, A.G.A.C. was able to negotiate its own reversion after 28 years. By the way, both of these contracts are four pages long. I have no doubt that, if the new law contains no reversion, A.G.A.C. will be able to negotiate a reasonable reversion when next it seeks revision of its contract.

Now Mr. Karp's client, the Authors League, has a Dramatists Guild which for over forty years, I believe, has maintained with stage producers a Minimum Basic Agreement. The duration of this agreement has never relied on copyright. As a matter of fact, the author retains his copyright and grants only a lease of stage performing rights for a limited period. Whether or not there is a reversion clause, I am sure the minimum agreement will not be affected.

As to authors' and composers' agreements with ASCAP, again there is no reliance on or transfer of copyright to establish a term. The

grant is for a limited period. I believe the current contract expires on December 31, 1965. In addition, the Consent Decree gives the author and composer the right to withdraw. I am not completely familiar with the BMI situation, but I imagine it's somewhat like ASCAP. Thus, we see, there is not nearly as much need for reversion as the advocates of reversion would have us believe.

KARP. Mr. Kaminstein, I would like to make this request at the outset. I can talk for two minutes or ten minutes on reversion, depending on whether we're going to argue the merits. If anyone proposes, or if the representatives of those interests which oppose reversion intend, to debate in full the basis for reversion on the merits, I would insist, to the extent I am able to insist here, on the privilege of answering that argument. If we are not going to repeat the deliberate and extended proposals and arguments and points that we have made, and which are fully set forth in the records of previous Panel meetings, I can keep my remarks to two minutes or less.

KAMINSTEIN. I think you know my preference. [Laughter] I would urge you to keep it to two minutes. If anyone takes ten minutes, we will give you additional time.

KARP. I am not interested in equal time. I am interested in answering the other phase of the argument if it's going to be made.

KAMINSTEIN. I would urge everyone concerned to take into account that these basic arguments have been presented to us at length, and that presenting them again here would take not only the morning but the entire day. I would urge you to keep your remarks brief.

KARP. As to Mr. Wattenberg's statement, which I think is one that presents considerations that we should be aware of, the law is being written not to protect the members of Mr. Kellman's organization or the members of the Dramatists Guild. On the contrary, the fact that the Dramatists Guild has negotiated this contract is the exception which proves the very hard, firm, fast rule that applies in every other area of publishing, in which thousands and thousands of authors are involved.

The Dramatists Guild represents the very few professional playwrights in the United States whose work is presented on Broadway and who are able to take care of themselves. The thousands and thousands of professional authors of books and of music in the United States cannot and have never been able to protect themselves adequately in making a grant of rights for a reasonably limited period of time. I have heard (or read, I should say, because it is in writing) a statement by the vice-president of one of the major publishing firms in the United States in which he said, "I have never in my entire publishing experience accepted a grant of rights to publish a book for only one term of copyright. I hope I never have to. I know of no

other publisher who has ever accepted a grant of only a single term. We all accept grants only of the original and renewal terms."

Now this is true of contracts made with highly successful professional authors, and with the second rank of competent but not as spectacularly successful popular authors, authors who number hundreds and thousands. And this is true of the many more thousands of authors who are quasi-professional—the teachers, the university professors, the rank and file—who have absolutely no power to bargain any contract for the publication of their work for a grant of only a single term of copyright, which type of grant was the grant envisioned when Congress wrote the renewal clause. I cannot speak for music writers; I think Mr. Kellman can do that much more effectively than I. But I understand that there are many, many hundreds or thousands of writers of popular music who do not belong to his organization and who do not sign that type of contract.

Now, as for my comment on the clause itself, I think that the Copyright Office has tried to work out a compromise of a very difficult and bitter problem. I would have preferred that the term of reversion be less than 35 years, because I think it exceeds the normal period and the reasonable period that is required. I would feel that 35 years would be a compromise that could be accepted if the clause were truly protective. I should hesitate to do this, because in this type of bargaining it has been my bitter experience that the first man who says "I'll accept this" finds that that's the starting point and not the finishing point. But we have to make progress.

I would say that, if this clause were truly an effective reversion clause, 35 years—while I believe it overly long—is acceptable. However, the clause is not effective for the very reason I pointed to before: because the definition of "work on special order or commission" included in the work-for-hire definition, coupled with the economic facts of life that authors would sign contracts stating that they agree that the work be deemed a "work for hire," would deny them the protection of the reversion clause. They would sign that type of contract, just as today they are compelled—I repeat, compelled—by their inferior bargaining position, when they bargain as individuals *vis-à-vis* a publisher or other business entity, to assign both terms of copyright, to tie in an assignment of the renewal with an assignment of the original copyright.

MANGES. That was one of the longest two-minute speeches I ever heard, but I will try to be brief anyway. From the point of view of book publishers, while section 16 as now written is a decided improvement over what it was in the draft, it is still intolerable. The present bill sets forth this reversion, to which the book publishers are definitely opposed. The American Book Publishers Council and the American

Textbook Publishers Institute filed a statement with the Register dated June 12th of this year, and in that they expressed their unequivocal opposition to any form of reversion and asked that, as under the British copyright law, there be no reversion.

The usual out-of-print clause in the author-publishing contract in the book industry is one definite source of protection to the author where the publisher is not continuing to publish and therefore the author is not getting any further revenue. He can get his entire work and copyright back again.

The bill claims to give a 35-year period. In fact there would usually be no such 35-year period, because it has a trick gimmick in that the period dates from the execution of the transfer. Very frequently in the book industry, at the time of the transfer (which would be the book publishing contract), there is no book written. It takes from several months up to thirteen years, in the case of certain reference books, to complete the work, so the so-called 35-year term is diminished by that period.

Mr. Karp in his talk referred to works for hire. I just want to say that, under his conception of works on special commission, he would even prevent an organization like a bar association from being the owner of the copyright under a transaction whereby it seeks out a historian to write a history of the association. The source material would be supplied to the person who would write the book and that person would be willing to do it on a special order and commission basis, and would not expect to get the copyright.

I could go on continuously, but I am not going to.

KAMINSTEIN. I hoped you wouldn't, because I've clocked both you and Mr. Karp at exactly the same time. [Laughter]

KELLMAN. I must say that I am quite fascinated by Mr. Wattenberg's statement that, even if there is no reversion, he is sure—he has no doubt—that A.G.A.C. in its next negotiations can get a limited term. I am fascinated because Mr. Wattenberg will no doubt be one of the negotiators, and his statement has just been recorded. [Laughter]

Now any form contract—whether it's our contract, whether it's the Dramatists Guild contract, whether it's any other contract—is irrelevant to whether there should be a reversion. If there is no limited period in the statute, any organization in negotiating this contract will definitely have a harder time. One of the reasons you have been able to get limited periods in form contracts is because, lurking in the background, there is this statutory reversion.

Now, with respect to bargaining power, there was a time when I was a counsel for one of the large talent agencies. I observed the bargaining power you have when a motion picture company is making

an offer for a property and the seller is full of his anxieties and full of his poverty and full of his desire to make a sale. I know this bargaining power; it is virtually non-existent. When you have bargaining power with such an organization as a motion picture company, then you can get a limited term: a term of fifteen years, or something like that. When they have to give it, they will—and gladly. It doesn't happen very often.

A basic reason for the idea of a reversion is that in many cases, when an author has written a work of any kind, he has an uncertain quantity. Neither he nor the buyer know what will transpire. The fair way to deal with this is to give the buyer a reasonable opportunity to make his profit and to pay back his costs on his work. At that time we know the value of it. He will know what he has; he will know what he has earned. And he will have paid his cost and made his profit. If he hasn't, then he has been unfortunate or has misjudged.

Either way—whether the writer has misjudged in selling his property too low, or whether the buyer has misjudged in buying his property—a termination, taking place at a certain time, places the matter in a different perspective. The seller can make another deal, the buyer can possibly make another deal, but I don't know of any organization or any business person who would buy a property knowing or believing that in all likelihood he will not make his profit and pay back his costs within a certain period of time. He just won't do it.

I don't accept the idea that you need a property in perpetuity to do this. Yes you may, but you don't buy it on that basis. Anything that you get over a certain time is gravy. Those particular situations which call for a longer period—derivative works of a certain type, perhaps compilations, encyclopedias—are special problems, and I think should be dealt with out of the context of a general term.

So far as the period of time is concerned, I agree with Mr. Karp, and for the reasons he has stated, that 35 years is a fair term.

Now there is just one more thing I should like to say. I don't agree with Irwin or whoever it was who said that there are hundreds of thousands of writers who are not members of A.G.A.C. There aren't hundreds of thousands of writers. There are some who are not members, and unfortunately it is among those non-members where the abuse of employment-for-hire is taking place and is increasing.

DUBIN. Because of what has been said, at the risk of being deliberately repetitious, I'd like to make this statement.

First of all, nothing has been said here today about the fact that the author now has a term of protection of fifty years after death, as proposed in this new bill. Now that is rather important, because

I want to call your attention to the fact that those of us who oppose reversion made the statement that we were in favor of an extension of the term of protection for the author upon condition that there be no reversion.

> If an author cannot make an effective assignment of his renewal, it may be worthless to him when he is most in need. Nobody would pay an author for something he cannot sell. We cannot draw a principle of law from the familiar stories of garret-poverty of some men of literary genius. Even if we could do so, we cannot say that such men would regard with favor a rule of law preventing them from realizing on their assets when they are most in need of funds. Nor can we be unmindful of the fact that authors have themselves devised means of safeguarding their interests. We do not have such assured knowledge about authorship . . . or the psychology of gifted writers and composers, as to justify us in importing into Congressional legislation a denial to authors of the freedom to dispose of their property possessed by others. While authors may have habits making for intermittent want, they may have no less a spirit of independence which would resent treatment of them as wards under guardianship of the law.

I would like to, although cannot, take claim of authorship in that statement. That, ladies and gentlemen, is the language of Mr. Justice Frankfurter speaking for the Supreme Court of the United States in *Witmark* v. *Fisher*.

Horace Manges made a statement about the British copyright law. All of us are businessmen and women; why don't we rely upon the experience of others? All of the English speaking countries in the great Commonwealth have had a provision limiting assignments for the purpose—as we announced—of protecting authors from improvident transfers and providing for their families. That provision was found in the British Act of 1911, and after 45 years was repealed because it was found to be worthless and ineffectual. And every one of the countries of the British Commonwealth of Nations that has enacted new legislation or has provided for pending legislation has specifically deleted that provision in their new acts because they have found it to be ineffectual and worthless. It doesn't benefit the author, it doesn't benefit his family, and it doesn't take care of his needs. I suggest we draw upon the experience of others and not go backwards.

DIAMOND. I would like to take just one minute to make a point which I think ought to be in the record of these proceedings, and I assure you that what I am about to say has nothing whatever to do with any special interest I may happen to represent. I suspect there are others here and elsewhere who are interested in this subject and who feel the same way I do about this problem that we have been discussing.

When I heard that the Copyright Office was drafting a bill based upon the so-called single system of copyright with a term of life-plus-fifty years I was delighted because to me that implied that the whole series of problems that we have had about renewal provisions would

evaporate. We now find that we have a new word, "reversion," instead of renewal, and the problems, if anything, would be multiplied rather than diminished.

EVANS. Mr. Chairman, it's very difficult to say anything good about section 16. I think at best it's an extreme case of misguided paternalism; at worst it's a reflection of the philosophy which someone in public life has, in another context, called "no win."

Let me say what I mean by that. If a television producer wants to make a series of programs based on a novel, he goes to the author and he tries to make an agreement with him. But of course he doesn't go to the author; he deals with the author's retinue: the author's lawyer, the author's agent, the author's agent's lawyer, the author's business manager, the author's tax man. When he makes an agreement, the producer ordinarly agrees to pay some money down and to give the author a share of the royalties.

Now suppose he makes this series for one year. That costs him about two million dollars. If the series is a flop, the producer certainly has not won anything. But suppose the series is successful and it goes on, as some television series have, for ten years. Now we have an investment of twenty million dollars.

But those series aren't produced immediately after the agreement is made with the author in every case. At the Columbia Broadcasting System in two instances we've waited over five years before we could find the right combination of people to do the job, and I know in the motion picture industry they've sometimes waited ten or fifteen years before they began production. So, after ten years and a twenty million dollar investment, some day the producer gets a call from someone in the author's retinue who says, "You know, in two years your rights are going to run out. We're going to shut off your water unless you make a new arrangement with us, and by and by we'll tell you how much we're going to let you keep of the money you've made."

This has been called "gravy" by one of the speakers here. I don't see anything wrong with the producer keeping all the gravy he can get if he's made an investment. That's the American free enterprise system. And it doesn't seem to me that we need to adopt something which may work perfectly well for other copyright systems that our socialistic friends on the continent of Europe and elsewhere find so satisfactory. Thank you, Mr. Chairman.

PETERSON. I don't intend to add to the statement of arguments for and against reversion. I think they have been adequately stated for the record. I think the record is complete. It contains these points and, of course, can always be supplemented if necessary.

I just want to ask one question at this time: whether there could be an inadvertence in language in section 16, where it says "otherwise than

by will." I don't suppose it would be the intention that, if an author left his right of reversion to his widow—left his copyright specifically to his widow by his will—that it would be intended that she wouldn't have the rights afterwards. I raise the question for the record so that that language can be studied.

PILPEL. I also will not repeat the interminable arguments that we have had on reversion, but I think we tend in these discussions to forget a few factors I would like to mention.

Mr. Dubin referred to the experience of other countries. I am not anywhere near as great a copyright scholar as he is, but I believe that in most of those other countries there is some kind of a moral right of authors. We don't have any such moral right in this country, and this draft of the act does not give the author such a moral right. Nor, indeed, am I asking for one at this time. I would merely like to point out that, in countries where there is no reversion, there may be other rights in authors which tend to make up, at least in part, for the lack of reversion.

In the second place, the present draft attempts to continue a *status quo*. The speakers against the draft sound as if the authors were somehow trying to get something which they did not already have. The fact is, of course, that if they are not alive at the time the copyright comes up for renewal, the rights have realistically reverted *i.e.*, a new deal has to be made by the user. To the extent there is a single term with no reversion under the present proposal, then that limited protection will no longer be available.

I think perhaps a word should be said about the public interest, which tends to be obscured in many of these discussions. I am aware of the fact that broadcasting companies and motion picture companies sometimes spend millions of dollars and many years on properties, but I am also aware of the fact that often they don't produce the properties at all. It seems to me that it is to the interest of those of us who want a wide dissemination of works not to have properties put on ice for a permanent period, regardless of what happens in terms of the subsequent development of the author or the subsequent development of the country.

I do not feel qualified to state whether the provision contained in the draft is the only solution of this problem. But I do feel that some solution must be found which will recognize that authors have some sort of continuing right in their works. And, at least in those situations where they do not share in the exploitation of those rights at all, some method should be found to make it possible for them to participate, both for their sake and for the sake of the public.

SCHAEFFER. One of the reasons that I felt favorable towards life-and-fifty-years was the fact that there would be no renewal period.

Now we find, of course, that there is going to be a reversion, and we're going to find ourselves in the same legal morass as we were before, of determining what the rights are at the end of 35 years.

I am inclined to believe that authors are well protected. The very eminent counsel that we have here today are well aware of contractual obligations and, if there is any property of merit, they can negotiate these by contract. I also call your attention to the fact that there has been, growing up with the law, a doctrine of "working the copyright," so that, if the copyright is not worked, the author has the right to go in and claim his work.

I see no reason now for injecting into the law something which would work exactly the same as the renewal right we had before.

KAMINSTEIN. I will give a minute to any of the earlier speakers or anyone else to wind up the discussions on section 16.

KARP. Mr. Kaminstein, I am really speaking again in defense of your work. The point has been made by two speakers that, where a motion picture company or a television network invests millions of dollars in preparing a derivative work—a motion picture series or a motion picture based on an underlying novel or play—reversion would work an unfair hardship. One of the essential points of this proposed compromise provision is to prevent that, because under section 16 the right of the television network or of the motion picture company to continue to show and profit from and utilize that series or motion picture would continue unaffected by reversion. Reversion would not cut off the motion picture company's rights or the television network's rights in their derivative work.

Under the present law, as Mrs. Pilpel has pointed out, we have a 28-year cutoff, and it has happened that, where an author has died before the renewal period, his heirs have been able to obtain additional compensation—and in some instances compensation that they were well entitled to—for permitting the user to continue to show the derivative work. In this sense, this new proposal is much to the benefit of the user.

Secondly, I think that this provision recognizes the underlying spirit of the copyright clause, which says that the exclusive right in an author's work shall be secure to the author. The assignment, which occurs at the beginning of the first term of copyright, of all rights in perpetuity does not comply with the basic constitutional mandate.

RITTENBERG. The Constitution does say "exclusive." That word is significant. When Mr. Karp suggests that the motion picture and television companies may continue under the proposal to exploit their derivative works, he somehow overlooks the fact that exclusivity in so doing is a commercial advantage for which such companies pay very considerable amounts of money. It is the exclusivity which is

important. Now it is true that the right to continue to exploit the work non-exclusively is something more than had been originally proposed, but it is small comfort indeed to own that right in competition with somebody else in regard to the identical work.

MANGES. I think there is a great deal of wisdom in that short statement that Mr. Diamond made. When life-plus-fifty years was broached, we too thought that this was a solution to some of the ills.

Mrs. Pilpel states that the authors aren't trying to obtain any more than they have now; but, when you look at the whole picture, they are. In fact, they would be getting a great deal more. Instead of 28-plus-28 they would be getting life-plus-fifty for individual authors, which would be a great deal more than they are getting now. It seems to me that the publishers are much better off under the present law, under which there is a possibility of getting 56 years in some cases, and a minimum of 28 years, than under this present section 16.

KELLMAN. I had something in my notes which I didn't mention before, because I was trying to rush through with my little talk. I always fear that reproachful look I get from Kami when I want to talk and I shouldn't be talking or I talk too long.

The bill has a provision to the effect that the author can grant in advance to the same assignee—and only to the same assignee—rights for the further period. I presume he can do this so that the assignee may come out with a period up to seventy years on the basis of a 35-year period. The picture companies have not mentioned this, but I can assure you that, if the reversion provision goes through in its present wording, they will know full well how to take advantage of this, and the author will know full well how to make his fair deal with the picture company.

There is a tremendous compulsion in that. When an author has sold his property—I say to a picture company but it could be anybody else—at a certain time within the 35-year period, everyone knows the value of that property. The assignee can deal with the author because the assignee is the only one who can do so. The author is anxious not to wait 35 years to extend it. He wants to get some money, he wants to provide somewhat for his future well within that time.

The compulsion to make a deal, the persuasiveness of the buyer, and the eagerness of the author, I think, will make this a tremendous advantage. It was so intended, and I think it should not be overlooked. You haven't got a reversion in the absolute sense because there are persuasive features which will enable assignees who have used their work well, and for whom there is a profit, to get a longer term.

SCHULMAN. Mr. Register, first I want to congratulate all the speakers who have spoken. This is one of the most difficult subjects in the entire bill, and I think that the reasonableness of their speeches in an area where emotion can enter is a good omen for a sound solution.

As you know, in Committee 304 we have had a special committee studying this problem. I hope to continue with that study. I anticipate having the special committee continue with its work, and I hope that the spirit which has been displayed here today will result in an adequate solution, not only of the problem itself, but of some of the drafting difficulties. Thank you.

LINDEN. I will not go into the philosophy behind a limitation of the freedom of contract, nor do I necessarily concur with Irwin Karp's assumption that writers cannot read. I will address myself to two clauses of section 16 as drafted.

With respect to section 16(a)(1), I submit that the period of "35 years from date of its execution" puts a ceiling of 35 years from the date of execution of a contract on the limitation of the right to transfer. There is not a 35-year minimum term for the exploitation or the use of a transferred property. I suggest that some clarification in that regard ought to be made.

With respect to section 16(b)(2)(B), if I understood Mr. Goldman correctly the intention there is that, with respect to the original transferee, the author may grant an additional 35-year term prior to the expiration of the initial term. However, that is not to say that the additional 35-year term would start running from the date of expiration of the first 35-year term. If that were so, it would be a much simpler setup.

GOLDMAN. May I clarify this? The intention was that any new contract made would run for 35 years from the date of the new contract before it could be terminated, but there could be no contract made that would run for more than 35 years from the date of its execution before the author could exercise this right.

Let me say one other thing which may be responsive to your first point. In our preliminary draft we had provided in Alternative A that termination was automatic at the end of a certain period of time. There is nothing automatic about the termination here. This is a privilege that the author must exercise, if he wishes to terminate, by taking an affirmative step of serving notice. The publisher, then, is guaranteed a minimum of 35 years before any notice can become effective.

LINDEN. May I say this? I have had experience with authors' representatives, and I am an author's lawyer in many instances. I would respond to section 16(a)(1) by participating in the execution of the transfer and having a secretary in my office automatically file, on behalf of the author, a notice of termination the following day. We would avoid the need of a tickler system. What we are actually saying, Mr. Goldman, is that the termination would in almost all instances be 35 years.

With respect to your reference to my last point about no contract being for a period longer than 35 years, may I illustrate what this means? An author enters into a contract with a publisher for a 35-year term. The next year he comes back to the publisher and says, "All right, I'll give you another 35 years." What is he giving the publisher? One additional year.

I was in favor of life-plus-fifty as a simple system of copyright protection. I thought that would serve the authors, the users, and the public at large rather well. But what you are suggesting is a system under which we would have the complicated problem of who owns what at the end of 35 years. You haven't even limited the reversionary rights to protection of the widow, widower, or children. No, you include next of kin, administrators, and various other collateral relatives who would take. This, of course, is a further complication. In addition, you're now suggesting that every user who enters into a contract have a staff available to negotiate year by year, or month by month, or day by day, an additional term up to another 35-year period. I submit that this is neither practical, advisable, nor in the spirit of the law as drafted by your Office.

KAMINSTEIN. I would like to say something about the spirit in which the bill was drafted, and the future of the law, at the end of the afternoon session. I will take one further speaker on section 16.

PERLE. Once again I am a little startled at some of the things that have been said here. For example, Mrs. Pilpel, I know for a fact, is a far better lawyer than she sounded here in terms of protection of authors' rights. She's never drafted a contract for an author that didn't say that, if the work isn't published within a given period of time, it goes back to the author. She's never approved a contract for any of her clients which didn't say that, if a book goes out of print, the author gets the right to get it back.

This whole conversation reminds me a little of a Woody Allen story. He said that he was going to a reunion of his group therapy class, and he was particularly anxious to see what happened to one couple in that group therapy class who fell in love and got married, because the guy was psychotic and the girl was schizoid, and they didn't know how to raise the kids. [Laughter]

I think that is, in effect, what this draft has done. Obviously section 16 is a compromise. It's a compromise that is going to make nobody happy. I would urge that if anything be done to the present law, if we adopt a term of a life in being and 50 years and if we cannot accept the fact that there should not be a reversion—if we are all subject or if the Congress is subject to enough pressure so that whole reversion concept is preserved—for God's sake let's preserve the reversion concept as we have it instead of building a whole new

body of problems and questions. Realistically, the only people who are going to benefit from the law as it's set forth in section 16 are in this group, who are in private practice and who are going to make a lot of money out of it.

KAMINSTEIN. Section 19 deals with pre-emption, and Miss Ringer will speak to that.

RINGER. Section 19, of course, is a key provision in the statute, since it is intended to pre-empt and abolish any State common law or statutory rights that are equivalent to copyright protection and that extend to works that come within the scope of the copyright law. The point has been made—for example, by Mr. Whicher in his superb article on the *Donaldson* case—that if Congress is going to take this rather large step, it has got to do so very clearly and explicitly. It must leave no misunderstanding about what it intends to do, or else there will be fuzzy borderline areas to plague people for literally centuries to come.

Our preliminary draft was criticized at a Panel meeting about a year ago in Chicago as being overdrafted: as being overly precise and too explicit. However, I think the wisdom of its approach was confirmed rather dramatically by the Supreme Court decisions in the *Compco* and *Stiffel* cases, which, of course, were decided several months after section 19 was originally drafted. Whether one agrees with those decisions or not, I think that they make it rather hard to argue that section 19 in its original form was based on a misconception of the law. And when, in the redrafting process, we came to look at section 19 in the light of these cases—which of course are absolutely landmark cases—I think we felt that the earlier draft stood up fairly well. We have made some changes in it in response to suggestions, and I think that there have been some clarifications and improvements.

One change does deserve special note; it was mentioned, incidentally, at the Committee 304 meetings earlier in the week. As originally drafted, section 19(b) said: "Nothing in this title shall annul or limit any rights or remedies under the law of any State: (1) with respect to material for which copyright protection is not available under sections 1 and 2." It was suggested to us that, although the *Stiffel* case impliedly preserves rights in unpublished writings that are not subject to copyright protection, the decision probably cuts off rights in published works that are "writings" under the Constitution but are not covered by the statute. Thus, to avoid any implication that this statute is preserving common law copyrights in published material that might be considered "writings" but that do not come within this statute, we added the word "unpublished" in section 19(b)(1). And, lest anybody misunderstand what I am talking about, I think an example of this is typography, which is an area that I don't think is covered under this statute but might well be covered under a future

statute. Industrial designs is another example, and there are several others.

A question was also raised as to whether it is sufficiently clear under section 19 that all rights arising under the Federal copyright law would come within the exclusive jurisdiction of the Federal courts under this provision. Of course this enlarges the jurisdiction of the Federal courts, since we are bringing in all material now covered by common law copyright, but reading section 19 in conjunction with the Federal Judicial Code, I believe the answer is yes.

KAMINSTEIN. I think it is also obvious in the case of this section that we cannot definitely answer questions as to whether titles, characters, and similar material will be covered here.

KAYE. Now that we are bringing all works which are tangibly fixed within the scope of statutory copyright, I think we should take notice of the practice of a few States in burdening copyrights with their own systems of registration. I think we should here provide that no State can impose any conditions on the creation, the transfer, or the enjoyment of copyright, and therefore prevent that duality of function.

SCHULMAN. My only comment is this. As a result of the *Stiffel* case, there may be a possibility of enactment of a Federal law of unfair competition along the lines of the Lindsay bill. Therefore shouldn't we provide that: "Nothing in this title annuls or limits any rights or remedies under the laws of any State or any other laws of the United States." In other words, you don't want to get into the situation where, because certain rights have received protection under a Federal unfair competition law, the rights under the copyright law are to be nullified.

BRESNAHAN. I am John Bresnahan, representing the Printing Industries of America and some six thousand commercial printers. We're not necessarily quarreling with the language of section 19. We're quarreling with its application in connection with what is copyrightable under the act.

Our specific problem lies in the area of original sketches, designs, and dummies that are made by printers and submitted to their customers as part of their sales presentation. There is disagreement in my own law firm as to whether or not we have a problem here. If we do, then it's a rather serious one, because the material that is prepared by most of these six thousand printers is not of sufficient value to justify going through all of the efforts that are necessary to protect their interests under this law.

Mr. Kaminstein, rather than take up a lot of time here in discussing the thing fully, I think perhaps our problem could be better worked out if you and I were able to get together in Washington sometime where we weren't on the road talking about this thing. May I have that privilege, sir?

KAMINSTEIN. We will be glad to see you. We realize the problem. I think you talked to us about it once before, but we'd like to discuss it in the context of the present language.

I would like to call on two experts on the Lindsay bill: Professor Derenberg and then Mr. Diamond.

DERENBERG. Perhaps you should have called on Mr. Diamond first, because he bore the brunt in connection with the preparation and presentation of that bill before the Subcommittee on June 16th and 17th, 1964.

KAMINSTEIN. I'll change it to "two experts on the *Compco* and *Stiffel* cases and the Lindsay bill."

DERENBERG. I find myself in agreement with what Mr. Schulman has said. We hope that the Lindsay bill will eventually become law, although comments by various congressmen at the recent hearings suggest that certain changes and modifications will have to be made in the bill.

With regard to the effects of the *Stiffel* and *Day-Brite* cases, I would suggest that we should not take time out at this meeting to discuss the question of what effect those decisions may have on common law copyright generally. Suffice it to say that Mr. Justice Black's opinion itself indicates that the Court's observations with regard to pre-emption and the law of unfair competition do not and could not affect common law copyright which is expressly reserved under section 2 of the Copyright Act of 1909. I may say in addition that there is now in preparation a comprehensive symposium on these two cases which will be published in the *Columbia Law Review* this fall.*

DIAMOND. It's unnecessary for me to repeat anything that Professor Derenberg has said, and incidentally I think you were quite right to call on him first. As to this little phrase "such as," which turned out all this week to create a tremendous amount of difficulty, maybe in the next version of the bill you will have to define "such as" to mean "including but not limited to" [laughter]—which is what I always thought it meant and, as I said at Committee 304, I like "such as" because it saves words.

I did just want to say, with specific reference to the Lindsay bill, that in its present version—and I think in every one of its versions—there has been a specific provision that nothing in it shall be construed so as to extend or enlarge the rights granted under the copyright statute. Of course that would automatically apply to this new copyright statute, if and when it becomes law. I think that having such a provision in the Lindsay bill will take care of the problem that John Schulman raised.

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*EDITOR'S NOTE: The symposium referred to is Leeds, Handler, Derenberg, Brown, Jr., and Bender, "Product Simulation: A Right or a Wrong?", 64 *Colum. L. Rev.* 1178 (November 1964).

KAMINSTEIN. We know there's a specific exemption there.

SCHIFFER. I think that this version of section 19 is a great improvement. Again, I suppose that the *Stiffel* doctrine should not be discussed in any sort of detail here. The limitations which that doctrine imposes on random doctrines of unfair competition and *ad hoc* approaches have an honorable and lengthy history known to most of the people here in considerable detail.

My concern with the section at this point is with subsection (b)(3) and particularly with the phrase "that are not equivalent to any of the exclusive rights . . ." As I conceive the applicable principle of differentiation it is that there be a recognizable independent tortious act as the foundation for the action. In other words, that would apply, for example, to privacy, to defamation, to breach of contract.

The importation of broader language with respect to something other than passing off or deceptive trade practices would put us right back where we started, in suggesting that the Copyright Act did not in fact intend to preclude such broadening of protectability. I suggest that the phrase "not equivalent" be defined positively instead of negatively—that, for there to be any action other than an action under the statute with respect to the involvement of any right in literary material (or however that term might be defined), there must be an independent tortious act, and so on. Obviously I am not going to draft language here, and I have submitted some language along these lines.

KAMINSTEIN. I think that, whatever language is drafted here, and going back to Mr. Perle's remarks, this is likely to be a field day for ingenious attorneys.

ROTHENBERG. I think that, as section 19(a) is presently drawn, it would not include such things as typography or literary characters. But, by the same token, the way clause (3) of subsection (b) is drawn, it too would not include the appropriation of typography or characters because they don't necessarily fall within false representation or passing off. Therefore, I would concur with Professor Derenberg that we add the phrase "unfair competition or unfair commercial practices."

DERENBERG. May I say just one word in connection with what George Schiffer has said? I notice that section 19 (b)(3) mentions " . . . including breaches of contract". Now, until the *community antenna* case, *Cable Vision, Inc.*, v. *KUTV, Inc.*, 335 F. 2d 348 (9th Cir. 1964), we had always assumed that deliberate inducement to violate an exclusive agreement is a tort and unfair competition. Regardless of whether or not such a tort was present in the *community antenna* case, attention should be called to the fact that there is rather disturbing language in the opinion of the court which would seem to

indicate that, as a result of the *Stiffel* case, interference with exclusive agreements may no longer be a form of unfair competition if the contract refers to copyrighted or uncopyrighted material.

Therefore, it seems to me very important not to limit this language, but to leave it wide open, perhaps by including "such as but not limited to". The illustration I just gave, I think, is a pertinent illustration of what we may have to bear in mind.

KAMINSTEIN. We move now to sections 20 to 23, dealing with duration, and I want to call on George Cary to present those provisions.

CARY. I think by now it's no secret that the bill provides for a term of life-plus-fifty years, so perhaps we won't have to dwell at too great length on these sections.

Section 20(a) sets out the basic term. Section 20(b) provides for the term in the case of a joint work, and the provision is a little different from that found in the usual foreign statute. The term for a joint work would consist of the life of the second of the authors to die and fifty years after his death. There was some criticism of this provision at the Committee 304 meeting, and there may be further discussion of it here. I might add parenthetically that both subsections (a) and (b) are substantially the same as the equivalent provisions in the preliminary draft.

Subsection (c) is also substantially the same, except that we omitted in this bill the words "registration in unpublished form." In effect, anonymous and pseudonymous works and works made for hire have a 75-year term from first publication or a 100-year term from creation, whichever expires first.

Then there is the problem of presumptions. Presumptions, we feel, are probably necessary to assist people who are trying to find out when the copyright expires in works by authors who may not be as well known as the Ernest Hemingways, the William Faulkners, and others as well known. Thus, we provide in subsection (e) that, after 75 years from publication or 100 years from creation, there is a presumption of death. If, after that period, the Copyright Office records disclose nothing to indicate that the author is living or that he died less than fifty years before, then a person who obtains a certified search report from the Copyright Office is entitled to the benefits of a presumption that the author has been dead for at least 50 years. Reliance upon this in good faith would be a complete defense in an infringement action.

Now the Copyright Office records that I mentioned are provided for in subsection (d). Here, there is another difference from the preliminary draft: on the basis of the comments made, we have provided that only a person who has an interest in the copyright may file a statement of death in the Copyright Office. He has to have an interest and he has to express the nature of his interest, and the Register by

regulations will provide for the form and content of the statements relating to this interest.

Section 21 deals with works that are now under common law copyright—works that have not been published before the effective date of the act. That section provides that these works would get the same term as that provided in section 20, except that there is a minimum cut-off date. If the work remains unpublished, the copyright will not expire before December 31, 1990, and if the work is published before that date, then it will be given a term lasting until December 31, 2015.

Section 22 deals with copyrights that are in their first term on the effective date of the act. Here we reluctantly kept the provisions of the old law on renewals with two changes. We extended the renewal term from 28 to 47 years, and we gave the renewal claimant a period of five years within which to make his renewal application.

Now at the A.B.A. Committee 304 meeting this five-year period seemed to meet with a considerable amount of disfavor. There was some sentiment—I would say probably a consensus—that this should revert back to the one-year period for renewal registration because of the uncertainty as to when the renewal term vests. This can be worked out, I think.

Subsection (b) deals with works which are in their renewal term at the time the act comes into effect, and here there's a flat extension to a term of 75 years from the date copyright was originally secured. Subsection (c) I am going to skip because we've discussed that in connection with section 16. It deals with ownership of the extended renewal term, and since it is the same as section 16 there's no reason to go over that problem again.

I am glad to close on a happy note. Section 23 is one of the very few sections which nobody has complained about. [Laughter]

KAMINSTEIN. How many of you have noticed that there is a typographical error in the group of sections covered by Mr. Cary? Well, I guess even lawyers don't read bills that carefully. This error crept in at the Government Printing Office: . . . ["any" is repeated in the phrase "any action" in section 20(e)]. There's another typo in the bill, but we'll leave it to you to find it.

GOLDBERG. I have essentially two comments, Mr. Kaminstein. First, with respect to section 21, I am not clear how that, when read together with sections 2 and 3 of the Transitional and Supplementary Provisions—how those three sections when read together—would affect the existence of copyright in a work where the term has expired prior to the effective date of this act. In other words, let's say the effective date of this act is January 1, 1967; what would be the status of a copyright that expired between December 31, 1965 and January 1, 1967? It seems to me that, as nearly as I can understand section 21 and

the Transitional and Supplementary sections 2 and 3, we would in effect be resuscitating a term of copyright which has already expired. Perhaps some clarification might be made on that.

GOLDMAN. I think, Mort, your question is answered squarely by the first sentence of Transitional Provision section 3, which says, "This Act does not provide copyright protection for any work that goes into the public domain before January 1, 1967."

GOLDBERG. Well, Transitional section 2 says—and there is a typo in line 2 of section 2, Mr. Kaminstein—"except as otherwise provided by section 22(b). At any rate, I think the point has been made.

One other point arises in connection with section 20(d) . . . The same point is presented also in certain other sections in the bill: sections 35(b) . . . and sections 11(b)(1) and 11(c)(1) . . . This is the question of the definition of one "having an interest" in the copyright and the identification of "the copyright owner" or "a copyright owner" as it appears in the records of the Copyright Office. I wonder whether perhaps this problem might not be solved by some over-all definitions in section 54 of phrases such as "an interest in a copyright" or "a copyright owner," tying that in with the constructive notice provisions.

ROSENFIELD. Mr. Kaminstein, the Ad Hoc Committee opposes section 20 and recommends retention of the present 28-plus-28 year renewal period. As an alternative, we favor your own proposal in the 1961 Report to the Congress: a 76-year total period comprised of an initial 28-year term plus a 48-year renewal term.

Education needs a maximum available degree of accessibility to copyrighted material. Therefore, in our judgment the public interest is damaged by efforts to extend the period before which copyrighted works go into the public domain. The Register's Report to the Congress in 1961 said, and I quote only one brief portion: "We do not believe that the maximum term of copyright . . . is necessary or advisable for all works. Experience indicates that the present initial term of 28 years is sufficient for the great majority of copyrighted works; less than 15 percent of all registered copyrights are being renewed at the present time."

Under present law, therefore, education would be able to use the nonrenewed 85 percent of all registered copyrights from the 29th year. Under the life-plus-fifty proposal it could be a hundred years or more before this very same kind of material goes into the public domain and becomes usable by education. As the Register has officially told Congress, this is neither necessary nor advisable for all works.

Furthermore, the present law, with a fixed 28-year initial term beginning with an easily-ascertainable date, is simple and it readily enables anyone to know when a copyrighted work is in the public domain. On the other hand, the new proposal, based on an uncertain life term

arising from a subjective date of creation, establishes a highly complex system of variable and multiple durations and makes it a gamble to determine when a copyrighted work is in the public domain. For these various reasons the Ad Hoc Committee opposes section 20, and prefers the present 28-plus-28 year term or the alternative of 28-plus-48 years.

KARP. Mr. Kaminstein, are we to speak to section 20 alone at this point or cover all these sections?

KAMINSTEIN. I think you might as well cover the entire area.

KARP. I would first of all like to point out that, if the problem of the work made on special order or commission is solved, section 20 as drafted by the Copyright Office will grant individual authors—the individual who creates a literary, dramatic, or musical work—copyright for life-plus-fifty years. And this authors in the United States and abroad wholeheartedly advocate and applaud.

Now life-plus-fifty has two obvious advantages. First of all, it assures to every author that he will have copyright in his work so long as he lives. Secondly, it assures that he can provide for his family and heirs for a reasonable period after his death. In doing these things it brings the United States Copyright Act into conformity with copyright statutes in most of the civilized world. It gives to American authors the protection that their work has in most foreign countries where, through the Berne Convention or other devices, they qualify for such protection.

Now I think that one of the most important aspects of life-plus-fifty years is raised by Mr. Rosenfield's comments, and I would like to address myself briefly to them. I think that the educational community does not take into account all of the effects of section 20 and of section 19. What this copyright act would do would be to eliminate completely all common law property rights in an author's work. And this is highly significant for two reasons.

First of all, it emphasizes a factor that I fear the educational community, and others who comment on copyright and on authors' and publishers' and users' rights to copyright, do not take account of. In Professor Shafer's comment on Wednesday, for example, he said, "Copyright is only a license or a franchise."

Now I don't propose to indulge in the luxury of debating the philosphy of copyright. I merely want to point out to Mr. Rosenfield and Professor Shafer and Dr. Wigren and others that there is no dispute about the fact that, so long as it remains unpublished, a play or a lecture or an address—whether by Dr. Martin Luther King or Admiral Rickover (leaving out the question of whether he was a Government employee)—is protected not for 28 years, not for 56 years, not for life and fifty years, but in perpetuity.

The common law recognizes and has recognized that, in dealing with a literary or artistic creation, the law is dealing basically with something that a human being has created, and there is no higher claim to property under our Anglo-Saxon system of law than creation. It precedes the claims deriving from inheritance, from purchase, from right of conquest, or from government grant. The fact that a person creates something gives him the primary claim to a right of property, and a right or property is nothing but a collection of exclusive rights to use that which he has created. Therefore, in talking—sometimes rather cavalierly—about the author petitioning Congress for a special privilege, a special franchise, they fly in the face of the incontrovertible fact that what they are asking Congress to do is to dispose of rights in a property, a literary property, which another human being has created for their special benefit.

They also fly in the face of the purpose of Article 1, Section 8 of the United States Constitution. The purpose which the constitutional draftsmen intended was to promote the progress of the literary arts by giving the author a property right in what he had created. And the legal complication, which sometimes escapes laymen and educational spokesmen, is the fact that the Copyright Act is not simply an act which grants rights; it is an act which destroys and forfeits rights. There is no better illustration of it than in the impact of sections 19 and 20 upon common law rights both in works that have not yet been published and in widely disseminated unpublished works such as plays, lectures, and addresses.

The whole point that should not be overlooked is that what the Copyright Act does is to end common law rights by granting a statutory right on a given event. From 1909 until the present time an author need not have forfeited these perpetual common rights so long as he did not publish a work. And in many areas it was possible, and is still possible, to disseminate an author's literary work without publishing it and therefore to retain perpetual copyright.

Now don't misunderstand me. Authors are not arguing for perpetual rights. We are willing, we are anxious to accept life-plus-fifty years, even though it means that, by so accepting life-plus-fifty years with copyright beginning from creation and ending fifty years after the author's death, the author thereby forfeits many valuable and much longer rights—rights which could last much longer than under the new law.

This has a considerable effect on both culture in the broadest sense and on education in the broad and the narrow sense. Let me point out to Mr. Rosenfield and the educational community, for example, that at the present time it is possible for valuable manuscripts, for valuable collections of letters, to be deposited in libraries and other archives where they may rest for a hundred or two hundred or three hundred

years. No one has the right to publish them. No educator has the right to make excerpts or multiple copies of excerpts and distribute them to his classroom. There is no right of fair use in connection with common law property. Educators are deprived, under the present system, of access to this material for an indefinite period of time. And they face much greater complications than deciding when fifty years after an author's death may have elapsed.

Let me point out that there are many works published at the present time which have enjoyed protection for literally twice or three times the duration of life-and-fifty years under our present system, which combines common law and statutory copyright. Mark Twain's "Letters from the Earth" were published only last year. They will be protected under statute for 56 years, but they will have been protected under common law and statute for almost a hundred years. Under the system of life-and-fifty years the Twain estate could not control the publication of "Letters from the Earth," because fifty years after Mark Twain's death that work would have fallen into the public domain and would have been freely accessible to anyone.

Another book which sticks in my mind is something called "Carp's Washington" (with a "C," not a "K"). This was a book written during the Civil War. It was only published two years ago. It was protected under common law for a hundred years, it will be protected under statutory law for another 56 years, making a total of 156 years. It would have fallen into the public domain under this section much sooner.

Consequently, I don't think it is well-advised at all for the educational community to fear the restrictive effects of this section. On the contrary, it will actually work far greater benefit for scholars for researchers, for educators than the present law, and at the expense of the estates of authors who have died many years ago.

There are two additional points I would like to address myself to. Mr. Rosenfield speaks about the 85 percent of the work that falls into the public domain because it is not renewed. Rather than repeating what so many other people have said and some may want to say here, I will say only briefly that the statistic is hardly illuminating. Most of this work consists of material that no one wants to copy: directories, advertising material, and the like. The type of work for which an author or his heirs seeks protection is renewed, and the only time it isn't renewed is through inadvertence.

Now the renewal system has one great drawback: that is, that an author may lose protection by failing to renew. It has great advantages. It cuts off an assignment if the author dies before the renewal year. It may even have greater benefits if the antitrust laws are applied to the present renewal system. The author is not seeking life-plus-fifty under a single-term system because he is interested only

in a single long term. In fact, I have proposed at one point, in an effort to compromise the reversion problem, that there be three terms of copyright.

Now, as far as section 22 is concerned, reference has already been made to the five-year provision for renewal. I would urge that this be cut back to one year in order not to deprive the families of those authors who might die during the five-year period of the reversion effect of the present law.

Despite the somewhat, I must say, snide reference to the motives of those of us who are seeking an effective reversion, it's not to promote litigation. It's to protect authors. And there are innumerable such statutes—antitrust statutes, the Robinson-Patman Act and many others—that interfere with the so-called right of freedom of contract and that promote litigation. That's an expense we may have to endure for the purpose of carrying out the purpose of these sections. Therefore, in section 22, I would urge again that the probably inadvertent effect of extending the renewal period to five years be changed.

RITTENBERG. I have a suggestion to make, which is by no means original, regarding this 85 percent which never gets renewed—this material which is of no value to anybody. I would suggest that, for this purpose only, a renewal be provided for as to published works, giving "publication" a very broad meaning for this purpose.

What I have in mind is this. If the author be living, or if he has made any grant, then whoever has the benefit of that grant at the time for renewal—or if the author be dead, any member of his immediate family—should have the right to renew. Now if none of those interested persons want to renew, then this work—one of this vast mass of 85 percent of all works—will go into the public domain. As to those which are renewed, then all of the other sections that have been devised would apply.

In other words, transfers would not be affected by renewal. Transfers would either continue to endure according to their own terms, or would be, subject to a 35-year limitation period, if that's what Congress enacts. The one should be divorced from the other. By this means, whatever is eventually arrived at with regard to transfers will be on the books, and yet this vast mass of material that nobody's interested in except the third grade teacher will be in the public domain.

