GENERAL GUIDE TO THE ©OPYRIGHT ACT OF 1976

SEPTEMBER 1977

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INTRODUCTION

The Copyright Act of 1976, Public Law 94-553 (90 Stat. 2541), is a general revision of the copyright law, Title 17, United States Code; it becomes fully effective on January 1, 1978. The new law supersedes the Copyright Act of 1909, as amended, and is the first extensive revision of the 1909 law.

Early in 1977 the Register of Copyrights established in the Copyright Office a Revision Coordinating Committee, chaired by the Register, to oversee the development and coordination of plans for implementation of the new law. The Committee recognized that an important part of this initial preparation was staff training and it asked Marybeth Peters, Senior Attorney-Adviser, to plan, organize, and conduct all internal training on the new law as well as to coordinate all training activities outside of the Copyright Office. As a result of her successful execution of the first part of this assignment, 260 staff members, in 15 sessions of one and one-half hours each, completed an intensive study of the new law; 125 other staff members participated a "mini-course". Ms. Peters, who has a teaching as well as a legal background, prepared all instructional materials and designed the format for both the short- and long-term courses.

Because Ms. Peters' instruction was basic and her "lesson plans" comprehensive, the Copyright Office received repeated requests for wider dissemination of her instructional materials. The Revision Coordinating Committee is responding to this demand by publishing Ms. Peters' guide. This general guide to the Copyright Act of 1976 is not an official summary of the law. It does not attempt to deal with all of the issues raised by the revision legislation nor to provide answers to legal questions. It is, however, an extensive training tool, the text of which follows the language used by Ms. Peters, with only a change in tense to avoid an appearance of obsolescence on January 1, 1978.

In developing the lectures and lesson plans, Ms. Peters relied heavily on the language of the law itself, the legislative reports, and the various statements of the Register of Copyrights to the Congress, i.e., the 1961 Report of the Register, 1965 Supplemental Report, and the 1975 Second Supplemental Report. Copies of these documents may be obtained by writing to the Copyright Office, Library of Congress, Washington, D.C. 20559. The fee for the 1961 Report of the Register is $.45 while the fee for the 1965 Supplementary Report is $1.00; there is no charge for the rest of the material.

THE VIEWS EXPRESSED IN THIS DOCUMENT ARE THOSE OF MS. PETERS AND DO NOT NECESSARILY REFLECT THE OFFICIAL VIEWS OF EITHER THE COPYRIGHT OFFICE OR THE LIBRARY OF CONGRESS.

CHAPTER I

HISTORICAL BACKGROUND

Copyright in the United States stems from a 1710 English statute known as the Statute of Anne. Following the American Revolution, most of the states enacted copyright laws generally patterned after this English act. The need for federal legislation, however, was soon recognized, and when the U.S. Constitution was drafted the principle of copyright was written into it. Article I, section 8 grants Congress the power "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Thus, the primary purpose of copyright legislation is to foster the creation and dissemination of intellectual works for the public welfare; an important secondary purpose is to give creators the reward due them for their contribution to society.

The first federal copyright statute was enacted in 1790 and covered maps, charts and books. This statute granted to authors and proprietors a term of 14 years with the privilege of renewal for a second term of 14 years. There were general revisions of the copyright law in 1831, 1870 and 1909.

The law under which we have been operating for the past 68 years is the Act of March 4, 1909. This act is based on the printing press as the prime disseminator of information. Significant changes in technology have resulted in a wide range of new communications techniques that were unknown in 1909--for example, radio, television, communications satellites, cable television, computers, photocopying machines, videotape recorders, etc., and there are promises of even greater changes in the future. This growth in technology made revision of the Act of 1909 imperative.

There were a number of unsuccessful attempts to revise the 1909 Act. The present revision effort began in 1955 when Congress appropriated the funds for a comprehensive program of research which produced a series of 35 studies analyzing what were then considered to be the major problems. In addition, the Register of Copyrights issued a report on the "General Revision of the U.S. Copyright Law," in 1961.

Comments raised both by the studies and the Register's Report led to a series of meetings with a panel of consultants drawn from the copyright bar, representatives of the interested parties, and the Copyright Office. These meetings spanned three years and provided an opportunity to thrash out many of the problems.

Statutory drafts with deliberate alternatives included were circulated for comment and Congressional consideration; then an extraordinary process of compromise and negotiation began. This process went on continuously for nearly fifteen years, down to the very day the bill was finally passed by both Houses of Congress.

In 1967, after extensive hearings, the House of Representatives passed a revision bill--H.R. 2512. It was hoped that the Senate would take quick action on S. 597, the companion bill, but the cable television issue appeared to be irresolvable at that time. There then followed a long period of relative inaction. In 1974, however, the revision effort again showed signs of life, and on September 9, 1974, by a vote of 70-1, the Senate passed S. 1361. It was, however, too late for consideration of the bill by the House in that session of Congress.

In 1976 Senator McClellan again introduced a copyright revision bill, S. 22. On February 19, 1976, by a vote of 97-0, the Senate passed it. On September 22, 1976, the House of Representatives passed a revision bill which differed in part from the Senate version, thus necessitating a Conference Committee. The Conference Report was adopted by both houses on September 30, 1976, and on October 19, 1976, President Ford signed the revision bill into law. The new copyright law, Public Law 94-553, with certain exceptions, takes effect on January 1, 1978.

The Register of Copyrights, Barbara Ringer, speaking on the revision bill, made the following comment:

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

She went on to conclude that "It is a source of wonder that somehow all of this succeeded in the end." But succeed it did, and we now have a new law which makes fundamental and pervasive changes in the U.S. copyright system. Some of the changes are so profound that they may mark a shift in direction for the very philosophy of copyright itself.

CHAPTER TWO

FEDERAL PREEMPTION AND DURATION OF COPYRIGHT

[Chapter 3, Sections 301 to 305]

SINGLE NATIONAL SYSTEM (Section 301)

Federal preemption represents the most basic change in the U.S. copyright system since its inception. Instead of the present dual system of protection of works under the common law before they are published and under the federal statute after publication, the new law would, under section 301, establish a single system of statutory protection for all works fixed in a copy or phonorecord. The common law would continue to protect works (such as live choreography and improvisations) up to the time they are fixed in tangible form, but upon fixation they would be subject to exclusive federal protection under the statute, even though they are never published or registered.

Some of the primary advantages of a single federal system are:

1. Promote national uniformity. One of the fundamental purposes behind the copyright clause in the U.S. Constitution was to avoid the difficulties of determining and enforcing an author's rights under different state laws. Today national uniformity is more essential than ever because of the advanced methods of disseminating an author's work.

2. Reduce the legal significance of "publication." The concept of "publication" is outdated; undue reliance on this concept has been one of the most serious defects with the Act of 1909. A single federal system will clear up what has become a chaotic situation.

3. Implement the "limited times" provision in the Constitution. Common law protection in unpublished works is now perpetual, no matter how widely they may be disseminated by means other than "publication." Section 301 will place a time limit on the duration of exclusive rights in this type of work and thus will aid scholarship by making unpublished. undisseminated manuscripts available after a reasonable time.

4. Improve international dealings in copyrighted material. No other country has anything like our present dual system. In an era when copyrighted works can be disseminated instantaneously to every country, the need for effective international copyright relations, and the concomitant need for national uniformity assume even greater importance.

Exclusive Federal Jurisdiction (Section 301(a))

The intent of this subsection is to preempt and abolish any rights under the common law or statutes of a state that are equivalent to copyright and that extend to works coming within the scope of the federal copyright law. Under section 301(a) all rights in the nature of copyright (which are specified as "copyright, literary property rights, or any equivalent legal or equitable right") are governed exclusively by the federal copyright statute if the work is of a kind covered by the statute. With the exception of sound recordings fixed before February 15, 1972, states cannot offer a work protection equivalent to copyright and it doesn't matter when the work was created, or whether it is published or unpublished, in the public domain, or copyrighted under the federal statute.

Section 1338 of Title 28, United States Code, also makes clear that any action involving rights under the federal copyright law would come within the exclusive jurisdiction of the federal courts.

Rights Preserved by States (Section 301(b))

Any rights which a state may claim, which are not equivalent to copyright, are preserved. Subsection (b) explicitly lists three general areas left unaffected by the preemption: (1) subject matter outside sections 102 and 103; (2) causes of action arising under state law before the effective date of the statute; and (3) violations of rights that are not equivalent to any of the exclusive rights under copyright.

Sound Recordings (Section 301(c))

This subsection provides an exception for sound recordings fixed before February 15, 1972 (the effective date of the law extending federal copyright protection to this type of work). If this provision were not included there would probably have been a resurgence of piracy of sound recordings. States may, however, only protect sound recordings fixed prior to February 15, 1972 and then may only protect them until February 15, 2047.

DURATION OF COPYRIGHT WORKS CREATED AFTER THE EFFECTIVE DATE OF NEW LAW, JANUARY 1, 1978 (Section 302).

This section specifies the duration of copyright protection under the new act.

Basic term. Life of the author plus fifty years after his or her death is the term for works created after January 1, 1978.

Joint works. In the case of joint works by two or more authors who did not work for hire, the fifty year period is measured from the date of the death of the last surviving author.

Anonymous and pseudonymous works. In the case of these works, the term lasts for 75 years from the year of first publication or 100 years from the year of its creation, whichever expires first. If the identity of the anonymous or pseudonymous author is revealed in the records of the Copyright Office, the term will be based on the life of the identified author plus fifty years.

Works made for hire. Term is 75 years from first publication or 100 years from creation, whichever is shorter. (Work made for hire is defined in section 101.) Since, under 201(b) the employer is considered the "author", it would not be appropriate to base the term on the author's life.

Presumption of author's death. Subsection (e) provides that, after a period of 75 years after first publication or 100 years after creation of a work, whichever expires first, users are entitled to rely on a presumption if they have no knowledge of whether or when a particular author died. Any person who obtains from the Copyright Office the proper document ("a certified report"), indicating that the records disclose nothing to show that a particular author is still living or died less than fifty years before, is entitled to the presumption that the author has been dead for at least fifty years. Reliance in good faith will be a complete defense in an infringement action.

Subsection (d) provides that any "interested" person may record a statement of the death of an author or a statement that the author is still living on a particular date.

There are a number of reasons for changing the term of copyright protection from a set number of years to one based upon the life of the author. Among those listed in the legislative reports are:

1. 56 years is not long enough to insure an author and his or her dependents the fair economic benefits of the work. Also, life expectancy has increased substantially.

2. Tremendous growth in the communications media has substantially lengthened the commercial life of many works. A short term discriminates against serious works whose value may not be recognized until many years after its creation.

3. There is no particular benefit to the public of a short term. The price of public domain works is usually no less than that of copyrighted works. In some cases the lack of copyright protection restrains dissemination since publishers cannot risk investing unless they are assured of exclusive rights.

4. The year of death is a simpler and clearer method of computing the term. All of a particular author's works will fall into the public domain at the same time.

5. The renewal device, one of the worst features of the 1909 Act will eventually be eliminated. [NOTE: For works in their first term of statutory protection on December 31, 1977, renewal in the last (28th) year will still be necessary in order to obtain the additional 47 years' protection. See the discussion of section 304 below.]

6. It places the United States in conformity with most of the international copyright community. It eliminates a major barrier to U.S. adherence to the Berne Copyright Union.

DURATION OF COPYRIGHT IN PRE-EXISTING WORKS UNDER COMMON LAW PROTECTION ON THE EFFECTIVE DATE OF THE NEW LAW. (Section 303).

For unpublished works already in existence on January 1, 1978, but not protected by statutory copyright and not yet in the public domain, the new act generally provides automatic federal copyright for the same life plus 50 or 75/100 year terms provided for new works. All works in this category, however, are guaranteed at least 25 years of statutory protection; the law specifies that in no case will copyright in a work of this sort expire before December 31, 2002, and if the work is published before that date the term is extended by another 25 years, through the end of 2027.

DURATION OF SUBSISTING COPYRIGHTS (Section 304).

This section is a transitional provision, but an important one. Subsection (a) deals with copyrights that are in their first term on January 1, 1978. It provides for a first term of 28 years from the date it was originally secured, with a right to a renewal term of 47 years--extending the total potential term of copyright protection to 75 years. The application for renewal term must be submitted within one year before the expiration of the original term by the same specified renewal claimants as under the 1909 Act. The reason for retaining the renewal provision is that many of the present expectancies in these works are the subject of existing contracts, and it would be unfair and confusing to cut off or alter these interests. [NOTE: Although section 304(a) reenacts and preserves the renewal provision the definition of "posthumous" adopted in Bartok v. Boosey & Hawkes, Inc., 523 F. 2d 941 (2d Cir. 1975) has been included in both the House and Senate reports. The House report defines it as "one to which no copyright assignment or other contract for exploitation of the work has occurred during the author's lifetime, rather than one which is simply first published after the author's death." The Senate report states "The reference to a 'posthumous work' in this section means one as to which no assignment has occurred during an author's lifetime, rather than one which is simply first published after the author's death."]

Subsection (b), which went into effect on October 19, 1976, extends the renewal term automatically to a total of 75 years.

The last 19 years of the copyright term are subject to a right of termination. [See Chapter 6.]

EXPIRATION DATE (Section 305).

The new law provides that all terms of copyright will run through the end of the calendar year in which they would otherwise expire. This will not only affect the duration of copyrights, but also the time limits for renewal registrations.

EXAMPLES OF DURATION AND RENEWAL UNDER SECTIONS 304 AND 305:

1. A book was first published with the required notice of copyright on July 1, 1950. The claim was subsequently registered in the Copyright Office.

   Under the 1909 Act the term would run from July 1, 1950 to July 1, 1978, and renewal registration was required to be made between July 1, 1977, and July 1, 1978.

   Under the new law there are two possibilities:

   a. If renewal is made before the effective date of the new law--(renewed between July 1, 1977, and December 31, 1977,) section 304(b) is applicable and the work is protected to December 31, 2025.

   b. If renewal is not made before January 1, 1978, section 304(a) is applicable. Under 304(a) a renewal application must be made "within one year prior to the expiration of the original term." While the normal expiration of the original term would be July 1, 1978, section 305 extends it to December 31, 1978. Thus, an application received before or on December 31, 1978, will be accepted. The renewal term is for 47 years and the work is protected until December 31, 2025.

2. A musical composition is registered in unpublished form on January 7, 1955.

Under the 1909 Act the term would run from January 7, 1955 to January 7, 1983. A renewal application must be received between January 7, 1982, and January 7, 1983. An application received after January 7, 1983, would not be accepted.

Under the new law:

a. Must renew between December 31, 1982, and December 31, 1983.

b. Renewal application received between January 7, 1982 and December 31, 1982, will not be accepted.

c. Renewal application received after December 31, 1983, will not be accepted.

Section 304(a) provides that renewal application and registration must be made "within one year prior to the expiration of the original term." Normal expiration would be January 7, 1983, (28 years from the date the copyright was secured [here the date of the unpublished registration]) but section 305 extends this to the end of the year in which it would normally expire, in this case, December 31, 1983.

CHAPTER THREE

SUBJECT MATTER OF COPYRIGHT (INCLUDING STANDARDS OF COPYRIGHTABILITY) [Chapter I, Section 102, 103 and 105]

The copyright clause of the U.S. Constitution empowers Congress to grant to authors the exclusive rights in their "writings." The Act of 1909 repeats the constitutional phrase in Section 4 and grants copyright to "all the writings of an author." Although the broad sweep of this phrase may imply that the statutory copyright grant is co-extensive with the constitutional power, it is clear that Congress has not exhausted the scope of "writings of an author" in the 1909 law.

It is well established, by a long line of court decisions, that in order to be copyrightable under the statute the work must meet the following requirements:

(A) The work must be in the form of a "writing," i.e., it must be fixed in some tangible form from which the work can be reproduced.

(B) The work must be a product of original creative authorship. Two interrelated elements are required: originality and creativity.

(1) The work must be original in the sense that the author produced it by his own intellectual effort, as distinguished from merely copying a preexisting work. There is no requirement of novelty, ingenuity or esthetic merit.

(2) The work must represent an appreciable amount of creative authorship.

The requirement of fixation is retained in the new law and serves as the dividing line between common law and statutory copyright. Under the definitions in section 101, a work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.

The new copyright law substitutes the phrase "original works of authorship" for "writings of an author" to clarify that the Constitutional power has not been exhausted in the copyright legislation. Also, this new phrase more accurately reflects the variety of authorship covered by the copyright law. Moreover, it seems that the phrase "original works of authorship" will permit protection for new forms of expression without allowing unlimited expansion into areas completely outside the present congressional intent.

The standard of original, creative authorship is not changed by the new law. All of the 14 classes mentioned in section 5 of the 1909 law are covered by the new law as well. For the first time, however, pantomimes and choreography are specifically recognized as copyrightable works.

The new law continues and clarifies the principle of existing law that copyright in new versions covers only the new material and does not enlarge the scope or duration of protection in preexisting works. The new law specifically provides protection for compilations. The term "new versions" is changed to "derivative works." The intent is that the terms "compilations" and "derivative works" include every copyrightable work that employs preexisting material or data of any kind. A difference is that the new law does not condition copyright in such works upon securing the consent of the copyright owner of the previous material. Instead the new law provides that protection does not extend to any part of the work in which such material has been used unlawfully.

SUBJECT MATTER OF COPYRIGHT: IN GENERAL (Section 102)

Section 102 provides that copyright protection subsists in "original works of authorship" fixed in tangible form. Seven broad categories are listed:

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

These categories are illustrative and are not meant to be limitative. The 1965 Supplementary Report of the Register of Copyrights states the categories are overlapping and not mutually exclusive. "It is quite conceivable, for example, that within itself a motion picture might encompass copyrightable works falling into all of the other six categories."

"Literary works," "pictorial, graphic, or sculptural works," "motion pictures," "audiovisual works" and "sound recordings" are defined in section 101. These definitions make clear the distinction between "works" and "material objects." Thus, under the new law a "book" is not a work of authorship but a particular kind of "copy." Instead, as the legislative reports make clear, the author may write a "literary work," which in turn can be embodied in a wide range of "copies" and "phonorecords," including books, periodicals, computer punch cards, microfilm, tape recordings, etc.

It is Congress' intent (according to these reports) that the standards of originality and creativity developed by the courts under existing law should remain unchanged under the new law. Thus, "deminimis" works, common or standard works, blank forms, etc. will not be registrable.

Pantomimes and Choreographic Works. The old law had no specific provision for copyright in choreographic works, although they could be registered as a "dramatic work." The same is true of pantomimes. To resolve any doubt as to the necessity for dramatic content as a condition for protecting these recognized art forms, the new law specifically mentions them. Choreographic works are not defined in section 101 because the meaning is presumably clear. The 1961 Report of The Register states, "For purposes of copyright at least, the term 'choreographic works' is understood to mean dance works created for presentation to an audience, thus excluding ballroom and other social dance steps designed merely for the personal enjoyment of the dancers." The legislative reports state that "choreographic works" do not include social dance steps and simple routines.

Computer Programs. Although they are not mentioned as copyrightable subject matter in section 102(a) and they are not referred to explicitly in the definition of "literary works" in Section 101, a careful reading of the new law with the legislative reports makes it clear that computer programs or "software" is within the subject matter of copyright. The definition of "literary works" refers to works expressed in "words, numbers, or other verbal or numerical symbols or indicia."

Section 102(b) states a fundamental principle: copyright protection does not extend to ideas, systems, or methods, processes, principles, etc., no matter how unique the concept. This proviso was added as a result of the debate over the copyrightability of computer programs, and is intended to make clear that, although the programmer's "literary" expression, as embodied in a program, would be copyrightable, his ideas, system and methodology would not.

Typeface designs. House Report 94-1476 states that the House Judiciary Committee wants to study whether typeface designs should be included in a possible law to protect original designs embodied in useful articles. (Page 50.) On page 55 of the same report the following appears: "The Committee has considered, but chosen to defer, the possibility of protecting the design of typefaces ..The Committee does not regard the design of typeface...to be copyrightable 'pictorial, graphic, or sculptural work' within the meaning of this bill and the application of the dividing line in section 101." [NOTE: In Eltra Corp. v. Ringer, E.D. Va. Oct. 26, 1976 No. 76-264-A, the court found a typeface design to be a "work of art" but refused to compel registration on the ground that Congress had acquiesced in the "long standing" practice of the Copyright Office of refusing to register such claims. 37 CFR section 202.10(c). This case has been appealed.]

Works of Art and Ornamental Designs. The definition of "pictorial, graphic, and sculptural works" in section 101 seeks to draw as clear a line as possible between copyrightable works of fine and applied art and uncopyrightable works of industrial design.

Section 101 defines "pictorial, graphic and sculptural works" as including "two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, technical drawings, diagrams, and models. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." The second sentence in this definition is classic language and is drawn from Copyright Office regulations promulgated in the 1940's and expressly endorsed by the Supreme Court in Mazer v. Stein, 347 U.S. 201 (1954).

The copyright revision bill had a Title II which in origin and content was essentially a separate though related piece of legislation entitled "Protection of Ornamental Designs of Useful Articles." This was to provide a limited form of copyright protection to the ornamental design elements of useful articles. The House deleted Title II as did the Conference Committee. The House Report states that it will be necessary for the Committee to reconsider the question of design protection in new legislation during the 95th Congress.

Sound Recordings. A sound recording is a work "that results from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords" in which it may be embodied. Protection extends only to the particular sounds of which the recording consists, and would not prevent a separate recording or another performance in which these sounds are imitated. Thus, mere imitation of a recorded performance would not constitute a copyright infringement even where one performer deliberately sets out to simulate another's performance as exactly as possible.

SUBJECT MATTER OF COPYRIGHT: COMPILATIONS AND DERIVATIVE WORKS (Section 103)

Section 103 complements section 102; it provides that a compilation or derivative work is copyrightable if it represents an "original work of authorship" and falls within one or more of the categories listed in section 102(a). The standards of copyrightability that apply to entirely original works also apply to those containing preexisting works.

The legislative reports state that section 103(b) is intended to define, more sharply and more clearly than does section 7 of the Act of 1909, the important interrelationship and correlation between protection of preexisting material and of "new" material in a particular work. The most important point is that copyright covers only the material added by the later author, and has no effect one way or the other on the copyright or public domain status of the preexisting material.

Section 101 states that a "compilation" results from the process of selecting, bringing together, organizing and arranging previously existing material of all kinds, regardless of whether the individual items in the material have been or ever could have been subject to copyright. Thus, it would be possible to have a copyright in a compilation of blank forms.

A "derivative" work requires a process of recasting, transforming, or adapting "one or more preexisting works;" the "preexisting work" must come within the general subject matter of copyright set forth in section 102, regardless of whether it is currently, or was ever, copyrighted.

Copyright is not conditioned upon the consent of the copyright owner of the preexisting material. The new law provides that protection does not extend to "any part of the work in which such material has been used unlawfully." Thus, for example, an unauthorized translation of a novel could not be copyrighted at all. However, the owner of copyright in an anthology of poetry could sue someone who infringed the whole anthology, even though the infringer proves that publication of one of the poems was unauthorized. The legislative reports indicate that the purpose of this is to prevent an infringer from benefiting, through copyright protection, from his unlawful act, but preserves protection for those parts of the work that do not employ the preexisting work.

MATERIAL DENIED COPYRIGHT PROTECTION

The following are examples of types of works which are denied U.S. copyright protection:

Works in the public domain. Section 103 of the Transitional and Supplementary Provisions provides: This Act does not provide copyright protection for any work that goes into the public domain before January 1, 1978.

A work falls into the public domain, and is available to everyone for use without payment or permission, when the copyright owner has authorized publication of the work without the notice of copyright required by the Act of 1909. It also enters the public domain when the first 28th year term of copyright expires without renewal.

Once a work has fallen into the public domain, copyright is lost permanently. The new law will not restore the copyright.

Ideas, methods, systems, principles. One of the fundamental principles of both the old and new laws is that copyright does not protect ideas, methods, systems, principles, etc. but rather protects the particular manner in which they are expressed or described. Section 102(b) contains this basic principle; it provides "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

Common or standard works. Works consisting of information that is common property containing no original authorship, such as standard calendars, height and weight charts, tape measures and rulers, and lists of tables taken from public documents or other common sources are not subject to copyright protection.

Devices and blank forms. Devices for measuring, computing, or use in conjunction with a machine are not subject to copyright protection. Common examples are slide rules, wheel dials, and nomograms. Ideas, methods, systems, mathematical principles, formulas, and equations are not copyrightable, and the same is true of devices based on them. The printed material of which a device usually consists (lines, numbers, symbols, calibrations) likewise cannot be the subject of copyright because this material is necessarily dictated by the idea, principle, formula or standard of measurement involved. Blank forms and similar works, designed to record rather than convey information, are not subject to copyright protection either.

Deminimis works. There are certain works to which the legal maxim of "de minimis non curat lex" (the law does not concern itself with trifles) applies. These are works in which the creative authorship is too slight to be worthy of protection. Examples include names, titles, slogans, mere variations of typographic ornamentation, lettering or coloring, translation of a work from aural to printed form, transliteration of existing harmonies in a musical work from piano to guitar tablature or ukelele diagrams.

Works of the United States Government (Section 105). This section states a basic premise of the Act of 1909--that works produced for the U.S. Government by its officers and employees as part of their official duties are not subject to U.S. copyright protection. The new law makes it clear that this prohibition applies to unpublished works as well as published ones. The National Technical Information Service sought a limited exception to the prohibition

in section 105. The House version included such a provision which was deleted by the Conference Committee. The Conference Report states that a hearing on this issue should be scheduled for early in the 95th Congress.

There is no mention of works prepared under a U.S. Government contract or grant. The intent is to allow an agency to determine whether or not an independent contractor or grantee is to be allowed to have a copyright in works prepared in whole or in part with the use of Government funds.

Section 105 allows the U.S. Government to hold copyrights that have been transferred to it by "assignment, bequest, or otherwise."

CHAPTER FOUR

ELIGIBILITY FOR COPYRIGHT PROTECTION IN THE UNITED STATES [Chapter I, Section 104]

Section 104 of the new law sets forth the basic criteria under which works of foreign origin can be protected under the United States copyright law. This section divides all works into two categories--unpublished and published. There are no qualifications of nationality and domicile with respect to unpublished works.

Published works are subject to protection if one of the following four conditions is met:

1. On the date of first publication, one or more of the authors is a national or domiciliary of the U.S., or is a domiciliary or national, or sovereign authority of a foreign nation that is a party to a copyright treaty of which the U.S. is also a party, or is a stateless person.

2. The work is first published in the U.S. or in a foreign nation that, on the date of first publication, is a party to the U.C.C.

3. The work is first published by the United Nations or any of its specialized agencies, or by the Organization of American States. (This represents a treaty obligation of the U.S. [Second Protocol of the U.C.C.])

4. The work comes within the scope of a Presidential Proclamation. Thus, protection is available to an alien author whose country is "proclaimed" by the President as granting to U.S. citizens and domiciliaries and to works first published in the U.S. substantially the same rights it grants to its own citizens. Section 104 of the Transitional and Supplemental Provisions provides that all proclamations issued by the President under 1(e) or 9(b) of Title 17 as it existed on December 31, 1977, or under previous copyright statutes, shall continue in force until terminated, suspended, or revised by the President.

The new law specifically recognizes stateless authors as eligible for protection. Also, it broadens eligibility conditions in three important ways:

First--it protects an author who is domiciled in a foreign country with which the U.S. has copyright relations through an international treaty. Thus, even though the U.S. has no relations with Iraq, an Iraqi author domiciled in the United Kingdom, (a U.C.C. country) would be eligible for protection here even if he or she publishes in Iraq.

Second--the new law makes eligible works first published either in the U.S. or another country that is a party to the U.C.C., regardless of the citizenship of the author.

Third--all unpublished works, regardless of the citizenship or domicile of the author are eligible for U.S. copyright protection.

Finally, it is now clear that a work is subject to protection in the U.S. even if only one of several authors is eligible.

CHAPTER FIVE

OWNERSHIP AND TRANSFERS OF OWNERSHIP
[Chapter 2, Sections 201, 202, 204 and 205]

Chapter 2 of the new law deals with ownership and transfer of rights. The chapter begins with a reconfirmation that the fountainhead of copyright is the author, and that copyright ownership belongs to him or her in the first instance. As under the 1909 Act, an exception is made for works made for hire.

BASIC PRINCIPLES OF OWNERSHIP (Section 201(a))

Two basic and well established principles of copyright are restated in this section: 1) that the source of copyright ownership is the author of the work and 2) in the case of a "joint work" the coauthors are coowners.

Section 101 makes it clear that a work is "joint" when the authors collaborate with each other or if each of the authors prepared his or her contribution with the knowledge and intention that it would be merged with the contributions of other authors as "inseparable or interdependent parts of a unitary whole."

The House Report indicates that the touchstone is intention at the time the writing is done.

The definition in section 101 is the first legislative definition of a joint work. Section 201 establishes the validity of joint ownership. The respective rights of the coowners, however, are not spelled out. The legislative reports state that the new law adopts the courtmade law on this point; that is, the coowners shall have the right to free use of the jointly owned property, subject only to the duty to account to one another for the profits.

[Note: the definition in section 101 overrules the decisions in the "Melancholy Baby" (Shapiro Bernstein & Co., Inc.v. Jerry Vogel Music Co., Inc., 161 F. 2d 406 (2d Cir. 1946) and "12th Street Rag" (Shapiro Bernstein & Co., v. Jerry Vogel Music Co., 221 F. 2d 569 (2d Cir. 1955) modified on rehearing, 223 F. 2d 252 (2d Cir. 1955)) cases. The test in these cases was "fusion of effort" rather than intent at the time of the writing.]

OWNERSHIP-WORKS MADE FOR HIRE (Section 201(b))

In this subsection another principle of the 1909 Act is adopted--that in the case of a work made for hire the employer is considered the author and is regarded as the initial owner of copyright unless there has been an agreement to the contrary. The definition of a "work made for hire" in section 101, however, appears narrower than the present case law.

A basic principle of American copyright law is that all rights to a work produced by an employee within the scope of his or her employment vest in the employer. This has been well established by the courts and in section 26 of the 1909 law. The rationale for this rule is that the work is produced under the employer's direction and expense; also the employer bears the risks and should be entitled to reap the benefits.

Works made on commission are those produced as the result of a special order, rather than in the normal course of employment. They are not mentioned in the 1909 law. In the cases concerning these works, courts have generally recognized copyright ownership in the party commissioning the work and not in the creator of the work.

This subsection vests all copyright interests in the employer in a work made for hire. It goes beyond the old law by codifying the idea that the parties may agree otherwise as to copyright ownership. Such an agreement must be in writing and must be signed by the parties. [NOTE: This section refers to "the employer or other person for whom the work was prepared." "Other person" apparently was included to make it clear that the person who commissions a work which fits within the definition in section 101 of a work made for hire shall be regarded as the author.

In section 101 of the new law, the definition of a "work made for hire" is divided into two sections. First, it says that it is a "work prepared by an employee within the scope of his or her employment." The second part is somewhat of a departure from previous interpretations. As the House Report notes on page 121, the status of works prepared on special order or commission was a major issue in revision. This definition represents a carefully balanced compromise. It spells out those specific categories of commissioned works that can be considered "works made for hire" under certain circumstances. The categories are:

1. a contribution to a collective work

2. part of a motion picture or other audiovisual work

3. a translation

4. a supplementary work (which is defined as prepared for publication as a secondary adjunct to a work by another for purposes of illustrating, introducing, concluding, etc., or assisting in the use of the other work, such as forewards, afterwords, answer material for tests, maps, musical arrangements, bibliographies, etc.)

5. a compilation

6. an instructional text, which is defined as "a literary, pictorial, or graphic work prepared for publication with the purpose of use in systematic instructional activities." (Thus, books used in teaching.)

7. a test

8. answer material for a test

9. an atlas.

HOWEVER, this is conditioned upon an express agreement in writing signed by the parties. This agreement must state that the work "shall be considered a work made for hire."

CONTRIBUTIONS TO COLLECTIVE WORKS (Section 201(c))

This subsection seeks to clarify one of the most difficult questions under the existing law--the ownership of contributions to periodicals and other collective works. It states that copyright in a contribution is separate and distinct from copyright in the collective work as a whole, and that, in absence of an express transfer, the owner of the collective work obtains only certain limited rights with respect to each contribution.

The first sentence in this subsection provides that "Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution." This is intended to establish that the copyright in a contribution and the copyright in the collective work in which it appears are two different things, and that the usual role with respect to initial ownership applies to the contribution.

Section 101 defines a "collective work" as "a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole."

The second sentence in 201(c), in conjunction with section 404, preserves the author's copyright in his contribution without requiring a separate notice in his name or an unqualified transfer of all his rights to the publisher.

The new law establishes a presumption that, in the absence of an express transfer, the author retains all rights except, "the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series."

Under this presumption, for example, an encyclopedia publisher would be entitled to reprint an article in a revised edition of an encyclopedia, and a magazine publisher would be entitled to reprint a story in a later issue of the same periodical. The privileges extended under the presumption, however, do not permit revisions in the contribution itself or allow inclusion of the contribution in anthologies or other entirely different collective works.

DIVISIBILITY OF COPYRIGHTS (Section 201(d))

In theory, under the 1909 law, a copyright was considered a single, indivisible bundle of exclusive rights. Thus, the old law regarded copyright as a single, indivisible entity; this means that a transfer of less than the entire rights to a work was merely a license which allowed the holder to use the work in a specified way but did not permit him to exercise any right of ownership.

This theory in practice is unworkable, and copyright proprietors, with the sanction of the courts, have developed customs and usages on the basis that copyright is divisible. Various subsidiary rights have been created and marketed separately--e.g., magazine rights, paperback rights, book club rights, motion picture rights, foreign rights, etc. The copyright has also been licensed for a period of time and/or for a particular territory.

Tension between theory and practice under the present law has produced some strange and unjust results in those cases where courts have not been able to accomodate copyright theory to commercial reality.

Section 201(d)(2) contains the first explicit statutory recognition of the principle of divisibility of copyright in U.S. law. This provision was long sought by authors. It means that any of the exclusive rights that go to make up a copyright, including those listed in section 106 and any subdivision of them, can be transferred and separately owned. The definition of "transfer of copyright ownership" in section 101 makes it clear that the principle of divisibility applies whether or not the transfer is "limited in time or place of effect."

Note, too, that section 101 provides that the term "copyright owner" refers to the owner of a particular right.

The granting of a non-exclusive license, however, does not constitute a transfer of ownership, but only a right of usage.

The second sentence of 201(d)(2) provides that "The owner of any particular right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title." Thus, an exclusive licensee would be given standing to sue to protect that interest. This provision caused some concern; some felt that if ownership rights were split, a user might then be liable to a multiplicity of suits. The Justice Department raised this issue in 1967. This problem is solved in section 501(b), however, by setting certain limitations on the right to sue. It gives the court discretion to require a notice to all interested parties, and to order the joinder of any party whose interest might be affected by an infringement proceeding.

TRANSFERABILITY

(Section 201(d)(1)) states the fundamental rule that ownership of all or any part of a copyright is fully transferable from one owner to another by any form of assignment or conveyance or by operation of law, and that, upon the death of an owner is to be treated as personal property.

The statement of this principle is supplemented by the definition of transfer of ownership in section 101. The definition is intended, among other things, to dispel any doubts as to whether mortgages or other hypothecations, discharges of mortgages and exclusive licenses come within the meaning of a "transfer of copyright ownership."

INVOLUNTARY TRANSFERS (Section 201(e))

The legislative reports state that the purpose of this section is to reaffirm the basic principle that the U.S. copyright of an individual author shall be secured to that author, and cannot be taken away by involuntary transfer. The intent is that the author is entitled, despite any purported expropriation or involuntary transfer, to continue to exercise all rights under the U.S. law, and specifically that the governmental body or organization may not enforce or exercise any rights in that situation.

DISTINCTION BETWEEN COPYRIGHTS AND MATERIAL OBJECTS (Section 202)

The language in this section makes it clear that, unless an author expressly transferred the rights in a particular work, the sale of a material object (e.g., a manuscript or a painting) does not carry with it the copyright in the work.

All this section really says is that copyright is one thing and the material object in which the work is embodied is another; that ownership of one is distinct from ownership of the other; that the transfer of ownership of one does not, in and of itself, transfer ownership of the other.

EXECUTION OF TRANSFERS OF COPYRIGHT OWNERSHIP (Section 204)

This section retains the requirement that transfers of copyright ownership be in writing and signed by the owner. The new law allows the transfer to be signed either "by the owner of the rights conveyed" or "by such owner's duly authorized agent."

Section 204 could have considerable impact since in the new law unpublished works are placed under the federal statute and thus subject to the above requirement, i.e., that all transfers be in writing.

Subsection (b) broadens and liberalizes the provision in the 1909 law regarding certificates of acknowledgment. It provides that these certificates would be prima facie evidence of the execution of any domestic or foreign transfer (although they would not affect the validity of a transfer).

RECORDATION OF TRANSFERS AND OTHER DOCUMENTS (Section 205)

The House Report states that section 205 is intended to clear up a number of uncertainties arising from sections 30 and 31 of the 1909 law and to make the recording and priority provisions more effective and practical.

Any "document pertaining to a copyright" may be recorded if it bears the actual signature of the person who executed it or is accompanied by a sworn or official certification that it is a true copy. The House Report suggests rather strongly that the Copyright Office will record self-serving or colorable documents (page 128) and the Register is told to take care that their nature is not concealed from the public in the office's indexing and search reports.

Subsection (c) provides that recordation of a document constitutes constructive notice (this is a conclusion of law that cannot be contradicted) of the facts it states only if it meets two requirements:

1. it specifically identifies the work to which it pertains so that after the document is indexed by the Copyright Office, it would be revealed by a "reasonable search" under the title or registration number; and

2. registration for the work has been made.

Subsection (d) requires a transferee to record his or her instrument of transfer as a condition to bringing an infringement suit, and thereby to place on public record the basis on which ownership is claimed. This subsection also makes it clear that a delay in making recordation until after an infringement has occured will not affect the transferee's rights or remedies against the infringer.

Subsection (e) resolves the priorities between conflicting transfers, by retaining the current policy in favor of the initial transfer, if properly recorded. It also retains the concept of a grace period but shortens it to one month for documents executed in the U.S. and 2 months for those executed abroad. This section also makes a binding promise to pay royalties, a form of valuable consideration and therfore repudiates the decision in Rossiter v. Vogel, 134 F. 2d 908 (2d Cir. 1943).

Subsection (f) provides that whether recorded or not, a nonexeclusive license taken without notice of a prior unrecorded transfer would be valid against the transferee, and an unrecorded nonexclusive license would be valid as against a subsequent transfer.

CHAPTER SIX

TERMINATION OF TRANSFERS AND LICENSES
[Chapter 2, Section 203 and Chapter 3, Section 304(c)]

Section 24 of the old law embodies what is known as the renewal provision. This section provided that copyright would generally revert to the author, if living, or if the author were not living, to other specified beneficiaries if a renewal claim were registered in the 28th year of the original term. This provision was included in the 1909 Act to give authors a "second chance" to reap the benefits of their creative efforts. In practice, however, the second chance did not materialize because the author assigned the contingent rights in the renewal term well before his or her rights vested, and the assignee reaped the benefits of the renewal term if the author survived until the renewal vested. Moreover, failure to comply with the registration formality led to many forfeitures.

It is generally acknowledged that during the early stages of the revision effort, "the most explosive and difficult issue" concerned a provision for protecting authors against unfair copyright transfers. The aim was to protect authors against unremunerative transfers and to get rid of the complexity, awkwardness, and unfairness of the renewal provision. As both the House and Senate reports note, the problem stems from the unequal bargaining position of authors and from the impossibility of determining a work's value until it has been exploited.

In 1965 representatives of publishers and authors met and agreed on a proposal which became, in essence, section 203 of the new law. This agreement essentially ended debate on the subject.

The sections covering termination rights are complex; the majority of material is presented in a question and answer format to make it more understandable.

WHAT MAY BE TERMINATED AND BY WHOM UNDER SECTION 203

What grants are covered?

Grants by the author (other than by will) of exclusive or nonexclusive rights arising under the new law, but not including works made for hire, may be terminated. This applies only to grants made on or after January 1, 1978--there is no retroactive effect. [Note that transfers made by an author's successors in interest are not covered.]

Who may terminate?

The author or, if he is deceased, a majority of owners of his termination interest--i.e., widow or widower and children or grandchildren may terminate. The key is that those who own a total of more than one half of the interest may exercise the right of termination. In works of joint authorship, where the grant was signed by two or more authors, a majority of those who signed it must join to terminate.

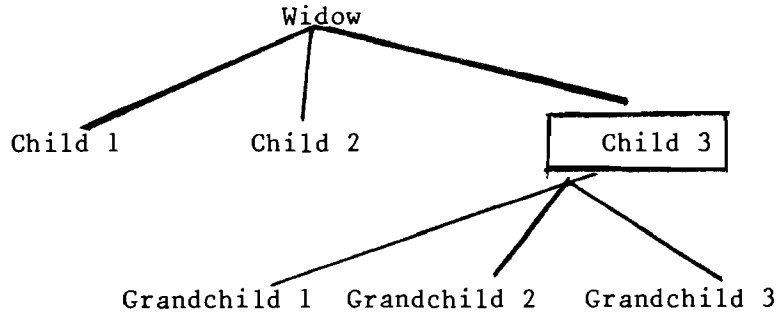
TERMINATION AFTER AUTHOR'S DEATH (Section 203(a)(2))
In the case of an author who is dead, his or her termination interest is owned and may be exercised by the following:

1. Where author dies and only a widow or widower survives and there are no children, then the widow or widower owns the entire termination interest.

2. Where there is no widow or widower but there are surviving children, then the children own the entire termination interest.

3. Where both a widow or widower and a child or children survive, then the widow or widower own 50%, and the child or children own 50%. [Note: The rights of the author's children and grandchildren are, in all cases, divided among them and exercised on a per stirpes basis and the share of the children of a dead child, for example, can be only exercised by a majority of them. Per stirpes--when descendants take by representation of their parent--i.e., child or children take among them the share their parent would have taken, if living.]

An example is given on page 125 of the House Report. A deceased author leaves a widow, two living children, and three grandchildren by a third child who is dead.



Widow gets 50% and the children of the author will divide 50%. Each of the three children would be entitled to 16 2/3% but Child 3 is dead. Per stirpes means that the three offspring of Child 3 will share Child 3's share. Thus, each of the three grandchildren get about 5 1/2%.

As the example points out, the widow is a necessary party in termination because she owns 50%. To get the majority she can be joined by either Child 1 or Child 2. But if neither join her she must get a majority of the grandchildren. Thus, even though the widow and one grandchild would own 55 1/2%, they would have to be joined by another child or grandchild to effect a termination or make a further transfer of reverted rights.

WHEN AND HOW TERMINATION IS EFFECTED (Section 203(3))

When may termination be effected?

Termination may be effected during the five years beginning at the end of 35 years from the date of the grant, or, if the grant covers the right of publication, 35 years from the date of publication or 40 years from the date of the grant, whichever is shorter.

How may termination be effected?

Termination may be effected by serving a written notice no less than two nor more than ten years before termination is to take effect. Notice must comply with Copyright Office regulations and a copy of the notice must be recorded in this Office before the effective date of the termination.

Two examples from the House Report are:

1. Contract for theatrical production signed on September 2, 1987. Termination of grant can be made to take effect between September 2, 2022 (35 years from execution) and September 1, 2027 (end of 5-year termination period). Assuming author decides to terminate on September 2, 2022 the advance notice must be filed between September 2, 2012 and September 2, 2020.

2. Contract for book publication executed on April 10, 1980; book finally published on August 23, 1987. Since contract covers the right of publication, the 5-year termination period would begin on April 10, 2020 (40 years from execution) rather than April 10, 2015 (35 years from execution) or August 23, 2022 (35 years from publication). Assuming that author decided to make the termination effective on January 1, 2024, the advance notice would have to be served between January 1, 2014 and January 1, 2022.

THE EFFECT OF TERMINATION

All rights revert to those with a right to terminate except that derivative works prepared before termination may continue to be utilized under the terms of the grant. Rights revert to everyone who owns termination interests on the date the notice was served, whether they joined in signing or not.