GOSNELL. The American Library Association, as some of you know, has taken a position of strong opposition to any indefinite period of copyright such as that based on the life of the author, for reasons which have already been explained and commented upon. We are opposed also to so long a term which, in its average, multiplies by three or perhaps four the present term—which, as has been pointed out, runs for some 85 percent of the material copyrighted now.

I will add, however, that we do welcome a terminal for unpublished material, which has long been a serious problem to libraries holding archival materials. I would add for Mr. Karp's information, however, that a great deal of that material is used and published simply because it is impossible to trace the proper ownership under the common law, or because it is assumed that nobody else can trace it either and lay claim to it. It is more or less abandoned property in that respect. But, as people who believe that things should be done properly if they can so be done, we do welcome this terminal date on the material which we hold and which is sought after and used by scholars, historians, and others.

PRATT. My name is Dana Pratt. I am the Executive Secretary of the Association of American University Presses, which comprises 66 university presses all across the country, and also in Canada and Mexico. I speak as a layman; I am not a lawyer. In representing our group, I speak fully as much as a part of the educational community as of the publishing community. I think our interests are in both groups.

I would like to comment on a remark made by Mr. Rosenfield, which puzzled me so much I wrote it down verbatim and I still don't understand it. He was commenting on the possibility that a book might stay in copyright for as long as one hundred years before it "goes into the public domain and becomes usable by education." I am puzzled by this remark for this reason, and I state the reason as a question: what is so *un*usable about a copyrighted book for education?

KAMINSTEIN. Are you sure you want to reply now, Mr. Rosenfield?

ROSENFIELD. I would like the opportunity of making the record clear on Mr. Karp's now twice-repeated lessons on the Constitution.

KAMINSTEIN. Don't you think you can do that in writing? We are running quite late.

ROSENFIELD. May I have just one and a half minutes? I wouldn't want this record to indicate that silence indicates my agreement with the reading of the constitutional provisions that Irwin has set forth. I think the Supreme Court and the House Committee which reported out the bill that became the present law disagree with him. Under Supreme Court rulings it is settled law that any copyright-right is simply a creature of statute. And the House Committee said the Constitution does not establish copyrights but provides that Congress shall have the power to grant such rights as it thinks best.

All we are suggesting is that the Supreme Court has said that the sole interest in the United States and the primary object in conferring the monopoly lie in the general benefit derived by the public. And Mr. Justice Douglas said that "the copyright law makes a reward to the owner a secondary consideration."

Now Mr. Karp say that the 85 percent is useless. We would rather decide that instead of having him decide it for us in the statute. I am delighted to say that I think Mr. Rittenberg's suggestion is a point of progress, and I think there is much in that that we can adopt. I think the answer to Mr. Pratt's question is a very simple one. If we are not permitted to use it without consent, we frequently can't use it, as indicated previously. Mr. Kaminstein, thank you for the privilege of speaking to these points.

SCHULMAN. I won't go into a long debate on what has already been said, but I might suggest that Mr. Rosenfield read Justice Reed's opinion in the *Mazer* case, where he ends up by saying that the interest of the United States, the public, lies in giving to the author an incentive to devote his efforts to authorship—and, as he said, that stimulant may be in the form of a monetary incentive.

But I rise for another purpose, and that is to speak to subsection (c) of section 22. In addition to difficulties in drafting, I want to point out that difficulty is encountered if reversion is carried too far in an old copyright. For example, I recently made some contracts on behalf of a client with a publishing firm relating to copyrights in contemplated renewals. That was done about four years ago, and the contract was made specifically in contemplation of the possibility of an extension of the term. The consideration was fixed on that basis, and I think that the publisher would be justly aggrieved to find that his anticipation didn't materialize. In other words, at the time we made the contract we had the Report of the Register recommending the extension of the term and the consideration paid was based in part on that factor.

Moreover, we get back to the question of who can demand the reversion. Recently a client of mine acquired copyrights in the renewal term, which will expire within the next few years, from an executor of a legatee. Now, is that executor going to be entitled to terminate the transfer? We will face many such problems.

I think that in section 22(c) special provision should be made for a continuation of contractual rights, and I think that that is one area, if in no other, where we should limit the right of reversion to the author or to his immediate family—his widow and his immediate children. Otherwise we will have a proliferation of demands for reversion from distant relatives, uncles, aunts, cousins, and what not, which will result in chaos.

MCCONNON. My name is James McConnon. Mr. Chairman, with respect to section 20 and the term of the copyright, I would like to observe that a great deal of the debate here is very properly between people who represent professional authors, professional publishers, and those groups most directly affected by them. I think we should observe that a great deal of the copyrightable material that's pub-

lished in this country today is created by people who are not professional authors and published by people who are not professional publishers.

By way of example I would point to what was mentioned earlier: advertising material that's used by industry which represents a great deal of creativity. Under the present act it's possible to obtain a 28-year copyright, and it's also possible to obtain damages—and I would refer to that section later—at a minimum statutory amount of $1.00 a copy. I feel that with respect to works of this type—where the works are not directly merchandise in themselves and the profit is not directly realized from the sale or the merchandising of the work itself, but where the profits are indirectly obtained and where the impact of the copyright is likewise indirect—the term could reasonably be shortened. At the same time, a fixed statutory damage for infringement could be a concomitant to that, so that the work would be released to the public domain more quickly.

On that basis I would like to submit recommendations in writing later directly to this point. These would recommend that a section be added to section 20 of the bill which would provide for a short-term copyright, which would be dealt with by short-term notice and specific mandatory statutory damages in the event of infringement.

WASSERSTROM. I will only take a minute. I hope I made my position clear to the Copyright Office when I indicated that I was in favor of a fixed term, not life-plus-"X" number of years. I think there are virtues to the simplicity, the certainty, the directness of a fixed term, and I don't want my silence to indicate that I have changed by view.

I think that the Copyright Office is to be commended, and I want to commend it, for its comprehensive Report. However, I am at a loss to understand why the Copyright Office has changed its position so radically on the issue of copyright term. I personally feel that we've had no serious problems with our present term of copyright, except for the pitfalls and technical niceties of renewal registration.

We could overcome those quagmires, I submit, by a flat 56-year term which seems reasonably long, thereby giving the author sufficient time to reap the economic rewards that should be his and permitting the public to gain reasonable and unfettered access to the work. All through our history, ever since 1790, we have had fixed terms for copyright, and I think we should adhere to that basic pattern. I am not suggesting that we follow the Medes and the Persians—that we never change. But I don't think we should change merely because a change may be the vogue. Unless there are compelling reasons I think tradition should give us at least guidelines, and I think there are virtues to having a fixed term. Whether it be 56 years or 60 years is not too important.

Fifty-six years—either a 28-year term plus a 28-year renewal, if you can avoid the undue refinements as to the mechanics of renewal, or a single term of like duration—would, I do believe, serve both the author and the public well. But if that seems too short for certain purposes as far as the economic rewards of authors are concerned, I would prefer—and I agree that it has all the virtues that the Copyright Office Report of July 1961 indicated—to see the proposal recommended in that Report implemented and written into law: that is a 28-year term plus a renewal under certain circumstances of 48 years. Such a term, despite its conceivable length, would, in my view, be better than an indefinite term of life-plus-50 years.

KAMINSTEIN. I think you know that I must have felt the same way when we issued our Report. I think there have been compelling reasons for the change, some of which I tried to explain in several speeches, including one to the Copyright Luncheon Circle in New York several years ago. I would also hope that we will be able to issue a supplemental report when we submit a new bill next year, and this will further explain the reasons for the change.

KORMAN. I'd just like to comment very briefly both on Mr. Wasserstrom's remark and Mr. Rittenberg's suggested compromise. I favor compromises, but I don't think we should lose sight of the fact that a term of life-and-fifty avoids the very difficult problem of determining dates of publication. This problem is particularly difficult when you're talking about works that have been revised and therefore have different dates of publication for different versions.

KAMINSTEIN. I should like to explain what my contemplated procedure is for the afternoon. There are a number of people who have come to the meeting especially to discuss section 43, the manufacturing clause. I would propose that we deal with the question of notice, sections 24 to 28, for as much time as is left this morning. I should like to open the afternoon session promptly at 2:30 and deal with sections 43 to 45. We would then proceed to sections 35 to 42, dealing with remedies. From there we will go back and pick up any remaining comments on sections 24 to 28, ending with discussions of sections 29 to 34, 46 to 53, 54, and the transitional provisions.

I should appreciate your cooperation in submitting to me, either at the end of this session or at the beginning of the afternoon session, slips indicating which particular sections you would like to speak to, other than those involving the manufacturing clause and remedies, so that I can gauge how to divide the time remaining. I will be here as long as anyone is prepared to speak today, but we will have to finish this afternoon.

SCHULMAN. Mr. Chairman, may I ask just one question?

KAMINSTEIN. Surely.

SCHULMAN. You've asked people who've spoken to submit statements in writing. I should like to know whether Committee 304 can have the privilege of studying the statements as well. Theoretically statements submitted to you are not submitted to us, and I would like to know if anybody objects to the idea that, when he submits a statement to the Register, he is also submitting it to Committee 304 so that we can have the benefit of it for our study as well.

KAMINSTEIN. I assume the statements submitted to us are public statements. We will be glad to make them available to anyone who is interested in seeing them.

SCHULMAN. Thank you very much.

KAMINSTEIN. Mr. Goldman, sections 24 to 28.

GOLDMAN. These are the sections on copyright notice. Section 24 describes the form and position of the notice on copies that can be visually perceived. The provisions here are very much the same as they were in the preliminary draft. I don't propose to review them here; the changes are really inconsequential in substance.

Section 25 prescribes the form and position of the notice on phonorecords with respect to copyright in the sound recording as a work in itself. Here again the provisions are virtually the same as they were in the preliminary draft, and I don't see any point in reviewing them now. Again any changes are inconsequential, except that we have added a new subsection (d) simply to specify that the notice requirements regarding phonorecords are applicable to phonorecords publicly distributed on or after the date when the new law itself becomes effective.

Section 26(a) is very much the same as the provision we had in the preliminary draft. The parenthetical expression ". . . not including advertisements inserted on behalf of persons other than the owner of copyright in the collective work", which appeared in a footnote to section 26 of the preliminary draft, has been added to the body of the section.

Section 26(b) refers to section 28(a) and I will leave that for a minute until we come to section 28(a), which is a sharp departure from what we had in the preliminary draft.

Section 27 differs from the preliminary draft in one very important respect. The first paragraph of that section in the preliminary draft, which said in effect that if notice is omitted deliberately the copyright is gone, has been omitted entirely. Section 27(b) in the preliminary draft spoke of inadvertent omission of the notice. We have dropped any distinction here between deliberate and inadvertent omission; in short, we have eliminated the issue of whether omission of the notice is deliberate or unintentional. We now provide that, in any case where notice is omitted—without specifying whether the omission is deliberate or unintentional—the copyright will not be invalidated if the notice

is omitted from no more than a relatively small number of the copies or phonorecords, or if registration was made at any time before, or at any time within five years after, publication without the notice.

Then we have proceeded, in subsection (b) of section 28, to incorporate provisions very much like those we had in the preliminary draft with respect to absolving from liability for damages and profits an innocent infringer who proves that he was misled by the omission of the notice. We have also adopted the provision that, if the court is to enjoin the continuation of an infringing undertaking begun by an innocent infringer who was misled by the omission of the notice, the court in its discretion may require reimbursement for expenditures, or the court may require, as a condition for allowing the undertaking to continue, that the infringer pay a reasonable license fee. Section 27(c) concerning removal of notice again is very much what we had in the preliminary draft, so I won't dwell on it any further.

Section 28(a) deals with the effect of putting the wrong name in the notice, and here we have made a very substantial change from what was in the preliminary draft. The preliminary draft provided in effect that, if the wrong name is in the notice, a person acting in good faith and in reliance on the name in the notice might acquire title or an exclusive license in the work. We have now provided in the bill merely that a person who, acting in good faith, deals with the person named in the notice on the assumption that he is the copyright owner, and not having reason to know that he isn't by virtue of anything recorded in the Copyright Office, is simply absolved from liability as an innocent infringer unless he's put on actual notice. This is quite different from what we had before.

Section 28(b) dealing with error in the date is substantially the same in the first sentence as what we had in the preliminary draft. The second sentence is somewhat different with respect to postdated notices. The preliminary draft provided that, if a later date than the proper date was used in the notice, no monetary damages were to be awarded for infringements that occurred before the date specified in the notice. We have changed that now to provide merely that, if the date in the notice is more than one year later than the year of publication, the case will be treated the same way as one in which no year date was put in the notice.

Section 28(c) is similar to what we had in the preliminary draft. If the work is published without a name or without a date, the effect is the same as provided earlier for the case of a work published without any notice.

KAMINSTEIN. I haven't spoken to him about this, but I would like to exercise my own privilege and call on Arpad Bogsch to say a few words, if he wants to, about how the notice provisions in this bill look

to a European regularly using copyrights or dealing with copyright law. Have you had a chance to go over these sections, Arpad?

BOOSCH. Well, as you know, a notice requirement is generally not regarded very favorably in Europe in whatever form it is presented. On the other hand, my feeling is that Europeans have generally become accustomed to the notice requirement in connection with the Universal Copyright Convention. I hope that the Europeans will make a step towards America with respect to notice, as America is probably going to make a step towards Europe in connection with duration, and that they will also recognize the undeniable advantages of notice.

As far as the new sections are concerned, I think they are a very great improvement on the previous ones, and I think they are on the whole very good.

KAMINSTEIN. Thank you, Arpad. I will close this session promptly at 12:30, and I'd like to get in as many comments on notice as possible before that time.

ANELLO. Douglas Anello, National Association of Broadcasters. We favor a notice requirement, Mr. Kaminstein. While we would agree that lack of notice should not be a cause for voiding a copyright, we definitely believe that lack of notice should preclude any damages. This is exceedingly important if all works of an author, both published and unpublished, are to be given protection from creation. Without notice, it would be extremely difficult for broadcasters to distinguish in, for example, an ordinary press release those items in which the author wished to claim copyright protection and those considered merely news. Accordingly, we favor the Register's recommendation in this regard.

WALDHEIM. Franklin Waldheim, Walt Disney Productions. I shall be less than a minute. I have already expressed my views about the injustice of forfeiting a copyright merely because the notice has been omitted. I have no objection to the notice provisions remaining in this bill.

I have only one amendment to suggest, and that is that section 27(a) be amended by retaining only the first four lines, which provide that omission of the notice does not invalidate the copyright. Subsection (b) of section 27 then protects the innocent infringer and applies sanctions against the owner who omits the notice. It is inconceivable that any copyright owner with these sanctions in the statute would deliberately omit the notice. I submit that this is a simple and a just way of abolishing the death penalty for copyright.

MASNIK. I'd like to address my comments to a special class of works, namely scientific and technical literary works. I believe the notice provision should be strengthened to provide that the failure to include

an appropriate notice on a substantial number of copies of scientific and technical literary works shall constitute forfeiture of any right to restrict dissemination by copying.

Why do I say this? On a statistical basis, most such works are not written by professional writers but by scientists who are not interested in copyrighting their works. Also, even where initially some of these works have been copyrighted, most such works are not being renewed under the present law, indicating at best only a short-term interest. The facts do not justify establishing a presumption that, even if such works do not bear a copyright notice, a copyright may be forthcoming.

The present bill overlooks the special characteristics of the fields of science and technology. The copyright law doesn't treat every work alike. It recognizes differences based on the balancing of public and private interests. The burden should be on the author in these particular works to identify what works he wants restricted by copyright, and such notice should be available to the public in order that it may search out the copyright owner and obtain his permission wherever it is needed. Absent notice, and without any further effort on the part of the public, and without the need for litigation, the work should be treated as free for copying and dissemination.

KAYE. In section 27, I assume that in subsection (a) (1) it is not intended to refer to a "small number" but rather to a "small proportion." There are many works which are distributed only in a relatively small number. In subsection (a) (2), I don't understand the purpose of a *locus poenitentiae* as long as five years. This seems to me exaggerated, because most works have expired—in their public interest if not in their term of copyright—before that.

In subsection (b) I call attention to the fact that the word "expenditure" is usually construed as referring to money. This will protect corporations who can show what they have paid out, but an author who would spend a year innocently making a dramatic version of a book would have no recovery at all except for the amount of paper he had used. I think "time" should be included here.

KAMINSTEIN. Thank you. For one minute, Mr. Levitas. I would like to close.

LEVITAS. For thirty seconds, just addressing myself to the provision in section 24(a) referring to the requirement for use of copyright notice "in the United States or elsewhere" if the work is published. The inclusion of the words "or elsewhere" can work great hardship and serve no legitimate purpose; this additional burden of extraterritorial notice requirements has no justification in the proposed bill. A result such as that in the *Ross Products* case (141 USPQ 652) should be avoided rather than codified.

KAMINSTEIN. Thank you. We'll begin again promptly at 2:30. (End of morning session.)

AFTERNOON SESSION

KAMINSTEIN. Ladies and gentlemen, another very important provision of the bill is that contained in section 43, dealing with the manufacturing clause and the related importation provisions. Barbara Ringer will speak to that section.

RINGER. Throughout the past century one of the most difficult problems in the copyright law of the United States has been the need to reconcile the interests of the American printing industry with those of American authors and publishers. And, as you all know, this problem is still facing us today. In the hope that economic factors had changed sufficiently to permit the dropping of the manufacturing requirement entirely from the copyright law, the Register's Report in 1961 recommended outright repeal of the requirement for manufacture as a condition of copyright. Instead, it suggested that, if limitations on importation were considered necessary, they should be provided outside the copyright law.

The book manufacturing industry, however, argued very strongly that a manufacturing requirement in the copyright law is essential for the protection of their interests, and in our preliminary draft we presented alternatives. Alternative A provided for outright repeal of the manufacturing clause, and Alternative B was a provision limiting importation of foreign-manufactured books to 1,500 copies, with a variety of limitations and special provisions.

Alternative B did not meet with any special favor from either side. However, at the Panel meeting at which we discussed this subject, it did become apparent that there was one really burning practical issue here. That resulted from the present practice of some book publishers of sending their manuscripts abroad for composition, the importation of reproduction proofs, and then the manufacture of their copies from the reproduction proofs composed and manufactured abroad.

We felt, on the basis of the discussions at the Panel and other discussions, that there was a genuine possibility of compromising this terribly difficult problem, and we also felt that, for the sake of general revision, it should be compromised. Section 43 of the bill represents the results of our efforts. It is a rather difficult and complex provision. I think it's considerably clearer and less complex than the present law, but for the sake of this discussion let me run through it rather briefly.

Under subsections (a) and (b), I should like to emphasize first that the restrictions, such as they are, would apply only to nondramatic literary material. Hence music, dramatic works, works of the graphic arts, works of fine art, and so forth, would not be included.

Second, the clause would cover only works preponderantly in English. This would mean that it would not cover bilingual or multilingual works or the foreign-language portions of any work.

Third, the clause would cover only those portions of a work that are subject to the requirement; that is, it wouldn't curse the entire work if some of the material was manufactured abroad. For example, if the illustrations were done abroad and imported and then inserted into a book that was otherwise manufactured here, the work as a whole would be in full compliance with the manufacturing requirements.

Fourth, clause (1) of subsection (b) would exempt works or parts of works by foreign authors. The manufacturing requirements would apply only to works by American citizens.

Under subsection (b) it would be possible for the copyright owner to import up to 3,500 copies of a foreign edition; in other words, we would be raising the 1,500-copy limitation of the present law to 3,500. And, as under the present law, there are certain cases under clause (4) where it would be possible to import a limited number of copies for use and not for sale.

Under subsection (c) we have a definition of what is "wholly manufactured in the United States." This is the core of the practical problem as it exists today, and this definition is intended, very frankly, to close the reproduction-proof loophole. "Reproduction proofs" are specified as a part of the "reproductive manufacture" of a work. A work prepared by this process would be covered, but I should mention that there are further exemptions from the manufacturing clause which I will discuss in connection with subsection (d).

Some concern has been expressed about the addition of the word "tapes" along with "reproduction proofs" in subsection (c). Apparently the feeling is that this would tighten the present manufacturing requirements, but it would seem to me that, if the manufacture of a book from tapes made abroad was part of a lithographic or photoengraving process, it would be covered by the present manufacturing clause. The same would probably be true of a typographic process, so I doubt whether this really changes anything.

In any case, turning to subsection (d), this is the most significant part of the section, since it provides the sanctions for the manufacuring requirements. It is substantially different from the earlier draft; I won't attempt any comparison, but will simply describe what the present subsection (d) provides.

Subsection (d) says, first, that manufacture or importation in violation of section 43 does not invalidate protection for a work under this title. It does, however, provide an infringer, in an action for infringement of the right to make or distribute copies, with a complete defense if he proves either that the owner had imported copies in violation of the section 43 or "that more than 3,500 copies not wholly manufactured in the United States had been publicly distributed in the United States by authority of the owner of such exclusive rights."

I should like to underline the fact that the manufacturing clause does not affect any right other than the rights to make and distribute copies. This preserves motion picture rights, dramatization rights, etc. Under clause (2), a United States publisher could import repro proofs, or tapes, or anything else, and manufacture from them a U.S. edition of up to 3,500 copies; but if he goes beyond 3,500 copies he would have to bring out a U.S. edition or face the consequences specified in subsection (d).

One other suggestion was made which seemed to us most constructive, and I think it's worth passing along here. This suggestion, which was thrown out at the meeting of Committee 304 on Wednesday, was that, even if the copyright owner has violated the 3,500-copy limit, it would be possible for him to restore protection by bringing out a U.S. edition later on. This seemed to us to be worthy of further consideration as offering advantages to both sides.

KAMINSTEIN. I would just like to emphasize one point that Miss Ringer mentioned, and that is that you can bring in either a repro proof or a tape under section 43(b) and run 3,500 copies of a U.S. edition. It has also been suggested to us that there is probably no reason why you could not run any number of copies for export, and this could help both publishers and manufacturers. I will leave that for discussion at a later point.

DERENBERG. Mr. Chairman, let me say first that I am fully aware of the difficult problem that has faced your Office in drafting this particular section. I strongly believe, however, that the manufacturing provisions should be eliminated in their entirety and that at least the Copyright Office and the Panel of Experts should not agree even to some modified form of this clause even though some such provision may eventually be imposed upon us by the Congress itself.

I will confess that I have always experienced a certain feeling of embarrassment in teaching the subject of copyright law when I have come to the point of having to explain to students, both American and foreign, the ramifications and the background of the manufacturing provision. Consequently, I had looked forward to being a member of the Panel of Experts, and particularly to the opportunity which would thus be afforded to change our existing law radically—as we believe it should be changed—by eliminating this clause completely. I was therefore gratified when, on page 120 of the Register's Report, I read: "Whatever justification may have existed for the manufacturing clause in 1891, however, it is now considered an anomaly in our copyright law. No other country requires domestic manufacture as a condition of copyright protection." On the next page the Report, in discussing considerations for a new law, begins as follows: "It is hard to see the basis in logic or principle for denying copyright protection to authors

as a means of protecting printers against foreign competition." There were then some very interesting illustrations given as to how American authors are presently handicapped and discriminated against by the manufacturing provisions.

I am quite aware that the new proposal alleviates some of these discriminating provisions. It appears, for instance, that for the first time a United States citizen may not have to have his books printed in the U.S.A. if they were written in a language other than in English. Furthermore, the affidavit requirements seem to be eliminated, and there are some other provisions regarding importation and ad interim protection which appear to be improvements over the present law.

However, these proposals do not go far enough. May I refer to the special study on the manufacturing clause that the Copyright Office released after the other revision studies had become available. It is there stated under "Conclusions": "To deny copyright protection to authors whose works are printed abroad seems to violate the fundamental purposes of the copyright law." (In other words—and this is my interpretation—such requirement does not seem to be in accord with the constitutional purpose of "promoting science and the arts.") The study continues: "That law is intended to benefit authors, but the manufacturing requirement subordinates their protection to that of the printers. And even aside from this, is there sufficient corresponding practical benefit to printers, whom authors admittedly need, to override the apparent inequity? Facts seem to deny this." This, Mr. Chairman, is the conclusion reached in your own Revision Study.

Permit me to illustrate what concerns me most by referring to one practical application of the present law. The distinguished Deputy Director of the International Bureaux in Geneva, Dr. Arpad Bogsch, who is with us today, just advised me during the lunch hour that a second edition of his treatise on the Universal Convention will be published in the near future.[1] It so happens that the author was of Hungarian nationality but subsequently became a naturalized U.S. citizen whose domicile now is in Geneva, Switzerland. The book is being printed in a European country which is not a member of the Universal Copyright Convention at the present time. Since the author is a U.S. citizen, there is no possibility of avoiding the manufacturing provision unless the author were willing to give up his American citizenship, since under present interpretation a work of an American citizen will never be regarded as a work of "foreign origin" and therefore exempt from the manufacturing clause even if the book were written in a foreign language.

It must also be borne in mind that the manufacturing provisions apply not only to U.S. citizens but to authors who are domiciled in

[1] EDITOR'S NOTE: Dr. Bogsch's book is now available. Bogsch, *The Law of Copyright Under the Universal Convention*. Leyden, A. W. Sythoff [and] Bowker, New York, 1964.

the United States as well, so that perhaps thousands of distinguished foreign authors domiciled in the U.S.A. are discriminated against by these provisions. Moreover, as all of us are aware, it is a well-known fact that in the United States publishers would more readily publish 5- or 6-volume works which can be sold at retail at a substantial price than publish slender but excellent scientific or scholarly works addressed to a limited audience which can be sold at a small price. Therefore, it has often become necessary to turn to publishers abroad who would be more readily willing to undertake such publication, just as in the case of the just-mentioned second edition of Dr. Bogsch's book.

I realize that the proposal now before us will permit the importation of 3,500 copies. But there may be many instances in which such a book would prove to be so successful that this number of copies would not be sufficient. What happens then? Instead of rewarding the foreign publisher for his courage and foresight in printing and publishing the book, it would become necessary to go to an American publisher and deprive the foreign publisher of his just rewards.

I profoundly believe that the copyright statute is not the place for imposing manufacturing restrictions or any other tariff-like provisions. I need not remind you that no other country in the world has made legal protection of literary works contingent upon domestic printing or binding. Nor has anyone ever suggested that the Musicians' Union should insist that, if we are to have copyright for phonograph records, those records would have to be made here, or that a motion picture, if it is to enjoy U.S. copyright, must be produced here and not, as is done many times, in a foreign country. I had a bad dream the other night that some day a federal law may be suggested providing that registration of a United States trademark, for instance, for cheese should be permissible only if the cheese were manufactured in Wisconsin. We are all aware that the cheese industry here, or the U.S. watch or apparel industry, may apply to the President of the United States for tariff relief if the pressure from foreign competition becomes too burdensome. Such relief may be granted by our Government through imposing the quota system or in some other appropriate way. But a statutory provision which would condition the very existence of legal ownership and protection of literary works on American manufacture contravenes—in my opinion—the constitutional purpose of copyright law.

As a member of the Panel of Experts, it is my position that the proposed revision bill should not include even the present modified version of the manufacturing clause which has been rightly characterized as a "pathological symptom." [1]

[1] Younger, "Citizens Who Publish Abroad," 44 *Cornell L. Q.* 215 (1959), reprinted 6 *Bull. Cr. Soc.* 114 (1959).

Mr. Chairman, if time permits, I have also a few brief comments with regard to the proposed sections 43 and 44. These comments are made on the assumption that my principal suggestion will not be adopted and that something like these sections will be retained in the bill. I am concerned about the words "literary material." There's no definition of it. I find a definition of "literary works" which would include many things that are not presently included in the manufacturing provision. I am also not sure about the language that refers to the authorship "of any such substantial part of any such material." Suppose, as is frequently the case, there is more than one author and one of them is a citizen or a domiciliary of the United States and the other is not? What happens in those situations? And what would be the solution if, for instance, dictionaries were involved which may be fifty percent in English and fifty percent in some foreign language?

KAMINSTEIN. Section 43(b)(1) says, Walter, that if "the author of any substantial part of such material is neither a citizen nor a domiciliary of the United States," the manufacturing requirements do not apply. But I think this again is a question of language and detail.

DERENBERG. I am also concerned about section 44, particularly with regard to the jurisdiction of the Bureau of Customs. It says that the Bureau "has no authority to prevent importation when the copies or phonorecords were lawfully made." That raises a very difficult problem. Is a work "lawfully made" in a foreign country if it is imported without the consent of the copyright owner here? We have similar problems in trademark law.

I am also wondering to what extent the import provisions will apply to artificial flowers, Christmas ornaments, and other copyrighted works, or whether they should not be limited to books.

KAMINSTEIN. The intention was to prohibit importation of more than 3,500 copies of "literary material" manufactured in violation of section 43, and to prohibit importation of copies or phonorecords of any kind of copyrighted material if they were not lawfully made. These are two different things, and are covered separately in sections 43 and 44.

DERENBERG. Mr. Chairman, may I thank you for having asked me to testify.

KAMINSTEIN. Thank you, Walter. I think you know, too, that I fully understand your position. I wish we did live in a world where we could act completely on the basis of principle and in terms of black and white. I also hope that Arpad will have to face the problem of what to do when he reaches the sale of 3,500 copies of his volume on the Universal Copyright Convention.

This was a case in which the Office had to make a very conscious decision as to whether we would recommend complete repeal or attempt to compromise the issue. We have spent a great deal of time in

trying to work out this problem, and section 43 represents a conscious decision to present a provision that people on both sides will be willing to discuss and to consider further.

FRENCH. James H. French, representing the Book Manufacturers Institute. In view of the vigorous attacks on the present manufacturing clause which have been made in recent years, the Register of Copyrights has shown great objectivity, courage, and statesmanship by including a manufacturing provision in H.R. 11947 at all, even though it be the much-attenuated version we see in section 43. Also, we think the Copyright Office staff is to be commended for its draftsmanship in devising a short, easily understandable and administrable provision. However, section 43 has certain deficiencies which we think should be pointed out.

Turning first to subsection (a), it is provided there that only the importation of the affected copies is prohibited. Since it is apparent from the provisions of the enforcement subsection, subsection (d), that up to the number of 3,500 copies are to be allowed to be bound (or printed and bound) in the United States, having been produced from foreign-made reproduction proofs or sheets, and that the 3,500-copy limitation is to be enforced by prohibiting public distribution in the United States of more than 3,500 copies produced in this manner, subsection (a) should refer to "public distribution in the United States" as well as to "importation into the United States." Accordingly it is recommended that the words "or public distribution in" be inserted between the words "into the" at the end of . . . [the first line].

Turning to subsection (b), clause (1), it is therein provided that the import limitation does not apply if, "on the date when importation is sought, the author of any substantial part of [a work] is neither a citizen nor a domiciliary of the United States." We submit that the words "any substantial part" are too vague to disclose a definite statutory standard, and would be likely to give rise to much inconclusive litigation.

Also, while we are fully aware that this exemption is required by Universal Copyright Convention obligations, experience under the existing manufacturing clause demonstrates that the "any substantial part" test is considerably more liberal than is required to meet these obligations. Moreover, we are quite convinced that this test would invite wholesale evasions of the manufacturing requirement. Accordingly, we recommend the words "of not less than half by volume" be substituted for the words "of any substantial part."

Turning to clause (2) of subsection (b), it is there provided that up to 3,500 copies of a work may be imported free of the manufacturing requirement. The present law allows importation of up to 1,500 copies under a five-year ad interim copyright. Proposed section 43

eliminates the ad interim limitation and accords full copyright. Based on the information that we have developed to date, we believe that the number of copies should be kept at 1,500. We are reasonably certain that raising the number of copies to 3,500 would result in severe injury to a large segment of the book-manufacturing industry. However, our studies are not yet complete, and we are keeping an open mind until they are. When they are complete we propose to submit the results to the Register, together with our recommendation based thereon.

In this connection I should like to note that, since section 43 would allow manufacture in the United States by the use of foreign-made reproduction proofs of the same number of copies as would be allowed importation, a paragraph should be inserted in subsection (b) exempting from subsection (a) the public distribution in the United States of the number of copies agreed upon.

Turning finally to subsection (d), clauses (1) and (2) of that subsection appear to impose an impossible burden of proof on a defendant in an infringement suit. We think this defect can be cured most appropriately by giving the defendant a defense if he proves that the importation or public distribution had been effected by any person other than an infringer, and we will submit appropriate language to the Register at an early date. I note that section 44 covers importations by infringers. Certainly, if the importation were by any person other than an infringer, it would be for the direct benefit of the copyright owner.

In closing I should like to recall the words of Mr. Karp, speaking this morning in connection with section 20 on duration of copyright. Mr. Karp was referring to the inherent property right of authors in their creations. His words were—I certainly hope that I am quoting him correctly—"The Copyright Act does not grant rights. It destroys and forfeits rights."

I agree with Mr. Karp. It destroys and forfeits the right of printers to make, sell, and profit from authors' published works. Now we do not purport to quarrel with this in any way. We believe the author's property rights in his creation should be preserved and protected. But we have little patience with any argument that printers are not part of the copyright-affected industries, and are not entitled to recognition and protection under the copyright law. Certainly book manufacturers have rights which are as entitled to recognition under the copyright law as those of the manufacturers of phonograph records, who are protected by a compulsory licensing provision, and as those of the jukebox operators. The manufacturing clause grants that recognition, and affords to book manufacturers a minimal amount of protection which is consistent with continuation of a sound book industry.

Now the tariffs on books are negligible today, and they are not going to get any higher. I think each person in this room who knows what is going on in the international trade area knows that they are not. Professor Derenberg said a few minutes ago that the United States is the only country in the world that has a similar provision. I don't know how many countries have provisions to protect the printers, but I do know that Canada, for instance, has a compulsory licensing provision in favor of the printers. Now perhaps a compulsory licensing provision would be the answer to this problem; I don't think so, and I don't think you do. The printer certainly has interests here which need to be protected, and he is entitled to that protection under the copyright law. Thank you.

STRACKBEIN. Mr. Kaminstein, my name is O. R. Strackbein. I represent the International Allied Printing Trades Association. This, as most of you undoubtedly know, is composed of the printing trades unions that are employed in the printing industry. I don't want to add anything in particular to the statement of Mr. French. I endorse it and believe that it is very sound. I want in particular to second his remarks about section 43 (b)(1) and (2), relating to the substitution of "not less than half by volume" in place of "any substantial part." Also we feel that, subject to the survey that is being made, the 1,500 copies should not be raised to 3,500 copies.

Now as to the good Doctor who said that he was embarassed in explaining to his students the existence of the manufacuring clause, I want to say to him that upon invitation I would be delighted to substitute for him to explain the reason for this.

Lastly, I want to reserve the right to make any further written statement so long as the record is open. Thank you.

KAMINSTEIN. I believe you were not here yesterday when I said that we will hold the record open for at least a month for written statements, and we will be glad to introduce any statement you wish to file at this point.

STRACKBEIN. Thank you very much.

BRESNAHAN. I am John Bresnahan, representing the Printing Industries of America. We have been meeting with the Book Manufacturers Association and with the representatives of the unions in this matter, and I see no reason why we should take up time by merely repeating what has already been said. The Printing Industries of America recognizes these problems, and endorses very strongly the statements made by Mr. French and Mr. Strackbein.

KARP. Mr. Kaminstein, first of all I would like to point out that in the past I have expressed the view that the manufacturing clause doesn't logically belong in the Copyright Act. Rather than reiterate points that I've made in that regard, let me pass on to the clause itself. Before I do, however, I might also say this: I understand and

sympathize with and agree with the desire of the printing industry and the printing trades unions to be protected against escape abroad to get the advantages of cheaper labor. In this I don't think the author is at all out of sympathy with the people in these industries and trades.

Now as far as the clause itself is concerned, I think the Copyright Office has reached what is almost a satisfactory compromise between two divergent interests. And it is a compromise that will help the lot of the author who stands in the middle and is actually caught in the crossfire.

First of all, as Professor Derenberg has pointed out and as Miss Ringer has pointed out, the clause as now drawn eliminates the unfortunate consequence of the complete loss of copyright to an American author writing in a language other than English. Secondly, it eliminates finally the drastic, Draconian measure of complete forfeiture of copyright where more than the specified number of copies are imported into the United States. I think that these are both very commendable improvements over the present law.

I would not agree with Mr. French that the limit should be reduced to 1,500, although I understand that that is not an ultimate position. I would have preferred to see the limit raised to 5,000; perhaps 3,500 is a good compromise.

Lastly, I would call attention to subsection (d), the enforcement section under the clause as drawn. Under subsection (d), if more than 3,500 copies are imported or manufactured here from reproduction proofs, the author in effect loses the copying right. Anyone else may then manufacture copies of the book. I would suggest that this serves neither the interests of the publishing industry, the interests of the author, nor the interests of his American publisher, and that the inducement to publish in the United States should be preserved in the act.

I would therefore suggest that, if the compromise clause stands, while the author and publisher might lose the copying right or an infringer might have the defense of foreign publication and importing of more than 3,500 copies, the author should be able to regain that copying right when an American edition is published and when registration of a claim to American publication is recorded in the Copyright Office. That would even more satisfactorily eliminate the hazards of the manufacturing clause to the author, and I think that it would provide a further incentive to publication here in the United States.

FRENCH. Mr. Kaminstein, I don't intend to take much time or to pontificate, but I neglected to say before that we are in full accord with that proposal. We are not interested in an author losing his rights. We are interested in the work being manufactured in the

United States, and we would be in full accord with a provision added to this manufacturing clause which would provide for the restoration of those rights upon the bringing out of an American edition.

MANGES. The position of the American Book Publishers Council has been and is that a manufacturing clause should not be in the copyright law because it involves, not a matter of copyright, but a matter of commercial protection. By means of the existence of this clause American authors, who are American citizens and American domiciliaries, are seriously prejudiced, so much so that there is a movement these days in which, even where American authors are the most expert in the particular field, the publisher is tempted to arrange for a foreign author to do the work because this clause stands in the way.

As you know, the clause does not now apply to works in the public domain, or to works of members of the U.C.C., or to works of foreign authorship first published in U.C.C.-member countries. Nevertheless, American editions of the works of Shakespeare and Tennyson are manufactured according to domestic procedures and there has been no rush to get those works published elsewhere. The effect of the clause is limited to a certain type of work.

We do not believe that such palliations as importation of repro proofs are any solutions. Such importation would just be an advantage for the domestic printer who would hope by the importation of a repro proof not only to print the 3,500 copies but also to print any excess that might be used for distribution abroad.

The clause as it now stands is of course much tighter than it has ever been before, much more burdensome to the publishing industry. It includes, as Miss Ringer mentions, the matter of tapes. We say that the use of tapes today would not violate the law, because if tapes are used the books would still be printed from type set in the United States. Yet tapes are also added here. Tapes are likely to become much more important in the future, we believe.

It is true that the wage differential is in favor of the foreign employee, but nevertheless this gap is frequently made up by the fact that the publisher is not tempted to go abroad for printing because of advantages in faster printing and in having other sources available in this country.

We say that this clause was wrong in 1909, and that the error should not be repeated now.

LINDEN. I listened carefully to Mr. French's comments and those of the other gentleman representing the printing unions in terms of protecting the printers and the book manufacturers. I'd like to deal with these two classes separately. With respect to the book manufacturers, I'd like to point out that a number of book manufacturers themselves import repro proofs for the manufacture of books in the United States. With respect to the printers I'd like to point out that

there are other segments of the industry involved in the areas of competition with foreign works. For example, American publishers compete with foreign publishers as well. They compete with respect to books printed predominantly in the English language. If the American publisher of scientific material, for example, must perforce have his work published in the United States, he is in competition with the British publisher publishing a competitive work and publishing it abroad. Therefore, with respect to the number of employees, workers that would be affected, I submit that a numerical count would find that more American workers would be directly affected than the number of American printers.

Furthermore, with respect to American authorship, let me emphasize—as we have suggested at earlier Panel meetings—that the American publisher does not wish to discriminate against the American author. We urge that the copyright law of the United States, which is a law primarily intended for the protection of American authorship, not be distorted to invite discrimination against American authors.

Obviously, in certain fields of endeavor where the American publisher must get repro proofs or composition done abroad because of the quality or time problems involved, when he is given a choice, for instance between an American author and a British author of similar caliber, he will be forced to select the foreign national. I submit that this is not the intention or the purpose of the copyright law, nor is it the public policy of the United States to discriminate in that manner against American authorship and to urge American publishers to so discriminate.

There is one more point that I'd like to make in regard to the change recommended in section 43(b)(1). The concept of having "half the work by volume" by an American citizen or domiciliary may function properly in a game of marbles, but it does not work effectively where intellectual property is being created by co-authors in any field of technical, scientific, religious, or similar areas. The amount of material that each co-author contributes is based upon his knowledge, his expertise, and not upon a mere count of words contributed.

BUCHMAN. We have indeed been edified by those who are pro, con, and neutral on the proposed manufacturing clause, but this is a matter of whose ox is being gored. The problem is understanding the proposed manufacturing clause, even as there were problems under the 1909 Act. The proposed manufacturing clause may require some clarification; perhaps clarification would make it even more complicated.

Although I didn't fully understand the manufacturing clause in the 1909 Act, I was faced, for example, with the problem where a work protected in the United States and first published in England in the

English language is extant, and an American publisher asks, "May I, by a United States photographic process, reproduce the work here?" My answer was yes. The United States publisher was doing nothing outside the United States in the manufacture of the work.

The language presently employed, and I submit it for your consideration and review, states: "A copy has not been wholly manufactured in the United States if any step in the process of its reproductive manufacture . . ." occurs in a foreign country. Well, assuming there is extant this English work, and I bring it in and I seek to reproduce it solely by a photographic process: does that violate the manufacturing clause presently contemplated by this bill?

KAMINSTEIN. I assume you mean an English work by an English author. That would not be covered by the proposed provision.

BUCHMAN. No. I assume an English work by an American author.

KAMINSTEIN. Well, then it would be covered by the manufacturing clause.

BUCHMAN. Well, every process in the reproduction of the work took place here.

KAMINSTEIN. I think this would clearly be covered, but then you come to the provision which has been suggested by Mr. Karp and which the manufacturing people have indicated willingness to agree on. I think we can resolve that by further language.

PILPEL. Although the manufacturing clause seems to me to make very little sense in relation to books, the wording of section 43 in relation to contributions to periodicals has left me completely bewildered. I don't know whether this is a point of order or a point of information, and when it says, for example, in subsection (b) (1), "the author of any substantial part of such material is neither a citizen nor a domiciliary of the United States," I wonder what is meant with reference to the American contributor to a symposium first published in London by the International Geophysical Society. He may be the only American contributor, but he is the sole author of his work.

It seems to me that, if the clause is to be maintained in any form whatsoever, some attention has to be paid to the very special problems of composite works. Especially is this true since elsewhere in the draft there is reference to composite works as presenting special problems. There is no such reference here.

Second of all, I do not understand the meaning of the words "authorized or knowingly acceded in the importation of copies" in clause (1) of subsection (d) of section 43. As we all know, the author has very little to say about where his book is published. Indeed, one of the prerogatives which the publishers (correctly in my opinion) claim is the right to decide details, et cetera, as to manufacture. Does this mean that, henceforth, if authors are not to be penalized by the activity

of this clause, they have got to write into publishing contracts that their work must be published in the United States? If so, they may be in a much worse position than they are now.

Finally, as far as the clause itself is concerned, it would seem that we have found a variety of other methods of dealing with protection of American industry. I would feel that to include this kind of provision in a copyright law before every effort has been made to solve it on some other basis, such as tax or tariff, is most unfortunate.

KAMINSTEIN. Because of the time limitations I should like to proceed now to consider the provisions on remedies in sections 35 to 42, and I call on Mr. Goldman to outline them.

GOLDMAN. Subsection (a) of section 35 contains the very general provision that anyone who violates the exclusive rights specified in sections 5 through 13, or who imports in violation of section 44, is an infringer. The present law has no definition of infringement. This section was in the preliminary draft substantially as it is here, we have kept it in the bill without any significant change.

Subsection (b) was also in the preliminary draft. We have made some changes, largely at the suggestion of persons appearing at our Panel meetings and of Subcommittee members of Committee 304.

Among those changes is the insertion . . . of the clause that starts out "and shall require that such notice be served upon any person whose interest is likely to be affected." This is an attempt to indicate to a court that persons whose interest may be affected should be brought into the case, to avoid a multiplicity of suits and to resolve the issues with respect to all parties who are concerned with the litigation. This would supplement—or be an indication to the court that it should supplement—the Federal Rules of Civil Procedure, which already provide for joinder of parties that the court thinks are necessary to the action.

Another change occurs in the clause "and shall permit the intervention, of any persons having or claiming an interest in the copyright." In the preliminary draft we merely provided that the court may require or permit the joinder of parties. This says that any person who claims or has an interest is entitled to intervene if he wishes to do so.

Section 36 provides for the remedy of injunction for infringement. The only change in subsection (a) is again one suggested by the Subcommittee of Committee 304, and it is purely a language change without any attempt, I think, to change the meaning. I don't think I have to go into the details there. With respect to subsection (b), we have retained substantially what was in the preliminary draft with respect to serving injunctions anywhere in the United States.

Section 37 was changed in one fairly important respect at the

suggestion of Panel members and members of the Subcommittee of A.B.A. Committee 304. It was formerly provided, at the beginning of both subsections (a) and (b), that the issuance of an injunction was the occasion for impounding. We have taken out any reference to the issuance of an injunction, and we would thus let the impounding and destruction orders stand on their own. We have also added, at the suggestion of members of Committee 304, the words . . . "or used" [in both these subsections] so that seizure may be made with respect to copies or phonorecords that are used, as well as those that are made, in violation of the copyright owner's exclusive rights. Otherwise I think that section is substantially the same as it was in the preliminary draft.