Rights vest on the date that the notice is served. If beneficiary dies, his heirs would inherit his or her share.

In addition, the law provides that a further grant or agreement to make a further grant of any right covered by a terminated grant is valid only if it is signed by the same number and proportion of owners, in whom the right has vested..., as are required to terminate the grant. Section 203(b)(3).

Moreover, such further grant or agreement is valid only if made after the effective date of termination, except that a new transfer to the original grantee or his successor may be made after the notice of termination is served. Section 203(b)(4). In effect this gives the original grantee or his successor a right of first refusal and a preference over others since such grantee or successor may have a two to ten year lead time in dealing for the rights.

[NOTE: Section 203(a)(5) provides that "termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.]

TERMINATIONS OF TRANSFERS AND LICENSES COVERING THE EXTENDED RENEWAL TERM (Section 304(c))

What grants are covered?

Grants made by the author or grants executed by those beneficiaries of the author who could claim renewal under the present law may be terminated. Only grants covering the renewal copyright and only grants made prior to January 1, 1978 are covered. There are no termination rights in works made for hire.

Who may terminate?

The author, or if he or she is deceased, his family may terminate. The shares are the same as spelled out earlier under section 203.

When may termination be effected?

Termination may be effected during a five-year period which begins at the end of 56 years from the date copyright was originally secured, or on January 1, 1978, whichever is later.

How may termination be effected?

Termination may be effected by serving a written notice upon the grantee or the grantee's successor in title. Where grant is executed by a person or persons other than the author, all of those who executed the grant and survive, or their duly authorized agents, must sign the notice. Notice must comply with Copyright Office regulations. A copy of the notice must be recorded in the Copyright Office before the effective date of termination.

What is the effect of termination?

All rights revert to those with a right to terminate except that derivative works prepared before termination may continue to be utilized under the terms of the grant. No new derivative works may be prepared after the effective date of termination. Termination rights vest on the date the notice is served.

NOTE: Some works will not be subject to any termination rights. Section 304(c) applies only to grants made prior to January 1, 1978 and section 203 applies only to grants made on or after that date. Section 203 termination rights apply only to grants made by the author, and works made for hire are not subject to termination.

Examples:

1. A publishing company, on July 1, 1977, makes a contract with Norbert Novelist for a new book. The book is not written until July 20, 1979. The rights transferred in the July 1, 1977 contract would not be subject to termination. The grant was made before January 1, 1977 but not for a work in which copyright was subsisting on the effective date of the new law.

2. An author writes book in 1970; the work is never published and no rights in the work were assigned during the author's lifetime--author died in August of 1980. In June of 1981 the author's widow of grants a publishing company certain rights. Those rights are not subject to termination. Only section 203 can apply and that section is limited to grants made by the author.

CHAPTER SEVEN

SCOPE OF THE EXCLUSIVE RIGHTS ACCORDED COPYRIGHT OWNERS [Chapter I, section 106]

The section setting forth the exclusive rights of the copyright owner is the heart of any copyright law. This section determines the limits of protection granted to authors and their successors in interest.

As the 1965 Supplementary Report of the Register states, "in a narrow view, all of the author's exclusive rights translate into money: whether he should be paid for a particular use or whether it should be free." This Report also notes that "[t]he basic legislative problem is to insure that the copyright law provides the necessary monetary incentive to write, produce, publish, and disseminate creative works, while at the same time guarding against the danger that these works will not be disseminated and used as fully as they should because of copyright restrictions."

The drafters of the new law took particular pains not to confine the scope of an author's rights on the basis of the present technology. Thus, the exclusive rights of an author are stated in broad terms.

Section 106 grants five basic and exclusive rights. The right to display a work publicly is specifically stated for the first time. Detailed limitations and exemptions follow in sections 107 through 118; these sections, therefore, must always be read in conjunction with section 106.

The House Report notes that the rights in section 106 are cumulative and to some extent overlap. For example, the preparation of a derivative work would usually also involve its reproduction.

The rights stated may be subdivided without limitation. Each subdivision of an exclusive right may be owned and enforced separately (section 201(d)(2)).

Reproduce the copyrighted work in copies or phonorecords

The right to reproduce the work is the most fundamental right granted by any copyright law. The terms "copies" and "phonorecords" include the first or original embodiment of the work (the prototype), as well as any other objects from which the work can be "perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."

Prepare derivative works

The right to prepare new versions of copyrighted works is a valuable one, and its existence permits the copyright owner to control uses of his work that might not otherwise be included in the reproduction. A derivative work is defined in section 101 as a work based upon on or more preexisting works such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.

Public distribution

This right includes distribution by sale, gift, or other transfer of ownership of the material object embodying the work, or by rental, lease, or lending the material object. The exclusive right to sell a copyrighted work is terminated on the first authorized sale, and a copyright owner is not permitted to control future disposition of sold copies of the work. This is made clear by section 109 which draws a basic distinction between the rights of a copyright owner and the rights of someone who owns a physical object (a copy or phonorecord) that embodies a copyrighted work. Section 109 states that once a copy or phonorecord has been lawfully made, it can be disposed of by its owner without the copyright owner's permission.

Public performing right

For certain kinds of works, the right of public performance has become the most important. The right of public performance under 106(4) extends to "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works;" there is no such right for sound recordings.

Unlike the present law, this right is not limited by any "for profit" requirement. There are, however, a number of exemptions and limitations in sections 107 through 118.

The exclusive right of public performance has been expanded to include motion pictures and other audiovisual works. Performance of an audiovisual work means to show the images in any sequence and to make any sounds accompanying the work audible. The House and Senate Reports state that the showing of portions of motion pictures, filmstrips, or slide sets sequentially will constitute a "performance" rather than a "display."

Under the definition of "perform" in section 101 it is clear that the following would constitute a performance of a work: live renditions that are face to face, renditions from recordings, broadcasting, retransmission by loudspeakers, and transmission and retransmissions by cable, microwave, etc. To perform publicly is defined as performing at a place open to the public or at a place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.

Right of public display

This is the only right granted under the new law whose existence is open to question under the old law.

By definition (section 101) to "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially. Thus, subject to the limitations imposed by section 109, the right of public display applies to any work embodied in manuscript or printed matter and in pictorial, graphic, and sculptural works, including "stills." Exhibition of a motion picture or other audiovisual work as a whole is a performance rather than a display.

Section 109(b) states that the owner of a lawfully-made copy can display it publicly to viewers present at the same place as the copy. Thus, the exclusive right of public display would not apply where the owner of a copy wishes to show it directly to the public, as in a gallery or display case, or indirectly through an opaque projector.

CHAPTER EIGHT

FAIR USE AND OTHER LIMITATIONS AND EXEMPTIONS ON EXCLUSIVE RIGHTS [Sections 107, 108, 110, 112]

FAIR USE (Section 107)

Although fair use (a doctrine developed by the courts) was not included in any copyright statute prior to the 1976 Act, the concept is firmly established in everyday usage. The concept of "fair use" is not susceptible to exact definition. Generally speaking, however, it allows copying without permission from, or payment to, the copyright owner where the use is reasonable and not harmful to the rights of the copyright owner.

Section 107 is somewhat vague since it would be difficult to prescribe precise rules to cover all situations. It refers to "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" and sets out four factors to be considered in determining whether or not a particular use is fair. These are:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

2. The amount and substantiality of the portion used in relation to the copyrighted work as a whole;

3. The nature of the copyrighted work; and

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

These criteria are not necessarily the sole criteria that a court may consider. Section 107 makes it clear that the factors a court shall consider shall "include" these four; section 101, the definitional section of the new law, states that the terms "including" and "such as" are illustrative and not limitative.

The legislative reports state that section 107 as drafted is intended to restate the present judicial doctrine; it is not intended to change, narrow or enlarge it in any way.

One thing is clear--the language of section 107 does not provide specific tests by which one can determine with much certainty whether or not a particular use is fair. The difficulty of arriving at a clear-cut definition is inherent in the nature of the doctrine. The House and Senate Reports state:

> Although the courts have considered and ruled upon the doctrine of fair use over and over again, no real definition of this concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.

Under these circumstances the various interest groups tried to work out some compromises. Three different educational groups, dealing respectively with copying for teacher and classroom use of print materials, photocopying of music, and audiovisual presentations met separately with authors' and publishers' organizations to work out guidelines. These efforts were successful in the music and print field. No agreement was reached on audiovisual works although attempts are still being made to resolve this issue.

The guidelines for books and periodicals appear in Appendix 3. They may be briefly summarized as covering: (1) single copies for teachers, (2) multiple classroom copies, and (3) prohibitions. Multiple classroom copying cannot exceed the number of pupils per class, must meet strict tests of brevity, spontaneity and noncumulative effect, and must include a notice of copyright.

The prohibitions include:

1. the copies may not be used as a substitute for anthologies, compilations or collective works;

2. copies cannot be made of consumable material such as work books;

3. the copies cannot be a substitute for purchases, be "directed by higher authority" or be repeated by the same teacher from term to term; and

4. there can be no charge to the student beyond the actual copying cost.

The music guidelines follow much the same pattern. They allow emergency copying to replace previously purchased copies for use in an immediate performance. Copying of excerpts of no more than 10% of the whole work is allowed for academic purposes other than performance. The excerpts cannot constitute a performable unit such as a section, movement or aria. Editing and simplifying purchased works is allowed as is the production of single copies of certain sound recordings for certain educational purposes.

Both sets of guidelines state that they constitute the minimum and not the maximum standards of educational fair use under section 107. They also state:

> The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future; and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines....There may be instances in which copying which does not fall within the guidelines stated...may nonetheless be permitted under the criteria of fair use.

The House Report states that the Judiciary Committee believes that the guidelines are a reasonable interpretation of the minimum standards of fair use. It notes that teachers will know that copying within the guidelines is fair use and that the guidelines, therefore, serve the purpose of fulfilling the need for greater certainty and protection for teachers. The House and Senate conferees accepted these guidelines as part of their understanding of fair use.

The problem of off-the-air taping for nonprofit use was left unresolved. The House Report states that the doctrine of fair use has some limited application in this area. The Senate Report, on the other hand, states that, "The committee does not intend to suggest however, that off-the-air taping for convenience would under any circumstances be considered 'fair use.'"

Certain non-educational materials receive attention in the legislative reports as well. In speaking of independent newsletters which are particularly vulnerable to mass photocopying practices, both the House and Senate Reports call for a narrower interpretation of fair use than might be applied to mass-circulation periodicals.

The legislative reports also state the belief that in the case of calligraphers, a single copy reproduction of an excerpt from a copyrighted work for a single client "does not represent an infringement of copyright."

REPRODUCTION BY LIBRARIES AND ARCHIVES - (Section 108)

Section 108 deals with a variety of situations involving photocopying and other forms of reproductions by libraries and archives. Subsection (a) provides that "...it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, or to distribute such a copy or phonorecord, under the conditions specified by this section if--

1. the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;

2. the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and

3. the reproduction or distribution of a work includes a notice of copyright."

Thus, (a) lays out the basic conditions under which a library or archives can claim an exemption. But this is only the beginning--for library activity to be exempt it must also qualify under one of the conditions laid out in subsections (b) through (f), must not run afoul of subsection (g), and must involve copying of a work that is not mentioned in subsection (h).

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

(c) Replacement--libraries or archives are authorized to duplicate a published work in facsimile form solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost or stolen but only if it finds that an unused replacement copy cannot be obtained at a fair price. The legislative reports offer some guidance as to what is meant--they indicate that a reasonable investigation will always require recourse to commonly known trade sources in the United States, and in the normal situation also to the publisher or copyright owner or an authorized reproducing service.

(d) Journal articles, small excerpts, etc.--This subsection applies to "no more than one article or other contribution to a copyrighted collection or periodical issue, or to...a small part of any other copyrighted work." The only conditions for supplying a reproduction are that "the copy becomes the property of the user;" there is no reason to suppose that it "would be used for any purposes other than private study, scholarship, or research;" and the library or archives must display prominently, at the place were orders are accepted, a warning of copyright. The institution must also include a warning to be prescribed by a Copyright Office regulation on its order form.

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

(f) General exemptions--this subsection contains four clauses aimed at precluding certain interpretations of section 108.

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

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

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

The intent is to permit libraries and archives to make off-the-air videotape recordings of daily network newscasts for limited distribution to scholars and researchers. The House Report notes that it is an adjunct to the American Television and Radio Archive established in Section 113 of the Transitional and Supplementary Provisions.

The House Report notes that this section does not apply to documentaries, magazine format or other public affairs broadcasts dealing with subjects of general interest to the viewing public. The report also states that this material is to be distributed only by lending. Performance, copying, or sale, whether or not for profit, by the recipient of a copy of a television broadcast taped off the air, is forbidden.

(4) The fourth clause is important. It declares that nothing in section 108 "in any way affects the right of fair use as provided by section 107." It also provides that the right of reproduction granted by section 108 does not override any contractual arrangements assumed by a library or archives when it obtained the work for its collections.

(g) Multiple and systematic copying--This subsection was one of the most controversial. It states that the rights of reproduction and distribution under section 108 extend to the "isolated and unrelated" reproduction or distribution of a single copy or phonorecord of the same material on separate occasions; they do not cover related or concerted multiple copying, even when done over a period of time for different users.

The exact language is: "that the rights under section 108 do not extend to cases where the library or archives, or its employees:

> (1) is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group; or
>
> (2) engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of materials described in subsection (d) [an article or contribution to a periodical or copyrighted collection or a small part of any other copyrighted work]: PROVIDED, That nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work."

The National Commission on New Technological Uses of Copyrighted Works (CONTU) developed, with the assistance of representatives of library organizations and authors and publishers, a set of guidelines on interlibrary arrangements which were incorporated into the Conference Report. However, in the report the conferees stated:

> "...the guidelines are not intended as, and cannot be considered, explicit rules or directions governing any and all cases, now or in the future. It is recognized that their purpose is to provide guidance in the most commonly-encountered interlibrary photocopying situations, that they are not intended to be limiting or determinative in themselves or with respect to other situations, and that they deal with an evolving situation that will undoubtedly require their continuous reevaluation and adjustment."

Part of this reevaluation process will be the requirement in section 108(i) that the Register of Copyrights, five years after the effective date of the new Act, and at five-year intervals thereafter, issue reports on the extent to which section 108 has achieved the intended balancing of the rights of the creators and the needs of users. The guidelines themselves call for a five-year review also.

[NOTE: the CONTU guidelines are limited to one of the most frequent interlibrary loan practices--the making of copies of articles from periodicals whose issue dates are less than five years old. The question of guidelines or interpretations of making copies from articles more than five years old is left to future interpretation. Note, too, that the focus of the guidelines is on the requesting library rather than on the one which fills the orders.]

(h) Material not covered--This subsection narrows the scope of subsections (d) and (e) to exclude musical works, pictorial, graphic, and sculptural works, and audiovisual works (other than television news programs) from the reproduction privileges set out therein.

The exclusions under (h) do not apply to archival reproduction under (b); or to replacement of damaged or lost copies under (c); or to "pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e)."

It is important to remember that the doctrine of fair use remains fully applicable under section 107 to musical works, pictorial, graphic and sculptural works and audiovisual works.

[NOTE: the Conference Report deals with the interpretation of "indirect commercial advantage" as used in section 108. With regard to libraries which are connected with industrial, profit-making, or proprietary institutions it says, "[a]s long as the library or archives meets the criteria in section 108(a) and the other requirements of the section, including the prohibitions against multiple and systematic copying in subsection (g), the conferees consider that isolated, spontaneous making of single photocopies by a library or archives in a for-profit organization without any commercial motivation, or participation by such a library in interlibrary arrangements, would come within the scope of section 108."]

EXEMPTIONS OF CERTAIN PERFORMANCES AND DISPLAYS-(Section 110)

The general rights of public performance and display which are enunciated in clauses (4) and (5) of section 106 (see Chapter 7) are made subject to nine specific limitations in section 110. This section exempts the following types of public performances from copyright liability under specified conditions:

(1) face-to-face teaching activities;

(2) instructional broadcasting (broadcasts that are essentially an adjunct to actual classwork of educational institutions as opposed to public broadcasts which are of a cultural or educational nature and directed to the public at large);

(3) religious services;

(4) live performances without commercial advantage to anyone;

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

(6) annual agricultural and horticultural fairs;

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

(8) noncommercial broadcasts to the blind or deaf;

(9) nonprofit performances of dramatic works transmitted to the blind by radio subcarrier.

As the legislative reports note, clauses (1) through (4) deal with performances and displays that were generally exempt under the "for profit" limitation or other provisions of the 1909 law.

(1) Face-to face teaching activities--This sets out the conditions under which performances or displays, in the course of instructional activities other than broadcasting, are to be exempt from copyright control. This clause covers all types of works.

To be exempt, the performance or display must be by a pupil or an instructor which would generally mean a teacher but it is intended to be broad enough to cover, for example, a guest lecturer. Performance by actors, singers or musicians brought in from outside would not be exempt.

"Face-to-face" was inserted to exclude broadcasting or other transmissions, whether radio or television, or open or closed circuit, from an outside location into a classroom. The exemption does, however, extend to the use of devices for amplifying or reproducing sound and for projecting visual images, as long as instructors and students are in the same building or general area.

"Teaching activities" is intended to mean systematic instruction; it would not include performances or displays that are given for the recreation or entertainment of any part of the audience. This is true even though the work performed or displayed has great cultural or intellectual appeal.

The phrase "classroom or similar place" limits the exemption to places devoted to instruction. The legislative reports indicate that such a place might be a studio, workshop, gymnasium, or library as long as it actually is used as a classroom for systematic instructional activities. Performances in an auditorium for a school assembly, a graduation exercise, etc. would be outside the scope of this exemption because the audience is not confined to members of a specific class, although they might be exempted under other provisions of section 110.

(2) Instructional broadcasting--This covers broadcasting which is an adjunct to the actual classwork of educational institutions; it exempts "the performance of a nondramatic literary or musical work or display of a work by or in the course of transmission" if three conditions are met. The first is that the performance or display must be a "regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution." The second is that "the performance or display is directly related and of material assistance to the teaching content of the transmission." The third is that the transmission must be made "primarily" for: "(i) reception in classrooms or similar places normally devoted to instruction; or (ii) reception by persons to whom the transmission is directed because of their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction; or (iii) reception by officers or employees of governmental bodies as part of their official duties or employment."

Only performances of nondramatic literary or musical works would be exempt. The performance of a dramatico-musical work such as an opera or musical comedy, or a motion picture or other audiovisual work could occur lawfully only if the copyright owner's permission had been obtained.

With respect to exhibitions, the exemption would apply to any type of work which the right "to display...publicly" under section 106(5) applies (see Chapter 7).

The reports indicate that "systematic instructional activities" is intended as the general equivalent of "curriculums" but that it could be broader in certain cases.

The term "educational institution" was used because it is broad enough to cover a wide range of establishments engaged in teaching activities. It is not supposed to cover, however, "foundations," "associations," etc. who are not primarily and directly engaged in instruction.

110(2) ties in with section 112(b) (see below) which represents a response to instructional broadcasters' requests for special recording privileges. It permits a nonprofit organization that is entitled to transmit a performance or display of a work under section 110(2) to make not more than 30 copies or phonorecords and to use the "ephemeral recordings" for transmitting purposes for not more than seven years after the initial transmission. Thereafter, only one copy or phonorecord may be preserved exclusively for archival purposes.

(3) Religious services--This covers performances of a nondramatic literary or musical work and also performances of dramatico-musical works "of a religious nature" and displays of all kinds. This exemption only applies to performances and displays "in the course of services at a place of worship or other religious assembly." This clause does not cover the sequential showing of motion pictures and other audiovisual works.

The House Report indicates that oratorios, cantatas, and musical settings of the mass are covered by the exemption, but that secular operas, musical plays, motion pictures and the like, even if they have an underlying religious or philosophical theme and take place in the course of a religious service, are not.

This exemption would not extend to religious broadcasts or other transmissions to the public at large.

(4) Certain other nonprofit performances--This clause provides that the noncommercial performance of a nondramatic literary or musical work other than in an transmission to the public is generally exempt from copyright liability if no compensation is paid to its performers, promoters or organizers. If, however, proceeds are derived through a direct or indirect admission charge for exclusively educational, religious, or charitable purposes, then the copyright owner is given a chance to serve a notice of objection concerning the performance.

To prevent the performance, the notice must be in writing and be signed by the copyright owner or his duly authorized agent, must be served on the person responsible for the performance at least seven days prior to the performance, and must state the reason for the objection. Also, the notice must comply in form, content and manner of service with regulations the Copyright Office is to promulgate.

(5) Mere reception in public--This clause applies to all types of works. Its basic purpose is to exempt from liability anyone who merely turns on, in a public place, an ordinary radio or television of a kind commonly sold to the public for private use. This clause is not supposed to have anything to do with cable systems; moreover, the exemption would be denied in any case where the audience is charged directly to see or hear the transmission.

[NOTE: with respect to Twentieth Century Music Corp v. Aiken, 422 U.S. 151 (1975), the House Report states that this fact situation represents the outer limit of the exemption and believes that the line should be drawn at this point. (Aiken had a small business and used a home receiver with four ordinary loudspeakers grouped within a relatively narrow circumference from the set. A proprietor of a small commercial establishment who brings standard home equipment to the premises and plays it for the enjoyment of the customer would fall within the exemption. If the equipment were of a commercial nature, then liability would be imposed. In making this determination, the House Report indicates that factors to consider are the size, physical arrangement and noise level of the areas within the establishment where the transmissions are made audible or visible, and the extent to which the receiving apparatus is altered or augmented for the purpose of improving aural or visual quality of the performance for the public.

(6) Agricultural Fairs--This clause exempts "performance of a nondramatic musical work by a governmental body or a nonprofit agricultural or horticultural organization, in the course of an annual agricultural or horticultural fair or exhibition conducted by such body or organization."

This clause makes it clear that only the governmental body or nonprofit organization sponsoring the fair is covered. Concessionaires have no exemption under this clause.

(7) Retail sale of phonorecords--This provision allows the performance of a nondramatic musical work or of a sound recording by a vending establishment open to the public at large without any direct or indirect admission charge, where the sole purpose of the performance is to promote the retail sale of copies or phonorecords of the work.