Section 38 is probably the section that is of most concern to most of the people here. This is the section on damages and profits. We have made one quite substantial change in this section. In the preliminary draft we had provided that the copyright owner may recover any of three measures of damages, whichever was the highest. One was the damages that were proven, two was the infringer's profits attributable to the infringement, and three was statutory damages with a specified minimum and maximum of $250 and $10,000. We have changed this, as you will note in subsection (a)(1)—which is explained further in section 38(b)—to provide that the recovery of damages may be accompanied by a further recovery of any profits of the infringer attributable to the infringement that are not taken into account in computing the actual damages. So, instead of making damages and profits alternative, we have provided for the accumulation of the two, but without overlap.

In the provision on statutory damages, section 38(c), we have made two important changes. One is the omission of a provision that was in the preliminary draft to permit a court to reduce the amount below $250 or to omit statutory damages entirely with respect to a person who proved that he was an innocent infringer—that is, that he was not aware and had no reasonable grounds to believe that he was infringing. That has been dropped from the bill.

We have inserted in the bill one other provision that was not in the preliminary draft and that is the . . . [second sentence in section 38 (c)]. This follows somewhat a provision in the present law, but with some change. The effect of this provision is that, if the infringement is proved to have been committed willfully after service of actual notice, the court in its discretion may award statutory damages in excess of $10,000.

Section 39, dealing with costs and attorney's fees, is the same in effect as the provision in the preliminary draft, and I shan't go into that.

Section 40 on criminal offenses represents a change in form from the same section in the preliminary draft. The change in form was made to conform the style of the criminal provisions here with the style that was developed by perhaps the leading experts on criminal law in the country when they rewrote the United States Criminal Code. We have adopted that style, and the main difference is that there is no mention of any minimum amounts with respect to fines or imprisonment, but only a mention of the maximum. This is the uniform style used throughout the United States Criminal Code.

The only other change in section 40 occurs . . . [at the end of subsection (b)] where formerly we had a fine for the public distribution or importation of articles bearing a notice that was known to be false. The fine was $250 as a maximum, and we have substituted the figure $2,500 to make the fine uniform in all cases.

Section 41, "Limitations on Actions," simply duplicates the section in the present law. Since this was put into the present law just a few years ago, it was our thought that we should leave it alone. There was considerable debate on the precise wording of this provision at the time that it was being considered in Congress, and the wording finally adopted represented the agreement of all concerned. It was our feeling that we should not tamper with it or we might reopen what I hope are dead issues.

Section 42 is much the same as a provision we had in the preliminary draft. It merely provides that the clerks of the Federal courts will inform the Copyright Office with respect to copyright infringement suits brought, and with respect to the decisions and decrees issued in such suits.

KAMINSTEIN. Thank you. I don't see Doug Anello around, but from what he has told us I think he would want to say that he is opposed to the change in the provision in our earlier draft that would have permitted a judge to reduce the $250 damages.

I believe that Mr. Kaye would like to speak to certain of these sections in his unbelievably brief style. [Laughter]

KAYE. Thank you for that heartfelt tribute, quoted from me. [Laughter] We are now opening the door—properly, I think—for the holder of any minor, limited exclusive right to start an action in his own interest in a remote jurisdiction. We say that the court shall require that notice be served on a person whose interest is registered in the Copyright Office, if his interest is likely to be affected. The local judge will have no way of knowing whether that interest is to be affected. It would seem to me, at the very minimum, that notice should be required to be given to everyone who has an interest that appears in the records of the Copyright Office. Otherwise somebody may find that there is a precedent against him that he never heard about, in

a copyright in which he has an interest. I would indeed go further and perhaps not permit a man to be vouched in to a distant jurisdiction to contest the validity of his copyright far from his home and in a subsidiary case. But that is something, I suppose, that requires much more consideration.

ROSENFIELD. Mr. Kaminstein, I regret seeing the elimination of the provision which appeared in the preliminary draft permitting the court either to waive or to decrease statutory damages in the event of innocent infringement. I am a little puzzled that discretion seems to be allowed to increase fines—this is a new provision—and at the same time the discretion to decrease fines for the opposite of willfullness has been removed. I won't reargue the issue; we've made the point clear. But I do want to say for this record that, so far as we're concerned, it is not the intention of the educational community in any way to suggest any provision which will allow pirating.

We urge the resuscitation and the incorporation in the new bill of the language which appears . . . [in section 38(a)(3)] of the preliminary draft, as follows: "If the infringer proves that he was not aware and had no reasonable grounds for believing that his acts constituted an infringement of copyright, the court in its discretion may withhold an award of statutory damages . . . or may reduce the amount to less than $250." However, we're perfectly willing and will be glad to suggest that such discretion be limited to instances in which the alleged infringing use was by a nonprofit educational organization or institution for nonprofit educational purposes, thereby hoping to avoid any encouragement of piracy for financial reasons.

LEVITAS. With respect to section 38 I regret also to note that the Copyright Office has determined to remove what I considered only a modest step in relieving a truly innocent infringer from liability for statutory damages and, I would also suggest, for actual damages and profits. I am referring now to the truly innocent infringer.

Anticipating that some people will begin to talk in terms of the "pirate" and the "thief" and those who "steal" copyrighted works, I am now adressing myself solely to the person who is innocent and can prove himself to be innocent or can prove that he had no reasonable grounds for knowing that he was infringing a copyright. As I have said previously and in writing, dealing with a copyrighted work is not like dealing with a wild animal or an explosive.

People who legitimately use works that are literary in nature, or works of other types which can sometimes be subject to copyright, frequently are in no position, and are completely helpless, to determine whether there is copyright protection for the work that is given them. News media, magazines, periodicals, printers, book manufacturers—particularly in connection with composite works—frequently

have no way of knowing whether the material a person gives them is or is not copyrighted. The methods of registration in the Copyright Office, unlike those under the patent law, are not susceptible to this type of determination.

It would seem that it is in the public interest and in the interest of legitimate users of works which may be the subject of copyright, that they not be subjected to either statutory or actual damages or profits in cases where they can prove that they are innocent. I would certainly urge the Copyright Office to consider the reincorporation of a section which would relieve the innocent infringer under appropriate circumstances, at least reincorporate the modest proposal made by the Copyright Office in its initial preliminary draft.

I also have certain observations with respect to the new clause which has been inserted in . . . section 88 concerning the right of the court in its discretion to award statutory damages of more than $10,000. I propose to comment on this in more detail in writing, but for the record I would simply like to state that the provision sets forth no standards, no criteria. There is no limit. Ten million dollars is in excess of $10,000. At least the present provision in the law had certain indicia in terms of a "per copy" or a "per item" reference, so that a court could be guided.

Aside from the question of fairness and reasonableness, I would even raise the question of the constitutionality of a provision which lets a court—without any frame of reference and without any limit upon the extent to which statutory damages can be awarded—go beyond $10,000 by simply saying that they can award more than $10,000. I suggest that some consideration be given to a frame of reference, standards, criteria, or limits.

FINKELSTEIN. The last speaker suggested that the poor printer and publisher and news media should be entitled to the defense of "innocent infringement" so as to escape the necessity of paying for the literary works they use. Now it would seem that when a work is used, someone ought to respond in damages to the person whose work is used. Otherwise, under the guise of innocence, someone who is in the business that these people are in—and who should be charged with an obligation to find out if they are apt to be infringing, rather than hiding behind a claim of "innocence"—would be able to escape responsibility. Someone should be held responsible.

In copyright there isn't any police force supplied to see that nobody pirates the work of an author or takes something that doesn't belong to him. Everybody who uses a work which is ultimately held to be an infringing work knows that he didn't write it. The Register has a provision (section 84) that provides that, if a work is not registered, there shall be no award of statutory damages or attorney's fees. It

seems to me that that is a great encouragement for registration. If the author does everything that can be done to put the public on notice—if he has his copyright notice, and if he has registered the work (and there is no police force out there trying to detect infringements for him,) and he goes to all the trouble and expense of ascertaining that the work has been infringed—it seems to me that experience under the existing law has shown that the statutory damage provisions are the only thing that the author can fairly rely on.

ROTHENBERG. With respect to subsection (c) of section 38, Mr. Rittenberg inquired at the meeting of Committee 304 whether the Subcommittee had a definition for the phrase "all infringements of any one work." We advised him that the Subcommittee had not proposed a definition. In the ensuing discussion it was indicated that it might cover several infringers, that it might cover several infringers in several media, or that it might be limited to infringements of only a particular exclusive right and that there might then be the question of overlapping exclusive rights. Accordingly, I would like to know what the Copyright Office had in mind when it used the terminology or whether it intends to leave it to the courts—which is what I would favor.

GOLDMAN. With respect to more than one infringer being involved, the language of the clause you referred to says ". . . all infringements of any one work for which the infringer is liable, . . ." The assumption there was that you were dealing with one infringer. If you have two separate infringers who commit separate infringements, presumably you can sue two people separately and collect from each.

The thought here was to avoid the award by a court of a tremendous amount of multiplying $250 times some supposed number of infringements by one person. These questions have been raised and pointed out for a long time. In the case, for example, where you have a motion picture that is shown in a thousand movie houses, is the producer to be liable for $250 times a thousand if the motion picture contains infringing material?

With respect to a series of infringements, if you bring suit today for infringements that have occurred before today, you certainly don't foreclose your claim for damages for infringements that are going to occur in the future, but you do recover for all the infringements for which the defendant is liable up to today. If you have more than one work involved, I think the answer is also spelled out here. It says, "infringements of any one work," and you will find at the end of that section a sentence which relates to the "one work" reference: "For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work." This means, for example, that if somebody infringes by taking ten different cuts out of an advertising

catalog, he's committed one infringement and not ten. This question has come up, as I think you know, in a number of cases.

ROTHENBERG. Mr. Goldman, you covered the question of one or more infringements, but you didn't cover the question of one or more exclusive rights.

KAMINSTEIN. I'm afraid it's going to be impossible to answer all of these questions now. I hope we will be able to resolve some of them by filing a supplemental report when we introduce the new bill. And, of course, we are still open to suggestions to clarify the particular language.

KARP. Mr. Kaminstein, I think Mr. Kaye has raised a rather serious question under section 35 without really having had a chance to think about what would constitute *res judicata* against an author or publisher in a suit for infringement by an exclusive licensee. It would impose a tremendous handicap on the author or the publisher or other user if he were bound by a determination of invalidity of the copyright in a suit in a distant jurisdiction over a minor right. I think that serious consideration should be given to a provision that such a determination not be *res judicata* as to him, and that, rather than compulsive joinder, he be permitted to determine whether to join in the suit or not.

As to the proposal that some exception be made for innocent infringement, I would first of all like to point out that, as Mr. Finkelstein notes, you already have inserted a provision to protect the innocent infringer against all damages where notice is omitted. Secondly, by introducing the concept of innocent infringement, you introduce a completely subjective test which can be used to defeat a legitimate suit for copyright infringement, and you eliminate both deterrence and the opportunity of the author or proprietor to be compensated for his damages. Under a system of life-plus-fifty years, I can think of no user who can plead that he was an innocent infringer unless innocence is tantamount to ignorance of the copyright law. If we have life-and-fifty years, anyone would know that the work of an individual author is protected until fifty years after his death. He could not establish himself as an innocent infringer unless, as I say, you are incorporating the doctrine that his ignorance of the copyright law is tantamount to innocence.

SCHIFFER. I have what is really a question with respect to the relationship between section 38(c) and the compulsory license provision. If I understand this correctly, if a man gets a compulsory license and then fails to make his payments, for example, the license can be terminated and suit brought for infringement under this section, this being then the sole remedy. Now the proof of damages would be virtually impossible, in that there is a non-exclusive license situation in the first place, and there may either be no profits or profits may be hard to

prove. So you end up with the statutory "in-lieu" provision. Now, at that point, isn't this really an invitation for people to bargain on the compulsory license fee—in other words, an invitation not to bargain initially for a different rate, but simply to refuse to make payment in the hope of settling somewhere between $250 and $10,000? Isn't there a hole here that we don't really intend at all?

KAMINSTEIN. Are there any other comments?

PERLE. Believe it or not, I would like to address myself to section 34, which I feel is a real boon to the "instant infringer" and may prove to be a real detriment to even the speedy registrant. In the last year we have had in our own publications at least five instances of "instant infringement" of valuable material—particularly growing out of the whole syndrome of President Kennedy's assassination, Lee Harvey Oswald's death and the Jack Ruby business—where, on the day that our magazines came out, photographs and text material were both instantly infringed by newspapers and by other publications both here and abroad. Granted, we do have other remedies, but if the television media and the newspaper media can freely appropriate when they know that it is not physically possible to get a copyright application down to the Copyright Office on that same day, you are depriving the publisher and the copyright proprietor at least of his attorney's fees. You are depriving him of a very real impediment to infringement.

Furthermore, when you start thinking of this in terms of unpublished works which are infringed, we all know that most people are never going to apply for registration for a family snapshot. Yet these very same family snapshots, such as the Oswald snapshots, can take on tremendous economic importance. So, when you say that liability for infringement depends on the registration of an unpublished picture (or unpublished text, as in Jackie Kennedy's case), you're asking people to do that which is virtually impossible or impracticable. And when you demand registration in a situation where you can have infringement prior to the time that you can affect registration as it's defined, you are also doing something which should not happen.

KAMINSTEIN. Since we have already begun to discuss section 34, I would like to turn to sections 29 through 34 at this point and call on Miss Ringer to deal with these problems.

I should also say that those of you who know me realize the terrible strain I am under sitting up here and not being able to talk freely. I hope to remedy this at the end of the afternoon. [Laughter]

RINGER. Sections 29 through 34 are the provisions dealing with deposit and registration. As those of you who attended the Panel meeting last year on notice and registration know, the notice provisions drew a lot of fire in the morning; but, perhaps because the fire had been drawn, there wasn't much substantive discussion of the registration

and deposit provisions in the afternoon. Except for section 34, which Mr. Perle has already anticipated, the changes that have been made are almost entirely matters of clarification or improvement of details.

Section 34 does deserve some comment. In the preliminary draft this section provided that, with respect to infringements commenced before registration, there could be no recovery of statutory damages, attorney's fees, or of any profits unless the infringement was shown to be willful. Leaving aside Mr. Perle's point, most of the specific criticisms of this section were directed at the problem of proving willfulness in order to obtain profits. As you will note, the references to profits and to proof of willfulness have been dropped from this section of the bill.

There seemed to be some general recognition at the meeting that, since you don't get statutory damages or attorney's fees under a common law copyright today, it is appropriate to induce registration by withholding them with respect to unregistered works. On the other hand, there was a fairly one-sided vote in Committee 304 to do away with this section entirely. This provision interrelates with the remedies sections, and some of the comments that have been made—Mr. Finkelstein's comments among others—should be kept in mind in this connection.

ROSENFIELD. A short observation, Mr. Chairman. Section 31(4) . . . requires the application to make some statement in connection with private employment. I suggest that some similar statement be made available in connection with official employment in the Government, so that information will be available to the Register for whatever use he may care to make of it.

KAYE. When we think of section 34, we have to envision a world in which every scrap of paper, every fleeting mimeograph sheet, every interoffice memorandum, and every letter will be entitled to statutory copyright. This is a world full of entrapment. A man who quotes or reproduces five letters might, if there weren't the protection in section 34, find that he had minimum damages of over a thousand dollars. I think one of the penalties of this is that we accept as a minimum section 34, lest we be accused of over-reaching.

I have one other thought with respect to transmuting all of common-law copyright except oral works into statutory copyright. Section 29 gives future Registers of Copyrights—no one could envision any criticism of Kami—the right to exempt any category of material from the deposit requirements, and section 49 permits him to return copies of unpublished compositions to the copyright proprietor.

Now all of us have had the unfortunate experience in common-law copyright of finding that a man comes up with a copy which is so like the thing which has been done years later that there is practical

identity, and he has eight cronies who seem to remember that that's just the way it was. I think it's absolutely essential that we limit the right of the Register of Copyrights to exempt material from deposit requirements to that material which is physically unsuitable for deposit, and that we require that unpublished material, which you can't find anywhere else, be held for the duration of the copyright.

KARP. Mr. Kaminstein, I would simply like to note that I find no serious objection to section 34 insofar as it continues what amounts to the status under common law: in other words, unless you register you are not entitled to statutory damages or attorney's fees. There is one weak point in the section, however, and I would like to second the point made by the previous speaker that, where an infringement takes place from a published work such as a magazine, some grace period should be allowed for registration.

WASSERSTROM. I would like to speak for a moment with respect to section 34. Perhaps some of the remarks that I would like to make I should have made earlier with regard to the general statutory recovery.

I happen to have been involved in perhaps the only case that went up to the U.S. Court of Appeals that involved a common law copyright. I am referring to *De Acosta* v. *Brown and Hearst*. We had a situation there which, I submit, we should take into account when drafting the bill. I think some recognition should be given to a situation where there is, in fact, an innocent infringer, and he is a publisher of a newspaper or a magazine, and he is in no position—no matter how reasonable he may be with regard to the investigation which he makes—to ascertain that the work, which has been submitted to him as the copyrighted work of the author, is not in truth and in fact the author's work. He's made the reasonable investigation, and yet he can find nothing to indicate that what he is publishing, and what he has been misled into believing is the work of the author, will turn out to have been plagiarized from someone else.

I am quite prepared to delimit my suggestion in the same way that a very able judge limited it, and that was Judge Learned Hand. We lost that case, but we had more than small comfort in knowing that Learned Hand agreed with us insofar as holding no recovery of damages. Therefore, I would respectfully suggest that, in certain circumstances—where there is an innocent and indirect copyist who is in the category of a newspaper or a magazine, and where the defendant had been reasonably misled into thinking that what he was copying he had the right to copy—a defendant should be exempted from paying damages.

Now you take statutory damages into account by requiring registration, and if the work has been registered then reasonable notice will reveal it. I am not trying to whitewash the publisher by any means.

I am merely suggesting that there are situations—and I think they should be taken into account in the statute—where a publisher of a newspaper or a magazine finds that he has made investigation but cannot know that the putative author is not the actual author, and is subsequently confronted with the claim that the author with whom he dealt was a plagiarist.

I would suggest that, where there is that degree of innocence and in that particular context, he not only be exonerated from statutory damages but also from actual damages. If he has made profits he should disgorge those under the doctrine of unjust enrichment, and I am not suggesting that he be permitted to withhold those profits from the author whose work has been infringed. But I do submit that he should not be amerced in damages.

SARGOY. I'd like to suggest the possibility that the situation as to the pictures in *Time* and *Life Magazine* might be alleviated to some substantial extent if we were to add a provision to section 34 so that it would read to this effect: "In any action under this title, no award of statutory damages or of attorney's fees shall be made for any infringement commenced before registration unless the infringer had notice of the copyright." I think the affixing of the notice on it might cover many of those situations.

PERLE. I think that might go part of the way but I don't think it would go all the way, particularly with respect to unpublished works in respect to which there is no notice. I think that it could be simply rectified as to published works by giving more time to deposit—by giving thirty days or some longer period after the time when you first publish, to apply for registration.

As to unpublished works, frankly I am a little at sea. Maybe this provision should not apply to unpublished works at all. I just don't know how to protect them. I see the merit in the provision and what it's trying to accomplish, but I don't know what the answer is with this sort of problem that we have. And I think it is realistic to anticipate that the problem is going to get worse, not better, for all of us in this news field.

FINKELSTEIN. Commenting on Mr. Wasserstrom's remarks, I am a little bit surprised at his suggestion that, merely because the infringement consists of plagiarism which a publisher can rarely detect, there be no award of statutory damages or counsel fees. If that were to happen there would be no recovery in any plagiarism case. I think that is the case where it is most needed.

GOLDBERG. I am commenting on Ed Sargoy's suggestion on section 34. As I understood it the purpose, or at least one of the purposes, of section 34 was to provide an inducement to registration. I should think that the inducement would be substantially nullified if statutory

damages were available to the proprietor so long as a copyright notice were put on the work, even though there had been no registration. But perhaps, in the drafting, the two considerations (statutory damages as a deterrent; and withholding statutory damages as an inducement to registration) might be balanced so that at least a part of each desirable end can be accomplished.

KAMINSTEIN. At the close of the morning session I received a letter from Joshua Binion Cahn of Cahn and Mathias relating to several different portions of the bill. Mr. Cahn has asked me to . . . [include] his statement . . . [in] the record . . .

Statement of Joshua Binion Cahn Representing Print Council of America

Dear Mr. Kaminstein:

* * * * * * *

My comments relate to the deposit requirements, particularly as they affect prints. By prints I do not refer to reproductions but to original works of art such as etchings, woodcuts or lithographs, for which the artist has made the plate, block or other matrix for the purpose of creating a print.

Often, as for example with drypoint or woodcut, only a few, perhaps as few as five to eight copies of the "best edition" can be or are pulled. While the Register "may" exempt any categories from deposit, he has not exempted prints nor is he likely to do so. I have been advised that exemptions are based upon the convenience of the Register and the Library of Congress.

The provisions of section 29 as it now appears in the bill would leave an artist only the following choices:

1) To deposit 2 copies, no matter how small the edition.
2) To pay $250 and the retail price of 2 copies.
3) To retain 2 copies forever, hoping that the Register will not ask for them.

Surely the Library doesn't need the artists' work free. It can and does acquire all the prints it wants. The artist, who is usually (with some major exceptions) economically near the bottom of the ladder, should not be thus burdened.

The problem could be solved by providing that the deposit requirement does not apply where the edition is small—say 1,000 or less.

As far as the requirement of registration before suit is concerned, I suppose it is too late to argue against it. I do not see the necessity, however, of providing that unless registration is made within 5 years, it is not *prima facie* evidence of copyright (section 32(c)). If a copyright notice was on the work all along no one was fooled by the fact that registration was later and the problems of proof are unchanged by the time lag.

The worst of the registration provisions is section 34. Why penalize the artist? The provision is all right for book publishers, but not for artists, who are often temperamentally incapable of registering and who often cannot afford to register; to pay the fee and give up two copies. This provision should be eliminated. Its only apparent purpose is to insure deposit. Statutory damages and attorneys fees should be payable whenever the infringer was made aware, or should have been aware of the copyright by reason of the notice. If the provision is not eliminated it should at least be limited to editions of over 1,000 copies.

Finally, and coming to the heart of the problem, prints should not be considered as "copies of a work." Prints are not defined in the bill. They should be considered, at least when the edition is small, as individual works of art, unpublished, since each example is different. However, there is no statutory or case law on this point, of which I am aware, and it would be difficult to create a definition which would exclude commercially published prints and include fine prints. The Print Council of America of which I am counsel has issued a brochure which I edited, that attempts to define the original print, the kind produced by an artist, not a commercial publisher, but I feel that the brochure's definition is normative rather than definitive, and should not be embodied into law at this time.

Section 29 should be limited to editions of over 1,000 and sections 32(c) and 34 should be eliminated or at the very least, applied only to editions of over 1,000.

It has been suggested by Mrs. Harriet Pilpel that where the edition is small the artist be permitted to deposit a photograph of the work in lieu of two copies of the best edition. This would help, but would still require the artist, shortly after creating a print, to pay the registration fee and obtain and file a photograph. This requirement would be excessively burdensome for an impoverished and obscure artist who might never expect that years later someone would wish to copy his work or that the Library of Congress might wish to obtain his work free after he has become famous and the work has become valuable.

Sincerely,

(S) JOSHUA B. CAHN.

KAMINSTEIN. Sections 46 through 53, our last group of sections except for the definitions and transitional provisions, deal with administrative matters, and I call on Mr. Cary to introduce them.

CARY. Coming back from lunch I met Sam Tannenbaum, and he told me a story on the way up the elevator. A young lad had gone to summer camp, and after his first night there he wrote his parents a long ten-page letter about his day's activities, which he concluded by saying, "Please forgive me for my longevity." Well, I hope I am

not going to have to apologize to you for my longevity, because I don't intend to take long on this series of sections.

As the Register has indicated, these are primarily administrative provisions. Most of them are merely a repetition of what is in the present law. I don't really think that sections 46 and 47 require any comment; they are self-explanatory. Section 48 is also a provision which exists in the present law. None of these three provisions found any objection in the Committee 304 meeting.

With respect to section 49, Mr. Kaye has already commented on the suggestion that the Office should be required to retain unpublished works. This is a problem that deserves some thought. The present draft does not envisage a requirement that all unpublished works necessarily be retained. It gives the Register the right to retain articles as long as possible. We do have a storage problem. Those of you who have visited the Office and have seen the limited space that we have to retain material realize that we cannot retain everything that is deposited for a hundred years or more. We do have to make some reasonable attempt to dispose of material after a certain time. At present we're retaining the deposits for about five years, and we are considering some possibilities of storage outside the Office.

Section 50 merely provides for the keeping of records and indexes, and the furnishing of search reports. Section 51 provides for the obtaining of certificates of registration, copies of the articles deposited, and so forth.

Section 52 did engender some discussion of the problem of the catalog in the Committee 304 meeting. The bill provides that the Register shall have discretion to determine the form and frequency of publication of each particular part of the catalog.

Section 53, having to do with fees, also engendered a considerable amount of discussion, and I point out to you only that the fees that are listed here are the fees that appear in the Steed bill, which was introduced in Congress earlier this year and on which no action has as yet been taken. The problem of fees is something that will ultimately come up, and it may come up before the Revision Bill since there have been strong indications by the Appropriations Committee that we need higher fees.

KAMINSTEIN. I think what the Deputy Register is really saying is that the fees are up to the Congress and not to the Copyright Office, and that situation is not likely to be changed.

SCHIFFER. For several years I have participated with many of you in committees and subcommittees dealing with Copyright Office affairs. In the course of that time I have received the indelible impression that one of the real problems of copyright administration is that the Copyright Office doesn't belong in the Legislative Branch,

and it doesn't belong as a sub-part of the Library of Congress. This is an extremely difficult and sophisticated administrative problem—indeed, also probably a political problem—and probably the context of general revision is the time to face up to it.

When Mr. Cary quite properly tells us that the space of the Copyright Office is limited so that deposits cannot be retained indefinitely—even though such retention would be of immense value to the public both in defining the public domain and in having the material available for examination in the event of litigation—he is simply saying that the various elements of the administrative structure down to the Copyright Office have not allocated sufficient space. The Government has many buildings and has a great deal of real estate. It just isn't available for this purpose.

Similarly, when we are faced with the problem of fees and are told that the Copyright Office cannot hire personnel, which we all know it needs, simply because the fees have to pay the bills of the Copyright Office, and when we are told that any possible increase in the necessary functions of the Copyright Office would result in an increase in fees, we are again being told simply that the Copyright Office is a step-child which is being mishandled to the detriment of industries contributing some six billion dollars a year to the gross national product.

Now this is a situation which seems quite remote, especially after two days of discussions of the serious problems of revision. And yet it has a serious impact on many other problems, and particularly on the numerous administrative problems which we are bound to encounter under any law. When, for example, we get into such questions as the publication of catalogs, unquestionably the funds available for such purposes will have as much of a bearing as the general utility of such catalogs on the question of whether the publication will in fact be undertaken. There are many further services which the Copyright Office could undertake if adequate funds or facilities were provided. I urge that all of you not let this problem be swept under the rug but that it be brought to the attention of Congress in the most forceful way possible so that some constructive solution may be found for it.

KAMINSTEIN. I would not ordinarily comment on this point, but I think that the discussions at the A.B.A. Patent, Trademark, and Copyright Section during the next three days may indicate that Government does not have buildings readily available. The Patent Office has not yet been able to decide or have decided for it where it's to be located. I also would like to say something about the problems of a small agency. The Copyright Office right now has less than three hundred employees, and there is a very grave reluctance on the

part of Congress to set up any separate agency of that size. If it's not going to be set up separately, where are you going to put it? Are we better off anywhere else than where we are right now? Moving the Copyright Office has been suggested before, and we have considered the problem, but frankly the present Register prefers to remain just where he is. Having the Office a part of the Library of Congress has great advantages that should not be overlooked either.

Having said that, we'll return to the discussion of the administrative provisions. Do you have any other comments on these sections?

SCHAEFFER. There are two things I want to call your attention to that have disturbed me because they are so indefinite. . . . [In section 52(c)] it says, ". . . shall be offered for sale to the public at prices based on the cost of reproduction and distribution." This is also repeated . . . [in section 53(10)]: ". . . cost of providing the service." I have had some experience with costs in relation to the distribution of material and things. The Copyright Office is offering a public service and therefore, when we insert the word "cost," we have no way of knowing or ascertaining what this cost may be. It may be a large amount if it is actually based upon the cost. There is a public service involved here, and so I think that we should set some definite maximum amount as to what the cost can be.

KAMINSTEIN. I don't see how you can do that, Mort. This is the usual provision with respect to the distribution of Government documents. It actually envisages that the Government will bear the cost of preparing the document, and will charge only the cost, not of preparation, but of distribution and printing. Otherwise you ask for the special privilege of having the Government bear the entire cost. What fee would you set?

SCHAEFFER. We have set now what the Office is to charge as a fee for certain services that are rendered. I think that this is a public service that is being rendered. The Government absorbs part of this cost and the public doesn't have to bear the full cost of it. Therefore it can be set at an amount of $3, $4, $5, but not more than such an amount.

KAMINSTEIN. Do you remember the size of our catalogs ten or fifteen years ago compared with what they are today?

SCHAEFFER. I know that they have increased in size, but still and all I say that it's a public service that is being rendered and the Government should bear the greater part of the expense of it.

KAMINSTEIN. We will be glad to have specific recommendations on that. With respect to section 53(10), which provides that the fees "for any other special services requiring a substantial amount of time" shall be "such fees as the Register of Copyrights may fix on the basis of the cost of providing the service," we are asked to perform special services for which there is no set fee under the present law, and we have

a real question as to whether we are authorized to perform those services or, if we are, what to charge for them.

KARP. Mr. Kaminstein, on the question of fees I would like to point out one problem that faces two classes of authors. I hope that in the future the issue of renewal fees will be academic because we won't have renewal, but for the present and for several years poets and composers of music face a very significant financial burden in renewing works. For example, a poet who publishes thirty poems in various periodicals and then reprints them in a book with ten new poems faces this burden. On the thirty separate poems, each of which he has to renew separately, he would have to pay a total of $180 in renewal fees. On the book itself with the ten poems he would pay a $6 fee. I think some consideration should be given to a lesser fee, either by class of work or by number of pages. I don't suggest that you have a long, staggered schedule, but you might provide that any work shorter than a specified number of pages can be renewed for a much lesser charge than $6.

LINDEN. Subsection (3) makes reference to a "document of six pages or less, covering no more than one title," and suggests a $5 fee. It then provides an additional fee of fifty cents for each page over six and for each title over one. Very often in intra-corporate transfers of copyright thousands of titles may be transferred, and I submit that very often the cost of transfer predicated on this fee schedule would be prohibitive. I wonder if some appropriate adjustment could be made in that regard.

KAMINSTEIN. We'd like you to suggest that we consider this, but if you're going to make title cards for each of those titles every time you transfer, who's going to bear the cost of making the index cards?

LINDEN. I would like to give it some thought and possibly submit something in writing.

WASSERSTROM. I know I made this point in the deliberations before Committee 304 the other day and we were voted down, but it was a close vote. I do submit that there should be in the act a similar provision to the one in the current act, permitting the payment of one registration fee for a multi-volume work published at the same time.

STEINBERG. Although I recognize that the question of fees is a matter for Congress, it seems to me that setting a uniform fee for registration regardless of the intrinsic value of the work—including, let us say, a label or a piece of advertising as compared with a book—is not a realistic basis. Though it may involve the same amount of work by the Copyright Office in issuing the certificate of registration, I think a difference should be made upon that score. I think that it should be recognized and should be given consideration.

KAMINSTEIN. You mean you would have the Copyright Office judge the value of the work?

STEINBERG. No. I am talking now about matters like labels or advertising material which consist of a few pages as compared with a volume. Material of that sort certainly occupies less space. I think consideration should be given to the registration fees of those items as a class because they do not have the intrinsic value of other general classes of works.

KAMINSTEIN. We once recommended that the fee for prints and labels be reduced from $6 to $4 to equalize all the fees, and were turned down by the Congress.

Do any of you want to bring up points on section 54, "Definitions," in addition to those which have been raised before?

MANGES. If the polls are still open for dealing with "such-as-isms," I should like to turn to . . . [section 54]. The definition of "literary works" is: "works expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects . . ." I think that, instead of "such as" there, it would be more appropriate to substitute "including but not limited to."

KAMINSTEIN. Would you welcome Mr. Diamond's suggestion that we define "such as" for all purposes? Maybe we should.

MANGES. I'll second that.

KAMINSTEIN. I'd like to call on Mr. Bricker, who ought to have a chance to speak, having come all the way from California.

BRICKER. Thank you, Mr. Kaminstein. I just arrived this morning. I really want to comment on section 10(b), but since it involves the definition of "sound recordings" it may not be out of order.

Section 10(b) provides that the exclusive right of the owner of copyright in a sound recording "does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds." I understand that language to be intended to prevent the protection against imitation of the performance by the musician or singer on the phonograph record. What concerns me is that the definition of "sound recording" expressly excludes motion pictures, and this raises the serious implication that the performance that could not be protected if placed on a phonograph record would be protected against imitation if put in a motion picture. I don't believe that was the intent of this provision.

RINGER. Would you be satisfied by the definition of motion pictures, which is specifically made to include "any accompanying sounds"? In other words, the definition of "motion pictures" is as follows: " . . . works that consist of a series of images imparting an impression of motion, together with any accompanying sounds . . ."

BRICKER. Barbara, maybe I did not make my point clear. I am not concerned about the fact that the sound track will be protected in motion pictures. What I am raising is the question of whether you are protecting the performance by the actor when it is embodied in a

motion picture, as opposed to when it is embodied in a phonograph record because of your exclusion of motion pictures in your definition.

RINGER. I see. This may be a good question.

GOLDBERG. . . . [In section 54], with respect to the two definitions of "copies" and "phonorecords," I assume that it's not intended that the definition in any way introduce something other than what appears in section 1 with respect to the subject matter of copyright. Accordingly, I'd suggest that the language . . . be changed to parallel that which appears in section 1. For example, the definition of "copies" would read: " 'Copies' are material objects, other than phonorecords, in which a work is fixed or reproduced in any tangible medium of expression, now known or later developed, from which the work can be perceived . . . [etc]." And similarly for "phonorecords."

In the definition of "compilation" . . . [in section 54] there is a reference to "pre-existing materials." Since at the tail end of the definition of "compilation" it states that the term "compilation" includes "collective works," it seems to me that this raises the question of whether a "collective work" must be a collection of "pre-existing materials." Apparently there is a specific significance which is being given to "pre-existing materials" here. I don't know what the significance of that phrase is, and I think that, whatever it is, it raises a problem in connection with the definition of "collective works."

LINDEN. With respect to the definition of "derivative work" [in section 54], I think the word "adaptation" . . . cuts down rather than amplifies the intention of including in a "derivative work" any work "based upon" one or more pre-existing works. This suggests the requirement of an "adaptation" if the other kinds of derivative utilizations as set forth in the paragraph are not the ones used. I have specific reference to answer sheets in test publishing. I think that, if the word "adaptation" were eliminated, the intent and purpose of defining a "derivative work" as being a work based upon a pre-existing work would be more satisfactorily achieved.

SCHIFFER. The definition of "transfer of copyright ownership" troubles me, particularly with respect to the phrase ". . . whether or not it is limited in time or place of effect." Now that would seem to require the recordation of thousands of ephemeral motion picture exhibition licenses, television exhibition licenses, and numerous other such documents. It would also seem possible to have a substantive effect on the definition of what is a separable exclusive right for the purposes of the act, which I am quite sure is not intended.

KAMINSTEIN. That was raised in the earlier sessions, and we will consider the language suggested there.

I'd like now to throw open the discussion of anything in the Transitional and Supplementary Provisions that troubles you.

SARGOY. With respect to the definitions, I am not making the suggestion that we have a special definition of "such as," but that phrase appears throughout many of these definitions and troubles a number of us by its possibility of an *ejusdem generis* interpretation. I was going to suggest that it might possibly be solved to the satisfaction of all if we just said "such as but not limited to," and then continue as you did.

Now as to "derivative work" and its definition, I did make the point before that under section 5 you may have derivative utilizations or appropriations which are intangible, and perhaps we could add that to this definition: "A 'derivative work' or a 'derivative utilization' is one based upon . . . [and so forth]."

DIAMOND. I wasn't going to get into some of these details but it seems to be the spirit of the occasion, and some of these definitions raise fascinating little questions: the one that Ed Sargoy just spoke about, for instance. With all due respect, I think he overlooks the fact that, if it is not fixed in tangible form, it cannot be a "work" and therefore it doesn't belong under the definition of "derivative work." Maybe is belongs someplace, to make clear that an intangible infringement can take place.

What I was really going to talk about—and I am surprised that somebody more closely identified with the motion picture industry than myself hasn't raised this sooner—is that in the definition of "motion pictures" the bill says "a series of images imparting an impression of motion..."

I myself have seen many scenes in motion pictures which don't impart any impression of motion. You simply have a still and it remains fixed on the screen for some period of time. Also, almost a separate industry has grown up which consists of taking still objects and panning a motion picture camera over them, and I am not sure that this would come under the definition of "motion pictures" as it is set forth in this bill.

JABLOW. This is not terribly important, but it would appear from the definition of phonorecords . . . [in section 54], that, when the soundtrack of a motion picture is taken off and sold separately as an album, it wouldn't qualify as a "phonorecord." I would suggest that this be corrected by substituting for the first word, "those," the word "when," so it would read: "'Phonorecords' are material objects in which sounds, other than when accompanying a motion picture... [etc.]."

MANGES. I don't like to labor this point, but in view of the well-known rule of *ejusdem generis* I think it is important, since the term "such as" appears so many times in the bill, that it should be changed to read "including but not limited to." I think that would make it clear that *ejusdem generis* should not apply.

Is there going to be a chance to make a brief remark about any other section?

KAMINSTEIN. How brief?

MANGES. About fifteen seconds.

KAMINSTEIN. Surely.

MANGES. Coming back to the section that Messrs. Karp and Kellman would probably call "Sweet 16," subsection (b) provides that, "upon the effective date of termination, ownership of all exclusive rights under this title . . . reverts." This might well be deemed to apply to world rights, and I ask that this be clarified so that only rights under the U.S. copyright law could possibly be included under any such reversion.

TANNENBAUM. On the question of definitions, at the Committee 304 meeting I called attention to the fact that nowhere is it provided how the various provisions which require notice, request, or demand are to be exercised. I think it might be advisable to frame some definition prescribing the method of executing either the notice or request or demand, where not otherwise expressly provided in the act. Where there is already a provision specifically providing a method of giving notice or demand or request, that should suffice. Otherwise, if left silent, personal service might be implied in each case. Some method—either by personal service, registered mail, ordinary mail, or whatever other method—should be specified.

GOLDBERG. Mr. Kaminstein, I recognize that I incline to similar sins, but the State of Georgia, as I understand it, has in its legislative wisdom passed a statute which defines the phrase "and or." I think we have to stop somewhat short of that.

KAMINSTEIN. Don't worry. The congressional legislative drafting services will take care of that. [Laughter].

FREUDENBERG. Mr. Rosenfield raised a question about the possibility of introducing in section 31 a clarification that, where information about a "work made for hire" is called for, this should also include a "work of the United States Government." I was wondering if language used in the definition of a "work of the United States Government" in section 4(e) could be added to the definition . . . [in section 54] of a "work made for hire."

KAMINSTEIN. As you know, the discussions in Committee 304 also indicated that many people felt that the major portion of section 31 should come out, but we will consider your suggestion in connection with the definitions.

I would like to concede myself a few minutes at this point. At the end of five fairly exhausting days on the McClellan-Celler bill, I am not at all anxious to prolong this discussion, but there are one or two points I should like to emphasize.

Coming down to New York last Sunday I took a little time to reflect on the week to come, and I tried to think through what we could hope for as an outcome of these discussions. I knew that we were in for a lot of nitpicking and detailed questions on specific language. We expected this, and let me say that we welcomed the technical comments and detailed questions. They have been of tremendous help to us in the past in working out revisions of our preliminary draft, and in fact one of our principal purposes in distributing the draft and collecting comments on it was to try to make it as technically valid and accurate as possible. I was hopeful that this bill has solved a lot of the detailed problems that were raised earlier, and that these would drop out of the discussions.

I am happy to say that this has happened. Despite some fussing over details, I think most people who have sat through this week's meetings would agree that, considered solely as a job of legal drafting, the bill may need some sharpening but it holds water as it stands. This carries us a long way, and I am not only gratified but also grateful to all of you for your genuine contributions to this bill as lawyers and specialists.

In anticipating the week that was to be, I also expected to hear a lot of speeches I had heard before. This was inevitable, and I have not been disappointed. [Laughter] But let me also point out that some speeches that had been made before were not made this time, that some of the speeches did not say quite the same thing as before, and that some of the speeches were delivered in a different way. What I was looking for was the tone of these discussions, and I was glad to see that, on the whole, the tone of the discussions was extremely good. It was also something of a personal pleasure to me, if I may be forgiven for this, to listen to other people fighting among themselves instead of having them all concentrate on me. [Laughter] Seriously, I have been deeply and sincerely impressed with the constructive tone of these discussions and the restraint and open-mindedness with which many of you approached problems about which I know you feel very strongly. I thank you for this, and I urge you to continue to approach the remaining problems with the same constructive attitude, both inside meetings of this type and outside them.

There are some problems remaining. A number of points on drafting, or on relatively minor matters of substance, I feel sure can be worked out with little difficulty. There are a few major problems that are going to take some effort to compromise out, but these questions have two sides, and for myself I am confident that a satisfactory compromise can be achieved on every one of them. I believe that there are no points on which the opposing interests are intransigent, or that cannot be reconciled if both sides approach them reasonably and if

the lines of communication are kept open. I will certainly do what I can to help achieve this process of compromise, but I need your cooperation.

It has been suggested that on certain problems, sometimes referred to as "matters of principle" or moral issues," we should take an adamant stand and go to Congress and fight for them, come what may. I myself feel very strongly about a number of things in the copyright law, and some of them are not reflected in this bill. In looking at this bill I recognize quite a few scars of battle. But it is more important to me, and I believe it should be to all of you, to obtain enactment and implementation of a good, clear, practical copyright law than to continue to make ringing declarations to congressional committees for the next fifty years and more. Strong opposition to a single section, a single subsection, or even a single phrase could well kill a bill. And to have that happen, it seems to me, would be a real, if not major, national tragedy.

As I said before, I am pleased and gratified by your reception of this bill, and I am grateful for your contributions to it. I am confident of your full cooperation in working out the compromises that still have to be reached. My staff and I will be working continuously during the next months on a new bill (and I hope for a report to accompany it) for submission to Congress in January. I welcome and encourage your comments and help in achieving this immediate goal, and I confidently expect your complete, if not your unqualified or wholehearted, support as we go to hearings.

Thank you. [Applause.]

COMMENTS ON 1964 REVISION BILL

JULIAN T. ABELES

October 5, 1964

* * * * * * *

1. The provisions of Section 11 (1) should be specifically limited to phonograph records, and should specifically exclude tapes, wires and any other method or means of reproduction. It has been my experience in the representation by my office of Harry Fox, as Agent and Trustee, in the licensing and enforcement of the rights and interests in the musical copyrights of his music publisher principals, that it is impractical for the manufacturer of any product other than phonograph records, to be authorized to exercise the rights thereto under the compulsory license provisions of the Act. While thousands of tapes of a particular recording will be manufactured, the manufacturer will only account for a trivial sum. This is effected through the manufacture of only a nominal number of each recording, from which countless copies are made by the purchasers or licensees thereof. As you are aware, while the manufacture of phonograph records requires a special process and machinery for such purpose, whereby they can only be manufactured in a plant equipped therefor, a tape can be readily reproduced in countless quantities by anyone acquiring the same, by the sole means of a tape recording machine. In fact, the manufacturers of such tapes, in recognizing that it would be impractical for the same to come within the purview of the compulsory license provisions of the Act, have either initially applied to the copyright proprietors for special license agreements therefor, or upon the institution of suit have invariably conceded that such right does not come within the purview of the compulsory license provisions of the Act, and accordingly have thereupon entered into such special license agreements.

2. The wording of Section 11 (1): "A person may obtain a compulsory license only if his purpose in making phonorecords is to distribute them to the public", should be changed to provide the requisite limitation, for the protection of the copyright proprietors. The use of the word "distribute" instead of "sale", could very readily be a shield for illegal activities. It is, therefore, respectfully submitted that the wording should accordingly be changed to read: "A person may obtain a compulsory license only if his sole purpose in making

the records pursuant thereto is for the sale thereof to the public in the normal channels of trade."

3. There is, of course, the other material provision, regarding which I have heretofore commented. I have reference to the provision in Section 16, that "At any time after 35 years from the date of its execution, the transfer may be terminated by the author who executed it or, if he is dead, by his legal representatives, legatees, or heirs. The termination may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any other future transfer." Under the present Act a copyright proprietor can acquire the work for both the term of the copyright and renewal. This can be effected through an agreement with the author, in which the wife and children join. If he leaves no widow or child, this can be accomplished through a provision in his agreement, to make a will containing a provision to such effect. While the term of copyright protection is now extended to "the life of the author and 50 years after his death", the term of the grant is curtailed to 35 years from the date of transfer. In the case of a music publisher, substantial efforts and expense are involved in the promotion and exploitation of a composition. Nevertheless, very few of them ever survive and become standards. Why then should the subsequent transferee reap the benefits of such few that do survive, through no efforts or expenditure on his part? Why should the term be extended for the benefit of the author and yet curtailed to the detriment of the material interests of the copyright proprietor?