(8) and (9) Transmissions for the blind and other handicapped persons--Subsection (8) provides an exemption for the performance of a nondramatic literary work. To qualify, a broadcast must be specifically designed for, and directed to, blind or other sight or hearing impaired persons; must be made without any purpose of direct or indirect commercial advantage; and be broadcast through the facilities of either:

a) a governmental body;

b) a noncommercial educational broadcast station;

c) a radio subcarrier authorization; or

d) a cable system.

Clause (9) exempts nonprofit performances of dramatic works transmitted to audiences of the blind by radio subcarrier authorization, but only for a single performance of a dramatic work published at least ten years earlier.

EPHEMERAL RECORDINGS - (Section 112)

Ephemeral recordings are "copies or phonorecords of a work made for purposes of later transmission by a broadcasting organization legally entitled to transmit the work." Thus, an ephemeral recording is a tape or phonorecord of a work made by a broadcaster who either by license of the copyright owner or exemption in the statute has the right to perform a work, but not necessarily the right to make copies. Without an ephemeral recording right, the broadcaster who may have secured a license to perform a copyrighted work on radio or television would not be able to tape the performance of the work.

The new copyright law distinguishes between a broadcaster who acquires a license to transmit a work and an instructional broadcaster who is exempt under section 110(2).

Under 112(a) a licensed broadcaster is allowed to make one copy of a program provided that the copy is retained and used only by the transmitter who made it and used only within that transmitter's normal transmission area. Additionally, the broadcaster is required to either destroy the copy within six months or use it exclusively for archival purposes. Motion pictures and other audiovisual works are not included in this exemption.

112(b) covers recordings for instructional transmissions. It permits a nonprofit organization that is free to transmit a performance or display under 110(2) or 114(a) to make not more than 30 copies or phonorecords and to use the ephemeral recordings for transmitting purposes for not more than seven years after the initial transmission.

[NOTE: there is no reproduction privilege for motion pictures or other audiovisual works. 110(2) covers only nondramatic literary and musical works and displays of all types of works.]

It is important to realize that ephemeral recordings made by instructional broadcasters are in fact audiovisual works that often compete for the same market. As the reports indicate, it is unfair to allow instructional broadcasters to reproduce multiple copies of films and tapes, and to exchange them with other broadcasters without paying any copyright royalties; this was considered to injure the market of producers of audiovisual material who pay substantial fees to authors for the same uses. This was the main reason why limitations were placed on this exemption.

112(c) covers religious broadcasts. This clause states that "it is not an infringement for a government or nonprofit organization to make no more than one copy or phonorecord for each transmitting organization of a particular transmission program embodying a performance of a nondramatic musical work of a religious nature or a sound recording of such musical work" if: (1) there is no charge; (2) there is no use other than a single transmission by a transmitting organization entitled to transmit to the public under a license or transfer of copyright (in plain English--a broadcasting station); and 3) one copy only is kept for archival purposes. All other copies are to be destroyed within one year from the date the transmission was first transmitted to the public.

The case made by the religious program producers before Congress was that they are producing a nonprofit broadcast and are merely using the convenience of tape or disc rather than long lines because it is cheaper to do so in this manner.

112(d) grants an ephemeral recording right to transmissions to handicapped audiences. This subsection ties in with 110(8).

112(e) covers the copyright status of ephemeral recordings. It provides that ephemeral recordings are not to be copyrightable as derivative works except with the consent of the owners of the copyrighted material employed in them.

LIMITATIONS ON EXCLUSIVE RIGHTS IN SOUND RECORDINGS (Section 114(b))

An exception to the exclusive rights in sound recordings granted in section 106 is that permission is not needed to use sound recordings in educational television and radio programs distributed or transmitted by or through public broadcasting entities as long as phonorecords of such programs are not commercially distributed by or through such entities to the public.

The rights in sound recordings are also limited by certain portions of sections 108 and 112 and of course by the doctrine of fair use, section 107.

CHAPTER NINE

THE COMPULSORY LICENSES AND THE COPYRIGHT ROYALTY TRIBUNAL
[Sections 111, 115, 116, 118 and Chapter 8]

SECONDARY TRANSMISSIONS (Section 111)

Section 111 covers the complex and economically important problem of "secondary transmissions." For the most part this section is directed at the operation of cable systems and the terms and conditions of their liability for the retransmissions of copyrighted works. It does, however, consider other forms of secondary transmission including apartment house and hotel systems, common carriers, and secondary transmissions of primary transmissions to controlled groups. Subsection (f) contains the definitions of the operative terms--e.g., "primary transmitter" and "secondary transmitter."

Cable television systems are commercial subscription services which pick up broadcasts of programs originated by others and retransmit them to paying subscribers. A typical system consists of three sections: the head end section, which is the point where the signal is introduced into the system; the trunk line section, which brings the signal from the head end to the local community; and the distribution system, which carries the signal from the trunk line to the various subscribers' homes. In an area where off-the-air reception is poor (e.g., where there is hilly terrain) the cable system may use microwave to bring TV signals to the head end. A growing number of cable systems also originate programs, such as movies and sports, and charge additional fees for this service (pay cable).

Subsection (c) establishes a compulsory license for cable systems. Generally it allows the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC. This license, however, is conditioned on compliance with the reporting and filing provisions of the law, payment of the royalties due, etc. The rationale for this provision is that Congress believed that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material. Congress believed that royalties should be paid by cable operators to the creators of such programs; but Congress recognized that it would be too burdensome and impractical to require every cable system to negotiate with every copyright owner.

Basic Principles of the Compulsory License:

1. A cable system's retransmission is clearly a public "performance" of the copyrighted work.

2. As long as a cable operator is authorized by his FCC license to carry a particular signal, he is entitled to rely on the "compulsory license" with respect to the copyrighted material carried by the signal.

3. The new law makes distinctions between cable retransmission of local and distant signals and between cable carriage of network and non-network programming. Congress believed that the retransmission of local signals, essentially those already available over-the-air in the cable system's community, did not economically injure copyright owners since they were compensated for use of their programs in the local markets under their broadcast licenses. Congress also concluded that retransmission of network programming, whether local or distant, did not injure the copyright owner. The owner would be adequately compensated under its contract with the network. Payment in this situation is generally based on reaching all markets served by the network by any means. Congress did, however, find that the retransmission of distant non-network programming would damage the copyright owner. Where a cable system brings a distant, non-network signal into its community, the copyright owner's ability to subsequently license the use of its program in that community would be impaired. In effect, the copyright owner would find itself dealing in used goods. Thus, all signals are under the compulsory license but generally the statutory fee is based on the amount of carriage of distant, non-network programming.

4. Commercial substitution and program modification is prohibited. The law provides that if a cable system intentionally alters the content of the retransmitted program, or changes, deletes, or adds to commercial advertising or station announcements transmitted by the originating station, it loses the benefit of the compulsory license. The law permits suit to be brought by the originating broadcast station or any broadcast station within whose local service area the cable retransmission is made. In such a case the court may deprive the cable system of the compulsory license for a period of up to 30 days. The effect of this is to preclude a cable operator from deciding that the economic benefits of commercial substitution or the like are significant enough to forego the compulsory license and negotiate directly with the copyright owner.

5. There are provisions governing the importation of foreign television signals. FCC rules permit certain border cable systems to retransmit certain Mexican and Canadian signals. The new law extends the compulsory license to the retransmission of Mexican and Canadian signals by cable systems located within limited zones in the U.S. In the case of Canadian signals the zone is defined geographically--it applies to areas located within 150 miles from the U.S.-Canadian border, or south from the border to the 42nd parallel of latitude, whichever distance is greater. Included within the compulsory license area: Detroit, Pittsburgh, Cleveland. Outside: New York, Philadelphia, Chicago and San Francisco.

The Mexican situation was harder to deal with because of the effect of the retransmission of Mexican signals on indigenous U.S. Spanish-language programming. With regard to Mexico, the zone is defined by technology. The compulsory license applies only in such areas where the signals may be received by a U.S. cable system by means of direct interception of a free space radio wave. Thus, the compulsory license is generally applicable only to systems which receive the program directly off-the-air and not to those systems which use microwave or other devices going beyond a mere receiving antenna.

Additionally, there is a grandfather clause. The new law permits cable systems authorized to carry Canadian or Mexican signals under FCC rules in effect on April 15, 1976 to continue to carry those signals under the compulsory license.

Cable systems operation outside the specified zones, and not grandfathered in, are not entitled to the compulsory license and must negotiate for the retransmission of the signals with the copyright owners.

6. Section 111 does not normally cover situations where someone tapes a program off-the-air and the program is later retransmitted from the tape. There is a complicated exception involving cable systems outside the continental United States, some of which are allowed to use tape because they cannot pick signals out of the air. See 111(e).

Exemptions

Subsection (a) contains four exemptions to the compulsory license. These are:

(1) Secondary transmissions consisting "entirely of the relaying, by the management of a hotel, apartment house, or similar establishment" of a transmission to the private rooms of guests or residents as long as no direct charges were made to see or hear it. Private rooms limit it to living quarters; it would not include dining rooms, meeting halls, theatres, ballrooms, or similar places that are outside of a normal circle of a family and its social acquaintances.

(2) Secondary transmissions of instructional broadcasts which are within the scope of section 110(2) [See Chapter Eight].

(3) Secondary transmissions of a passive carrier--i.e., one which "has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission."

(4) The operations of non-profit "translators" and "boosters" which do nothing more than amplify broadcast signals and retransmit them to everyone in an area for free reception if there is "no purpose of direct or indirect commercial advantage" and if there is no charge to the recipients "other than assessments necessary to defray the actual and reasonable costs" of maintenance and operation. This exemption does not apply to a cable television system.

Outside the scope of the compulsory license (must be licensed from the copyright owner(s) of the program(s)) - Secondary transmissions of primary transmission to a controlled group.

Subsection (b) makes it clear that the secondary transmission to the public of a primary transmission embodying a performance or display is actionable as an act of infringement if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public. Examples include MUZAK, closed circuit broadcasts to theaters, subscription television, or pay cable.

Filing Requirements: Notices, Statements of Account and the Royalty Fees

111(d)(1) required all cable systems in operation on April 17, 1977, to file by April 18, 1977, an initial notice giving certain identifying information and listing all signals that it regularly carries. Cable systems that begin operations after April 18, 1977, must file such a notice 30 days prior to the commencement of operation. All cable systems are required to file supplemental notices within 30 days of any change in the information recorded.

The Copyright Office has adopted a regulation implementing this notification requirement [37 C.F.R. Section 201.11. Copies are available from the Copyright Office, request ML-142.]

This regulation requests that the notice be identified as such by prominently captioning the document as "An Initial Notice of Identity and Signal Carriage Complement." The notice should include: the identity and address of the person who, or entity which, owns or operates the system or has power to exercise primary control over it. The regulation suggests that the legal name be given with any fictitious or assumed name adopted for the purpose of conducting business. It also asks for the name and location of the primary transmitter or primary transmitters whose signals are regularly carried and suggests the station's call sign, accompanied by a brief statement of the type of signal carried (TV, "FM" etc.) be given. The location the Copyright Office would like is the name of the community to which the transmitter is licensed by the FCC. The Office in its regulation suggests that the notices be dated and that they contain the individual signature of the person identified as the owner, etc. or his authorized agent.

The Initial Notices and Notices of Change will be placed in "the appropriate public files" of the Copyright Office. For a fee of $3 the Copyright Office will furnish a certified receipt.

Section 111(d)(2) requires all cable televisions to file semiannual statements of account. These statements must include a royalty fee for the six-month period covered; must list all signals carried during that period; and must provide information on the number of channels, the number of subscribers and gross receipts for basic service. Each statement must also be supplemented by a special statement of account covering distant non-network programming carried pursuant to FCC rules allowing for the addition or substitution of signals. Also, the Register is empowered to require, by regulation, the filing of "other data."

Section 111(d)(3) provides that the fees are to go to the Register, who, after deducting the reasonable costs incurred by the Office, shall deposit them in the Treasury. The Treasury is instructed to put the money into interest bearing U.S. securities.

Section 111(d)(4) lists the copyright owners entitled to royalty fees. They are: (1) copyright owners whose works were included...by a cable system of a distant non-network television program; (2) any copyright owner whose work is included in a secondary transmission identified in a special statement of account; and (3) copyright owners whose works were included in distant non-network programming consisting exclusively of aural signals--i.e., radio.

No royalties may be claimed or distributed for "local" or "network" programs.

Every year during the month of July every person claiming to be entitled to royalties must file with the Copyright Royalty Tribunal (see below). After the first day of August of each year the Tribunal shall determine whether a controversy exists. If no controversy exists, the Tribunal, after deducting its reasonable administrative costs, shall distribute the fees to the owners or their agents. If a controversy exists, it must conduct a proceeding in accordance with chapter 8 of the 1976 Act.

Summary

In order to be covered by the compulsory license provided by Section 111, a cable system must:

- retransmit only those signals permitted under FCC rules
- comply with the filing and reporting requirements of the Copyright Office
- pay the royalties established by the formula in the law
- avoid program modification or commercial substitution
- restrict its retransmissions to programs that originate from FCC-licensed stations in the U.S.
- (in the case of a Canadian signal) be located in the appropriate zone; or
- (in the case of a Mexican signal) limit itself to the appropriate technology.

COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS EMBODYING NONDRAMATIC MUSICAL COMPOSITIONS (Section 115)

Sections 1(e) and 101(e) of the 1909 Act grant the copyright owner of a musical composition the exclusive right to make or license the first recording. After that anyone else may make a "similar use" of the work. The compulsory license provision of the old law required that the compulsory licensee notify the copyright owner of his intent, send a copy of the notice of intention to use to the Copyright Office for recordation, and pay the statutory royalties at the appropriate time.

A major issue in the revision effort was whether to retain this compulsory license. The Copyright Office originally suggested that the compulsory license provision be eliminated. This proposal was met with fierce opposition by record producers both small and large. Even copyright proprietors favored its retention in some form.

In 1967 the House Judiciary Committee noted in its report that it favored retention of the principle; it did, however, also state "that the present system is unfair and unnecessarily burdensome on copyright owners" and observed "that the present statutory rate is too low."

The compulsory license for making phonorecords of copyrighted nondramatic musical compositions is retained in section 115 of the new law; there are, however, substantial changes in the system.

Availability and Scope of the Compulsory License (Section 115(a))

This subsection makes the compulsory license available as soon as the copyright owner of the music distributes phonorecords to the public in the United States. The distribution must be authorized by the copyright owner of the music.

The compulsory license is available only if the purpose in making phonorecords is to distribute them to the public for private use. (Background music systems need the express consent of the copyright owner; they may not rely on this section.)

The compulsory license provided by section 115 is not available to an unauthorized duplicator. Moreover, the interpretation of Duchess Music Corp. v. Stern, 458 F.2d 1305 (9th Cir.), cert. denied, 409 U.S. 847 (1972) and its progeny--Marks, Jondora and Fame--is incorporated into the legislative reports. However, it

is possible to duplicate the sounds fixed and owned by another as long as the owner of those sounds authorizes the duplication. If the owner of the sounds authorizes the use, section 115 is applicable.

Subsection (a) recognizes the practical need for a limited privilege to make new arrangements of the music being used under a compulsory license. It does not, however, allow the music to be "perverted, distorted, or travestied." [House Report 94-1476.] A new arrangement may be made as long as it doesn't change the basic melody or fundamental character of the work. There can be no copyright in the new arrangement unless the copyright owner of the music specifically authorizes the new arrangement.

Notice of Intention to Obtain a Compulsory License (Section 115(b))

The user must serve a notice of his or her intent on the copyright owner before or within 30 days after the phonorecords have been made; however, the notice must be served before any phonorecords are distributed. If the copyright owner is not identified in the registration or other records of the Copyright Office, the notice of intention should be filed with the Copyright Office.

The notice must comply with the form, content and manner of service required by the regulations of the Copyright Office.

Failure to file the required notice of intention rules out the compulsory license; in the absence of a negotiated license, the user is subject to the remedies applicable to other types of infringement.

Royalty Payable under the Compulsory License (Section 115(c))

A "notice of use," Form U, is not required under the new law. Instead, to receive royalties, the copyright owner must be "identified in the registration or other public records of the Copyright Office."

Proper identification is an important condition of recovery--the owner is entitled to royalties for phonorecords made and distributed after being so identified, but is not entitled to recover for any phonorecords previously made and distributed.

Royalty payments are to be made on or before the 20th day of each month. Each payment must be under oath and must comply with the requirements of the Copyright Office regulation on this subject.

The Register of Copyrights, by regulation, is to establish criteria for the detailed annual statements of account which must be certified by a Certified Public Accountant. A regulation will prescribe the form, content, manner of certification with respect to the number of records made, and the number of records distributed.

The royalty rate is 2 3/4 cents or 1/2 cent per minute or fraction of playing time, whichever is larger, for each work embodied in the phonorecord.

Under the old law, the royalty payment was for each phonorecord manufactured; under the new law, it's for each phonorecord "made and distributed." Congress believed it was unfair to require payment of license fees on records which merely go into inventory, which may later be destroyed and from which the record producer gains no economic benefit. A phonorecord is considered "distributed" if the compulsory licensee has voluntarily and permanently parted with possession.

The House Report notes that "made" is meant to be broader than "manufactured;" that it is meant to "include within its scope every possible manufacturing or other process capable of reproducing a sound recording in phonorecords."

The legislative reports make it clear that "even if a presser, manufacturer, or other maker had no role in the distribution process, that person would be jointly and severally liable where the provisions of section 115 were not complied with."

The Register of Copyrights is to issue a regulation prescribing a point in time when, for accounting purposes, under section 115, a phonorecord will be considered "permanently distributed," and situations in which a compulsory licensee is barred from maintaining reserves (e.g., situations in which the compulsory licensee has frequently failed to make payments in the past).

Subsection (4) allows the copyright owner to serve written notice on a defaulting licensee; the compulsory license is terminated if the default is not remedied in 30 days from the date of the notice. Termination makes the making or the distribution, or both, of all phonorecords for which the royalty has not been paid actionable as acts of infringement.

PUBLIC PERFORMANCE BY MEANS OF COIN-OPERATED PHONORECORD PLAYERS (Section 116)

Section 1(e) of the 1909 law contains the "jukebox exemption." The position of the Copyright Office has been that this exemption is an historical anomaly. The 1961 Report of the Register notes that it was placed in the law in 1909 "at the last minute with virtually no discussion." The Report also observes that in 1909 coin-operated music machines were apparently a novelty of little economic consequence. The Copyright Office recommended that this exemption be repealed, or at least be replaced by a provision requiring jukebox operators to pay reasonable license fees for the public performance of music for profit.

Section 116(a)(2) provides that the operator of a coin-operated phonorecord player may obtain a compulsory license for the public performance of nondramatic musical works on that machine. A "coin-operated phonorecord player" is defined as one which is "activated by the insertion of coins, currency, tokens, or other monetary units or their equivalent." To come within the compulsory license provision the following must be present:

1. The establishment where the machine is located must make "no direct or indirect charge for admission;"

2. The phonorecord player must be "accompanied by a list of titles of all musical works available for performance on it," and the list must be affixed to the machine itself or "posted in the establishment in a prominent position where it can readily be examined by the public;" and

3. The machine must provide "a choice to be made by the patrons of the establishment in which it is located."

To obtain the compulsory license, the jukebox operator must file an application with the Copyright Office, send the royalty payment, and then affix the certificate to the jukebox in a way that it is readily visible to the public. The application must be filed within one month after the machine is placed in use and during the month of January in each succeeding year. The royalty payment for a full year is $8.00, or if filed for the first time after July 1 of any year the fee is $4.00.

Within twenty days after the Copyright Office receives an application and fee, the certificate must be issued. The certificate must be affixed to the machine on or before March 1 or within ten days after the date of issue.

Under 116(b)(2) the failure to file, affix the certificate or pay the royalty would make any public performance on that machine an infringement subject to all the remedies provided by Chapter Five of the law.

Section 116(c)(1) requires the Register, after deducting reasonable administrative costs, to deposit in the Treasury the fees collected. These fees are to be invested in interest-bearing securities for later distribution with interest by the Copyright Royalty Tribunal. The Register has to submit to the Tribunal an annual detailed statement accounting for all the fees received during the preceding year.

116(c)(2) provides that during each January every person claiming to be entitled to a portion of the fees collected under §116 shall file a claim with the Tribunal. The claim must include an agreement to accept the determination of the Tribunal as final in any controversy. Judicial review, however, is provided for in section 810.

After the first of October the Tribunal is to determine whether a controversy exists. If there is no controversy, it will distribute the fees after deducting "its reasonable administrative costs." If it decides that there is a controversy, it must conduct a hearing to determine the distribution of royalty fees.

116(4) directs the Tribunal to promulgate regulations whereby the persons who have reason to believe they will be entitled to file a claim for public performances of their works for a given year are permitted to have access to phonorecord players (jukeboxes) to determine their share of the fees. A potential claimant could not harass an establishment proprietor, but if the claimant were denied access which is granted by this section, he or she may bring an action in the U.S. District Court for the District of Columbia for cancellation of the compulsory license of the jukebox to which he or she was denied access.

Under 116(d) certain actions which would fraudulently subvert the intent of this section would be subject to a criminal penalty. The falsification of material facts in the application, the alteration of the certificate, or knowingly affixing the certificate to a machine other than the one it covers, would subject the guilty party to a fine of up to $2,500.

[NOTE: it is the operator and not the proprietor of the establishment that section 116 is aimed at. The proprietor is exempt from liability unless he also is an operator of the machine or unless he fails or refuses to reveal the identity of the operator. (§116(a)(1))].

NONCOMMERCIAL, i.e., PUBLIC BROADCASTING (Section 118)

Section 118 provides a compulsory license for public broadcasting for the use of published nondramatic musical works and published pictorial, sculptural and graphic works provided certain conditions are met.

Works Not Included

Materials which are excluded under this compulsory license are: nondramatic literary works, plays, operas, ballets, motion pictures and other audiovisual works including television programs.

Subsection (e), however, encourages the parties to conclude voluntary agreements for the use of nondramatic literary works, and the Register is to report to Congress on January 3, 1980 on the extent to which voluntary agreements have been reached. The report is also to include any problems that have arisen and to make appropriate legislative recommendations.