* * * * * * *

Cordially,

JULIAN T. ABELES.

AD HOC COMMITTEE OF EDUCATIONAL INSTITUTIONS ON COPYRIGHT LAW REVISION

December 17, 1964.

REVISION OF DRAFT PROPOSED BY AD HOC COMMITTEE OF EDUCATIONAL INSTITUTIONS ON COPYRIGHT LAW REVISION

(Adopted at its meeting on December 17, 1964, at American Council on Education)

Section 8

"(b) Notwithstanding the provisions of Section 5, recognized non-profit educational institutions or organizations may use for non-commercial educational purposes:

(1) non-dramatic copyrighted works, provided that no more than a single copy or recording of such copyrighted works is made in the course of such use;

(2) dramatic copyrighted works where the performers and audience are limited to students, faculty or staff provided that no more than a single copy or recording of such copyrighted works, so performed, is made in the course of such use, and that no special admission fee is charged to the audience;

(3) excerpts or quotations from copyrighted works if such uses are for illustrative, critical or ancillary educational purposes, provided that such excerpts or quotations are identified as to source and are not substantial in length in proportion to that source;

where no such copyrighted material is sold or leased for profit, no commercial advertising is included, nor other private gain is involved.

For the purposes of this section, "Non-dramatic copyrighted works" shall include works in the categories listed in Section 1(1), (2), (5), and (7) of this Act, and "dramatic copyrighted works" shall include works listed in the categories in Section 1 (3), (4), and (6) of this Act."

(Define "motion pictures" to include filmstrips.)

AMERICAN BOOK PUBLISHERS COUNCIL, INC.

AND

AMERICAN TEXTBOOK PUBLISHERS INSTITUTE

December 17, 1964

REQUEST FOR CHANGES IN CERTAIN PROVISIONS OF H.R. 11947; S. 3008

American Book Publishers Council, Inc. and American Textbook Publishers Institute, for the reasons set forth herein and in prior statements, earnestly urge the following changes in H.R. 11947; S. 3008:

Section 4. Subject matter of copyright: United States Government works.

(d) Delete "further" . . . Since this word does not appear in Section 7 of the Copyright Law, the comparable present provision, its inclusion might lead to an unintended construction.

Section 5. Exclusive rights in copyrighted works.

(b) *Definitions of certain exclusive rights.—*

In subdivision (1) the word "perform" is defined, in part, as "to recite, render, play, act, or represent" the work. If the words

"render", "play", "act" and "represent" are intended to be synonymous there would seem to be no reason to use all of them; however, if those words are intended to mean different uses, then the Bill should clarify the uses so intended.

Section 6. Limitations on exclusive rights: fair use.

We agree with the Register that it is appropriate to include a provision referring to the judicially imposed doctrine of "fair use" since as stated by him, it would seem anomalous for the statute to specify the rights of copyright owners in absolute terms without reference to that doctrine.

However, in our opinion, the provision with respect to "fair use" should be expressed as a defense to an action for infringement rather than as a limitation on the exclusive rights of a copyright owner. The limitations on such exclusive rights now set forth in Sections 7 and 8 are specifically delineated. However, whether "fair use" has been made of copyrighted material is a question which depends upon the facts of a specific situation and, therefore, it is difficult, if not impossible, to encompass all of the relevant factors within a statutory provision. In fact, Section 6 does not attempt to set forth the limits of "fair use" or all the factors which are or may be involved in a determination as to whether "fair use" has been made of copyrighted material. Accordingly, we suggest that the provision as to "fair use" be titled "Fair use as a defense to infringement", be placed following Section 35, and read as follows:

> "Fair use of a copyrighted work shall constitute a defense to a claim of copyright infringement."

Section 8. Limitations on exclusive rights: exemption of certain performances and exhibitions.

Subsections (b) (1) and (2) of Section 5 (setting forth the exclusive rights of the copyright owner in copyrighted works) define the words "perform" and "exhibit" in broad enough terms to include all possible transference of copyrighted material to film, tape, transparencies, and information retrieval devices.

However, these same terms, "perform" and "exhibit", are included in the exemptions granted in Section 8 with respect to certain performances and exhibitions.

It appeared from the earlier discussions and panel meetings that only live performances were intended to be exempt under Section 8. Based upon that intent, the book publishing industry concurred in such exemption. We submit that the terms "perform" and "exhibit" should be given express limitations in Section 8 in order that the broad definitions afforded them in Section 5 should not carry over to Section 8. Accordingly, we urge that after "work" in subdivisions (1),

(2), (3) and (4) of Section 8 the following be inserted "except by means of motion picture films, slides, or any other device or process".

Section 16. Termination of transfers of copyright ownership.

We again state that we are strenuously opposed to any provision which, despite the contrary agreement of the parties, permits a copyright owner to terminate a transfer of rights.

As we have repeatedly maintained, there is no more reason to impose a statutory limitation with respect to transfers of rights by a copyright owner than there is in the case of a patent owner or owner of any other type of property. There is no adequate reason why the well-entrenched doctrine of non-governmental interference with freedom of contract should not be applied to this situation. As we have heretofore asserted, the antiquated concept that an author requires protection against his own improvidence in bargaining with a publisher is not true today if it ever was. Today an author is often represented by a literary agent, by an attorney trained in the field of literary property and by tax counsel. As a matter of fact, if an author's first book sells well, usually other publishers bid for him and his original publisher must bargain competitively or lose the author. The absence of a reversion provision from the copyright laws of other countries, particularly the British Commonwealth, is additional substantiation that there is no basis for the inclusion of such a provision.

However, if, over our opposition, the Congress should enact a provision for termination of transfers of rights under a copyright despite the contrary agreement of the parties, then we urge the following changes in Section 16:

Subsection (a)(1)

The 35 year limitation for transfers of rights under a copyright is entirely too short, particularly, since, under the present law, such a transfer may continue for the original term of copyright and the renewal term, to wit, 56 years. *Therefore such term should be not less than 42 years.*

Furthermore, the provision that the term shall commence on the date of execution of the transfer is completely unrealistic in that it loses sight of the fact that in most instances publication contracts are executed before the manuscript is prepared, and that in some instances, particularly in the case of reference books, it has taken in excess of 10 years before the material was ready for publication. *Accordingly, any such term should commence with the date of first publication or other first use of the copyrighted material.*

Since the alleged reason for seeking termination of transfers of rights under a copyright is to protect an author's widow and children against the improvidence of the author, it seems to us that such

protection, if any is required, should be afforded solely to the widow, widower and/or children of the author. Bearing mind that under Section 14, subsection (d) (1) "ownership of a copyright . . . may be bequeathed by will", the intended purpose for this protection may be thwarted if the . . . [words "legal representatives, legatees or heirs"] now contained in . . . [subsection (a) (1)] were permitted to stand.

We therefore recommend that the words "legal representatives, legatees or heirs" should be deleted and that in their place there should be substituted the words "the widow, widower and children of the author, provided they or any of them are the copyright owners".

Subsection (a) (2)

The present provision reads that "The termination shall be effected by serving a written notice", etc. Whether termination is to be effected by "legal representatives, legatees, or heirs", as now set forth therein, or by the widow, widower and children of the author, provided they or any of them are the copyright owners", as we suggest, the same problem arises. Assuming that a copyright is owned by the author's widow and his three children, is the termination effective if it is signed by one of them and the other three do not wish to terminate the transfer? It seems to us that the only logical provision that can be made in this situation is that after the word "notice" . . . the following should be inserted: "signed by all of the owners of the copyright and, if any of such owners are infants, by their natural or legal guardians".

Although the subsection provides that the notice of termination must be served at least two years before the effective date of termination, it does not otherwise provide when it may be served. Accordingly, we recommend that . . . the words "but not more than five years" be inserted after the words "at least two years".

Section 18. Recordation of transfers and other documents.

(f) *Priority between conflicting transfer of ownership and non-exclusive license.*

Under this subsection an unrecorded non-exclusive license prevails over a conflicting transfer of copyright ownership if the license was taken before execution of the transfer or was taken in good faith before recordation of the transfer and without notice of it. We see no reason for granting such a preferential status to non-exclusive licenses over exclusive transfers. We recommend that non-exclusive licenses be treated in the same manner as conflicting transfers of copyright ownership are treated in subsection (e) of this Section. We

therefore recommend that subsection (e) be amended so as to include non-exclusive licenses and that subsection (f) be deleted.

Section 22 Duration of copyright: subsisting copyrights.

(c) *Ownership of extended renewal term.*

(1) With respect to copyrights subsisting in either their first or renewal term on January 1, 1967, this subsection grants to "legal representatives, legatees, or heirs" the right to terminate transfers of the renewal copyright or of any extended right under it made before January 1, 1967 at any time after 56 years from the date the copyright was originally secured.

Here, too, for the same reasons as set forth in our discussion with respect to Section 16 subsections (a)(1) and (a)(2), the words "legal representatives, legatees, or heirs" should be deleted and in their place there should be substituted the words "the widow, widower and children of the author, provided they or any of them are the copyright owners"; and in subsection (c)(2) after the word "notice" . . . the following should be inserted "signed by all of the owners of the copyright, and if any of such owners are infants, by their natural or legal guardians".

Section 32. Registration of claim and issuance of certificate.

(a) We do not believe that this subsection was intended to confer upon the Register the right to refuse to register a claim for copyright if the deposited material constitutes copyrightable material in accordance with the provisions of this Bill. Therefore, we recommend that "in accordance with the provisions of this title" be inserted . . . after "determines that", and also in subsection (b) . . . after "determines".

Section 43. Manufacture and importation of certain copies.

We reiterate our request for the elimination of any manufacturing clause for the reasons set forth at pages 27-31 in our Statement of Position dated June 12, 1964.* Indeed, we consider this Section more objectionable than the manufacturing clause in the present law.

Section 54. Definitions.

We recommend that the following definitions be amended to read as hereinafter set forth (new material is in italics; material to be deleted is in parentheses):

"Copies" are material objects(,) *or instrumentalities*, other than phonorecords, in which a work is fixed or reproduced by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

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*Editor's Note: See *Copyright Law Revision*, Part 4 at 277 (Comm. Print 1964).

A "derivative work" is a work based upon one or more preexisting works, (such as) *including but not limited to* a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, *condensation*, or any other form (of adaptation) in which a work may be recast, (or) transformed, *or adapted.* A work consisting of editorial revisions, annotations, elaborations, or (similar) *other* modifications which, as a whole, represent an original work of authorship, *and any work which is a dependent* adjunct to an existing work, is a "derivative work". (See Section C of exhibits to Statement of Position, dated June 12, 1964.**)

"Literary works" are 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, or film,) *instrumentality* in which they are embodied, *including their covers.*

Respectfully submitted,

AMERICAN BOOK PUBLISHERS COUNCIL, INC.,
(Signed) RAYMOND C. HARWOOD, *President.*
AMERICAN TEXTBOOK PUBLISHERS INSTITUTE,
(Signed) EMERSON BROWN, *President.*

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

November 19, 1964.

The American Newspaper Publishers Association is a trade association whose membership consists of more than 900 daily newspapers published throughout the United States and Canada. Member newspapers account for more than 90 percent of the daily newspaper circulation in the United States. Inasmuch as they are both users and creators of copyrighted materials, the interest of our members would be affected by certain provisions of S. 3008 and H.R. 11947, the identical bills providing for general revision of the Copyright Law of 1909, which were introduced in the United States Senate and House of Representatives during the 88th Congress, 2d Session, for purposes of study and comment only. We have reviewed the draft bill and offer the comments set forth below for your consideration in redrafting the present bill.

**EDITOR'S NOTE: See *Copyright Law Revision*, Part 4 at 287 (Comm. Print 1964).

Government Copyright

Although Section 4(a) of the draft bill continues the present law's general prohibition against securing copyright in any published work of the United States Government, Section 4(c) provides that:

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

As defined in Section 4(e) of the bill, a " 'work of the United States Government' is a work prepared by an officer or employee of the United States Government as part of his official duties."

We are deeply concerned over the implications of this provision and we urge that you delete it in the redrafting of the bill. The published works of the United States Government are created by public employees with public funds. As such, they are public property and they should be given the widest possible dissemination. Access to them should not be prevented or hampered by copyright restrictions. Under this proposed system of permissive Government copyrights, newspapers and other members of the public would have only the right to quote brief passages of such a Government work, or to criticize or summarize its contents under the doctrine of fair use. The verbatim reproduction of any such Government document would constitute a copyright infringement and could subject the infringer to both civil and criminal penalties. In our view, no possible benefits to be derived under such a system can justify any such restriction upon the public's access to the full text of all published Government documents.

The language employed in Section 4(c) offers little hope that Government copyrights would be limited in number. If this provision were enacted into law, it is too much to expect that the heads of Government agencies would do other than err on the side of caution in exercising the power to determine whether a Government copyright should be obtained in any particular case. The multiplication of such instances would result in the accumulation of such a volume of Government copyrights that the general prohibition in Section 4(a) would become relatively meaningless as a practical matter.

There appears to be general agreement that works produced by the United States Government should be open to the widest possible dissemination. We note that you stated your agreement with this basic principle in your July, 1961 Report on General Revision of the U.S.

Copyright Law. We also have noted in the Report and in the study of this subject made by a member of your staff that most Government agencies responding to your inquiry saw no need for copyrighting any of their publications. Even those "few agencies" which reported that they favored some provision authorizing such copyrights in special cases indicated that there was no need to secure copyright in the "vast majority" of their publications. The special or exceptional cases listed by the agencies included instances where private publication might be advantageous to the Government as a matter of economy, might procure distribution to a particular group of interested persons, might be used to have an edition of special quality published, or might be desirable as a safeguard against reproduction of Government material in distorted form or in connection with commercial advertising.

None of these reasons warrant any such provision in the law since there are ample means at hand to meet those needs other than by granting the Government the right to secure copyright. Our Government which spends billions of dollars for so many different programs and activities certainly need not effect an economy by any move which is restrictive of the free dissemination of Government information, papers, laws, decisions or other writings. The expressed desire to authorize copyright as a safeguard against the reproduction of Government works in distorted form is not a sound reason for the granting of Government copyrights. In fact, it could be used by Government as an indirect means of regulating the dissemination of information about the activities of Government while pretending merely to protect its copyrights. Any legitimate concern in that regard or in regard to the misuse of Government works in advertising should be met by considering the need for appropriate penal legislation, not by granting Government copyright.

Newspaper Reproduction of Copyrighted Photograph

The damage provisions of the draft bill are also of special concern to newspapers. Section 101 of the present law provides that in the case of a newspaper reproduction of a copyrighted photograph, such damages shall not exceed the sum of $200 nor be less than the sum of $50. This special damage limitation is not included in Section 38 of the draft bill. Several other important changes were made in Section 38 of the draft. Under present law the court, in cases not involving special limitations, has the discretion to award statutory damages in lieu of actual damages and profits in an amount not less than $250 nor more than $5,000. Section 38 provides that the copyright owner may elect to receive statutory rather than actual damages and the limitation upon such damages has been increased to $10,000.

This Association is strongly opposed to the deletion of the special limitation applicable to newspaper reproduction of copyrighted photographs and asks that this provision be reinserted in Section 38(c) by deleting the period . . . [at the end of the first sentence] inserting a semi-colon and adding the following language:

"provided, however, that in case of a newspaper reproduction of a copyrighted photograph, such damages shall not exceed the sum of $200 nor be less than the sum of $50."

We are convinced that the special considerations which prompted the enactment of this provision are still present today and that this provision should be retained in the law. The Report of the House Committee on Patents on the 1909 Copyright Act (H.R. Rep. No. 2222, 60th Cong. 2d Sess. (1909), at p. 15 stated that the special limitation of damages relating to the newspaper reproduction of copyrighted photographs was made "because such reproduction has little permanent value or usefulness and a reproduction in this form does not damage the copyright proprietor to as great an extent as would the reproduction and sale of copies of the photograph in a different form." This is equally true today. In fact, where proper credit is given, the usual case involving the newspaper reproduction of a copyrighted photograph would confer a benefit rather than inflict a legal injury upon the owner because of the advertising value of such a publication. In any event, it is extremely doubtful that the publication of any single photograph would result in profit to the newspaper which could be recovered by the copyright proprietor. Accordingly, the proprietor would be certain to elect statutory damages under the provisions of the draft bill. At this point, the court before whom any such action is pending would be authorized to award not less than $250 nor more than $10,000 for the single photograph. No standards are provided for guidance of the court except its discretion in light of the circumstances of the case. In our opinion the permissible damage limitations are fictitious when applied to photographs. The situation thus created presents a legalized means of forcing a newspaper publisher who inadvertently uses a copyrighted photograph to pay up or else face litigation with no reasonable means of predicting the amount which will be awarded. This was the very thing the existing limitation was designed to prevent.

It is important to understand the circumstances under which photographs are used and handled by newspapers. While care is used in the handling of photographs submitted for publication, the pressures of time inherent in the newspaper business make it impossible for newspapers to make appropriate copyright searches before publishing each photograph submitted for publication. In view of the risk of

such substantial financial penalties as could be imposed under the provisions of the draft bill, the deletion of the special damage provision regarding photographs could have far reaching consequences for daily newspapers. For the reasons we have stated, we believe it would be in the public interest to retain this special damage limitation in the copyright law.

We respectfully urge that in the redrafting of the copyright revision bill you give further consideration to the foregoing matters which are of vital concern to American newspapers.

Yours very truly,

STANFORD SMITH,
General Manager,
American Newspaper Publishers Association.

AMERICAN TEXTBOOK PUBLISHERS INSTITUTE

October 28, 1964.

Your letter of July 21, 1964, called our attention to the fact that a copyright revision bill was introduced by Congressman Celler, H.R. 11947, and Senator McClellan, S. 3008, on July 20, 1964, and that consideration would be given to the American Textbook Publishers Institute's statement of July 17 in further work in preparation for the reintroduction of a bill in the next session of Congress.

You will recall that the ATPI statement of July 17 concluded by endorsing Section 5(a) of the preliminary draft, as well as the language in Section 2(a), which expressly made "derivative works" copyrightable, and the definition of such work in Section 2(d). This endorsement was based upon a reading of these sections as providing coverage for answer sheets to educational and psychological tests. The preliminary draft gave the proprietor the exclusive right to make such answer sheets as "derivative works" based on the copyrighted tests, and would, therefore, permit him to restrain the printing and distribution of unauthorized answer sheets for his test.

In view of the foregoing, we deem the definition of derivative works to be crucial from the point of view of test publishers. Our study of the revision bill reveals a slight change from the language of the preliminary draft. I refer to the language in Section 54 . . . where the following definition appears:

> "A 'derivative work' is a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, or any other form of adaptation by which a work may be recast or transformed."

We note that this language omits the phrase "and dependent for its existence upon" as used in the opening clause of Section 2(d) of the preliminary draft as follows:

> "A 'derivative work' is a work based *and dependent for its existence upon* one or more pre-existing works . . ."

We assume that no substantive difference was intended by this change which appears to be one of language merely . . .

Sincerely yours,

AUSTIN J. MCCAFFREY,
Executive Director,
American Textbook Publishers Institute.

AMERICAN TEXTBOOK PUBLISHERS INSTITUTE

February 1, 1965.

Re: Section 5(b)(1) and 5(b)(2)
Section 8

Elaboration of the Position of December 1964

To avoid ambiguity and misunderstanding, we believe that Section 8 should state specifically the kinds of use that teachers may make of copyrighted materials in face-to-face teaching situations. It should be clear that teachers may read aloud or recite such material, show it by hand, or display it on racks, walls, bulletin boards and the like.

The same uses should be expressly permitted in closed-circuit educational television programs.

We believe Section 8 should explicitly prohibit use of any "process or device" in classroom performance or exhibition. Any language which permits the use of copyrighted materials in overhead projectors, opaque projectors, or other devices now known or developed in the future is contrary to fair use and to the meaning of the law.

There is a clear distinction in practice between reading, reciting, showing, or displaying on the one hand and projection on the other. Reading and reciting are momentary in duration; showing and display are limited to perception of individual viewers. By contrast, projection can be viewed by large groups over an entire class period. For practical purposes projection is the creation of a copy.

Section 8 sets forth performance and exhibition of "face-to-face teaching activities" and in closed-circuit television and broadcasting within "educational institutions" as non-infringing uses of copyrighted material.

The definitions of *performance* and *exhibition* in Section 5(b)(1) and 5(b)(2) include not only live performance (direct) but the use "of any device or process."

The right to make copies for performance or exhibition is not specifically granted in Section 8. Whether this right is granted under the broad language of Section 6 is indeterminate.

The Publisher's Position as of December 1964

In a position paper, dated December 17, 1964, the Joint Committee of the American Textbook Publishers Institute and the American Book Publishers Council requested ". . . after 'work' in subdivisions (1), (2), and (3) of Section 8, the following be inserted: "except by means of motion picture films, slides, or any other device or process." *

The purpose of this language was to confine the terms *exhibition* and *performance* to live, face-to-face situations in which an original copy or authorized reproduction is employed.

A page of type, held up before a class, cannot in fact be read by anyone. The same page, projected on wall or screen, can be read as easily by a large group as though each one in the group had a copy in his hand. *Projection thus becomes a device for circumventing the copyright owner's exclusive right "to reproduce the copyrighted work."*

Example: 1. A map showing Westward Expansion, appearing in a textbook, may be projected on a classroom wall for use during an entire class period.

2. A chart showing the sources of Gross National Product, appearing in a textbook, may be projected for reference during an entire class period.

3. The perforated page of an arithmetic workbook may be removed from the book and projected on the classroom wall while students work the problems on *blank paper purchased by the school district.*

Workbooks comprise the largest part of a class of instructional materials known as "consumable." The answer sheets used with standardized tests are another example. These consumable materials are designed to be consumed in their first use and to be replaced by other copies for a second use. They are created, manufactured, and priced on this basis. They are purchased on this basis, and they are purchased almost exclusively by educational institutions for non-profit use.

It may be argued that publishers could publish and sell a single copy explicitly designed for duplication or exhibit by the schools, charging a price high enough to justify this kind of publication. The reply is that publishers have already tried this procedure and found it inade-

* EDITOR'S NOTE. See p. 224, *supra*.

quate: They have published series of projecturals for use in reading, geography, English, and mathematics courses. Sales of these materials have been minimal.

The use of projectors in classroom instruction is in a beginning stage. It will be several years before there are enough of them in regular use to provide a market for published projecturals. What we face is a transition period during which use of projectors will grow.

The hazard to publishers at this moment is that there are enough projectors in use to substantially reduce the market for workbook materials if free projection use is permitted. In short, while the use of projectors does not now provide a market, free use would damage an existing market, and the damage would grow progressively worse until a substitute market emerged.

The purpose of such projection is not to increase the educational value of the material but to avoid purchase of books containing charts, maps, and workbook materials.

The use of practice books, laboratory manuals, and workbooks to reenforce concepts or to increase skills is a significant part of American educational practice. Workbook sales in 1958 amounted to $43,570,000. In 1963, they amounted to $63,485,000, or 20% of all school textbook expenditures.[1]

The Question of Availability

It is represented by certain educational groups that the classroom teacher does not have the time to secure permission from copyright owners for reproduction or projectoral use of copyrighted material. It should be noted that copies of workbooks and laboratory manuals come to teachers as free examination copies, usually months ahead of their potential classroom use. These examination copies are distributed in order to permit teachers to order needed materials in time for class use. The question here is not whether materials are available, but whether schools are to pay for their use. If the question of availability has merit in any other context, it has none whatever with respect to workbooks and sources of charts, maps and other visual material.

It is the function of publishers not only to create instructional materials but to *distribute* them as widely as possible. In 1963, American textbook publishers spent $8,580,000 (8.3% of their total income) providing free examination copies of their publications to elementary and secondary schools.

Dissemination of good instructional materials is of great importance to American education. While creation of materials may take place

[1] Annual Survey of the Textbook Publishing Industry, 1963. American Textbook Publishers Institute, New York, N.Y.

in many classrooms, only commercial publishers have the staffs and facilities for distribution. The vitality of this important distribution system is threatened by any statutory provision that permits free use of these materials without purchase or license.

Summary

Any language in the copyright law permitting circumvention of the purchase of consumable instructional materials such as workbooks and test answer sheet would make their publication impossible. Section 6, we believe, now contains such language since it permits use of "devices and processes" to exhibit and perform these materials in face-to-face teaching situations.

As a matter of survival, textbook and test publishers would find it necessary to fight retention of such language in the law. Publishers of other materials for equally substantial reasons find this language equally oppressive.

LEE C. DEIGHTON,
Chairman of the Copyright Committee,
American Textbook Publishers Institute.

ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INC.

November 20, 1964.

Recently our Copyright Committee and our Board of Directors have carefully studied the draft bill for general revision of the Copyright Law. We wish, first of all, to salute you for welding a sound legal instrument out of a congeries of firmly held positions. To do so took skill, diplomacy, and above all, patience.

Save for one section, we find it an acceptable bill as now drawn. There might be one or two fine points on which we would enter mild demurrers, but let us put them aside and concentrate on the one section that disturbs university presses greatly. It is Section 43, the manufacturing clause. We realize that it is less stringent in some respects than what appears in the present law, and is thereby an effort at reconciling the positions taken by authors and publishers, on the one hand, and book manufacturers on the other. But it seems to us that it is a quantitative adjustment of a principle that should not, in fact, be compromised. Just as the juke box exemption has no place in the Copyright Law, so too, the manufacturing clause. Both are equally anachronistic.

We continue to maintain that the site of the composition or printing has nothing at all to do with the rights of literary property; there-

fore a restriction as to the former does not belong in a law about the latter.

In short, we believe that Section 43 should be expunged from the draft bill.

Sincerely yours,

DANA J. PRATT,
Executive Secretary,
Association of American University Presses, Inc.

AUTHORS LEAGUE OF AMERICA, INC.

November 17, 1964.

We submit herewith our suggestions for changes in the Copyright Office's Revision Bill (H.R. 11947, S. 3008). These follow our comments at your hearings on the Bill, in August; and supplement the statements we submitted before the Bill was filed. After we have received the transcript of the August hearings we may have further suggestions, and comments.

At the outset, may we emphasize the urgency of revising Sections 14 and 16, and the definition of "works made for hire". As these sections and definition now stand, many authors would not have copyright for life-plus-fifty years and would be deprived of any protection, under Section 16, against "assignments in perpetuity". Moreover, Section 16, even when applicable, is regrettably inadequate.

Sec. 4.—Government Works

Subd. (*d*). The word "further" should be stricken. It does not appear in the comparable provision of the existing law (last paragraph, Sec. 8) and its introduction here might be taken to imply that the Government's use, without permission, was allowed.

Sec. 6—Fair Use

I. We suggest that *Sec. 6* be deleted. The defense of fair use should be left to the Courts.

II. In the alternative, we suggest that Sec. 6 be completely changed to read as follows:

"Nothing in this title shall be construed to annul or limit the defense of fair use."

or as follows:

"(a) Notwithstanding the provisions of Sec. 5, the fair use of a copyrighted work * * * is not an infringement of copyright.

III. As a second alternative, we suggest that Sec. 6 be changed to read as follows (* * * indicate deletions; italics indicate new material):

"(a) Notwithstanding the provisions of Sec. 5, the fair use of a copyrighted work * * * is not an infringement of copyright.

"(b) In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

(1) the purpose and character of the use;

(2) the nature of the copyrighted work;

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

(4) *the amount and substantiality of the portion used in relation to the work in which it is used as a whole; and*

(5) the effect of the use upon the potential market of the copyrighted work."

"(c) *In no circumstances shall any of the following be deemed a fair use:*

(1) *the use of an entire copyrighted work, or a substantial portion thereof;*

(2) *the reproduction or distribution of a copy or copies of any portion of a copyrighted work where such portion is not used in another work created by the user.*

(3) *the performance of a dramatic work or a part thereof except by instructors or pupils in the classroom in the course of face to face teaching activities.*

"(d) *Fair use must be pleaded as a defense and proven, by the person who has used the copyrighted work without the copyright owner's consent.*"

IV. If the words "necessary or incidental" are to be included in any context, "or" should be changed to "and".

Sec. 7

Subsec. (a) should be deleted. This negates the grant of lending rights made in 5(a)(3). In fact, if 7(a) stands, there is no point in adding the words "or by rental, lease or lending" in 5(a)(3).

Sec. 13—Public Communication of Broadcasts

Subd. 1 should be modified to read as follows:

"(1) *relaying* of a *public* broadcast embodying a performance or exhibition of the work, *that has been received by a public establishment*, to the private rooms of *such* establishment by means of a system of loudspeakers or other devices, unless the person responsible for the relaying or the operator of the establishment alters or adds to the content of the material included in the broadcast;"

This would make it clear that the section was not intended to exempt performances of copyrighted works transmitted by "closed circuit" methods to audiences gathered in "private rooms" of hotels and other public establishments.

Sec. 14—Ownership of Copyright

I. *Definition of "Works Made for Hire"*

Both Section 14 and Section 16 are significantly affected by including "works made on special order or commission" in the category of "works made for hire" (Section 54).

Under this loophole, many authors, who are not employees for hire, would be prevented from having copyright for "life-plus-fifty" years and would be deprived of protection under Section 16. As we advised you in our letter of June 19, 1964, we are completely opposed to this provision.

Books are often published under contracts executed before the work is written, or completed. These could be deemed written "on special order or commission"; but they are not now considered "works made for hire". Under the new definition they would be. Inevitably, publishers' printed form contracts would contain a clause providing that the author agrees that his work shall be "deemed" a work made for hire—just as all publishers' form contracts now provide for a grant of rights under renewal, as well as original copyright, and for the same purpose. Authors do not have the economic power to resist this pressure. They would have to sign contracts containing this clause, just as they now must sign away their renewal rights—in order to get their books published.

We request that the definition of works made for hire be changed to read as follows:

> "A 'work made for hire' is a work prepared by an employee within the scope of his employment. A work made on special order or commission is not a 'work made for hire'."

This is the definition proposed in your prior draft. Provisions to deal with the problems of textbook and encyclopedia publishers under Sec. 16, are proposed below.

II. *Sec. 14(b)*

(i) For the reasons discussed above, we request that the phrase "or other person for whom the work was prepared" be deleted . . .

(ii) The logical presumption is that the person who wrote a work is its author. The person who needs the protection of a "statute of frauds" is the author, who is mortal; not a corporation, with unlimited lifespan and the means of "making a record" in for-hire situations. Therefore, we request that 14(b) be revised as follows:

> "In the case of a work made for hire, *the person or persons who wrote the work* is considered the author for purposes of this title, and shall own

all of the rights comprised in the copyright, *provided, however, that if the parties have expressly so agreed in writing, signed by them,* the employer shall be considered the author for the purposes of this title, and shall own all of the rights comprised in the copyright."

Sec. 16—Termination of Transfers

We suggest that certain changes be made in Sec. 16 to remedy its shortcomings. The changes are contained in a revised version of the Section, below. We are also setting forth as an alternative, a revision of the present Sec. 24, which would meet the problem of "reversion" by retaining the present renewal system and adding a third term.

These are the shortcomings of Sec. 16 which lead to our suggestions for a revision of it:

1. *Denial of Protection.* The Section would unfairly deny protection to many authors in these situations:

(a) where a book, play, symphony or other work that is a creative entity in its own right (as distinguished from contributions to dictionaries, encyclopedias and other composite works) are written under a contract that might fall into the "special order or commission" category. Under 16, protection would be denied because a publisher agreed to pay for a book to be written, rather than to pay for one that had been written. (This is not a reason for granting protection to some novelists, playwrights, etc., but not others. Indeed, no criteria could be written into the Act to justify the distinction for these types of works. Compensation can be the same in one situation or another. For example, a work can be specially "ordered or commissioned" on the same monetary terms as a contract for the publication of a finished work—a guaranteed advance and royalties. Efforts to draw distinctions on the ground of "direction" or "suggestions" by a publisher, or other person, specially "ordering or commissioning" a creative work in these areas, is equally futile. A publisher's "suggestions" as to what an author is to write (when a novel is specially "ordered or commissioned") no more give him a claim to perpetual control of the copyright in the author's creation, than do an editor's suggestions as to changes an author should make in a book written before a contract to publish the book is made (i.e. when *not* on special "order or commission".) Experience in other media of communication show that claims as to what a non-writing executive allegedly "contributed" to the creation of a piece of writing, can cause bitter controversy and become a weapon for abuse of an author's rights. Undoubtedly, any distinction in the statute, on this ground, would become a means of evading the termination clause—with spurious, doubtful or litigious claims of "direction" or "contribution" by non-authors.)

(b) where the writer, though an employee for hire, is to be deemed the author for copyright purposes: e.g., under the Section as written—when his employer agrees to this.

(c) where an author has written a book for one person (on special order or commission, for hire) but has reserved or recovered various rights which

he then transfers to others. As now written, Sec. 16 is barred to him as to a work labeled "made for hire", even where he transfers a right in it to some one who neither employed him to write the work nor commissioned or ordered the work; e.g., an author writes, as employee or on special order, a novel, but the publishing contract reserves the motion picture rights to him, and he transfers them subsequently to a motion picture company. Under the Section, he could not terminate this transfer; he should be able to.

See changes I and VII, below.

2. *Transfers of non-exclusive rights should be included.* As written, Section 16 would not allow an author to terminate transfers of non-exclusive rights. This would permit publishers and other users to vitiate the protection of the Section—by requiring an author to simultaneously grant an exclusive license or assignment of certain rights for 35 years *and* a non-exclusive (and presumably non-terminable) transfer of the same rights for the duration of the copyright term. Even if an author terminated a transfer of publishing rights, he might be effectively prevented from licensing them to another publisher, since he could not grant an "exclusive" license—his original publisher would still hold an effective non-exclusive license. Even if a composer terminated a transfer of his copyright to a publisher, the latter could still share in his recording and performance income—if the publisher had demanded (as he could under 16) a non-exclusive perpetual license of these rights, as well as an exclusive assignment of the copyright.

Moreover, a non-exclusive license "in perpetuity" can also be unfair and harmful to an author and deprive him of a fair share of the income his work produces 30 to 40 years in the future. The circumstances which call for right of termination in connection with an assignment of a copyright or an exclusive license of rights, are present with equal force in the case of a non-exclusive license. The renewal clause now applies "across-the-board" to all transfers on an exclusive or non-exclusive basis. We believe the termination clause should, too.

See change II, below.

3. *Thirty-five years is too much.* In your prior draft, transfers could have been terminated after 25 years. We think this is a more than adequate period. Indeed, in the Register's Report to Congress, 20 years was stated to be sufficient. On the other hand, thirty-five years is far too long. The author who contracts for the publication of a novel at age 35 will not be able to terminate the transfer until he is 70.

See change III, below.

4. *The effective date of termination is ambiguously stated.* It is obvious to us that the intention of the Section is to allow an author to terminate a transfer, with the termination taking effect at the end of the 35th year. But some have interpreted the Section to mean that the author cannot *act* to terminate until that time; that he must *then* give two years' notice; and that, as a result, the effective date of termination cannot occur until at least 37 years after execution. We believe this ambiguity should be eliminated.

See change IV, below.

5. *The time for notice is insufficient.* An author should have more than two years in which to exercise the right of termination. This brief a time could work a forfeiture. We suggest 10 years. On the other hand, we have no objection to prohibiting the service of notice until a reasonable time after the execution of the transfer, as requested by publishers at the August hearings.

See changes V and VI, below.

6. *The exception as to derivative works should be limited to motion pictures.* The reasons for permitting the continued use of a motion picture version of a copyrighted work, after termination of the transfer, grow out of the special economic and creative circumstances involved in that medium. Millions of dollars may be spent in creating a new work, in which underlying work is one of several elements making up the finished product. The same considerations do not apply in the case of other derivative works, and they should not be excepted.

See change VIII, below.

7. *The free use of an author's motion picture rights after termination, should not be permitted.* One of the circumstances in which a renewal or termination clause is most needed, is the transaction in which the user takes a perpetual assignment for a lump sum and refuses to provide that the author shall share, in later years, in the continuing income from his work, or be paid for its continued value. Under such contracts, authors of books and plays have been denied any share in the windfall income earned by motion picture companies from the exhibition of motion picture versions of their works on television. The right to continue showing a motion picture should be conditioned on payment of a reasonable fee to the author. This can be done, as we suggest below, by specifying a fee in the statute, or by providing that a standard fee will be fixed from time to time by the Copyright Office.

See change IX, below.

8. *The author's right to use his reverted motion picture rights should be made clear.* We understand that the intention of Section

16 is to allow the author to make full, free use of the rights that he recovers when he terminates a transfer to a motion picture company (or, as now written, to the maker of any other derivative work), subject to the company's right to continue exhibiting its film. However, the Section leaves open the possibility of a claim by a motion picture company-transferee that the author could not license further motion picture or television versions of his book or play after termination, because these would diminish the value of its original grant and the continued exhibition of its film. We think the statute should make it clear that the author may, after transfer, freely license new motion picture versions of his work.

See change IX.

9. *The continued use of contributions to encyclopedias, dictionaries and other composite works, after termination.* It is not necessary to deny the protection of the termination clause to authors of works "prepared on special order or commission"—in order to allow the publisher of a dictionary, encyclopedia or other composite work to continue to publish the work, after the authors of those contributions exercise their right of termination. This can be accomplished by adding a provision to that effect to Section 16. (There is also suggested below, as an alternative, another definition of "work made for hire"—changing its aplication to works prepared on "special order or commission".)

See change X, below.

10. *The author's right to negotiate transfers for use in subsequent periods.* Section 16(b)(2) prohibits the author from making any subsequent transfer of rights that covers a period after the prospective termination date (of the first transfer), before that date arrives. But it excepts transfers made to the original transferee. This provision penalizes the author and his family, and places them at the mercy of the original transferee. It should be eliminated. The only limitation on transfers that cover any period after the termination date, should be that imposed under (a)(1)—namely, that such transfers be terminable 35 (or as we propose, 25) years after the date they are *executed.* This effectively protects the author against pressures to transfer rights, in advance, for future periods—whether by a tie-in transaction, or otherwise.

The following is the text of Section 16, revised in accordance with our suggestions—both additions and deletions are indicated; and the changes are numbered in the margin in accordance with the foregoing references:

See change XI, below.

§ 16. TERMINATION OF TRANSFERS OF COPYRIGHT OWNERSHIP.

(a) CONDITIONS FOR TERMINATION—~~In the case of any work other than a work made for hire,~~ *A* transfer by the author after January 1, 1967, otherwise than by will, of copyright or of any exclusive *or non-exclusive* right under a copyright is subject to termination under the following conditions. (Change) I II

(1) ~~At any time after 35 years from the date of its execution~~ *The* transfer may be terminated by the author who executed it or, if he is dead, by his legal representatives, legatees, or heirs. The termination may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any other future transfer. *The termination may take effect at any time after ~~35~~ 25 years from the date of execution of the transfer.* IV III/IV

(2) The termination shall be effected by serving a written notice, stating the effective date of termination, upon the transferee at least ~~two~~ *ten* years before that date, and recording a copy of the notice in the Copyright Office before that date. The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation. *The notice may not be served within ten years from date of execution of the transfer.* V VI

(3) *In the case of a work made for hire, if the person who prepared the work is not considered the author (under the provisions of Section 14(b) hereof), he, or if he is dead, his legal representatives, legatees or heirs, may nonetheless terminate any transfer made by him to anyone other than the employer for whom he prepared the work.* VII

(b) EFFECT OF TERMINATION—Upon the effective date of termination, ownership of, *and the privilege to exercise,* all exclusive *and non-exclusive* rights under this title that were covered by the terminated transfer reverts to the person or persons who effected the termination, but with the following limitations.

(1) After the termination of a transfer under this section, ~~a derivative work~~ *a motion picture version of a work* prepared before the termination under the authority of the transfer may continue to be utilized under the terms of the transfer, *provided that the transferee shall pay annually to the person or persons who effected the* VIII

(Change)

termination, a royalty of 5% of the transferee's gross receipts from said motion picture version, or the compensation provided in the transfer for such continued use, whichever amount is greater, ~~but this privilege does not extend to the preparation~~ *After* the termination, *the transferee may not prepare any other motion picture version, or* other derivative works, based upon the copyrighted work covered by the terminated transfer; *and the person or persons who effected the termination may, thereafter, prepare, or authorize others, to prepare and exploit other motion picture versions, or derivative works based upon said copyrighted work.* IX IX IX

(2) ~~No transfer of or agreement to transfer, for any period of time after the termination, any exclusive right covered by the terminated transfer, is valid unless;~~ XI

(~~A~~) ~~it is made after the effective date of termination, or~~

(~~B~~) ~~it is made to a person who was the transferee under the terminated transfer.~~

(3) *After the termination of a transfer under this section, contributions to composite works, supplementary materials and text materials, published before the termination under the authority of the transfer, may continue to be published under the terms of the transfer in the composite work, textbook or main work in which such contribution or material had been published before the termination, or revised editions thereof; provided that after the termination, the transferee may not make any other use of such contribution or material, and the person or persons effecting the termination may make any other use thereof.* X

To accompany proposed Sec. 16(b)(2) above, the following definitions would be added to Sec. 54:

(i) "A '*composite work*' is a work such as an encyclopedia, dictionary, thesaurus, glossary or atlas, in which several contributions are collected in a volume or series of volumes for reference purposes."

(ii) "'*Text material*' is material written primarily for, and first published in, a textbook sold ar distributed to public or private educational institutions. To the extent that such material is thereafter published and used in any other manner, it shall not be considered textbook material."

(iii) "'*Supplementary material*' includes such material as forewords, introductions, prologues, epilogues, indices, maps, charts, tests and answers, or similar material prepared by one person for use in connection with a work written by another, illustrations for a text written by another author where such illustrations do not constitute a major portion of the combined work, arrangements of musical compositions and translations.

(iv) "A '*main text*' is the work in which 'supplementary material' is used."

As an alternative to our proposal for Section 16(b)(2), the definition of a "work made for hire" might be revised as follows:

"A 'work made for hire' is:

"(A) a work prepared by an employee within the scope of his employment; or

"(B) supplementary material, text material or a contribution to a composite work prepared on special order or commission, if the parties expressly agree in writing, signed by both of them:

"(1) that such material or contribution shall be considered a work made for hire; and

"(2) that the person who prepared such material or contribution shall have the right to publish it otherwise than in a textbook, main text or composite work, as the case may be, at any time after 25 years from the date of execution of the agreement."

We think the approach of our proposed 16(b)(2) is preferable to the above definition. Also, we might note that we are willing to accept the "special order or commission" device here only because in the special categories of works to which it could apply, it would not be as likely to become a weapon for abusing the author's rights.

Extending copyright under the present renewal system to life-plus-fifty years. In a letter dated April 10, 1964 it was proposed that the problem of safeguarding authors against "assignments in perpetuity" could be solved by retaining the Renewal System and adding a third term which would extend protection for life-plus-fifty years. A draft of Section 24 of the present law, revised to accomplish this, follows. It is drawn to cover all works, unpublished as well as published; it could also be drawn to retain the present system of common law protection, by eliminating Sub-par. *F*. (We have also drafted a "modernized" and more concise version, which appears below).

§ 24. DURATION; RENEWAL AND EXTENSION.—

(*A*) The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyrighted works bears the author's true name or is published anonymously or under an assumed name: ~~Provided,~~

(*B*) (*1*) ~~That~~ In the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for ~~the further~~ *a second* term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly

registered therein within one year prior to, *or within 5 years after*, the expiration of the original term of copyright:

~~And provided further, That~~ (2) In the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children, be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a ~~further~~ *second* term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to, *or within 5 years after*, the expiration of the original term of copyright:

(C)(1) In the case of any copyrighted work referred to in paragraph (B)(1) above, the proprietor of such copyright shall be entitled to a second renewal and extension of the copyright in such work for a further term of nineteen years, when application for such second renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to, or within five years after, the expiration of the first renewal term of copyright.

(2) In the case of any copyrighted work referred to in paragraph (B)(2) above, the author of such work if still living, or the widow, widower or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin, shall be entitled to a second renewal and extension of the copyright in such work for a further term which shall continue until the end of the fiftieth year after his death, when application for such second renewal and extension shall have been made to the copyright office and duly registered within one year prior to, or within five years after, the expiration of the first renewal term.

(D) In default of any application for renewal and extension, as provided in Subparagraph (B) or (C) above, the copyright in any work shall determine, effective as of the first day of the first or second renewal term, as the case may be.

(E) In the event that an application for renewal and extension is filed within five years after the expiration of the preceding term of copyright, any person who begins an undertaking that infringes such renewal copyright prior to the filing of such application, incurs no liability for damages or profits under Section 38; and in a suit for infringement in such case, the court may require and impose the conditions specified in Section . . . (27(b) of Revision Bill).

(F)(1) Copyright in an unpublished work created after January 1, 1967, subsists from its creation and shall terminate at the time provided in the following subsections, unless published before then:

(a) In the case of a work prepared by one author, at the end of the fiftieth year after his death.

(b) In the case of a joint work by two or more authors, at the end of the fiftieth year after the death of the last of the authors to die.

(c) In the case of an anonymous work, a pseudonymous work, or a work made for hire when the employer is considered the author, fifty years from the year of its creation; but if the indentity of the author of an anonymous or pseudonymous work is revealed, before then, in the registration or other public records of the Copyright Office, at the time provided in subsections (a) or (b).