Subsection (f) clarifies that section 118 does not apply to unauthorized dramatizations of nondramatic musical works, to program productions based on published compilations of pictorial, graphic or sculptural works, or to the use of audiovisual works, except as such may be considered "fair uses" within the meaning of section 107.

Voluntary Negotiations

Although this section sets up a compulsory license, it strongly encourages voluntary agreements between public broadcasters and copyright owners. Voluntarily negotiated agreements shall prevail in every case provided they are filed in the Copyright Office within 30 days of execution in accordance with regulations prescribed by the Register of Copyrights. [37 C.F.R. Section 201.9; copies available from the Copyright Office request ML-146].

Voluntary agreements become effective upon their being filed in the Copyright Office. This applies not only to the categories of works included under the compulsory license, but also to nondramatic literary works which are not. The Regulation provides that the original instrument of agreement, or a legible photocopy or other full-size facsimile reproduction accompanied by a certification that the reproduction is a true copy be filed. All persons identified as parties in the document must sign it or have an authorized agent sign for them. The document must be complete on its face; it should be clearly identified as being submitted under section 118, and it must be accompanied by the appropriate fee. The date of recordation is the date on which all elements have been received by the Copyright Office and after recordation, the document is returned to the sender with a certificate of record.

Components of Compulsory License

A compulsory license may be obtained for one or more of the following activities [subsection (d)]:

1. performances or displays of published music or graphics by a public broadcasting entity in the course of a noncommercial educational broadcast transmission;

2. production, reproduction and distribution of copies or phonorecords of such programs by a public broadcasting entity; and

3. simultaneous off-air videotaping and performance or display of such transmissions by nonprofit institutions or governmental bodies for face-to-face teaching purposes within the conditions of 110(1) for a period of seven days from the transmission.

There is a provision, however, that broadcasters are not liable for copies of programs they supplied which are not destroyed within this period if they inform the receiving institution of this destruction obligation.

The terms and rates of the compulsory license are to be established by the Copyright Royalty Tribunal between 120 days and six months after it publishes a notice of the initiation of proceedings. The notice is supposed to be published "not later than thirty days after the Copyright Royalty Tribunal has been constituted."

No initial rates have been established by the new law for public broadcasting licenses; nor does the Tribunal collect and distribute monies. Rather the Tribunal is to devise a schedule of rates and terms within 120 days or six months from the date of the publication of the initial notice. In addition, section 118 does not indicate when compulsory licensing rates must be paid.

A provision in subsection (b)(3) directs the Tribunal to establish requirements by which copyright owners may receive reasonable notice of the use of their works under section 118 -- the records of such use are to be kept by public broadcasting entities.

Definitions

As used in section 118, "public broadcasting entity" means a noncommercial educational broadcast station as defined by the FCC. In addition, any "nonprofit institution or organization" is eligible if it is engaged in the activities described in section 118(d)(2).

COPYRIGHT ROYALTY TRIBUNAL
[Chapter 8 - Sections 801-810]

The Copyright Royalty Tribunal, an independent body in the legislative branch of the government, shall consist of five commissioners to be appointed by the President with the advise and consent of the Senate. The term of service is seven years; however, for start-up purposes three commissioners will have seven-year terms while the other two will be named to serve for five years.

The Copyright Royalty Tribunal was established for the purpose of distributing the royalties to those entitled to receive payment under sections 111 (secondary transmissions by cable systems) and 116 (performance by means of a jukebox). If disputes arise over the distribution of these royalties, the Tribunal is to resolve these disputes. In addition, the Royalty Tribunal is to make determinations as to reasonable terms and rates of royalty payments as provided in section 118 (public broadcasting), and to periodically review and adjust statutory royalty rates for the use of copyrighted materials pursuant to the four compulsory licenses.

Distribution of Royalties (Section 809)

The Tribunal is charged with distributing the royalties for cable and jukeboxes. If a controversy is determined to exist, the Tribunal must publish a notice of commencement of proceedings. The Tribunal is required to render a final decision in any such proceeding within one year from the date of publication of the notice.

The full scope of judicial review allowed by the Administrative Procedure Act is allowed. Section 810 specially provides that any final decision of the Tribunal under 801(b) is appealable to the U.S. Court of Appeals within 30 days after publication in the Federal Register.

Periodic Review (Section 804)

The new law provides for a periodic review of the established royalty rates as follows:

Cable -- section 111: 1980 and each subsequent fifth year.
Mechanical license for music on phonorecords - section 115: 1980, 1987 and in each subsequent 10th year.
Jukeboxes -- section 116: 1980 and in each subsequent 10th year.
Public broadcasting -- section 118: rates established will be reviewed in 1982 and in each subsequent 5th year.

CHAPTER TEN

NOTICE OF COPYRIGHT [Sections 401 - 406]

As the Supplementary Report of the Register points out, one of the principal criticisms of the 1909 Act concerns the provisions requiring a notice of copyright as a condition of protection. Unintentional omission of the notice and comparatively trivial errors in its form and position have caused forfeiture in a number of cases.

Both the 1961 Report of the Register and the 1965 Supplementary Report recommended, however, that the notice did serve several useful and definite purposes. They recognized four principal values of a copyright notice: (1) placing published material which no one is interested in protecting in the public domain; (2) showing whether a work is under copyright; (3) identifying the copyright owner; and (4) showing the year of publication. Therefore, these reports recommended that the new law continue to require a notice on published copies but suggested that there be provisions ameliorating the effect for inadvertent omissions and errors.

In general, sections 401 through 406 represent an effort to preserve the values of the notice by inducing its use while substantially ameliorating the effects of accidental or even deliberate errors or omissions. Subject to certain safeguards for innocent infringers, protection would not be lost by the complete omission of the notice from large numbers of copies or from a whole edition, if registration for the work is made before or within 5 years after publication. Error in the name or date in the notice would not be fatal and could be corrected.

Sections 401 and 402 set out the basic notice requirements--401 deals with "copies from which the work can be visually perceived," and 402 deals with "phonorecords" of sound recordings. As the legislative reports note, the notice requirements established by these parallel provisions apply only when copies or phonorecords of a work are "publicly distributed." They [the reports] state that no copyright notice would be required in connection with the public display of a copy by any means, including projectors, television or cathode ray tubes connected with information storage and retrieval systems, or in connection with the public performance of a work by means of copies or phonorecords, whether in the presence of an audience or through television, radio, computer transmission, or any other process.

Both sections 401 and 402 require that a notice be used whenever the work "is published in the United States or elsewhere by authority of the copyright owner." The phrase "or elsewhere," makes it clear that the notice requirements apply to copies or phonorecords distributed to the public anywhere in the world, regardless of where and when the work was first published.

NOTICE ON VISUALLY PERCEPTIBLE COPIES (Section 401)

Subsections (b) and (c) set out the requirements concerning form and position.

Subsection (b) states the required elements. They are:

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

2. the year of first publication of the work

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.

There are two special provisions concerning compilations or derivative works and certain pictorial, graphic or sculptural works:

In compilations or derivative works incorporating previously published material the year of first publication of the compilation or derivative work is sufficient.

In pictorial, graphic, or sculptural works, with accompanying text matter, if any, the year date may be omitted where such a work is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles.

Subsection (c) simply provides that the notice "shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright." This provision follows the flexible approach of the Universal Copyright Convention.

This subsection also provides that the Register of Copyrights is to set forth by regulation a list of examples of "specific methods of affixation and positions of the notice on various types of works that will satisfy this requirement." A notice placed or affixed in accordance with Copyright Office regulations would clearly meet the requirements but, since the Register's examples are not to be considered exhaustive, a notice placed or affixed in some other way might also comply with the law if it were found to give reasonable notice of the copyright claim.

NOTICE ON PHONORECORDS OF SOUND RECORDINGS (Section 402)

Subsections (b) and (c) set out the requirements concerning form and position.

Subsection (b) requires three elements for the notice. They are:

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.

With regard to the name requirement, the law also provides for a presumption in favor of the record producer. This subsection states "if the producer of the sound recording is named on the phonorecord labels or containers, and if no name appears in conjunction with the notice, the producer's name shall be considered a part of the notice.

Subsection (c) provides that "The notice shall be placed on the surface of the phonorecord, or on the phonorecord label or container, in such manner and location as to give reasonable notice of the claim of copyright."

The legislative reports note three of the reasons for prescribing use of the symbol "Ⓟ " rather than "©":

1. Need to avoid confusion between claims to copyright in the sound recording and in the musical or literary work embodied in it;

2. Need to distinguish between claims in the sound recording and in the printed text and art work appearing on the record label, album cover, liner notes, etc.

3. This symbol has been adopted as the international symbol for the protection of sound recordings by the "Phonograms Convention" (The Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, done at Geneva October 29, 1971) to which the U.S. is a party.

NOTICE FOR PUBLICATIONS INCORPORATING UNITED STATES GOVERNMENT WORKS (Section 403)

This section requires a special notice for a publication that incorporates United States Government works. It provides that, when the copies or phonorecords consist "preponderantly of one or more works of the United States Government," the notice identify those parts of the work in which copyright is claimed--that is, the "new matter" added to the uncopyrightable United States Government work. A failure to meet this requirement would be treated as an omission of the notice subject to the provisions of section 405.

NOTICE FOR CONTRIBUTIONS TO COLLECTIVE WORKS (Section 404)

In conjunction with section 201(c), section 404 deals with a serious problem under the 1909 law: the notice requirements applicable to contributions published in periodicals and other collective works. The basic approach of this section is to permit but not require a separate contribution to contain its own notice and to make a single notice, covering the collective work as a whole, sufficient to satisfy the notice requirement for the separate contributions it contains.

As the legislative reports indicate, the rights in an individual contribution to a collective work generally would not be affected by the lack of a separate notice as long as the collective work as a whole bears a notice. One exception is advertisements inserted on behalf of persons other than the owner of copyright in the collective work.

Subsection (b) provides that where a separate contribution does not bear its own notice and is published in a collective work with a general notice containing the name of someone other than the copyright owner of the contribution, it is treated as if it has been published with the wrong name in the notice. This means that this will be governed by section 406(a) and an innocent infringer who in good faith took a license from the person named in the general notice would be shielded from liability to some extent.

OMISSION OF COPYRIGHT NOTICE (Section 405)

Subsection (a) makes it clear that the notice requirements of sections 401, 402 and 403 are not absolute and that, unlike the 1909 law, the outright omission of a copyright notice does not automatically forfeit protection and place the work into the public domain. Under this section a work published without a notice will still be eligible for statutory protection for at least five years, whether the omission was partial or total, unintentional or deliberate.

Subsection 405(a) provides that the omission of notice does not invalidate the copyright if either of two conditions is met:

(1) if "no more than a relatively small number" of copies or phonorecords have been publicly distributed without notice; or

(2) if registration for the work has previously been made, or is made within five years after publication without notice, and a reasonable effort is made to add notice to copies or phonorecords publicly distributed in the U.S. after the omission is discovered.

Thus, if the notice is omitted from more than a "relatively small number" of copies or phonorecords, copyright is not lost immediately, but the work will go into the public domain if no effort is made to correct the error and if the work is not registered within five years after copies or phonorecords were published without a notice.

Both the House and Senate Reports state that the phrase "relatively small number" is intended to be less restrictive than the phrase "a particular copy or copies" in section 21 of the old law.

[Note: the basic notice requirements are limited to cases where a work is published "by authority of the copyright owner" and 405(a), therefore, refers only to omission "from copies or phonorecords publicly distributed by authority of the copyright owner." Example: if the copyright owner authorized publication only on the express condition that all copies or phonorecords bear a prescribed notice, the notice provisions would not apply since the publication itself would not be authorized.]

Subsection (b) provides that an innocent infringer who acts "in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted" and who proves that he or she was misled by the omission is protected from liability for actual or statutory damages with respect to "any infringing acts committed before receiving actual notice" of registration. This is seen as a major inducement to use of the notice.

Subsection (c) deals with the removal, destruction or obliteration of the notice without the authorization of the copyright owner. It provides that this does not affect the copyright protection in the work.

ERROR WITH RESPECT TO NAME OR DATE IN NOTICE (Section 406)

It was common under the 1909 law for a copyright notice to be fatally defective because the name or date had been omitted or wrongly stated. As the legislative reports indicate, this section is intended to avoid technical forfeitures in these cases, while at the same time inducing use of the correct name and date in protecting users who rely on erroneous information.

Wrong name: Under 406(a) the use of the wrong name in the notice would not affect the validity or ownership of the copyright. However, unless the error has been corrected in the records of the Copyright Office, an innocent infringer misled by the notice would have a complete defense if he infringed under the apparent authority of the person named in the notice.

Wrong date: 406(b)

a. Antedated: where the year is earlier than the year of first publication, any statutory term measured from the year of first publication will be computed from the year given in the notice. This is the established judicial principle which is codified in this subsection.

   This would be applicable to anonymous works, pseudonymous works and works made for hire--see 302(c). The legislative reports indicate that this will also be applicable to the presumptive periods set forth in section 302(e).

b. Postdated: where the year in the notice is more than one year later than the year of first publication, the case is treated as if the notice had been omitted and is therefore governed by section 405.

The reports state that notices postdated by one year are quite common in works published near the end of the year, and it would be unnecessarily strict to equate cases of this sort with works published without a notice.
[Note: under the 1909 law claims are registered in cases where the year in the notice is postdated by one year. See 37 CFR 202.2. Where the year in the notice is postdated by more than one year the Copyright Office rejects the claim.]

Omission of name and date: Subsection (c) provides that, if copies or phonorecords "contain no name or no date that could reasonably be considered a part of the notice," the result is the same as though the notice had been omitted entirely and section 405 controls.

As the legislative reports point out, there is no requirement that the elements of the copyright notice "accompany" each other. The reports state that under this provision a name or date that could reasonably be read with the other elements may satisfy the notice requirements even if somewhat separated from them. "Direct contiguity or juxtaposition of the elements is no longer necessary; but if the elements are too widely separated for their relation to be apparent, or if uncertainty is created by the presence of other names or dates, the case would have to be treated as if the name or date, and hence the notice itself had been omitted altogether."

CHAPTER ELEVEN

DEPOSIT AND REGISTRATION [Sections 407-412]

Sections 407-412 mark another departure from the old law and bring the U.S. closer to international practice. Under the 1909 Act, deposit of copies for the collections of the Library and for purposes of copyright registration have been treated as the same thing. The new law's approach is to regard deposit and registration as separate though related requirements. Deposit of copies and phonorecords for the Library is generally required for material published in the United States. Copyright registration, as such, is not required but the new law has substantial inducements for registration. Deposit for the Library can be combined with registration.

DEPOSIT FOR THE LIBRARY OF CONGRESS (Section 407)

The basic requirement of this provision is that within three months after a work has been published with notice in the United States, the owner of copyright must deposit two copies or phonorecords of the work in the Copyright Office. Exceptions to this requirement will be embodied in regulations promulgated by the Register which will be aimed at meeting the needs of the Library and adjusting the deposit obligations to meet special situations.

If the "owner of copyright or of the exclusive right of publication" does not deposit the copies or phonorecords and the work is not one of the categories that is exempted, the Register may demand deposit. Failure to comply would not invalidate the copyright; however, it would subject the owner to fines.

The legislative reports make it clear that section 407 applies to a foreign work as soon as such a work is first published in this country.

With respect to works, other than sound recordings, the basic obligation is to deposit "two complete copies of the best edition," as defined in section 101. Section 101 makes it clear that the Library is entitled to receive copies or phonorecords from the edition it believes best suits its needs regardless of quantity or quality of other U.S. editions that may also have been published before the time of deposit.

For sound recordings, two complete phonorecords of the best edition and any other visually perceptible material published with the phonorecords must be deposited. Thus, for example, text or pictorial matter appearing on record sleeves and album covers would have to be deposited too. As the legislative reports state, the required deposit in the case of a sound recording would extend to the "entire package" and not just to the disk, tape or other phonorecord.

407(c) is aimed at the special needs of artists whose works are published in expensive limited editions. Under the present law, optional deposit of photographs is permitted for various classes of works but not for fine prints. This subsection requires the Register to issue regulations under which such works would either be exempted entirely from mandatory deposit or would be subject to an appropriate alternative form of deposit.

Subsection (d) provides for demand by the Register. It states that if, after written demand has been made, the required copies (or copy) are not deposited within three months after the demand is received, the person or persons on whom the demand was made are liable:

1. to pay a fine of not more than $250 for each work; and

2. to pay to the Library's specially designated fund, the total retail price of the copies or phonorecords demanded, or, if no retail price has been fixed, the reasonable cost of the Library of Congress of acquiring them; and

3. if such person willfully or repeatedly refuses to comply with such a demand, to pay an additional fine of $2,500.

Subsection (e) ties in with the American Television and Radio Archives Act, 2 USC 170, which appears as section 113 of the Transitional and Supplementary Provisions. This subsection was added to provide a basis for the Librarian of Congress to acquire, as part of the copyright deposit system, copies or recordings of non-syndicated radio and television programs without imposing any hardships on broadcasters. Under this subsection the Library is authorized to tape programs off the air in all cases and may "demand" that the Library be supplied with a copy or phonorecord of a particular

program. As the House Report notes, this "demand" authority is extremely limited for: 1. the broadcaster is not required to retain any recording of a program after it has been transmitted unless a demand has already been received; 2. the demand would cover only a particular program--"blanket" demands would not be permitted; 3. the broadcaster would have the option of supplying by gift, by loan for purposes of reproduction, or by sale at cost; and 4. the penalty for willful failure or refusal to comply is limited to the cost of reproducing and supplying the copy or phonorecord in question.

[Note: section 705 requires that records be kept of all deposits. For $2 the Office will provide a receipt of deposit--section 708(3).]

COPYRIGHT REGISTRATION IN GENERAL (Section 408)

Permissive registration. Under 408(a) registration of a claim to copyright, whether published or unpublished, can be made voluntarily by "the owner of copyright or of any exclusive right in the work" at any time during the copyright term. The claim may be registered by depositing copies, phonorecords, or other materials specified by subsections (b) and (c), together with an application and fee.

Except where registration is made to preserve a copyright that would otherwise be invalidated because of omission of the notice, (section 405(a)), registration is not a condition of copyright protection.

Deposit for purpose of registration. In general, and subject to various exceptions, the material to be deposited should be one complete copy or phonorecord of an unpublished work, and two complete copies of the best edition in the case of a published work.

For works first published outside the United States, one complete copy or phonorecord "as so published" would be required.

[Note: the provision in the 1909 law, section 215, which allows waiver of the registration fee for foreign works if, within six months of first publication, two copies are deposited instead of the usual one, has been dropped. This provision was enacted in 1949 to meet the serious postwar problems of transferring funds from foreign countries to the United States. This waiver-of-fee option was found to be administratively burdensome and the 1965 Supplementary Report of the Register states that it "appears to have outlived its usefulness."]

For a contribution to a collective work, one complete copy or phonorecord of the best edition of the collective work will be required.

Subsection (b) also provides that copies or phonorecords deposited for the Library under 407 may be used to satisfy the deposit provisions of 408 "if they are accompanied by the prescribed application and fee, and by any additional identifying material that the Register may, by regulation, require."

Beginning on January 1, 1978, the effective date of the new law,...deposit copies or phonorecords must be accompanied by an application and fee if they are to be used for copyright registration. If copies or phonorecords are sent separately they will not be held to await connection with an application and fee. After this date, if copies or phonorecords are sent without simultaneously submitting an application and registration fee, the deposit will be used for the Library of Congress but not for registration.

The Register is authorized to issue regulations under which deposit of additional material, needed for identification of the work in which copyright is claimed, could be required in certain cases.

Classification and deposit regulations. Subsection (c) allows the Register, by regulation, to specify "the administrative classes into which works are to be placed for purposes of deposit and registration." The legislative reports state that it is important that the statutory provisions setting forth the subject matter of copyright be kept entirely separate from the administrative classification. Moreover, the law makes it clear that the administrative classification "has no significance with respect to the subject matter of copyright or the exclusive rights provided by this title."

The Register is also given latitude in adjusting the type of materials deposited to the needs of the registration system. The Register is authorized to issue regulations specifying "the nature of the copies or phonorecords to be deposited in the various classes" and for particular classes, to require or permit deposit of one copy or phonorecord rather than two.

The legislative reports note that under this provision the Register could, where appropriate, permit deposit of phonorecords rather than notated copies of musical compositions, allow or require deposit of print-outs of computer programs under certain circumstances, or permit deposit of one volume of an encyclopedia for purposes of registration of a single contribution.

The Register is also allowed to require or permit the substitute deposit of material that would better serve the purposes of identification where copies or phonorecords are bulky, unwieldy, easily broken, or otherwise impractical to file and retain as records identifying the work registered. Examples: billboard posters, toys and dolls, ceramics and glassware, costume jewelry and a wide range of three dimensional objects.

The Register's authority also extends to rare or extremely valuable copies which would be burdensome or impossible to deposit. The legislative reports note that deposit of one copy rather than two would probably be justifiable in the case of most motion pictures.

The Register also has the authority to allow a single registration for a "group of related works." The legislative reports include the following examples: the various editions or issues of a daily newspaper, a work published in serial installments, a group of related jewelry designs, a group of photographs by one photographer, a series of greeting cards related to each other in some way, or a group of poems by a single author.

Under 408(c)(2) the Register is directed to establish regulations permitting, under certain conditions, a single registration for a group of works by the same individual author, all first published as contributions to periodicals, including newspapers, within a 12 month period, on the basis of a single deposit, application and fee. Each of the works as first published must have contained a separate copyright notice, and the name of the owner must have been the same in each notice. Deposit of one copy of the entire issue of the periodical, or of the entire section in the case of a newspaper, in which each contribution is first published is required. The application must identify each work separately, including the periodical containing it and its date of first publication.

408(c)(3) provides, under certain conditions, an alternative to the separate renewal registrations under section 304(a). If the specified conditions are met, a single renewal registration may be made for a group of works by the same individual author, all first published as contributions to periodicals, including newspapers. The requirements are:

1. the renewal claimant or claimants and the basis for the claim or claims under 304(a) is the same for each of the works; and

2. the works were all copyrighted upon their first publication, either through separate copyright notice and registration or by virtue of a general notice in the periodical issue as a whole; and

3. the renewal application and fee are received not more than 28 or less than 27 years after the 31st day of December of the calendar year in which all of the works were first published; and

4. the renewal application identifies each work separately, including the periodical containing it and its date of first publication.