(2) If a work is published before the end of the applicable term specified in subdivision 1 above, copyright thereon shall endure for the periods, and under the conditions specified in subparagraphs (A) to (E), inclusive, above.

(G) Any transfer by an author, his spouse or children, of the first or second renewal copyright in a work, or both, or any rights secured thereby, shall be void ab initio and unenforceable, if made in connection with or as a condition for the acceptance of, a transfer of the original or first renewal copyright in such work, or any rights secured thereby; but without impairing the validity of the transfer with respect to such prior copyright."

A, B and C of the foregoing proposed revision of Sec. 24 are drawn in the literal language of the present section, except for the proivsion for a five year grace period. Sec. E, patterned after 27(b) of the Revision Bill, would protect any user who commenced uses during the grace period, before an application for renewal was filed.

Sec. G is, of course, not in the present Act. But, it is, we think, in the law. We believe it states both the rationale of the *Witmark* case and the Supreme Court holding in *United States v. Paramount* and *United States* v. *Loew's, Inc.* In *Witmark*, Mr. Justice Frankfurter said the purpose of Congress in establishing two separate copyrights on a work, instead of a single term, was to "enable (d) the author to sell his copyright without losing his renewal interest."

In *United States* v. *Paramount* and *United States* v. *Loew's Inc.* the Court made a "flat holding" that

> " 'a refusal to license one or more copyrights unless another copyright is accepted' is illegal."

As mentioned, we have recast Sec. 24, in the terms of the present statute. However, we believe that it could be restated more concisely without changing the substance of its provisions. Also, we believe

that provision could be made which would prevent *forfeiture* of copyright during the renewal period without substantially interfering with the use of works whose owners are no longer interested in protecting them. This could be accomplished, by providing that renewal occur automatically, in favor of the person entitled to obtain it, but that he not be entitled to prevent use of a work during a renewal period until he had filed notice of his intention to exercise his rights during that renewal period.

The text of the "modernized" version of Sec. 24 is as follows:

"Sec. 24. Duration; Renewal and Extension

(A) The Copyright secured by this title shall endure for twenty-eight years from the date of first publication.

(B) The author of the work, or if he is dead, his spouse and children, or if they are dead, his legal representatives, legatees or heirs, shall have

(1) a renewal and extension of the copyright for a second term of twenty-eight years; and

(2) a further renewal and extension of the copyright for a third term which shall continue until the end of the fiftieth year after the author's death, or, in the case of joint works by two or more authors, until the end of the fiftieth year after the death of the last author to die.

(C) In the case of an anonymous work, pseudonymous work or a work made for hire when the employer is considered the author, the copyright proprietor shall have

(1) a renewal and extension of the copyright for a second term of twenty-eight years; and

(2) a further renewal and extension of the copyright for a third term of nineteen years; provided that if the identity of an author of anonymous or pseudonymous work is revealed in the records of the Copyright Office before then, the third term shall endure for the term specified in subparagraph (B)(2).

(D) The right to the first and second renewal copyright shall vest in the person who shall, on the first day of each such term, be entitled thereto under subparagraph (B) or (C) above, without any formalities.

(E) (1) A statement of election to exercise rights under a renewal copyright during a renewal term, may be filed at any time during such renewal term, or within one year prior to the commencement thereof.

(2) where a statement of election is filed after the start of the renewal term to which it applies, a use of the copyrighted work during such renewal term, commenced prior to, or within 60 days

after the filing, of said statement shall not be an infringement of copyright; but the continuation of such use after three months from the date the user receives a notice that a statement of election has been filed, shall be an infringement of copyright. In a suit for infringement in such a case, the court may require, as a condition for enjoining the completion of the use, that the infringer be reimbursed for any reasonable expenditures incurred by him that he has not already recouped out of the proceeds of the use, and the Court may require as a condition for permitting the infringer to complete his use, that he pay the copyright owner a reasonable license fee in an amount and on terms fixed by the Court.

(F) (1) Copyright in an unpublished work created after January 1, 1967, subsists from its creation and shall terminate at the time provided in the following subsections, unless published before then.

(a) In the case of a work prepared by one author, at the end of the fiftieth year after his death.

(b) In the case of a joint work by two or more authors, at the end of the fiftieth year after the death of the last of the authors to die.

(c) In the case of an anonymous work, a pseudonymous work, or a work made for hire when the employer is considered the author, fifty years from the year of its creation; but if the identity of the author of an anonymous or pseudonymous work is revealed, before then, in the registration or other public records of the Copyright Office, at the time provided in subsections (a) or (b).

(2) If a work is published before the end of the applicable term specified in subdivision 1 above, copyright thereon shall endure for the periods, and under the conditions specified in subparagraphs (A) to (E), inclusive, above.

(G) Any transfer by an author, his spouse or children, of the first or second renewal copyright in a work, or both, or any rights secured thereby, shall be void ab initio and unenforceable, if made in connection with or as a condition for the acceptance of, a transfer of the original or first renewal copyright in such work, or any rights secured thereby; but without impairing the validity of the transfer with respect to such prior copyright."

Sec. 19—Pre-emption

We suggest that the Act include a provision to assure the continued protection of characters in copyrighted works and titles of copyrighted works. The recent Supreme Court decisions have caused some confusion in this area. We doubt that the decisions actually stand for the proposition that a title of a copyrighted work, or characters in the work, cannot be protected at common law. However, there is

no point in putting off to another day, and at the cost of confusion and considerable litigation, determination of the issue; and we think that the problem should be met in the pending revision of the Copyright Act.

We suggest that it be done by adding to Section *19* new subparagraph (c), reading as follows:

> "Nothing in this title shall be construed to annul or limit the right of the author or proprietor of a copyrighted work, at common law or in equity, to prevent the copying, publication or use of the title to, or the names or portrayal of characters in, such work, without his consent, and to obtain damages therefor."

Or, by providing in Section 2, that the subject matter of copyright shall include titles and characters of copyrighted works; and by excluding statutory damages for infringements of these rights.

Sec. 20—Duration

The first lines of subparagraph (c) shall be changed to read as follows:

> "In the case of an anonymous work, a pseudonymous work, or a work made for hire, when the employer is deemed the author under the provisions of this title, copyright endures (etc.)."

As now drawn, a writer who is employed for hire, but by agreement is to be deemed the author, would be deprived of protection for life-and-50 years. This change remedies that anomaly.

Sec. 22—Duration of Copyright in Subsisting Works

[In subsection (a)(1)] . . . "five years" should be changed to "one year", to avoid reducing the protection of the renewal section.

We would also urge that the provisions of 22(a)(3) be revised to conform with the comparable provisions of Sec. 16 above.

Sec. 24—Notice

The words "*or elsewhere*" should be deleted . . . To require notice in copies published abroad, whether under the authority of the copyright owner or not, could result in widespread forfeiture of copyright and endless litigation. As we have emphasized, authors in this country seldom have any control over the actions of foreign publishers. Often, they are not even in a position to insist that a license for foreign publication contain a clause requiring the insertion of notice. Nor have they the power to enforce such a provision.

If these words are not deleted, there would be considerable controversy in this area. Piratical publishers would have a loophole permitting them to issue competing copies of a work whenever they managed to find a European, African, South American, or other edi-

tion without a copyright notice, and American authors and publishers would be put to heavy expense in proving either that the edition was without their authority, or that they had required the insertion of notice in the copies and that the foreign publishers had failed to comply with the contract. Perhaps the practical consequences of this have not become apparent to the Copyright Office. We would assure you that assembling proof and testimony in this type of action are formidable and costly. We urge that these words be deleted from Sec. 24, and from Sec. 25.

Sec. 27—Notice

(ii) We request that in (a)(2) "five years" be changed to "ten years".

(ii) *Subparagraph* (*b*). We urge that there be added . . . the folowing words:

> "An undertaking commenced more than 60 days after registration for the work has been made under Section 30, shall not be deemed an innocent infringement and shall not be governed by the provisions of this subparagraph (b)."

It would be impossible for a publisher who discovers the erroneous omission of a copyright, to give "actual notice" of a registration to anyone throughout the United States, or the rest of the world, who might be planning or had embarked on an undertaking that would constitute infringement (Until the results appeared, he would not even know of it). We think it is unreasonable to require this. Certainly, any publisher, motion picture company, etc.—in undertaking use of a copyrighted work for profit (and where any expenditure is involved)—takes the trouble and (brief) time required to check the Copyright Office records. In fact, with a 60 day post-filing grace period, there would be no chance of such a user being injured.

If your concern is with a teacher, or other casual user who makes a few copies of a work, we submit that their unique problem can be dealt with separately, without opening the door for infringement by users who rely on the omission of notice.

Sec. 25—Notice of Copyright

We must emphasize our view that this section proceeds on an utterly fallacious premise, namely, that copyright notice is, or should be, a starting point for a search of title. This section has nothing to do with advising whether a work is or is not in copyright. It primarily relates to transactions for the licensing of rights. A prospective licensee or assignee can start with the assumption that the author is the owner and easily find whether someone else has title by checking the records of the Copyright Office—by looking for a re-

corded transfer executed by the author. We submit that in a commercial transaction it is no great burden on a prospective user to verify the validity of the transferor's title. Moreover, where the transferor is a reliable business concern, the user can usually hold him responsible for any lack of title in the rights transferred.

We urge that Sec. 25 be amended by deleting everything after the first sentence. These provisions still create a risk to authors, in the event of a delay in registration, that they should not be required to bear.

Sec. 30—Copyright Registration

We suggest that subdivision (b) (2) be amended by eliminating the requirement for deposit of copies as a condition for registration (and therefore for the protection of all rights under the Copyright Act). The recent experience under the Mexican Copyright Law brings home to us the complete unfairness of coupling the deposit of copies with registration requirements. Many American authors will be unable to comply with the Mexican Act because they cannot, at this point, find copies. We do not believe that our Act should impose this burden either on American authors or foreign authors. Registration per se, the preparation and transmittal of documents, is not a great hardship; but the filing of copies of the work is. We think that the filing of copies can be encouraged by making copies, certified by the Copyright Office, proof in a court proceeding.

Also, we urge that if any deposit requirements are retained, that subsection (b) (2) be amended to read:

> "In the case of a published work, two complete copies or phonorecords of the best edition then available; provided that, if copies of a published edition are not available, two copies of the work prepared by any method of duplication which will reproduce them legibly from a typed or printed text."

Sec. 54

We propose the addition of a sentence, reading as follows:

> "The omission of a definition of any term used in this Act, connotes that the meaning of the term is commonly understood, and that no definition is required."

The reason for this, we should point out, is that while many works, such as "motion picture", "literary works", etc. are defined, other categories of work, such as dramatic works, choreography, etc., are not. The omission of a definition mght be seized on to argue that there was some implication to the omission.

Very truly yours,

IRWIN KARP,
Counsel, Authors League of America, Inc.

AUTHORS LEAGUE OF AMERICA, INC.

November 23, 1964.

Our letter of November 17, 1964, proposing changes in certain sections of the Revision Bill, did not cover the Manufacturing Clause and other provisions which we believe also require modification. Our suggestions as to those are set forth below.

Sec. 43—Manufacture and Importation of Copies

Subparagraph (d) now provides that an American author loses forever his exclusive right to make and distribute copies of a work, once copies are imported or distributed in the United States, in violation of Sec. 43. We have pointed out that irrevocable forfeiture of this basic right is a harsh and unfair penalty; and also that it was not required even to serve the protective purposes of *43*, i.e., to protect the American book manufacturing industry against foreign competition. This clause can defeat that purpose by making it difficult for an American author to obtain domestic publication of a work previously published abroad. Without the protection of the exclusive right to copy, the risk may be too great.

We proposed at the August hearings that if the Manufacturing Clause is to be retained, it be modified to provide that once copies of a work are wholly manufactured in the United States, the author recovers full control of his exclusive right to make and distribute copies, and the Manufacturing Clause would not thereafter be available as a defense in an action for infringement of that right.

The representative of the book manufacturing company indicated, at the hearings, that this modification was acceptable to the groups he spoke for.

We request that Sec. 43 be amended by adding a new subsection (e), as follows:

> **(e) The provisions of subsection (d) shall not apply in the case where the infringer has made or distributed copies of the work more than thirty days after the filing in the Copyright Office of a notice that copies of the work have been wholly manufactured in the United States by the owner of the exclusive rights to make and distribute copies of the work, or by authorization from him.**

We have previously indicated our view that the Manufacturing Clause should be completely eliminated from the Copyright Act. But, if it is retained, we feel that the foregoing modification is essential.

Sec. 35—Infringement of Copyright

We request that . . . Subsection (b) . . . be revised by deleting the words indicated below:

"The court ~~may require the joinder, and~~ shall permit the intervention, of any person having ~~or claiming~~ an interest in the copyright."

We believe an author should have the right to intervene in a suit involving his copyright, but should not be compelled to join. Otherwise, "divisibility" could become an onerous burden. An author may assign various of the exclusive rights in his work to different persons in various parts of the country. Any assignee might bring a suit for infringement of the right granted to him which is of such importance to the author that he might wish to intervene. On the other hand, an assignee might bring one, or several suits, throughout the country of minor importance, and in which the author has no monetary interest. To compel him to join; to retain counsel; to travel great distances, would be burdensome. If joinder were compulsory, an author might have no alternative. A defendant in a minor infringement suit brought by an assignee, might well—as infringers often do—assert the invalidity of the copyright. Under the compulsion of an order of joinder, the author would face the choice of entrusting the defense of the validity of all of his rights in his work to the assignee—or of going to great expense to intervene in the assignee's suit, which might involve a minor infringement, minimal damages, and in which the author might have no financial stake.

If this is to be the price of divisibility, we suggest that further thought be given to reestablishing full control over suits for infringement in the author so that he can make this critical decision. This, however, should not be necessary. The section could be changed as indicated above to remove the compulsion of joinder while reserving the right of intervention; and it should be supplemented by a further provision as follows:

"A judgment in an action brought by or against the legal or beneficial owner of an exclusive right under a copyright shall not be binding upon the legal or beneficial owner of the copyright, or of any other right thereunder, who is not a party to the action."

Lastly, we suggest that the right of intervention should be granted to those who have an interest in the copyright, but not (broadly) to anyone claiming an interest therein. This might open the door for frivolous applications.

Sec. 53—Copyright Office Fees (And Sec. 31—Registration)

We request that the renewal fee be reduced to $2.00.

We also suggest that consideration be given to establishing separate, and lower, registration and renewal fees for poems, articles and similar short works which are usually published as contributions to collective works; and musical compositions. An author writing in these media may create anywhere from a dozen to a hundred separate "works" in a year, each no more than a few pages long. He should be able to register these at lower rates than those charged for a longer work.

Lastly, we suggest that a subsection (b) be added to Sec. 31, as follows:

"A single application for copyright registration may be filed for a collection of unpublished literary works written by the same person or persons, if such collection be less than fifty pages in length."

Sec. 2—Derivative Works

We suggest that Sec. 2(a) be amended as follows:

"(a) The subject matter of copyright as specified in section 1 includes compilations and derivative works, but protection for a work employing pre-existing material in which copyright subsists is available only to the extent that such material has been used ~~lawfully,~~ *with the consent of the proprietor of the copyright in the pre-existing material.*"

The italicized portion is from present Section 7. We think it is clearer than the cryptic "lawfully"—and will prevent anyone from making the mistaken assumption that they can employ copyrighted pre-existing material in a derivative work without the consent of the copyright owner.

Very truly yours,

IRWIN KARP,
Counsel, Authors League of America, Inc.

AUTHORS LEAGUE OF AMERICA, INC.

December 18, 1964.

We would like to make the following changes in our letter of November 17th, in which we commented on the Revision Bill:

1. *Section 16—Termination*

Sec. 16(a)(2) would require that an author serve the notice of termination at least two years before the termination date. We felt that this was unnecessarily restrictive and that the author should have

more time, near the end of the period, to exercise his right of termination. However, in commenting on this clause (at p. 9 of our letter) we suggested that the two years be changed to ten. This was erroneous. We intended to suggest that the two years be changed to one—that an author should be entitled to serve a notice of termination at any time before one year prior to the termination date.

In this connection, our suggested change V (p. 14 of our letter) should be from *two* years to *one* year, not ten.

2. *Page 15 of our letter.*

In our proposed change IX, the words "and exploit" should be added after the word "prepare", so that the clause would read as follows:

> "and the person or persons who effected the termination may, thereafter, prepare *and exploit*, or authorize others, to prepare and exploit, other motion picture versions, or derivative works, based upon said copyrighted work."

3. *Page 16 of our letter.*

In subparagraph (iv) the phrase "Main Text" should be changed to "Main Work". The latter is the phrase used in change X, on p. 15, to which the definition applies.

4. *Page 26 of our letter.*

The reference to Sec. 22(a) (3) should read 22(c) (3).

5. *Page 28 of our letter.*

The discussion of "Notice of Copyright" pertains to *Sec. 28* of the Bill, not to Sec. 25.

Very truly yours,

IRWIN KARP,
Counsel, Authors League of America, Inc.

LEONID V. AZAROFF

December 15, 1964.

Please add my small voice to the opponents of the "Fair Use Clause" and of the copyright bill H.R. 11947.

Superficially this clause aims only to provide official sanction for a fairly common malfeasance, but in fact it opens the door to the violation of private property rights. If popularity of an action is to become the guiding spirit for framing new laws, then, in the same holiday spirit, Congress should next consider legalizing the filching of staples, envelopes, etc. by office workers, or bolts, nuts, and screwdrivers by shopworkers.

It seems to me that this clause strikes at the very heart of private property ownership just as the protectionist "Manufacturing Clause" strikes at the principle of private enterprise for private gain. Although the fair use clause may not prevent a dedicated author from preparing a manuscript or a profit-seeking publisher from publishing it, this clause is certainly improper because it legalizes a procedure which, under different trappings, is outlawed by Federal and State laws which render private property safe from seizure when the only justification for that seizure is private gain—be that private organization: educational, tax exempt, apolitical, or just plain greedy.

Sincerely yours,

LEONID V. AZAROFF,
Professor, Illinois Institute of Technology.

HAROLD E. BABBITT

December 24, 1964.

My attention has been called to the impending H.R. 11947, in the House of Representatives, relating to a revision of the present Copyright law. Some of the features of that bill seem to threaten the rights and welfare of present and of future authors as to require alert and vigorous opposition from those of us who are vitally interested and affected.

It seems evident that effective protection of any copyrighted material is removed by the permission to educational institutions to permit the reproduction of "* * * a single copy". Such a permit is enough to discourage the writing of new books for which copyright protection is necessary.

As an author of college textbooks, produced for me by McGraw-Hill Book Co. and John Wiley and Sons, I wish to call my protest to your attention, and to offer any assistance possible in a fight against the bill.

Very truly yours,

HAROLD E. BABBITT.

RONALD E. BARKER

November 24, 1964.

Re: *Manufacturing Clause*

I was visiting the U.S.S.R. during your recent correspondence with my colleague Mr. Bowers about the Manufacturing Clause in the new Copyright Bill (H.R. 11947) but I have since seen it and I am most grateful to your for clearing up that point about the importation of repro-pulls.

This is, of course, entirely a matter of American legislation, and I should not be presuming to write to you again on this subject had you not made it clear in previous correspondence and when we met last year that you would welcome any views which I or my Association might have on this extremely important Bill. Although, therefore, I quite see that the fact that one may still secure ad interim copyright by importing a set of repro-pulls and using them to manufacture an edition of not more than 3,500 copies for sale in the U.S.A., it does seem to me, and to my Council, that the overall effect of the new Manufacturing Clause (43(c)) is to set back rather than advance the reform at which your most welcome Bill is otherwise addressed.

As you know only too well, British publishers (and American publishers, too, for that matter) have always taken the view that the Manufacturing Clause is a piece of petty protectionism that has no place in a copyright act, even if it has a place in so technically advanced a country as the U.S.A. at all. I know that the printers are fearful that without the protection of this Clause they would lose a great deal of business which is valuable to them. I do not think this is in the least true, but I recognize that their fear is nevertheless real to them and that, unless someone is able to quiet their fears, attention may have to be paid to them.

In practice, as I am sure all the evidence shows, by far the greatest part of printing which American publishers import from overseas is (where it does not in any case fall outside the requirements of the Manufacturing Clause) of a kind that American printers are not in general anxious to have. I seriously doubt, therefore, whether the removal of this protection would in fact harm their interests in any measurable degree. Indeed, to the extent that it would enable them to import material from which they could print without damaging copyright they would surely be the gainers.

This, in fact, is the point I want to make. The new Manufacturing Clause defines far more strictly than the present Clause the processes of reproduction whose importation would nullify the degree of domestic manufacture required for full copyright protection. The present Manufacturing Clause (16) requires only that a work "shall be printed from type set within the limits of the United States . . . or from plates made within the limits of the United States from type set therein" although, as you well know, your Copyright Office have generally agreed to register for copyright works (even by American authors) which have been printed in the United States but by an offset process using plates made in the United States from typesetting done outside the country. It does not seem to us that this liberal interpretation of the law would similarly be open to you under the new Clause 43(c), which says that no book is wholly manufactured

in the United States "if any step in the process of its reproductive manufacture including but not limited to the composition of type and the preparation of sheets, films, plates, mats, reproduction proofs, tapes, or other devices for the reproduction of copies by any process" takes place outside the United States. This to us seems at one sweep to attempt to wipe out all the advantages of technical progress from which not only the American people but people throughout the world have a right to expect a benefit.

Books are surely so essential to people everywhere (for educational and scientific purposes, as well as those of culture and recreation) that anything which might tend to put up their cost must be disfavoured. The English language is world-wide, with two main centres of publishing, the United States and the United Kingdom. Although the demand for books in the English language is enormous, the demand for copies of any individual work can often be quite small. Although in the U.K., for example, we reckon to publish some 20,000 new titles a year, it is calculated that the average size of the first printing of those titles is hardly more than 5,000 copies. The total world market, shared by the U.S.A. and the U.K., is often less than 10,000 copies. The economies that can be produced by American and British publishers printing their separate editions from the same typesetting are therefore important. To deny copyright protection to an American work which may command a market of only, say, 4,000 copies, because it had been printed in the United States from type set in the United Kingdom would be iniquitous, for the book needed by that relatively small number of people might well be far more important in terms of humanity than the best-selling novel which may be printed by the hundreds of thousands. If, to preserve copyright, American publishers are obliged to set even the short-run book in the United States, then their prices must be correspondingly higher and, similarly—and this is where I must declare our interest—so must the price of the British edition of the same book (since the composition cost for that edition will then have to be borne entirely by the British publisher).

Even more importantly, by referring to "tapes or other devices" the new Manufacturing Clause would appear to wish to prevent what promises to be the greatest development in printing since the invention of moveable type. Computer setting is already here, and it can hardly be very long before printers on both sides of the Atlantic will cease to use any hot metal at all but will go straight into photosetting by computer. The tapes necessary for these computers are at present quite expensive, and they can only be profitable either for long-run works or else works where more than one edition is printed from the same tape. There will soon be correction tapes which will automatically Anglicize American spelling, and vice versa, even to

the point of making "translations" such as "spanner" for "wrench". This, as I say, is almost here, and it brings with it the prospect of cheaper books—provided, as I have said, the tapes are interchangeable between countries. And because, to start with, the price of these tapes will be high, it is essential that the tapes shall be exchanged between countries if we are to develop their use to an extent where the tapes themselves will become cheap as well as making for cheaper methods of production. If the proposed Manufacturing Clause passes into law, then the American people, and people throughout the world who depend upon the U.S.A. for their books, are going to be denied these benefits. I find it extremely hard to believe that a country with the international sense of responsibility of yours could allow such a thing to come to pass.

I am sorry to bother you with this long letter, and I hope you will forgive me if I have been too outspoken. I know your own views on this Clause, and my only hope is that I may have given you some ammunition to help ward off those dark powers who seem to be intent on maintaining the restrictive practices that have in truth been unnecessary for years.

To sum up: British publishers would vastly prefer the Manufacturing Clause to be eliminated entirely; but if this cannot be, then we do most earnestly hope that those parts of the Clause which are designed to restrict technical and economic development will be removed.

Yours sincerely,

RONALD BARKER,
Secretary, The Publishers Association, London.

RALPH H. BLANCHARD

December 21, 1964.

I am writing in opposition to the Bill which has been drafted and which, if enacted, would grant certain nonprofit institutions the right to copy, without payment, copyrighted works.

The copyright privilege is, of course, the principal assurance that an author has of being paid for his work. If copyrights were extended to non-commercial organizations, it would, in effect, require an author to make the equivalent of compulsory contributions to these institutions and in many cases destroy all or much of the market for his work.

In addition, copies of work which may have their origin in non-commercial use would undoubtedly find their way to persons who should purchase the original material.

I trust that these comments may be of some use to you in forming an opinion of the validity of this proposal.

As an author of certain books and as former editor of the McGraw-Hill Insurance Series, I am a party in interest.

Very truly yours,

RALPH H. BLANCHARD.

CHARLES M. BREDEHOFT

February 4, 1965.

It was a pleasure for me to have been present at the APLA luncheon last week to hear your talk on some of the more sensitive areas of the Bill For Revision of the Copyright Law.

Having had a chance to give further thought to the points you made, I find myself rather uncertain about one matter in particular: the "fair use" provision. You mentioned that the new bill provides statutory recognition for this doctrine, but that the statutory provision is not intended to either diminish or expand the fair use doctrine as it has been developed in the courts.

It seems reasonable to conclude that the statute, therefore, is intended to more firmly establish the doctrine of fair use in its present stage of development. That, at least, would appear to be the expected result of a codification of the existing state of the law, and this is the very point about which I have certain misgivings. I realize that any revision of the copyright law must strike a very delicate balance between what seems to be conflicting interests: copyright owners on the one hand, and users of information on the other. Therefore, I can understand it may be virtually impossible to come up with any generally acceptable fair use provision that departed in any significant way from existing law.

I question, however, whether it is wise to freeze this doctrine in its present form. Recognizing that the judicially developed fair use doctrine is a liberalizing departure from the otherwise literally exclusive rights in copyright owners, it seems to me that this doctrine has been developed to accommodate the legitimate needs imposed by changing circumstances, and should continue to develop as circumstances continue to change. To more or less freeze the doctrine at this stage may very well impede desirable further development. As a result, the new statute may become obsolete much sooner than it should, and we would be faced with the problem of revising it all over again.

The prospect of a possible prematurely arrested development of a practical fair use doctrine presents me with somewhat of a dilemma, and I am having difficulty in properly resolving the questions it raises.

I am sure that a great deal of perceptive thinking underlies the fair use provision included in the pending bill, and perhaps an understanding of it would help me. Any comments you might send me concerning this aspect of the proposed fair use provision would be most gratefully received.

Very truly yours,

CHARLES M. BREDEHOFT,
Patent Department, Xerox Corporation.

JEROME CHODOROV

November 29, 1964.

As a playwright I strongly urge that authors be protected under the new Copyright Act against the performance of a dramatic work by students in public performances.

Perhaps Section Six should contain wording to the effect that performances shall only be authorized for pupils or instructors in the classroom.

Please give this matter your serious consideration. I feel that if the wording of the Act is less specific it may open the gates to serious violations of all dramatists' rights.

Most sincerely,

JEROME CHODOROV.

SIDNEY A. DIAMOND

January 12, 1965.

I have been meaning for some time to submit written comments on H.R. 11947 and I apologize for having waited so long. I have arranged these in order by section numbers, not in the order of their importance.

Section 2(a). The word "lawfully" at the end of this subsection seems likely to cause difficulty in interpretation. I suggest substituting: "under license from the copyright owner."

Section 4(c). I disagree with this subsection as a matter of principle and I suggest that it be deleted altogether. If exceptional circumstances arise, each of them could be treated as requiring separate legislation, as was done when Section 2506 of Title 39 was enacted.

Section 5(a)(4). I have stated my reasons elsewhere for believing that the right of public performance should be extended to sound recordings as well as to motion pictures and the other works listed in this subsection. I suggest that . . . the word "and" be deleted and that the following be inserted after "motion pictures": "and sound recordings."

Section 5(b)(1). If a motion picture sound track is made audible without any accompanying images, I do not believe that the motion picture itself (as defined in Section 54) has been "performed." I suggest that . . . the words "or to make" be deleted and the following substituted: "with or without making."

Section 5(b)(2). In many instances, especially where works of art are involved, it is the original rather than a copy that is exhibited. Accordingly, I suggest that . . . the words "it or" be inserted after the word "show."

Section 5(b)(3)(B). The expression "otherwise than as a common carrier" in this subsection already has created difficulties of interpretation. It seems to me the best way to solve the problem is to eliminate subsection (B) altogether; the point would appear to be covered sufficiently by subsection (C).

Section 6. In view of the controversies aroused by this section, my proposal would be to delete everything after the word "work" . . . [in the first sentence] and insert the following: "shall be an affirmative defense to any claim of copyright infringement."

Section 10(a). In view of the change proposed above for Section 5(a)(4), I would delete this subsection altogether.

Section 10(c). This subsection also would be deleted for the same reasons.

Section 11(b)(1). I do not think it reasonable to require all of this procedure to be completed before the record is made. Accordingly, . . . I suggest deleting the word "making" and substituting the word "distributing."

Section 11(c)(1). Following the same suggestion made immediately above, I would substitute the word "distributed" for the word "made" . . . [in the two places where it appears in the second sentence].

Section 11(c)(2). I do not see the logic or justification for requiring payment to be made on records "made" when they may never even leave the warehouse. I suggest inserting the following at the end of the first sentence of this subsection, i.e., immediately after the word "license" . . .: "and distributed to the public." With regard to the question of the proper royalty rate, there has been no economic evidence submitted which would justify an increase of 50% and more in the current royalty rate. I submit that the present 2¢ figure should be retained; or, in the alternative, that another suggestion I made previously be adopted, which is to make the rate of 10% of the manufacturer's selling price. This figure would preserve the same relationship between the royalty and the price of the record that existed when the 2¢ figure was adopted in 1909.

Section 11(c)(3). For many years, it has been standard practice in the record industry to account 45 days after the close of the calendar quarter. There does not seem to be any sufficient justification for changing this period, as the subsection in question would do, to a maximum of 30 or 31 days depending on the length of the particular month involved. Accordingly, I suggest that the words "in January, April, July and October" should be deleted and that the following be substituted: "on the 15th days of February, May, August and November." . . . I would then delete "three months" and substitute: "calendar quarter." Continuing with the next sentence of this subsection, the requirement for certification by a certified public accountant seems very extreme; even a large company which regularly uses the services of a certified public accountant does not have its individual quarterly royalty statements certified, so that the expense element would be quite considerable. I suggest rewriting . . . [the language appearing after the word "as" in the second sentence] to read as follows: "correct under oath by an officer of the licensee if it be a corporation; otherwise, by an owner."

Section 13(1). The expression "a system of loudspeakers or other devices" seems inappropriate since there will have to be speakers and/or television screens in the private rooms for the section to be operative; the "system" involved really is the means of transmission of the broadcast from the central receiver to the individual rooms, which does not require loudspeakers except in the private room itself at the very end of the process. I suggest that the quoted words be eliminated and the following substituted: "a privately-operated wired or wireless system."

Section 16. I have stated publicly that I am opposed to this provision and would delete it in toto.

Section 19(b). . . . I suggest inserting, after the word "State," the following: "or of the United States." The principal reason for this is that there might be federal rights under subsection (3), especially if the Lindsay Bill or some equivalent should be enacted.

Section 20(b). . . . I would delete the word "second" and substitute "last."

Section 20(c). I do not believe that a pseudonymous work is in the same category as an anonymous work or a work made for hire. Accordingly, I would delete . . . the words "pseudonymous works", . . . "a pseudonymous work", and . . . "or pseudonymous."

Section 20(e). There is a typographical error . . . [in the last sentence] the word "any" should appear only once.

Section 24. I have stated elsewhere my reasons for opposing formalities, especially any requirement of a copyright notice. Accord-

ingly, I would either delete Section 24 in toto, or make the notice an optional provision.

Section 25. For the reasons indicated, this section also either should be deleted or made optional.

Section 25(c). Assuming that Section 25 remains, some change should be made in the expression "intended to remain with it" which qualifies the word "container" . . . This is inconsistent with the provision in subsection (b)(3), where the word "containers" appears without qualification, as in the Neighboring Rights Convention, from which this requirement is taken. I can see some reason for not wanting to permit the notice simply to appear on a plain paper sleeve that is intended to be thrown away but I do not think the present language serves the purpose. I am not entirely satisfied that I have been able to devise a suitable substitute but I suggest: "or on the label or a container which also bears the title of the work." In this connection, it should be noted that the name or alternative designation of the owner would automatically be required by the cross-reference to the word "notice," whose requirements are set forth in subsection (b).

Sections 26 and 27. My comments on Section 24 naturally apply to these sections as well.

Section 28 (b) and (c). Consistently with my comments on the entire question of notice, the words "and is governed by the provisions of Section 27" should be deleted from . . . [both subsections].

Section 35(b). . . . [In the last sentence], I suggest deleting "require the joinder, and shall"; and also deleting the comma after the word "intervention." I am concerned that a court might lean in the direction of requiring the party to be brought in rather than the reverse; and there could be many situations, especially with divisible copyright, where this would be an unnecessary nuisance and expense.

Section 39. . . . I would delete "in its discretion may" and substitute the word "shall." . . . I would insert after the word "by" the following: "the prevailing party except." Also, I would then delete the word "or" and the words "any party other than."

Section 43. I would delete this section in toto.

* * * * * * *

Sincerely yours,

SIDNEY A. DIAMOND.

JONATHAN ELKUS

January 18, 1965.

I am disappointed by the stand taken by MENC (Music Educators National Conference) in that they doubt that the new identical copyright bills (H.R. 11947 and S. 3008, introduced by Representative

Celler and Senator McClellan respectively), will "fail to provide necessary and suitable protection for educational rights in the public interest in the schoolchildren of our Nation."

I am wholeheartedly in favor of the much broader view assumed by the proponents of the new bills—that is, when a composer's and publisher's rights are satisfactorily defined, amplified and protected, and when they begin to receive a financial return commensurate with the experience, effort, care and expense involved in composing and publishing music, the most desirable of all results will be better achieved: a tangible encouragement for the composition and publishing of music of quality, depth and substance for educational purposes—a repertoire which our students, teachers and audiences greatly need and most certainly deserve.

Sincerely,

JONATHAN ELKUS,
Associate Professor of Music,
Lehigh University.

HERMAN FINKELSTEIN

December 15, 1964.

Re: *Drafting Committee of Committee 304*

At the August meetings of Committee 304, I made certain comments about particular sections of the Register's bill. The following are the specific suggestions I have in mind:

Section 5

Sub-section "(b)(3)(B)" contains the phrase "otherwise than as a common carrier". It is possible that Community Antenna Television operators may be regulated in some States as common carriers. In order to be sure that performances transmitted to the public by CATV operators are not inadvertently exempt, the term "common carrier" might be defined to one whose acts are along the following lines:

"The mere transmission of a performance or exhibition over wires or other means of transmission operated by a common carrier having no participation or choice directly or indirectly in (a) the production or selection of the subject matter of the performance or exhibition or (b) the selection of the subscribers to or recipients of a service supplying the performance or exhibition."

I would add the following in place of the present language of "(b)(3)(C)":

"(C) to communicate or transmit the work to the public by radio, television, telephony, or any other means or device whether now known or hereafter invented."

Section 8

In "(4)" insert after the term "performers": "presenters or promoters". This would make it clear that compensation is not to be paid to those responsible for the performance as well as to the performers, if the performance is to be exempt.

In addition, in "(4)(B)", after the term "performance", there should be added the phrase: "not to exceed ——% of such proceeds,". This change is necessary in order to be sure that a promoter will not be in a position to reap a profit by arranging with a landlord of an auditorium to share in the rent paid.

Section 11

I suggest that the scope of the compulsory license should be limited so that a person may obtain a compulsory license only if his purpose in making phonorecords is to sell (not distribute) them to the public and that such a license should be obtained only if that is his *sole* purpose. Accordingly, I would have sub-section "(a)(1)" read as follows:

"(1) When phonorecords of a non-dramatic musical work have been ~~distributed~~ *sold* to the public under the authority of the copyright owner, any other person may, by complying with the provisions of this section, obtain a compulsory license to make and ~~distribute~~ *sell* phonorecords of the work. A person may obtain a compulsory license only if his *sole* purpose in making phonorecords is to ~~distribute~~ *sell* them to the public *through normal general commercial channels, without any restriction, and in no way connected with the sale of any machine or other device used to reproduce the phonorecords or the sounds recorded thereon.*

This change would make it clear that those who record musical works for the purpose of having the recordings used in connection with a background music service or the sale of reproducing devices are not entitled to a compulsory license.

Section 13

Sub-section "(1)" is intended to furnish an exemption with respect to performances in the private rooms of hotels. I think the following would accomplish that purpose better than the present language:

"(1) transmission by a hotel of a radio or television broadcast embodying a performance or exhibition of the work to the private guest rooms of the hotel by means of loudspeakers or other devices in such guest rooms, unless the person responsible for the transmission or the operator of the hotel alters or adds to the content of the material included in the broadcast or limits the choice of programs available to the occupants of such guest rooms."

Section 27

Sub-section "(a)" dealing with the effect of omission of notice refers to the omission from copies or phonorecords publicly distributed by authority of the copyright owner, and provides that such omission shall not invalidate the copyright in certain cases. I think the first sentence of the section should begin as follows:

"(a) EFFECT OF OMISSION ON COPYRIGHT.—The omission of the copyright notice prescribed by sections 24 and 25 from copies or phonorecords *published or* publicly distributed *in the United States* by authority of the copyright owner does not invalidate the copyright in a work if:'

Section 38

The third line of sub-section "(c)" contains the phrase: "damages for all infringements of any one work" which I suggest be changed to: "damages for all infringements *by one infringer* of any one *right in a particular* work."

Section 42

This section specifies the information to be furnished by the clerks of the Courts of the United States to the Register of Copyrights within one month after the filing of any action under Title 17. I think that in addition to the title, author and registration number involved in the action, the date of registration should be furnished and I would add to sub-section "(a)" the same sentence as appears as the last sentence of sub-section "(b)", so that the same sentence would appear in both sections. That sentence is:

"Upon receiving the notification the Register shall enter the pertinent information in the public records of the Copyright Office."

* * * * * * *

Sincerely,

HERMAN FINKELSTEIN,
General Counsel, ASCAP.

GENERAL ELECTRIC COMPANY

December 4, 1964.

There is little doubt that modernization of our Copyright Laws is needed. We agree with the Register's position that a half century of changes in technology and business relations has left the Copyright Laws inadequate in their application to present day conditions.

Thus far, the Register of Copyrights has published his recommendations for revision (dated July 1961), has prepared the Copyright Revision Bills, H.R. 11947 and S. 3008 which were introduced in

Congress on July 20, 1964, and is expected to resubmit these Bills to Congress with some changes in early 1965.

At the request of the Register, we are happy to submit a statement of our position with respect to the various provisions of the Copyright Revision Bill, H.R. 11947 and S. 3008. The General Electric Company is in the unusual position, because of the diversity of its business interests, of occupying the dual roles of creator as well as user of copyrighted works. Beyond the specific business interests of the Company, we recognize the importance of considering the public interest at large. In any revision effort, there will arise the important and necessary steps of balancing the needs of the author with those of the public. This is the vital role that faces Congress when it finally addresses itself to an enactment of a new Copyright Law. We submit our statements in the spirit of contributing to the successful enactment of this much needed legislation.

Briefly, the Company's position with respect to important substantive provisions of the Bill which are within its area of interests can be summarized as follows:

General Electric Position Statements
Copyright Law Revision

I.

Copyright duration of scientific and technological literary works should be limited to 5 years plus a renewal period of 20 years.

A scientific and technological literary work is any exposition or graphic representation of scientific and technological, theoretical or experimental, information resulting from research or development activities in a form primarily intended for the development and advancement of progress in science and technology.

Note: Only about 10% of *all* copyrighted works are presently being renewed by their owners for the second half of their 56 year term—thus coming into the public domain after 28 years. The renewal rate is considerably lower in the case of scientific and technological works since these are generally superseded by more advanced work within a few years after publication.

II.

An exemption should be provided for certain, common types of library services including reasonably limited photocopying.

Note: The American Library Association has expressed a need for a library exemption in order to continue properly its library functions. The General Electric Company endorses the As-

sociation's request that the principle of "fair use" be specifically incorporated into the Copyright Law toward providing a reasonable such exemption.

III.

The absence of an appropriate copyright notice from a substantial number of copies of a scientific and technological work should automatically constitute a dedication of such a work to the public domain.

Note: Under the Bill, enforcement of copyright against an innocent user without notice would be precluded *provided the innocent user first proves his innocence in court.* The presumption is established that *all* or *most* works (including scientific and technological works) are or may be copyrighted even if not so indicated. This presumption is incorrect—with respect to scientific and technological works—many of which flow through Industry and Government channels without copyright restrictions.

IV.

Copyright protection extended to computer programs should be specifically delimited in the light of the special character and problems of this art.

We suggest, subject to further evaluation, the following viewpoints as consistent with this premise:

a. Copyright may properly include literal reproduction of a copyrighted program.
b. Copyright should not preclude alternative application of the analytical concepts embodied in the program.
c. Storage of any copyrighted work in a computer or manipulations of such works within such computer should not constitute a copyright infringement of such work. Copyright infringement should be determined by the form and the use that is made of such work at the output of the computer.

V.

The making of a single copy or phonorecord of any copyrighted work by any individual for his private use should not constitute infringement under the Copyright Laws.

Note: This constitutes a reasonable extension of the exemptions that already attach to private uses of copyrighted works. Under the present law, one can freely perform or exhibit copyrighted works, in their entirety, in private.

Private copying is equally widely practised by the public and condoned by the copyright owners. The Bill is unreasonable in making such uses punishable by heavy fines and/or imprisonment.

VI.

The making of a *research* adaptation, in single copy form, of any copyrighted scientific and technological work by or for any individual for his private use should not constitute copyright infringement.

Research adaptations of copyrighted scientific and technological literary works shall include abstracts, digests, summaries, translations, excerpts.

Note: Industrial and Governmental uses require immediate availability of such adaptations for the effective conduct of research and development. In most cases—such individual uses have been shown to have negligible effect on the marketable value of any copyrights involved.

VII.

All further retransmission of copyrighted works to private establishments after such works have been received by way of a public broadcast shall not be considered an infringement of such works provided no unauthorized alteration or addition is made to the content of the material included in such received broadcast being communicated.

Note: This recognizes all special and community antenna facilities, whether by paid subscription or not—as an extension of the free right to receive a public broadcast in the home.

VIII.

The reception of a broadcast embodying a copyrighted work on any receiving apparatus of a kind commonly used in the private home should not be considered a copyright infringement unless the reception is a public reception and a direct admission fee is charged.

Note: The Bill provides an exemption only in the case of reception by a *single* receiving apparatus. This is unrealistic in an era of *multiple* set uses in the home and in social centers. Also, in its present form, the Bill provides an exemption only with respect to the performance and exhibition rights. The exemption should apply to *all* rights bearing on a reception in the home—particularly since such rights, by definition, are *not* mutually exclusive, but overlap one another.

IX.

"Useful articles" (such as clocks, lamps, ash trays, appliances . . .) sometimes incorporate copyrighted works. Where such "useful articles" are offered for sale to the public, the purchaser of such useful

articles should be permitted to display the articles in environmental type advertising where the articles are shown serving their normal utilitarian function.

Note: Absent a possible, though by no means certain application of the Fair Use principle, this type of use would constitute an infringement and necessitate the seeking of copyright clearances.

X.

A fair use exemption should be provided *specifically* for educational uses. This should include a reasonably limited privilege of photocopying.

Note: A large group of Educational Organizations have expressed a need for a specific educational exemption on the basis that the "fair use" principle embodied in the Bill does not recover the educational exemptions removed by the deletion of the "for profit" limitation which exists in the present law.

These summary statements are explained in greater detail in the attachment to this letter. Reference is made by number to the specific sections of these companion bills, and, to facilitate analysis, the summary statements are explained by:

A. indicating the effect of the Bill's provision.
B. identifying and explaining the position preferred by the General Electric Company, and then
C. recommending the specific language changes in the Bill for implementing this position.

Throughout the Bill we recognize the Register's efforts toward developing a proper balance between serving the public interest and encouraging creative authorship. We offer our comments and recommendations, as we said earlier, in the spirit of assisting the Register and Congress in achieving this proper balance. Although the fields of copyright are vast and expanding, the Company can speak with considerable knowledge in certain areas such as science and technology, home entertainment, information storage and retrieval, ... With respect to these areas, we recommend special treatment—which is not the least foreign to the evolution of our copyright laws. The Bill already distinguishes in its treatment of dramatic and non-dramatic works, between "works for hire" and "non-hired works," between phonorecords and other types of reproduction, ... We feel that an even stronger justification forms the basis for our recommendations.

We thank you for the opportunity of presenting the Company's position with respect to this urgently needed legislation.

Very truly yours,

H. R. MAYERS,
General Patent Counsel, General Electric Company.

Explanatory Material Relating to General Electric Position Statement

In the following, the Roman numerals relate to corresponding items in the General Electric Position Statement. The Section numerals refer to the corresponding Sections of the Copyright Revision Bill.