Corrections and amplifications: There is no provision in the present law for correcting or amplifying the information given in a completed registration. There is such a procedure provided by regulation--see 201.5 of the present Copyright Office Regulations.

Subsection (d) authorizes the Register to establish "formal procedures for filing of an application for supplementary registration," in order to correct an error or amplify the information in a copyright registration. The "error" to be corrected is an error made by the applicant that the Copyright Office could not have been expected to note during its examination.

A supplementary registration under subsection (d) is subject to payment of a separate fee and would be maintained as an independent record separate and apart from the record of the earlier registration. It would, however, be required to identify clearly "the registration to be corrected or amplified" so that the two registrations could be tied together by appropriate means in the Copyright Office records.

The original record would not be expunged or cancelled, rather it would be maintained to insure a complete public record.

APPLICATION FOR COPYRIGHT REGISTRATION (Section 409)

This section provides that the form prescribed by the Register 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 dates of their deaths;

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

(4) in the case of a work 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 preexisting 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;

(10) in the case of a published work containing material of which copies are required by section 601 to be manufactured in the United States, the names of the persons or organizations who performed the processes specified by subsection (c) of section 601 with respect to that material, and the places where those processes were performed; and

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

The legislative reports indicate that the catchall phrase at the end of section 409 was included to enable the Register to obtain more specialized information, such as that bearing on whether the work contains material that is a "work of the United States Government." The reports also note that in the case of works subject to the manufacturing requirement, the application must also include information about the manufacture of copies.

REGISTRATION OF CLAIM AND ISSUANCE OF CERTIFICATE (Section 410)

The Register is required to register the claim and issue a certificate if he or she determines that "the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements... have been met."

The Register is required to refuse registration and notify the applicant if he determines that "the material deposited for registration does not constitute copyrightable subject matter or that the claim is invalid for any other reason."

Subsection (c) deals with the probative effect of a certificate of registration. A certificate is required to be given prima facie weight in any judicial proceedings if the registration it covers was made "before or within five years after first publication of the work"; thereafter the court is given discretion to decide what evidentiary weight the certificate should be accorded.

The legislative reports note that the five-year period is based on a recognition that the longer the lapse of time between publication and registration the less likely the facts are to be reliable.

Under 410(c) a certificate is to "constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate." The principle that a certificate represents prima facie evidence of copyright validity has been established in a long line of court decisions. What this means is that the plaintiff should not ordinarily be forced in the first instance to provide all of the multitude of facts that underline the validity of copyright unless the defendant, by effectively challenging them, shifts the burden of proof to the plaintiff.

Section 410(d) makes the effective date of registration the day when the application, deposit, and fee ("which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration") have all been received. Where the three necessary items are received at different times, the date of receipt of the last of them is controlling regardless of when the Copyright Office acts on the claim.

REGISTRATION AS PREREQUISITE TO INFRINGEMENT SUIT (Section 411)

This section restates the present statutory requirement that registration must be made before a suit for copyright infringement is instituted. A copyright owner who has not registered his claim can have a valid cause of action against someone who has infringed his copyright, but he cannot enforce his right in the courts until he has registered his claim.

The new law also provides that a rejected claimant who has properly applied for registration may bring an infringement suit if he serves notice on the Register, thus allowing the Register to intervene in on the issue of registrability. The Register has 60 days to enter. If the Register fails to join the action this will "not deprive the court of jurisdiction to determine that issue."

Subsection (b) is intended to deal with the special situation presented by works that are being transmitted "live" at the same time they are being fixed in tangible form for the first time. Under certain circumstances, where the would be infringer has been given advance notice that copyright is being claimed in the work, an injunction could be obtained to prevent the unauthorized use of the material included in the "live" transmission.

REGISTRATION AS PREREQUISITE TO CERTAIN REMEDIES (Section 412)

This section offers an incentive to register; it allows the owner of a registered work a broader range of remedies. Remedies available are tied to the date of registration. If an infringement occurred before registration, the copyright owner would be entitled to the ordinary remedies of injunction and actual damages. If, however, infringement occurred after registration, the owner would be entitled to the extraordinary remedies of attorney's fees and statutory damages.

This provision, which would apply to both domestic and foreign works, is subject to a grace period. If the work is registered within three months of first publication, there is no loss of rights. Full remedies could be recovered for any infringement begun during the three months after publication if registration is made before that period has ended. The legislative reports indicate that this exception (the three-month grace period) was needed to take care of newsworthy or suddenly popular works which may be infringed almost as soon as they are published, before the owner has had a reasonable opportunity to register his claim.

CHAPTER TWELVE

MANUFACTURING REQUIREMENTS AND IMPORTATION OF COPIES OR PHONORECORDS [Sections 601-603]

Prior to the Copyright Act of 1891 no protection was afforded to foreign authors. Thus, the works of English authors were widely pirated in the United States. When a movement was started for protection for foreign authors one of the conditions mentioned was that their works must be printed in the United States to be protected here.

The Act of March 3, 1891 is commonly known as the "International Copyright Act." It contained a complicated compromise which the Second Supplementary Report of the Register characterizes as having "the effect of giving U.S. copyright protection to foreign authors with one hand and taking it away from many of them with the other." The Register was referring to the manufacturing clause, which was the price of support for the printers, book manufacturers and the labor unions in the printing trades.

The manufacturing clause in the 1909 law had its most direct impact upon English language books and periodicals by U.S. authors or by foreign authors who are not covered by the U.C.C.

Books and periodicals of "foreign origin" in a language other than English are exempted from the manufacturing requirements. The term "of foreign origin", is limited however, and if the first edition of a foreign language work is by a U.S. author and is printed abroad, it is denied U.S. copyright protection. Such a work cannot even be eligible for "ad interim copyright" -- this is available only to a book or periodical in the English language.

The 1961 Report of the Register favored elimination of the manufacturing clause as a condition of copyright protection. However, as the 1965 Supplementary Report notes, the book manufacturing industry took a very strong position against complete elimination of the manufacturing requirements. The Supplementary Report notes that it was apparent for the sake of the revision program that a compromise on this issue would be necessary.

MANUFACTURING REQUIREMENTS - (Section 601)

Under the new act, this section is scheduled to be phased out completely on July 1, 1982. Until that time, the manufacturing clause will continue, under a considerably limited scope. The Register is to report on the effect of this phase-out by July, 1981 so that Congress may reexamine the issue. It would apply only to "a work consisting preponderantly of nondramatic literary material that is in the English language and is protected under this title." It does not cover: (a) dramatic, musical, pictorial or graphic works; (b) foreign language, bilingual, or multilingual works; (c) material in the public domain; or (d) works consisting preponderantly of material that is not subject to the manufacturing requirement.

The legislative reports give the following examples:

1. Where the literary material in a work consists merely of a foreword or preface, and captions, headings, or brief descriptions or explanations of pictorial, graphic or other nonliterary material, the manufacturing requirement does not apply to the work in whole or in part. In such a case, the non-literary material clearly exceeds the literary material in importance, and the entire work is free of the manufacturing requirement.

2. Where a work contains pictorial, graphic or other nonliterary material which merely illustrates a textual narrative or exposition, the nondramatic literary material is subject to the manufacturing requirement regardless of the relative amount of space occupied by each kind of material. In such a case the narrative or exposition plainly exceeds in importance the nonliterary material. However, only the portions of the work consisting of copyrighted nondramatic literary material in English are required to be manufactured in the United States or Canada. The illustrations may be manufactured elsewhere without affecting their copyright status.

The manufacturing requirement does not apply where "the author of any substantial part" [of the work] is neither a citizen nor domiciliary of the United States. In other words, the manufacturing requirement would not apply to a work of which any substantial part was written by a foreign author. It would apply only to works of U.S. authors and only then when no co-author was foreign. Moreover, works by American nationals domiciled abroad for at least a year preceding the date when importation is sought would be exempted.

Works made for hire. Section 601(b)(1) makes it clear that the exemption does not apply unless a substantial part of the work was prepared for an employer or other person who is not a national or domiciliary of the United States, or a domestic corporation or enterprise. The reference to "a domestic corporation or enterprise", the reports say, is intended to include a subsidiary formed by the domestic corporation or enterprise primarily for the purpose of obtaining the exemption.

Section 601 adopts a proposal put forward by various segments of the U.S. and Canadian printing industries recommending an exemption for copies manufactured in Canada. The legislative reports note that the wage standards in Canada are substantially comparable to those in the U.S. and, therefore, equal treatment arguments were persuasive. Also persuasive, however, was the "Toronto Agreement." Indeed this is noted in the Conference Report.

> Canada is specifically exempted from the provisions of Section 601... This exemption is included as a result of an agreement reached in Toronto in 1968... Upon addition of the Canadian exemption in American legislation, that agreement contemplates Canadian adoption of the Florence Agreement and prompt joint action to remove high Canadian tariffs on printed matter and the removal of other Canadian restraints on printing and publishing trade between the two countries, as well as reciprocal prompt action by U.S. groups to remove any remaining U.S. barriers to Canadian printed matter. The Canadian exemption is included in Section 601 with the expectation that these changes will be made.

The Conference Report goes on to note that if for any reason Canadian trade groups and the Canadian Government do not move promptly in reciprocation with the U.S. trade groups and the U.S. government to remove such tariff and other trade barriers, Congress would be expected to remove the Canadian exemption.

Limitations on Importation and Distribution of Copies Manufactured Abroad (Subsection (b))

The basic objective of section 601 is to induce manufacture of an edition in the U.S. if more than 2,000 copies are to be imported or distributed in this country. Subsection (a) therefore provides in general that "the importation into or public distribution in the United States" of copies not complying with the manufacturing requirement is prohibited. Subsection (b) then sets out the exceptions and clause (2) fixes the limit of importation at 2,000 copies. The exemption is intended to allow an author or publisher to test the potential market for the work in America before an entire American edition is printed.

Additional exceptions to the copies affected by the manufacturing requirement are set out in clauses (3) through (7) of subsection (b). Clause (3) permits importation of copies for governmental use, other than in schools, by the U.S. or by any state or political subdivision of a state. Clause (4) allows importation for personal use of "no more than one copy of any work at any one time." It also exempts copies in the baggage of persons arriving from abroad and copies intended for the library collection of nonprofit scholarly, educational, or religious organizatons. Braille copies are exempted under clause (5), and clause (6) permits the public distribution in the U.S. of copies allowed entry by the other clauses of that subsection. Clause (7) covers cases in which an individual American author has, through choice or necessity arranged for publication of his work by a foreign rather than a domestic publisher.

Defining the Manufacturing Requirement (Subsection (c))

As the legislative reports note, restrictions to be imposed on foreign typesetting or composition posed a difficult problem. A number of publishers, under what they regard as a loophole in the present law, have been having their manuscripts typeset abroad, importing "reproduction proofs", then printing their books from offset plates "by lithographic process...wholly performed in the U.S." The language in the 1909 law is ambiguous; the practice had been considered to have support from the Copyright Office since it registered such claims under its rule of doubt.

The book publishers strenuously opposed any definition that would have closed this so-called loophole or would interfere with their use of new techniques, including use of imported computer tapes for composition here. Subsection (c) is a compromise between the book publishers and authors and the typographical firms and printing trade unions.

Under subsection (c) the manufacturing requirement is confined to the following processes:

1. Typesetting and platemaking "where the copies are printed directly from type that has been set, or directly from plates made from such type."

2. The making of plates "where the making of plates by a lithographic or photoengraving process is a final or intermediate step preceding the printing of copies."

3. In all other cases, the "printing or other final process of producing multiple copies and any binding of the copies."

Thus, there is nothing to prevent the importation of reproduction proofs, however prepared, as long as the plates from which the copies are printed are made in the U.S. and are not themselves imported. Also, computer tapes from which plates can be prepared here could be imported. However, regardless of the process involved, the actual duplication of multiple copies, together with any binding, are required to be done in the United States or Canada.

Effect of Noncompliance (Subsection (d))

Subsection (d) makes it clear that compliance with the manufacturing requirement no longer constitutes a condition of copyright protection; moreover, the consequences of noncompliance would affect only reproduction and distribution rights. The present "ad interim" copyright limitations and registration requirements are eliminated.

If copies are imported or distributed in violation of section 601, the copyright owner is not precluded from making and distributing phonorecords of the work, or from making derivative works (including dramatizations and motion pictures), or from performing or displaying the work publicly. Even the rights to reproduce copies are not lost in cases of violation, although their enforcement is limited against certain infringers.

An infringer of the exclusive rights of making and distributin copies would be given a complete defense if: (1) the copyright owner authorized or acquiesced in an importation or public distribution of copies in violation of the manufacturing requirement, and (2) the infringing copies were manufactured in the United States. The burden of proof is on the infringer.

Subsection (d) also provides, in effect, that a copyright owner can reclaim his full exclusive rights by manufacturing an edition in the U.S. and registering his claim in the Copyright Office.

INFRINGING IMPORTATION - (Section 602)

This section has nothing to do with the manufacturing requirement in section 601, rather it deals with two situations--importation of "piratical" articles (copies or phonorecords made without any authorization of the copyright owner), and unauthorized importation of copies or phonorecords that were lawfully made. The general approach of this section is to make unauthorized importation an act of infringement in both cases, but to permit the Customs Service to prohibit importation of only "piratical" articles.

Subsection (a) states that unauthorized importation is an infringement but then spells out three exceptions: 1. importation under the authority or for the use of the U.S. government or of any State or political subdivision of a State, but not including copies or phonorecords for use in schools or copies of any audiovisual work imported for purposes other than archival use; 2. importation, for the private use of the importer and not for distribution, by any person with respect to no more than one copy or phonorecord of any one work at any one time, or by any person arriving from outside the U.S. with respect to copies or phonorecords forming part of such person's personal baggage; or 3. importation by or for an organization operated for scholarly, educational, or religious purposes and not for private gain, with respect to no more than one copy of an audiovisual work solely for its archival purposes, and no more than five copies or phonorecords of any other work for its library lending or archival purposes, unless the importation of such copies or phonorecords is part of an activity consisting of systematic reproduction or distribution, engaged in by such organization in violation of the provisions of section 108(g)(2).

ENFORCEMENT OF IMPORTATION PROHIBITIONS - (Section 603)

The importation prohibitions of both sections 601 and 602 would be enforced under section 603. Subsection (a) authorizes the Secretary of the Treasury and the U.S. Postal Service to make regulations for this purpose, and subsection (c) provides for the disposition of excluded articles.

Subsection (b) deals only with the prohibition against importation of "piratical" copies or phonorecords, and is aimed at solving problems that have arisen under the 1909 statute. Since the Customs Service is usually not in a position to make determinations as to whether particular articles are "piratical," this subsection allows the Customs regulations to require the person seeking exclusion either to obtain a court order enjoining importation, or to furnish proof of his claim and to post bond.

CHAPTER THIRTEEN

COPYRIGHT INFRINGEMENT AND REMEDIES
[Sections 501-510]

INFRINGEMENT OF COPYRIGHT (Section 501)

This section contains a statement of what constitutes an infringement. Subsection (a) identifies an infringer as someone who "violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118" or "who imports copies or phonorecords in violation of section 602."

Because section 201(d) establishes the principle of divisibility of copyrights, there was a need to provide protection for the rights of all copyright owners and to avoid a multiplicity of suits. Subsection (b), the reports note, enables the owner of a particular right to bring an infringement action in that owner's name alone, while at the same time insuring (to the extent possible) that the other owners whose rights may be affected are notified and given a chance to join the action.

501(b) empowers the "legal or beneficial owner" of an exclusive right to institute a suit for "any infringement of that particular right committed while he is the owner of it." A "beneficial owner" is defined in the legislative reports as one who has parted with his legal title in exchange for percentage royalties based on sales or license fees.

INJUNCTIONS (Section 502)

Courts are given discretionary power to grant injunctions and restraining orders, whether "preliminary," "temporary," etc. to prevent or stop infringements.

IMPOUNDING AND DISPOSITION OF INFRINGING ARTICLES (Section 503)

Courts are given the power to impound allegedly infringing articles during the time the action is pending. The court is also empowered to order the destruction or other disposition of articles found to be infringing.

In both cases the articles affected include "all copies or phonorecords" and also "all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced."

DAMAGES AND PROFITS (Section 504)

The legislative reports state that this is the cornerstone of the remedies sections and of the new law as a whole. Two basic aims of the section are: (1) to give the courts specific unambiguous directions concerning monetary awards, and at the same time, (2) to provide the courts with reasonable latitude to adjust recovery to the circumstances of the case.

Subsection (a) establishes the liability of the infringer for either "the copyright owner's actual damages and any additional profits of the infringer," or statutory damages. Recovery of actual damages and profits, under subsection (b), or of statutory damages, under subsection (c), is alternative and for the copyright owner to elect.

This section recognizes that an award of damages serves a different purpose from an award of profits--it provides: "The copyright owner is entitled to recover the actual damages suffered by him or her 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." Damages would be paid to compensate the copyright owner for his losses caused by the infringement, while an award of profits is intended to prevent the infringer from unjustly benefiting from his wrongful act. If profits alone are used as a measure of the plaintiff's damages, however, only one or the other could be awarded. Where the copyright owner has suffered damages not reflected in the infringer's profits, or where there have been profits attributable to the copyrighted work but not used as a measure of damages, both may be awarded.

Subsection (c) covers <u>statutory</u> damages. It provides that the plaintiff's election to recover statutory damages may take place at any time during the trial before the court has rendered its final judgment.

Basic provisions:

1. Generally, where the plaintiff elects to recover statutory damages, the court is obliged to award between $250 and $10,000. The court may exercise its discretion within that range, but unless one of the exceptions in clause (2) is applicable, it cannot make an award of less than $250 or more than $10,000.

2. An award of minimum statutory damages may be multiplied if separate works and separately liable infringers are involved in the suit; however, a single award in the $250-$10,000 range is to be made "for all infringements involved in the action."

   A single infringer of a single work is liable for a single amount no matter how many acts of infringement are involved and regardless of whether the acts were separate, isolated, or occurred in a related series.

3. Where the suit involves infringement of more than one separate and independent work, minimum statutory damages must be awarded for each work. An example is given in the legislative reports--if one defendant has infringed three copyrighted works, the copyright owner is entitled to statutory damages of at least $750 and may be award up to $30,000. Subsection (c)(1) makes it clear that "all parts of a compilation or derivative work constitute one work" for the purpose of assessing damages. Moreover, although minimum and maximum amounts are to be multiplied where multiple "works" are involved, the same is not true with respect to multiple copyrights, multiple owners, multiple registrations, or multiple exclusive rights. This is important since under a scheme of divisible copyright, it is possible to have the rights of a number of owners of separate "copyrights" in a single "work" infringed by one act of a defendant.

Clause (2) provides for exceptional cases in which the maximum award could be raised to $50,000 and the minimum could be reduced to $100. Courts are given discretion to increase statutory damages in cases of willful infringement and to lower the minimum where the infringer is innocent.

The innocent infringer provision is where the infringer "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright." It was felt that this provision offered adequate insulation to broadcasters and newspaper publishers who are particularly vulnerable to this type of infringement suit.

Also, there is a special clause dealing with the special situation of teachers, librarians, archivists and public broadcasters, and the nonprofit institutions of which they are a part. Where such person or institution infringes copyrighted material in the honest belief that what they were doing constituted fair use, the court is precluded from awarding any statutory damages. In these cases, the burden of proof with respect to the defendant's good faith is said to rest on the plaintiff.

COSTS AND ATTORNEY'S FEES (Section 505)

This section leaves the award of costs and attorney's fees (as part of the costs) entirely in the court's discretion. Attorney's fees may be awarded to the prevailing party. An exception to this section is where "the United States or an officer thereof" is a party.

CRIMINAL OFFENSES (Section 506)

Four specific types of activities constitute a criminal offense:

1. Criminal infringement--infringement of "a copyright willfully and for purposes of commercial advantage or private financial gain";

2. Fraudulent use of copyright notice--with fraudulent intent, to place on an article a notice that the defendant "knows to be false" or to publicly distribute or import any article bearing such a notice;

3. Fraudulent removal of copyright notice--also requires fraudulent intent in removing or altering a notice;

4. False representation--knowingly making a false representation in connection with an application for copyright registration.

This section provides for a fine, imprisonment or both.

There is a special provision applying to any person who infringes willfully and for purposes of commercial advantage the copyright in a sound recording or a motion picture. First offense: fine of not more than $25,000 or imprisonment for not more than one year, or both. For each subsequent offense, fine of not more than $50,000 or imprisonment for not more than 2 years, or both.

STATUTE OF LIMITATIONS (Section 507)

This section, which deals with both criminal proceedings and civil actions, is substantially identical with section 115 of the 1909 law. It establishes a three year statute of limitations.

NOTIFICATION OF FILING AND DETERMINATION OF ACTIONS (Section 508)

This section is intended to establish a method for notifying the Copyright Office and the public of the filing and disposition of copyright cases. The clerks of the federal courts are to notify the Copyright Office of the filing of any copyright actions and of their final disposition. Courts are also to send a copy of the written opinion if there is one. The Copyright Office is to make these notifications a part of its public records.

SEIZURE AND FORFEITURE (Section 509)

This provision allows for the seizure and forfeiture to the United States of all copies or phonorecords and all the implements of reproduction, manufacture, or assemblage, used, or intended for use or possessed with the intent to use in violation of section 506(a) (criminal infringement).

Subsection (b) states that the applicable procedures for seizures and forfeitures under Title 19 (customs) shall apply to forfeitures and seizures under this section insofar as appropriate and consistent with the terms of this section. For the items described in subsection (a), however, the actions necessary are to be performed by such officers, agents or other persons authorized by the Attorney General rather than employees or officers of the Treasury Department.

REMEDIES FOR ALTERATION OF PROGRAMMING BY CABLE SYSTEMS (Section 510)

This section allows a remedy for the alteration of or substitution of programming by cable systems in violation of section 111(c)(3). The court may deprive the system of the compulsory license for one or more of its distant signals for a period not exceeding 30 days.

CHAPTER FOURTEEN

ADMINISTRATIVE PROVISIONS
[Chapter 7, Sections 701-710]

Chapter 7, entitled "Copyright Office," contains the administrative or "housekeeping" provisions of the new law.