I. Sections 20-23--Duration of Copyright . . .

A. Effect of the Bill

These Sections provide that the *period* during which copyright owners are permitted to retain their exclusive rights in copyright be *increased uniformly* for all works. It is proposed that the present fixed maximum of 56 years (28 year term with a possible additional renewal of 28 years) be increased to a longer term of 75 years in the case of works for hire, or for the life of the author plus 50 years after his death in the case of non-hired works. This increase in the period of the author's exclusivity is not justified in the case of scientific and technological literary works as defined below under item C. This type of work is unique. Millions of such works are created each year—primarily by scientists and engineers, and not professional writer—and the volume is rising at an ever increasing rate. It is estimated that the volume of the world's technical literature is now doubling every 10 years. The value of this type of work lies in its scientific and technological information content—and not its literary style. Such works are generally superseded by more advanced work within a few years after publication. Any need for protection is for a short term—not a term approaching a hundred years or more. Thus, any protection beyond a relatively short period—becomes an unreasonable burden on the public. Actual experience shows that only about 10% of *all* original copyrights are renewed after the present, initial term of 28 years. The figure must be an insignificant fraction of this total in the case of scientific and technological works. This indicates that a longer full term of copyright protection is a small inducement to original creation and publication. The longer term only postpones the attainment of the public's need—freedom from all restrictions, licenses, title searches and cataloguing of copyright facts—with the work residing in the public domain.

B. Company Position

The Company would prefer that copyright duration in the case of scientific and technological works be limited to 5 years plus a renewal period of 20 years.

C. Recommended Changes to Sections 20 and 54

(a) Section 20(c), after "first", insert—

In the case of a scientific and technological work, the copyright endures for a term of 5 years from the year of first publication or creation, whichever shall first expire. The owner of such copyright may have the term extended for an additional 20 years upon application for such extension to the Copyright Office during the fifth year of copyright.

(b) Section 54—add the following definition:

A scientific and technological literary work is any exposition or graphic representation of scientific and technological theoretical or experimental information resulting from research or development activities in a forum primarily intended for the development and advancement of progress in service and technology.

II. Library Service Exemption

The American Library Association has expressed its needs for an exemption for library services, including photocopying—and, in this connection, has asked that the Fair Use principle be incorporated into the Law.

The General Electric Company supports this manner of reaffirming this important principle—and would be in favor of any further clarifying action which would establish the applicability and adequacy of this principle to satisfy the needs of the library services function.

III. Section 27—Omission of Copyright Notice

A. Effect of the Bill

Under the present law, a copyright owner is *induced*, under threat of loss of his copyright, to include a notice identifying himself as copyright owner and the date of commencement of his copyright term on every copy of his work. The public is thereby able to quickly and safely distinguish between the relatively few works that are still under copyright from the greater mass of works that are in the public domain. This mandatory notice facilitates rapid access to and availability of copies of published scientific and technological information, which is needed by Industry and the Government in the conduct of research and the making of related business decisions.

The Bill, on the other hand, for the first time provides that a copyright owner may omit any notice from his work for as long as *five years*—and then still be permitted to copyright his work. A user of an "unnoticed" work proceeds at his peril—for now he no longer can distinguish between a copyrighted and an uncopyrighted work. A published work, bearing no notice, may become copyrighted within 5 years—in which event his prior innocent use without notice must be

proven in court. This burden on the public—that an "unnoticed" work may become copyrighted—is unrealistic and unjustified in the field of science and technology where the greater mass of information is compiled, not by professional writers but by scientists and engineers without any though of copyright.

B. Company Position

The Company believes that the burden should be assumed by the author, at least in the field of scientific and technological works, to identify what works he wants restricted by copyright by proper notice as provided by the *present law*. Absent notice and without any further effort on the part of the public—and without need for litigation—the work should be treated as *free* for all uses, including copying and dissemination.

C. Recommended Changes to Sections 27 and 28

After Section 27(a)(2), add the following paragraph:

(b) However, in the case of scientific and technological works, the omission of the copyright notice from a substantial number of copies of such work shall constitute a dedication of such work to the public domain.

IV. Section 5—Computer Uses of Copyrighted Works

A. Effects of the Bill

The Bill extends copyright protection to computer programs without defining the nature and extent of this protection. Programs, as contrasted with other works, rely heavily on logic and mathematics for their implementation. This in itself justifies the spelling out of what shall constitute an infringement.

Provisions of the Bill can be interpreted as making mere entry of a copyrighted work into a computer an infringement of the "copying" right. Computers, however, are capable of duplicating or enhancing many human thought processes—such as reading, analyzing, searching, etc. If performed by a human, these processes do not constitute an infringement.

B. Company Position

The point at which the question of copyright infringement should be decided—is at the output, rather than the input to a computer. The extension of copyright protection to computer programs should be specificaly delimited in the Bill.

C. Recommended Changes to the Bill

As indicated in the Company's Position Statements, specific recommendations will be submitted upon completion of present studies.

V. Sections 5 and 6—Exclusive Rights . . . and . . . Limitations on Exclusive Rights . . .

A. Effect of the Bill

Under the existing law and the provisions of this Bill—the making of a single copy or a "substantial" extract of a copyrighted work by an individual for his private use constitutes an infringement. This type of infringement is almost never policed—and is accepted by copyright owners. Children copy song lyrics, scholars copy published papers, tape recording enthusiasts copy music broadcast over radio and TV—without significant effect on the market or value of the copyrighted work.

This type of use can be interpreted as being a crime, punishable by up to a $2,500 fine and/or 1 year imprisonment—or a civil wrong punishable by statutory damages of $250–$10,000.

B. Company Position

The Company would prefer to see this type of individual use for private purposes made a non-infringing use. Certainly such use does not justify the harsh civil and criminal remedies provided for in the Bill.

C. Recommended Changes to Section 5

Revise subparagraph (a)(1) to read:

(1) To reproduce the copyrighted work in copies or phonograph records other than by an individual for his private use.

VI. Sections 5, 54—Exclusive Right to Prepare Derivative Works

A. Effect of the Bill

Modern day research has an ever increasing need to quickly *adapt* problem-oriented compilations of previously published scientific and technological works for research applications. Such adaptations may take the form of translations, condensations, summaries, etc. Time does not permit the searching and securing of copyright clearances from all copyright owners. The right to make such derivations for private use—would appear to have negligible effect on the marketable value of the copyrights involved.

B. Company Position

The Company would prefer to exempt from copyright infringement any such *research adaptations* of scientific and technological works for private use.

C. Recommended Changes to Sections 5 and 54

Section 5(a)(2), after "work" insert:

other than research adaptations of any copyrighted scientific and technological work by or for an individual in single copy form for his private use.

Section 54, at the end of the definition of "derivative work" insert:

Research adaptations shall include abstracts, digests, summaries, translations and excerpts.

VII. Sections 5 and 13—Exclusive Right to Communicate a Broadcast by Means of any Device or Process

A. Effect of the Bill

The Bill would make the furnishing of a community antenna service for TV reception in the home an infringement. Community antenna TV already exists—operating some 1,000 stations and serving some 30,000,000 listeners. This type of operation is generally considered to be a mere extension of the home TV set—and except for one reported instance, has been deemed free of copyright restrictions or royalty obligations.

B. Company Position

All further communication of copyrighted works to private establishment after such works have been received by way of a public broadcast shall not be considered an infringement of such works provided no unauthorized alteration or addition is made to the content of the material included in such received broadcast being communicated.

C. Recommended Changes to Section 13

Insert the following new paragraph:

(3) Further communication of a broadcast to private establishments by means of any device or process provided no unauthorized alteration or addition is made to the content of the material included in the broadcast which is being communicated.

VIII. Sections 5, 13, 54—Limitations on Exclusive Right to Receive Broadcasts

A. Effect of the Bill

Section 13(2) can be interpreted as making the reception of a TV broadcast on more than one set an infringement. This obviously is not intended in an era of multiple set uses in the home and in social centers. The language also fails to recognize the practice of appliance dealers of displaying many sets operating simultaneously in their showrooms.

Under the *present law*, home reception of broadcasts is not considered to be a copyright infringement of any copyrighted broadcast work. However, *the Bill's* copyright exemption for broadcast reception is incomplete. This arises from the fact that the *exclusive rights*, as defined by the Bill, are made to *overlap one another*—whereas the exempting language is directed only to performances or exhibits and not to all the rights in copyright. Thus the definition of copying, which can be interpreted to read on a home TV reception, will still make home TV reception an infringement. This, obviously, was not intended.

B. Company Position

The reception of a broadcast embodying a copyrighted work on any receiving apparatus of a kind commonly used in the private home should not be considered a copyright infringement unless the reception is a public reception and a direct admission fee is charged.

C. Recommended Changes to Sections 13, 5, and 54

Section 13, cancel "the exclusive right to perform or exhibit"
Section 13(2), delete "a single"
Section 5(a)(1), replace with—

(1) To make copies or phonorecords of copyrighted works.

Section 54, in definition of "copies" cancel "or reproduced"; substitute "visually (including braille) or orally" for "reproduced or otherwise communicated".

IX. Section 9—Exclusive Rights in Exhibiting Applied Art

A. Effect of the Bill

Copyrighted works can be incorporated into useful articles, such as bookends, clocks, lamps, candlesticks, ash trays.... The Bill permits the making, distribution or exhibition of pictures or photographs of such "useful articles" in connection with advertisements or commentaries relating to the distribution or exhibition of *such* articles.

B. Company Position

Where such "useful articles" are offered for sale to the public, the purchaser of such useful articles should also be permitted to display the articles in environmental type advertising for other products where the articles are shown serving their normal utilitarian function.

C. Recommended Changes:

Section 9(a)(2), after "such articles," insert:

or other products where such articles serve to complete a natural environment setting for displaying such other products.

X. Ad Hoc Committee of Educational Organizations on Copyright Law Revision

This organization, representing many educational institutions and organizations, has expressed its need for a specific exemption for *educational services.* Their position is that the Fair Use principle, as reaffirmed in the Bill, does not recover the educational rights which, for the first time, are being taken away by other provisions of the Bill.

The Company supports the general position of the educators that a specific educational service exemption be provided in the law to avoid any uncertainty and inadequacy that might arise in the application of a general Fair Use principle.

PETER GRAY

December 15, 1964.

I am deeply concerned of certain of the items on H.R. 11947 dealing with the free reproduction of copyright material. As the author of seven books I have considerable experience.

In the course, for example, of preparing a small book on basic microtechnique I paid out the sum of eleven hundred dollars to various artists for illustrations. I was then asked by individual teaching in another university if I had any objections to his taking these illustrations and blowing them up to decorate his laboratory even though he had not the slightest intention of purchasing the book for class use. I refused permission. As I understand it, I would have received no protection against this sort of piracy under the new act.

I trust that you will use your best efforts to ensure that those of us who spend our money in preparation of books might have the opportunity of enjoying the meager profits that are at present possible.

Sincerely,

PETER GRAY,
Andrey Avinoff Professor of Biology,
University of Pittsburgh.

DAVID GROSSBERG

December 4, 1964.

Our attention has been called to . . . [section 6] of the proposed revision of the Copyright Law relating to fair use. The definition set forth might be interpreted as permitting public performance of segments of a work by schools, without payment therefor, even though the schools are not prohibited from charging admission.

We understand that parties interested in this provision have already met with you concerning this. We urge you to adopt the suggestions of Mr. Louis Aborn to either delete the definition of "fair use" and rely on the common law or to adopt a proviso stating that scholarship use is to be limited to classroom performances, without admission charge.

Very truly yours,

DAVID GROSSBERG.

ARTHUR C. HARDY

December 15, 1964.

I am writing to express opposition to any legislation whose effect would be to weaken the protection now provided under the Copyright law. It is my understanding that a committee convoked by the National Education Association has endorsed H.R. 11947. Legislation of this sort would literally kill the goose that lays the golden eggs.

I happen to be an author (with F. H. Perrin) of "The Principles of Optics." Work on this volume began in the fall of 1929, and the book was finally released in 1932. During the three years that it was in preparation, my secretary, whose salary I personally paid, spent a very large fraction of her time taking dictation and transcribing various drafts of the manuscript. Indeed, the load was so great that, during part of the time, I engaged a second secretary who worked exclusively on the manuscript. Partly because of this investment in the preparation of the manuscript, the volume is still selling, without revision, after thirty-two years. The total out-of-pocket expenses incurred in the preparation of the manuscript have never been figured, but I suspect that by now they have been defrayed and that the net amount (after taxes) received by the authors in royalties has begun to compensate them at a rate considerably below the (current) legal minimum wage standards.

Permission to use portions of "The Principles of Optics," especially permission to reproduce certain figures, has frequently been sought and invariably granted. Indeed, in the case of one figure whose reproduction is a bit tricky, the authors have supplied gratis photographic reproductions from the original negatives.

I realize that there are more users of textbooks than authors. Politically, the users represent more votes than the authors. It is to be hoped that someone in Government will be wise enough to resist the pressure from the user groups, who would, unwittingly perhaps, discourage potential authors by removing even the slim hope of financial reward.

Very truly yours,

ARTHUR C. HARDY.

J. O. HEDRICH

December 14, 1964.

It has just been called to my attention that the 1965 Congress will be considering the revision of the Copyright Law to allow for "fair use" of copyrighted materials by nonprofit organizations.

I must object strenuously!

We are a commercial business enterprise in the business of making photographs. We make money when people use our photographs. If nonprofit groups, of which there are thousands in the United States, are to be allowed free use of our material, without any sort of payment, then I must ask that the Congress also enact the least legislation necessary to require typewriter manufacturers to supply them at no charge—and that gymnasium equipment manufacturers supply their equipment to schools at no charge—and that General Motors must sell their school busses at no charge!

Although we may not incur any immediate or specific expense in having someone copy our photographs for use, the fact that they are not adding to the photographic industry income by purchasing a photograph when it is needed, hurts the entire industry and hurts our firm as a part of the industry. The Copyright Law is the only protection we have!

Sincerely,

J. O. HEDRICH.

HELEN D. HILL

December 27, 1964.

Since I am a believer in private property rights I am opposed to the proposed change in copyright laws. These changes, I feel, will be unjust to both authors and publishers.

A government that provides for the lazy stimulates laziness. A government that permits industry to make returns for thrift by payment for saving and investment encourages effort. The proposed law, by depriving authors of returns for their efforts, will not stimulate creativity. Instead, it will encourage sloth on the part of a group most well equipped to provide information and inspiration.

Authors should not be called upon to contribute their productive efforts without suitable compensation. We have many libraries all over this country equipped to provide without cost access to the products of authors who have given their energy to the writing of books instead of indulging themselves in unproductive pasttimes.

As an author, even though in a very limited way, I resent changes in copyright laws that will deprive me of the small reward at present coming to me in the form of royalties.

Very truly yours.

(Mrs.) Helen D. Hill.

International Brotherhood of Electrical Workers

December 28, 1964.

This office has just been informed of a piece of legislation, namely HR-11947, which was submitted to the last Congress but failed to receive consideration.

It is our understanding that the above bill will be resubmitted to the forthcoming Congress shortly after the first of the year. We of the International Brotherhood of Electrical Workers would like to go on record as opposing this piece of legislation in the strongest manner possible. We are very much concerned and interested in that in our opinion, the passing of this legislation could result in very serious harm to our several hundreds of training programs throughout this nation, involving the vast majority of our some 800 thousand members. I refer specifically to our apprenticeship and skill improvement training program for which we have expended many thousands of dollars in the development of highly sophisticated related instructional materials, training aids, etc., most of which have been copyrighted in order that we might prohibit the improper use of these materials by unqualified personnel in their misguided efforts to bypass our long proven and accepted methods of training highly skilled workers.

We would be extremely grateful if you could see fit to make our feelings known to those members of the Congress who have the responsibility for this program.

Your cooperation and assistance is very much appreciated.

Sincerely yours,

Gordon M. Freeman,
International President, I.B.E.W.

Richard B. Jablow

November 9, 1964.

I have given considerable thought to the means by which one could remedy what I consider to be two of the defects in the proposed Copyright Act.

As you know, I have been concerned, among other things, with the right of an employer and an employee to effectively agree that a work made for hire would not be treated as such for reversion and term pur-

poses pursuant to the Copyright Act. To this end I suggest that certain language changes in Sections 16 and 20 be made. Enclosed are my proposed changes.

I am also concerned with the definition of the word "publicly" in Section 5. Enclosed herewith is my proposed revision of Section 5 in that connection.

As I have previously stated, these are not the only areas in which I feel some changes should be made in the proposed Act. These are, however, among the most important.

Cordially,

RICHARD B. JABLOW.

[ENCLOSURE].

Section 5(b)(3) (B) and (C) should be amended as follows:

(B) to broadcast a performance or exhibition of the work to the public, or to any gathering of persons other than a normal circle of a family and its social acquaintances, or transmit any performance or exhibition otherwise than as a common carrier.

(C) to communicate to a substantial number of other persons a performance or exhibition of the work by means of any device or process.

Section 16 should be amended in the following respects:

Paragraph (a) should begin as follows:

"(a) Conditions for termination.—except as is otherwise provided in subparagraph (a)(3) hereof, a transfer by the author, etc."

There should be added to Section 16(a) a new subparagraph 3 which should read as follows:

"(3) The provisions of this Section 16 shall not apply in the case of a work made for hire except where the parties expressly agree that the provisions of this Section 16 shall so apply to any work made for hire."

Section 20(c) should be changed by making an addition to the first sentence thereof so that it would then read as follows:

"(c) ANONYMOUS WORKS, PSEUDONYMOUS WORKS AND WORKS MADE FOR HIRE.—In the case of Anonymous work, pseudonymous works and works made for hire, the Copyright endures for a term of seventy-five years from the year of its publication, or a term of one hundred years from the year of its creation, whichever expires first; provided, however, that if the parties so agree in the case of any work made for hire, the term thereof shall consist of the life of the author and fifty years after his death."

JOSEPH GRAY JACKSON

August 24, 1964.

Re: *H.R. 11947 for General Revision of the Copyright Law*

In reading over this bill a few very small points have occurred to me and I am going to note them as follows:

1. Regarding Section 4, what are the rights of a state of the United States or a division of a state such as a municipality in respect to obtaining a U.S. copyright?

2. As to Section 5(a)(5), is it not possible that a literary work such as a book (poem) might be exhibited on TV and should not rights of this sort be extended to a literary work?

3. When I came to Section 5 (b)(3)(A) and saw that certain rights were given to the normal circle of a family and its social acquaintances, I expected to find a definition of family under Section 54. Nothing of this sort is included. Would not a single woman or single man living for example in an apartment have a right to give a social function under the section in question, and would such a function be considered to be the normal circle of a family?

4. Section 20(b). I suppose it is intentional that the copyright endures for the life of the second of the authors to die, but I am wondering if this is rational where there may be a number of different authors.

5. Section 20(e) . . . cancel "any" second occurrence.

6. Section 47 seems to me to require some study. The right of the Register of Copyrights to establish regulations is limited to administration. This is causing some problems in the Patent Office. The rights of the Commissioner of Patents to issue regulations, as I remember it, relate to the regulation of practice before the Patent Office, and there may be some question as to whether this would include something like the number of species which you could include in a patent application. There are a lot of gaps in the statute which I would think the Register of Copyrights should be entitled to fill by regulations.

One example is the decision that computer programs are registerable. I would suggest, therefore, that besides administration the regulations might apply to the mission of the Register in carrying out his responsibilities under the Act independently of mere administration.

7. Section 54. The definition of a state should have some attention. Puerto Rico is a problem. In the Act it is intended by Congress to be something between a territory and an independent country. The First Circuit which has jurisdiction of appeals from Puerto Rico has refused to decide whether Puerto Rico is a state and I understand privately they have told one of the judges from the Third Circuit

that they never intend to decide this question because it is political dynamite. Therefore, the definition of a state should include commonwealths or mention Puerto Rico. Why is it necessary that the act be extended to territories by an act of Congress? Why should not the act state where it applies?

8. Section 54—Definitions. As to the definition of the United States, the United States includes the organized territories. Does this include Puerto Rico which is a commonwealth? Does it include the trust territories in the Pacific? Does it include territory administered by the Armed Services of the United States in the Pacific? What are the rights as to copyright in respect to a ship flying the American flag? Should there not be a definition indicating that the intention is to extend as far as the Federal jurisdiction extends, similar to the statement in the opening clause of the Lanham Trademark Act?

9. In the transitional provisions, Section 2 . . . correct the spelling of "except".

* * * * * * *

Very sincerely,

JOSEPH GRAY JACKSON.

LEE H. JOHNSON

January 11, 1965.

It has come to my attention that the National Education Association is demanding the inclusion of a clause providing for free use of copyrighted materials in Bill H.R. 11947, which I understand is to be introduced in the forthcoming Congress.

I wish to go on record as opposing the point of view of the National Education Association and in opposing the free use of copyrighted materials. In my opinion, this will take away a tremendous incentive from authors to create and publish.

No other major products in this country are distributed free of charge. I see no reason why individual publications or productions should be an exception.

Most sincerely,

LEE H. JOHNSON,
Dean, School of Engineering,
Tulane University.

LEON KELLMAN

September 15, 1964.

I would like to take this means to comment upon several portions of the Bill, S. 3008.

One is the matter of the proposed fee for registration of claim to renewal, which is proposed to be $6.

As I have previously stated, this amount would be a hardship upon many songwriters and/or their families. These writers have not put out a substantial quantity of hits, but have written a number of compositions which cumulatively continue to earn moderate income. In such a case, a fee of $6 to renew a song, multiplied by the total number of songs, would be a genuine hardship. I urge that the fee be kept at the present rate of $2.

A further point is the following: Section 14(b), provides that in the case of a work made for hire the employer (or other person for whom the work was prepared) is the author unless the parties expressly agree otherwise. I would assume it is the intention of this section that the parties by agreement can provide that the work shall be deemed to be, for all purposes, a work *not* for hire and that the individual creator is vested with all authorship benefits. However, it appears this may not be the case under the wording of the bill. Section 16, (a) provides reversion "in the case of any work other than a work made for hire." The meaning of this seems to be that even though the parties, under Section 14(b) have agreed that a work was not prepared for hire and/or that the employer is not to be considered the author, nevertheless reversion can in no event come into effect with respect to a work defined in Sec. 54 as one made for hire.

The same is true of duration. In Section 23, copyright endures for 75 or 100 years, in the case of a work made for hire. Therefore, even though the parties agree that a work shall not be deemed to be made for hire and/or that the creator shall retain the status of author, the "for hire" period will prevail if the work is one made for hire within the definition of Section 54.

I suggest that the Bill be clarified to assure that when an employer and employee agree that a work is not to be considered made for hire, such agreement controls for all purposes of the statute.

One manner in which this could be done, I believe, would be to insert the words "unless the parties have agreed otherwise" on the second line of 16(a), after the word "hire" and also in the second line of text of Section 20(c), after the word "hire."

An alternative suggestion would be: In Section 14(b) . . . the period at the end of that subdivision to become a comma, followed by the words "in which event such agreement shall govern for all purposes of this title."

A further point which concerns me greatly is the matter of the wording of the present compulsory license division in the present Bill. This refers to "phonorecords." The intent of the statute, and all parties, of the diverse viewpoints, participating in the panels and Bar Association meetings, have taken for granted, that the compulsory license is concerned only with phonograph records as the term is generally understood. However, it would seem that the compulsory

license provisions in the Bill (Sec. 11), read in conjunction with the broad definition of "phonorecords" in Sec. 54, could be construed to permit any form of sound recording to be produced under the compulsory license, provided any form of recording whatsoever has been distributed to the public with consent of the copyright owner. I do not believe that the last sentence of subdivision of Sec. 11 . . . goes sufficiently far in this respect. For example, a company which produces recordings of musical compositions designed solely for use by radio stations or in restaurants and similar places where music is publicly performed (and some places utilize this method instead of wired music, for various reasons) might be deemed to have, as its purpose, the making of phonorecords for distribution to the "public." If a company manufactures such phonorecords and fills orders received from anyone who desires such recordings, might not this be a distribution to the "public"?

Even if, as has been suggested, the word "sale" is substituted for "distribute" in subdivision (a), (i), such substitution might not clearly and definitely cure the danger I fear.

To eliminate this danger, I would suggest that the statute contain a definition similar to that contained in license agreements and performing artists' agreements concerning phonograph records. One way of applying it to the Bill would be as follows: After "phonorecords" . . . [in] Sec. 11, insert a comma, and the words "designed primarily for sale to persons who purchase them for private use, as in homes, particularly as distinguished from sound recordings designed for utilization for public performance," . . . The last sentence of subdivision (a) . . . could then be deleted and the word "such" be inserted before "phonorecords" wherever this word appears in Sec. 11 . . .

A further comment is that I am most disturbed with respect to the definition, in Sec. 54 of a "work made for hire." In my opinion, a work made for hire is just that—a work created by an author who was genuinely employed in whole or in part for that purpose.

While an author may, by agreement, give anyone else all rights in the work to the extent such rights subsist, an agreement between parties does not establish a work made for hire.

Further, in the case of a work made within the scope of an author's employment, the only rights which should be covered by the employment relationship are the rights which the employer requires on the basis of having employed thet author to create the work. He did not hire the author for any other purpose and should not acquire any other rights. The expression, "on special order or commission" is a broad one and, as has been stated at panels and meetings, can extend to situations other than employment. The mere giving of an advance by a publisher or producer of one sort or another can be

deemed to constitute a special order or commission. You will find, if this provision becomes law, that many agreements in situations which are not employment situations at present, will contain language to the effect that the work was prepared on special order and/or commission and shall be considered work made for hire.

I recommend that the last sentence of Sec. 54 end with the word "employment." Other situations can be taken care of by special agreement and its publishers of compilations, etc., who claim to require rights on an employment situation can acquire them by assignment.

Sincerely,

LEON KELLMAN.

M. SLADE KENDRICK

December 16, 1964.

As an author, as well as a citizen, I was shocked to read the other day a copy of the "fair use" and manufacturers' clauses in the Copyright Bill, which I understand will be introduced in the next session of Congress.

Never in more than forty years of teaching do I recall any emphasis on education even approaching the immense and ever-increasing emphasis now placed on that objective. What was once limited to state and local concern has become national. But if more and more children, young persons, and aspiring adults, are to be educated, and on a higher level than in the past, the supply of books will have to be increased correspondingly and most of them will have to be new books. This means that they will have to be written and published.

The royalties of the authors as incentives to writing, and the costs of manufacturing to publishers, thus take on large and growing importance. Any diminution of the one and increase of the other are blocks to the attainment of this universally recognized national objective. The proposal that legislation be passed to serve these purposes is nothing short of stupid.

Sincerely,

M. SLADE KENDRICK,
Professor Emeritus of Economics and Public Finance,
Cornell University.

BERNARD J. KOHLBRENNER

December 14, 1964.

I am writing in reference to the proposed revisions in the current Copyright law. As I view both the so-called "fair use" clause and the manufacturing clause, I think both would work undue hardship on

authors and publishers. I speak as a writer in a rather restricted area of higher education. I am convinced that if these features of the proposed revision go into effect, authors and publishers will suffer unnecessarily. I hope, therefore, that some changes will be possible relative to both sections so that there will be strong incentive for both writers and their publishers to further their work of making available at the lowest cost compatible with good production books for the use of students in higher education, as well as all others.

Sincerely yours,

BERNARD J. KOHLBRENNER,
Professor of Education,
University of Notre Dame.

HERMAN E. KROOSS

December 14, 1964.

I would like to go on record as being opposed to the "fair use" clause in H.R. 11947, a bill to revise the copyrights laws.

As an author of books and as the holder of the copyright on a learned journal I do not think it is necessary to grant a blanket exemption from the procedure of obtaining permission to reprint. It seems to me that an educational institution that has a bonafide reason for reprint can easily obtain permission. On the other hand, a blanket exemption subjects the donor to a variety of abuses.

Sincerely,

HERMAN E. KROOSS,
Graduate School of Business Administration,
New York University.

LOU LABRANT

January 19, 1965.

I understand that a major revision of our copyright law is soon to be introduced in Congress. May I call your attention to one matter which seems to threaten writers. (I agree, of course, that we need a revision of many aspects of our present law.)

Permission to reproduce without compensation excerpts or portions of books, simply on the identification of the source, would mean that writers of text books would realize practically nothing from their efforts since many schools could reproduce such parts of books as they needed with expenditure for one copy. I have, for example, spent much time over a period of ten years, writing and editing a series of texts for high school English. Royalties for the first two years were required to pay for permissions to quote and for editorial and secre-

tarial help. Obviously, if a few office copies per school were all that would be sold the writer would not only work for nothing but would be seriously at a loss financially. I cannot believe textbook writers would continue for the pure joy of writing.

Sincerely yours,

LOU LABRANT.

J. HARRY LABRUM

September 8, 1964.

Sometime ago I wrote to express my concern about the restrictions proposed in new copyright legislation which would drastically curtail the use of educational materials by teachers in the classroom and by those who teach through the medium of non-profit broadcasting. I have a copy of Senate Bill 3008 which deepens my concern.

There is no clear definition of "fair use" for educational uses. The present reading of the Bill leads to uncertainty in interpretation which, with the heavy penalties for violations, will impose restrictions which, in my opinion, are unfair to teachers and the children they teach.

I urge the inclusion of a clearly stated educational exemption for teachers and educational broadcasters for non-profit instructional uses of educational materials.

The House Report on the Copyright Bill of 1909 stated that copyrights were to be given "not primarily for the benefit of the author, but primarily for the benefit of the public".

In my opinion, the present bill is in conflict with a paramount public interest—the education of America's children.

Sincerely,

J. HARRY LABRUM,
President, Board of Public Education,
School District of Philadelphia.

RICHARD S. LAZARUS

December 30, 1964.

As the author of four University level books in my field of research specialization, I want to add my voice to those who oppose the so-called "fair use" clause in Title 17 of the proposed revision of the Copyright Law, H.R. 11947. The authors of scholarly works and textbooks would lose their traditional protection of the copyright laws, protection which has encouraged commercial publishers as well as University presses to print these works. It has also stimulated academic people

to write the very materials which the National Educational Association desires to be made available to educational organizations. Aside from the damage that would be done to the academic writer, from the national standpoint, one major incentive for writing fine textbooks would be lost because of the economic damage caused by the spread of privilege to reproduce these books without copyright protection. This seems not only designed to benefit one group at the expense of another, but to be damaging to the high social values of creativity and the effort to disseminate learning by publishing.

As a professor, I would certainly wish to see educational endeavors strengthened in this country. However, this method (the "fair use" feature of the proposed copyright law) seems to me to be a most questionable one. Good education must be paid for, and anything that comes cheap is ultimately apt to be cheap in quality. At a time when we have moved increasingly toward the economic protection of artists, composers and performers in recognition of their important role in the entertainment industry, it seems especially destructive and unwarranted to strip away such protection from the author of educational books in the vain hope that this would be beneficial to national educational interests.

I hope that this unfair and dangerous clause will be stricken from the bill.

Sincerely yours,

RICHARD S. LAZARUS,
Professor of Psychology,
University of California, Berkeley.

JAMES MICHAEL LEE

December 21, 1964.

As a professional educator, and also as an author, I would like to express my opinion concerning the future introduction of a bill for copyrighting materials. It is my opinion, probably more as an educator than as an author, that that section of the bill which provides so that non-dramatic copyright works may be produced virtually at will for non-commercial purposes is quite detrimental to the scholarly work world in general. Indeed, it introduces somewhat of a similar situation to Russian pirating of American copyright books, the difference here being that the Russians are now replaced by non-commercial institutions.

I assume that as Register of Copyrights you are interested in doing all in your power to ensure that the highest quality books and other materials are produced. It is my opinion that the section of Copyright

Law noted above would do irreparable harm to the quality of textbooks, monographs, and other materials, and thereby cripple the educational standards which America is trying so hard to raise.

* * * * * * *

Very truly yours,

JAMES MICHAEL LEE, *Ed. D.*,
Assistant Professor of Education,
University of Notre Dame.

BRENDAN A. MAHER

December 22, 1964.

In reference to the imminent revision of the Copyright law per bill H.R. 11947, I would like to direct your attention to the enclosed . . . [letter] which represents my views. This letter appeared in the December 27, 1963, issue of SCIENCE magazine, and was written in reply to a prior letter from Hayward Cirker, president of Dover Publications, on the same topic.

Very truly yours,

BRENDAN A. MAHER,
Professor of Psychology,
University of Wisconsin.

[Enclosed Letter]

Many readers of *Science* are authors, working under the limitations of existing copyright law and at a disadvantage in protecting their investment as compared with their neighbors who have spent time developing real estate, grocery stores, or bowling alleys. They may well prefer supporting any move to extend copyright protection to joining Cirker in opposing it.

Cirker points out that books may be sold more cheaply if authors are deprived of their royalties at the earliest possible date. He is correct. What is surprising is that he fails to carry this argument to its logical conclusion by proposing that publishers, printers, bookbinders, and booksellers join the author in this act of abnegation, thereby providing the public with books at no cost at all.

Behind this thesis, and behind copyright law in general, is the interesting assumption that, after a certain time, the public has a "right" to benefit from an author's labor without paying him for it. An extension of the copyright period beyond the current 56 years is thus seen, by Cirker at least, as an instance of giving "public property to private interests." What should be made clear is that present copyright law gives away private property to the public in a manner that

would provoke great uproar if it were applied in the field of real estate and other areas of the business world. To argue that the 56-year protection of the law covers the lifetime of most authors is absurd. If writing is to be treated like any other kind of labor, then its fruits should be secured to the writer and his estate in the same way that a title deed to his house is secured.

We are asked to believe, however, that the availability of books is of such vital public interest that the property rights of authors must be limited for the common good. Here again it is difficult to see why this principle is not even more applicable in other fields—to such commodities, say, as food, medical care, housing. The availability of these commodities at low cost is surely more crucial to the general welfare than the production of cheaper books. While it may be flattering to conclude that the written word takes primacy over the necessities of life, it is a little unrealistic.

But even if books *were* more important than bread, we move into an Alice-in-Wonderland kind of logic when we maintain that the more valuable something is to society, the less right there is for the man who produces it to receive his reward.

Does the royalty-rate factor seriously reduce the reading resources of the man in the street? British practice, as Cirker points out, provides much longer copyright protection for a writer—his lifetime plus 50 years. Yet, if some recent reports are to be believed, more people read more books in Britain than in the United States, and they do so within the framework of a lower standard of living.

The "censorship" issue is utterly misleading, and mention of the *Mein Kampf* affair irrelevant. How would Cirker resolve a problem of that kind? By unlimited pirating of foreign works in "the national interest," perhaps? Any author can prevent the public from knowing what he is thinking by not writing a book in the first place; or, having written it, by withholding the manuscript from publication. Curtailing copyright will not affect the tendency of governments, on both sides of the Atlantic, to keep some of their documents from the public eye.

Cirker has confused two issues, copyright and royalties. There is no reason why authors should not retain their right to royalties after copyright has expired. Copyright is concerned with the right to copy material. It is perfectly possible to construct copyright laws that provide for general permission to republish a book after a certain period of time has elapsed but that require anyone doing so to pay royalties at some statutory rate to the author or his estate. Why not? The reprinter of books in the public domain is already free of many of the risks taken by the original publisher. He is not investing in an unknown author; he can find out what the sales have been over the

years and plan his printing with a smaller margin of error. It is not unreasonable to demand that he pay the writers who make his own profits possible.

BRENDAN A. MAHER.

Center for Research in Personality,
Harvard University,
Cambridge, Massachusetts

GEORGE G. MALLINSON

January 12, 1965.

It has come to my attention during the past few weeks that certain changes are contemplated in the Copyright Bill. It seems to me that certain of these changes would result in the destruction of benefits of copyright protection and also would make it difficult for publishers to produce textbooks on a competitive basis. I shall try to be specific:

1. It does not seem to me that appropriate safeguards are provided if educational groups are given complete privilege for reproducing *entire* documents, even if only one copy is reproduced. I am aware that reproduction methods at the present time are more expensive than original materials; nevertheless, technological breakthroughs might make it possible for all educational libraries to obtain single copies without any return to the publisher.
   As an editor of a journal I certainly have no objection to free use of the materials and in almost any quantity. But, when documents represent extensive personal labor, there should be some limits to this privilege.
2. The manufacturing clause seems to me to be somewhat antiquated. I am well aware that in many cases it is almost impossible to obtain services of American printers because of press of other business. Thus, restrictions in which copyright privileges are lost because of manufacture out of the United States seems rather difficult to defend.

Obviously, as an educator, I am more than pleased to disseminate information in so far as it may be possible and on a free basis. However, the connotation of "a free basis" should respect the rights of those who labor to produce quality materials. I realize that this statement may not have much impact considering the National Education Association takes an opposite view.

However, as a member of that Association, I wholeheartedly and unequivocally reject any viewpoints that suggest that the Association speaks for me, because it does not. I have reviewed many of the recent publications of the NEA and fail to find that the membership has been pooled to determine its views. Thus I am convinced that a few persons "at the top" have attempted to speak in the name of those who may not choose to be spoken for.

Very truly yours,

GEORGE G. MALLINSON,
Dean, School of Graduate Studies,
Western Michigan University.

HAROLD MATSON COMPANY, INC.

December 16, 1964.

As literary agents we submit to you herewith our expression of opposition to any enlargement of the doctrine of fair use as was evidently proposed in Section 6 of the Copyright Bill (HR 11947) introduced in the last session of Congress. In anticipation of such a provision's being included in a Copyright Bill being introduced in the next session of Congress, we respectfully submit that that or a similar provision could permit wide and uncontrollable free use of dramatic works in areas which have been a major source of revenue for authors and composers of general works and practically the only source of revenue for older works and those especially prepared for the educational market, and thus result in hardship for the authors and composers so affected.

We propose in the event such a provision is included in the new Copyright Bill that the following qualification thereto be added:

"Nothing herein contained, in this Section 6 shall authorize the performance of a dramatic work or a part thereof except by instructors or pupils in the classroom in the course of face to face teaching activities."

Sincerely yours,

HAROLD MATSON.

H. B. MAYNARD

December 11, 1964.

I would like to express strongly my opposition to the "fair use" clause in the proposed new copyright bill H.R. 11947.

As an author of management and technical books and articles, I have seen my work copied shamelessly by many people, even under our present copyright law. In my opinion, the "fair use" clause would increase the unfair copying of material to an extent that would make it completely unprofitable for the writers of books for somewhat limited audiences to undertake the hard work and effort necessary to produce a serious piece of writing.

It must be recognized that our managerial and technical know-how has made our country the envy of the civilized world. If the developers of new knowledge are discouraged from sharing this knowledge with others through writings from which they may expect to receive modest royalties, it will have a serious effect on our rate of progress as a nation in the future.

I further feel that the manufacturing clause in the proposed new copyright bill is an unwise provision and I urge its deletion. The book publishers are not asking for it for their protection, as I understand it. The clause would not benefit them, but only harmfully affect serious American writers who, because of a limited market, find

the only practical way of getting their work published is to have it done abroad where small quantity printing is usually less expensive. To deprive them of copyright protection under these circumstances seems patently unfair.

Very truly yours,

H. B. MAYNARD,
President, Maynard Research Council, Inc.

ARCH A. MERCEY

September 16, 1964.

A belated thanks for your sending me a copy of the proposed copyright revision bill. Certainly a revision is long overdue.

I hope, however, that by the time any revision legislation wends its way through Congress that there will be some protection against Government officials placing a copyright embargo on their literary production. The taxpayers take it on the chin quite enough without seeing some unjust enrichment on the part of people in and out of the Government who profit by the exclusive use of what should be public property.

This question is by no means a simple one and I sincerely hope it gets the consideration and public airing it deserves when the appropriate time comes.

Thanks for thinking of me and in sending the bill.

Sincerely,

ARCH A. MERCEY,
Vice President, Merkle Press, Inc.

NEAL E. MILLER

January 11, 1965.

As an author who has given permission to have a good deal of his work reproduced, I am opposed to the so-called "fair use" clause which would allow educational and other non-profit institutions or organizations to copy my publications without permission.

The royalty, when one collects it, is a very small compensation for the amount of work that goes into most publications. I would be glad to donate this to education, provided the contractors who build schools and the oil companies who provide fuel, would be willing to do this on a non-profit basis. However, as long as other people are going to be paid for the work for education, I believe that authors ought to be paid, or at least have the option of deciding whether to be generous and let their material be copied free.

Finally, I am opposed to putting a rider on the copyright bill making it necessary for all the manufacturing to be done in this country

in order to get a copyright. If certain aspects of the manufacturing, such as the typesetting of mathematical formulae and special material that requires handsetting, can be done more cheaply elsewhere, let's take advantage of it.

Sincerely,

NEAL E. MILLER,
Department of Psychology,
Yale University.

JOSEPH MORGAN

December 14, 1964.

I am very much concerned about the "fair use" clause in the new Copyright Bill which is to be introduced in the next session of Congress. As an author of technical books in my field I now feel safe from copyright encroachments on my marketable works. If free copying is established in our country it appears to me it would not only virtually destroy the benefits of copyright protection but it would also then follow that our fundamental rights, as authors, to earn our just returns, would be in large measure removed.

I would also urge against passage of the "manufacturing clause" since this would tend to increase the cost per copy of technical books and also tend to make the publication of many books of limited circulation impossible.

I trust that these important matters will be looked upon from the view of the authors who must have their rights protected if they are to continue to produce works that are beneficial to mankind and to our country.

Sincerely yours,

JOSEPH MORGAN,
Chairman, Department of Physics,
Texas Christian University.

MOTION PICTURE ASSOCIATION OF AMERICA, INC. COPYRIGHT COMMITTEE

January 26, 1965.

Re: *Some views of U.S. producers and distributors of motion pictures as to copyright revision proposals in the McClellan-Cellar-St. Onge companion bills (S. 3008, H.R. 11947, and H.R. 12354, 88th Cong.) and proposed new legislation to be introduced in the 89th Congress.*

On March 2, 1962, the undersigned Copyright Committee of the Motion Picture Association of America, Inc. submitted to you its written views indicating the position of motion picture producers and dis-

tributors on the recommendations made by you in 1961 to the Congress for a general revision of the Federal statutory copyright system in effect since 1909.

From time to time thereafter, as discussion and consideration developed on various major segments of a proposed new copyright system, various individuals from our industry have made clear the views of our producers and distributors on certain important aspects. Such was done at your Panel meetings in Washington and elsewhere, in informal conversations and meetings with you, and in published articles as well as in bar association and other symposia on copyright. At the meeting of American Bar Association Committee 304 on Program for General Copyright Revision, as well as your Panel meeting, during the week preceding the annual meeting of such Association in New York last August, such views were again expressed on the above revision legislation drafted by your office, and introduced last July in the 88th Congress.

We had felt that you were well aware of our views in general, as reflected from all these sources, and especially of the major importance and significance we have attached to certain particular provisions, the resolution of which we have considered of vital consequence to our industry if there were to be a general copyright overhauling. The particular provisions, as you know, are: (a) the so-called "reversion" feature by which the statute authorizes an author, his legal representative, legatees or heirs, to terminate a transfer of exclusive rights after a certain period, despite any agreement to the contrary; and (b) an acceptable definition of "works made for hire." Accordingly, we had not contemplated any further general expression of our views or the necessity to reiterate our position on reversion or works for hire. We were awaiting the new bill being drafted by your office and shortly to be introduced in the 89th Congress.

Recently, a variety of proposed amendments touching upon these vital matters of "reversion" and "works for hire," and highly adverse to the interests of our industry, have been proposed to you. As to "works for hire," such proposal is for you to reverse the position taken by you in the above drafted legislation, reached after extensive consideration of views urged not only by us but by other industries in a similar situation utilizing services under the "works for hire" concept.

We would therefore like to make clear to you that our position has not changed on these vital provisions. You are aware of our aversion to the basic concept of "reversion." There would be no purpose in our discussing the details or devices by which still another form of objectionable reversion is proposed.

We appreciate, of course, that there are many other major aspects to the proposed general revision of our present statutory and common

law system of copyright. As to these, we have found that the Copyright Office has given careful and understanding consideration to our views. It has indicated a considerable appreciation of our problems as purchasers, authors, owners, and users of a great variety of copyrightable source materials of a literary, dramatic, musical, and artistic nature, as well as authors and owners of motion picture copyrights seeking to recoup their formidable investments by distributing their performing rights under copyright protection in a worldwide market.

The draft legislation introduced last summer reflects many respects in which we can go along with and support in principle the Copyright Office's conception of a new copyright system, on the basic assumption that full freedom of contract in negotiating transfers of rights, without arbitrary statutory reversion features, and a livable definition of works made for hire, will predicate the long extension of copyright term and other proposed basic changes.

As to these two particular matters of underlying fundamental concern may we simply reiterate our position:

(a) *Reversion by statutorily authorized termination of transfer of ownership.*

It has been and remains our position that any form of reversion whereby statutory authorization is given to the author to terminate any transfer of the copyright or of any exclusive right thereunder after a specified period of time, despite prior agreements to the contrary, is wrong in philosophy and would be harmful in result in this day and age. This includes the type of reversion provided by section 16 of the above legislation for future copyrights, as well as by section 22(c) for extension of the term of copyright subsisting at the time the new Act will go into effect. We adhere to and reaffirm the principles of the positions in this respect advanced in our above position paper of March 2, 1962, at pages 16 and 24–27, and as further indicated at your Panel meetings in Washington in June of 1963 and in New York in August of 1964. We also refer you to views in such regard, which are in accord with those of the undersigned Committee, set forth by individuals associated with our member companies, in copyright symposia as below noted.[1]

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[1] "Some Essentials in Copyright Revision for Motion Pictures," 11 Bull of the Copyr. Soc. 19 (1963), by Richard Colby, of the legal staff of Twentieth Century-Fox Film Corporation, and Chairman of the undersigned Copyright Committee. [At the 1963 A.B.A. Copyright Symposium in Chicago.]