ADMINISTRATIVE PROCEDURE ACT (Section 701)

Section 701(d) makes the Copyright Office fully subject to the Administrative Procedure Act (with one exception: under 706(b), reproduction and distribution of deposit copies would be made under the Freedom of Information Act only to the extend permitted by the Copyright Office regulations.

REGULATIONS (Section 702)

Section 702 states that the Register of Copyrights is authorized to establish regulations "not inconsistent with law." All regulations are subject to the approval of the Librarian of Congress.

EFFECTIVE DATE OF ACTIONS IN THE COPYRIGHT OFFICE (Section 703)

This section provides that where an action is to be performed on a specified date and that date falls on a Saturday, Sunday, holiday, or other non-business day within the District of Columbia, the action may be taken on the next succeeding business day. It also provides that the action is effective as of the date when the period expired.

RETENTION AND DISPOSITION OF ARTICLES DESPOSITED IN THE COPYRIGHT OFFICE (Section 704)

As the Reports of the Register indicate, a practical problem of concern to both the Office and the copyright bar concerns the storage limitations of the Copyright Office. Also mentioned was the need to retain copies and phonorecords for the identification of works in which a claim to copyright has been registered. The legislative reports note that aside from its indisputable utility to future historians and scholars, a substantially complete collection of both published and unpublished deposits (other than those selected by the Library) would avoid the many difficulties encountered when copies needed for identification in connection with litigation or other purposes have been destroyed.

The basic policy behind section 704 is copyright deposits that should be retained as long as possible. The Register and the Librarian of Congress, however, are empowered to dispose of deposits under appropriate safeguards when they jointly decide that it has become necessary to do so.

Section 704(a) makes it clear that any copy or phonorecord, or identifying material deposited for registration, whether registered or not, becomes "the property of the United States Government." The legislative reports state that this means that the copyright owner or person who made the deposit cannot demand its return as a matter of right, even in rejection cases.

Section 704(b) deals in the first instance with published works. It makes all deposits available to the Library of Congress "for its collections, or for exchanges or transfer to any other library."

With respect to unpublished works, the Library is authorized to select any deposit for its own collections or for transfer to the National Archives or to a federal records center.

704(c) authorizes the Register to make "facsimile" copies of all or any part of the material deposited under section 408 and to make such reproductions part of the Copyright Office records of the registration. This is to be done before transferring or otherwise disposing of the copies or phonorecords.

Subsection (d) deals with deposits not selected by the Library. It provides that they are to be retained under the control of the Copyright Office "for the longest period considered practicable and desirable" by the Register and the Librarian. The aim is to preserve copyright deposits of all classes of material for as long a period as is reasonably possible by any practical means of storage. The 1965 Supplementary Report of the Register states the reference to "government storage facilities" contemplates that "dead storage" available in or out of Washington would be considered preferable to outright destruction.

Because of their unique value and irreplaceable nature, intentional destruction of unpublished works is prohibited during their copyright term unless a facsimile reproduction has been made.

Subsection (e) establishes a new procedure whereby a copyright owner can request retention of deposited material for the full term of copyright. The Register is authorized to issue regulations prescribing the fees for this service and the "conditions under which such requests are to be made and granted."

COPYRIGHT OFFICE RECORDS (Section 705)

Subsection (a) requires the Register to keep records of all deposits, registrations, recordations, and "other actions taken under this title." The Register must also prepare indexes of all such records.

Subsection (b) provides that these records and indexes, as well as the deposits within the control of the Copyright Office, be open to public inspection.

Subsection (c) provides that upon request and payment of the prescribed fee, the office shall search its public records, indexes, and deposits, and furnish a report of the information they disclose.

COPIES OF COPYRIGHT OFFICE RECORDS (Section 706)

Subsection (a) provides that copies may be made of any public records or indexes. It also provides for additional certificates.

Subsection (b) provides that copies or reproductions of deposited articles which are under the Copyright Office's control shall be furnished only under conditions specified in its regulations.

COPYRIGHT OFFICE FORMS AND PUBLICATIONS (Section 707)

(a) Catalog of Copyright Entries. Sections 210 and 211 of the 1909 law require that an indexed catalog of all copyright registrations be printed at periodic intervals, and that it be distributed to customs and postal officials and offered for sale to the public.

The Reports of the Register noted that this catalog is extremely expensive to prepare and that some parts of it are used much less than others. The 1961 Report suggested that the purposes of the catalog might be served better and at less cost if the Register were given discretion to decide when and in what form the various parts should be issued.

Thus, the new law retains the 1909 law's basic requirement that the Register compile and publish catalogs of all copyright registrations at periodic intervals, but provides for "discretion to determine on the basis of practicability and usefulness the form and frequency of publication of each particular part."

As the legislative reports note, this will in no way diminish the utility or value of the present catalogs, and the flexibility allowed, coupled with the use of new mechanical and electronic devices now becoming available, will avoid waste.

(b) Other publications. Register is to furnish application forms and general informational material. The Register is also authorized to publish other material that may be of value to the public.

COPYRIGHT OFFICE FEES (Section 708)

(1) for the registration of a copyright claim or a supplementary registration under section 408, including the issuance of a certificate of registration, $10;

(2) for the registration of a claim to renewal of a subsisting copyright in its first term under section 304(a), including the issuance of a certificate of registration, $6;

(3) for the issuance of a receipt for a deposit under section 407, $2;

(4) for the recordation, as provided by section 205, of a transfer of copyright ownership or other document of six pages or less, covering no more than one title, $10; for each page over six and each title over one, 50 cents additional;

(5) for the filing, under section 115(b), of a notice of intention to make phonorecords, $6;

(6) for the recordation, under section 302(c), of a statement revealing the identity of an author of an anonymous or pseudonymous work, or for the recordation, under section 302(d), of a statement relating to the death of an author, $10 for a document of six pages or less, covering no more than one title; for each page over six and for each title over one, $1 additional;

(7) for the issuance, under section 601, of an import statement, $3;

(8) for the issuance, under section 706, of an additional certificate of registration, $4;

(9) for the issuance of any other certification, $4; 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;

(10) for the making and reporting of a search as provided by section 705, and for any related services, $10 for each hour or fraction of an hour consumed;

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

Subsection (b) states that except for the possibility of waivers in "occasional or isolated cases involving relative small amounts," the Register is to charge fees for services rendered to other government agencies.

Subsection (c) provides that the Register may, in accordance with regulation, refund any sum paid by mistake or in excess of the required fee. However, before refunding in a rejection case, the Register "may deduct all or any part of the prescribed registration fee to cover the reasonable administrative costs of processing the claim."

DELAY IN DELIVERY CAUSED BY DISRUPTION OF POSTAL OR OTHER SERVICES (Section 709)

This section authorizes the Register to issue regulations to permit the acceptance of material which is delivered after the close of the prescribed period if the delay was caused by a general disruption or suspension of postal or other transportation or communications services.

VOLUNTARY LICENSING FOR REPRODUCTIONS FOR THE USE OF THE BLIND AND PHYSICALLY HANDICAPPED (Section 710)

Section 710 directs the Register, after consulting with the Chief of the Division for the Blind and Physically Handicapped and other appropriate officials of the Library of Congress, to establish, by regulation, forms and procedures by which copyright owners of certain specified categories of nondramatic literary works may voluntarily grant to the Library a license to reproduce and distribute copies or phonorecords of the work solely for the use of the blind and physically handicapped.

APPENDIX ONE

OVERVIEW IN OUTLINE FORM

THE COPYRIGHT ACT OF 1976 (Public Law 94-553, 90 Stat. 2541)

I. Introduction and Background

A. Copyright--U.S. copyright laws stem from Article I, Section 8 of the Constitution. A copyright is a statutory grant of certain rights for limited times.

B. Need for a new copyright law

1. Last major revision of the Copyright Law, the Act of 1909, was based on the printing press as the prime disseminator.

2. Development of new technologies--wide range of new techniques for communicating, e.g., cable television, communications satellites, computers, etc.

3. The "copyright revision program" was culminated with the signing of the new law on October 19, 1976; with certain exceptions, will take effect on January 1, 1978. [Transitional and Supplementary Provisions, Section 102.]

a. New law makes a number of fundamental changes; some so profound that they mark a shift in direction for the very philosophy of copyright itself.

b. Compromise was the key word; practically every provision is a product of at least one compromise.

c. New technology not completely dealt with--e.g., computer programs and computerized data bases. Recognized as copyrightable works, Sections 101 and 102(a) but protection is frozen to law in effect on December 31, 1977, Section 117. Congress is awaiting CONTU's recommendations.

C. Legislative History

1. Senate Report 94-473

2. House Report 94-1476 (NOTE: in connection with this report, reference must be made to both the "Corrections" printed in the Congressional Record of September 21, 1976 at pp. 10727-28, reprinted as Copyright Office Announcement ML-130 and additional corrections, amplifications and modifications announced during the House Floor Debates printed in the Congressional Record of September 22, 1976, reprinted in Copyright Office Announcement ML-132.)

3. Conference Report: House Report 94-1733

II. Major Provisions

A. Preemption of state and common law copyright protection--Section 301

1. Single national system for all works within the subject matter of copyright fixed in a copy or phonorecord

2. Protection begins on the date of creation

3. Exception: sound recordings fixed before February 15, 1972--Section 301(c)

B. Duration

1. For works created after the effective date of the new law--Section 302

a. Basic term: life of the author plus fifty years

b. Joint work: life of the last surviving author plus fifty years

c. Anonymous, pseudonymous, and works made for hire: 75 years from first publication or 100 years from creation, whichever is shorter

d. Copyright Office to keep records

e. System of presumptions established to take care of the situation in which a user cannot determine the date of the author's death

2. For preexisting works under common law protection on the effective date of the new law--Section 303

    a. Same terms as in Section 302

    b. To assure that all works are given a "reasonable" term, guarantee of 25 years of protection. If work published before 2002, term of protection extended another 25 years.

3. Duration of subsisting copyrights--Section 304 (maximum of 75 years)

    a. For works in their first term on January 1, 1978 28 years for the first term and provision for a renewal term of 47 years

    b. For works already in their second, renewal term, including copyrights whose renewal terms have been extended, the renewal term is automatically extended to make a total of 75 years--Transitional and Supplementary Provisions, Section 102

4. All terms expire on December 31st--Section 305

C. Ownership

1. Fountainhead of copyright is the author, and copyright ownership in the first instance belongs to the author--Section 201(a)

2. Works made for hire--Sections 201(b) and definition in Section 101

3. Divisibility--Section 201(d)(2): first statutory recognition. Any of the exclusive rights that go to make up a copyright can be transferred and owned separately. The definition of "transfer of ownership" in Section 101 makes it clear that the principle of divisibility applies whether or not the transfer is "limited in time or place of effect."

4. Transfers of copyright ownership must be in writing and signed by the owner of the rights conveyed or by such owner's duly authorized agent

5. Documents to be recorded in the Copyright Office--Sections 204, 205

D. Termination of Transfers and Licenses

1. Grants by the author (other than by will) made on or after January 1, 1978 of exclusive or nonexclusive rights arising under the new law but not including works made for hire may be terminated during a five year period beginning at the end of 35 years from the date of the grant. If, however, the grant covers the right of publication, the termination period begins 35 years from the date of publication or 40 years from the date of the grant, whichever is shorter. See Section 203 and House Report 94-1476, pp. 124-128

    a. Termination may be effected by serving a written notice no less than two nor more than 10 years before termination is to take effect. Notice must comply with Copyright Office regulations and a copy of the notice must be recorded in the Copyright Office before the effective date of termination

    b. All rights revert to those with a right to terminate except that derivative works prepared before termination may continue "to be utilized" under the terms of the grant

    c. Rights vest on the date that the notice is served

    d. "Termination of the grant may be effected notwithstanding any agreement to the contrary, including any agreement to make a will or to make any further grant." Section 203(a)(5)

2. Grants by the author or grants executed by those beneficiaries of the author who could claim renewal under the present law may be terminated at the end of 56 years from the date copyright was originally secured or beginning on January 1, 1978, whichever is later. See Section 304(c) and House Report 94-1476 pp. 140-142

    a. Does not apply to works made for hire

b. Applies only to grants made before January 1, 1978

E. Scope of Exclusive Rights--Section 106 sets forth five basic rights. Rights are cumulative and to some extent overlap

F. Limitations on the rights of copyright owners

1. Doctrine of Fair Use--generally speaking, copying without permission from, or payment to, the copyright owner is allowed where the use is reasonable and not harmful to the rights of the copyright owner--Section 107

a. Four factors to be considered are included

b. Legislative reports make it clear that Section 107 as drafted is intended to restate present judicial doctrine; it is not intended to change, narrow or enlarge it in any way

c. Guidelines for educational use of Print Material and Music--see pp. 68-72 of House Report 94-1476 and correction in Congressional Record of September 22, 1976.

2. Reproduction by Libraries and Archives--Section 108. For Inter-Library Loan Guidelines see Conference Report

3. Computer and data base uses--Section 117. Recognizes computer programs and data bases as copyrightable subject matter but freezes protection respecting use in automatic storage and retrieval systems

4. Compulsory licenses [A compulsory license is a device allowing use of the copyrighted work without the owner's permission but guaranteeing remuneration for the owner]--new law has four

a. Compulsory license for making and distributing phonorecords embodying nondramatic musical compositions--Section 115

b. Public Performance by means of coin-operated phonorecord players--Section 116

c. Secondary transmissions--Section 111

d. Use of published nondramatic musical works and pictorial, sculptural and graphic works by noncommercial broadcasters--Section 118

e. Creation of a Copyright Royalty Tribunal (Chapter 8) to determine the reasonable terms and rates of royalty payments under Section 118, to distribute the royalties collected under Sections 111 and 116, and to resolve certain disputes. Also to periodically review the royalty rates of all four compulsory licenses

G. Formalities: notice, deposit and registration. Relaxed, and more amenable to international standards

1. Notice--Sections 401-406: preserve the requirement for a notice on copies that are publicly distributed anywhere but substantially ameliorate the effects of accidental or even deliberate errors or omissions. Subject to certain safeguards for innocent infringers, protection would not be lost by the complete omission of the notice from large numbers of copies or from a whole edition, if registration for the work is made before or within 5 years after such publication and a reasonable effort is made to add notice to copies or phonorecords publicly distributed in the U.S. after the omission is discovered

2. Deposit and Registration--Sections 407-412

a. Registration and deposit are now separate formalities which could and would usually be combined

b. Deposit for the Library of Congress of copies or phonorecords published with a notice of copyright in the United States--Section 407. Failure to deposit after written demand makes the copyright owner liable for the cost of the copies and fines.

c. Registration permissive, Section 408, but is a prerequisite to an infringement suit (Section 411)

3. Manufacturing requirement--Section 601. Substantially liberalized, scheduled to be phased out on July 1, 1982 [Register to report on the effect of this by July, 1981 so that Congress may reexamine this issue].

a. Applies only to "a work consisting preponderantly of nondramatic literary material that is in the English language" and is protected by Title 17

b. Does not apply where the author of any substantial part of the work is neither a citizen nor domiciliary of the U.S.

c. Works of American national domiciled abroad for at least one year preceding the date when importation is sought or distribution in the U.S. desired are exempted

d. Requirement of U.S. manufacture is satisfied by manufacture in Canada

e. Present importation limit of 1500 copies expanded to 2000

H. Remedies--Chapter 5, Sections 501-509

1. Definition of an infringement, Section 501

2. Injunctions, Section 502

3. Impounding and disposition of infringing articles, Section 503

4. Damages and profits, Section 504

a. Actual damages, Section 504(b)

b. Statutory damages, Section 504(c)

1. Not less than $250 nor more than $10,000

2. Willfull - in court's discretion may increase award to not more than $50,000

3. Innocent infringer

(a) General-court may, in its discretion, reduce to not less than $100

(b) Special-employee or agent of a nonprofit educational institution, library, or archives itself, or public broadcasting entity or an employee of such entity: court shall remit statutory damages where infringer believed and had reason to believe the use was fair

c. Must elect between actual and statutory damages

5. Attorney's fees, Section 505

6. Criminal provisions, Section 506

7. Alternation of programming by cable systems, Section 510

APPENDIX TWO

THE 1909 ACT VS. THE 1976 ACT (A COMPARISON)

	Act of March 4, 1909	Act of October 19, 1976
SUBJECT MATTER	Protects "writings" of an author. Writing has been interpreted as requiring fixation in a tangible form and a certain minimum amount of original, creative authorship. [Section 4]	Protects "original works of authorship which are fixed in a copy (material object, other than a phonorecord, from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device) or a phonorecord. [Sections 102(a), 301, 101]
	14 classes of works enumerated: Class A - Books, including composite and cyclopedic works Class B - Periodicals, including newspapers Class C - Lectures, sermons, addresses (prepared for oral delivery) Class D - Dramatic or dramatico-musical compositions Class E - Musical compositions Class F - Maps Class G - Works of art; models or designs for works of art Class H - Reproductions of a work of art Class I - Drawings of plastic works of a scientific or technical character Class J - Photographs Class K - Prints and pictorial illustrations including prints or	7 classes of works enumerated: (1) literary works (2) musical works, including any accompanying words (3) dramatic works, including any accompanying music (4) pantomimes and choreographic works (5) pictorial, graphic, and sculptural works (6) motion pictures and other audiovisual works (7) sound recordings. [Section 102(a)] The Register of Copyrights to specify classification for registration purposes only. Classes will be: Class TX - for claims in nondramatic literary works, other than audiovisual works, expressed in words, numbers or other verbal or numerical symbols or indicia. Class PA - for claims in musical works, including any accompanying

	labels used for articles of merchandise Class L - Motion picture photoplays Class M - Motion-pictures other than photoplays Class N - Sound recordings [Section 5]	words; dramatic works, including any accompanying music; pantomimes; choreographic works; and motion pictures and other audiovisual works. Class VA - for claims in pictorial, graphic, and sculptural works. Class SR - for claims in works resulting from the fixation of a of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work.
	"New versions"--"compilations, abridgments, adaptations, arrangements, dramatizations, translations or other new versions when produced with the consent of the copyright owner." [Section 7]	"Compilations and derivative works." (Derivative work is defined as every copyrightable work that employs preexisting material or data.) Consent of the copyright owner is not a condition of protection; copyright protection "does not extend to any part of the work" in which the preexisting material "has been used unlawfully." [Section 103]
STANDARDS OF COPYRIGHTABILITY	Product of case law. Work must represent an appreciable amount of original, creative authorship. Original means that the author produced it by his own intellectual effort as distinguished from copying from another.	Legislative reports accompanying Public Law 94-553 indicate that the standards of copyrightability remain unchanged.

	Act of 1909	Act of 1976
ELIGIBILITY	The following works are eligible for copyright protection in the United States: 1. Works by United States citizens; 2. Works by an author who is domiciled in the U.S. on the date of first publication; 3. Works by an author who is a citizen of a country with which the U.S. has copyright relations; 4. Works first published in a country other than the U.S. that belongs to the Universal Copyright Convention. Works by authors that are stateless--status of these works is unclear. Copyright Office registers these claims under its rule of doubt. [Section 9]	All unpublished works are eligible for copyright protection in the United States. If the work is published, it is eligible for U.S. protection if one of the following applies: 1. On the date of first publication, one or more of the authors is a national or domiciliary of the U.S., or is a national or domiciliary, or sovereign authority of a foreign nation that is a party to a copyright treaty of which the U.S. also is a party; 2. If on the date of first publication, one or more of the authors is stateless; 3. If the work is first published in the United States or in a foreign nation that on the date of first publication is a part of the Universal Copyright Convention; 4. If the work comes within the scope of a Presidental proclamation. [Section 104]
OWNERSHIP & TRANSFER OF OWNERSHIP	Copyright vests initially in the author Joint works--There is no statutory provisions but courts have held that, in the absence of an agreement to the contrary, joint authors will be deemed as tenants in common. This means that each owns an undivided interest in the entire work and each has an independent right to use or license the entire work. There is no definition of a "joint work" and courts have defined this extremely broadly and eroded the original concept.	The original source of ownership is the author. [Section 201(a)] "The authors of a joint work are coowners of copyright in the work." [Section 201(a)] A work is defined as joint when the authors collaborate with each other or if each of the authors prepared his or her contribution with the knowledge and intention that it would be merged with the contributions of the other authors as "inseparable or interdependent parts of a unitary whole." [Section 101]

	Act of 1909	Act of 1976
OWNERSHIP & TRANSFER OF OWNERSHIP	Work made for hire--The statute provides "the word 'author' shall include an employer in the case of works made for hire." [Section 26] There is no definition of a work made for hire in the law. Courts, however, have generally said a work prepared by employee within the scope of his employment is a work made for hire. Important factors include the right of the employer to direct and supervise the manner in which the work is performed, payment of wages or other renumeration, and the existence of a contractual arrangement concerning the creation of the work. Many "commissioned" works have been considered 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..." [Section 201(b)] Work made for hire is defined. For a commissioned work or one prepared on special order, only certain categories can be works made for hire. Also, the parties must expressly agree to this in writing and both parties must sign the document. [Section 101]
	Copyright said to be indivisible; transfer of anything less than all of the rights was a license. Only transfers of ownership (assignments) had to be in writing and be signed by the party granting the transfer. [Section 28] Assignments should have been recorded in the Copyright Office. [Section 30]	Copyright is made completely divisible. [Section 201 (d)(2)] Transfer of ownership is defined as an assignment, mortgage, exclusive license of any of the exclusive rights comprised in a copyright, whether limited in time or place of effect Transfers must be in writing and signed by the party making the transfer. [Section 204] Transfers should be recorded in the Copyright Office. [Section 205] Transfers made by authors on or after January 1, 1978, otherwise than by will, may be terminated after a certain period of time. The notice of termination must be filed by certain specified people no more than 10 nor less than 2 years before the date of termination. The notice must comply in form, content and manner of service with regulations the Register of Copyrights is to prescribe. [Section 203] Termination of the grant may be effected notwithstanding any agreement to the contrary [Section 203(a)(5)]