"International Developments," 12 Bull. of the Copyr. Soc. 20, at pp. 34–35 (1964), by Joseph S. Dubin, Chief Studio Counsel for Universal Pictures Company, Inc. [At the 1964 A.B.A. Copyright Symposium in New York.]

"Reversion, Duration, and Limitation Assignments Under Present and Proposed Copyright Law," a paper by Saul N. Rittenberg, Chief Studio Counsel for Metro-Goldwyn-Mayer, Inc., delivered at the Briefing Conference on Copyright and Trademark Law and Practice January 14–15, 1965, Ambassador Hotel, Los Angeles, Calif., sponsored by the Federal Bar Association, UCLA Law School, and The Bureau of National Affairs, Inc.

We do not propose now to enter upon a restatement of the views previously adressed to you, except only to say that as a keystone of our position, we will continue to oppose any effort to impose a statutory restraint on the freedom of persons to negotiate and contract with respect to rights in copyright properties, particularly where it would appear that a final bill will provide for an extended copyright term of life plus 50 years. May we again point out that such experience as the United Kingdom and other English speaking countries of the Commonwealth had from 1911 with a form of statutory reversion, was such as to drop any such reversion concept from their general revisions since 1956.[2] Other major countries, which have had the copyright term of life plus 50 years for generations, have not had such reversion provisions in their old laws, nor have they chosen to adopt reversion while preserving the life plus 50 years concept in their general revisions of recent years.

The philosophy that an individual author needs to be protected by statutory barriers, shields and options against the consequences of his voluntary contracts, is not in our opinion a concept which should find favor in any modern copyright law.

(*b*) *Works made for hire.*

The concept of authorship of works made for hire has not only been a vital one in the development and growth of the American motion picture industry, but has been important as well to other industries in which works have been prepared by employees or on special order or commission. The Copyright Office recognized this fact, in departing from an earlier approach in the Register's 1961 recommendations to the Congress, by embodying the following provisions in Section 14(b) and Section 54 of the proposed legislation introduced last summer, with which provisions we are in accord.

> Section 14(b). WORKS MADE FOR HIRE—In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and owns all of the rights comprised in the copyright unless the parties have expressly agreed otherwise.
>
> Section 54. DEFINITIONS—A "work made for hire" is a work prepared by an employee within the scope of his employment, or a work prepared on special order or commission if the parties expressly agree in writing that it shall be considered a work made for hire.

The above provisions indicate an appreciation of the practical working problems of the motion picture and other industries. We would oppose most strenuously any change as proposed in the above provisions, which contain a balance of contending provisions. It is our view that to revamp these proposals, as recently urged upon you, would

[2] "International Developments," *ibid.*, at pp. 84–85.

completely upset the possibility of working out a satisfactory solution in this area.

We have indicated all along that provisions such as these are the heart and soul of the operation of commercial and personnel relationships in our industry, without which there would be a very severe upset. Such remains true today and will be the cornerstone of our position before the Congress.

Subject to the recognition of the above underlying major factors and reserving our right to make suggestions as to detail, modifications and new proposals in respect of the provisions of any copyright bill shortly to be introduced, may we comment briefly on various other provisions of the McCellan-Celler-St. Onge bill, with many of which we find that your office resolved prior considerations and embodied an approach generally acceptable in principle to us.

1. *Subject Matter of Copyright* (Sections 1–4)

We are substantially in accord with the principles laid down in these sections. We note that the provisions as to national origin provide for conditions of recognition of works of foreign origin substantially along lines which have met our general approval in the past.

2. *Exclusive Rights in Copyrighted Works* (Sections 5–13)

Insofar as exclusive rights in respect of motion pictures are concerned, we observe that in line with views in our 1962 position paper, sec. 5(a)(4) of the above legislation expressly gives a performing right to motion pictures. Under the 1909 Act, which omitted any reference to motion pictures in Section 1, the Courts construed such right as a species of copying under Section 1(a).[3] We also note that the Copyright Office is in accord with our recommendation, dwelt upon at length in our 1962 position paper, concerning an express lending right. We urged that the exclusive right to distribute copies to the public expressly include distribution by way of rental, lease, or lending, as well as by sale or other transfer of ownership. Such lending methods of distribution, which are not mentioned in Section 1 of the 1909 Act, should not be left for judicial implementation, as was the motion picture performing right in 1909, and we feel they have wisely been included in sec. 5(a)(3).

The express performing right so provided, however, is to perform the motion picture "publicly." Our 1962 position paper urged that the motion picture performing right not be qualified by a requirement of "public" (as it presently is not under the "copying" concept

[3] *Patterson v. Century Productions* (2 Cir. 1938) 93 F. 2d 489, cert. denied 303 U.S. 655.

by which *Patterson* v. *Century Productions* placed it under Sec. 1(a) of the 1909 Act). This was asked because of the very serious situation existing with respect to thousands of copyrighted films which have come into the unauthorized hands of bootleg distributors for distribution by way of rentals for performances at schools, clubs, camps, churches, factories, homes, etc. We appreciate, however, that a great part of this problem has been alleviated by two other provisions in the new legislation. The first is the above express "rental" right, by which unauthorized renters of copyrighted motion pictures prints, the possession of which prints has not been obtained under any lawful transfer of title thereto, can be held for infringement. The second is an express definition of "publicly," in sec. 5(b)(3) in line with suggestions made by undersigned counsel, which would now include any gathering of a substantial number of persons outside the normal family circle and its social acquaintenances. This would preclude judicial decisions such as that in the *Maryland Yacht Club* case,[4] holding that performances before hundreds of people in a club not open to the general public, within the meaning of a civil rights test, were private and non-infringing.

We are somewhat concerned, in the light of recent applications by community antenna television stations to be treated as common carriers, by the use of the phrase "a common carrier" in Sec. 5(b)(3)(B). We believe this provision should be clarified so as to exclude from any intended exemption, any CATV station.

We do not know whether communication of performances of our motion pictures via wired or wireless closed circuit TV, or other media, was intended to be comprehended in the broad language of the definition of public performance provided by Section 5(b)(3)(C), namely "to communicate a performance or exhibition of the work to the public by means of any device or process." We think, however, there should be language expressly covering transmissions intended for subscribers to a wired or wireless diffusion service.

The exclusive right to prepare derivative works based upon the copyrighted work, provided by Section 5(a)(2), is too narrow. The definitions of "works," and of "derivative words," in Section 54, indicate that such are fixed in *tangible* copies or phonorecords. This is entirely in order, of course, in respect of derivative works in the sense of Section 2, as subject matter for copyright on their own accord to the extent that the derivative material has been used lawfully. The constitutional requirement for a "writing" is here involved. However, where the question is one of infringibility under Section 5, which

[4] *Metro-Goldwyn-Mayer Dist. Corp.* v. *Wyatt and Maryland Yacht Club* (U.S.D.C. Md. 1932) 21 Copyright Office Bulletin 203.

tells us what infringers may not do, rather than of copyrightability under Section 2, we must consider important forms of derivative utilizations of a copyrighted work which are not expressed in tangible form. For example, a novel may be unauthorizedly utilized by way of the performance of a ballet or play based thereon which were never reduced to writing. Even under the law prior to the 1909 Act, theatre owners who projected upon the screens of their theatres a motion picture unauthorizedly made and distributed by the Kalem Company, based on the copyrighted novel BEN HUR, were deemed to be dramatizing in pantomime this non-dramatic literary work, so as to make the Kalem Company liable as a contributory infringer for the pantomimic screen dramatizations, rather than for making the film under then existing law.[5]

We think it should be made clear in subdivision 2 of Section 5(a) that this exclusive right includes the making of derivative intangible "utilizations" as well as derivative "works" based upon the copyrighted work.

Motion picture producers are not only concerned with the matter of exclusive rights for the motion pictures which they create. As important purchasers, creators, owners, and users of literary, dramatic, musical and artistic source materials which go into the motion pictures, they are also vitally interested in the exclusive rights for such copyrightable properties. We find the provisions as to such generally satisfactory in principle.

We are substantially in accord in principle with the limited scope of the exclusive rights in sound recordings provided by Section 10. We understand that, under Section 10, there is not included any right of performance in the rendition or interpretation represented by the fixation of sound, separate and apart from the copyrighted literary, dramatic or musical material incidentally performed. We also understand that the right to duplicate the sound recording thereunder, in the form of phonorecords, does not extend to the making or duplication of another sound recording that is an independent fixation of other sound imitating or simulating those in the copyrighted sound recording. We make no comment on the matter of compulsory licensing for making and distributing phonorecords, nor on the matter of performances of non-dramatic musical works on coin-operated machines, under Sections 11 and 12.

As to the matter of "fair use" under Section 6, we feel that it should be clearly indicated in the statute that this is a matter of defense as to which the alleged infringer should bear the burden of proof.

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[5] *Kalem Co. v. Harper*, 222 U.S. 55.

3. *Ownership of Copyrights, Transfers and Recordations* (Sections 14–18)

We are in accord substantially with the provisions as to initial ownership, joint works, works made for hire, contribution to collective works, how ownership may be transferred in whole or in part, and for divisibility in transfer and enforcement, under Section 14. We agree with preserving the distinction between transfer of the copyright and transfer of the material object (§ 15), as well as with the requirement that a transfer be in writing, and the provisions concerning acknowledgment of a transfer (§17). We concur, under Section 18, as to the conditions for and methods of recordation, and the requirement that recordation be a condition precedent to infringement suit, but have some reservations as to the provisions in subsections (e) and (f) concerning the effect of recordation as constructive notice, and for determining priority between conflicting transfers of exclusive and non-exclusive rights respectively.

We understand the intention under Section 18(e) is that an unrecorded prior transfer of copyright ownership will nevertheless prevail over a recorded subsequent transfer, provided the prior transfer is thereafter recorded within two months after its execution in the U.S., and within four months if executed abroad. Unlike the race for priority of recordation to the County Clerk's Office in the case of real estate transfers, which has nevertheless worked satisfactorily for generations, the above retention of the present copyright system holds in limbo for two months or four months, as the case may be, the enforceable validity of any copyright transfer until it has been ascertained that no unknown previously executed transfer comes forward for recordation within such periods. For copyright transfers, this results in either a gamble, or a reliance upon warranties, rather than upon the much more satisfactory recordation, if payment is made by the transferee at the time of execution and not held up for the period in limbo. Appreciating that real estate transfers are usually in the same county as the recording office, whereas copyright transfers must be sent from worldwide points to one office in Washington, D.C., the fact is that money is usually not passed for the copyright transfer until the essential instrument is delivered. It could then be airmailed to Washington. We would like further consideration of the desirability of shortening, if not eliminating, this hiatus.

As to a prior non-exclusive license, whether or not recorded, prevailing over any subsequent transfer of copyright ownership, whether the latter be recorded or not, as provided in Section (f)(1), we have some reservations. Reliance upon searches for prior recordations

would be much more satisfactory than upon warranties as to the absence of prior non-exclusive licenses. We appreciate the desire of the Copyright Office not to encourage extensive recording of non-exclusive licenses. Since most such licenses are transitory in nature, very few are likely to be recorded as a practical matter, if recording were required to prevail against subsequent exclusive transfers. However, since there are also many non-exclusive licenses which are not transitory but long term in nature, or which involve major and expensive uses, which could and would be recorded, if required to prevail, consideration might well be given to the possibility of making the recording system operative as to non-exclusive licenses. We would like to reserve our views pending further consideration and resolution of this problem.

Hypothecation was probably intended to be covered under transfer of ownership of copyright, or of any exclusive rights therein, as provided by Section 14(d)(1) and (2), and in definition of "transfer of copyright ownership" under Section 54. Since there are variations among the states as to whether, how, and when legal title passes in the course of hypothecations, it would be preferable that the definition of "transfer of copyright ownership" in Section 54 expressly include any form of hypothecation, a very important factor in copyright. "Hypothecation" is a broader term and would be preferable to the much more limited word "mortgage". Consideration might also be given as to whether a uniform federally enforceable system of foreclosure might be spelled out in the copyright statute, or authorized in the statute subject to such Rules as the U.S. Supreme Court might promulgate therefor, rather than depend on varying and diverse systems of state foreclosure.

You will appreciate, of course, that we are not in accord, as already indicated, with intervening Section 16 providing for the "reversion" principle as to future copyrights, and with its counterpart provision in Section 22(c) providing a form of reversion as to copyrights subsisting on the effective date of the new Act, whose terms are extended.

4. *Pre-emption into an Exclusively Federal System* (Section 19)

We note that the Copyright Office, which in 1961 had gone much of the way, has now gone all the way, to eliminate future enforcement of rights in unpublished works under the common law or statutes of any state, by pre-empting all enforcement in the area of literary property rights to federal law exclusively, under Section 19. We are in accord. We note and concur with the express exclusion from the pre-empted area, of activities violating rights as to unpublished materials not coming within the subject matter of copyright, or that are not equivalent to exclusive rights within the scope of copyright, such

as breaches of contract or trust, invasions of privacy, defamation, and deceptive trade practices.

5. *Duration of Copyright* (Sections 20–23)

The protection of copyright from creation, the provisions for life plus 50 years as to individuals, and 75 years from publication (or 100 years from creation, whichever comes first) as to works for hire, anonymous and pseudonymous works, in respect of works created after January 1, 1967, under Section 20, are in substantial accord with our views. We similarly find acceptable in principle the provisions of Section 21 for "unpublished" works which neither have been copyrighted nor have fallen into the public domain, to have a similar term as above provided, but in no event to expire before December 31, 1990, or if published before such date, not before December 31, 2015.

We could also go along with the principle in Section 22 of extending existing copyrights in their 28 year first term an additional 47 years (instead of the present additional 28 years), upon renewal during the last 5 years of their present first term, so as to have a total of 75 years. Similarly, we have no objection to permitting copyrights already in their renewal term on the effective date of the new Act, to be extended to 75 years from their inception. We appreciate that as to subsisting copyrights, when the new law takes effect, you have felt that the present renewal system (except as to length) might require preservation. We speculate whether consideration might not be given to improving this very ambiguous and unsatisfactory renewal system.

We are agreeable to having the term of copyright run to the last day of the calendar year in which it would otherwise expire (§ 23).

6. *Notice of Copyright, Deposit and Registration* (Sections 24–34)

Although we feel more significance than warranted is still attached to the concept "notice of copyright," the legislation introduced last summer considerably modifies your original 1960 proposals to the Congress. We can go along substantially in principle with the provisions as to "notice" (§§ 24–28); deposit of copies (§ 29); as well as with the provisions as to copyright registration, its effect, and it being a prerequisite to infringement suit, as well as to any infringement for which statutory damages or an attorney's fee may be awarded (§§ 30–34). We would suggest that as to so-called innocent infringers under Section 27(b), the previous registration of the copyright should be sufficient to put such users on notice, and it should not be required, as provided in the bill, that they shall have received "actual" notice that the copyright was registered. "Omission" of notice should be added under Section 27(c) to the categories of "removal, destruction or obliteration of the notice without the authorization of the copy-

owner," in providing that protection is not to be affected where such is the case.

Our position paper of 1962 objected to the Register's proposal for mandatory deposits. We pointed out the difficulties and enormous expense of deposit requirements with respect to motion pictures, particularly as to 70mm. prints of such films as BEN HUR, each print weighing a quarter of a ton and costing many thousands of dollars. We also indicated how onerous this would be as to films prepared for TV series, where only a few prints are made for network broadcast. We note that Section 29(c) of the legislation introduced last summer, now permits the Register to exempt any categories of material from the deposit requirements.

7. *Infringement and Remedies for Infringement* (Sections 35–39)

We are in accord with the proposal under Section 35 that the legal or beneficial owner of an exclusive right may sue for its infringement, leaving to the Court the necessity, if any, for joining the copyright owner or any other interested party.

We approve the retention, under Section 36, of injunctive relief as provided under the present statute.

We think the provision for impounding infringing copies and devices, as framed in Section 37, should expressly specify "in accordance with such Rules as the Supreme Court of the United States may promulgate for such purposes in the Federal Rules for Civil Procedure or otherwise," rather than "on such terms as it (the Court) may deem reasonable." This is a very special and important remedy which requires a very detailed procedure, the provisions of which should be known in advance and uniform throughout the country, rather than be at the whim of any individual judge. Under the Act of 1909, the U.S. Supreme Court was expressly given authority to promulgate special Rules of Procedure for civil copyright infringement actions. The Supreme Court accordingly promulgated a special set of detailed Rules, primarily covering seizure and impounding, which have worked most effectively in practice since 1909. When the Federal Rules of Civil Procedure were adopted in 1938, these special copyright rules were nevertheless retained by the Supreme Court, although not long thereafter the FRCP was otherwise made applicable to copyright infringement actions. Such special rules are still in effect to this day.

In 1962, the Advisory Committee on the Federal Rules of Civil Procedure tentatively recommended the abolition of the Supreme Court's Copyright Rules, on the ground that FRCP 64 generally relating to Seizures of Property might suffice. When undersigned counsel pointed out the impracticability of abandoning the proven

and nationally uniform seizure rules of the Supreme Court, for a system under FRCP 64 of fifty diverse state procedures never intended for copyright, the proposal was abandoned. In 1963, the Advisory Committee again renewed its proposal to abolish the Supreme Court Rules, but to rely instead on FRCP 65 (Injunctions), by considering copyright seizure and impounding a species of mandatory interlocutory injunctive relief. When it was pointed out that the special remedy of seizure and impounding is not a form of mandatory interlocutory injunctive relief, but requires a detailed procedure in many respects similar to the detailed procedures still provided for the so-called special remedies of replevin in the various states, as well as the impracticability of such proposal, the Ninth Circuit Judicial Conference reversed its prior tentative approval of the Advisory Committee's recommendation and unanimously disapproved the same. Similarly, when undersigned counsel raised the matter by way of motion before the Section of Patent, Trademark and Copyright Law at the annual meeting of the American Bar Association in New York last August, to disapprove such proposal of the Advisory Committee, the motion was unanimously passed. In both instances of such disapproval, it was recommended that the special Copyright Rules of the Supreme Court be retained as such, or incorporated substantially intact into the Federal Rules of Civil Procedure.

While our 1962 position paper proposed that actual damages and "profits attributable to the infringing use" be alternate remedies, we note that Section 38(b) of the above legislation provides that profits attributable to the infringement may be added to actual damages to the extent that they have not otherwise been taken into account in computing actual damages.

We approve of the treatment of statutory damages in Section 38(c) as in line with our original proposals. We observe that the Copyright Office has now provided for minimum statutory damages on a "per copyright infringed" basis, rather than "for all infringements of which the defendant may be liable," as originally proposed. The latter could have included many different copyrights in one minimum award, and the change is for the better. It is also noted that the Copyright Office abandoned its original proposal that the court in its discretion could withhold statutory damages or reduce the same, in the case of so-called innocent infringers who claim that they did not know and had no reason to suspect they were infringing. We are in accord with the change, since the proven practical effect of stated minimum statutory damages, with its insurance of normal licensing of small performing uses, and deterrence of mass small piracies, could otherwise have suffered greatly by such a provision.

8. *Criminal Offenses, Limitations, Manufacture, Importation, and Copyright Office Housekeeping Provisions* (Sections 40–53)

We note that the Copyright Office has provided, under Section 40, severer punishments insofar as second offenders in criminal violations of the statute are concerned, with which proposal we concur. The retention, under Section 41, of present limitation provisions with respect to criminal actions and civil claims, meets with our approval.

We have no comment concerning the importation and manufacture of copies of a work consisting preponderently of non-dramatic literary material in the English language (§ 43). We do note, under Section 44, that importation into the United States without the authority of the owner of copyright, of copies or phonorecords of any work for the purpose of distribution to the public, is an infringement of the exclusive right to distribute copies of phonorecords under Section 5, with which provision we are in accord. We gather that while such importation under Section 44(a) is deemed an infringement (and thus subject to injunctive relief by the courts, among other remedies), it is not necessarily "prohibited" by the statute under Section 44(b), and thus subject to seizure, forfeiture, destruction or return to the country of origin, with enforcement by the Secretary of the Treasury. Prohibition of importation extends only to pirated copies, that is, those whose making would have been an infringement if our copyright statute were applicable. It would appear that non-piratical copies, authorizedly made abroad by the authorized owners of foreign rights in the work, would not be prohibited importation, although they could be subject to infringement and injunction proceedings at the instance of the American owner of the exclusive distribution rights therein.

We have no comment upon the Copyright Office housekeeping provisions under Sections 46–53, except that we have reservations concerning the right to destroy deposited copies of motion pictures without notice to the owner, as well as to the provisions permitting the Library of Congress to exchange with or transfer the same to other libraries.

We note that in line with views which we have heretofore expressed, the certificate of copyright registration, under Section 32, shall also constitute *prima facie* evidence of the validity of the copyright, as well as heretofore of the facts stated in the certificate. We still think that with problems arising fifty to a hundred or more years later as to the unavailability of individuals originally concerned and their normal records, consideration may well be given to some additional presumptions concerning authorship, ownership, validity, place of first publication, etc., along the lines of the British and Canadian statutes.

9. *Definitions* (Section 54)

Definitions are of course a vital and most useful part of an Act, serving to simplify the language of many of the separate sections, while giving such sections a necessary interpretive base for the phrases used.

We have already adverted to the definitions of "work," "derivative work," "work for hire," and "transfer of copyright ownership."

In the definitions where the device of illustration is used, *e.g.*, "such as books, periodicals, manuscripts, phonorecords, or film, in which they are embodied" (for literary works), and "such as films or tapes, in which they are embodied" (for "motion pictures"), unlike the elaborate definition used for phonorecords, we are concerned with a possible unfavorable *ejusdem generis* interpretation. It would be clearer in intent to follow an expression "such as" with the additional phrase "but not limited to." Motion pictures in the future may be embodied on wires, in perforated cards, and in other manners unknown today.

We think the entire definition of motion pictures needs revision. The motion picture film, as copyrighted, is not itself a series of images imparting an impression of motion, with accompanying sounds. It is rather its communication visually, with or without accompanying sound, by projection or performance on a reflecting surface, regardless of the manner, method, medium, system, device, or combinations thereof by which so communicated, so as to change the projected visual images rapidly in timed sequence, that imparts the illusion of life and motion.

We will be pleased to be available as heretofore for any discussion, and look forward with great interest to the introduction in the present Congress of the new copyright revision bill being drafted by your Office.

Respectfully submitted,

THE COPYRIGHT COMMITTEE OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.,
Edward A. Sargoy, of Counsel.

NATIONAL AUDIO-VISUAL ASSOCIATION, INC.

November 24, 1964.

As you will recall, after several meetings and a great deal of consultation within our industry, we submitted to you on July 10, 1964, a statement of our position concerning the proposed revisions of the copyright law.

We were glad to find that in S. 3008 and the companion bill, you were able to accommodate all but one of our major proposals, and we want to express to you our appreciation for your very reasonable and considerate handling of our requests.

The exception to which I referred above is in Paragraph (2) of Section 8 of S. 3006. This apparently would permit the electronic reproduction and distribution of educational filmstrips, study prints, projection transparencies, slides, and other still picture materials without the permission of the copyright owner.

The standard method of distributing all of these types of copyrighted visual materials is by selling individual copies to schools, school systems, or institutions of higher education. Normally, materials are sold with express or implied licenses permitting their optical projection, or direct use, within a classroom or auditorium.

Some of our large school systems buy as many as thirty copies of an educational filmstrip when it is first released. If the proposed exemption should become a part of the final law, this would mean that, once an individual copy of a filmstrip had been bought by a particular school system, the system would have the right to show it in many locations simultaneously through the use of a closed circuit television system.

The various producers of audio-visual materials certainly do not wish to inhibit the development of educational television, or of electronic distribution of educational materials. However, because the inevitable result of such distribution will be a very substantial decrease in sales of copies of the filmstrips or other visuals, it is important that the producers be able to require a special payment, or to charge a special price, for copies which are to be used on closed-circuit television networks.

We would therefore like to request that, in the event you are considering changes in the proposed bill prior to its resubmission in the 89th Congress, you consider the deletion of Paragraph (2) of Section 8, and the rewording of Paragraph (4) to read "performance of the work, otherwise than in a broadcast *or by electronic reproduction or transmission*, without any purpose . . .".

It is my understanding that some individuals within the educational field have been conducting a campaign to induce various prominent educational groups to go on record as opposing the proposed bill in its present form and favoring some wording which would make possible the general use of audio-visual materials on educational television without special licenses or fees. To the best of our knowledge, virtually all of this agitation comes from a very few people within the educational establishment who are personally committed to edu-

cational television and who would like to use this revision of the copyright law to make materials available to educational television at little or no cost.

Since the members of our Association have invested many millions of dollars in the production of these materials, we believe they should have the right to establish reasonable licensing arrangements governing their use on open- or closed-circuit television.

We most sincerely hope you will continue to go along with what we believe is the reasonable and fair position of our materials producer members in this matter. If there is any information or assistance which we can supply, I hope you will let me know.

Sincerely,

DON WHITE,
Executive Vice-President,
National Audio-Visual Association, Inc.

NATIONAL JOINT APPRENTICESHIP AND TRAINING COMMITTEE FOR THE ELECTRICAL INDUSTRY

December 30, 1964.

It has come to our attention that proposed changes in the Copyright Law would allow certain copying of copyrighted materials by "recognized non-profit educational institutions or organizations," under a "fair use" clause.

We believe this to be unfair to copyright holders and, therefore, object to it.

We are both a copyright holder and non-profit educational organization.

Sincerely,

BUCK BAKER,
Director, National Joint Apprenticeship and
Training Committee for the Electrical Industry.

MELVILLE B. NIMMER

November 3, 1964.

At your suggestion I am happy to send you herewith my comments regarding H.R. 11947.

Section 1

1. This section as presently worded is apparently intended to encompass all "writings" as this term is used in the Constitution. If this is the intention, I think it should be expressly stated in the Statute so as to avoid the kind of ambiguity that now exists under present

Section 4 of the Copyright Act. This could be done either by including in the committee report an express statement that "works of authorship fixed in any tangible medium of expression" refers to constitutional "writings", or the last sentence of the proposed Section 1 prior to the enumeration might be worded as follows: "Such works of authorship encompass all writings of an author within the meaning of Article 1, Section 8, of the United States Constitution, and include, but are not limited to, the following categories:".

2. Ancillary to the above suggestion is the determination of whether the title of a work in itself shall be subject to copyright. It may well be argued (although the issue is debatable) that a title is a "writing" in a constitutional sense. If, then, it is intended to exclude titles from the scope of the proposed Copyright Act, it is probably desirable to provide for such an express exclusion. This is particularly true if otherwise all "writings" are to be protected. Even without an express reference to "writings", it may well be that the term "literary work" as defined in Section 54 might be held to include titles unless again there is an express exclusion. It may be that you are relying on the line of cases which excludes titles from copyright protection notwithstanding the absence of an express exclusion in the existing Copyright Law. I would suggest that such line of cases may not be applicable to the new Copyright Law, in view of the new reference to "literary works". In any event, this is the time to avoid any possible ambiguities.

3. Subdivision 4 should be reworded as follows: "(4) pantomimes and choreographic works;" This is to avoid an argument that pantomimes are protected only if they are of a choreographic nature.

Section 2

I think it is a mistake to create the two categories of compilations and derivative works rather than to include all such matter under the single term "derivative works". The two definitions as contained in Section 54 seem to be largely overlapping. (Is there a distinction between "pre-existing *materials*" and "pre-existing *works*"?) The distinction, besides being confusing, seems unnecessary since (it seems to me) the two classes should be treated in an identical manner.

Section 3

1. With reference to Section 3(b)(1) in an over-abundance of caution, I would suggest insertion of the word "copyright" prior to the word "treaty" so as to avoid any argument that the word "copyright" prior to the word "convention" does not modify the word "treaty".

2. Section 3(b)(2) should be reworded as follows: "(2)(a) The work is first published in the United States or (b) The work is first

published in a foreign nation provided such publication has occurred after the effective date of adherence by both the United States and such foreign nation to the Universal Copyright Convention of 1952; or". This to avoid a construction that a work first published in a foreign nation prior to its or our adherence to the UCC is now eligible for U.S. copyright protection if such foreign nation is presently an adherent to the UCC.

Section 4

With reference to Section 4(c) I would add the following at the end thereof: ", provided that such statement in any event must be published not later than contemporaneously with the publication of the United States Government work in which copyright protection is claimed."

Section 5(a)(1)

Between the words "in" and "copies" there should be inserted the words: "one or more". It should be clear that a single copy may constitute an infringement.

Section 5(a)(2)

Following the word "prepare" there should be inserted the words: "one or more", for the same reason as indicated above.

Section 5(a)(3)

Following the word "distribute" there should be inserted the words: "one or more", for the same reason as indicated above. In addition, the words "to the public" should be stricken. It should be clear that an unauthorized sale or transfer may be infringing even if no offering is made to the general public.

Section 5(b)(3)(A)

The definition of "publicly" as here used seems to me to be too all-inclusive. For example, it would mean that a play reading in a school classroom with no one present other than the students might constitute a public performance. (The exclusion of Section 8(1) would not apply in the case of a dramatic work). I would reword this as follows: "(A) to perform or exhibit it at a place open either to the public or to a substantial segment of the public;"

Section 6

An attempt to define "fair use", even as loosely as is done in Section 6, may lead to trouble. For example, is the principle of *ejusdem generis* applicable in the first sentence so that "legitimate purpose" must be of a nature similar to the specific purposes set forth in that sentence? If so, would this mean, for example, that quotation of

several lines from the lyrics of a popular song within a novel would not be considered a fair use? On the whole, I think it would be better to reword Section 6 in its entirety as follows:

"Notwithstanding the provisions of Section 5, the fair use of a copyrighted work, as such phrase has heretofore been judicially defined and recognized, is not an infringement of copyright".

Section 7

Sections 7(a) and (b) should be stated in the negative rather than in the affirmative. That is, it should be said: "The sale or other disposition of the possession of a particular copy or phonorecord lawfully made under this title by the owner of such copy or phonorecord shall not constitute an infringement of the rights of the copyright owner under the provisions of Section 5(a)(3) even if such sale or other disposition is made without the authority of the copyright owner. (Section 7(b) should be similarly reworded). The reason for the negative rather than the affirmative form is to avoid an argument that Sections 7(a) and (b) constitute a federal pre-emption so as to invalidate any state law contractual restrictions on the right of the owner of the particular copy to dispose, exhibit, etc. same.

Section 8

1. With respect to Subsections 8(1) and (2), it would seem that this exemption should apply to dramatic works as well as nondramatic, literary or musical works. These types of performances may well be regarded as "non-public" performances under the present act, and as such would not constitute an infringement of the performance rights in a dramatic work under the present act. The implication of Section 8 is that such performances would now constitute an infringement of the performance rights of a dramatic work, thus substantively changing existing law. This seems undesirable, and probably is not intended.

2. Section 8(4) should, it seems to me, only be applicable to musical works, and not to non-dramatic literary works. The reason for this distinction is stated at Section 107.31 of my book.

Section 9(a)

1. With reference to clause (1), the reference to the law in effect on December 31, 1966 is apt to create a good deal of confusion. For example, does this mean that the right to "complete, execute and finish" is applicable to a "model or design for a work of art"? If so, this right should be explicitly stated in the new law. Further, the new law should expressly state whether architectural structures are considered copies of architectural plans for purposes of infringement. The definition of "copies" in Section 54 might well include architectural struc-

tures as copies of plans. This conclusion is probably negated under the present law by virtue of the doctrine of *Baker* v. *Selden*. But query whether the full scope of *Baker* v. *Selden* is any longer applicable even under the existing law?

2. In clause (2) there should be inserted following the word "photographs" in the fourth line thereof, the following: "of such useful articles".

Section 10

In Sec. 10(a) the exclusive rights of the owner of a copyright in a sound recording should include rights under Section 5(a)(2) as well as 5(a)(1) and (3). Likewise the Section 10(b) reference should be made to Section 5(a)(2) as well as Section 5(a)(1). As Sections 10(a) and (b) are presently written, it might be possible to "pirate" a sound recording simply by adding certain additional sounds, music or otherwise, and claim the resulting work to be a derivative work outside of the scope of protection for sound recordings.

Section 11

1. A new Section 11(a)(3) should be inserted reading somewhat as follows: "The compulsory license provided for hereunder shall in no event constitute a license to make and distribute phonorecords of sound recordings, but may include the right to make and distribute phonorecords of non-dramatic musical works which have theretofore been embodied in sound recordings." The purpose of the foregoing is to make clear that the compulsory license provision does not permit record "piracy". This result probably follows in any event from the bill as it presently exists, but a further clarification might be in order.

2. In Section 11(b)(2) it should be made clear that a belated filing of a notice may be effective to obtain a compulsory license as to all phonorecords made and distributed after filing of such notice.

Section 14

With reference to Section 14(d)(2), the last three words of the first sentence thereof should be stricken and in their place should be substituted language identical to that contained in Section 14(d)(1) beginning with: "in whole or in part by any means of conveyance . . ." The present difference in language between the two subsections may well lead to confusion as to the manner of transferring exclusive rights. Furthermore, in Section 14(d)(2) I would strike the words: "including any subdivision of the rights specified by Sec. 5" and insert in its place: "including all or any portion of the rights included in any subdivision of Sec. 5". This is to make clear that "motion picture rights", for example, may be the subject of a separate transfer of ownership.

Section 16

1. In Section 16(b) the word "exclusive" in the second line thereof should be deleted, and the same in the second line of Section 16(b)(2). Unless this is done, the purpose of Section 16 may to a degree be circumvented by providing that the transferred rights become non-exclusive after 35 years, etc. Such circumvention may be envisaged and intended, but if so, I think it inadvisable.

2. There appears to be a contradiction between the last sentence of Section 16(a)(1) and Section 16(b)(2)(B). Thus, although on the one hand it appears that any agreement entered into prior to the expiration of 35 years which purports to prevent termination at such time is invalid, on the other hand it appears possible prior to the expiration of the 35 year period to make a present grant of rights or an agreement to grant rights to be effective upon the expiration of the 35 year period. It seems to me that Section 16(b)(2)(B) should be deleted. Without such deletion we are back to a *Fisher* v. *Witmark* rule, but without even a reservation of rights for widows and children.

Section 18(f)(2)

There should be a requirement of payment of a valuable consideration or a binding promise to pay royalties in order for such a license to prevail.

Section 19(b)(3)

Included in state rights which are preserved, there should be express mention of the right of publicity. This for the reason that the right of publicity, unlike the right of privacy, is a "property" right and might therefore be considered subject to the preemption unless expressly saved therefrom.

Section 22(c)(3)

The same comments re use of the word "exclusive" as made above with respect to Section 16.

Section 25

1. An unnecessary pitfall for the unwary is created by requiring the letter "P" instead of the letter "C" in connection with notice for sound recordings. The notice requirement should be uniform as to sound recordings and all other copyrighted works.

2. It would appear that in the case of a work, other than a sound recording, which is reproduced in phonorecord form, no notice whatsoever is necessary if no copyright protection is claimed for the phonerecord as a sound recording. Is this intended?

Section 30(e)

Does the use of the word "may" indicate that such additional registration is permissive only and not mandatory even for purposes of the registration requirement of Sec. 27(a)(2)?

Section 34

In my view this section should be deleted.

Section 36(a)

Shouldn't it be made clear that this applies to preliminary injunctions as well as to permanent injunctions?

I hope that some time during the next several months it will be possible for me to visit Washington to discuss with you and your associates the proposed new law in greater detail. Suffice at the moment to say that notwithstanding the above suggestions, I do sincerely believe that H.R. 11947 is a remarkable job in which you may rightfully take a great deal of pride.

Sincerely yours,

MELVILLE B. NIMMER,
Professor of Law,
University of California, Los Angeles.

J. KENDRICK NOBLE, JR.

September 28, 1964.

I have recently learned that your office has been subjected to a great volume of mail in support of the doctrine of "free use" presently incorporated in Section 6 of the pending copyright revision law. I had thought it needless to point out that I am completely opposed to the wording proposed by the National Education Association, but if a letter count will help, here is another to add to the collection from those opposing that wording.

As an alternative, I heartily support a statement which will soon be released by the American Textbook Publishers Institute. Basically, that statement will remark that we recognize the interests of users of the new forms of reproduction equipment, and are currently seeking ways by which their interests and ours can be mutually served by a licensing arrangement. On the other hand, however, we believe that free, unlimited use of the type now authorized by the proposed Section 6 would have disastrous effects on our industry in the foreseeable future as it becomes possible for any "student," "educator," or "researcher" (and which of us does not fall, at least to some extent, into one of those categories) to equip himself with all the written

material he wishes without fair regard to the rights of the original authors, manufacturers and publishers of that written material and without any remuneration to them.

The old doctrine that "the worker is worth his hire" seems to be appropriate here. I firmly believe that implementation of Section 6 as it stands will lead to a situation in which all reference books, textbooks, and other materials of long-lasting but specific interest will be produced, if at all, only by governmental and other non-profit groups or those with an ax to grind for which they are willing to forego any normal remuneration.

I have had the pleasure of hearing you speak on this question, and I realize that Section 6 does not necessarily reflect your own views but rather those of the public as expressed to you in letters and meetings. I do, therefore, trust that this expression of sincere views of such as I will help to counter letters from those who have been advocating the present section on "fair use."

This is a personal statement and may be a little over-vigorous. However, I think the whole question is of the greatest possible concern to our industry, and that this letter should reflect some of that concern.

Yours sincerely,

J. KENDRICK NOBLE, JR.,
Vice President, Noble and Noble Publishers, Inc.

NEIL O'BRIEN

December 15, 1964.

It seems to me the so-called "fair use" clause in the proposed new Copyright bill (H.R. 11947) would virtually destroy the benefits of copyright protection in this country—and the "manufacturing" clause would be equally disadvantageous to book publishing.

As a textbook author ("Television Advertising", McGraw-Hill) I am, naturally, deeply concerned in this matter and hope that, upon further consideration, both these clauses will be dropped.

Cordially,

NEIL O'BRIEN.

O. OLDENBERG

December 17, 1964.

The prospective revision of the Copyright law will include important exceptions, which, of course, will be exploited to the utmost and virtually destroy the benefits of the Copyright protection.

It is obvious that the National Education Association wants these exceptions as well as any consumer wants to get something for nothing.

I feel that in our system there is no reason to abrogate the property

right of the author. Much as I appreciate the need for Education, there is no reason to impose a financial load on authors of textbooks.

Sincerely,

O. OLDENBERG,
Professor of Physics, Emeritus,
Harvard University.

A. J. PANSHIN

December 14, 1964.

It has recently come to my attention that a new Copyright Bill, H.R. 11947, will be introduced at the forthcoming session of the Congress. It is my understanding that this bill contains a fair use clause section dealing with photocopying and other methods of reproduction of copyrighted material.

I wish to state that as an author of three technical books, I am opposed to this provision. We are already faced with formidable copyright infringements from Free China and the U.S.S.R. The proposed fair use provision would result in further domestic erosion of copyright protection.

Even though the new clause specifically states that such reproductions are limited to a single copy by recognized non-profit educational institutions or organizations, who is to determine what constitutes a non-profit educational organization? There is nothing in this provision that would preclude a group of people engaged in some educational activity from acquiring a single copy of a book from a publisher and then proceeding to reproduce it, one copy at a time, for each member of such a group. With the tremendous proliferation of all kinds of non-profit educational groups in this country, this method of circumventing the copyright law could lead to a considerable reduction in copyright benefits.

In the case of many technical publications with relatively small total distribution, this might have quite disastrous effects. The benefits to the authors could be so reduced that few would be willing to spend the long and financially unprofitable hours it takes to produce a technical book. And even if such a manuscript were written, the publishers might be much more reluctant than they are now, to produce it, if denied the opportunity of at least recovering the costs incurred in its publication. Either way, the real loser would be the potential user of such material. The impact of this breakdown in effective copyright protection might indeed have quite a serious effect in curtailing the free flow of technical information in this country.

Sincerely yours,

A. J. PANSHIN,
Chairman, Forest Products Department,
Michigan State University.

EDWIN W. PATTERSON

December 18, 1964.

In re: Proposed Amendment to Copyright Law

I am writing to express my firm opposition to the proposed amendment to the Copyright Law of the United States which has been supported by resolutions from 27 educational groups, as set forth on p. 1 of Imprint, the McGraw-Hill trade publication of November, 1964.

This proposal would enable "recognized nonprofit educational institutions" to have the privilege of using excerpts from an author's copyrighted (non-dramatic) book, without obtaining the permission of the copyright holder.

As the author of several books that have a limited sale among students and teachers, I am opposed to this picking my brains free of charge. One of my books was carefully written (in two editions) for non-lawyers in the insurance business. I discovered that an "association", doubtless non-profit but supported by life insurance companies having millions, was using a part of my book without my permission. I warned them to desist. No doubt many "non-profit educational institutions" (e.g. Harvard University with $500,000,000 endowment) can far better afford to part with a fair royalty payment than can the academic author.

Yours truly,

EDWIN W. PATTERSON,
Cardozo Professor Emeritus of Jurisprudence,
Columbia University; Scholar in Residence,
University of Virginia.

NORMA S. REES

December 22, 1964.

I am writing to express my opposition to the proposed portion of the Copyright Bill which would allow unlimited recording of portions of copyrighted materials by non-profit educational institutions or organizations. Although the bill as proposed sounds innocent, it could destroy many benefits of copyright protection, especially those which concern textbook authors.

Sincerely yours,

NORMA S. REES,
Director, Queens Speech & Hearing Center.

HERBERT RIEHL

December 19, 1964.

My attention has been drawn to proposed copyright legislation which would give certain types of institutions the right of free re-

production of textbooks and would restrict the publisher in his choice of printer.

I have written an advanced specialty text *Tropical Meteorology* for McGraw Hill and I am presently completing another somewhat more general text. I am therefore concerned in the copyright legislation.

The textbook, published ten years ago, has remained the only one of consequence in the field, and I believe it has served a highly useful function all over the globe. Nevertheless, as you are undoubtedly aware, the main motivation in writing and publishing such a book is performing a public service. After these ten years, I believe that my hourly pay from the accumulated royalties for writing the book is about $1 and I hope that the publisher has more or less made expenses by now. Under these circumstances, it is disturbing and galling to learn that certain groups of educators wish to take further advantages and erode further the financial situation which is very hapless to begin with. I would feel taken advantage of in a gross manner if the proposed bill became law. Undoubtedly I would be deterred from further active textbook writing if I felt that all the work was being reduced to an extreme giveaway proposition.

In view of these reasons I wish to be put on record as opposing these provisions of the copyright bill, and I intend to advise the Colorado Senators and Congressmen, and others concerned in this matter, in the same sense.

Yours truly,

HERBERT RIEHL.

WM. RIEMAN III

December 14, 1964.

As a teacher and as an author of textbooks, I am interested in the revision of the Copyright law. My concern centers chiefly about the "fair use" clause. I see no objection to part (a) of this clause, which gives non-profit organizations the right to make a single photocopy of a portion of copyrighted works. This can not be prevented anyway, and the clause simply legalizes the current practice in most university libraries.

On the other hand, I regard clause (c) as very harmful. Should this become law, I can have parts of my competitor's textbook reproduced in a quantity sufficient to give one copy to each of my students. Surely this would interfere with the sale of his book. Hence it would discourage authors from writing and publishers from marketing books, and thus it would be contrary to the interests of education. I hope that you will use your influence against this clause.

I also regard the "manufacturing clause" as detrimental to education. Certain types of books that have only small sales can be produced less expensively overseas. Many of these books that might be manufactured abroad will not be produced at all if the "manufacturing clause" becomes law.

Sincerely yours,

WM. RIEMAN III,
Director, School of Chemistry,
Ralph G. Wright Laboratory,
Rutgers—The State University.

JEROME ROBBINS

January 11, 1965.

I am greatly concerned and troubled by the possible inclusion of that section of the proposed Copyright Law on Fair Use, and especially Section 6 of the Bill (H.R. 11947), as presented to Congress.

A great deal of my life has been devoted to the creation of choreography and other material used in dramatico-musical works, much of which is not adequately protected under the present Copyright Law, and will be even less protected if the proposed amendment is passed. As drafted, I think the Fair Use section will prejudice my rights, as well as those of us working in the theatre, who create material which is used for dramatic and dramatico-musical productions. I would, therefore, like to associate myself with those people who wish to have the Fair Use section omitted. In the alternative, if the section remains as it is, then I would like to associate myself with those responsible people in the theatre who have suggested that the following be added:

'Nothing herein contained in this Section 6 shall authorize the performance of a dramatic work or a part thereof except by instructors or pupils in the classroom in the course of face to face teaching activities.'

* * * * * * *

Very truly yours,

JEROME ROBBINS.

MARIE RODELL

August 11, 1964.

As one who has fought hard for years to try to get authors a decent return for their labors, I am outraged by the stand taken by the educational groups on the proposed new copyright act, as reported in the New York Times for August 6 last.

If authors announced publicly that teachers should receive no salary—after all, teaching is educational, isn't it?—would the edu-

cators find that reasonable? If the technicians on the educational television stations were asked to work for nothing, as their contribution to education, would they agree? By what rule is the author discriminated against and denied the just fruits of his labors?

I hope you can get across to all concerned the basic injustice of this position.

Sincerely,

MARIE RODELL.

HARRY N. ROSENFIELD

September 15, 1964.

During the meeting of Committee 304 of the American Bar Association in the first week of August, you were kind enough to ask me to send you a proposal that I made to the Committee for amendment of Section 38(c) of H.R. 11947—S. 3008, dealing with the waiver of statutory damages for innocent infringement.

I take pleasure in sending you herewith the suggested draft for this purpose to be inserted wherever deemed appropriate in Section 38(c):

"If the infringer proves that the infringing use was for bona fide nonprofit educational purposes and made in reasonable belief that such a use was not an infringement, the court in its discretion may withhold an award of statutory damages under this subsection or may reduce the amount to less than $250."

As an alternative the following is proposed which (except for the italicized language) is taken directly from Section 38(a)(3) of your preliminary draft dated November 5, 1963:

"If the infringer proves that he was not aware and had no reasonable grounds for believing that his acts constituted an infringement of copyright, *and that the infringing use was by a nonprofit educational organization or institution or one of its employees or officers for nonprofit educational purposes,* the court in its discretion may withhold an award of statutory damages under this subsection or may reduce the amount to less than $250."

Please believe me I appreciate the opportunity thus afforded me to submit these proposals and hope that you will reinsert some such provision in the new bill to be introduced next year.

Sincerely,

HARRY N. ROSENFIELD.

JOHN A. ROTHERMICH

February 2, 1965.

I am a teacher but I object to the so called "Fair-Use" clause proposed for the new copyright law. Passage of this provision will, in time, destroy our excellent textbooks. Why should a man pour twenty

or more years of schooling, years and years of teaching, and more years sweating over manuscripts, revisions etc. only to have it all pirated upon publication? Why should publishers spend five to ten years and a half million dollars to develop a text to have it used "fairly"? The makers of desks, buses, a-v equipment are all protected by patents or in some way or another. In America, inventiveness and originality are supposed to pay off. Why not in one of the most crucial and significant areas of human endeavors—education? Certainly the administrator and the teacher expect to be paid for their efforts. Why not the writer, without whom society could not survive? The "Fair Use" clause must be dropped, or at least amended to protect the property of others—in this case educators, writers, and publishers.

Sincerely,

JOHN A. ROTHERMICH.

GEORGE SCHIFFER

January 28, 1965.

Since my letter of April 16, 1963, the community antenna industry has grown and it has been finally vindicated in its contention that it does not violate the rights of broadcasters. These developments do not, however, affect the fundamental issues. Consequently, there is very little which need be added to my previous letter.

Community antennas are an equipment service which tends to reduce the discrimination in television service now available to people in various parts of the country, as a result of technical and economic accidents. So long as broadcasting is governed by technical regulations of the present kind, people in different locations will require different equipment for adequate reception. The use of community antennas, side by side with other devices servicing the same function, overcomes what would otherwise be a serious deprivation of television service. The law ought not, and in the past, has not, made such accidental disadvantages the basis of new property rights. On the contrary, the fundamental concept is to offer equal opportunity to everyone and to minimize the impact of local disadvantages.

The structure of broadcasting is deliberately and intentionally to provide free service to the public. There is no provision for charges to the public by the broadcaster or by the copyright proprietor. The broadcaster cannot physically and may not lawfully attempt to control reception. The copyright proprietor is paid handsomely for permission to have his work scattered to the public pursuant to this scheme.

The service does not mean that television set manufacturers or other equipment manufacturers must furnish equipment for nothing. It

simply means that the government, in making available for private use the broadcast spectrum, a natural resource, has imposed conditions which preclude any charge for reception.

The imposition of the duty to pay royalties on community antennas and their subscribers would result in a specific discrimination and a violation of the concept of free broadcast service. The mere fact that it might be practical to collect royalties from community antennas, and I seriously doubt that practicality, does not justify the authorization of such a discriminatory impost. That the result would be dual payment to the copyright proprietor aggravates the inherent inequity.

The idea of imposing royalties on community antennas is also a major departure from a long and healthy tradition of Anglo-American copyright. Historically, copyright royalties are imposed on active uses, not on enjoyment of the work. While ultimately the public pays, the copyright proprietor has never had a right of enforcement against members of the public who acquired or enjoyed an infringing copy or performance. The present proposal, in its particular language would permit enforcement against the owner of the receiving set.

The scheme is in actuality not only discriminatory; not only a departure from a sensible principle, but impractical. That the sponsor who pays for the right to address an audience should have a part of that audience lopped off or taxed for the privilege of hearing him is fundamentally ludicrous.

Yet even granting that the sponsor deserves no consideration, how is the scheme to be accomplished? Are all copyright proprietors to join a single cooperative venture in which they will share the royalties in exchange for blanket licenses? If so, who will undertake to organize the monopoly? Indeed, what single broadcaster not wholly ignorant of the antitrust laws would dare to acquire a license from each and every copyright proprietor so that he could in turn collect from community antennas receiving his broadcast? How would such a monopoly be administered? Who would get the money?

Not only would the cost of administration of such a scheme be enormous, and its legality doubtful, but the true beneficiaries, if the fundamental problems could be overcome, would be not authors but a limited group of large users. Many of these users are now in a quandary. They occupy positions as producers of programs, distributors of programs, owners of broadcast facilities, owners of community antennas and others peculiarly inconsistent. Authors, performers, music owners and others would claim a share; but the interlocked interests would require years to reach any sort of accommodation.

In addition to these difficulties, it must be remembered that the community antenna has no control over what it receives. The spuri-

ous argument, that a community antenna selects channels, requires little reply. Given a limited installation of three, five or twelve channels, the community antenna must carry those channels which its subscribers desire. This does not preclude the subscribers' using other equipment simultaneously to receive other channels. Nor does the selection of channels give the community antenna any control whatsoever over the content of broadcasts over any particular channel, not any control over the subscribers' television set. The spurious notion is fondly adopted by some opponents of community antennas, but it does not survive analysis, nor does it in any way deal with the present problem.

If the community antenna cannot predict what will be broadcast, then it follows that the community antenna cannot safely accept a license from any source except one which is all-inclusive.

Another aspect of the point is that, since the present draft bill does not even offer compulsory licensing, every community antenna would be subject to suit by innumerable copyright proprietors and their assigns whom it would be virtually impossible to reach without a huge staff. Further, the present draft grants every proprietor power to deny a license altogether and some of the more vocal user-proprietors have indicated an intention to deny licenses or to demand exorbitant fees.

This brings into question the very desirability of imposing license fees on community antennas. Why, after all, should three million or more people in the United States be forced to pay for what the rest of the people receive for nothing? Why should these willful users be paid twice? What is the public advantage of this impost? How is the purpose of copyright advanced by making these people pay? The draft discussed at the panel contained a number of ambiguities, which were then pointed out. Once the basic principle is determined, these ambiguities can be eliminated. It is the principle which needs settling.

Copyright serves the public. The authors' just compensation makes that service possible. In an act which may be with us for a generation or two, broad accommodation of major trends must be envisaged. Petty discrimination and opportunities to squeeze a little extra charge from the public's pocket are inconsistent with the high purpose which this revision has and with which it was undertaken.

There is a clear and logical dividing line which ought to be incorporated into the present act: that wired transmission system which originates programs or which serves to decode broadcasts lawfully made in a manner so that the broadcaster retains control (as by being able to sell a unique decoding device) should be subject to copyright. Pay television or program origination without extra compensation

mean that the community antenna is providing something not already available or dedicated to the public. This origination ought to be on permission of the copyright proprietor and an incident requiring payment to him.

On the other side, furnishing a device, no matter how sophisticated, for the reception of television broadcasts made under circumstances depriving the broadcaster of control should be free from further copyright obligations. To do otherwise is to extend by a legal fiction control over what is by definition scattered to the winds without hope of physical or legal dominion. It is put there for the public to take. The copyright law cannot logically or in consistency with fundamental principle take the position that under such circumstances only a portion of the public shall be free to take and not the rest, or that the particular technical device by which the public accepts the offer to take makes the slightest difference.

The constitutionality of such a discriminatory enactment would be in serious doubt. The right to hear is as much a right under the First Amendment as the right to speak. To deprive one group of listeners of the right to hear on purely technical grounds would be constitutionally indefensible. More fundamentally, the recognition of a right of dominion where none can in fact exist, and that for purely private purposes in the course of use of a public asset, is a violation of due process. Given that two neighbors can use different devices for the reception of a specific broadcast, and that this law would impose a copyright obligation on one and not the other, the law must be stricken down.

In consequence, the situation is properly characterized as follows:

The attempt to impose a copyright obligation on community antennas is contrary to the fundamental policy of free broadcast reception; it would create discrimination; it would benefit a comparative few at huge cost to a large number; it would depart from a sound, historic copyright principle; it would be impractical; and it would be unconstitutional. I therefore urge that this attempt be abandoned.

Respectfully submitted,

GEORGE SCHIFFER.

NINA SCHNEIDER

December 18, 1964.

As an author of educational materials, I am entirely opposed to the "fair use" clause of the proposed Copyright law.

It is clearly a serious infringement of the author's right to payment for use of his work. It would make writing for education the business of novices and failures and would reduce the quantity and qual-

ity of published works because there would simply be—from the point of view of both author and publisher—no incentive whatsoever—other than the mediocre one of departmental advancement—for published material.

There is little enough protection as of now!

As it is, authors of educational materials see much of their work used freely and without remuneration on Educational T.V. in curriculum and classroom mimeographs—while any soap commercial returns substantial royalties to all participants.

I can see no advantage to further depleting the ranks of competent writers and persuading them that advantage in education is gained by boon-doggling grants. If *NEA* and *NSF* etc. can provide all the free study(?) and random research grants they now provide, they can pay royalties on educational material published by publishers.

NINA SCHNEIDER.

JOSEPH E. SHIGLEY

December 15, 1964.

I have been told by my publishers that Congress is soon to take action on a new copyright law. The proposed legislation appears to be good in all respects except as follows:

1. Protection under this new law is to run from the date of the publisher's contract rather than from the date of publication. There are two facets of this of which you should be aware:

(a) It is not too difficult to change the title of a manuscript, sign a new contract, and thus update the protection. To prevent this, the new law would have to contain a messy and difficult clause, which, surely, would be difficult to enforce.

(b) Many writers will publish only a single book in a lifetime. This may well contain the wisdom and knowledge accumulated in 20 years or more of practice. Writing is frequently difficult for such persons and as many as 7 years may be required to complete such a treatise. It seems unfair to penalize such people simply because they are not prolific writers.

2. Under the proposed law, permission is to be granted for reproducing entire pages and even entire chapters without compensation to the publisher, and hence, to the authors. If passed, such a provision could set back education in this country hundreds of years because it will almost completely remove the incentive to write.

As a typical example, my latest book, "Mechanical Engineering Design", McGraw-Hill Book Company, Inc., New York, 1963 contains six lubrication charts on pp. 352–356. The design, computation, and construction of these charts required over 500 hours (13 weeks) of my time. They are very important and useful charts and represent an

important section of this book. There are a great many other examples I could cite. But, under the proposed new law, I simply would not feel justified in performing such a task.

In my opinion, inclusion of this provision in the new law will greatly affect the scholarly content of new books, and will severely reduce the quality (if not the quantity) of all books published.

3. The manufacturing clause, in my opinion, will prohibit or greatly reduce the number of scholarly or so-called prestige books which are published since no protection would be given to United States authors whose books were published abroad. Such books are extremely important in my work. They furnish me with many valuable educational and professional ideas, and I would certainly not like to see this source dried up.

* * * * * * *

Sincerely yours,

JOSEPH E. SHIGLEY,
Professor, College of Engineering,
University of Michigan.

A. E. SIEGMAN

December 14, 1964.

I should like to offer some experienced comments on the proposed 'fair use' and 'domestic manufacturing' clauses in the draft revision of the Copyright law.

My viewpoint on these matters comes out of a dual background: my connection with education as a professor of engineering, and my connection with publishing and as an author and consulting editor for McGraw-Hill.

My current experience in the university, with its rapidly increasing supply of advanced copying machines, makes evident the truth of the assertion that "if portions of a work may be reproduced freely, a single copy of a book and a photocopying machine may service an entire community"—especially when the cost of the copying service is buried in overhead, rather than charged directly to the user, as is often the case. I have, in fact, seen books copied *in toto* on such machines.

My current experience in close association with a publisher has made evident the major contribution which the publishing industry makes to education at every level, from elementary through graduate school—a contribution which ranges far beyond the mere manufacture of printed pages. Publishers are an integral part of the education process, in many cases with small profit to themselves, especially in the production of the scholarly works which often have a small market, an expensive production, and a great importance.

The publishers need and deserve protection from the rapid advances in photocopying technology—without such protection, in fact, a Copyright may be largely meaningless.

The domestic manufacturing clause is nearly as harmful, and again strikes hardest at the important technical, scientific and scholarly books. Aside from the fact that such a basically protectionist clause seems entirely out of place in a Copyright act, it seems likely to have an effect opposite to what is intended. How will domestic manufacturers benefit if authors of affected works decide—as they may well—to publish their books entirely abroad, in order to keep the cost within reach of the scholars whom they hope to address?

Scholarship and education are international concerns by their nature. The United States surely will benefit more than it will lose by free and open exchange of knowledge—and of books.

Yours truly,

A. E. SIEGMAN,
Professor of Electrical Engineering,
Stanford University.

ROBERT P. SLINGLAND

August 25, 1964.

We'd appreciate receiving a copy of House Bill H.R. 11947, or Senate Bill S. 3008, for our study.

We are particularly concerned that the wording of these bills is not favorable to educational interests and that it will specifically hamstring our work in educational broadcasting.

We understand no exemption is offered to education for purposes of making any single copy of a program, nor for pre-recording. This would seriously hamper development of educational broadcasting to the point of making it not feasible, economically, to continue what has been a most important adjunct to the development of education today.

We hope that your interest in these bills will be that of support of education's concern in its inadequacies.

Sincerely,

ROBERT P. SLINGLAND,
Director, Television Education,
Tacoma School District No. 10.

HELEN P. SMITH

December 13, 1964.

Perhaps our number is small but to the widows of university professors who wrote successful textbooks, the passage of the proposed

"Copyright" Law with its "fair use" clause would cause us real financial hardship. These Royalty checks make all the difference in the way we can live. To have that clause in the new law would be most *un*fair to us.

The manufacturing clause should definitely be repealed. Publishers would find it difficult if not impossible to compete when trying to turn out important books which, because of their highly specialized nature, could not be expected to sell in quantity. However, these same books are most important to those who need that particular information but would be unable to get it unless this manufacturing clause is repealed.

* * * * * * *

Yours,

HELEN P. SMITH (MRS. GILBERT M.)

W. E. STREET

October 9, 1964.

I notice that Congress is considering revising the Copyright Law, which was last revised in 1909.

I wish to raise a question for consideration when this is revised. At the present time, the authors of textbooks and similar publications and publishers do not receive any remuneration for second-hand books sold. Is it possible to provide for the authors and publishers some remuneration for the sale of second-hand books? Could this be written into the new Copyright Bill?

Thanking you for consideration of this matter,

Yours very truly,

W. E. STREET, *P.E.*,
Head, Engineering Graphics Department,
College of Engineering, Texas A. & M. University.

GEORGE P. SUTTON

December 29, 1964.

I am particularly concerned about the "fair use" clause which involves the reproduction of copyrighted material by educational institutions and educational organizations.

Having been an author or a contributor to several books and college text books, I have learned that it is accepted practice to print special low-cost editions for the educational institutions, and I have learned to expect lower author's royalties from sales to educational institutions. If the proposed fair-use clause is adopted, it will mean total loss of revenue to authors for books copied or sold to educational

organizations. This will seriously dampen an author's interest to create and it will discourage publishers from starting as many new works as they have in the past several years. Not only would it deprive authors of their rightful income, but it will probably seriously handicap the free flow of information.

Very truly yours,

GEORGE P. SUTTON.

FREDERICK L. THOMSEN

December 19, 1964.

As the author of two textbooks I am in a position to speak with some feeling about the proposed "fair use" clause of the revision of the copyright law which will be considered in the forthcoming session of the Congress.

Preparation of my two books required years of hard work and the expenditure of considerable sums for typing and mimeographing before final publication. Sales of many textbooks, particularly those requiring the most effort and greatest expense, are small, bringing a return less than that provided by the minimum wage law. Any free use of copyrighted materials would further reduce the already inadequate rewards to technical authors, and certainly would discourage both writing and publishing of these much-needed educational materials.

I hope that you will use your influence to keep this clause from being enacted into legislation, and to protect the interests of technical authors, not only for their benefit but also for the benefit of education in general.

Sincerely yours,

FREDERICK L. THOMSEN.

JOHN TOCCHINI

December 16, 1964.

The next session of Congress is to receive the H.R. 11947 Bill which is known as the Copyright Bill. There are many features of this Bill that are favorable to those of us who have served as authors and are interested in continuing to add new material and new ideas in published form.

One portion of this Bill, referred to as the fair use clause, dealing with photo copying and reproducing of copyrighted material is being unfairly presented.

The defeat of this Bill should be a paramount objective of Congress. Authors and publishers both need the protection they have had in order to continue to be encouraged, publish, and protect the publish-

ing firms and authors that have copyrighted important technical material.

Your earnest consideration of the above is appreciated.

Sincerely yours,

JOHN TOCCHINI, *D.D.S.*,
Dean, School of Dentistry, College of Physicians and Surgeons, University of the Pacific.

JOSEPH J. WADDELL

December 16, 1964.

I note, with considerable concern, a proposed major revision of the copyright law that is expected to be introduced in the next session of Congress.

The portion that distresses me is the so-called "fair use" clause specifically granting the authorization to reproduce copyrighted works to certain organizations. As an engineer, I recognize the need of occasionally copying portions of technical works for my personal use. As an author of technical books, I am deeply concerned about the implications of writing into law the permission of free copying of copyrighted works, even to an apparently limited group. I strongly urge that this provision be eliminated from the proposed legislation.

Another clause in the copyright legislation is the manufacturing clause, making domestic manufacture a condition of copyright for a book by an American author. This has the potential of adversely affecting the cost of producing certain technical books that require hand composition, as these books are sometimes made by the photo-offset process from reproduction proofs made elsewhere at less cost. This provision of the law is, to me, an unfair interference with private enterprise, and obstructs the production of much needed American technical and scientific books. This provision should be repealed.

Yours very truly,

JOSEPH J. WADDELL,
Technical Services Engineer,
Riverside Cement Company.

J. A. WAGNER

December 18, 1964.

Re: *Revision of Copyright Law*

As you are undoubtedly aware, there is considerable resistance to the "fair use" clause currently contained in the pending revision of the copyright law. As I understand it, the "fair use" clause would threaten the existence of textbook divisions, for example, in large

publication houses, and would literally destroy the business of small publishers who depend upon the publication of educational materials for their livelihood. If this clause has been inserted in this revision through ignorance or error, then its rectification is a simple matter. However, if its intent is to destroy initiative, scholarly publications, and free enterprise, then we face a problem of another nature.

A clarification of your understanding of the effects of the "fair use" clause, if retained in this legislation, would be appreciated. It would seem also that a dissertation on the intent of this clause is in order. A response to this letter at your earliest convenience would be appreciated.

Yours very truly,

J. A. WAGNER,
Professor, Speech Department,
California State College.

FRANKLIN WALDHEIM

August 31, 1964.

Spencer Olin, Elliott Levitas and I wish to suggest a few changes in language (which are not changes of substance) in H.R. 11947.

Section 2(a)—The section, as it reads, seems to rule out protection for that part of the work which is original. We suggest that the final clause should read: "but protection for a work employing pre-existing material in which copyright subsists is not available as to any portion thereof using such material unlawfully". (I suggested this change at the Panel Meeting.)

Section 7(b)—We think that there should be a clarification of the phrase "to exhibit that copy publicly by showing it to viewers present at the place where the copy is located". The expression "to exhibit a work publicly" is defined in Section 5(b) to mean, among other things, "to broadcast an exhibition of the work to the public". That definition is inconsistent with this clause, which speaks of exhibiting a copy publicly by showing it to viewers present at the place where the copy is located. To avoid the conflict between this clause and the prior definition, we suggest that the clause read: "to show that copy to viewers present at the place where the copy is located". This would express the intention of the clause as expressed by Miss Ringer at the Panel Meeting.

Section 9(a)—the words "or on" should be inserted after the words "to reproduce the work in" . . . The desirability of this clarification is self-evident.

Section 9(a)(2)—After the words . . . "exhibition of pictures or photographs" there should be inserted the words "of such articles". This would make it clear that others may (without the consent of the copyright owner) use pictures or photographs of the *articles* which reproduce the copyrighted work as distinguished from pictures or photographs of the copyrighted work separate from the articles.

Section 19(b)(3)—We are concerned about the wording of this clause because rights not preserved by this clause (and not afforded by the Act) would be ruled out by the *Stiffel* case. We are concerned with such matters as rights in titles and rights in characters. These are not protected under this Bill and yet they are so involved with the copyrighted work that a court might consider them equivalent to, or within the general scope of, copyright. We think that the first two and a half lines of this Section should read: "activities violating rights other than the exclusive rights specified by Section 5".

Section 24(a)—The words "or elsewhere" should be omitted . . . The inclusion of these words adopts a statutory view on a point concerning which there have been diverse judicial holdings. The view here adopted makes the copyright notice more burdensome for the author. It is difficult enough for the author to police the inclusion of his copyright notice in this country where publishers are accustomed to the copyright notice. It is much more difficult to enforce inclusion of the notice in other parts of the world where the copyright notice has never been necessary (except for those who may now be alert to its inclusion by reason of the Universal Copyright Convention). It should hardly be necessary to impose the tougher restrictions on American authors.

Section 24(c)—. . . [T]he words "or attached to" should be inserted after the words "The notice shall be placed on". This would make it possible to attach copyright notices to miniature items, dresses and many other articles upon which it is not feasible to place the notice directly. A suggestion made by Mr. Leonard Zissu, at a meeting of Committee 304, might be another way of handling this problem. His suggestion was that the notice shall be placed on the copies or in such other manner and location as the Register of Copyrights shall by regulation prescribe.

Section 27(a)—For the reasons I expressed at the Panel Meeting, we suggest retaining the language of this Section up to and including the word "work" . . .—omitting the rest. This change would necessitate striking out in Section 30 . . . the words: "Subject to the provisions of Section 27(a)".

Sincerely yours,

FRANKLIN WALDHEIM.

PHILIP B. WATTENBERG

January 4, 1965.

I hope that you will not look upon the following suggestion as being made late in the day. However, it occurred to me only last week in the course of a discussion with an FBI agent, who has been working with us on the Fake Book matters. The agent explained to me that in one particular case where the FBI seized 4500 Fake Books in October 1963, they are having great trouble in securing witnesses willing to testify. He mentioned one particular witness, whom we both know, who is in a position to wrap up the case but who has refused to testify. The agent said that if this witness could be granted immunity as could be done in cases involving bribery, conspiracy, gambling, etc., our problems would be over but the statute must have the immunity provision expressly set forth in it in order for immunity to be invoked.

It seems to me that the criminal section of the copyright law is ideally suited to inclusion of an immunity provision. The crime is not so heinous as to stir public opinion or stimulate a desire in witnesses to serve the public welfare by testifying. Also there are usually a great many peripheral persons involved in the commission of the crime who would testify if they could be protected.

In addition, what is involved in criminal infringements of copyright does not cause law enforcement agencies to view them with a sense of urgency. When they do decide to prosecute a disproportionate amount of time and money is required to bring the case to its ultimate conclusion.

In § 40 of H.R. 11947, we are attempting to strengthen § 104 by increasing the possible penalties. It remains to be seen whether this will serve as a greater deterrent. What I suggest is an addition to § 40 of an immunity provision which would result in strengthening the criminal section by making enforcement less onerous.

As an example of language which might be adapted to fit the situation, I refer you to 49 U.S.C.A., 46, 47 and 48.

Sincerely,

PHILIP B. WATTENBERG.

JOHN F. WHICHER

August 24, 1964.

I write to comment on § 1 of the proposed revision bill.

The first phrase therein to catch and hold my eye is "works of authorship." This phrase, I gather, is intended to replace the phrase in § 4 of the present statute, "all writings." As I recall our panel's earlier discussions of your Report on General Revision, some thought was then entertained that the protection of the new copyright act

should be restricted to certain broad categories of "writings" and should not, any longer, be extended to all writings generally. I see the broad categories here in § 1 of the bill; but I also see that "works of authorship" include, "but are not limited to" those categories. The notion of restricting copyright to specific broad categories of writings thus appears to have been given up.

But, I submit, the sense of *some* attempt to narrow down from the coverage of our present statute remains. The substitution of the phrase "works of authorship" for "all writings" is what gives rise to the impression that *some* kind of change is intended. "All writings," of course, went as far as the Constitutional fences permit, so the change implied or inferred cannot be one of expansion of the statutory coverage, but must be one of restriction. The adjective "original," and the adjectival clause beginning with the word "fixed", both impose limitations on coverage; but since they could equally have modified the word "writings" if we had chosen to use that word, we are left with the sense of some *further* limitation intended by the rejection of that word and the substitution of the phrase "works of authorship" in its place. The word "works" is much broader than "writings", so the further limitation we're looking for must be in the words "of authorship."

I hate the pedantry of the dictionary; but I must recognize that judges, construing § 1 of your proposed revision bill, can be led into the hunt for some refinement of distinction between the meaning of "writings" and "works of authorship" by the kind of reasoning above employed. When they turn to dictionary definitions of "authorship" for light on the distinction, as they almost certainly will, they will find a host of misleading sign-posts. Thus, they will find one definition that reads, "Profession of writing books, articles, etc." Given the seven categories of the statute, only one of which is "literary works," the courts are not likely to be misled by the quoted definition into the supposition that we're now restricting coverage to "books, articles" and things *like* books and articles, i.e., literary works. But may they not be misled into thinking that we mean to distinguish between the works of those who are authors by profession, as opposed to those who write only as a hobby? Surely we don't *mean* to exclude amateur authors; but isn't there a danger that a court might, by the reasoning above outlined, be misled into *thinking* that that's what we meant? (Speaking of amateur authors, I wish I could remember who said that the two men who have thus far made the most original contributions to the English language in the Twentieth Century are James Joyce and Dwight D. Eisenhower.)

Another dictionary definition of "authorship" is "Origination, esp. of a literary work." Again, we have the conflict between the categories and the definition's reference to literary works. And I'm

troubled by what a court *might* do confronted with "original originations." Such a double stress on originality, I fear, may bring in, with another word, all the difficulties we've hitherto had over "creativity." There is, I think, a real danger of this kind in this apparent redundancy, quite apart from the offense to one's sense of aesthetics to which it gives rise. (Again I'm reminded of someone's comment that, when Dr. Johnson *wrote* "Let observation with extended view/ Survey mankind from China to Peru," he was really *saying* "Let observation with extensive observation observe mankind extensively." That was not very kind to Dr. Johnson; and I hope the new bill, when passed, will not give future commentators any occasion to be similarly unkind to A.L.K.)

Still a third dictionary definition of "authorship" is "Instigation; as *authorship* of a crime." Setting our current difficulties over author's reversion to one side, I don't think this definition is terribly relevant to anything before us.

I wonder: now that we're *not* restricting coverage to broad categories, *do* we mean anything different from "writings" by "works of authorship"? The attempt to find such a difference, as I've indicated, leads us into such unlikely results that I'm inclined to doubt that any change is really intended.

If my conclusion is correct, then I suggest that the substitution of "works of authorship" for "writings" is misleading and dangerous since it *could* lead future judges astray. "Writings" is not, after all, a *bad* word. It's been in the Constitution for nearly two hundred years, and our copyright statutes since 1790 have put a considerable gloss of historical interpretation upon it. Why throw all that away, just to substitute a new phrase that raises all the same problems of definition? Do we really *have* to start all over?

I respectfully suggest that we'd be better off to say "writings of authors" (using the Constitutional words) instead of "works of authorship."

Concerning the categories, I have only a few, very minor points to raise. Some of the categories, or parts of categories, in § 5 of the present law were, I believe, added by the authors of the 1909 act to make it clear that certain kinds of works were included in the coverage of that act which had theretofore been thought to be excluded. I'm thinking particularly of newspapers. By reverting to general categories, we run some risk, I think, of excluding such works again. I don't suggest we should change the language of § 1; I do suggest that our definitions, in § 54, of the kinds of works covered by the language used in § 1 to describe the categories, should be carefully reviewed to make sure that nothing is unintentionally lost.

Yours sincerely,

JOHN F. WHICHER.

C. TAYLOR WHITTIER

September 15, 1964.

Bill S. 3008 which will change the copyright laws has come to my attention. This Bill will impose severe restrictions on the use of printed and filmed educational materials by teachers in the classroom. It will almost completely prohibit the use of such materials for classroom instruction on non-profit, educational broadcasting stations.

As Superintendent of the Philadelphia Public Schools, I wish to emphasize the tremendous needs of our schools to provide quality education. You are aware, I am sure, of the scarcity of funds for public education.

Therefore, I urge a continuation of the exemptions for non-profit, educational uses of copyrighted materials which exist under the present laws. Also, I should like to point out that the values of resources made available to pupils over closed circuit installations are just as important to pupils who receive instruction over non-profit educational stations. Therefore, I suggest that the exemptions for closed circuit broadcasting in S. 3008 be extended to include all non-profit instructional broadcasting for classroom use.

It is to be hoped any changes in the copyright laws will not hinder the educational processes in America.

Sincerely yours,

C. TAYLOR WHITTIER,
Superintendent of Schools,
School District of Philadelphia.

WALTER WILTERMOOD

January 9, 1965.

May I add my voice to the others who are deeply interested in the proposed copyright revision. If it is not too late I would hope that some exemption would be specified that would let individual teachers use materials that had been copyrighted, in classrooms only for the enrichment and broadening of children's minds and attitudes.

There are many districts, and individual schools where budgets do not allow workbooks for all subjects and where for certain units the teacher who had material could ditto off copies for the specific number of children in the class, which would greatly add to the understanding of the unit.

Many times I have purchased material which I felt would enhance the teaching situation and which I would have liked to reproduce for the class. I am certain that the reasonable use of material in this nature would not work a monetary hardship on the copyright holder.

Thank you sincerely,

WALTER WILTERMOOD,
Pres., Grants Pass Education Association.

MIRIAM BREDOW WOLF

December 12, 1964.

I have been shocked to learn of the provision for free copying provided for in the copyright bill now before Congress. I am a writer of textbooks whose income depends to a great extent on the sale of these books and once free copying is permitted, the sale of textbooks is bound to dwindle to a trickle, as copies for any number of students can be made from one book. I strongly protest this provision in the new Bill.

Very truly yours,

MIRIAM BREDOW WOLF.

JOSEPH M. WOOD

October 9, 1964.

In reference to S. 3008, a bill for the general revision of the Copyright Law, title 17 of the United States Code, I should like to comment on . . . [the first sentence of] Section 6 . . . This statement does not specifically state the degree of fair use.

The enrollment of my freshman botany class is usually about six hundred. Section 6 does not clearly state whether or not I may duplicate charts, diagrams, flow sheets or portions of the text from copyrighted works in sufficient number to provide a copy for each student enrolled.

There are, in my opinion, about twelve excellent references in botany that are useful to freshman students. After careful study of all references available, I select a reference for my course. Each student buys his own copy of the selected text. However, each of the other references has diagrams, charts or text portions that I would like to use in class. In my opinion it would be unreasonable to ask each student to purchase a copy of each of these texts so as to have his own copy of a portion thereof for ready reference or study. Moreover, with the ever-increasing enrollments I doubt if any university library could stock enough duplicate copies of each of these works to meet the demand because these requests would cluster around certain lectures rather than be spread evenly throughout a semester.

Therefore, I suggest that . . . [the first sentence] of Section 6 . . . [is] ambiguous. Consequently, in my opinion, the areas of teaching, scholarship and research should be set aside in a separate category. This new category should permit those engaged in teaching, scholarship, or research to duplicate in unlimited numbers for the use of their students portions of copyrighted works when those portions are to be used as teaching or study aids, scholarship guides or tools, or research materials.

In my opinion no just and prudent man would wish to reduce the effectiveness of those engaged in teaching, scholarship or research, and I do not think that the author(s) of this proposed bill had this intent; however as presently worded, this bill would permit a copyright holder to sue a teacher, scholar or researcher in a test case, and this would be a most unfortunate situation.

Sincerely,

JOSEPH M. WOOD,
Associate Professor, College of Arts and Science,
University of Missouri.

WRITERS GUILD OF AMERICA

September 14, 1964.

The following statement is submitted on behalf of Writers Guild of America.

This statement is not meant to be an all inclusive comment concerning the provisions of H.R. 11947 but is rather directed at a few of the sections of that proposed Bill which need clarification. I am sure you will appreciate the fact that our failure to comment on other sections does not imply either assent or disapproval of those sections:

1. Section 4(d) of the Bill does not specifically state that the United States Government can not use any copyrighted work without the consent of the copyright owner. Although the title of Section 4 makes reference to "United States Government Works" we fear that there might conceivably be read into this section a right on the part of the United States Government to use a copyrighted work by an individual without his consent.

2. Section 5(b)(3) (B) and (C) fails to properly define the use of the word "publicly." In subparagraph (A), directly preceding (B) and (C), the act of performing or exhibiting a work publicly is defined as meaning "to perform or exhibit at a place open to the public" or "at any place where a substantial number of persons outside of the normal circle of a family and its social acquaintances are gathered." Although the first alternate definition is faulty in that it defines the exhibition of a work publicly by using the word "public", the subsequent alternate definition set forth in (A) is sufficient to make the definition meaningful. However, in both subparagraph (B) and subparagraph (C) this meaningful clarification is omitted and we are left for the most part with just the crucial word "public" as a means of defining the word "publicly."

3. Section 6 should contain some statement to the effect that under no circumstances can the use of an entire work be deemed a fair use.

4. Section 8(4) should be amended . . . [by inserting the words "sponsors, promoters or producers" after the word "performers,"].

5. Section 13(1) is somewhat ambiguous, if our understanding of this section is correct. The uncertainty that exists in our mind would be cleared up by the substitution of the word "reception" for the word "communication" . . .

6. In Sections 14(b) and 54, a most serious problem is raised. It is obvious that certain rights and disabilities flow from the classification of a work as a "work made for hire." In light of these consequences it is, therefore, most important to understand when and under what circumstances a work will be so designated. Section 14(b) states in substance that the employer owns all of the rights in the copyright of such a work "unless the parties have expressly agreed otherwise." However, it is unclear from Section 14(b), as well as from the definition set forth in Section 54, whether the parties can agree that a work which would otherwise be classified for copyright purposes as a "work made for hire", will not be so classified. In other words, suppose an employee creates a work during the course of his employment which, without further agreement, would clearly be deemed a "work made for hire." Suppose, further, that the employer and the employee agree that with the exception of certain television licenses, all rights in and to the material belong to the employee. This would be a typical situation in, let us say, the television writing field. Under those circumstances, the employer, in most situations, would be left only with the license to broadcast the work under certain terms and conditions imposed by the applicable collective bargaining agreement. All of these premises being true, what for example, would be the term of copyright of the work? Would it follow the term of copyright of a "work made for hire" or would the term be the life of the author, plus fifty years?

It is respectfully submitted that under those circumstances the work should not be considered as a "work made for hire" but should be considered for all purposes as if such were not the case. To do otherwise would negate the intent of the parties, as well as the spirit of the copyright law.

Further, the definition of a "work made for hire" in Section 54 appears to give the parties the right to agree in writing that a work prepared on special order *shall be* considered a "work made for hire." Completely aside from our objections to this latter clause, it would seem inconsistent that the parties could not agree in writing that a work shall *not be* considered a "work made for hire."

7. In Section 54, the definition of "an anonymous work" does not take into account the common situation of a corporate entity identify-

ing itself on copies of a work as the author. Because such corporate entity is not a "natural person" within the accepted meaning of such term, many works, particularly works made for hire, might well be deemed to be anonymous works, when, in fact, they are not.

As previously stated, the within statement does not embody all of the points in the proposed Bill with which we agree or disagree. We will attempt to submit a further statement of position at some future date.

Respectfully submitted,

RICHARD B. JABLOW,
Counsel for Writers Guild of America.

SUBJECT INDEX

Page

ANONYMOUS WORK:
Definition 344
APPLICATION FOR REGISTRATION. *See* Registration.
ART, WORKS OF:
Right to exhibit 61, 66, 264, 272, 279
Right to reproduce in any kind of article 67, 316-317, 337
BROADCASTING (*See also* Community antenna systems; Educational broadcasting):
Performing rights with respect to 96, 128, 238, 268, 272, 344
CERTIFICATE OF REGISTRATION:
As prima facie evidence 310
COLLECTIVE WORK:
Definition 216
COMMISSIONED WORKS:
Ownership of copyright in 147-148, 150, 239
COMMON CARRIERS:
As an exempt category with respect to broadcasting rights ... 59, 65, 264, 267, 303
COMMUNITY ANTENNA SYSTEMS (*See also* Broadcasting) 59-63, 117, 128-130, 267, 272, 303, 326-329
COMPILATIONS, DERIVATIVE WORKS, ADDITIONAL MATERIAL:
Definition of "compilation" 216
Definition of "derivative works" 216, 228, 232, 278, 314
Extent of protection 38, 256, 263, 336
COMPULSORY LICENSE:
Sound recording of nondramatic musical works 131-139, 221, 264-265, 268, 288-289, 317
COMPUTERS:
Use of copyrighted works in programming and operation of 62-63, 271, 276
CONTRIBUTIONS TO COLLECTIVE WORKS:
Ownership of copyright in 148-150, 152
CO-OWNERSHIP:
Definition of "joint work" 144, 152
COPIES:
Definition 216, 227
COPYING, EDUCATIONAL. *See* Fair use.
COPYRIGHT OFFICE:
Fees 211-215, 256, 286-287
Regulations 285
Retention and disposition of articles deposited 211-212, 310
CRIMINAL OFFENSES 200, 310, 338

DAMAGES AND PROFITS. *See* Remedies for infringement.
DATA PROCESSING. *See* Computers.
DEFINITIONS:
Anonymous work 344
Collective work 216
Compilation 216
Copies 216, 227
Derivative work 216, 228, 232, 278, 314
Government publications 43, 45, 48, 52, 229
Joint work 144, 152
Literary works 215, 228
Motion pictures 38, 215, 217, 311
Perform 216, 217
Phonorecords 223
Publicly 62, 284, 285, 302, 315, 343
Sound recordings 215
State 285–286
Transfer of copyright ownership 216, 306
United States 286
Work made for hire 144–148, 150, 218, 239, 287, 301, 344
DEPOSIT OF COPY (*See also* Copyright Office) 209–210, 253, 308
DERIVATIVE WORKS. *See* Compilations, derivative works, additional material.
DESIGNS. *See* Art, Works of.
DIVISIBILITY 144, 317
DURATION OF COPYRIGHT:
Joint works 170, 248, 285
Records and presumptions as to author's death 170, 172
Religious textbooks 81–93
Subsisting copyrights 171, 176, 178, 227, 246
Unpublished works 171, 173–175, 248, 250, 307
Works created after effective date of Act 170, 172–180, 251, 270, 274–275, 284, 293, 307
Works created but not published or copyrighted before effective date of Act 171–172, 307
EDUCATIONAL BROADCASTING 63, 64, 105–126, 233, 313, 332, 341
EMPLOYER FOR HIRE:
As owner of copyright 144–151, 239–240, 287, 344
Definition of "work made for hire" 144–148, 150, 218, 239, 287, 301, 344
EPHEMERAL RECORDINGS 67, 77
EXHIBIT, RIGHT TO. *See* Art, Works of.
FAIR USE (*See also* Libraries, Copying and recording by) ..... 94, 96–112, 124–128, 143–144, 222–224, 233–238, 257–258, 261–264, 267–268, 271–273, 277, 280–283, 286, 289–293, 295–298, 312–313, 315–316, 319, 326, 329–336, 341–343.
FEES FOR COPYRIGHT REGISTRATION. *See* Copyright Office.
FOREIGN AUTHORS:
Protection of works of 39–42, 314–315
GOVERNMENT PUBLICATIONS:
As subject matter of copyright 43–56, 223, 229–230, 237, 263, 297, 315, 343
Definition 43, 45, 48, 52, 229
Duration of copyright in 43–44, 52
HIRE, WORKS MADE FOR. *See* Employer for hire.
HYPOTHECATION 306
IMPORTATION 185, 190-192, 195, 197, 254

IMPOUNDING INFRINGING ARTICLES. *See* Remedies for infringement.
INDUSTRIAL DESIGNS. *See* Art, Works of.
INFORMATION STORAGE AND RETRIEVAL. *See* Computers.
INFRINGEMENT OF COPYRIGHT (*See* also Criminal offenses; Innocent infringement: Remedies for infringement):
Notification of filing and determination of actions 200, 269
INJUNCTIONS. *See* Remedies for infringement.
INNOCENT INFRINGEMENT:
Effect of, because of unintentional omission of copyright notice 182, 183, 252, 307
Effect of, on award of damages 199, 201–205, 207–208, 325
JOINDER OF PARTIES 198, 200–201, 255, 266
JOINT WORKS. *See* Co-ownership.
JUKE BOX EXEMPTION 68–76
LENDING RIGHT 61, 64, 79
LIBRARIES, COPYING AND RECORDING BY 103, 105, 270
LIMITATIONS ON ACTIONS 200
LIMITATIONS ON EXCLUSIVE RIGHTS. *See* Fair use; Libraries, Copying and recording by; Performing rights.
LIMITATIONS ON TRANSFERS OF COPYRIGHT. *See* Reversion clause.
LITERARY WORKS:
Definition 215, 228
MANUFACTURING CLAUSE (*See also* Importation) ..... 185–198, 227, 236, 254, 258–261, 289, 295–298, 320, 324, 331–333, 335.
MOTION PICTURES:
Definition 88, 215, 217, 311
Performing rights 58, 302–303
Sound tracks 264
MULTIPLE INFRINGEMENTS:
Statutory damages for 203–204, 269
NEIGHBORING RIGHTS 39, 79, 80
NEWSPAPER REPRODUCTION OF PHOTOGRAPHS:
Limitation of damages 230–232
NOTICE OF COPYRIGHT:
Errors in name or date 182, 252
Omission 181–184, 252, 269, 271, 337
Phonorecords 181 266, 318
Visually-perceptible copies 181, 184, 251, 337
PANTOMIMES:
As subject matter of copyright 314
PARODIES, BURLESQUES, ETC.:
Applicability of "fair use" doctrine to 101
PERFORMING RIGHTS (*See* also Motion pictures; Sound recordings):
Definition of "perform" 223
Definition of "publicly" 62, 284, 285, 302, 315, 324, 343
Exemptions for educational, religious, or charitable purposes 95, 107, 111–123, 224–225, 283, 266–267, 296, 315, 324, 343
"Profit" as requirement 57, 64, 95, 111–112, 117, 119, 121
PHONORECORDS:
Definition 216, 217
PHOTOGRAPHS:
Limitation of damages for newspaper reproduction of 230–232
PICTORIAL, GRAPHIC AND SCULPTURAL WORKS. *See* Art, Works of.
PRE-EMPTION WITH RESPECT TO OTHER LAWS. *See* State laws, Effect on.

Page

PROFITS. *See* Remedies for infringement.
PUBLICITY, RIGHT OF 318
RECORDATION:
As constructive notice 153
Priority between conflicting transfer of ownership and non-exclusive license 226, 305, 318
REGISTRATION:
Application 206, 218, 256
As prerequisite to certain remedies for infringement 205–210
In general 205, 210, 227
REGULATIONS OF THE COPYRIGHT OFFICE. See Copyright Office.
REMEDIES FOR INFRINGEMENT (*See also* Criminal offenses):
Damages and profits 199, 201–205, 230–232, 309
Impounding and disposition of articles 199, 308–309
Injunctions 198
Notice to Copyright Office of infringement suits 200, 269
Registration as prerequisite 205–210
REVERSION CLAUSE 153–166, 218, 222, 225–226, 240–246, 256–257, 284, 287, 299–301, 318
RIGHTS COMPRISED IN COPYRIGHT (*See also* Broadcasting; Performing rights):
Effect of transfer of particular copy or phonorecord 66, 79, 316
In general 56–65
Right to make derivative works 58–59, 63, 277, 303–304
Rights in sound recordings 77–80, 94, 317
SOUND RECORDINGS:
As subject matter of copyright 89
Definition 215
Protection against unauthorized duplication and distribution of 304, 317
Right to perform 263
STATE LAWS, EFFECT ON 166–170, 250–251, 306, 318, 337
SUBJECT MATTER OF COPYRIGHT (*See also* Compilations, derivative works, additional material; Government publications):
In general 87–89, 313–314, 338–340
Pantomimes 314
Titles 314
SUPREME COURT OF THE U.S.:
Rules on seizure and impounding in copyright actions 308–309
TANGIBILITY:
As requirement of copyrightability 87, 314
TERMINATION OF TRANSFERS AND LICENSES. *See* Reversion clause.
TITLES:
As subject matter of copyright 314
TRANSFER OF PARTICULAR COPY OR PHONORECORD 66, 79, 316
TRANSFERS OF COPYRIGHT OWNERSHIP:
Definition 216, 306
UNITED STATES:
Definition 286
Government use of another's copyright work 43, 55, 56
UNPUBLISHED WORKS (*See also* State laws, Effect on):
Of foreign authors; protection 40–42
Of United States Government 43, 49–50, 53
WORK MADE FOR HIRE. *See* Employer for hire.
WRITINGS OF AN AUTHOR. *See* Subject matter of copyright.

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