	Act of 1909	Act of 1976
SECURING COPYRIGHT PROTECTION	For unpublished compositions that are registrable, it is the act of registering a claim in the Copyright Office that secures the copyright. For published works it is the act of publication of the work in visually perceptible copies with the required notice of copyright that secures the copyright. The notice must appear in a location specified by the law, e.g., for a book either upon the title page or the page immediately following. [Section 20] Promptly after publication, a claim should be registered in the Copyright Office. [Section 13] If a work is published without an acceptable notice, copyright protection is lost and cannot be regained.	The act of creation and fixing the work in a copy or phonorecord secures the copyright. [Section 301]
DURATION	For unpublished works the term is exactly 28 years from the date of registration; a renewal claim may be filed in the 28th year in which case there is an additional term of 28 years. Copyright protection will expire either 28 or 56 years from the exact date of registration. For published works the term is same as for unpublished works except the term is measured from the date of first publication. [Section 24]	For works created on or after January 1, 1978, the term of copyright will be: 1. life of the author plus 50 years 2. joint works--life of the last surviving author plus 50 years 3. anonymous, pseudonymous works, if the name of the author is not revealed in Copyright Office records, and works made for hire--100 years from creation or 75 years from first publication, whichever is shorter. [Section 302]

	Act of 1909	Act of 1976
DURATION		For unpublished works created, but not registered before January 1, 1978, the term of copyright is the same as for works created after January 1, 1978 except there is a guarantee of protection until December 31, 2002. [Section 303] For works under statutory (federal) copyright protection on December 31, 1977--if copyright is renewed during the last (28th) year then the term will be 75 years. [Section 304] All terms will run out on December 31st of the year in which they would otherwise expire. [Section 305]
NOTICE WHEN REQUIRED	The required notice of copyright must be affixed to each copy published or offered for sale. [Section 10]	The required notice of copyright must be placed on all visually perceptible copies and phonorecords of sound recordings that are distributed to the public under the authority of the copyright owner. [Sections 401, 402]

	Act of 1909	Act of 1976
FORM OF NOTICE	For works other than sound recordings: the word "copyright," the abbreviation "Copr.", or the symbol "©" accompanied by the name of the copyright proprietor and the year in which copyright was secured by publication (or, in some cases, registration). (There are certain exceptions to this basic rule.) [Section 19]	For visually perceptible copies: the symbol © (the letter C in a circle), or the word "copyright," or the abbreviation "Copr."; and the name of the copyright owner, or a recognizable abbreviation or a generally known alternative designation, and the year of first publication. [Section 401]
	For sound recordings: the symbol ℗ (the letter P in a circle), the year of first publication of the sound recording; and the name of the owner of copyright in the sound recording, or a recognizable abbreviation or generally known alternative designation of the name. [Section 19]	For sound recordings: same as the Act of 1909 [Section 402]
PLACEMENT	Specified by type of work - e.g., for a book or other printed publication, upon the title page or the page immediately following...; For music, upon the title page or first page of music...; [Section 20]	For visually perceptible copies - "reasonable notice" of the copyright claim. Copyright Office regulation will include examples of reasonable placement and affixation of the copyright notice. [Section 401]
	For sound recordings - "reasonable notice" of the claim to copyright [Section 20]	For phonorecords of sound recordings - same as the previous law - [Section 402]

	Act of 1909	Act of 1976
EFFECT OF OMISSION OR ERROR IN NOTICE	If the notice is omitted or contains a serious error, copyright is lost and cannot be regained.	If the notice is omitted or there is a serious error, there is no effect as long as the claim to copyright is registered in the Copyright Office before or within 5 years of publication without the notice and a "reasonable effort" is made to add the notice to copies that are later distributed in the U.S. [Section 405]
DEPOSIT	"Promptly after publication, two copies of the best edition" are to be deposited with an application and fee of $6.00. Thus, registration and deposit are joined. [Sections 13, 215]	Within three months after the work has been published with a copyright notice in the U.S., the copyright owner should deposit two complete copies or phonorecords of the "best edition". "Best edition" will be determined by the needs of the Library of Congress. The Register of Copyrights, may by regulation, exempt any categories of material from this requirement, or require deposit of only one copy or phonorecord with respect to any category. Alternate forms of deposit may also be allowed. [Section 407]
	Failure to deposit the required material after a "demand" by the Register of Copyrights can result in the copyright becoming void. [Section 14]	Failure to deposit the required material within three months after the Register of Copyrights makes a written demand will subject the copyright owner to fines. [Section 407(d)]
REGISTRATION	Unpublished works that are subject to registration--one complete copy of the work in legible notation must be sent to the Copyright Office with a properly completed application and a fee of $6.00 Phonorecords are not acceptable as deposit copies of the underlying works they embody. [Section 12, 215]	Registration for both published and unpublished works is entirely permissive. There are, however, substantial inducements to register. [Section 408(a)] Unpublished works--one complete copy or phonorecord must be sent with the appropriate application form and a fee of $10. [Sections 408, 709]

	Act of 1909	Act of 1976
REGISTRATION	Published compositions--two complete copies of the best edition as first published must be sent to the Copyright Office with a properly completed application and a fee of $6.00. The first published edition of a work registered in unpublished form must be registered again. [Sections 12, 13, 215]	Published works-two complete copies of the best edition (or in the case of works first published abroad or contributions to collective works, one complete copy) with an appropriate application and a fee of $10 must be sent to the Copyright Office.[Sections 408, 708] The Register of Copyrights, by regulation, can require or permit the deposit of identifying material instead of copies, or the deposit of phonorecords rather than notated copies. The Register may also allow the deposit of one copy rather than two and provide for a single registration for a group of related works. [Section 408]
COMPULSORY LICENSE TO USE COPYRIGHTED MUSICAL COMPOSITIONS ON PHONORECORDS	The copyright owner of a musical composition has the exclusive right to make or license the first recording of the work. Whenever the copyright owner of a musical composition has used or permitted his work to be recorded then anyone else may make "similar use" by complying with the compulsory license provisions of the law.	The copyright owner of a musical composition has the exclusive right to make or license the first recording of the work. Once phonorecords have been distributed to the public in the U.S. under the authority of the copyright owner, the work becomes subject to the compulsory license. The compulsory license is available only if the user's primary purpose is to distribute the phonorecords to the public for home use.

	Act of 1909	Act of 1976
COMPULSORY LICENSE TO USE COPYRIGHTED MUSICAL COMPOSITIONS ON PHONORECORDS		The 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; the new arrangement cannot change the basic melody or fundamental character of the work. The arrangement is not subject to protection as a derivative work unless the copyright owner expressly gives his consent.
	Compulsory licensee must send to the copyright owner, by registered mail, a notice of his intention to use the music; a copy of that notice must be sent to the Copyright Office for recordation.	To obtain a compulsory license, the user must send a notice of his intent to the copyright owner. It must be served before or within 30 days after making and before distributing any phonorecords. This notice must comply in form, content and manner of service with regulations prescribed by the Register of Copyrights. A copy of this notice need not be sent to the Copyright Office.
	Once a copyright owner records or licenses his work for recording, he must file notice of use (Form U) with the Copyright Ofice. Courts have held that the copyright owner cannot collect royalties for any infringing records made before he files this notice [Sections 1(e), 101(e)]	To be entitled to royalties the copyright owner must be identified in the registration or other public records of the Copyright Office. If the registration or other public records of the Copyright Office do not identify the copyright owner and his address, the notice should be filed with the Copyright Office.

	Act of 1909	Act of 1976
COMPULSORY LICENSE TO USE COPYRIGHTED MUSICAL COMPOSITIONS ON PHONORECORDS		Failure to file a notice of intent forecloses the possibility of a compulsory license. Compulsory licensee must pay 2 3/4 cents or 1/2 cent per minute of playing time or fraction thereof, whicher is larger, for records that are made and distributed.
	On the 20th of each month, the compulsory licensee must account to the copyright owner of the music. He must send the required royalty of 2 cents for each "part" manufactured.	Royalty payments are to be made on or before the 20th day of each month. Each payment must be under oath and must comply with the requirements of the Copyright Office regulations. The Register of Copyrights, by regulation, is to establish criteria for the detailed annual statements of account which must be certified by an independent Certified Public Accountant. The notice of use (Form U) is no longer required. [Section 115]

APPENDIX THREE
EDUCATIONAL AND CONTU GUIDELINES

AGREEMENT ON GUIDELINES FOR CLASSROOM COPYING IN NO-FOR-PROFIT EDUCATIONAL INSTITUTION WITH RESPECT TO BOOKS AND PERIODICALS

The purpose of the following guidelines is to state the minimum, and not the maximum standards of educational fair use under section 107 of H.R. 2223. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future; and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in section 107 of the Copyright Revision Bill. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

GUIDELINES

I. SINGLE COPYING FOR TEACHERS:

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

A. A chapter from a book;

B. An article from a periodical or newspaper;

C. A short story, short essay or short poem whether or not from a collective work;

D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper.

II. MULTIPLE COPIES FOR CLASSROOM USE:

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; provided that:

A. The copying meets the tests of brevity and spontaneity as defined below;
and,

B. Meets the cumulative effect test as defined below;
and,

C. Each copy includes a notice of copyright.

DEFINITIONS:

Brevity:

i. Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words.

ii. Prose; (a) Either a complete article, story or essay of less than 2,500 words, or (b) An excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.

[Each of the numerical limits stated in "i" and "ii" above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.]

iii. Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

iv. "Special" works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph "ii" above notwithstanding such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced.

Spontaneity:

i. The copying is at the instance and inspiration of the individual teacher, and

ii. The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect:

i. The copying of the material is for only one course in the school in which the copies are made.

ii. Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.

iii. There shall not be more than nine instances of such multiple copying for one course during one class term.

[The limitations stated in "ii" and "iii" above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]

III. PROHIBITIONS AS TO I AND II ABOVE:

Notwithstanding any of the above, the following shall be prohibited:

A. Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or are reproduced and used separately.

B. There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.

C. Copying shall not:

a. substitute for the purchase of books, publisher's reprints or periodicals;

b. be directed by higher authority;

c. be repeated with respect to the same item by the same teacher from term to term.

D. No charge shall be made to the student beyond the actual cost of the photocopying.

In addition, representatives of the Music Publishers' Association of the United States, Inc., the National Music Publishers' Association, Inc., the Music Teachers National Association, the Music Educators National Conference, the National Association of Schools of Music and the Ad Hoc Committee on Copyright Revision developed the following guidelines:

GUIDELINES UNDER FAIR USE FOR MUSIC

The purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under section 107 of H.R. 2223. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future; and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in section 107 of the Copyright Revision Bill. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

A. PERMISSIBLE USES

1. Emergency copying to replace purchased copies which for any reason are not available for an imminent performance provided purchased replacement copies shall be substituted in due course.

2. For academic purposes other than performance, single or multiple copies of excerpts of works may be made, provided that the excerpts do not comprise a part of the whole which would constitute a performable unit such as a section, movement or aria, but in no case more than (10%) of the whole work. The number of copies shall not exceed one copy per pupil.

3. Printed copies which have been purchased may be edited or simplified provided that the fundamental character of the work is not distorted or the lyrics, if any, altered or lyrics added if non exist.

4. A single copy of recordings of performance by students may be made for evaluation or rehearsal purposes and may be retained by the educational institution or individual teacher.

5. A single copy of a sound recording (such as a tape, disc or cassette) of copyrighted music may be made from sound recordings owned by an educational institution or an individual teacher for the purpose of constructing aural exercises or examinations and may be retained by the educational institution or individual teacher. (This pertains only to the copyright of the music itself and not to any copyright which may exist in the sound recording.)

B. PROHIBITIONS

1. Copying to create or replace or substitute for anthologies, compilations or collective works.

2. Copying of or from works intended to be "consumable" in the course of study or of teaching such as workbooks, exercises, standardized tests and answer sheets and like material.

3. Copying for the purpose of performance, except as in A(1) above.

4. Copying for the purpose of substituting for type purchase of music, excepts as in A(1) and A(2) above.

5. Copying without inclusion of the copyright notice which appears on the printed copy.

CONTU Guidelines for interlibrary loans

PHOTOCOPYINC--INTERLIBRARY ARRANCEMENTS

Introduction

Subsection 108(g)(2) of the bill deals, among other things, with limits on interlibrary arrangements for photocopying. It prohibits systematic photocopying of copyrighted materials but permits interlibrary arrangements "that do not have as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work."

The National Commission on New Technological Uses of Copyrighted Works offered its good offices to the House and Senate subcommittees in bringing the interested parties together to see if agreement could be reached on what a realistic definition would be of "such agregate quantities." The Commission consulted with the parties and suggested the interpretation which follows, on which there has been substantial agreement by the principal library, publisher, and author organizations. The Commission considers the guidelines which follow to be a workable and fair interpretation of the intent of the proviso portion of subsection 108(g)(2).

These guidelines are intended to provide guidance in the application of section 108 to the most frequently encountered interlibrary case: a library's obtaining from another library, in lieu of interlibrary loan, copies of articles from relatively recent issues of periodicals--those published within five years prior to the date of the request. The guidelines do not specify what aggregate quantity of copies of an article or articles published in a periodical, the issue date of which is more than five years prior to the date when the request for the copy thereof is made, constitutes a substitute for a subscription to such periodical. The meaning of the proviso to subsection 108(g)(2) in such case is left to future interpretation.

The point has been made that the present practice on interlibrary loans and use of photocopies in lieu of loans may be supplemented or even largely replaced by a system in which one or more agencies or institutions, public or private, exist for the specific purpose of providing a central source for photocopies. Of course, these guidelines would not apply to such a situation.

GUIDELINES FOR THE PROVISO OF SUBSECTION 108(G)(2)

1. As used in the proviso of subsection 108(g)(2), the words "...such aggregate quantities as to substitute for a subscription to or purchase of such work" shall mean:

   (a) with respect to any given periodical (as opposed to any given issue of a periodical), filled requests of a library or archives (a "requesting entity") within any calendar year for a total of six or more copies of an article or articles published in such periodical within five years prior to the date of the request. These guidelines specifically shall not apply, directly or indirectly, to any request of a requesting entity for a copy or copies of an article or articles published in any issue of a periodical, the publication date of which is more than five years prior to the date when the request is made. These guidelines do not define the meaning, with respect to such a request, of "...such aggregate quantities as to substitute for a subscription to [such periodical]".

   (b) with respect to any other material described in subsection 108(d), (including fiction and poetry), filled requests of a requesting entity within any calendar year for a total of six or more copies or phonorecords of or from any given work (including a collective work) during the entire period when such material shall be protected by copyright.

2. In the event that a requesting entity--

   (a) shall have in force or shall have entered an order for a subscription to a periodical, or

   (b) has within its collection, or shall have entered an order for, a copy or phonorecord of any other copyrighted work, material from either category of which it desires to obtain by copy from another library or archives (the "supplying entity"), because the material to be copied is not reasonably available for use by the requesting entity itself, then the fulfillment of such request shall be treated as though the requesting entity made such copy from its own collection. A library or archives may request a copy or phonorecord from a supplying entity only under those circumstances where the requesting entity would have been able, under the other provisions of section 108, to supply such copy from materials in its own collection.

3. No request for a copy or phonorecord of any material to which these guidelines apply may be fulfilled by the supplying entity unless such request is accompanied by a representation by the requesting entity that the request was made in conformity with these guidelines.

4. The requesting entity shall maintain records of all requests made by it for copies or phonorecords of any materials to which these guidelines apply and shall maintain records of the fullfillment of such requests, which records shall be retained until the end of the third complete calendar year after the end of the calendar year in which the respective request shall have been made.

5. As part of the review provided for in subsection 108(i), these guidelines shall be reviewed not later than five years from the effective date of this bill.

The conference committee is aware that an issue has arisen as to the meaning of the phrase "audiovisual news program" in section 108(f)(3). The conferees believe that, under the provision as adopted in the conference substitute, a library or archives qualifying under section 108(a) would be free, without regard to the archival activities of the Library of Congress or any other organization, to reproduce, on videotape or any other medium of fixation or reproduction, local, regional, or network newscasts, interviews concerning current news events, and on-the-spot coverage of news events, and to distribute a limited number of reproductions of such a program on a loan basis.

Another point of interpretation involves the meaning of "indirect commercial advantage," as used in section 108(a)(1), in the case of libraries or archival collections within industrial, profit-making, or proprietary institutions. As long as the library or archives meets the criteria in section 108(a) and the other requirements of the section, including the prohibitions against multiple and systematic copying in subsection (g), the conferees consider that the isolated, spontaneous making of single photocopies by a library or archives in a for-profit organization without any commercial motivation, or participation by such a library or archives in interlibrary arrangements, would come within the scope of section 108.

OFFICIAL SOURCE MATERIALS ON COPYRIGHT REVISION

I. Copyright Revision Studies, Nos. 1-35

Studies prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate.

STUDIES 1-4. 142 pages. 1960.
1. The History of U.S.A. Copyright Law Revision from 1901 to 1954
2. Size of the Copyright Industries
3. The Meaning of "Writings" in the Copyright Clause of the Constitution
4. The Moral Right of the Author

STUDIES 5-6. 125 pages. 1960.
5. The Compulsory License Provision of the U.S. Copyright Law
6. The Economic Aspects of the Compulsory License

STUDIES 7-10. 125 pages. 1960.
7. Notice of Copyright
8. Commercial Use of the Copyright Notice
9. Use of the Copyright Notice by Libraries
10. False Use of the Copyright Notice

STUDIES 11-13. 155 pages. 1960.
11. Divisibility of Copyrights
12. Joint Ownership of Copyrights
13. Works Made for Hire and on Commission

STUDIES 14-16. 135 pages. 1960.
14. Fair Use of Copyrighted Works
15. Photoduplication of Copyrighted Materials by Libraries
16. Limitations on Performing Rights

STUDIES 17-19. 135 pages. 1960.
17. The Registration of Copyright
18. Authority of the Register of Copyrights to Reject Applications for Registration
19. The Recordation of Copyright Assignments and Licenses

STUDIES 20-21. 81 pages. 1960.
20. Deposit of Copyrighted Works
21. The Catalog of Copyright Entries

STUDIES 22-25. 169 pages. 1960.
22. The Damage Provisions of the Copyright Law
23. The Operation of the Damage Provisions of the Copyright Law: An Exploratory Study
24. Remedies Other Than Damages for Copyright Infringement
25. Liability of Innocent Infringers of Copyright

STUDIES 26-28. 116 pages. 1961.
26. The Unauthorized Duplication of Sound Recordings
27. Copyright in Architectural Works
28. Copyright in Choreographic Works

STUDIES 29-31. 237 pages. 1961.
29. Protection of Unpublished Works
30. Duration of Copyright
31. Renewal of Copyright

STUDIES 32-34. 57 pages. 1961.
32. Protection of Works of Foreign Origin
33. Copyright in Government Publications
34. Copyright in Territories and Possessions of the United States

STUDY 35. 73 pages. 1963.
35. The Manufacturing Clause of the U.S. Copyright Law

II. Copyright Office Reports and Panel Discussions

Part 1. Register's Report, 1961
Part 2. Register's Report - Discussion and Comments, 1963
Part 3. Preliminary Draft for Revised Copyright Law with Discussion and Comments, 1964
Part 4. Preliminary Draft - Further Discussions and Comments, 1964
Part 5. 1964 Revision Bill with Discussions and Comments, 1965
Part 6. Supplemental Report of the Register, 1965
Draft Second Supplemental Report of the Register, 1975

III. Legislative Hearings

1. 1965 Hearings before Subcommittee No. 3 of the House Judiciary Committee. Serial No. 8, Pts. 1-3 (3 Volumes, with index)

2. 1965-1967 Hearings before the Subcommittee on Patents, Trademarks & Copyrights of the Senate Committee on the Judiciary - specifically, the following seven volumes:

(i) August 18-20, 1965 on S. 1006
(ii) August 2-4 & 25, 1966 on S. 1006 (CATV)
(iii) March 15-17, 1967 on S. 597 ("Part 1")
(iv) March 20-21 & April 4, 1967 on S. 597 ("Part 2")
(v) April 6, 11-12, 1967 on S. 597 ("Part 3")
(vi) April 28, 1967 on S. 597 ("Appendix")
(vii) [Combined] index of Hearings

3. July 31 and August 1, 1973 Hearings before the Subcommittee on Patents, Trademarks & Copyrights of the Senate Committee on the Judiciary

4. 1975 Hearings before the Subcommittee on Courts, Civil Liberties & Administration of Justice of the House Committee on the Judiciary (Serial No. 36) (3 Volumes)

5. July 24, 1975 Hearings before the Subcommittee on Patents, Trademarks & Copyrights of the Senate Committee on the Judiciary (Primarily Performance Royalty)

IV. Legislative Reports

Conference Report. 94th Cong., 2d Sess., House Report 94-1733. 1976

Report of the House Committee on the Judiciary. 94th Cong., 2d Sess., House Report 94-1476. 1976. Report together with Additional Views. [NOTE: In connection with this report reference must be made to both (a) the "corrections" printed in the Congressional Record of September 21, 1976, at pp. 10727-28. (Reprinted in Copyright Office Announcement ML-130) and (b) additional corrections, amplifications and modifications announced during the House Floor Debate printed in the Congressional Record of September 22, 1976. (Reprinted in Copyright Office announcement ML-132).

Report of the Senate Committee on the Judiciary. 94th Cong., 1st Sess., Calendar No. 460, Senate Rept. 94-473. 1975. Report together with Additional Views.

Report of the Senate Committee on Commerce. 93d Cong., 2d Sess., Calendar No. 995, Senate Rept. 93-1035. 1974. Minority and Additional Views.

Report of the Senate Committee on the Judiciary. 93d Cong., 2d Sess., Calendar No 946, Senate Rept. 93-983. 1974. Additional and Minority Views. (Star Print).

Report of the House Committee on the Judiciary. 90th Cong., 1st Sess. House Report 83, 1967.

Report of the House Committee on the Judiciary, 89th Cong., 2nd Sess., House Rept. 2237. 1966.

V. Floor Debates

Relevant proceedings are reported in the Congressional Record for:

September 22, 1976 (House) [Reprinted Copyright Office Announcement ML-132].

September 30, 1976 (House & Senate) [Reprinted in Copyright Office Announcement ML-133]

February 16-19, 1976 (Senate)

September 5, 6, and 9, 1974 (Senate)

April 6 and 11, 1967 (House)

*U.S. GOVERNMENT PRINTING OFFICE: 1979 0-281-693/2815